

The University of Hull

**Social Reintegration of Offenders: The Role of the Probation
Service in North West Frontier Province, Pakistan**

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By

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Dedications

To the memory of my father Altaf Hussain, uncle Khadam Ali and grandfather Wahab Ali (Lala)

who have supported me since the beginning of my studies but sadly

passed away before the completion of my thesis

Also to my mother, and my wife Riffat Shaheen who suffered due to my prolonged absence,

but always prayed and wished for the successful completion of my thesis.

Abstract

This thesis examines the role of the probation system in the social reintegration of offenders in NWFP, Pakistan. Probation is the punishment most widely associated with rehabilitation and helping offenders to lead law-abiding lives. The probation system in Pakistan has a colonial origin. The Probation Ordinance of 1960 has its origins in the Criminal Procedure Code, 1898 (Amended 1923) passed into law by the British Colonial government. The passing of the probation law in 1960 was part of General Ayub Khan's attempt to modernise Pakistan. The central argument of this thesis is that the meaning of punishment changes when it is taken out of its cultural setting. The punishment of probation has no equivalent in Pakistani culture. Throughout this study, it was found that probation was perceived differently by the probation officers in the Reclamation and Probation Department (RPD) of NWFP Pakistan, the judicial magistrates who are empowered to grant probation orders and the offenders placed on probation. The result is a deluded system which was founded upon the rehabilitation ideal but which tries to offer an 'advice, assist and befriend' service. The empirical data showed that even that support was not provided. Probation officers measured their success in terms of how many people they were able to persuade judicial magistrates to release to them on probation. This made their job resemble that of the 19th century missionaries in England – 'saving souls'. It is argued that the problems of the RPD are due to lack of political support for the probation service in Pakistan, evidenced by its lack of identity and infrastructure. This has meant that the RPD has not 'evolved' enough to be able to meet its goals of rehabilitation and reintegration of offenders.

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Abbreviations

CETS	Church of England Temperance Society
CJA	Criminal Justice Act
CrPC	Criminal Procedure Code
CSO	Community Service Order
IG	Inspector General
NWFP	North West Frontier Province
PSR	Pre-Sentence Report
RPD	Reclamation and Probation Department
SNOP	Statement of National Objectives and Priorities

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Introduction

This thesis presents a critical evaluation of the probation system in the North West Frontier Province (NWFP) of Pakistan. It examines what being on a probation order implies in Pakistan and the extent to which the rehabilitation ideal is achieved in the treatment of offenders on probation in the country. Specifically, the thesis examines:

- (a) The types of offences for which an offender will be eligible for a probation order in Pakistan
- (b) The court processes leading up to the award of a probation order by the courts
- (c) The role of judicial magistrates
- (d) The role of the probation officer before, during and after a court order is given
- (e) The role of lawyers in the judicial process. In Pakistan, where illiteracy and ignorance of law are common and the majority of the defendants tried in magistrates' courts are poor, how accessible is legal representation to such defendants in court? What is the nature of the lawyer-client relationship in probation cases?
- (f) What a probation order entails in Pakistan
- (g) The management of breach cases. How does the probation system in Pakistan ensure offenders comply with their orders and how is the overall performance of the system measured? What happens when offenders fail to comply with their probation orders?

The general view of probation as a form of punishment is that it has the potential to rehabilitate offenders and reintegrate them back into society as law abiding citizens. In fact, research in Britain has shown that well designed and well delivered probation programmes can help reduce re-offending more than the incarceration of offenders. This is because

probation programmes and interventions are often focused on criminogenic need and risk factors associated with offending and re-offending and how they could be tackled. It is expected that a probation order would provide an opportunity for offenders to change from their criminal lifestyles, develop socially acceptable behaviour and a respect for law and, in addition, be 're-settled' in their communities. A probation order could also provide offenders with the opportunity to acquire skills with which they could aspire to a new life in their communities, for example, through employment. This study explores what types of rehabilitation (if any) are provided to offenders on probation in Pakistan and examines the question of how offenders on probation in NWFP Pakistan are re-integrated back into their communities.

In order to be able to present a full picture of the use of probation in NWFP Pakistan, it was essential to examine the perspectives of all those who are actively involved in the probation system in the region. These include the probation officers, judicial magistrates, and the probationers themselves. Thus, the study covers issues such as the views of judicial magistrates about probation as a sentence and their sentencing practices with regard to the granting of probation orders; the views of the probation officers about their work, what they can achieve and how they manage their clients and assess their effectiveness; and the probationers' understanding of what being on a probation order means.

However, the probation system in Pakistan is a colonial creation. The current Probation of Offenders Ordinance of 1960 has its roots in two colonial laws: the Criminal Procedure Code of 1898 (Amended 1923) and the All India Probation Bill of 1931. The CrPC 1898 (Amended 1923) law allowed the provincial governments in British Colonial India (which during the

colonial era included modern day Pakistan), to release prisoners for their good conduct in jail for the remaining period of their imprisonment. The All India Probation Bill of 1931 was not passed into law because of the chaotic political situation in the region at that time, which was linked with the independence movement in British India. However, Pakistan's current probation law, the Probation of Offenders Ordinance 1960, is largely an amended version of the 1931 Probation Bill. Pakistan gained her political independence from Britain on 14 August 1947. Since independence, Pakistan, like most post-colonial developing countries, has retained many of her colonial laws, with very minor modifications.

The use of colonial laws is not in itself wrong as they are based on sound legal precepts. The issue with their use in post-colonial countries is the fact that they are imposed on societies with a different culture from the ones from where the laws originated. A law may not convey the same meaning when applied in a different country or culture outside that within which it was constituted. In other words, a law that originated in one culture and is imposed on another will not produce the same meaning in the culture where it is imposed. As will be shown in chapter 1, the meaning of punishment is both universal and culturally specific. Whilst imprisonment may convey the same meaning irrespective of culture, the concept of probation does not. The practice of probation as a punishment is foreign to Pakistan.

More importantly, the fact that the law that has been adopted is based on sound legal principles does not mean that the infrastructures are already there to support it. A law is only as good as those who implement it and the structures which support it. This study will show that the administrative structures in place to support the probation system in NWFP Pakistan

are inadequate to provide effective supervision of probationers and the monitoring of breach cases. As the study progressed, it became clear that the administrative problems inherent in the probation system in Pakistan could be explained in terms of the problems with post-independence Pakistani politics and the lack of political will by Pakistani political leaders to support the probation system financially and make it work in Pakistan. The Probation law in Pakistan has remained the same since it was passed in 1960, contrary to its counterpart in the ‘mother country’ (Britain) where the idea of probation has undergone several changes since its inception in the nineteenth century (see Chapter 2). With the exception of the Juvenile Justice System Ordinance 2000, which allows juvenile offenders to be placed under a probation order, successive governments in Pakistan have not seen probation as an important part of the legal system in need of reform. However, it needs to be stressed that this lack of political will is the result of the chaotic political situation in Pakistan, which has led politicians to be more concerned about security and political stability than the rehabilitation of offenders.

Thus it became clear that history and politics are important macro factors in the understanding the probation system in Pakistan. In addition, there are the micro factors of lack of funding and infrastructure to support the service and the fact that the probation system in NWFP Pakistan is not an autonomous institution but a sub-division under the leadership of the Inspector General of Prisons. However, it will be argued that the position of Pakistan is not atypical but is one that is common to most post-colonial developing countries that have inherited western legal systems and have not made any significant changes to reflect local needs and culture after independence from colonial rule. Thus, the problems faced by the probation system in Pakistan are explained in terms of the related theories of ‘modernisation’ ‘post-colonialism’ and ‘development’.

My Personal Reasons and Motivation for Conducting this Research

There were many factors that motivated me to conduct my PhD research on the probation system in NWFP, Pakistan. As a lecturer in the Social Work department of the University of Peshawar, NWFP Pakistan, I am familiar with research on social problems affecting Pakistan such as drug misuse, child labour, poverty and gender inequalities etc. However, ever since I joined the Social Work department in the University of Peshawar, I have had the desire to explore new areas of research and make a contribution to the existing body of knowledge on social problems and social control in Pakistan. I was interested in researching a new area that has not been researched so far. Criminology is a relatively new academic discipline in Pakistan. Needless to mention is the fact that the academic link between social work and criminology is yet to be explored fully. Research has shown that people with social problems are more likely to engage in crime. The criminal justice system is often seen as the legal structure within which crime and social problems are addressed and perhaps solved. The image of probation as signifying caring and helping people to address problems, makes it even more appealing. Probation officers are, indeed, social workers.

Thus, for a person with a background in social work, the study of the probation service in my country was a 'natural' choice. More importantly, my interest was further kindled by the fact that of all the criminal justice system agencies in Pakistan, the probation system is the least researched compared with the prisons and the police. A preliminary detailed search for past research on the probation system produced only one source: an MA dissertation written in 1987 (Jan, 1987). That study was very limited in scope in the sense that it focused only on the routine activities of the probation officers at that time. Further enquiries revealed that not much is known in academic circles in Pakistan about the country's probation system despite

its introduction more than four decades ago. The acknowledgement of a lack of academic knowledge about the probation system in Pakistan was the main reason given by my university for the approval of my application for PhD scholarship. Thus, as far as I am aware, this is the first detailed study on the probation system in NWFP, Pakistan.

Structure of the Thesis

This introductory chapter explains the purpose of my study. It also tells the story of how and why I decided to research the probation system in NWFP, Pakistan. This part also highlights the significance of the study along with its limitations.

Chapter one provides a theoretical discussion of the concept of punishment based on a review of criminological and philosophical writings on the purpose and meaning of punishment. The basic questions addressed in the chapter are those of why we punish people for crime and what society hopes to achieve via the infliction of punishment. Specifically, the chapter examines the arguments of the two philosophical schools of thought on punishment, described in Duff and Garland (1994) as consequentialism and non-consequentialism (or retributivism). The former is a forward-looking view of punishment whilst the latter is backward looking. While in a general sense, these two theories of punishment could be said to be universally applicable in principle (that is, the view of punishment as a reflection of public condemnation of varying degrees of immoral or unacceptable behaviour and the view that punishment is a “good” form of social engineering - a means by which social relations can be improved and a source of moral correction of individuals and society at large) at a specific level, punishment must be located within a specific culture for it to be truly

meaningful. Punishment must reflect the cultural meanings attached to it. The fact that a particular method is being used to punish particular offenders must make sense to the offenders themselves and the society at large. Thus, this chapter concludes that where a particular punishment does not have a cultural meaning attached to it, it is likely not to be effective. The cultural backing that a punishment receives determines its effectiveness. This chapter also discusses the punishment system from Islamic perspective.

In **Chapter 2** this theoretical argument is continued in a discussion of the concept of probation based on the development of the probation idea in the United Kingdom (UK). In this chapter, the five stages in the development of the probation system in Britain are discussed in order to show how the concept of probation has evolved since its earliest beginnings in the 19th century, especially the extent to which it has adhered to its claim to rehabilitation. This analysis is important as the probation system in Pakistan, as mentioned above, is based on the British model. The chapter highlights how the probation idea in the UK has changed almost dramatically over the centuries from the ‘advise, assist and befriend’ position of the 19th century to a risk management focus in the 21st century. The political and financial reasons behind these changes are also discussed. **Chapter 3** presents a historical account of the development of the probation system in Pakistan in general and in the NWFP in particular. It highlights how the concept of probation came into practice in the Indian sub-continent during the colonial era when the area was under British rule and its development (or non-development) in Pakistan since she became a sovereign country in 1947. Specifically, the chapter describes the salient features of the probation system in Pakistan and NWFP, the laws, the administrative setup of the Reclamation and Probation Department (hereinafter referred to as RPD) in the NWFP and some of the main problems facing the RPD at the time that this study was conducted. The chapter concludes with the revelation that the Pakistani

probation system is founded on the philosophy of ‘treatment and rehabilitation’ of offenders but in practice operates on the principles of assisting, helping and befriending offenders. Thus, the background is set for a critical evaluation of the RPD and its activities undertaken in the rest of the thesis.

Chapter 4 explains the research strategy adopted for this study including access to the study area, the research tools used and the types of people interviewed. In addition, the suitability of each and every step taken is justified in relation to the significance of the study. Furthermore, details of the way field work was organized and conducted are also presented.

Chapters 5, 6 and 7 present the analysis of empirical data collected during the research. An analysis of the views of offenders on probation is presented in **Chapter 5**. This chapter presents the demographic characteristics of the sample of 60 probationers interviewed for this study; the types of offences for which they obtained a probation order and their perceptions of probation in terms of its ability to rehabilitate and reintegrate them back into their communities. **Chapter 6** presents the views of the officials of the RPD, NWFP, Pakistan. These include the Director and Deputy Director of the RPD, and the 14 Probation Officers who were interviewed for the study. Alongside a description of the profiles of these officials, this chapter examines the working pattern of the probation officers in terms of their supervision of probationers. The chapter highlights the main problems which the probation officers were facing in their working environment at the time of this study, their relationship with and perceptions of judicial magistrates and of their clients, the probationers. The chapter also details the views of these officials on how the probation system in the province could be improved. Finally, the views of the probation system held by the 10 judicial magistrates

interviewed are presented in **Chapter 7**. The chapter describes how a court arrives at the granting of a probation order and the roles that the judicial magistrates, probation officers and lawyers play in this process. Thus, the chapter focuses on the legal process leading up to the granting of a probation order and, more importantly, the sentencing behaviour of judicial magistrates. It is revealed in that chapter that the decision to grant a probation order is often based exclusively on the judicial magistrates' discretion and individual assessment of the case. The crucial issue is that the judicial decision was often taken without any input from probation officers as to whether the offender would benefit from a probation order or not.

Why is it that the probation system in NWFP Pakistan has taken the form that it does take? **Chapter 8** provides explanations in terms of the fact that the probation law being applied is a colonial law that did not evolve in Pakistan and does not have a particular cultural meaning. The western (modern) punishment of probation has no cultural equivalent in Pakistan. More importantly, not only is the legal system in Pakistan not evolved well enough to provide the administrative infrastructure necessary to support the inherited probation system, there has been no political will to reform the law in order to make it relevant to Pakistan. The 1960 Probation Law is based on the rehabilitative ideal but due to lack of resources and infrastructure, the probation system in NWFP Pakistan operates at the level of assisting and befriending offenders, at a time when the probation idea is changing and evolving significantly in other countries. Thus, an explanation of the Pakistani situation is provided in this chapter by applying the established theories of 'development', 'modernisation' and 'post-colonialism'. The discussions prioritise the importance of politics and history in the understanding of the development of the criminal justice system in developing countries. The post-colonial history of Pakistan could be described as that of chaotic politics in which the legitimating of power by the different factions of the political

classes and the prioritising of state security have led to the marginalisation of criminal justice issues.

The key argument in this thesis is that there is no sound structural, political, economic or cultural backing for the probation idea in Pakistan. Probation officers in NWFP Pakistan do not have the infrastructure to enable them to carry out effective supervision of offenders on probation and monitor their compliance with their orders. There are no effective mechanisms in place for dealing with breach cases and most importantly, the RPD NWFP does not have access to rehabilitative facilities in the community although there was evidence that the Social Welfare Department in the province had some drug rehabilitation facilities used mainly for non-offenders.

It is clear that in the NWFP, probation is being used simply because it exists as a sentencing option that can be conveniently imposed on offenders who are unproblematic. It seems that no serious thoughts have been given to the rehabilitation, resettlement or reintegration requirements of a probation order. Judicial magistrates appeared not to have given any serious thought to whether those to whom probation orders have overwhelmingly been granted – people in possession of illegal weapons – would really benefit from a probation order. Probationers see probation as an alternative to imprisonment but not as a soft option. Many of them resented the restrictions placed on their movement by their probation orders and would have preferred a court fine instead.

Chapter 9 is the concluding chapter of the thesis. In that chapter, the main arguments of the thesis are presented. It is clear that the ‘modern’ idea of probation as a form of punishment conveys a different meaning in Pakistan from that which it conveys in the Western European countries where it originated.

Limitations of the Study

This study was conducted in the NWFP, Pakistan. None of the respondents interviewed belonged to the other provinces in Pakistan. The study had to be limited to the NWFP, Pakistan because it is my home region in Pakistan. In addition, it is practically impossible to research the probation systems in all the provinces in Pakistan because they vary in administrative structures and the problems they face are also different. For example, the province of Punjab has a bigger administrative setup and many more probation officers than NWFP, but the RPDs in Baluchistan and Sindh provinces are smaller than that in NWFP in all respects. Similarly, all the RPDs in the other three provinces are independent government departments, whereas the RPD in NWFP is under the Prison Department. Therefore, extending the scope of this study to other provinces would have created many practical problems and the study would have lost its focus. In other words, the findings of this study cannot be generalised to include all Pakistan, although many of the issues discussed are also experienced by all the RPDs in all the other provinces not included in this study.

Chapter 1

The Idea of Punishment

1.1 Introduction

The questions of why, how and when we should punish offenders are easy to ask but difficult to answer. Numerous philosophers and sociologists of punishment have tried to answer these questions, resulting in the emergence of various theories of punishment. Societies have always punished those who offend against set value systems. However, responses towards dealing with offenders have been influenced greatly by theories of criminal behaviour emerging at different times. The history of punishment is full of harsh penalties given to offenders including flogging, burning, branding, mutilation, disembowelling, crushing, beheading etc. However, in the present world, most of these punishments are now almost obsolete.

This chapter explores the conceptual confusion relating to the concept of punishment, how punishment is carried out and the rationale for it. The discussion in the chapter will focus on some of the important issues related to punishment which include: Why punishment? What does society express when it punishes offenders? How can legal punishments be justified? How much punishment is enough for offenders? In other words, is there such a thing as a 'just measure of pain?'; what can punishment achieve? Lastly, the chapter discusses the cultural meaning of punishment and the punishment system from Islamic perspective.

Every society in the world possesses 'laws' which prohibit a wide array of deviant or unacceptable behaviours. Society expects its members to follow its laws and not indulge in

‘unlawful’ activities. The laws define behaviours which are prohibited and the response or penalty associated/attached with those kinds of behaviours. Therefore it can be said that the history of punishment is very old. Walker (1991:1) considered punishment ‘an institution’ that is present in almost every society of the world. Pereda (2002) considered penal institutions as one the oldest and persistent social mechanisms in history. They exist for specific societal aims and objectives, based upon the values of the society. However, it is worth emphasizing that the field of punishment is not simple and focused on crime control, as is generally assumed and explained. Hirst (1994) argued that punishment has become an increasingly problematic and controversial issue in the last 40 years or so. With the increasing crime rate in many countries of the world, a high level of media (both electronic and print) coverage of crime reports, public fear and unrest, the debate over how to deal with offenders has yet to be resolved. One of the major problems, according to Ainsworth (2000:145-6), is that ‘many of those who work within the criminal justice system disagree as to how this might best be achieved’. A wide range of measures have been tried and will continue to be tried in order to reduce the apparent increasing crime rates worldwide.

1.2 Defining Punishment

There appears to be a consensus as to the definition of punishment. Generally, it is considered as the ‘pain, suffering or loss’ inflicted on the person because of his/her offence. Penal philosophers have defined the term ‘punishment’ in different ways. Some of the definitions, like that of Garland (1990), are more comprehensive than others. For him, punishment is not confined to the infliction of pain or suffering on the person who has violated the law. Rather, punishment is a complex and differentiated legal process ‘involve[ing] discursive frameworks of authority and condemnation, ritual procedures of

imposing punishment, a repertoire of penal sanctions, institutions and agencies for the enforcement of sanctions and a rhetoric of symbols, figures, and images by means of which the penal process is represented to its various audiences' (Garland, 1990:17). Garland added that punishment includes 'law making, conviction, sentencing, and the administration of penalties' (Garland, 1990:17).

Other theorists have mainly emphasised the physical impact of punishment on the offender. Adams (1999) for example has described punishment as the 'infliction of mental or physical deprivation, discomfort or pain on a person as a penalty for a violation, fault or offence' (Adams, 1999:2). Punishment, according to Benn (1967), is 'inflicted on an offender because of an offence he has committed; it is deliberately imposed, not just the natural consequence of a person's action (like a hang-over), and the unpleasantness is essential to it, not an accidental accompaniment to some other treatment (like the pain of the dentist's drill)' (Benn, 1967:29).

Many theorists on punishment emphasise the element of unpleasantness as a feature of punishment. For example, Von Hirsch (1976:35) holds that punishment is 'the infliction by the state of consequences normally considered unpleasant, on a person in response to his having been convicted of a crime'. Similarly, Barlow (1981:419) defined punishment as 'any action designed to deprive a person or person of things of value because of something that person has done or is thought to have done'. As he puts it, punishment is the deprivation of something which the 'punisher assumes is valued' (Barlow, 1981: 420).

From the above definitions, we can conclude that punishment is the process of presenting a response after an unlawful behaviour has occurred, in order to reduce or eliminate the frequency or intensity with which the behaviour occurred initially. Punishment serves as a

threat by providing an undesirable stimulus, which thereby reduces the probability of the behaviour occurring again. It is important to remember that punishment is not a single strategy; it is rather a collection of different strategies along a continuum that ranges from mild to severe approaches depending upon the degree of societal condemnation of an act as defined by the criminal law.

1.3 The Scope of Punishment

Punishment is not exclusively a legal concept. It is a general term that is used in day-to-day life in different circumstances, with different meanings from its legal meaning. Sometimes we punish others and sometimes we get punished, depending upon the social role we play. For example, parents punish their children for their disobedience; teachers punish their students; and punishment systems also exist among friends in informal groups. Pereda (2002) differentiated legal punishment from other kinds of punishments on the following grounds. He says that in the personal (non-legal) uses of punishment:

- a) 'no law has been broken (at least no law in the legal sense of the word);
- b) both parties presuppose a background of emotional trust in their face-to-face relations, whether these are relations of love or friendship;
- c) what we understand as punishment is a momentary intervention in a complex personal relation based on some type of reciprocity' (Pereda, 2002:405).

Pereda (2002) argued that what differentiates legal punishment from other kinds of punishment is the violation of law and emotion of mistrust between the conflicting parties. For an action to be called punishment in legal terms, Hart suggested that some important conditions should be met. According to him, punishment:

Must involve pain or other consequences normally considered unpleasant ... It must be for an offence against legal rules ... It must be of an actual or supposed offender for his offence ... It must be intentionally administered by human beings other than the offender ... It must be imposed and administered by an authority constituted by a legal system against which the offence is committed (cited in Feinberg, 1977:25).

Similarly to differentiate legal punishment from other kinds of punishments, Walker (1991) mentioned seven features of legal punishment which are summarized below:

1. It [punishment] involves the infliction of unpleasantness in the form of physical pain, suffering, loss or deprivation of valuable things. For example people generally do not welcome penalties like imprisonment or physical and psychological suffering associated with imprisonment, fines, loss of liberty, disqualification of licence, etc.
2. The reaction must be deliberate and there must be a reason for that.
3. Those who order the penalty must have the right to do so. For example, in families, the adults generally reserve this right, whereas in other organizations, there are rules which specify who has the authority to punish lawbreakers.
4. The infliction must be for omission or violation of law. Things like thoughts, disliking others or fear of someone are not regarded as punishable.
5. The offender is responsible for the infringement, or the punisher believes this to be so.
6. The punisher must justify his/her punishing the offender. It must not be mere sadism, for example.
7. The question of whether an action is punishment or not, depends upon the person who inflicts it, not on the person who receives it (Walker, 1991:1).

In other words, the field of punishment is vast and the legal aspect is just a part of it. Adams (1999:2) stated that ‘punishment is intimately bound into the fabric of the major social institutions governing religion, work, state protection by the armed forces, social control and criminal justice, socialization in the household, schooling and play’. For him, it plays a prominent part in all social institutions. It means that punishment is equally important in both formal and informal settings. In this context, Garland (1990:18) has made a general statement that ‘punishment in some form or other is probably an intrinsic property of all settled forms of association and there is much to be learned from viewing punishment in these various social settings’. Durkheim argued that the concept of punishment exists even at the small level of a group. He was fascinated by what holds groups together. He explained that groups are formed and work together not by power (as Foucault believes), or economy (a Marxist view), but by their morality (Garland, 1990).

Hence, various other terms are often used synonymously with punishment. Walker (1991) maintained that punishment, albeit the same process has different names in different settings. Punishment, he argued ‘when imposed by English-speaking courts, is called *sentencing*; in the Christian Church it is *penance*; in schools, colleges, professional organizations, clubs, trade unions, and armed forces its name is *disciplining* or *penalizing*’ (Walker, 1991:1).

From the above discussion, it can be said that punishment exists in one way or another in most forms of associations. In this context, Garland (1990:91) argued that punishment ‘is to be viewed as a social phenomenon, which has a set of determinants and a social significance which go well beyond the technical requirements of crime control’. Similarly Rusche and Kirchheimer (1995) considered punishment as a social phenomenon and discussed it beyond its legal aspect. They argued that ‘punishment is neither a simple consequence of crime, nor

the reverse side of crime, nor a mere means which is determined by the end to be achieved. Punishment must be understood as a social phenomenon freed from both its juristic concept and its social ends' (cited in Garland, 1990:91).

Garland (1990) gave a broad meaning to the concept of punishment and discussed it outside the canvas of crime control, into the realms of social control. The institution of punishment is to be considered as an integral part of the state mechanism of social control. In a civilized society, the state is responsible for providing a peaceful living environment for its citizens and it is the right of the citizens that their lives and property be protected. Therefore Barlow (1981:421) argued that 'when a convicted criminal is punished today, he is punished by the state in the name of its people. Crimes are conceived as public wrongs, and in criminal law the state is the victim'.

In any society, the detection and prosecution of criminals are the responsibility of the criminal justice system. Ainsworth (2000:145-6) argued that 'one of the primary aims of the criminal justice system would surely be to persuade those who do offend to cease their criminal activities'. He added that members of society hope and expect that those who violate laws will be punished. Furthermore, Pakes (2004:119) argued that it is not enough to punish the offenders; he added that punishment should be able to 'restore a victim's faith in the criminal justice system or in society at large'. Punishment should be such that the public feel protected about their life, liberty and property. It is a known fact that societies want to uphold their basic values and the violators of values, especially of those drafted into laws, are punished accordingly. However, in the next section, the focus will be on what societies express when they punish.

1.4. What Punishment Expresses

In this section, the logic behind legal punishment is discussed. Traditionally, punishment is often viewed as an expression of the authoritative disapproval of deviant conducts. It depicts the disapproval of the conduct of the offender, recognizes, and protects the right of the victim. Feinberg (1977) explained this argument with the help of the following example:

Suppose that an airplane of nation A fires on an airplane of nation B while the latter is flying over international waters. Very likely high authorities in nation B will send a note of protest to their counterparts in nation A demanding, among other things, that the transgressive pilot be punished. Punishing the pilot is an emphatic, dramatic, and well understood way of condemning and thereby disavowing his act. It tells the world that the pilot had no right to do what he did, that he was on this own in doing it, that his government does not condone that sort of thing. It testifies thereby to government A's recognition of the violated rights of the government B in the affected area, and therefore to the wrongfulness of the pilot's act (Feinberg, 1977:31).

This example shows that punishment is used as a means of expression of condemnation of an understandably unacceptable (mis)conduct. Punishment can be used as a means to an end or an end in itself; the end may be social solidarity (Durkheim) or political domination (Foucault). Some philosophers believe that through punishment, society wants to convey a moral message, explicit or implicit to deviants and to those who intend to commit crime in future. For Durkheim, for example, punishment is an act of taking revenge. He argued that punishment, thus, 'remains for us what it was for our fathers. It is still an act of vengeance since it is an expiation. What we avenge, what the criminal expiates, is the outrage to morality' (Durkheim, 1960:89). For Feinberg (1977) 'punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those "in whose name" the punishment is inflicted' (Feinberg, 1977:28).

Similarly for Bottoms (1992:176), punishment has a 'symbolic significance both for the offender and for others. It expresses symbolic disapproval of the act to both the offender and to society and this process 're-qualifies' the offender as well'. He explained his argument by taking as an example, a game of ice hockey, thus:

Here, a player who breaks the rules may be given a 'penalty'; this is a term of fixed duration (perhaps two minutes or five minutes) during which he must leave the ice. For this period, he is placed in a 'penalty box', a special spatial area at the side of the rink, in clear view of the public but symbolically placed on the opposite side of the ice from the other members of the offender's team who are awaiting their turn to play. Thus by symbolic representation the infraction of the player is marked, both for himself and for others; and, since teams do not wish to lose players, the overall purpose of the system is clearly to prevent breaches of the rules of the game. Once the player has 'sat out' for the required period, however, he may return to the ice without disgrace: he is now a 're-qualified subject' (Bottoms, 1992:176).

Durkheim discussed the issue of punishment in his own way. For him, crime violates the collective conscience which in turn necessitates a collective response to it. He stated that the collective conscience is 'the totality of beliefs and sentiments common to the average citizens of the same society forms a determinate system which has its own life; one may call it the *collective or common conscience*' (Durkheim, 1960:79). Therefore, whenever people violate the collective conscience of a society, the society wants to discourage the deviant acts and express its denunciation by means of punishment. Thus, for Durkheim, Garland (1990) argued, physical penalties, imprisonment, fines, and stigmatizations are 'concrete signs by which we express disapproval, reproach, and the power of the moral order' (see Garland, 1990:44).

Durkheim further argued that societies differ from one another on the basis of their collective sentiments. He believed that the collective conscience of 'mechanical' societies differs from that of 'organic' societies. According to him, the collective sentiments of mechanical societies, on the one hand, are more than those of organic societies due to the fact that these are based on religion and tradition. Any offence against these sentiments demands

intense punishment. On the other hand, the collective conscience of organic societies is of a different type. It is based on individual values rather than collective, as are found in the mechanical societies. Moreover, the violation of individual conscience does not spark moral outrage as does that of collective conscience. The transformation from collective conscience to individual, according to Durkheim, is due to the weakening of religious control over human beings. Accordingly, punishment has also changed its form from more harsh to more lenient.

In essence, Durkheim argued, punishment is a means of conveying a moral message and of indicating the strength of feeling which lies behind it. Its point is ‘not to make the guilty expiate his crime through suffering or to intimidate possible imitators through threats, but to buttress those consciences which violations of a rule can and must necessarily disturb in their faith (see Garland, 1990: 44). Garland (1990:44) concludes that ‘we inflict various degrees of suffering and hardship upon the offender, not for what they can achieve in themselves, but in order to signalize the force of the moral message being conveyed’.

To proceed further, it is argued that if a society deserves its right to express disapproval through punishment, it also has the responsibility to justify its actions. Therefore, in the following section, the justifications of punishment will be discussed, based on the arguments of some philosophical writers on punishment.

1.5 The Rationale of Punishment

Nobody can deny the fact that punishment plays a key role in any society. Members of society want offenders (criminals) to be punished. However, a moral question arises here as

to 'what justifies the infliction of punishment on people?' (Cavadino and Dignan, 1997:32) Inflicting pain, restricting liberties, and extracting money, are all painful acts and there should be a reasonable or logical ground to justify these measures. Despite the fact that there is no general acceptable justification of punishment, moral philosophers, however, agree that there should be a justification for state infliction of pain on offenders; otherwise, it becomes nothing more than an 'evil' act by the state. According to Cavadino and Dignan (1997:32), it is 'immoral' to inflict punishment without justification. They argued that sometimes offenders may not find punishment painful or they might welcome it. Some offenders might want refuge from the social pressure of the outside world. Even in such situations, infliction of punishment needs some justification. However, Rawls (1955:3) argued that it is not an easy task to justify punishment. He added that various arguments have been given by moral philosophers, but so far 'none of them has won any sort of general acceptance'.

Punishment requires that an offender has violated the rules of society. Today, crime is considered as a multi-causational, complex social problem. Criminality might occur for many reasons: social, psychological, economic or political. Some argue that criminals are those who are unable to comply with the social order of the society and face serious problems of adjustment with their social environment. In this situation, it would be unfair to blame the offender as wholly responsible for his or her offence. If, for example, society is unable to provide proper means of earning to its members, how can that society reserve its right to punish those of its members involved in monetary offences? Nevertheless, this does not justify the unlawful behaviour of the offender. So all these considerations make the matter more complex and in this situation, we need a strong base to justify state infliction of pain or suffering on offenders.

Generally, prevention of crime is considered to be the main purpose or justification of punishment. However, some philosophers have justified punishment on the principle of *hedonism*: the doctrine holding that behaviour is motivated by the desire for pleasure and the avoidance of pain. Therefore, punishment is justified as a means to balance the pleasure gained through the offence (see Lilly, Cullen and Ball, 2002:13). Durkheim's analysis of punishment is different and broad. He stated that 'it is the fear of punishment which makes all mobile and immobile creatures do their duty and accomplish their tasks ... punishment rules humanity, punishment protects humanity' (Durkheim, 1960:141).

Rawls (1955) justified the penal system and punishment itself with the help of an example where the father answers the questions of his son. He stated that suppose the son asks:

"Why was *J* put in jail yesterday?" The father answers, "Because he robbed the bank at *B*. He was duly tried and found guilty. That's why he was put in jail yesterday." However, suppose the son had asked a different question, namely, why do people put other people in jail?" Then the father might answer, "To protect good people from bad people" or "To stop people from doing things that would make it uneasy for all of us; for otherwise we wouldn't be able to go to bed at night and sleep in peace." There are two very different questions here. One question emphasizes the proper name: It asks why *J* was punished rather than someone else, or it asks what he was punished for. The other question asks why we have the institution of punishment: Why do people punish one another rather than, say, always forgiving one another? Thus the father says in effect that a particular man is punished, rather than some other man, because he is guilty, and he is guilty because he broke the law (past tense). In his case the law looks back, the judge looks back, the jury looks back, and a penalty is visited upon him for something he did. That a man is to be punished, and what his punishment is to be, is settled by its being shown that he broke the law and that the law assigns that penalty for the violation of it. On the other hand we have the institution of punishment itself, and recommend and accept various changes in it, because it is thought by the (ideal) legislator and by those to whom the law applies that, as a part of a system of law impartially applied from case to case arising under it, it will have the consequence, in the long run, of furthering the interests of society (Rawls, 1955:5-6)

Furthermore, Hudson (1996) provided multiple answers to the question of why offenders should be punished. She stated that offenders should be punished because:

They deserve it ... to stop them committing further crimes ... to reassure the victim that society cares about what has happened to him or her ... to discourage other people from doing the same thing ... to protect society from dangerous or dishonest people ... to allow offenders to make amends for the harm they have caused ... to make people realize that laws must be obeyed (Hudson, 1996:3).

She added that ‘each of these reasons and others, one could easily imagine, are plausible justifications for imposing punishment on offenders’ (see Hudson, 1996:3).

For Sayre-McCord (2001:10) the familiar justifications of punishment fall into three groups. First is the ‘consideration of justice and desert’; second is the consideration of ‘utility and the prevention of crime’; and third is ‘the role of punishment in expressing moral condemnation and contributing to moral education’.

Some theorists have supported their argument and justified punishment on the philosophy of the ‘social contract’. Russell Pond (1999:117), for example, stated that ‘all citizens are bound together by a nexus of rights and duties which include obedience to the law of the land’. Accordingly, no one is allowed to break the law and to get unfair advantage over others. Criminal behaviour disturbs this equilibrium and punishment restores it. Similarly, Cesare Beccaria, founder of Classicism – a theory of crime and punishment that is also built upon the social contract theory – argued that people generally sacrifice a portion of their own freedom in the hope that they might enjoy the rest of it in peace and safety. In addition, Beccaria argued that ‘rational people drawing up a just social contract would only be willing to grant governments the power to punish to the extent that was necessary to protect themselves from the crimes of others’ (cited in Cavadino and Dignan, 1997:46).

Similarly, Bentham - a great English philosopher - justified punishment only if 'it prevented crime' (cited in Barlow, 1981:424).

1.6. Philosophical Justifications of Punishment

Generally, philosophical theories on the justification of punishment are often discussed under two schools of thought, namely, the *non-consequentialist (retributivist)* and *consequentialist* schools of thought (see Duff and Garland, 1994: Chapter 1). The former focuses on the past conduct of the offender whilst the latter looks at the future consequence of the punishment. In short, the retributive school of thought considers punishment as a right and deserved response towards the crime committed in the past. It does not take into account the future consequences of punishment. Atkin (2000) argued that non-consequentialists or retributivists consider punishment an end in itself. For non-consequentialists, the answer to the justification question is very simple. If a person has committed a crime, he is responsible for it and he has to bear the consequences. To justify punishment, the important and essential component is the guilt. For retributivists, therefore, it is the only and necessary component that justifies punishment. For all retributivists, 'punishment has moral worth independently of any further desirable effects' (Ezorsky, 1977: xviii). Walker (1991) linked the retributive argument with religion. He argued that 'in Christian, Judaic, and Islamic cultures there are many people to whom the retributive justification seems to need no further explanation. It has the 'scriptural authority' (Walker, 1991:72).

On the other hand, consequentialists justify punishment on the basis of the future consequences for the individual offender and for the society as a whole. Brownlee (1998:35) stated that consequentialist theories hold a forward-looking stance. He argued that consequentialist theories seek to justify the present pain [in the form of punishment] by

pointing to some future good as a consequence of punishment. The argument is that the future good would 'outweigh the present pain of punishment itself' (Brownlee, 1998:35). Within consequentialism is the utilitarian justification of punishment as put forward by Jeremy Bentham. Utilitarianism answers the question of justification of punishment by its utility. According to Pond (1999:115), the utilitarian argument rests on 'the greatest good for the greatest number and the reduction of crime will be to that end'. In addition, Ezorsky (1977:12) stated that 'utilitarianism holds that punishment must always be justified by the value of its consequences'. Therefore, it can be said that for utilitarians, the main and important point of consideration in punishment is its future value or usefulness.

1.6.1. The Retributive School of Thought

Retribution as a school of thought dominated the penal history of many countries of the world for quite a long time. As said above, it is a theory of punishment that justifies punishment on the basis of past conduct of the offender. Accordingly, it is enough that a crime has been committed for a punishment to be justifiable. This fact alone demands that a reciprocal penalty be imposed on the offender. The eventual consequences of this reciprocity of action are of little concern. The retributive school argues that 'if punishing a guilty person also achieves some utilitarian consequence, so much the better; but this is not the aim or the justification' (Brownlee, 1998:37).

Thus, retributivism (or retribution) is about taking a backward stance towards crime and inflicting punishment accordingly. As Atkin (2000) stated, guilt is regarded as a *necessary* and *sufficient* condition for justifying punishment. The retributivists' argument is that it is

morally right that an offender should suffer in proportion to his or her offence. It is better to punish rather than not to punish the offender without looking at the consequence of the punishment. According to Wilson and Herrnstein (1986:497) 'retribution does not presuppose that an offender, or anyone else, will be reformed or restrained by punishment. The punishment is, rather, inflicted and justified simply on the grounds that it is just, not on the grounds that it is effective'.

The retributivist answer to the justification question is, therefore, very simple. It considers punishment an end in itself. The argument is that if a person has committed a crime, he or she is responsible for it and has to pay for it. Atkin (2000) argued that the retributivist answer to the justification question is generally based upon the human desire for revenge. The legal system plays the role of avenger of the victim. However, retribution should not be confused with vengeance. Retribution, Conklin (1981:426) mentioned, 'differs from vengeance in that vengeance is 'private and personal' and does not require the established authority of one institution over individuals. Retribution, in contrast, requires a legitimate system of authority with the acknowledged right to mete out sanctions to convicted offenders'.

Some theorists have explained the retributive argument on the basis of social contract theory. Cavadino and Dignan (1997:40) for example argued that 'all citizens are bound together in a sort of multilateral contract which defines our reciprocal rights and duties'. This contract includes obeying the law of the land, which applies to all of its members. Accordingly, people sacrifice some part of their freedom and refrain from unlawful behaviours in order to spend the rest of their life in peace. Those who break the law gain unfair advantage over other fellow members of the society. Retributive punishment,

according to Cavadino and Dignan (1997:40) therefore ‘restores the balance by cancelling out this advantage with a commensurate disadvantage’.

Immanuel Kant, the eighteenth century German philosopher, was a great retributive thinker. For him, the only possible justification for punishing an offender is that he deserves it. He expressed his idea in the message that:

Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as complicit in their public violation of legal justice (cited in Wilson and Herrnstein, 1986:497).

The retributive argument has certain logic but as Cavadino and Dignan (1997:40) stated, ‘retributivism is not without its own philosophical difficulties’. The main problem with retribution is how to give the retributive principle a moral grounding in the first place. Although for many people, it seems ‘right’ and accords with ‘commonsense’, however the matter is not so simple. The argument is that this theory would prove valid only if our society is a just one where all citizens enjoy the same amenities of life. Generally, it is believed that most offenders come from a low economic background. They are more likely in terms of their social and economic conditions than others to choose law breaking as an option. In this case, punishment, according to Cavadino and Dignan (1997:41) ‘tends to increase inequality rather than do the opposite’.

Similarly, Pond (1999) argued that the retributive argument is valid only if, ‘to employ a modern and over-used expression, you start with a level playing field’. He added that ‘if you

do not, then restoring equilibrium can have no meaning - but we know that most offenders started from a position of social disadvantage and punishment then increases inequalities' (Pond, 1999:117). The main difficulty with the retributive argument, therefore, is that, apart from guilt, it does not take into account other factors which sometimes play a more important role in law breaking. It asks whether a crime was committed; however, it does not ask why it was committed.

Retributivism lost its credibility in the 1960s and early 70s due to the apparent global political support for positivism and consequentialist theories of punishment. However, it was revived again in the mid 1970s, in response to political allegations of the failure of the positivist ideals in punishment and it emerged in a new version, namely 'just deserts'.

Just desert

The 'just desert' theory of punishment is based on the principle of the proportionality of punishment to crimes. The just desert theory soon dominated sentencing practices in England and Wales during the late 1970s and 1980s, in what is commonly referred to as the 'justice' model of criminal justice eventually enshrined in the Criminal Justice Act of 1991.

Pond (1999) traced back the history of just desert to the Italian scholar, Cesare Beccaria (1738-1794), of the Classical School, who, in his book *On Crime and Punishment*, published in 1764, wrote 'there must be a proper proportion between crimes and punishments' (cited in Pond, 1999:9). Beccaria was the first writer to articulate the argument that punishment should fit the crime. However, since its beginning, just desert as a punishment theory has received substantial support from penal philosophers. Hudson (1996:39) stated that 'the new

retributive theory of just desert has become the most influential penal theory' especially in the United States of America and the United Kingdom in the 1980s. According to Cavadino and Dignan (1997:50) 'many states in USA moved substantially away from indeterminate sentences and positivistic devices such as parole'. As mentioned earlier, the justice model is the key principle behind the UK's Criminal Justice Act of 1991.

The just desert approach to the justification of punishment stipulates that through the act of committing an offence, the offender violates his or her obligation to the state as a responsible citizen. Therefore, punishment is justified as it balances the unfair advantage gained through crime. However, the amount of punishment should be in proportion to the benefit unlawfully gained through crime. Like retribution, desert philosophy does not take into account the future consequences of sentences on either the offender or other members of society. Muncie (1999:269) stated that 'proponents of "back to justice" argued that determinate sentences on the seriousness of the offence, rather than the needs of individual offenders' should be the guiding principle of the penal system.

An influential proponent of 'just deserts' in America, Von Hirsch (1976), proposed that the following principles be reinstated at the centre of criminal justice practice:

1. Proportionality of punishment to crime: the offender should receive punishment, which should be in proportion to the severity of his/her offence.
2. Determinacy of sentencing: this approach does not believe in indeterminate or treatment-based sentences, like probation.
3. No discretion: there should be an end to judicial, professional and administrative discretion.

4. An end to disparities in sentencing: for every crime, there should be a clear cut sentence to be imposed on the offender, irrespective of other considerations.
5. Equity and protection of rights: there should be a due process and fair trial which should guarantee the rights of both the victim and the offender as well (Von Hirsch, 1976 cited in Muncie, 1999:269).

Proportionality, therefore, is the central feature of the just desert philosophy. Hudson (1996:40) stated that ‘instead of the equivalence of talionic systems, the modern version interprets commensurate as *proportionate*’. It argues that there should be a schedule of punishments in which offences should be classified on the basis of their seriousness. Accordingly, severe punishment should be reserved for the most serious crimes and for less serious crimes, the punishment should be less severe. This classification is often known as *tariff* - for every crime there is a price to pay’ (Hudson, 1996:40).

However, one of the main problems with just deserts is how to set up the penalty structure based on proportionality. Von Hirsch (1993) attempted to answer this question by distinguishing between ordinal proportionality and cardinal proportionality. *Ordinal proportionality*, according to him, is concerned with the way offences are ranked in relation to each other, normally starting from less serious to most serious. He argued that ‘persons convicted of crimes of like gravity should receive punishments of like severity. Persons convicted of crimes of differing gravity should receive punishments correspondingly graded in their degree of severity’ (Von Hirsch, 1993:18). Furthermore, Von Hirsch stated that ‘punishing one crime more severely than another expresses greater disapprobation of the former crime, it is justified only to the extent the former is more serious’ (ibid). He further added that ordinal proportionality is based on three sub-requirements i.e. parity, rank-ordering and spacing of penalties. By *parity*, he means, ‘when offenders have been convicted

of crimes of similar seriousness they deserve penalties of comparable severity'. *Rank-ordering*, means that 'punishing crime Y more than crime X expresses more disapproval for crime Y, which is warranted only if it is more serious. Punishments should thus be ordered on the penalty scale so that their relative severity reflects the seriousness - ranking of the crimes involved'. And for *spacing of penalties*, he argued, suppose penalties X, Y, and Z are scaled in ascending order on the basis of their severity. For example Y is considerably more severe than X but slightly less severe than Z; to 'reflect the conduct's gravity, there should be a larger space between the penalties for X and Y than for Y and Z'. He added that 'spacing, however, depends on how precisely comparative gravity can be calibrated - and seriousness - gradations are likely to be matters of rather inexact judgement' (Von Hirsch, 1993:18). For the severity of sanction, von Hirsch argued that 'there may be limits on the severity of sanction through which a given amount of disapproval may be expressed, and these constitute the limits of *cardinal* or non-relative proportionality' (1993:19). Cardinal proportionality is related to the upper and lower anchoring points for each offence ranked in the ordinal scale. It shows the severity or leniency of the sanctions appropriate to the seriousness of the offence.

Von Hirsch believed that ranking offences, although difficult and time consuming, is not impossible. In the United States, Minnesota, according to Hudson (1996) was the first US State to adopt proportionality as the central feature of its criminal justice system. Sentencing guidelines are shown by a grid having two axes. Offences are classified on the vertical line starting from less severe to more severe, whereas the horizontal line shows the previous convictions of the offender. In order to determine the sentence proportionate to the offence, a judge will have to locate the place where the severity of offence type and previous convictions of the offender intersect. Hudson (1996) added that 'each cell on the grid contains a presumptive prison term in months, which would be the normal term for a standard

case of that type. A band below and above the presumptive sentence is also given, indicating the range within which the sentence should fall in the actual case' (Hudson, 1996:43-4).

Like other theories of punishment, just deserts (proportionality) theory has been criticised. Von Hirsch (1993) himself believed that it is not easy to achieve proportionality. He argued that 'whether x months, y months or somewhere in between is the appropriate penalty for (say) armed robbery depends on how the scale has been anchored and what punishments have been prescribed for other crimes (Von Hirsch, 1993:19). Similarly, Hudson (1996:43) raised the same question of classifying the offences on the basis of their severity and setting sentences proportionate to them. She argued that this is a subjective process because 'one society's view of desert may vary considerably from another's, as will one person's from another's, when it comes to establishing the scale'. In addition, Pond (1999:120) asks: 'how do we rank robbery, rape, the supply of drugs and so on'? He argued that it is not easy to compare a crime with a similar crime, or with other more or less serious crimes.

Thus, while in the public eye, just desert has a clear advantage of seeming fairness because it punishes the offender 'as he deserves', the theory is not without its problems. As Von Hirsch (1993:19) argued, 'once the anchoring points and magnitude of the penalty scale have been fixed, ordinal proportionality will require penalties to be graded and spaced according to their relative seriousness, and require comparably-severe sanctions for equally reprehensible acts'. The question is how these anchoring points could be achieved and how the magnitude of the penalty scale could be fixed. These are difficult questions to answer.

1.6.2 Consequentialist Schools of Thought

As said earlier, Brownlee (1998:35) considered consequentialist theories of punishment as ‘forward looking’. These are theories that seek to justify punishment by imposing some present pain and pointing to some future good that will come as a consequence. The focus of these theories is on the end result of punishment or its value either for the offender or society as a whole. Rawls (1955) argued that utilitarian justify punishment on the ground that bygones are bygones and that only future consequences are worth any consideration. Thus, punishment is justified only by reference to the probable consequences of maintaining it as one of the devices of the social order. The argument is that if punishment can promote effectively the interest of society it is justifiable, otherwise it is not. The unpleasantness associated with punishment is justified only if it reduces the incidence of crime in future.

Consequentialist justifications of punishment could vary, depending on the ends that are expected from punishment. However, philosophical writings on punishment have focused mainly on three ends of punishment, namely:

- a) Deterrence
- b) Incapacitation (e.g. imprisonment)
- c) Rehabilitation.

Deterrence

‘Deterrence’ as a theory of punishment implies that the justification for punishment lies in the fact that it has the ability to discourage actual or potential offenders from committing crime in future as a result of the fear or threat of punishment. The deterrence model,

according to Conklin (1981:392) assumes that 'people engage in specific types of behaviour only after careful and rational consideration of the costs (or risks) and the benefits (or rewards) of particular courses of action. People who comply with the law seek the rewards of conformity and try to avoid the costs of deviance. Punishment, therefore, is one means of inducing compliance. People presumably fear punishment and do not want to risk their *state of conformity*'.

Deterrence can be classified into two main categories, i.e. individual and general deterrence. *Individual deterrence*, according to Cavadino and Dignan (1997:33) 'occurs when someone commits a crime, is punished for it, and finds the punishment so unpleasant or frightening that the offence is never repeated for fear of more of the same or worse'. Whereas, *general deterrence*, Pond (1999:115) argued, stops people from committing crime if they are aware of 'what will happen to them if they do'. Proponents of this idea believe that offenders will voluntarily refrain from crime, for fear of punishment. Bentham supported the general deterrent effects of punishment. He argued that 'the punishment suffered by the offender presents to everyone an example of what he himself will have to suffer, if he is guilty of the same offence' (Hudson, 1996, 19). However, Sanderson (1993:158) believed that if the practice of punishment is to have a deterrent effect, two points are very important; first, 'the severity of punishment and second, the possible detection of offenders'.

Unfortunately, research studies provide very little support for the deterrence effects of punishment. Let us start the debate by considering the two points mentioned by Sanderson, that is, the severity of punishment and detection of offenders. The first point - the severity of punishment, has very little deterrent effect. Let us take the example of murder. In most countries of the world, the death penalty is imposed for murder. Now, the question arises, to what extent has the death penalty deterred people from murdering others? This crime is still found in almost all countries of the world. In England and Wales, the death penalty was

abolished in 1965. However, research studies show no definable impact on the incidence of murder. It is argued that murder, especially in a domestic context, is a crime where the offender is less likely to make a rational choice before committing the crime. If this is the case Sanderson (1993:158) argued, 'the potential consequences will be irrelevant, so that deterrence is unlikely'. Cavadino and Dignan (1997:35) also questioned the notion that severe punishment deters people from offending. They argued that there is 'little to suggest that severer punishments deter any better than more lenient ones'. However, the argument here is not to prove that deterrence does not have any effects at all. The main difficulty with deterrence strategy, according to Hudson (1996:21) is 'how we can know how severe penalties have to be to make people decide against crime'. Other research studies conducted on the deterrence effects of punishment in reducing the incidences of robberies and assaults were also not encouraging. Sanderson (1993) for example argued that the famous and well-publicized case of the 'Birmingham mugger' who was sentenced to 20 years in custody did not reduce the incidence of mugging.

Sanderson's (1993) second point is that the detection of offender is a necessary condition for deterrence. This factor itself depends upon many other factors, including efficient and effective patrolling by the police, public cooperation, and reporting of crimes to the police. It is believed that whatever is reported to the police is just the 'tip of the iceberg'. The number of crimes not detected or reported is far more than those reported or detected by the police. If crimes are not reported by the public or are not detected by the police, this situation goes in favour of the offenders, thus reducing the likelihood of punishment and its deterrent effects. If people believe that they might be caught if they offend, this does have a deterrent effect. Cavadino and Dignan (1997:35) argued that 'there is some good evidence that general

deterrence can be improved if potential offenders' perceived likelihood of detection can be increased'.

Thus, practically, it is extremely difficult to measure the deterrent effects of punishment. Hudson (1996:22), for example, believed that 'if crime rates, any changes in them, could be measured with reasonable accuracy, it would still be difficult to be sure that any reduction in crime was due to deterrent penalties'. She added that 'even with normal offences, however, reciprocity can only be a working hypothesis: it is impossible to know with any certainty that what would deter me would deter anyone else' (Hudson, 1996:21).

Furthermore, one of the deterrence arguments, according to Wilson and Herrnstein (1986:493) that deterrence deals with punishment on the basis of 'rational calculation', is difficult to maintain. Conklin (1981:392) believed that 'many offenders do not calculate risks and rewards as carefully as suggested by the deterrence model'. To explain his argument, he gave an example of a mugger who described his state of mind prior to his mugging as follows:

I was scared, but it was exciting. You see, the whole thing, I was scared and excited. And I knew, you know, I have a *fifty-fifty* chance of either getting away or getting caught. But I figured *that was the chance I was going to take*. I wanted to get the money (Conklin, 1981:398).

Conklin added that we cannot say anything for sure about the deterrent effects of punishment. It operates differently for different people and for various types of crimes. Researchers have studied the specific deterrent effects of punishment on offenders and concluded that it is very difficult to say for sure that any reduction in crime is due to such effects. There are several reasons why a person would desist from reoffending. As Conklin

(1981) explained, a convicted robber, when released from prison may refrain from robbery because:

He fears further incarceration (specific deterrence); he has learned that robbery is wrong (didactic effect); he has been changed by prison treatment programmes (rehabilitation); or he is older than when he entered prison and is ready to retire from a criminal career (maturing - out- effect) (Conklin, 1981:393-4).

He added that in this situation, it is extremely difficult to separate specific deterrent effects from other consequences of punishment. Indeed, it is believed that punishment has other effects which according to Cavadino and Dignan (1997:34) 'cancel out and even outweigh its deterrent effects'.

However, the widespread criticism of the deterrence model does not mean that punishment has no effect at all. Cavadino and Dignan (1997:35) for example argued that 'this does not mean that deterrence never works', but the main difficulty, they argued, is that 'its effects are limited and easy to overestimate'. In addition, Barlow (1981:456) stated that 'although most authors agree that any rejection of the deterrence doctrine is premature; few are willing to accept it. We are confronted by a vast array of conflicting results'.

Incapacitation

As a philosophy of punishment, incapacitation implies that the community is protected from crime by the fact that those who have offended are taken out of circulation and put in secluded places where they can no longer pose a threat or danger to society. Thereby, society and actual or potential victims are protected or feel protected at least for the duration of the offender's incarceration. Imprisonment is the most common form of incapacitation, although

other forms of physical restrictions now exist that serve the same purpose as incarceration by limiting the offender's opportunity to reoffend whilst serving a sentence (for example, electronic tagging).

Incapacitation as a theory of punishment is based on the philosophy of prediction. Imprisonment, according to Brownlee (1998:36) is 'a policy which emphasises the need to control and contain those who, usually on the basis of prediction derived from their past conduct, are thought likely to offend in the future if they are at liberty so to do'.

The history of modern prison is not so old. Historically, Pond (1999:123) argued, 'the prison - as we know it - is a comparatively recent social experiment which only began 200 years ago (although different forms of prisons in the sense of private dungeons or keeps existed earlier)'. Before that, imprisonment as a sentence was rare and it was used to confine offenders awaiting trial. Early prisons, Durkheim mentioned, 'were found in, or attached to, royal palaces, temples and churches, city walls, and even the private homes of court officials, members of the nobility, and others in positions of wealth and privilege' (Barlow, 1981:432). Therefore, the main forms of punishment were execution and transportation. For example in Great Britain, transportation was one of the most common types of punishment for professional criminals. Offenders were transported to the colonies, especially to America and Australia. However, the transportation of offenders as a form of punishment was seriously hampered in 1755 due to the American War of Independence, which provided a stimulus to the changeover to prisons. Due to shortage of prison space, 'two floating prisons or *hulks* were moored in the Thames and became home to 2,000 convicts' (Pond, 1999:123). However, by the end of the eighteenth and beginning of the nineteenth century, a great transformation

occurred in the field of punishment. Capital punishment was replaced by imprisonment, for those who would previously have been transported or executed.

The writings of early thinkers did not show great interest in incapacitation as a form of punishment. In Beccaria's writings, there is no programme for imprisonment. He discussed imprisonment as a temporary place of confinement for those awaiting trial. Bentham however gave the idea of imprisonment in the shape of the Panopticon, and considered it as a useful way of dealing with offenders; 'although the Panopticon was never built exactly as he designed it (a modified version was constructed at Milbank on the Thames and opened, with extremely poor results, in 1817)' (Cavadino and Dignan, 1997:47). However, with the passage of time, imprisonment rapidly became the dominant form of punishment.

Today, imprisonment is synonymous with punishment in most societies, especially in societies where sentencing options are limited. In most societies, those in prison are those society would regard as receiving punishment. Non-custodial sentences are often regarded as lenient sentences or being let-off.

As a theory of punishment, incapacitation means simply that the offender is physically excluded from the rest of society in a temporary confinement, in response to their crimes or perceived dangerousness, until a time when they are perceived to be fit and ready to re-enter society as law abiding citizens. Incapacitation has had strong political support in Western countries where it is perceived as a potentially effective crime control strategy. For example in the UK, a former Home Secretary Michael Howard, speaking to the Conservative Party Conference in October 1993, stated, 'Let us be clear. Prison Works. It ensures that we are protected from murderers, muggers, and rapists and it makes many who are tempted to commit crime think twice (Cavadino and Dignan, 1997:33). Similarly, former Labour Prime

Minister Tony Blair believed that prisons “can work” for the same reasons. The main issue with prisons has always been what is to be done with prisoners so that they refrain from offending after the completion of sentence.

In spite of a lack of sufficient evidence that they reduce re-offending, prisons continue to be the most common form of sentence throughout the world. If we look at the statistics about prison populations around the world, they are extremely shocking. The British Home Office (2003) reported that today, there are over ‘9 million people in the world who are held in penal institutions’ and most of them are held in the so-called developed countries of the world. Giddens (2001:236) stated that the United States has by far the ‘most punitive justice system in the world’ with 701 per 100,000 of her population in penal institutions, followed by Russia (606/100,000) and Belarus (554/100,000). In Western Europe, United Kingdom has the highest prison population rate with 141 per 100,000 of the national population in prisons (see Home Office Report, 2003). Giddens (2001) added that although the United States makes up only 5 percent of the world’s overall population, it accounts for 25 percent of the world’s prisoners. The American prison system employs more than 500,000 people and costs 35 billion dollars annually to maintain.

In spite of the increasing numbers, there is little evidence to show that prison actually reduces the crime rate. Most of the studies in western societies showed that prisons actually breed crime. It is generally assumed that first time offenders confined with professional criminals learn criminal lessons and after release, they are more likely to get involved in more crimes than they were before. Cavadino and Dignan (1997:34) referred to custodial institutions as notorious ‘schools for crime’ where offenders can interact with other

professional criminals, can learn new criminal techniques and can 'enter into a criminal subculture'. Furthermore, Giddens (2001) talked about how offenders are socialised into the criminal subculture of prisons, gain access to seasoned criminals and acquire new criminal skills. For this reason, he argued that prisons are not schools but 'universities of crime'. This situation directly affects the recidivism rate or relapse back into crime. He added that 'over 60 percent of all men set free after serving prison sentences in the UK are rearrested within four years of their original crimes' (Giddens, 2001:237).

On the basis of the foregoing arguments, Wilson and Herrnstein (1986:493) argued that imprisonment might protect the public but 'not fellow offenders' As McGuire and Priestley (1995:12) concluded 'a general increase in the use of imprisonment, either by increasing the proportion sentenced to imprisonment, increasing the sentences imposed or increasing the proportion of the sentence that offenders spend in custody, would not affect crime levels by any substantial amount'. Similarly, Giddens (2001:235) added that, whilst generally people believe that prison can reform criminals and prevent new crimes, 'evidence seems to suggest that they do not'. The British Home Office reported in 1990 that imprisonment is an 'expensive way of making bad people worse' (cited in Pond 1999:125). Furthermore, McGuire and Priestley (1995:11) believe that 'there is certainly little evidence that the deterrent impact of the prison is substantial or even satisfactory'. Indeed, there is no easy answer to the question of whether or not prisons 'work'. As mentioned earlier, there are other factors that also contribute toward desistance from crime. The deterrent effect of imprisonment is expected to result from its unpleasant living conditions but as prison conditions in the United Kingdom, for example, have become more 'humane', the prison has apparently lost its deterrent effect. As Giddens (2001: 237) puts it, 'the less harsh prison conditions are the more imprisonment loses its deterrent effect'.

Rehabilitation

Rehabilitation and reform are words that are often used interchangeably. Reformation implies a change of personality or character as a result of punishment. In the 19th century, reformation was associated with imprisonment, when prisoners were placed in solitary confinement and exposed to hard work and Christianity as a means of changing them morally and physically so that they return to society as “good” persons. Rehabilitation, on the other hand, has ‘evolved’ into several meanings depending on the purpose that it serves within the criminal justice system. The term simply means ‘to restore to former state’ (Conklin, 1981:448). However, this definition is now restricted to only one type of rehabilitation, often referred to as ‘technical rehabilitation’ This is rehabilitation in the form of statutory arrangements whereby former convictions are considered spent or void after a specific period of time and the offender is literally back to his or her former state (see Treverton-Jones, 1989). This is similar to the retributivist idea that the offender, having served a penalty, has paid the price for the offence or repaid his or her debt to society and is thereby entitled to resume his or her place in the community irrespective of whether or not he or she poses a future threat to society.

However, modern approaches to rehabilitation include elements of reformation (that is behavioural change) and engaging offenders in programmes designed to address offending behaviour and criminogenic needs; promoting understanding in offenders of the harmful effects of crime and equipping them with useful skill to enable their ‘re-settlement’ in society. Thus, Conklin (1981) argued that rehabilitation is not about restoring offenders to their former state (more so as many offenders come from criminogenic environments) but is about transforming offenders into ‘new people’ (Conklin, 1981: 448). In fact, Cavadino and Dignan (2002:36) explained rehabilitation as ‘the idea that punishment can reduce the incidence of crime by taking a form which will improve the individual offender’s character or

behaviour and make him or her less likely to re-offend in future'. The main purpose of the rehabilitation programme according to Pond (1999:116) is that 'punishment will improve the wrongdoer's character and reduce the likelihood of further criminal behaviour'. Rotman (1986) conceived of rehabilitation as a right:

The right to an opportunity to return to society with an improved chance of being a useful citizen and staying out of prison. This right requires not only education and therapy, but also a non-destructive prison environment and, when possible, less restrictive alternatives to incarceration (Rotman, 1986: 1027)

For most of the twentieth century (especially during the 1950s and 1960s), the rehabilitative philosophy dominated penal thinking (Cavadino and Dignan, 2002:36). The rehabilitative ideal, often known as the 'treatment model', considered crime as a symptom of some kind of mental or physical defect. Therefore, the best solution to deal with crime was by treatment. Punishment in the form of 'treatment' was imposed, keeping in view the needs of the offenders rather than the seriousness of the crime.

During the 1960s, for example, indeterminate sentences with cure as the factor determining release, and treatment programmes, were popular forms of sentences (Pond, 1999). Under indeterminate sentencing schemes in California, for example, the Adult Authority - equivalent to the Parole Board in England and Wales - was responsible for deciding the term of sentence for offenders. Such decisions were made keeping in view 'how much the offender had *improved* (psychologically, socially) and what was his or her likelihood of re-offending, rather than being decided by the trial judge with reference to the actual crime committed' (Hudson, 1996:39).

Proponents of this theory of punishment believe that several external factors such as the social, economic, psychological, environmental, family and peer group pressure are important contributing factors in the criminal act. Francis A. Allen explained the rationale behind rehabilitation in the following words:

It is assumed first that human behaviour is the product of antecedent causes. These causes can be identified as part of the physical universe, and it is the obligation of the scientist to discover and to describe them with all possible exactitude. Knowledge of the antecedents of human behaviour makes possible an approach to the scientific control of human behaviour (cited in Conklin, 1981:448).

Therefore, this philosophy of punishment believes that sentencing should take into account the external factors that may have played a significant part in the criminal act and are beyond the control of the offender. Conklin (1981:447) argued that 'by emphasizing the causes of crime rather than relying on the abstract notion of free will, positivists such as Lambroso, Ferri, and Garofalo drew attention to the conditions that could be changed to prevent and reduce crime'. For example, Ferri (1901) argued that a grave crime is always a manifestation of the pathological condition of the individual (see Conklin, 1981). Therefore, any decision about punishment should be made after proper understanding of these external contributing factors.

The philosophy of rehabilitation rests on the premise that harsh punishments cannot reduce crime. As McGuire and Priestley (1995:4) argued, 'it has become ever more apparent over recent decades, that punitive measures have done little to arrest the increase in crime'. It is often argued that instead of reducing crime, harsh penalties have increased the crime rate (this argument has already been discussed in the section on deterrence). In this context, Wilson and Herrnstein (1986:494) argued that punishment as moral education (a type of rehabilitation) is more likely to reduce crime than punishment as deterrence. However,

rehabilitation is often seen as an outcome of imprisonment whereby prisoners are given opportunities to address their offending behaviour and obtain useful skills whilst in prison. There are serious questions as to whether this approach to rehabilitation works as it is often practised in the form of a 'carrot or stick' approach.

As mentioned earlier, rehabilitation suffered a serious (political) blow in the 1970s. It was criticised for being ineffective, ineffectual, authoritarian and inhuman. The discrediting of rehabilitation was 'partly as a result of research results which suggested that penal measures intended to reform offenders were no more effective in preventing recidivism than were punitive measures' (Cavadino and Dignan, 2002: 36). It was argued that whatever is done to offenders' makes no difference as *nothing works* with offenders.

A major critic of rehabilitation was Martinson who, after a study of different treatment programmes, found a mixture of positive and negative qualities 'which indicated to him that no single category of treatment was likely to be effective for the majority of offenders' (Martinson, 1974, cited in Eysenck and Gudjonsson, 1989: 200). Similarly, Pond (1999:116) stated that by the 1970s it was seen as unjust that those who played the 'cure game' were released earlier than prisoners who would not, even if the crime of the former was worse. In addition, Hudson (1996:39) stated that 'civil rights and prisoners' rights groups were demanding sentencing reforms in the form of determinate sentences, graded according to the seriousness of crimes'.

Despite the criticism it has attracted, rehabilitation as a philosophy of punishment still plays a central role in many countries' penal systems. Probation, parole and community sentences are the punishments most widely associated with rehabilitation in many parts of the world, including Pakistan. Probation seeks to reform and rehabilitate offenders in two main

ways. First, it addresses the criminogenic needs of the offenders, including cognitive behavioural problems that tend to encourage offending; and second, it accompanies the punishment with some guidance, monitoring and provisions for the acquisition of skills that would help the offender to return to society a 'better' person (see chapter 2).

To conclude, philosophers have answered the question of justification of punishment in different ways, the effects of which can be seen in the diversity of ideas about what punishment means or can achieve. However, these are not the only questions addressed in the study of punishment. There are other questions. For example, if punishment is justified in one way or the other, then when can one decide that the punishment that is meted out is the correct or appropriate one? How is the adequacy or sufficiency of punishment decided? These questions are addressed in the following section.

1.7. How Much Punishment is Enough?

Historically, up to the 18th century, corporal and capital punishment dominated the field of punishment. During these historical times, 'public hanging, flogging, mutilation, branding, banishment, the stocks and pillory and many other physical penalties were utilized to punish the culprit and be a lesson to others' (Rex, Milton and William, 1991:222). Punishments were severe in nature, as Durkheim argued, due to the 'violations of fundamental moral code which society holds sacred' (cited in Garland, 1990:29). Durkheim elaborated that the criminal act violated the collective consciousness of the people, which necessitated a punitive response to it. In addition, 'it provokes a sense of outrage, anger, indignation, and a passionate desire for vengeance' (ibid: 30). Punishment, according to Durkheim, was a

passionate response to show the anger of the people. Due to this fact, punishment used to be severe in nature.

However, the severity of punishment changed with the passage of time. Durkheim argued that as societies moved from 'mechanical' to 'organic', the nature of punishment also changed. It became less severe in nature or more lenient. As he noted, 'deprivation of liberty by imprisonment has emerged as the preferred form of punishment, replacing the various capital and corporal methods which pre-existed it' (cited in Garland, 1990:36). Some philosophers believed that if punishment is to achieve its desired results, the severity of punishment should exceed the pleasure gained due to crime. Beccaria, for example, argued that 'for punishment to produce the effect that must be expected of it, it is enough that the harm that it causes exceeds that good that the criminal has derived from the crime' (cited in Foucault, 1979:94). Beccaria added that 'the penalty must be made to conform as closely as possible to the nature of the offence, so that fear of punishment diverts the mind from the road along which the prospect of an advantageous crime was leading it' (cited in Foucault, 1979:104).

Foucault - the French philosopher and one of the influential thinkers of 20th century - in his book *Discipline and Punish*, written in 1975, stated that there should be a link between the pleasure gained through crime and punishment. He argued that

With the idea of each crime and the advantages to be expected of it must be associated the idea of a particular punishment with the precise inconveniences that result from it; the link from one to the other must be regarded as necessary and unbreakable (Foucault, 1979:95).

Foucault added that:

The ideal punishment would be transparent to the crime that it punishes; thus, for him who contemplates it, it will be infallibly the sign of the crime that it punishes; and for him who dreams of the crime, the idea of the offence will be enough to arouse the sign of the punishment (Foucault, 1979: 104-5).

Sutherland and Cressey (1960) classified punishment into four different categories, including removal from the group, physical torture, social degradation, and financial loss (cited in Barlow, 1981:424). Examples of the first category include the death penalty, banishment, transportation and imprisonment; the second category includes mutilation, branding and logging and whipping; the third category includes removal from employment, citizenship or right to vote or even the right to work in certain occupations; and the last category includes money payments. However, in most societies of the world today, the use of severe punishments has diminished whilst those that one might refer to as 'lenient' have increased. The direct infliction of pain as punishment (corporal punishment) is rare, although it is still practised in some, predominantly, non-Western countries.

In most Western countries today, punishment can be divided into three broad types: physical detention or forms of incarceration, monetary sanctions such as fine and community-based punishments like probation. In spite of the high prison population figures, the fine appears to be the most widely used punishment in Western countries (McGuire and Priestley, 1995). However, it seems that the use of community penalties has also increased significantly, for example in the United Kingdom (see chapter 2). The increase in the use of 'less severe' punishments does not mean that the use of punishments has decreased; in fact, it has increased. It is an issue of a dispersal of punishment rather than a concentration of punishment. Punishments have even become more severe in terms of the restrictions to liberty; intrusions and monitoring that are attached to many so-called non-punitive

punishments. There is a culture of control (cf. Garland, 2001) evidenced by the emphasis of risk assessment and the introduction of repressive welfarist penal policies, for example, the lowering of age of entry into the penal system via the 'get-them-before-they-get-worse' punishments introduced in the United Kingdom under the 1998 Crime and Disorder Act. The boundary of definition of who gets punished, it seems, is political.

More importantly is the question of whether the punishment is appropriate. There are certain offences for which different societies punish offenders differently. For example, in Saudi Arabia, 'one might lose a hand for property offences like theft, whereas, in England and Wales you might lose six months or a year of your life in prison for a similar offence. In other jurisdictions one might, perhaps, get away with a community service order' (Pakes (2004:118). This simply shows that the criminal justice systems of different societies react differently to a similar offence. One of the reasons for this difference is the different value systems operating in different societies.

The sufficiency of punishment is not the same as the punishment fitting the crime. It is about whether the 'measure of pain' received sends the right message to society as to the appropriateness of the punishment. In other words, is the punishment legitimate and socially or culturally acceptable as the 'right' punishment for the crime that it punishes? The punishment must make sense to those who have authority to give it, those receiving it and the society that is watching. Society must be able to say that the person punished deserves to be punished in the way he or she is punished and the punishment is reasonable, just and fair.

1.8. What can Punishment Achieve?

Penal philosophers agree that legal punishment has a perceived goal to be achieved. However, disagreement emerges when it comes to the question of what exactly the goal is. It is generally expected that society would gain some advantage from punishment; be it in the form of preventing or controlling crime; securing social harmony or safety or simply showing that justice has been done. According to Ezorsky (1977:7-8), 'the function of punishment is to bring about a state of affairs in which it is as if the wrongful act had never happened'. To this could be added the perception that punishment can 'cleanse' or 'sanitise' society in a moral or even physical sense.

Some theorists have looked at the value of punishment from the victims' perspective. Ainsworth (2000:141), for example, argued that 'for those affronted and distressed by victimization, punishment of the offender might lead to a feeling of satisfaction'. By knowing that the culprit is also suffering the pain for his offence, the victim will feel satisfied that justice has been done.

However, Durkheim argued that primitive societies punished offenders without any preconceived or predetermined goal to achieve. He stated that:

Primitive peoples punish for the sake of punishing, make the culpable suffer particularly for the sake of making him suffer and without any advantage for themselves from the suffering, which they impose. The proof of this is that they seek neither to strike back justly nor to strike back usefully, but merely to strike back (Durkheim, 1960:85-6).

He added that

Today, it is said, punishment has changed its character; it is no longer to avenge itself that society punishes, *it is to defend itself*. The pain which it inflicts is in its hands no longer anything but *a methodical means of protection*. It punishes, not because chastisement offers it any satisfaction for itself: but *so that the fear of punishment paralyze those who contemplate evil* (Durkheim, 1960:86; emphasis mine).

The main purpose of punishment, in Durkheim's view, is education. On the one hand, it teaches offenders to obey the laws and on the other hand, it 'sends a symbolic moral message that the offender's action is socially abhorred, and therefore wrong' (Cavadino and Dignan, 1997:42). This is similar to Foucault's view on punishment. For Foucault, the purpose of punishment is simply to balance the account. He argued that 'if the motive of a crime is the advantage expected of it, the effectiveness of the penalty is the disadvantage expected of it' (Foucault, 1979:94). He stated that the punishment, to be effective, should be made public. In his view, a secret punishment is half wasted. He argued that

Children should be allowed to come to the places where the penalty is being carried out; there they will attend their classes in civics and grown men will periodically relearn the laws. Let us conceive of places of punishment as a Garden of the Laws that families would visit on Sundays (Foucault, 1979:111).

Foucault offered the idea of the punitive city, where criminals are punished and the public can see the criminals and the effects of punishment on them. It would serve two main functions. On the one hand, the criminal is being punished and on the other hand, 'It will be a visible punishment, a punishment that tells all, that explains and justifies itself' (see Foucault, 1979:113).

However, it needs to be said that what society expects from punishment is complex and could be culturally specific. What the state and the judiciary expect punishment to achieve may not necessarily be what society or the offenders themselves expect it to achieve. As

Pakes (2004:117) puts it, in practice ‘we often do not know the exact reason for a particular sentence A judge might impose a certain sentence with a particular goal in mind, or with a mixture of objectives to be achieved’ whereas that goal may not be the same as that given by the state for passing the law that created the offence in the first instance. For the society that watches, the expectations could be different.

1.9. Punishment and Culture

Punishment has meaning only if placed within a cultural context. Garland (1990:193) argued that punishment is a ‘cultural artefact, embodying and expressing society’s cultural forms’. Culture plays an important role in our understanding of defining what constitute crime and justice in any society (Presdee, 2004). The infliction of pain, its intensity, and forms of suffering allowed in penal institutions are determined by reference to particular cultural practices.

The concept of ‘culture’ for Garland (1990) includes ‘all those conceptions and values, categories and distinctions, frameworks of ideas and systems of belief which human beings use to construe their world and render it orderly and meaningful’ (Garland, 1990:195). It is within these values and traditions that institutions like politics, economics and the penal system are conceived and developed. Punishment, therefore, is a cultural artefact, which is ‘deeply embedded in the national/cultural specificity of the environment which produces it’ (Melossi, 2001:407).

Criticizing the earlier work of Foucault, Marx, Durkheim and of Weber, Garland (1990) argued that each of them took a particular aspect of the society – ‘its individualism, its rationality, its secularism, or its bourgeois values’ – and explicate it in terms of a particular

theory of social structure or of social change (Garland, 1990:193). Much of the earlier work has studied cultural phenomena and penal institutions in a systematic but less comprehensive way. Garland (1990) argued that social theorists studied very selective accounts of culture, in which certain cultural elements were emphasized while others were ignored that did not fit into general concerns.

In his influential work, *Punishment and Modern Society* (1990), Garland argued that penal practices are conceived and develop in particular cultural codes and practices. As he puts it:

Penal laws and institutions are always proposed, discussed, legislated, and operated within definite cultural codes. They are framed in languages, discourses, and sign systems which embody specific cultural meanings, distinctions, and sentiments, and which must be interpreted and understood if the social meaning and motivations of punishment are to become intelligible (Garland, 1990:198)

However, this is not the case with respect to the colonised world where policies including criminal policies were formulated by the colonial powers and imposed on the indigenous people. Pakistan is not an exception in this regard. The Criminal Procedure Code and probation legislation both have their origins in British colonial penal laws. Colonial laws created new crimes and punishments, some of which had no meaning or parallels in traditional laws and modes of punishment (see Cole, 2002).

Probation as a type of punishment has no historical roots in Pakistani culture and society. It is a punishment that evolved in Britain and was later exported to her colonies, which included Pakistan (formerly part of colonial India). In this context, Garland (2006) has warned that the concept of punishment and penal practices changes its meaning when it is taken out of its cultural setting. According to Garland (2006)

Penal institutions, legal terms or criminological conception that are transferred from one culture to another will tend to change their character and connotations as they become embedded in the new cultural setting (Garland, 2006:424)

In this thesis, I have put forward the same argument that the meaning of punishment does not remain the same when it is conceived and developed in one culture and is then imposed on another. Punishment loses meaning when taken out of its cultural context; more so where it is imposed on a culture different from that in which it evolved.

1.10 Punishment and Islam

The religion of Islam put more emphasize on unity and integrity of Muslim Ummah (community) and therefore has obliged individual about his obligations towards one God and solidarity with the community. It is because of this intimate interrelationship between the individual and the Ummah that crime is consider as the violation of individual's responsibility towards God, and towards the harmony and solidarity of Muslim Ummah and therefore, necessitate punishment (Ammar, 2001).

Islamic law is commonly known as the Sharia Law. The guiding principles of Sharia Law are derived from Quran and Sunnah. Islam does not separate Church and State and therefore extends the scope of Sharia law to every aspect of life including government, legislation, civil, public and personal matters (see Khan, 2003). Sharia controls and regulates almost every aspect of a Muslim's life. The State has the freedom to legislate in an aspect of human life provided they do not coincide with the basic principles of Islam (Khan, 2003). According to Miethe and Lu (2005)

Islamic criminal law covers wrongdoing in the areas of public safety, family relations, property and its illegal acquisition, and subversive activities against the state and religion (Miethe and Lu, 2005:165)

Under Islamic law – the Sharia law – crime and their punishments are classified into three major types i.e. fixed punishment (Hudud), retaliation (Qasis) and discretionary punishment (Tazir) (Ahmad, 2005; Ammar, 2001; Umar, 2006). The *Hudud offences* are offences against God and their punishment have already been specified by God in Quran and Sunnah. There are seven crimes that come under the list of Hudud crimes, these includes, ‘theft, adultery, slander, drinking alcohol, highway robbery, rebellion and apostasy’ (Levinson, 2002: 933). Hudud crimes are the most serious crimes and as a result, their punishments are also harsher. The violator is assumed to have violated the rights of God and has injured the harmony of the community and therefore need strict response to it (Ammar, 2001).

The second category of crime in Islamic law comes under *Qasis*. These crimes pertain to the rights of people that mainly includes murder and all types of bodily harm that result in injury or death of a person. The prescribed punishments for crimes that come under *qasis* vary and are dealt with retaliation, compensation, and reconciliation. Shariah law allows the victim to demand punishment or forgive the criminal and demand blood money called ‘diyya’ (Miethe and Lu, 2005:172).

The third category of crime according to Shariah law comes under *Ta’azir*. This concerns the rights of the community. These crimes do not come under the Hudud or Qasis and for which there are no prescribed punishments in the Sharia. These are up to the discretion of the court to measure the intensity of the crime and inflict punishment accordingly (Ammar, 2001; Ahmad, 2005).

Today, there are very few Islamic countries such as Saudi Arabia for example where legal system is operating under strict Sharia law as has been discussed above. In the past, the legal system of Muslim societies was operated under Sharia law prior to the Western Colonialism (Umar, 2006). The colonisation of the Islamic world has transformed the Islamic legal system and was later on replaced with the Western legal system. Despite gaining political independence from the Western colonial states, the legal system of most Muslim countries is pre-dominantly colonial in nature (Umar, 2006).

Like other post colonial countries (both Muslim and non-Muslim), Pakistan is not an exception with regard to adopting and maintaining significant part of the colonial laws and the justice system. There are certain Islamic laws such as Hudud Laws of 1979 which were introduced by President General Zia-ul-Haq under his Islamization policy; however, there is no separate legal structure such as Sharia courts to enforce Sharia laws. Sharia laws are being practiced under the national court system that is predominantly colonial in nature. As will be shown in the thesis (Chapters 5 – 7), probation is being used for crimes that are also punishable under Sharia law. For example, drinking alcohol is a *Hudud* (serious) crime with a strict penalty under Sharia law. However, due to the fact that there are no Sharia courts, the crime is being treated as a less serious crime and offenders given a probation order.

1.11. Summary

Punishment is a process through which societies sanction behaviour. It is a key concept in the field of criminology. It simply means the infliction of pain, suffering, deprivations or restrictions in response to an offence or unlawful behaviour. However, it can be argued that the definition of an ‘offence’ is not as controversial as is the ‘infliction of pain’. In penal history, philosophers have tried to resolve this controversy, which resulted in the emergence

of different theories of punishment. These theories tried to relate punishment to the goal a society wanted to achieve, generally in terms of a ‘reduction of crime’, or ensuring ‘public protection’. These theories are classified into two schools of thought namely *non-consequentialism*, which includes retribution and just deserts, and *consequentialism* which includes deterrence, incapacitation and rehabilitation. However, history has shown that none of these approaches completely dominated the penal system and none can claim to be a panacea for all kinds of offences.

In spite of what may be done in the name of punishment, one fact needs to be kept in mind, that is, that offenders ought to be treated humanely. Foucault (1979:74) argued that ‘in the worst of murderers, there is one thing, at least to be respected when one punishes, his *humanity*’. Moreover, crime and punishment should not be taken in isolation. Other factors, which include social, economic, family setup and peer group pressures do contribute in different ways to offending. Therefore, the approach to dealing with offenders should be such that it could encourage them to become law-abiding citizens. In this context, the use of probation is one of the sentencing options available to the courts in dealing with offenders that embraces these ideals. It aims at providing opportunity for reformation and rehabilitation, thereby reducing reoffending.

This thesis will address the question of what philosophy of punishment, if any, guides the use of probation as a sentence in NWFP Pakistan. What does probation mean to the magistrates who impose the sentence, the probation officers who have to enforce the order and the probationers who have to endure the sentence? How do judicial magistrates in NWFP Pakistan decide the appropriateness of the sentence, where probation is a preferred

option? What is expected of offenders on probation in NWFP Pakistan? As the probation law in Pakistan is derived from Britain, it is expected that rehabilitation and reformation would be the central goals of probation in Pakistan. If so, what model of rehabilitation is practised in NWFP Pakistan? These issues are addressed in the following chapters. In the next chapter, we shall see how the concept of probation has evolved and developed over the centuries, using the United Kingdom as a framework.

Chapter 2

The Philosophy and Practice of Probation

2.1 Introduction

In the field of criminal justice, one of the most difficult tasks facing practitioners is how to work with offenders. There is no doubt that crime is a complex issue as is the subject of punishment. People expect punishment to discourage potential offenders from offending and actual offenders from re-offending. In the previous chapter, we studied how the complex nature of the concept of punishment has inspired a rich body of philosophical, sociological and criminological literature which provided a base for a number of sentencing options to the court to deal with law breakers and probation is one of them.

This chapter describes the origins and development of probation in England and Wales. It highlights how the probation service started its journey as a voluntary service and became an integral part of the modern day criminal justice system. In this context, it explains all those important events which have transformed and shaped the probation service in England and Wales from a philanthropic organisation to a social welfare activity and later into a law enforcement agency. A study of the probation system in Pakistan would be incomplete without discussing the probation service in Britain, due to the historical links between the two countries. Thus, in this study, the development of the probation service in Britain is taken as a framework for assessing the development of the probation system in Pakistan.

2.2 Changing Faces of Probation in England and Wales

Generally, probation as a concept has a mixed and confused beginning. Bochel (1976) argued that most literature on probation refers back to the Boston shoemaker, John Augustus, who initiated voluntary work of bailing offenders under his supervision in 1840 and continued until his death in 1859. He is believed to be the first probation officer. The introduction of the Massachusetts Act 1878 was the first legislation on probation giving statutory recognition to the voluntary probation work of Augustus in the United States of America (USA).

In Britain, the conditional release of offenders was started by the magistrates of Warwickshire Quarter Sessions in 1820 whereby young offenders, after getting a nominal one day imprisonment, were released on conditions under the supervision of their parents or masters (Raynor and Vanstone, 2002). Later on in 1840, Mathew Davenport Hill started a similar experiment in Birmingham for young offenders (Bochel, 1976). However, most literature on the history of probation in England and Wales refers to the police court missionary of Church of England Temperance Society as the earliest probation service in England and Wales (Raynor and Robinson, 2009).

Different writers (for example Crow, 2001; Chui and Nellis, 2003) have divided the history of the probation service in England and Wales into different phases. In this chapter, the history of the probation service in Britain is divided into five distinct phases where each phase reflects major changes in the theory and practice of probation. These phases are as follows:

1. Saving the Sinners: The Missionary Phase (1876 – 1907)
2. Treatment and Rehabilitation of Offenders: The Welfare Phase (1907 – Early 1970s)
3. Nothing Works: Diversion from Custody Phase (Mid 1970s – 1982),
4. The Punishment in the Community Phase (1982 – 1997); and
5. What works: Effective Practices Phase (1997 until the present day)

2.2.1 Saving the Sinners: The Missionary Phase (1876 – 1907)

The origin of the probation service in Britain is often linked to the work of police court missionaries founded in 1876 by the Church of England Temperance Society (CETS). However, as mentioned above, it is believed that some of the influence came from the successful experiment initiated by John Augustus in Boston, Massachusetts, in USA in 1841 (Bochel; 1976, Worrall, 1997). Therefore, Brownlee (1998) argued that the birth of the modern probation system in USA and UK can be traced back to the ‘pioneering activities of philanthropic individuals rather than any initiative by the state or other official bodies’ (Brownlee, 1998: 64).

Raynor and Vanstone (2002) stated that it was, in fact, the Hertfordshire printer, Frederic Rainer who wrote a letter to his friend Canon Ellison, the chairman of the CETS to appoint missionaries to work for the welfare of offenders. Frederick Rainer argued that:

Once a person got into trouble there seemed no hope for him but only offence after offence and sentence after sentence (King, 1964:2)

Most of the literature on the history of probation in England and Wales identifies this as a defining moment for the probation service in Britain. The Society responded to this letter

and started to appoint missionary workers in different Metropolitan police courts in London during 1876. The work of police court missionaries soon expanded and by 1900, there were 'over a hundred men and nineteen women' working as police court missionaries (King, 1964:3). The job of CETS, according to Mathieson (1992:143) was to bail offenders and place them under the supervision of missionaries whose job was to 'reclaim' their lives and souls. The majority of offenders supervised were those charged with either drunkenness or drink-related offences.

According to May (1994), the police court missionaries were basically Christian Workers rather than professionally trained people. Therefore the reformation of offenders also revolved around the concept of 'mercy'. McWilliams (1983) argued that the responsibility of the police court missionaries was to reform offenders by showing reasons to the court why 'mercy' should be shown to offenders. Therefore, to be able to achieve this objective, the police court missionaries were to 'advise, assist, and befriend' offenders under their supervision (See Vanstone (2004) for details; see also Worrall, 1997).

The initial success of this voluntary work soon opened the debate about accepting and adopting this approach as a public service. The Summary Jurisdiction Act 1879 is considered as the first probation statute in Britain (McWilliams, 1983; Lesson, 1914; UN, 1951). The Act gave legal recognition to the existing volunteer practice carried out by the police court missionaries. However, in a real sense, it was different from the probation legislation that we know today because it said nothing about the supervision of offenders. It allowed the conditional release of young or petty offenders, both male and female, without sentence under the supervision of police court missionaries (Raynor and Vanstone, 2002). The 1879 Act, McWilliams (1983) argued, was a government effort to reduce prison numbers and

prison costs rather than to rehabilitate offenders; a theme, the importance of which can be seen throughout the history the probation service in Britain and elsewhere.

On the other side of the Atlantic, Massachusetts informal probation system had been in practice since 1841 and was given a statutory status by the Massachusetts Act of 1878. The legislation required the appointment of paid probation officers to work with different courts in Boston. The probation officers appointed were responsible for selecting cases where they felt that offenders could reform without punishment. They were also responsible for investigating the cases and helping the courts to grant probation orders. Their job also included submitting periodic reports to the court and helping and encouraging offenders not to offend again. They also had the power to arrest offenders if they re-offended (King, 1964).

These developments encouraged the policy makers in Britain to follow the footsteps of the Americans. The first attempt in this direction was the introduction of conditional release of first offenders under the supervision of police court missionaries, which was passed by the House of Commons in 1886 but was rejected by The House of Lords in the same year. However, the same legislation was passed the following year. The *Probation of First Offenders Act of 1887* included provisions for the supervision of offenders similar to those in the Massachusetts Act of 1878. The major development of the 1887 Act was the introduction of the word 'Probation' for the first time in the penal history of Britain. The scope of this Act was limited. It was available to first offenders involved in more serious offences such as larceny and false pretences, and other offences not punishable for more than two years imprisonment. Factors such as age, character and antecedents were given priority as to the selection of the case. Despite its official recognition, Chui and Nellis (2003) argued that probation remained the work of missionaries outside the state administrative setup.

Despite its limitations, King (1964) believed that statutory probation work grew in conjunction with the voluntary work of the missionaries. The work extended from helping only youth to the adults; from helping offenders who were common drunkards to other offences too. The nature of the missionaries' service also extended from matrimonial conciliation to prison aftercare, finding or keeping employment, providing shelter, the provision of clothes and tools to enable offenders make a fresh start. The work of the missionaries grew considerably from merely working with courts to the prisons. The major development was the start of 'prison gate' missions and appointment of police court missionaries at Wakefield prison first and then in Liverpool prison, which later on spread to other prisons. The missionaries were responsible for helping released prisoners who had little hope of finding suitable work and were therefore prone to further criminality. The released prisoners were asked to keep in touch with the clergy close to their residence. Thus King (1964:6) argued that 'drunkenness no longer looms large amongst the probation officers' problems'.

King (1964) argued that the police court missionaries continued their inspiring work of helping offenders with limited resources. Most of the missionaries did not have suitable office accommodation to interview offenders in privacy. These missionaries were often helped by the magistrates, the clerks, and the police in their daily routine work. They were accountable to their senior and experienced clergymen who used to give them advice on dealing with different cases.

To summarise, the probation service we know today in Britain is the result of the efforts undertaken by the police court missionaries of the CETs during 19th century, whose job was to reform the lives of offenders affected by a combination of alcohol and 'moral weakness'.

This voluntary work was soon given statutory recognition in the introduction of Probation of First Offenders Act of 1887. Probation work grew and expanded under the influence of the missionaries. As King (1964) argued, it was basically the faith and inspiration of the missionaries which enabled them to perform their tasks and to bring probation work from its tiny beginning to a full-fledged service, acceptable to the court and the community.

2.2.2 Treatment and Rehabilitation of Offenders: The Welfare Phase (1907-Early 1970s)

The beginning of the 20th century brought considerable changes with it. On the political side, the Liberals took control of the government from the Conservatives in 1906. Furthermore, the overall social and political atmosphere was conducive and positive towards public welfare in general and reformation of offenders in particular. By the end of the 19th century, probation in USA was already introduced in other states including Missouri (1897), Vermont (1898), Illinois, Minnesota and Rhode Island (1899), and New Jersey (1890) (see Dressler, 1969). In Britain, the efforts of the missionary workers and the American influence for a statutory probation system resulted in the enactment of the Probation of Offenders Act in 1907 which came into force on 1st January 1908 (Leeson, 1914:7).

Speaking to the House of Commons on the general purpose of the Probation Bill, the Home Office minister Herbert Samuel said that:

Certain offenders whom the court did not think fit to imprison, on account of their age, character or antecedents, might be placed on probation under supervision of [Probation] officers, whose duty it would be to guide, admonish and befriend them (cited in Mathieson, 1992:143)

The Probation Bill was passed by both Houses without much discussion. The proponents of the probation service saw the new law as an indication of a positive change in public opinion that had taken place after the enactment of the Probation of First Offenders Act in 1887. The scope of the Probation of Offenders Act, 1907 was much wider than that of the Probation of First Offenders Act, 1887. It was not limited to first offenders only but included all types of offenders except those involved in murder and treason (Leeson, 1914). Probation would now be applicable to what Leeson (1914:7) called 'all reclaimable offences'. Furthermore, factors like age, health, character, antecedents, the nature of offence and the extenuating circumstances were given due consideration while placing offenders on probation.

Probation was not considered as a sentencing option in its own right; it was rather an alternative to custody option available to the courts (Nellis, 2001). The 1907 Act asked magistrates' courts to appoint paid probation officers whose job would be to 'advise, assist, and befriend' offenders under their supervision and to find the offenders suitable employment (Brownlee, 1998:65). Overall, the practice of probation was based on the philosophy of rehabilitation. It was also expected to be 'welfare-oriented and non-punitive' (Brownlee, 1998:65).

The 1907 Act encouraged magistrates' courts to appoint paid probation officers. It was noted that almost half of those appointed as probation officers were former missionaries who were still being funded by the Temperance Society (Jarvis, 1972). Furthermore, the officers appointed to work with Juvenile Courts after the enactment of the Children Act of 1908 were paid wholly from public funds (King, 1964). In addition, the control over the direction and philosophy of the probation service remained in the hands of the CETS and the petty

sessional probation committees which remained until 1936. However, Chui and Nellis (2003) argued that the Probation of Offenders Act of 1907 was the first and major initiative in bringing the probation service under state control. Furthermore, according to King (1964), the 1907 Act not only laid down the foundation of the legal probation system in England, it was later exported to the British colonies including the Indo-Pak subcontinent. In 1923, new sections were inserted into the Criminal Procedure Code of 1898 (Amended 1923) which empowered courts in the British colony of India (which included Pakistan) to place certain offenders on probation.

The Probation of Offenders Act of 1907, which was a good initiative, nevertheless soon began to reveal its limitations and weaknesses. It was widely used in some courts, whereas relatively little in others. Lack of centralised control resulted in weaknesses in the use of probation, in the provision of treatment programmes and even in the appointment of probation officers (King, 1964). According to Leeson (1914):

The defects of the probation system [were] defects of administration, rather than of principle, and are traceable largely to misapprehensions of the nature of the system arising from its extraordinarily rapid growth (Leeson, 1914:175)

Leeson (1914) found defects in the probation system in four main areas. The first was the unsuitable appointment of probation officers in respect of their age, education, training experience and personality, which were important to exert a positive influence on offenders to stop offending behaviour. The second defect in probation was the selection of unsuitable cases or the inappropriate selection of cases. Leeson (1914) criticised the indiscriminate and widespread use of probation, which gave the impression that probation was a panacea for all offenders. The third defect was concerned with the period of the probation order. Many courts made probation orders with little information about the offenders. Furthermore, the

1907 Act said nothing about the minimum and maximum period for a probation order. Therefore, most probation orders made were for twelve months or less (King, 1964). Leeson (1914) saw this as a problem. He argued that such a short period is useless in terms of gaining some constructive results. The fourth defect of the probation system was the inadequacy of organisation/lack of centralised control. At that time, there was no government body responsible for supervising, development and co-ordination of probation work at a national level. King (1964) listed some other problems including annual re-appointment of probation officers, fixed remuneration, no provision for pensions, and inadequate salaries. However, despite all these problems, the courts made considerable use of the Probation Act of 1907 and ‘8000 probation orders were granted in 1908’ (Whitfield, 1998:13).

Following the introduction of the 1907 Act, three major developments took place, which greatly influenced the future direction of the probation service in Britain. The first was the foundation of National Association of Probation Officers in 1912, which a Home Office Departmental Committee recommended in 1909 was to ‘assist in the dissemination of information and the development of probation work’ (King, 1964:13). Second, the local authorities became responsible for recruiting probation officers, for appointing officers to oversee the probation work and for maintaining the interest of the magistrates in probation work. Third was the move towards a centralised control of the probation service. The Home Office assumed responsibility for the general supervision of the development of the probation service.

Organisation and Development after World War I

The World War I affected developments in probation in Britain for some years. In 1922, a major development took place when a Home Office Departmental Committee published a

report on 'Training, Appointment and Payment of Probation Officers' acknowledging that probation had taken an important place in the existing justice system (King, 1964). The Committee recommended the appointment of probation officers, especially female probation officers to supervise female offenders and children. The Committee also recommended continuance of local appointments, abolition of annual re-appointments, increase in salaries, and continuance of links with social and religious agencies where the chief agencies were Police Court Missionaries, The Church Army, and Society of St. Vincent de Paul. The link with these societies was justified on two grounds. One was the belief that religious convictions were essential for success in probation work and the other was their contributions to the salaries of missionaries turned probation officers (King, 1964).

The Criminal Justice Act of 1925, which was later amended by the Criminal Justice (Amendment) Act, 1926 incorporated the main recommendations of the 1922 Home Office Departmental Committee. It also stressed the establishment of a comprehensive probation service in the country. Furthermore, the 1925 Act empowered courts to appoint probation officers (Whitfield, 1998). Another development in the 1925 Act was the preservation of the local basis of the probation service. The age limit for the first appointment as probation officers was fixed at 25-40 years. The age of retirement was fixed at 65. However, King (1964) argued that the qualification required for the appointment of probation officers was left vague. The only qualification mentioned in the Act was that the person must be of a 'strong character and a personality which is likely to influence for good the probationers placed under his supervision' (King, 1964:18).

There is no doubt that the Criminal Justice Act 1925 (and the subsequently amended 1926 Act) provided the basic framework for the development of the probation service in

England and Wales. Grice (2003) noted that this Act made it mandatory for each petty session to employ at least one probation officer to work in their jurisdiction. In addition, the Criminal Justice Acts of 1925 was a milestone for the probation service due to the fact that by 1922, 215 courts did not have any probation officer, although the 1907 Act suggested that they should do so (Grice, 2003:13). The 1925 Act also allowed the Home Secretary for the first time to extend financial support to local probation areas. It fixed the salaries of the probation officers at the national standards and specified qualifications required for the appointment of the probation officers in the future. The 1926 law also created a hierarchal structure for the working of the probation service (Brownlee, 1998).

However, there were still some problems hindering the progress of the probation service. The probation service was in local hands, which resulted in an uneven development of the service, according to varying local responses. The Home Office asked the local probation services to ensure careful selection of probation officers and to give them as many cases as they could manage to supervise. Whitfield (1998) stated that the appointment of the probation officers was not regular. Some courts had part-time unqualified probation officers, and some did not have any at all. Many courts did not have any female probation officers. However, the caseload for the probation officers was rapidly increasing. During 1933, 'a total number of 8782 juveniles were granted probation orders compared to 7023 cases in 1926' (King, 1964:20). In addition, the Home Office issued a circular in 1928 emphasising that probation orders should not be limited to juveniles; they should also be used for adult offenders. Consequently, 4461 adult offenders were granted probation orders in 1928.

Subsequently, the size of the Probation Service started to expand with time¹. Therefore, there was increasing concern to develop probation as a full-time independent public service. Full-time probation officers were proved to be more efficient than the part-timers. Furthermore, the most difficult task of the growing probation service was to assess the pros and cons of its future link with voluntary societies and the employment of missionaries in the probation service. In this regard, at the Annual Conference of the National Association of Probation Officers in 1935, many probation officers favoured the abolition of dual control on probation service. The issue, as McWilliams (1985) pointed out, was ‘administrative rather than ideological’ (1985:271). Le Mesurier (1935) believed that the officers were against the control of the Mission, not of the missionary zeal.

McWilliams (1985) referred to two important documents produced during mid 1930s, which played a very important role in the gradual move of probation towards a professional service. The first was *A Handbook of Probation and Social Work of the Courts*, produced by the National Association of Probation Officers in 1935, and the second was the *Report of the Departmental Committee on the Social Service in the Courts of Summary Jurisdiction* published in 1936. Both documents acknowledged the difficulties currently hindering probation work. However, McWilliams (1985) added that ‘both documents were imbued with a pervasive spirit of optimism and a sense that progress was being made and would continue in a benevolent direction’ (McWilliams, 1985:270). It is important to mention that although both documents recommended a move away from the missionary style to the diagnosis and treatment of offenders, they however, suggested retaining the missionary zeal of the service. Furthermore, the 1936 a Home Office Departmental Committee recommended that probation should remain under the control of local areas and the Home Office should take more

¹ From 1926 to 1933, the number of full time appointed probation officers increased from 225 to 307. However, there were still many part-time officers working for under £20 per annum. Moreover, among 150 full time officers, 100 were Police Court Missionaries and were paid by voluntary organisations (see King, 1964:27).

responsibility in the organisation and direction of the service (Whitfield, 1998). In this regard, according to Williams (1970), a special division was created in 1936, which was responsible for dealing with probation related matters. This division was later upgraded in 1964, and became the Probation and After Care Department.

Consolidation and Extension after World War II

The Second World War undoubtedly interrupted the development of the probation service in England and Wales (McWilliams, 1985). Shortage of staff, recruitment and training, difficulty in supervision, especially in the heavily bombed areas, were some of the main problems that affected the growth and development of the probation service during the Second World War. However, following the war, probation work accelerated enormously, which in turn increased the workload of probation officers. Probation officers took part in the evacuation process, by taking care of children displaced from their families and having behaviour problems.

After their victory in the 1945 election, the Criminal Justice Act of 1948 was enacted by the Labour government. It focused on reducing the prison population and extended the possibility of early release on license for various prisoners. It established the legal and administrative framework for the probation service divorcing it from the voluntary organisations (King, 1964; Brownlee, 1998; Whitfield, 1998). Abolishing previous legislations, the 1948 Act embodied most of the suggestions made in a Probation Service Report in 1936 (King, 1964). For the first time, probation was used as a ‘sentencing option’, and a formal conviction was needed. In other words, the offender had to have either been found guilty, or had pleaded guilty to a criminal offence. The 1948 Act fixed the minimum period of a probation order at one year. Another major development was that ‘the conviction

should precede probation order in all adult courts' (King, 1964:34). Before that, the courts were permitted to make a probation order without proceeding to conviction. The 1948 Act omitted probation conditions such as 'abstention from intoxicating liquor' by giving discretionary powers to the courts to grant probation orders, imposing such condition, as are considered necessary for securing good conduct of offenders and to stop their offending behaviour (King, 1964:35).

The introduction of parole by the Criminal Justice Act of 1967 gave new roles and responsibilities to the probation service. Brownlee (1998) argued that these changes affected the probation service in two ways. On the one hand, it increased its structure, scope and responsibilities of the probation service in dealing with different types of offenders. On the other hand, probation officers started to deal with those offenders who, according to Brownlee (1998:71), had been 'diverted from imprisonment' as well as those who 'have been imprisoned'. The probation service, which used to deal with minor or first offenders now started to deal with more serious, experienced offenders including recidivists.

The Beginning of Professionalism

From the 1920s onward, the philosophy and practice of probation started to change from a service devoted to *saving the souls of sinners* to one dedicated to the *scientific investigation of offenders* (McWilliams, 1985). The scientific criminology developed during the first half of 20th century according to Garland (1997:44) was heavily dominated by 'a medico-psychological approach, focused upon the individual offender and tied into a correctionalist penal-welfare policy'. The change in the social construction of criminology required a change in the approach of the probation service towards offenders. McWilliams (1985:260) argued that the probation service in the second phase observed the rise of the 'diagnostician' and

‘new service professional aspirations’, which for May (1994:863), significantly altered its approach from ‘saving the soul’ of the sinners to identifying and treating the ‘pathologies of the sick’. Therefore, the question of ‘faith’ no longer dominated the debate as the religious and missionary zeal started to decline in working with offenders. The prevention of crime and treatment of offenders became the overriding concerns of the criminal justice system during that time (Brownlee, 1998).

The logic of the ‘treatment approach’, according to Crow (2001:25) was that people should be treated until they got better. As a result, the casework approach, diagnosis and treatment became the principal methods of dealing with offenders (Brownlee, 1998). Since the 1930s, probation work had moved away from spiritual activity to a welfare activity and the routine assessment of the probation officers started to move away from ‘soul and its potential for grace, to the mind and behaviour and the potential for modification thereof’ (McWilliams, 1985:259). For Garland (1997), probation eventually became a welfare approach where the main emphasis was on ‘rehabilitation, resettlement, case-work, [and] re-integration – a social welfare approach to social problems’ (Garland, 1997:2). Under this model, McWilliams argued:

Criminal behaviour is seen as a manifestation of psychological or psycho-social disease and, as such, susceptible to expert diagnosis and treatment; and the key to the whole process was accurate diagnosis based upon an objective, factual appraisal of the offender, his circumstances and his likely response to the repertoire of treatment (McWilliams, 1985:260)

Similarly, Robinson and Raynor (2006) argued that

It is possible to isolate or identify the causes of an individual’s offending – whether they are related to his or her character, morality, personality, psychological makeup or choices – and then intervene in ways that will remove those causes or otherwise effect positive changes in the individual. Given the right interventions, programmes

or 'treatment', it is assumed that offenders can be brought into line with a law-abiding 'norm' (Robinson and Raynor, 2006:336)

The shift of probation work from philanthropic to welfare activity considerably changed the role and responsibilities of probation officers in the court. In the past, probation officers were helpers, savers and supplicants for mercy on behalf of their clients from courts whereas now they considered themselves as experts who were able to educate the magistrates in the courts on the proper disposal of the case (May, 1994; Garland, 1990; McWilliams, 1986). The social enquiry report prepared by probation officers started to become an important document for magistrates in passing sentences (Jarvis, 1980). Such reports focused on the social and personal factors responsible for offending behaviour, which diverted the attention of courts from 'tariff sentences towards greater consideration of the social and domestic circumstances of the offender' (Bochel, 1976:193). Furthermore, these reports were used to find out ways of proper treatment and rehabilitation of offenders on new scientific methods (McWilliams, 1986).

The gradual shift of missionary ideal to diagnostic ideal demanded proper training of probation officers. Many missionaries-turned-probation officers were untrained and had little knowledge about the diagnostic model of working with offenders. Furthermore, many probation officers believed that untrained and inexperienced probation officers would bring disrepute to the probation service itself (Bochel, 1976). Therefore, probation officers were required to get training in social work, which was first provided by the London School of Economics (McWilliams, 1985).

Despite many problems, the probation service grew and expanded since the 1930s (Chui and Nellis, 2003). New staff members were appointed, caseloads increased and the reputation and image of successful probation work was enhanced with policy-makers and sentencers. For example, the number of offenders to be supervised increased from 55,000 in 1951 to 120,000 in 1971. Similarly, the number of probation officers increased from 1,006 in 1950 to 5,033 during 1976 (Haxby, 1978:51).

To summarise, the second phase is of great importance in the history and development of the probation service in England and Wales. This was the time when the probation service moved from a volunteer service to a statutory public service, despite the fact that the new legal machinery [the Probation Service] still held most features of the old missionary work. The Criminal Justice Acts of 1925 (amended 1926) and 1948 clarified many issues concerning probation such as the probation period and qualification for probation officers, which was not clear before, giving the service a uniform standard with regard to the working conditions of probation officers. In addition, treatment of offenders in the community was first officially recognised with greater responsibility on offenders to accept and justify the chance given to them for their reformation.

2.2.3 Nothing Works: Diversion from Custody Phase (Mid 1970s – 1982)

From the 1960s, the probation service started to move into a third and chaotic phase marked by considerable changes away from its traditional welfare oriented theory and practice, towards more punitive community measures aimed primarily at reducing the prison population. Probation was increasingly perceived as ‘soft on crime’ (Robinson and McNeill, 2004:281). Therefore, the effectiveness of rehabilitation programmes came under attack from politicians, academicians, and practitioners, which resulted in the emergence of ‘nothing

works' agenda (Davies, Croall and Tyrer, 2005). The new punitive climate fostered by the Conservative government compelled the probation service to prove that probation is not only cost effective, but also demanding and punitive like prison, which the current situation demanded (May, 1994). The loss of the traditional identity of the probation service gave rise to an ideological tension as to what should be its future role in dealing with offenders; care or control (Easton and Piper, 2005:281). This section explores the main developments that occurred during mid-1970 – 1982 in the probation service in Britain.

The Decline of the Rehabilitation Ideal

The mid-1970s experienced a decline in the rehabilitation ideal, which was linked to two major developments that took place during that time. The first and a well-documented development centred on USA and British research studies, which seemingly showed how ineffective penal measures were in reducing offenders' criminal behaviours (Chui, 2003; Worrall, 1997; Von Hirsch, 1976; Robinson and McNeill, 2004; Whitefield, 1998). The most important among these researches were Martinson's (1974) work in the United States of America and Brody's (1976) work in the United Kingdom. However, it was Martinson (1974) who first questioned the effectiveness of rehabilitative programmes.

The second development is concerned with a change in the political climate in Britain where the Conservatives brought the issue of 'law and order' to the forefront of public debate by challenging the effectiveness of non-custodial measures and demanding stricter community measures. Willis (1986) stated that the period between 1965 and 1985 was characterised by an increased use of imprisonment, prison crisis, and other problems

associated with their management and control. In order to curb the increasing crime rate, the key political parties, Labour and Conservative, started to formulate policies from their own perspectives. The winning of the 1979 general election by the Conservative party was partly due to successful exploitation of the 'crime and order' issue. The Conservative policies were aimed primarily at employing extra police officers, tougher sentencing and immigration control with the purpose of reducing crime and prison population (Downes and Morgan, 1997).

As has been stated earlier, it was Martinson (1974) who challenged the effectiveness of rehabilitation programmes in America; his assertions were based on a review of 231 research studies on rehabilitation of offenders by using different therapies during 1945-67. These programmes included a wide range of therapeutic techniques such as counselling, individual and group work (Easton and Piper, 2005).

In 1974, Martinson published his work on 'What Works? Questions and Answers about Prison Reform'. In his article, he presented a pessimistic picture about the whole range of treatment programmes. He concluded that:

With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism (Martinson, 1974:25 cited in Easton and Piper, 2005:286).

In the UK, the Home Office Research Unit conducted a research study on the Intensive Matched Probation After-Care and Treatment Programme (IMPACT) in 1976, to see whether community based treatment programmes work with offenders who otherwise would go to prison. The research study was carried out in four areas: Dorset, Inner London, Staffordshire

and Sheffield during 1971-72. Approximately 500 male offenders aged 17 or above were allocated to both the control group and the experimental group. Crow (2001) stated:

The findings were consistent with Martinson's conclusion that no general treatment effect could be demonstrated (Crow, 2001:28).

In addition, Brody's (1976) work, *The Effectiveness of Sentencing*, which is considered as the British version of Martinson's study, supported Martinson's views. Brody (1976) reviewed UK sentencing policies and found 'no evidence to suggest that a particular type of sentence was more effective than others in preventing re-offending' (cited in Easton and Piper, 2005:286).

The evidence of these research studies gave a serious blow to the dominant rehabilitation philosophy (Hedderman and Hough, 2004). Martinson's paper was mistakenly quoted in many places, which resulted in the emergence of the 'nothing works' phase in the penal paradigm. As Whitfield puts it:

Martinson's work produced a very pessimistic assessment of the effectiveness of a whole range of treatment provision, which was generally taken to conclude that, in fact, nothing works; or not very much at all (1998:15)

The *nothing works* agenda removed the *rehabilitation model* away from mainstream penological thought and opened a space for other alternatives to fill the gap left behind. Consequently, Crow (2001) argued that the objective of punishment was replaced and was starting to be based upon the philosophy of just desert.

The attack on traditional optimism about rehabilitation of offenders from politicians and academicians decreased the use of probation orders in the courts. The offenders had started to

be given fine sentences instead of being placed on probation. One of the important developments was the introduction of shorter orders of six months and the courts' reliance on shorter orders. Bottomley and Pease (1986:90) argued that the decade of 1968-78 can be characterised as the 'decade of probation's decline':

The proportion of 3 years probation orders decreased from 25% in 1972 to 4% in 1983, whereas the proportion of one-year orders tripled from 11% (1972) to 33% (1983): 5% of all those orders were for less than one-year (Home Office 1984a, Table 2.9, p. 32) (Bottomley and Pease, 1986: 90)

Martinson's work was widely criticised by the proponents of the rehabilitation philosophy. It was argued that Martinson was looking for the success of each and every programme, which was wrong. The advocates of the treatment philosophy argued that some programmes were more successful with some offenders in certain circumstances. Palmer (1975) argued that some programmes can work for some offenders and that Martinson in 1974 had overlooked these. What he [Martinson] was looking for, was 'a guaranteed way of reducing recidivism' (Crow, 2001:58).

Although Martinson later on admitted methodological deficiencies in his early study, he produced more positive evidence and came up with the conclusion that some approaches work with some offenders. In his later article, Martinson (1979:244) accepted the role of treatment programmes:

Contrary to my previous position, some treatment programmes do have an appreciable effect on recidivism. Some programmes are indeed beneficial; of equal or greater significance, some programmes are harmful ... Indeed, it was misleading to judge criminal justice on the basis of these evaluation studies (cited in Crow, 2001:59).

After his early review of effectiveness of correctional treatment which led to the ‘nothing works’ article, Martinson (1979:252) later studied 555 research studies and gave a different response:

However, new evidence from our current study leads me to reject my original conclusions and suggest an alternative more adequate to the facts at hand (cited Crow, 2001: 59)

Furthermore, Martinson (1979:253-4) added that:

The very evidence presented in the article indicates that it would have been incorrect to say that treatment had *no* effect ... More precisely, treatments will be found to be ‘impotent’ under certain conditions, beneficial under others, and detrimental under still others (cited Crow, 2001:59).

Easton and Piper (2005:286) argued that by the late 1970s, Martinson’s work was considered to be ‘out of date’ because the proponents of rehabilitative approach argued that:

Large scale studies of re-offending do not tell us enough about *which* individuals were helped by *which* programmes, and the individual who is helped may be overlooked in data on those were not (Easton and Piper, 2005:286).

Despite all the new evidence from different researches, including Martinson’s work, there was little support left for the treatment model. In addition, all these positive evidences came at a time when damage had already been done and rehabilitation was dead in the water (Brownlee, 1998; Whitefield, 1998). Raynor (2002) argued that there were some positive outcomes from the despondency after Martinson, where:

Practitioners had to find their own sources of optimism and belief in what they were doing. As a consequence the ‘nothing works’ era actually became a period of creativity and enthusiasm in the development of new methods and approaches’ (Raynor, 2002:1182).

Diversion from Custody Movement

In Britain, the prison population has been rapidly increasing since 1950. The diversion/alternative to custody movement emerged in the early 1970s because of the sharp increase of the prison population. The aim of the alternative to custody movement according to Bottoms, Gelsthorpe and Rex (2001:4) was to 'offer judges and magistrates options that might avoid the damage and expense of a custodial sentence'. Some of the major steps in this regard were the introduction of Parole and the Suspended Sentence in the Criminal Justice Act of 1967, which was followed by another intermediate sanction, the Community Service Order, in the Criminal Justice Act of 1972 (Nellis, 2001).

May (1994) argued that parole was introduced not only to reduce the prison population, but also to provide an opportunity for resettlement and rehabilitation to prisoners. It also had an element of 'public protection' where the probation officer is supposed to supervise parolees in their communities and the parolees are in turn required to report to the probation officers on a regular basis. Suspended sentences on the other hand were prison sentences held suspended unless the offender committed a crime. If they re-offend, the offender is liable to the suspended sentence of imprisonment plus punishment for the new offence (May 1994).

The Suspended Sentence was supposed to be used as an alternative to imprisonment not instead of pre-existing non-custodial measures such as probation or fines. In 1972, statutory effect was given to this intention by the addition of a stipulation that a suspended sentence should not be passed unless the case appears to the court to be one in which a sentence of imprisonment would have been appropriate (Bottoms, 1987). However, critics argued that suspended sentences were applied in cases other than those where the offences concerned were serious enough to warrant imprisonment. Consequently, rather than having a reduction

effect on the overall prison population, the introduction of the suspended sentence may have actually added to it indirectly, because some people who would not otherwise have been imprisoned received suspended sentences which were later activated by reason of subsequent offending. The outcome in such cases, as Brownlee (1998) argues, was almost inevitably a longer period of imprisonment than would have been merited by the second conviction alone and, thus, an overall increase in the prison population.

Brownlee (1998) drew attention to the doubts which had emerged recently that sentencers, especially magistrates, tended to increase the period of imprisonment awarded when suspending it, and so any subsequent activation resulted, once more, in longer sentences being served than might have been justified by the seriousness of the original offence. As such, the suspended sentence appeared to have done little or nothing in its first twenty years to reduce the prison population (Bottomley and Pease, 1986; Bottoms, 1987). It rather added to the prison population. During 1989, 80% of offenders on suspended sentence were sent to prison after not complying with the conditions of the suspended sentence (Home Office, 1990). It is argued that although suspended sentence was introduced as an alternative to a custody option, however, during its early years, it was often used as 'alternative to an alternative' (May, 1994: 864).

The Advisory Council on the Penal System Report on *Non-Custodial and Semi-Custodial Penalties* (the Wootton Report, 1970) recommended a new community measure namely 'community work' (May, 1994; Nellis, 2001). This new development is considered as the most important alternative to custody since the inception of probation itself. Bottomley and Pease (1986) stated that the community service order was introduced first in six

experimental areas, which was gradually extended to other parts of England and Wales in 1975. The basic motive of these initiatives was to reduce the increasing rate of custodial sentences. This new innovative proposal contained elements of punishment, reformation and restitution to both the community and to the victim (May, 1994). Under this Order, offenders were required to carry out between 40 to 240 hours of unpaid work over a one year period. However, the Order carried with it the threat of imprisonment if conditions were violated.

This recommendation of the Wootton Committee was incorporated into the Criminal Justice Act in 1972, and the Community Service Order (CSO) was introduced with punishment and retribution as its central core. Before the introduction of the CSO, a probation order was the main community sanction. It is important to mention that the introduction of Community Service Orders sharply decreased the use of probation (Worrall, 1997). The CSO was introduced as an alternative to a short custodial sentence. It was based on indirect reparation and punishment and so was a contentious issue for many probation officers (Brownlee, 1998). Worrall (1997:90) called the order 'a fine on time'. Raynor (2003) argued that community service was brought in to satisfy the requirements of sentencers rather than rehabilitate offenders and, if this were its prime objective, one can only agree that it was at least partly successful.

To summarise, the treatment and rehabilitation of offenders approach lost confidence among politicians, sentencers, and the public following concerns about the increasing crime rate and prison numbers since the Second World War. On the one hand, a number of research studies, conducted both in USA and UK during the early 1970's, seriously challenged the rehabilitation philosophy. The most important and most quoted in this regard was the work of Martinson (1974) which resulted in the emergence of the 'nothing works' movement. However, it would be wrong to blame Martinson for the decline of rehabilitation ideal as Hedderman and Hough (2004:148) argued that 'the nothing works scepticism is a product of

its time'. For example, on the political spectrum, the Conservative Party's tougher stance on the issue of 'law and order' was viewed by many as the proper solution to control the increasing crime rate in Britain. Thus, the rehabilitation option was discredited as soft and unproductive.

All these developments seriously affected the probation service. By the 1980s, probation could find very few allies in the political spectrum. Once dominant, probation became marginal; although it never disappeared from the agenda. In fact, under the Thatcher government, probation began to serve two main purposes; first, as part of the decarceration agenda of the government and second, as an effective punishment in its own right. According to Hedderman and Hough:

The probation service was no longer to 'assist, advise and befriend' petty and inadequate offenders; its new role was to provide 'punishment in the community', and this was to be 'tough and demanding' (Hedderman and Hough, 2004:149).

Therefore, the subsequent community measures introduced were more tough and demanding. The main aim was to boost the sentencers and public confidence and to overcome the image of probation being a *soft option*.

2.2.4 The Punishment in the Community Phase (1982 – 1997)

This section highlights two major developments that took place during this period, which had tremendous effects on the future direction of the probation service in England and Wales. The first was the introduction of National Standards and the second, the expansion of the use of community penalties by the Criminal Justice Act of 1991.

National Standards and its Impact

The growing concern about crime and prison overcrowding coupled with the impact of the 'nothing works' arguments compelled the Conservative government elected in 1979 to think about a unified and centrally controlled probation service. The first step in this regard was the introduction of the Statement of National Objectives and Priorities (SNOP) in 1984 (see Whitfield, 1998). This document set out an agenda for the Probation Service where the provisions of an alternative to custody measures were considered as the main role of the probation service. Furthermore, probation officers were required to prepare social inquiry reports to assist the courts in reaching a decision on the sentencing of offenders. The key element of this document (Home Office, 1984b) was that the probation service was to target those offenders with greater risk of imprisonment. Therefore, May (1994) argued that it signalled a shift away from the traditional role of the probation service. Originally, the probation service was created to deal with less serious offenders who could benefit from treatment, help and support provided by the probation officer. Hence, in Nash's (2004) opinion, the SNOP started to develop in a way that:

Began to steer it [probation service] away from its welfare roots towards a more corrections-based future, aimed at providing credible alternatives to custody (Nash, 2004:237)

During the 1980s, the probation service in England and Wales was run in 54 autonomous local probation areas with varied management and administrative styles from each other. One of the aims of SNOP was to control local variations in the probation service and was therefore an attempt by the government to bring local probation services under central control (May, 1994). The central government started to take responsibility for the future direction of the probation service (Nash, 2004). The move towards central control of the probation service accelerated during late 1980s and early 1990s.

Community Penalties

The increasing concern about probation being a 'soft option' led to the addition of new provisions to the probation order, first through the Criminal Justice Act of 1972 and later on in the Criminal Justice Act of 1982, where offenders placed on probation were required to attend Day Training Centres up to a maximum of sixty days (May, 1994). These programmes were related to drug or alcohol education (May, 1994). The 1990s saw the growth in community penalties mainly as a result of the passing of the 1991 Criminal Justice Act.

Community measures started their journey as an 'alternative to custody' option focusing on treatment and rehabilitation of offenders. As explained before, this rationale provided a base for sentencing practices both in USA and UK until the late 1960s. For most part of its history, a probation order was the only non-custodial community measure available to the courts to deal with offenders, apart from fine and discharge. During the 1970s and 1990s, new community measures were added to the list, which included Community Service Order, Probation with special conditions, and Suspended Sentence. The Criminal Justice Act of 1991 added more orders to the list of community penalties, such as Combination Order and Curfew Order with electronic monitoring.

Community penalties, according to Nellis (2001:17) are, 'sentences other than fines for dealing with convicted offenders outside prison'. Similarly, for Bottoms, Gelsthorpe and Rex (2001), community penalties are:

Court-ordered punishments (following the terminology of the Criminal Justice Act 1991), structurally located between custody on the one hand, and financial or nominal penalties (fines, compensation, discharge), on the other (Bottoms, Gelsthorpe and Rex, 2001:1).

Community penalties are restrictive in practice in the sense that it always requires some form of contact with one of the agents of the court. However, this contact is different from that in the custodial sentence and is community based. The type of contact is different from case to case. As Bottoms, Gelsthorpe and Rex (2001) argued:

It might take the form of active surveillance of the offender (as in electronic tagging), or participation by the offender in a programme of counselling or treatment (as in probation orders or drug treatment orders) or supervised work or other activities' (as in community service orders or attendance centres) (Bottoms, Gelsthorpe and Rex, 2001:1).

In 1988 the government published the green paper entitled *Punishment, Custody and the Community* (Home office, 1988). This document further signalled the direction of the future probation service away from penal welfarism. It suggests that people chose to commit crimes and they must have an idea of what would happen to them if they offend. However, stressing the importance of the alternative to custody options, this document clearly stated that:

Imprisonment is not the most effective punishment for most crimes. Custody should be reserved as punishment for very serious offences (Home Office, 1988:2)

The 1988 Green Paper was followed by the White Paper entitled *Crime, Justice and Protecting the Public* (Home Office, 1990). It stressed the use of more community based options for less violent crimes such as burglary and theft (Whitfield, 1998). However, this document rationalised future sentencing practices including community punishments around the philosophy of just desert or proportionate sentences (Home Office, 1990, para. 4.3). In this regard, three sentencing bands were developed which would guide the courts in their sentencing practices according to the nature of the offences. At the top end were the offences for which only custodial sentences were required. At the middle level, were offences serious enough to be dealt with by community punishments; and fines and discharges were at the

lowest level. Probation disposals fell into the middle band, which would be available for serious enough offences but not so serious (Nash, 2004).

Based on the philosophy of ‘just desert’, the Criminal Justice Act of 1991 incorporated the recommendations of the 1990 White Paper. Public protection became at the centre of the criminal justice policy. The 1991 Act discouraged custodial sentences and encouraged the use of community sentences but in their own right, not as an alternative to custody (see Nash, 2004, Easton and Piper, 2005).

The Criminal Justice Act 1991

The Criminal Justice Act 1991 is an important piece of legislation in the penal history of Britain. It came into effect in October 1992 and is considered as the first major legislation of crime control since 1982 (Worrall, 1997). Based on the philosophy of ‘just desert’, the 1991 Act emphasised increased use of community measures and the Home Office demanded that community measures should be ‘tough, realistic and demanding’ (Mathieson, 1992:145).

The CJA 1991 was also the turning point in the history of community penalties in Britain. The core philosophy of the Act was that *punishment should be appropriate to the seriousness of crime*, which revealed the government’s tough sentencing policy under its ‘tough on crime’ agenda (Whitefield, 1998:17). It is important to mention that this sentencing policy was already popular in USA and Canada. Worrall (1997) believed that the 1991 Act provided a new coherent sentencing framework based on the principle of ‘just desert’ with only the most serious offences being punished with imprisonment. For Bottoms, Gelsthorpe and Rex (2001), the 1991 Act was important due to the fact that:

It enacted a significant departure from the penal-welfare concepts that had predominated in the era of treatment by making the probation order a sentence of the court (Bottoms, Gelsthorpe and Rex, 2001:1)

The major contribution of the 1991 Act was a move from ‘alternatives to custody’ to ‘punishment in the community’. Under this Act, community punishments were regarded as sentences of their own, not as alternatives to custody options. Section 125 of 1991 Act clearly stated that ‘community sentences stand in their own right and should not be seen as alternatives to custody’ (cited in Worrall, 1997:35).

Another contribution of the 1991 Act was that *Social Inquiry Reports (SIRs)* was replaced by *Pre-Sentence Reports (PSRs)*. According to May (1994), it was not only a change of the name, but of the content as well. He added:

Pre-sentence reports now shift the focus on probation officer’s report writing away from the diagnosis of offender’s needs, towards the sentencing requirements of the court (May, 1994:876).

Similarly, Worrall (1997) argued that the social inquiry report, prepared by probation officers, was used to cover information about offenders’ personal and social circumstances based on their welfare. However, the Pre-Sentence Report mainly focused on the offence and its related issues. The court then had the authority to decide suitable sentencing options not necessarily based on the welfare of the offenders, although the purpose of 1991 Act was to give community sentences to the less serious offenders and more violent criminals to be sent to prison (May, 1994). However, this Act tightened the community sentences. Courts were empowered to attach additional requirements in probation orders, which could be desirable for securing rehabilitation of offenders, preventing re-offending and protecting the public (see section 9 of CJA, 1991)). Furthermore, a new *Combination Order* was introduced focusing

on a mixture of punishment, reparation and rehabilitation of offenders (May, 1994). The 1991 Act also introduced the Curfew Order under which offenders are required to remain in a place for certain amount of time and monitored by electronic tagging (CJA, 1991, s.12 and 13).

Mathieson (1992) argued that Government ministers deliberately used the phrase 'punishment in the community' in order to counteract public perceptions of community measures being soft options and the public image that probation was 'offenders being let off' (Mathieson, 1992:146). Therefore, to erase this image and win the confidence of the public on community measures, the 'punishment in the community' phrase entered into the official discourse through the Criminal Justice Act of 1991 (Hedderman and Hough, 2004).

The Criminal Justice Act 1991 has the credit of not only initiating tougher community sentences; it also changed government priority in terms of its sentencing policies. Rehabilitation of offenders no more remained on the top priority list of the government sentencing policies. Even for the probation service, public protection and reducing offending became foremost important objectives rather than rehabilitating offenders. According to Garland (1997):

Rehabilitation interventions [became] much more focused upon control issues, much more concerned to address offending behaviour. There [was] a shift from client-centeredness to offence-centeredness Offence behaviour rather than personality or social relations [became] the target of transformative work. Changing the pattern of offending [was] the primary concern, and this may or may not involve engaging with the whole person, or any underlying conflicts and difficulties he or she may have (Garland, 1997:6)

May (1994) argues that since the introduction of the Criminal Justice Act 1991, two major developments have occurred in the field of community punishments. First, the movement from 'welfare' to a 'punishment' model of community corrections; and secondly

the political call for community sentences to be 'tough' on offenders' (1994:861). Moving the philosophy of community punishment measures from 'welfare' to 'punishment' also conveys the message that the offenders are not only punished, but in a way which is more visible and productive to the offender and to society as a whole (May, 1994). In addition, Worrall (1997) argued that tougher community punishments refuted that popular misbelief that if offenders get non-custodial sentences, they are being let off with a soft alternative.

Although the Act appeared to be successful initially in achieving its objectives, this positive trend was short-lived as the proportionate use of custody began to rise from early 1993 (Brownlee, 1998). Worrall (1997) argued that:

The Criminal Justice Act 1991 represented the culmination of Thatcherite criminal justice policy and was surprisingly radical in its attempt to implement a 'just desert' model of sentencing, which endorsed community penalties for the vast majority of offenders (Worrall, 1997:36).

She further argued:

The failure of the 1991 CJA was not due to its inability to achieve its objective of decentring the prison, but to its inability to establish the punitive city outside the prison (Worrall, 1997: 39)

Brownlee (1998) argues that the direct practical consequences of this renewed punitiveness in political rhetoric were marked by an immediate increase both in the number of people being sentenced to custody sentences and in the proportionate use of custodial sentences.

Following strong public criticism, the Criminal Justice Act of 1991 was revised in 1993 (Worrall, 1997). In addition, according to Hedderman and Hough (2004), the year 1993 saw

many brutal murders including the murder of two-year old James Bulger that attracted strong criticism from the public and press. The Conservative Government felt under pressure to change its penal policy. The government had to move away from its decarceral policy by removing restrictions from sentencers to pass prison sentences, which were imposed under the Criminal Justice Act of 1991. With these changes, the prison population continued to rise.

It is believed that the probation service experienced another serious blow when the then Home Secretary, Michael Howard, announced that ‘prison works’ (Chui and Nellis, 2003:8, Robinson and McNeill, 2004: 281). Addressing the Conservative Party Conference at Blackpool, the then Home Secretary, Michael Howard, stated:

Let us be clear. Prison works. It ensures that we are protected from murderers, muggers and rapists – and it will make many who are tempted to commit crimes think twice (see Worrall, 1997:39)

In 1994, he announced his 27 points policy under the banner of ‘Prison Works’ where more emphasis was given to incapacitating offenders than to rehabilitating them (Hedderman and Hough, 2004). Whitfield (1998) argued that the ‘prison works’ agenda of Michael Howard was totally against that of his predecessor who suggested that ‘prison is an expensive way of making a bad person worse’ (1998:17). All these developments seriously affected probation work in the sense that the service was seriously neglected during 1993-97 (see Chui and Nellis, 2003).

2.2.5 What Works and Effective Practice (1997 onward until present day)

The probation service found itself under enormous pressure during the 1980s and 1990s as a result of the tough political climate, where the policies of the government were anti-

welfare, more punitive and tough towards dealing with offenders. At this time, the official policies were formulating a new role for the probation service in working with offenders, although the 1991 Act had attempted to place the probation service in the 'centre stage' of the criminal justice system in England and Wales. However, the issues of public protection and risk management started to play as guiding principles for the working of the probation service. At the same time, new research evidence coupled with the changing attitude of the politicians and the public was building. They were looking for the effectiveness of the supervision of offenders in the community. The role of the probation service then began to be dominated by the 'what works' agenda, which was a response to earlier researches that seemed to suggest that 'nothing works'. Much of the 'What Works' research came from Canada (Davies, Croall and Tyrer, 2005) which focused on providing the right programmes for the right people with the aim of reducing offending behaviours. The New Labour government adopted the evidence – based approach in working with offenders in 1997 as their central Crime Reduction Policy.

This section will highlight the move from 'nothing works' towards 'what works' and the future direction of the probation service in Britain.

From 'Nothing Works' to 'What Works'

The Probation Service survived a very tough stage during the 1970s and 1980s where its role and effectiveness were seriously questioned after the emergence of 'nothing works' literature. However, since the early 1990s, there was scepticism about the 'nothing works' agenda and it was soon realised that most of those evaluative studies were misinterpreted and exaggerated. Therefore, towards the end of the 20th century, there were signs of increasing

interest in the probation service to play a more effective role in reducing crime. This situation lead to the emergence of new literature based on the principle of ‘what works’ according to which ‘something works for some people some of the time’ (Hedderman and Hough, 2004:153).

From the mid 1990s, developments towards a ‘what works’ movement accelerated rapidly. They included McIvor’s review of evidence on effective sentencing for the Scottish Office in 1990s; the conference on ‘What Works’ in 1991; the launch of the Effective Practice Initiative in 1995; the publication of McGuire’s edited collection of papers from ‘What Works’ conference (McGuire, 1995); the launch of the ‘What Works’ pathfinder projects and the Joint Accreditation Panel in 1999; and the launch of the National Probation Service in England and Wales in 2001 (see for detail Raynor, 2003).

Among British research studies, STOP (Straight Thinking on Probation) was an important study carried out in Wales, which was initiated by Mid-Glamorgan Probation Service in 1991. The basic idea of this programme was developed from Ross and Fabiano (1985), a Canadian cognitive behavioural programme, ‘Reasoning and Rehabilitation’ (Crow, 2001). Raynor and Vanstone (1994) evaluated the STOP programme based on the reconviction data of the last 12 months and concluded:

For those who completed the programme, the actual reconviction rates of 35 percent were better than the 42 percent predicted for the participants concerned, and better than other forms of disposal. In addition, none of those who were reconvicted received a custodial sentence (Crow, 2001:69)

Kemshall (2002) argued that these results increased the interest of the government in constructive approaches for reducing crime and criminal behaviour, which subsequently

started to cancel the 'nothing works' era suggesting that it was wrong to conclude that nothing works. All these developments subsequently lead to the 're-birth of rehabilitation' (Raynor, 2003; Crow, 2001; Nellis, 2002; Lewis, 2005). The new rehabilitative model of working with offenders was based on an evidence-based approach. Hence, under the 'what works' agenda, there are a variety of programmes to be offered to offenders. However, much emphasis is on the importance of cognitive behavioural intervention focusing on 'risk factors' associated with offending behaviour. Therefore, the cognitive skills courses are aimed at changing the attitude i.e. the habit of thinking (cognition) and behaviour pattern of the offenders (Davies, Croall and Tyrer, 2005).

The cognitive behavioural approach is based on looking at the role of social learning and of thinking or cognition in the development and maintenance of offending behaviour. According to this approach, many offenders have poor problem-solving skills, which lead them to believe that they are controlled by external factors rather than accepting the responsibility for their actions (Raynor and Vanstone, 2002).

Therefore, treatment through the cognitive behavioural approach gives the offender the ability to control his or her own behaviour, an internal rather than an external control system (Crow, 2001). There are a variety of programmes, which are used in cognitive behaviour programmes including behaviour modification; getting offenders to work, training in problem solving, social skills training and anger management. In essence, the intervention programmes based on the cognitive behavioural approach focused on changing the risk factors involved in offending behaviour.

New Labour Government Policies

In 1997, 'New Labour' came to power but the new administration did little to intervene in the ongoing sentencing practices. The emphasis on tougher management and enforcement continued. However, one of the major tasks of the New Labour was the amalgamation of the Prison and Probation Service into a combined Department (Nash, 2004). In this regard, the then Home Secretary, Jack Straw, announced a review of joint working of the prison and probation service on 16th July 1997. The basic aim of this review was to look at the options for a closer and more integrated prison and probation work together. According to Wargent (2002), the modernisation of the prison and probation service was aimed to develop a structure which should be:

- publicly accountable
- responsive to government policy with a single strand of management
- a united, professional voice; and
- in which local operations were managed locally (Wargent, 2002:184)

Therefore, the government published a consultation paper entitled *Joining Forces to Protect the Public* (Home Office, 1998) to consider the possibilities of greater integration of the prison and probation service together under one umbrella (Crow, 2001). This report however did not attract much support and the merger of the prison and probation service did not take place. At that time, there was very little support for a joint prison – probation (joint corrections) agency. It was argued that there were considerable differences between the tasks, values and structure of both services and they should remain independent but with closer co-operation. However, in 2004, the probation and prison service were brought together under one umbrella, which was named a 'National Offender Management Service'. Since then, the

NOMS has taken over the responsibility of offender management, both in custody and under community supervisions (Robinson, 2005, Davies, Croall and Tyrer, 2005).

Another development was the cancellation of social work qualification for probation officers during the late 1990s (Robinson, 2005). Many believed that this change symbolised the changing function of the probation service – a change from a social work service responsible for providing welfare and rehabilitation of offenders to a law enforcement agency responsible for managing and controlling offenders (Raynor and Vanstone, 2002; Robinson and McNeill, 2004).

According to Crow (2001), those entering the probation service with a diploma in social work now need a diploma in probation studies which is followed by in-service training. With the new changes, the supply of professionally-trained practitioners started to decrease but the size of caseloads was increasing. It was soon realised that ‘a shrinking pool of probation officers could no longer cope with the end-to-end supervision of probation caseloads’ (Robinson, 2005:309). Hence, the probation areas started to develop resource-based policies based on ‘risk management’. Robinson argued that:

In accordance with the twin rationales of ‘what works’ and ‘public protection’, probation areas began to realize that they could now legitimately focus the resources of their professionally qualified staff on those offenders posing the highest levels of risk (Robinson, 2005:309).

By the end of the 20th century, Robinson (2005) argued that the probation areas had reached a strategic consensus that ‘resources should follow the risk’ (2005:309). This practice changed the mode of offender supervision. Offenders are now regarded as ‘portable entities to be assessed and then managed into appropriate resources’ (Robinson, 2005: 310).

Furthermore, in 1997, some steps were taken which moved the probation service towards more law enforcement rather than a social work agency. Before 1997, the consent of the offender was required in making a probation order. However, from 1997, the consent of the offenders in making a probation order was no longer necessary and it was withdrawn. Therefore, in the opinion of Davies, Croall and Tyrer (2005), probation became an imposed sentence rather than a voluntary contract between the state and the offender. In addition, before 1997, probation officers had considerable discretion to take the offender to court in cases of the breach of the order, but now this discretion was also removed.

Under New Labour government policies, the probation service was preparing itself for a major shift when unlike Michael Howard, the New Home Secretary Jack Straw announced that 'prison doesn't work' (Nash, 2004:240). His claim came after the publication of the Home Office report suggesting that focused intervention programmes could reduce re-offending rates (Goldblatt and Lewis, 1998). Hence, New Labour started to rely on evidence-based practice and returned to a policy of keeping more offenders in the community.

For most of its history, the probation service was managed locally by the area-based probation committees. However, in April 2001, the Criminal Justice and Court Service Act established the National Probation Service for England and Wales (Chui and Nellis, 2003). This creation was the result of years of efforts and reforms taking place in the probation service. The new structure replaced the 54 autonomous probation areas by 42 probation areas (matching the boundaries of the police force areas and Crown Prosecution Service areas) throughout England and Wales together with the National Probation Directorate based in London. A post of Director was created to run the administration of the National Probation Service (Wargent, 2002). Under the new arrangement, the Chief Probation Officer manages

each probation area, accountable to the London-based Director. The Director itself will be accountable directly to the Home Secretary. Therefore, towards the end of 20th century, Crow argued that:

The probation service had experienced a transition from a voluntaristic, locally based service to a much more centralized service under the control of the Home Secretary (Crow, 2001:98).

According to Nash (2004), the main purpose for creating a National Probation Service was to provide an opportunity for the probation service to have access to the central criminal justice policy, which the police and prison officers enjoy. Furthermore, consideration was also given to renaming the probation service by the Home Secretary, who suggested the titles 'Public or Community Protection Service' or 'Criminal Justice Service'. Nash (2004:241) stated that 'many people were relieved that the new service retained the word 'probation' in its title'.

In 2000, the major community penalties were renamed, such as probation order into community rehabilitation order, community service order into community punishment order and combination order became community punishment and rehabilitation order. Nash (2004) argued that the changes of name reflected the government's move towards a more correctionalist stance in community sentences. Under the new national standards, the role of probation officers became more controlling or managing the problem of crime rather than really getting at its causes. Furthermore, the probation service is now dealing with more serious offenders than it used to. Therefore, the management of risk has begun to dominate the daily practice of the probation officers. The working of the probation service closely with other departments is considered as a more efficient and effective way of crime control. In this regard, the government launched a new community measure entitled *Intensive Control and Change programme (ICCP)* for 18-20 years offenders, which was piloted in five probation

areas (Nash, 2004). The probation officers are required to work with the police in order to monitor and restrict the liberty of the offenders under daily curfew and surveillance. In addition, probation officers are required to find suitable rehabilitation programmes of education or work with job centres and other agencies and to ensure compensation to victims (Nash, 2004).

However, there is still scepticism about the evidence to support evidence-based ‘what works’ programmes. These programmes are considered narrow as they focus on the narrow concepts of cognitive skills, rather than on the wider social and economic needs of the offenders (Mair, 2004). In addition, the emphasis on cognitive behavioural approach, as some critics argued, implies a return to the medical model of deviance with its assumptions that offenders are somewhat ‘different’ and ‘deficient’ and that they are to be treated (Mair, 2004). In addition, ‘what works’ research stresses the individual responsibility and cognitive skills rather than taking a more holistic approach of the broader personal and social problems which the offenders face. Therefore, it is argued that for offenders facing pressures due to unemployment or homelessness, programmes focusing on learning social skills may not provide sufficient motivation to stop offending behaviour or to complete the programme at all. However, most of the programmes focus on acquisition of skills and the experience of working, which no doubt give offenders a feeling of confidence and raise their self esteem.

2.3 Summary

The history of the probation service in England and Wales is ever changing and is full of complexities. The probation service as we see today has travelled far away from its volunteer and philanthropic beginning. For most of its history, it has portrayed a consensus

approach towards crime and rehabilitation of offenders. It was the police court missionaries of the CETS who initiated the volunteer work of helping offenders in 1878. In the beginning, the probation service aimed at saving the soul of the sinners and asking for mercy on behalf of the offenders (Raynor and Robinson, 2009). The period between the two world wars was the *golden era* for the expansion and development of the probation service in Britain. The rehabilitation of offenders was the principal aim of not only of the probation service, but the government and its commitment to the welfare state. Therefore, during this period, the offenders were helped and treated by different rehabilitative programmes which mainly focused on the social, psychological and economic needs of the offenders.

Since the late 1960s and early 1970s, faith in the commitment to rehabilitation declined with the increasing rate of crimes and attacks on rehabilitation programmes. The empirical and ideological attack on the rehabilitative ideal left the probation service to struggle for its existence and it was forced to articulate a coherent rationale in order to justify its purpose and existence. However, in spite of increasing rates of crimes and government hard-line crime reduction policies during the 1980s and 1990s, the probation service managed to survive. However, it had to compromise on its traditional policies. To achieve this, the probation service re-oriented its purpose whereby *penal reductionism* – reducing the number of offenders in custody – became its main purpose. Since then, the probation service started to operate as a service providing ‘alternative to custody’ options to the courts rather than aiming at treatment of offenders to stop re-offending. The process of transition and development continued and since the introduction of the Criminal Justice Act of 1991, probation has moved away from providing ‘alternatives to custody’ to offering ‘punishment in the community’.

For most of its history, probation supervision has been delivered in the context of a one-to-one relationship between the probation officer and the offender. The style and theoretical approach underlying supervision has changed a lot. Initially, inspired from a religious zeal, this relationship was aimed at helping offenders and asking for mercy from the court on their behalf. Since then, it has changed its focus from a 'casual relationship' to a 'case work relationship'.

Therefore, the qualification in religion was changed to a qualification in social work and the role of the probation officers was to find the pathologies of offending behaviour, keeping in view their social, psychological and economic needs. The main aim of probation was the welfare of offenders rather than their punishment. Therefore, during the 1960s the casework relationship of the probation officer with the offender was considered a key to effectiveness in reducing offending behaviour.

Since the 1980s, the trends in dealing with offenders changed, which subsequently affected the style of relationship between the offender and the probation officer. The new role of the probation officer was more inclined towards managing and controlling offenders in their communities rather than finding the pathologies of their crimes. Therefore, the new role of the probation officer moved away from 'case work' to 'case management'. In addition, the probation officer's new job was to work with offenders in collaboration with other crime controlling agencies. A significant shift toward this practice can be seen in the government Green Paper in 1988 entitled *Punishment, Custody, and the Community*, which proposed that the supervision of offenders could be shared with other service providers. It was believed that the new management approach would ease some of the burden from probation officers and change their traditional role too. As the approach towards dealing with offenders moved from

‘case work’ to ‘case management’, the qualification in social work was no longer needed. During the mid 1990s, the Home Secretary repealed the need for probation officers to hold a social work qualification due to the fact that the probation service was now more a *law enforcement agency* rather than *social work agency*.

Finally, the key issue is that the probation service in England and Wales is constantly changing with the times. The politicisation of crime and changing nature of policies in Britain has compelled the probation service to revise its approach in working with offenders. The probation service is now struggling to achieve its multi-purpose goals of working with offenders including punishing offenders in the community, offender management, crime reduction, public protection, law enforcement and of course rehabilitation of offenders. In addition, the move of the service from dealing with low risk offenders to high risk offenders has endangered its credibility. Furthermore the creation of new penalties and their expansion since the 1970s, with aim of containing offenders in the community, has so far not achieved the high hopes of decreasing the use of imprisonment. The critics suggest that community penalties have expanded the means, or forms of punishment, and are another convenient means of extending the process of control, becoming more intrusive and capturing more and varied groups of people in its meshes.

Chapter 3

The Development and Operation of Probation Service in Pakistan and in the North West Frontier Province

3.1 Introduction

This chapter describes the historical origins of probation in Pakistan in general and explores the development of the probation service in NWFP in particular. The main objectives, responsibilities, staffing, organizational structure and working pattern of the RPD in NWFP are also included in this chapter. In addition, some of the salient features of Pakistani probation legislation are discussed. Finally, some information is provided about the background of probationers in Pakistan based on statistics obtained during the field work for this thesis. The information includes background characteristics such as age groups, levels of education and professional background of probationers. It also includes details of offences for which the offenders were granted probation orders and the lengths of their orders.

3.2 The Background of Probation in Pakistan

The probation system in Pakistan started in the 1960s, at a time when probation was known and practised in most developed countries of the world. As has been explained earlier (chapter 2), statutory probation was already introduced in most states in the USA and in Britain at that time. However in Pakistan, probation as a form of punishment did not evolve in the way it did in the USA and Britain. It was one of the many colonial legacies adopted by the Government of Pakistan (then part of colonial India).

In 1923, the British colonial government in India upgraded the CrPC of 1898 and three new sections which deal with 'First Offenders' were inserted in it. These sections include:

- Section 562 (*Power of Court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment*),
- Section 563 (*Provision in case of offender failing to observe conditions of his recognizance*) and
- Section 564 (*Conditions as to abode of offender*) (see Ranchhoddas and Thakore, 1946)

These sections, according to Ranchhoddas and Thakore (1946:418), 'enable the court, under certain circumstances, to release the accused, who has been convicted, on probation of good conduct'. The aim of these sections was to benefit first offenders involved in minor offences. Any person having no previous conviction was eligible for probation; however, the final decision rested on the discretion of the judicial magistrate. The provision for release on probation was based on the British *Probation of Offenders Act* of 1907, which gave statutory status to the voluntary work of the police court missionaries (see Chapter 2). Thus, probation was one of the many criminal justice ideas that were framed in Britain and then exported to its colonies including British India.

The colonial government of British India tried to pass a separate legislation on probation; they however did not succeed. In 1931, the *All India Probation Bill* was drafted and was circulated to all the provincial governments for their comments (Hamid-uz-Zafar, 1961; Jillani, 1999). The Bill was not passed into law mainly due to the political crisis in the country associated with the ongoing independence movement. After gaining political

independence from Britain in 1947, the Government of Pakistan introduced a legislation on probation, namely, the *Probation of Offenders Ordinance 1960/Rules 1961* which was enacted in both wings of Pakistan, i.e. East Pakistan (now known as Bangladesh) and West Pakistan (the present Pakistan) in 1961. The Probation of Offenders Ordinance 1960 is largely an amended version of the 1931 Probation Bill.

It is important to mention that the release of prisoners on parole was already in practice during colonial times even before the introduction of provisions for probation. The Criminal Procedure Code of 1898 contained some sections under which provincial governments were empowered to release prisoners from jails for their good conduct and for such prisoners to remain in the community for the remaining period of their imprisonment. This provision was made under section 401, chapter XXIX (*Suspension, Remissions and Commutations of Sentences*) of the Criminal Procedure Code 1898. Specifically, the section states that:

When any person has been sentenced to punishment for an offence, the Provincial Government may at any time without conditions or upon any conditions, which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced. (See Ranchhoddas and Thakore, 1946:289)

At that time, there was no provision for the supervision of those released under this law. In 1927, the British colonial government passed separate legislation for release of offenders on parole namely, the *Good Conduct Prisoners Probationary Release Act 1926/Rules 1927*. Under this law, parole officers were appointed and made responsible for identifying eligible cases for parole. Supervision was to be made compulsory for those released on parole for the

remaining period of their licence. Those released were expected to live freely within the state laws and under the supervision and friendly guidance of parole officers. The law was to have effect in the various provincial governments of British India including the province of Punjab. In addition, RPD was established in all provincial governments in 1927, to deal with the release of prisoners on parole. After independence, Punjab was the only province in Pakistan that had the RPD in place. The rest of East and West Pakistan had their respective RPDs in 1957 (Hamid-uz-Zafar, 1961).

Until the Probation of Offenders Ordinance was passed in 1960, the RPD dealt only with parole cases. The Probation of Offenders Ordinance of 1960 established the probation arm of the RPD and enabled probation officers to be appointed for offenders on trial before the courts.

Initially the administrative setup of the RPD was small and simple. Under the ‘One Unit²’ scheme, the RPD worked as a federal department headed by the Secretary to the Government of West Pakistan (Home Department). Probation was initially started in only two divisions of West Pakistan, namely Lahore and Rawalpindi, with the Director based at the provincial capital in Lahore. For administrative purposes in 1962 all the probation and parole officers were placed under the control of commissioners of the divisions. Four years later, the RPD was extended to other divisions of both East and West Pakistan. In West Pakistan, the RPD was extended to twelve divisions, the details of which are as follows:

² After gaining political independence from Britain in 1947, independent Pakistan started as a federation of five provinces namely, Punjab, Sindh, Baluchistan, North West Frontier Province (NWFP), and Bengal. In 1955, ‘one Unit’ scheme was introduced under which the country was divided into two wings. The provinces of Punjab, Sindh, North West Frontier Province (NWFP) and Baluchistan were amalgamated and were called ‘West Pakistan’ with Lahore as its provincial capital. For administrative purposes, the provinces were divided into divisions. The other wing, the province of Bengal, was known as ‘East Pakistan’. This wing was later separated from the rest of Pakistan in 1971 and it became the independent country of Bangladesh.

Province	Divisions with Reclamation and Probation department
Punjab	Lahore, Multan, Bahawalpur, Sargodha, Khairpur and Rawalpindi
Sindh	Hyderabad, Karachi
NWFP	Peshawar, Dera Ismail Khan
Baluchistan	Quetta and Kalat

The second martial law regime of General Yahya Khan Khan (1969-1971) undid the ‘One Unit’ scheme in 1969 and the status of the provinces was restored (Hussain and Hussain, 1993:25). The change in the administrative setup of the country affected the working of the RPD too. Previously, the RPD worked under the federal government of West Pakistan. Now it was placed under the provincial governments in each province.

After the dismemberment of ‘One Unit’, the provincial government of Punjab established an independent Directorate of RPD with a full time Director, a Deputy Director, and nine Assistant Directors in all divisions of Punjab province. The province of Sindh also established its independent directorate with a full time Director and three Assistant Directors. The government of Baluchistan along the same lines set up an independent directorate by creating the post of Deputy Director under the Home Department. Like other provinces, the RPD in NWFP remained with the Home Department after the restoration of the status of provinces in 1969.

3.3 Probation Service in NWFP

With regard to the NWFP, as mentioned earlier, the RPD was established in Peshawar and Dera Ismail Khan Divisions in 1957 to carry out parole work. In 1965, the probation law was extended to Peshawar division in the NWFP. In order to work with offenders on probation and parole in the province, eight probation officer posts and two parole officer posts were appointed during that year (1965). Four of the probation officers were based in Peshawar district and two in the Mardan and Kohat districts of Peshawar division. No restriction was made on the qualification for the post of probation officer. However, preference was given to law graduates. Later on, in 1971, probation was also extended to Dera Ismail Khan Division. The newly appointed probation and parole officers received in-service training at the Central Jail Staff Training Institute, Lahore.

3.4 Initial Problems and Difficulties

The journey of the probation service in NWFP was not easy and simple. For the new Department of Probation, it was not easy to find a place in the existing justice system of the country. There was opposition from some criminal justice agencies, for example, the police. As Rehman Gul³, Ex-Deputy Director, RPD, NWFP puts it:

Initially, we faced numerous problems especially opposition from police department. They did not believe that how can a person be released after the commission of an offence. The police department strongly believed that with the introduction of probation services, the crime rate would go high. However, time has proved that they were wrong. We made significant progress in rehabilitation of first offenders (Field Notes, February 22, 2005).

³ Rehman Gul is among the pioneers of the RPD in NWFP and was among the first eight probation officers appointed in 1965. He retired as Deputy Director in 1996.

He added that all the probation officers worked hard to find their place in the existing penal system. They had to meet regularly with the judicial magistrates in order to convince them to grant a probation order in cases of a petty nature. He admitted that:

The judicial magistrates, deputy commissioners and commissioners were cooperative and it was because of their cooperation that we made progress in our work (Field Notes, February 22, 2005).

Similarly, in an interview, Mohammad Shafiq⁴, Ex-Deputy Director RPD, NWFP stated:

Those were very tough days. On many occasions, I became hopeless and believed that this department might not function any more. Probation was a new experiment for all those associated with the justice system in the country. For magistrates, the concept of conviction was limited to paying back for what the offender has committed (Field Notes, January 20, 2005).

More importantly, there were ideological differences between the new probation department and the existing criminal justice agencies resulting from the fact that probation officers not only dealt with cases before the courts but sometimes handled parole cases, which meant that they had to still work with the police, magistrates and the prison department. As Mohammad Shafiq puts it:

The educational level of those working in police and prison department was very low. They did not know about human psychology and the concept of rehabilitation of offenders. For them, the only answer to the crime was severe punishment (Field Notes, January 20, 2005).

⁴ Mohammad Shafiq was also among the pioneers of the RPD in NWFP and was among the first eight probation officers appointed in 1965. He retired as Deputy Director in 1999.

He added:

The judicial magistrates being educated people soon understood our motive. They realized the importance of rehabilitation of offender and cooperated with us to place offender on probation (Field Notes, January 20, 2005).

Attaullah⁵, Ex-Assistant Director RPD, NWFP stated:

We soon developed our personal links with the magistrates. The probation officers worked hard which improved the strength of probationers in the province. We did work as parole officer too. The basic purpose was to help the offenders to keep them away from the bad influence of the prisons. It in turn improved the progress of the RPD in NWFP as well (Field Notes, January 24, 2005).

With the creation of new districts, more probation officers were appointed to work with offenders on probation in the new districts.

However, a very significant change took place in NWFP in 1976 when the RPD was placed under the administrative control of the Inspector General of Prisons as its Director. This administrative set-up still exists. In 1992, the post of Deputy Director for the probation arm of the RPD was established. In addition, the posts of Assistant Directors were created for each of the seven divisions in the NWFP. The main job of Assistant Directors was to facilitate the work of probation officers and parole officers. In case of any problems, probation and parole officers would report to their local Assistant Directors based in their respective divisions.

Furthermore, in 2001, another significant administrative change took place under the government's downsizing policy. All the seven posts of Assistant Directors working with

⁵ Attaullah was also among the pioneers of the RPD in NWFP and was among the first eight probation officers appointed in 1965. He retired as Assistant Director in 1999.

RPD in NWFP were abolished. This was a serious blow in the sense that the Assistant Directors had played a key role as a 'bridge' between probation officers and magistrates (see Chapter 7). In case of any problems, probation officers reported to their immediate bosses, the Assistant Directors, who were more or less local (See rule 24 of 'Probation of Offender Rules, 1961'). The removal of the Assistant Directors meant that all the probation officers in the Province now report to a single Deputy Director based in the head office in Peshawar, miles away from many of the probation officers, especially those who reside in the far away districts. This has created many practical problems; for example, in breach cases where probation officers would have reported cases to their local Assistant Directors but now have to report to the Deputy Director in the capital (Peshawar)⁶. The process of dealing with breach cases has taken a triangular shape whereby the probation officer and the concerned court are physically close to each other but cannot communicate about breach cases. The Deputy Director is now the only person legally empowered to communicate on breach cases with the courts in the whole Province. The result of this 'centralisation' is that a simple process is made very complicated and breach cases are either lost in the system or not pursued (see Chapter 7). It was found during the course of this research that some probation officers no longer bother to report breach cases. In some places where cases were reported and passed on to the Deputy Director, probation officers were not made aware of the final decisions of the courts (see Chapters 6 and 7)

What is interesting is the fact that the RPD in NWFP is administratively attached to the Prison Department with the Inspector General of Prisons (IG) as head of both departments. The tension between these two departments is an ongoing issue (see Chapter 6). Rehman Gul,

⁶ Where there is a breach case, probation officers cannot inform the courts directly. All cases must be reported to the Deputy Director.

ex-Deputy Director of RPD, NWFP stated that at one of the meetings with the provincial finance minister, the Inspector General of Prisons NWFP questioned the work of the probation department and remarked that the RPD is useless and that probation officers are doing nothing. According to Rehman Gul, his reply to the Inspector-General's comments was:

RPD is not a dumping place for offenders as your prisons are. If you are going to question our work, could you please tell me what the prison staffs are doing? Look at our approaches. Our treatment of offenders is friendly whereas your treatment is forced. We help offenders to rehabilitate and not to commit other offence. You teach first offenders criminal lessons. So who is useful for the offenders and for the society as a whole? (Field Notes, February 22, 2005)

The RPD resents being placed under the directorship of the Inspector-General of Prisons (I.G.). Since the joint department was created, the RDP has been struggling to detach itself from the Prison Department and to establish an independent RDP directorate in NWFP. In the other three provinces of Pakistan, the RPDs are separate independent departments. The staff of the RPD NWFP believe that an independent status will improve their work and that the department will flourish as an independent establishment. They believe that the IG is responsible for the lack of progress of the RPD. Not only did the IG do nothing to save the posts of the Assistant Directors (interestingly, all the Assistant Directors in the other provinces were retained), but also, numerous requests made in the past to appoint more office staff and probation officers in order to improve the quality of work of the RPD were not granted. For example requests were made to appoint at least six male probation officers and four female probation officers for Peshawar, Abbottabad, Swat and Dera Ismail Khan districts (Daily Express, 22/3/2005). In an interview to the Daily Express dated March 22, 2005, Inspector General of Prisons NWFP argued:

The independent directorate of RPD will increase the financial burden of the government. It will not improve the quality of probation work. Furthermore, there is no justification to establish a separate directorate for only 44 employees (Field Notes, June 13, 2005).

It is not clear if an independent directorate will improve the quality of work of the RPD in NWFP. However, the staff of the RPD strongly believe that it would improve their quality of work. The staff of the RPD in NWFP always look with admiration at their counterparts working in other provinces, who enjoy independent status.

3.5 The Reclamation and Probation Department, NWFP

Since its creation in 1957, the RPD in NWFP has gradually become an integral part of the criminal justice system in Pakistan. The probation work of the department, as already indicated, includes working with offenders sentenced to probation by the courts and the supervision of prisoners released on parole. Probation officers initially supervised only adult offenders but since the passing of the *Juvenile Justice System Ordinance 2000/Rules 2001*, they now also supervise juvenile offenders on probation. However, this research is concerned with their supervision of adult offenders on probation only.

3.5.1 Objectives of RPD, NWFP

RPD operational documents state the following as the four main objectives of probation in NWFP:

A. To kill the crime, not the criminal

The purpose of probation is to assist in reducing the incidence and impact of crimes without committing further harm to the offender. Research studies have shown that prisons are the breeding places for professional criminals. It is believed that ‘every habitual offender had been a first time offender’ (Gillani, 1999:175). Therefore, the purpose of probation service is to stop first offenders from becoming professional criminals and help them to become useful and productive citizens of society.

B. To reduce overcrowding in jails

Overcrowding in prisons is an international phenomenon and Pakistan is not an exception. Prisons in Pakistan are keeping more prisoners than their official capacity (Rizvi and Jillani, 2003). In 2005, there were approximately 86,000 prisoners in 87 prison establishments in Pakistan. The official prison capacity target for Pakistan for 2005 was 38,839 (International Centre for Prison Studies, 2005). According to Penal Reform International, prisons in all the South Asian countries including Pakistan are overcrowded and are below the international standard (Penal Reform International, 2003). In NWFP, the total number of prison establishments is 22, which includes four central prisons, six district jails, eight sub-jails and four judicial lockups. On January 1, 2005, the total strength of prisoners was 9137 against the official capacity of 8082 (Prison Department NWFP, 2005). As in most countries, the use of probation is expected to help in reducing the prison population in Pakistan and the NWFP.

C. To cut down government expenditure on prisons

The government of Pakistan, like most modern governments, is keen to reduce public expenditure incurred from keeping offenders in prisons. In NWFP, it would be extremely difficult to calculate how much a person in prison costs to the taxpayer as the number of prisoners fluctuates. However, a comparative analysis of the cost of the RPD with that of the Prison Department in NWFP would give an idea of how much government expenditure is incurred in both departments. By end of June 2005, there were 1664 staff working with the Prison Department in NWFP. The total strength of the RPD, NWFP was only 44. The total annual budget of both departments for the year 2004-2005 is given below (Prison Department, NWFP, 2005).

Prison Department NWFP = Rs. 220605200 (£ 1838376.67) [£ 1 = Rs. 120]

The RPD, NWFP = Rs. 4352190 (£ 36268.25) [£ 1 = Rs. 120]

The above figures show that imprisonment is far more expensive compared with non-custodial or community penalties. Thus, placing more offenders on probation and the use of parole are penal measures that are believed to be capable of reducing the financial costs of keeping offenders in prison.

D. To rehabilitate and re-integrate offenders as law abiding citizens

Placing offenders on probation is not only an economical way of dealing with offenders; it is a useful means of controlling crime and reducing re-offending. As indicated in chapter 2, the appeal of probation lies in the claim to rehabilitation and prevention of future offending or re-offending. The probation system in Pakistan is founded upon the rehabilitation idea.

The need to keep petty, habitual and first offenders and parolees away from re-offending by providing them with help, advice and support that would enable them to lead law-abiding lives in their communities is at the core of the probation service in Pakistan, as elsewhere.

3.5.2 Responsibilities of RPD

The RPD's work is governed by three criminal justice laws. First, the *Good Conduct Prisoners Probation Release Act 1926/Rule 1927* which allows prisoners to be released on licence on parole. All probation officers are also empowered to do parole work. However, in addition, there are parole officers who specialise in parole work only. At the time of this research, there were only two such parole officers in NWFP. The workload of parole officers is almost negligible because of the rather lengthy procedure of getting an offender released on licence. Thus, at the time of this research, one of the parole officers worked as a probation officer.

Second, the *Probation of Offenders Ordinance 1960/Rules 1961* is the main probation law in Pakistan. The law allows offenders released by the courts to be supervised by probation officers in the community. The main duties of probation officers are to 'advise, assist and befriend' offenders placed under their supervision as well as help them to be reintegrated back into their respective communities. At the time of this research, there were 13 probation officers working with offenders on probation. They were located in the 11 regional offices that cover the 24 districts of the NWFP (see Table 3.6)

Third, the *Juvenile Justice System Ordinance 2000/Rules 2001* introduced by the military government of General Pervez Mushraf, in 2001. This law simply extended the duties of probation officers to juvenile offenders. This is a radical departure from the inherited British system. In Britain, probation officers do not deal with juvenile cases. There is a separate youth justice system and young offenders are dealt with by specially trained youth offending team officers. In NWFP, probation officers do not receive special training on how to deal with young offenders. There is no additional financial or administrative setup to support work with young offenders. No additional staff has been provided to deal with juvenile offenders. The probation officers who deal with adult cases also deal with the juveniles. It was not possible to collect data on juveniles offenders on probation because the probation officers do not keep separate records on juveniles offenders placed on probation. All records on offenders are kept together. Thus, as mentioned above, this research could only deal with adult offenders because of the difficulties that would be encountered in separating adult cases from those of juveniles. More importantly, adding juvenile cases to the sample of offenders under study would raise different and possibly more complicated issues.

3.5.3 The Structure of the RPD

The *Probation of Offender Ordinance 1960/Rules 1961* authorized provincial governments to appoint the following staff to carry out probation work within the RPD in their respective provinces. These posts include:

1. The Officer-in-Charge (The Director) RPD, (section 2.c)

2. The Assistant Director (rule 2.a)
3. The Chief Probation Officer (rule 5.1)
4. The Probation Officer section 2.d)

a) *Officer-in-Charge (The Director)*

The Director or ‘officer-in-charge’ is the head of the RPD in the province (see Rule 2(c) of *Good Conduct Prisoners Probation Release Act 1927* and rule 3(1) of *Probation of Offenders Rules 1961*). The main responsibilities of the Director include overall control, supervision, and direction of all activities of the RPD that are related to probation, parole and juvenile justice. As already mentioned, at the time of this research, the Inspector General of Prisons was also the Director of RPD in NWFP.

b) *The Assistant Director*

According to rule 4.1 of the Probation Rules 1961, the Director shall appoint the Assistant Directors who shall be responsible for managing the activities of a particular ‘probation area’ under his control (rule 2.f). Furthermore, as defined under rule 2(a) of Probation Rules 1961 the Assistant Director is to assist the Director in the general administration of the RPD. Specifically, the Assistant Director is responsible for supervising, inspecting, and monitoring the work of the probation officers working in his probation area. He is expected to work in close liaison with the case committee (see rule 16 for details) on matters related to probation (see rule 3) and to authorise the release of offenders on parole. In the practical sense, the Assistant Director is expected to be the immediate line manager to probation officers in the districts under his control. However, as has been explained earlier, the posts of RPD Assistant Directors (seven in number) were abolished in NWFP in 2001 as a

result of the government's downsizing policy. Instead, the post of a single Deputy Director was created to take over the responsibility of Assistant Directors.

c) Chief Probation Officers

Rule 5.2 allowed for the appointment of a Chief Probation Officer who should be responsible for looking after the probation work in a particular district or any such area entrusted to him by the Director of the RPD in the province (see rule 5.2). The Director RPD is empowered to appoint as many Chief Probation Officers as are sanctioned by the provincial government. The Chief Probation Officer should be responsible for supervising and distributing probation work among probation officers working under his control (see rule 5.3). At the time of this research, there were no Chief Probation officers in the RPD, NWFP. With the abolition of the post of Assistant Director and the non-existence of Chief Probation Officers, the immediate line manager of probation officers, as discussed above, is the Deputy Director stationed in the provincial capital, Peshawar.

d) Probation Officers

Probation officers are appointed by the RPD Director (see section 12.1 and rule 6 of the probation ordinance). Probation officers are expected to perform their duties as directed by the Director to whom they are also accountable. There are certain limitations on the person eligible to be appointed as a probation officer. The age limit for a first appointment as a probation officer is fixed at a minimum of 23 years and a maximum of 45 years. The qualification required for the post of a probation officer is a minimum of a university undergraduate degree. The applicant is expected to have a sound personality and be of good

character. In addition, the applicant should have a ‘working knowledge or practical experience of social work’ (see rule 7).

The total staff of the RPD, NWFP Pakistan at the time of this research comprised 44 individuals who work in the 24 districts of the province. These include the Director, the Deputy Director, the Probation and Parole Officers, and support staff. The RPD has 11 regional offices throughout the province where 13 Probation Officers and 2 Parole Officers work along with their support staff.⁷

⁷ One of the Parole Officers was also working as a probation officer at the time of this research.

Table 3.1 Staff Working in Different Offices of the RPD, NWFP

S/ No	Regional Offices	Director	Deputy Director	Probation officers	Parole Officers	Stenographer	Admin. Assistant	Senior clerk	Junior Clerk	Driver	Naib Qasid ⁸	Chowkidar ⁹	Total
1	Head Office	1	1	-	-	1	2	1	2	1	2	1	12
2	Peshawar	-	-	2	1	-	-	-	-	-	1	-	4
3	Charsadda	-	-	1	-	-	-	-	-	-	1	-	2
4	Mardan	-	-	2	-	-	-	-	1	-	2	-	5
5	Swabi	-	-	1	-	-	-	-	-	-	1	-	2
6	Abbottabad	-	-	1	-	-	-	-	1	-	1	-	3
7	Manshera	-	-	1	-	-	-	-	-	-	1	-	2
8	Swat	-	-	1	-	-	-	-	1	-	1	-	3
9	Dir (Upper)	-	-	1	-	-	-	-	-	-	1	-	2
10	Kohat	-	-	1	-	-	-	-	1	-	1	-	3
11	Bannu	-	-	1	-	-	-	-	-	-	1	-	2
12	D.I.Khan	-	-	1	1	-	-	1	-	-	1	-	4
Total		1	1	13	2	1	2	2	6	1	14	1	44

⁸ Naib Qasid means Personal Assistant

⁹ Chowkidar means Watch Man

Diagram 3.1 Organizational structure of the RPD, NWFP

Inspector General of Prisons NWFP

Director RPD, NWFP

Head Office

Deputy Director	=	1
Administrative Assistants	=	2
Stenographer	=	1
Senior Clerk	=	1
Junior Clerk	=	2
Driver	=	1
Naib Qasid / Chowkider	=	3

Regional Offices of RPD at District level

Peshawar	Dera Ismail Khan	Bannu	Kohat	Mardan	Swabi
Probation Officer (2)	Probation Officer (1)	Probation Officer (1)	Probation Officer (1)	Probation Officer (2)	Probation Officer (1)
Parole Officer (1)	Parole Officer (1)	Naib Qasid (1)	Junior Clerk (1)	Junior Clerk (1)	Naib Qasid (1)
Naib Qasid (1)	Senior Clerk (1)		Naib Qasid (1)	Naib Qasid (2)	
	Naib Qasid (1)				
Charsadda	Swat	Upper Dir	Abbottabad	Mansehra	
Probation Officer (1)	Probation Officer (1)	Probation Officer (1)	Probation Officer (1)	Probation Officer (1)	
Naib Qasid (1)	Junior Clerk (1)	Naib Qasid (1)	Junior Clerk (1)	Naib Qasid (1)	
	Naib Qasid (1)		Naib Qasid (1)		

3.6 Salient Features of Probation Legislation

This section highlights the important features of the probation legislation in Pakistan. It explains the scope of the probation law and the procedure that the courts adopt in the process of making a probation order. It also discusses how offenders are supervised and the procedures in case of failure by an offender to observe the conditions of probation order.

3.6.1 Scope of the Probation of Offenders Ordinance 1960

In practice, the scope of the Pakistan Probation of Offenders Ordinance of 1960 is limited. Firstly, probation is not a punishment for all types of offences. The law enjoins the courts to be guided by the personal characteristics and the needs of the offender as well as the type of offence committed. Section 5 of Probation of Offenders Ordinance 1960 makes this quite clear as it permits a court to make a probation order only if it is of the opinion that such a course is expedient “having regard to the circumstances including the nature of the offence and the character of the offender”. This clearly points to the fact that probation is an exceptional course, a concession to be justified by the particular facts of a case. According to section 5, probation cannot be insisted on, nor can it be demanded as a right. Even where the above legal conditions are present, the court has the discretion to choose other forms of punishment instead of probation.

Secondly, although the probation law is applicable to both males and females and to offenders of all age groups, the law is more lenient towards female offenders than male offenders. The probation law is not applicable to male offenders convicted of grave offences punishable by death or life imprisonment. In addition, male offenders are not eligible for probation order if found guilty of heinous crimes as described in the Pakistan Penal Code of 1860 under the following sections:

- 216-A - harbouring robbers or dacoits,
- 311 - being a thug,
- 328 - causing hurt by means of poison etc, with intent to commit an offence,
- 346 - kidnapping or abducting in order to murder,
- 382 - theft after preparation made for causing death, hurt or restraint in order to commit the theft,
- 386-389 - putting a person in fear of injury or death in order to commit extortion, etc,
- 392-402 - commitment of robbery, dacoity or belonging to a gang of thieves, etc.,
- 413 - habitual dealing in stolen property,
- 455 - house-trespass or house-breaking after preparation for hurt or assault, etc.,
- 460 - where several persons are jointly concerned in house-trespass or house-breaking by night and death or grievous hurt was caused by one of them
- Chapter VI - offences against the state,
- Chapter VII - offences relating to the Army, Navy and Air Force,
- Offence of Zina Ordinance 1979 – offences of rape, adultery and fornication
- Offence of Qazf Ordinance 1979 - offence of false accusation of zina (rape)

In contrast, female offenders are eligible for a probation order in all offences except offences punishable by the death penalty. It is important to mention, however, that offences of a grave or heinous type are rarely committed by women in Pakistan. The courts have discretion to decide which punishments are appropriate for a female offender (see section 5b).

The probation ordinance (1960) does not contain a list of offences for which a court could grant a probation order. The law is, in essence, a procedural law, guiding the courts on sentencing. The offences for which the courts in NWFP made probation orders between 2000 and 2004 are listed in Appendix A. This information was obtained from the records of all regional offices of the RPD in NWFP. However, during the course of this research, offenders interviewed (60) were on probation for five main offences: possession of unlicensed or illegal arms (The Arms Act, 1878); possession and trafficking in narcotics (Control of Narcotic Substance Act, 1997); unnatural offences (homosexuality); possession of counterfeit banknotes (Pakistan Penal Code, 1860); and drinking alcohol (Prohibition Order, 1979).

3.6.2 Courts Empowered to Deal with Probation Cases

The judicial system of Pakistan is divided into two hierarchies of courts: the Supreme Judiciary and the Subordinate/District Judiciary.

The Supreme Judiciary

The Supreme Judiciary consists of the Supreme Court, the High Courts, Federal Shariat Court and Supreme Judicial Council. The Supreme Court is the apex court in the judicial hierarchy of Pakistan. It is the court of ultimate appeal and therefore final arbiter of law and the Constitution. Its decisions are binding on all other courts (Article 189). The Court exercises original jurisdiction in inter-governmental disputes (Article 184 (1)), be that dispute between the Federal Government and a provincial government or among provincial governments. The Court also exercises original jurisdiction (concurrently with High Courts) for the enforcement of fundamental rights, where a question of public importance is involved (Article 184 (3)). In addition, the Court has appellate jurisdiction in civil and criminal matters

(Article 185). Furthermore, the Court has advisory jurisdiction in giving opinion to the Government on questions of law (Article 185).

There is a High Court in each province of Pakistan headed by a Chief Justice. The Court exercises original jurisdiction in the enforcement of fundamental rights and appellate jurisdiction in judgments/orders of the subordinate courts in civil and criminal matters. The High Court supervises and controls all the district courts subordinate to it (Article 203). It appoints its own staff (Article 208) and frames rules of procedure for itself as well as courts subordinate to it (Article 202).

The Federal Shariat Court consists of eight Muslim Judges including the Chief Justice (Khan and Shah, 2003). Of the eight Judges, three are required to be *Ulema* who are well versed in Islamic law. The Judges hold office for a period of three years and the President may further extend such period (Article 203-C). The Court, on its own motion or through petition by a citizen or a government (Federal or provincial), may examine and determine as to whether or not a certain provision of law is repugnant to the Injunctions of Islam (Article 203-D). Appeal against its decision lies to the Shariat Appellate Bench of the Supreme Court, consisting of three Muslim Judges of the Supreme Court and not more than two *Ulema*, appointed by the President of Pakistan (Article 203-F). If a certain provision of law is declared to be repugnant to the Injunctions of Islam, the Government is required to take necessary steps to amend the law so as to bring it in conformity with the injunctions of Islam.

The Supreme Judicial Council consists of the Chief Justice of Pakistan, two senior judges of the Supreme Court and two senior chief justices of High Courts. The President of Pakistan may ask the Supreme Judicial Council to inquire into matters relating to the operation of the

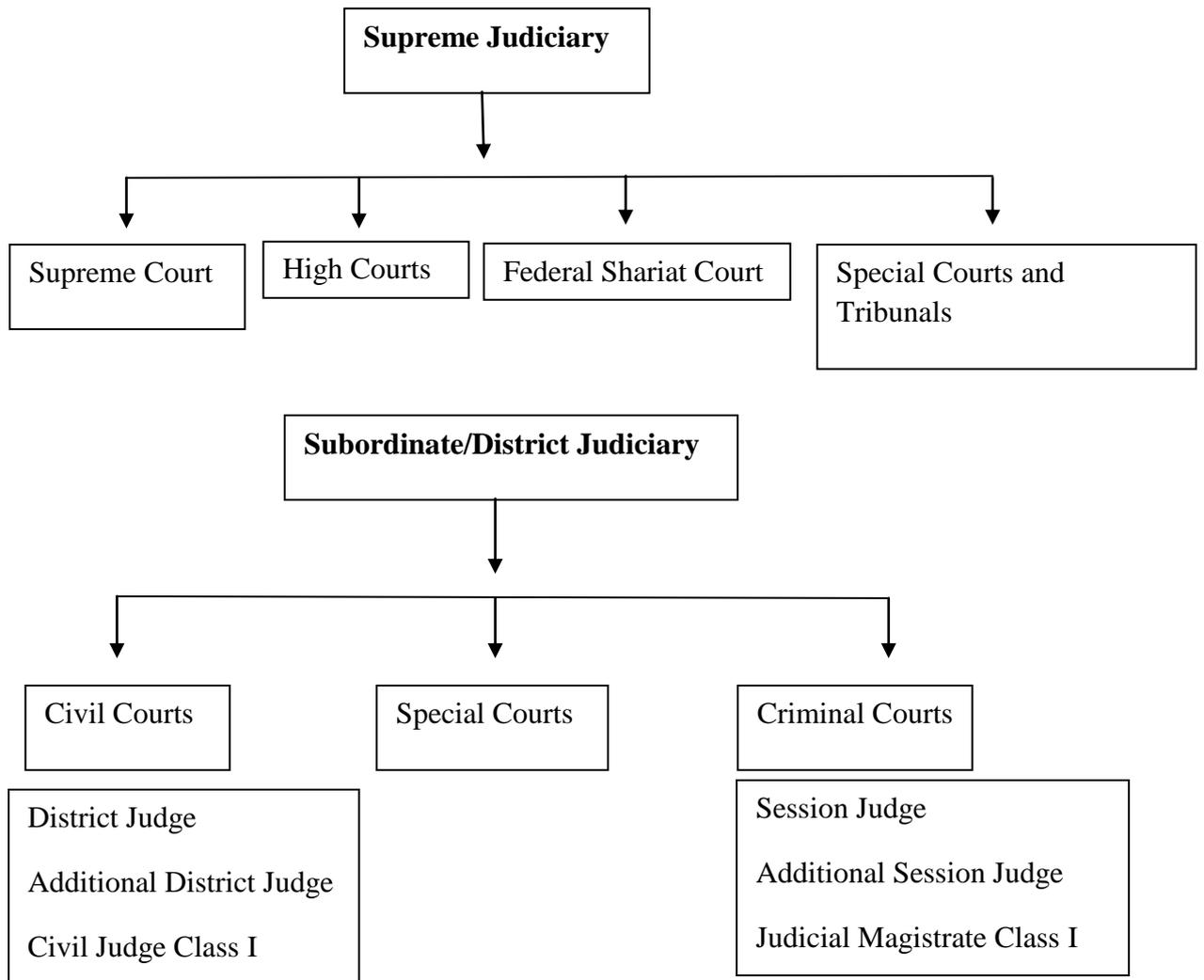
judicial system such as whether or not a judge is capable of performing his duties or is guilty of any misconduct (Khan and Shah, 2003:5).

The Subordinate or District Judiciary

The subordinate or district judiciary operates at the district level. The District Judiciary consists of two arms, namely, the civil courts, established under the West Pakistan Civil Court Ordinance of 1962 and the criminal courts, created under the Criminal Procedure Code of 1898. There are a number of other courts and tribunals of civil and criminal nature which were created under special laws and enactments and whose jurisdiction, powers, and functions are specified in the statutes that created them. The decisions of the district judiciary and other lower courts could be challenged before the superior judiciary such as the High Court or the Supreme Court through a revision or appeal.

The appointment of civil and criminal judges is the responsibility of the provincial governments. However, the High Court in each province exercises administrative control over such courts. The civil courts consist of District Judges, Additional District Judges and Civil Judges Classes I, II, and III. Similarly, the criminal courts comprise Session Judges, Additional Session Judges and Judicial Magistrate Classes I, II and III.

Diagram 3.2 Organization of Judicial Hierarchy in Pakistan



Under the probation law, the following courts are empowered to place offenders on probation:

- High Court
- Sessions Court
- Judicial Magistrates Class I
- Any other magistrate specially empowered on this behalf

However, it is in the criminal courts in the subordinate/district judiciary that the majority of probation orders are granted. This is simply because the majority of cases for which offenders are eligible for a probation order are not offences that are serious enough to be tried in higher courts. However, not all lower courts can impose a sentence of probation. Only courts with the power to impose a sentence of up to three years imprisonment are empowered to impose a probation sentence. Thus, only session judges, additional session judges and judicial magistrates Class I have the power to impose a probation order, whereas judicial magistrates of Classes II and III do not have the power to do so. This is because a judicial magistrate Class –II has a sentencing limit of one year imprisonment while a judicial magistrate of Class – III has a sentencing limit of up to one month.

The trial

Criminal trials before judicial magistrate are covered by sections 241, 241A, and 249 of CrPC 1898. Under section 241A, the accused person shall be given copies of the case/documents against him seven days prior to the commencement of the trial. The court under section 242 explains the criminal charges against the accused and asks whether he/she pleads guilty or claim trial. If the accused pleads guilty, the court may sentence the accused under section 243 on the basis of the facts of the case. However, if the accused claims trial, the magistrate may orders the complainant party (prosecution) and accused party (defence) to

produce their witnesses to argue the case. The court decides the case on the basis of the evidence and witnesses that are produced from both the prosecution and defence. The court may sentence the accused person if found guilty or acquit him if found innocent. The court is guided under section 245(1) to acquit the accused person if the evidence produced is not enough. Conviction is made under section 245(2) keeping in view the nature of the case.

The defendant can appeal against any decision of the court including the decision to grant a probation order instead of other sentencing options. Application can be made to the appellate court or a court sitting in revision against the decision of the court in which offender has been granted a probation order. Such court may set aside or amend the order made. However, such court shall not impose a punishment greater than the punishment against which the appeal was originally made.

3.6.3 The Role of Probation Officer in the Court Decision Making Process

The probation law has provided provisions for the role of the probation officer before a probation order is made by the courts. In this regard, the courts, under rule 18 (1) of probation rules may ask a probation officer to prepare and submit a preliminary enquiry report about the accused person. This report is expected to focus on the nature and circumstance of the offence, the character of the accused, the antecedents, home surroundings and any other matters related to the commission of the offence. It is up to the court to fix a time period for the submission of this report. Generally, a probation officer, if ordered by the court, is expected to submit a preliminary enquiry report not less than 7 days and not more than 15 days from the date that the request was made by the court. However, the time period for the

submission of an enquiry report can be extended either at the request of the probation officer or by the court itself (See Rule 18 (2)).

A preliminary enquiry report is expected to present enough evidence to the courts to support granting the offender a probation order. However, the decision whether to place an offender on probation or impose a different sentence is entirely up to the courts. If a court is convinced that the person qualifies to be placed on probation, it shall make a probation order accordingly. However, it was discovered during the course of this research that the requirement that probation officers' reports should be presented to aid sentencing was generally ignored by the judicial magistrates in NWFP. Of all the 60 cases observed, it was only on one occasion that a probation officer presented a report on an offender to the court. In that particular case, the magistrate simply disagreed with the report and, instead, imposed a fine on the offender. The general practice in NWFP at the time of this research was that the decisions on sentences were based exclusively on the discretion of magistrates. Probation officers did not play any role in this process (see chapter 7).

3.6.4 The Making of a Probation Order

Where a court is about to grant a probation order to an offender, the usual procedure is to order the probation officer(s) working within the jurisdiction of the court to attend court. However, where a probation officer is unavailable on the day of sentence, the court could grant a probation order in their absence and where a probation officer is in attendance, the court 'shall entrust the offender to the charge of the probation officer for the period as specified in the probation order' (rule 22.1). Where a court makes a probation order in the absence of the probation officer, it shall send a notice to the probation officer to attend the

court on a specified date to take charge of the offender. In the meantime, the court may keep the offender in custody or release him on bail with or without sureties as the court may decide keeping in view the nature and circumstances of the case (rule 22.2).

3.6.5 The Probation Order

If the court is satisfied and is of the opinion that probation is the appropriate punishment, it would grant a probation order under section 5 of Probation of Offender Ordinance 1960. Under rule 20, it shall make such order in *Form D*. The minimum and maximum periods for a probation order are fixed as one year and three years respectively. The court may place an offender on probation for a period within this limit (section 5).

The court making a probation order shall furnish a copy of the probation order to the Director RPD, the probation officer, the probationer for whom the order is being made and his sureties. The court may communicate any other document related to the probationer's case to the probation officer if the court deems it fit to do so. A copy of the probation order is presented to the probationer and his sureties free of charge (rule 21).

The offenders placed on probation and their sureties must enter into a bond. The bond should be made in *Form C* (rule 19). The amount in the bond is subject to the discretion of the court. The usual amount is of Rs. 50000/- per surety, to be paid to the government exchequer in case the probationer violates the conditions of their probation order.

Under section 9 of the probation law, the court has the right to allow or prevent any surety/sureties from signing the bond for an offender. The legal provisions relating to sureties are contained in the following sections of the Pakistan Penal Code of 1860:

- 122 – power of court to reject surety/sureties,
- 406-A – Appeal against rejecting surety under section 122,
- 514-A – Procedure in case of insolvency or death of surety or when a bond is forfeited),
- 514-B – Bond required from young offenders and his surety/sureties,
- 515 – Appeal from and revision of orders under section 514; and
- 514 – Procedure on forfeiture of bond.

The court expects the surety to be a respectable, responsible and law abiding citizen. He should have enough understanding and knowledge of the offender with whom he is signing the bond. The court also expects the surety/sureties to make sure that the offender abides by all the conditions of the probation order.

3.6.6 Conditions of Probation Order

Under section 5 of Probation of Offenders Ordinance 1960, the court must impose conditions or restrictions on the person being placed on probation. Generally, these conditions include

- Not to commit an offence
- To keep the peace
- To be of good behaviour
- To observe other conditions that may be considered necessary for his supervision, treatment and rehabilitation, and
- To appear and receive sentence if called upon to do so during the period of the bond (see Probation and Parole Guide, 1986:3)

These conditions are listed in the bond signed by the probationer and his sureties. It is the duty of the court and the probation officer to inform the offender about all the conditions associated with their probation order. The probation law further requires the court to be sure of the residence of the person for whom it is going to make the probation order or one of his sureties at least. The court should not issue a probation order if it is not satisfied about the place of abode of the offender or of his sureties. According to section 5 of the probation ordinance, a court shall not make a probation order unless it is satisfied that:

The offender or one of his sureties, if any, has a fixed place of abode or a regular occupation within the local limits of its jurisdiction and is likely to continue in such place of abode or such occupation, during the period of the bond (section 5)

The Probation Ordinance made a provision for the payment of costs or compensation to the victim. Where there is an aggrieved party, the court may order the person for whom probation order is being made to pay the cost of loss or injury to the victim associated with the offence. The court may fix a reasonable compensation as it may decide along with making a probation order.

3.6.7 Probationers Profile (2000-2004)

This section covers some of the basic information about probationers in NWFP obtained from the records of the RPD. Tables 3.2 – 3.5 give us a picture of the background of offenders who were granted probation orders for the first time in 2000 – 2004, their age, education, profession, and the period of their probation order. Table 3.6 gives the cumulative number of all offenders on probation (both current and new) in the 24 districts that make up the NWFP in 2000 – 2004.

Table 3.2 Age Groups of Probationers

S. No	Age Groups	2000	2001	2002	2003	2004
1.	10 - 18	103	44	69	96	128
2.	19 - 25	382	244	256	217	287
3.	26 - 35	467	323	306	233	295
4.	36 - 45	227	153	192	112	183
5.	46 - 55	131	102	94	89	111
6.	56 - 65	71	39	39	54	39
7.	66 and Above	21	19	21	18	16
Total		1402	924	977	819	1059

Table 3.3 Educational Level of Probationers

S. No	Educational Level	2000	2001	2002	2003	2004
1.	Illiterate	915	589	593	461	711
2.	Primary	261	159	169	177	138
3.	Middle	93	81	92	88	107
4.	Matric	100	72	86	68	79
5.	Intermediate	18	13	21	14	6
6.	Graduation	4	5	9	5	5
7.	Masters	2	1	3	-	-
8.	Tech: Education	9	4	4	6	13
Total		1402	924	977	819	1059

Table 3.4 Occupation of Probationers

S. No	Occupation	2000	2001	2002	2003	2004
1.	Agriculture	652	364	309	248	278
2.	Govt. Servant	32	10	25	22	11
3.	Private Servant	59	52	37	42	43
4.	Student	32	33	39	31	28
5.	Shopkeeper	76	67	57	57	133
6.	Labourer	383	321	361	273	411
7.	Miscellaneous	148	72	127	120	126
8.	Unemployed	20	5	22	26	21
Total		1402	924	977	819	1059

Table 3.5 Probation Period of Probationers

S. No	Probation Period	2000	2001	2002	2003	2004
1.	1 year	393	165	321	264	587
2.	1 ½ year	13	29	20	22	2
3.	2 years	166	157	132	109	83
4.	2 ½ years	1	-	1	9	-
5.	3 years	829	573	503	415	387
Total		1402	924	977	819	1059

Table 3.6 Cumulative Strength of Probationers (2000-2004)

S. No	Name of Districts	2000	2001	2002	2003	2004
1.	Dera Ismail Khan	291	230	194	128	83
2.	Tank		97	52	38	44
3.	Bannu	685	521	504	495	495
4.	Lakki	113	125	122	97	59
5.	Karak	270	6	17	27	19
6.	Kohat		129	102	78	49
7.	Hangu		206	192	104	58
8.	Peshawar	406	479	544	384	666
9.	Nowshera	129	114	91	60	45
10.	Charsadda	212	322	467	365	306
11.	Mardan	281	274	281	256	300
12.	Swabi	114	56	43	74	96
13.	Abbottabad /Haripur	6	10	68	114	89
14.	Mansehra/Batagram/Kohestan	36	30	53	78	71
15.	Swat/Shangla/Bunir	128	135	160	150	119
16.	Malakand/Lower Dir	197	143	89	67	100
17.	Upper Dir/Chitral	DNA*	13	18	17	24
Total		2868	2890	2997	2532	2632

* Data not available

3.6.8 Supervision and Rehabilitation of Offenders

Immediately after the offender is released by the courts to the charge of a probation officer, the probation officer must explain the conditions of the probation order to the probationer in simple language that the probationer understands. The primary role of a probation officer is to make sure that the probationer fulfils the conditions of the probation order (see section 13.b and rule 10.a). In addition, the probation officer is to help and advise the probationer on how to live a law-abiding lifestyle. According to sections 10c and 13d of the Probation law, a probation officer is to ‘assist, befriend, advise and strive to improve his conduct and general conditions of living’. The probation officer is expected to make enquires of the probationer’s conduct, mode of life, and living environment (section 13.a and rule 10.b). If a probationer is unemployed, it is the duty of the probation officer to try to find suitable employment for the probationer.

Most importantly, a probation officer is expected to disseminate information about available social welfare facilities provided by the government or voluntary organizations in the community to the probationers under his supervision and encourage them to make use of these facilities in order to improve their well-being and rehabilitation (see rule 10.d). The RPD in NWFP does not offer offenders programmes. Supervision is mainly in the form of visits. Probationers are expected to visit their probation officers at least once in a fortnight during the first two months of their probation order. After two months, it is up to the probation officer to fix the time and frequency of attendance of his probationers. The probation officer should, however, keep record of the progress made by every probationer under his supervision.

As regards female probationers, rule 22(3) of Probation of Offenders Rules 1961 says that ‘no female offender shall be placed under the supervision of a male probation officer’. This reflects the cultural setup of the country whereby the free mixing of male and female is strictly prohibited. Unfortunately, there was no female probation officer working with RPD, NWFP at the time of this research. This has no doubt created problems to the extent that female offenders who could have been placed on probation may, instead, be sent to prison or given alternative punishments due to the absence of female probation officers to supervise them (Daily Express, 22/3/2005). However, a judicial magistrate could make an exception to the rule and allow a female probationer to be supervised by a male probation officer where the court is of the opinion that probation is the best sentencing option for the offender. During the course of this research, there was one female offender on probation. It could be argued that for this offender, the need for her to get help and be rehabilitated was considered more important by the court than the cultural ‘rules’ entrenched in the probation law

3.6.9 Procedure in Case of Breach Cases

In the case of a probationer failing to observe the conditions of the bond, the probation officer without any delay must inform his immediate superior, the Deputy Director who should make inquiries into the case. The Deputy Director should investigate the reasons for the breach. He would thereafter forward the report of the probation officer with his own remarks to the court that originally made the probation order (rule 24). Where the court agrees that a probationer has failed to observe any of the conditions of his bond, the court has two options:

- a) issue a warrant for the arrest of the probationer by the police or
- b) issue summons to the offender and his sureties to appear before the court at a time specified in the summons (see section 7.1).

Where the offender appears before the court, the court has again two options:

- a) to remand the probationer in custody until the case is heard; or
- b) release the probationer on bail with or without sureties and order him to appear before the court on a fixed date of hearing (see section 7.2).

After hearing the case, if the court believes that the probationer is responsible for the breach of any of the conditions of the bond mentioned in the probation order, the court can:

- a) imprison the offender for the original sentence; or
- b) let the probationer continue his bond and impose a fine not exceeding Rs. 1000.

If the probationer fails to pay the amount of fine imposed upon him under section 7(3b), the court may impose a prison sentence on the offender (see section 7.4). Section 5(3) of Probation of Offender Ordinance 1960 says that when an offender is sentenced for the offence in respect of which a probation order was made “that probation order shall cease to have effect” (see section 5.3).

3.6.10 Monitoring the Work of Probation Officers

The probation law requires that probation officers be monitored. For this purpose, the law provides that a ‘case committee’ be set up in every district. The case committee should include the following members:

- The District Magistrate (Chair)
- All First Class Magistrates in the District; and
- The Assistant Director in charge of the district or another officer of the RPD, not below the rank of a Chief Probation Officer

The committee is expected to oversee the work of probation officers and the probation service in each district. The Chair of the committee is expected to forward an annual report of probation work in their respective district to the Director of the RPD before 31 March of every year (see rule 25). However as already mentioned, there are no Assistant Directors or Chief Probation officers in the RPD of NWFP. So, in essence, there are no monitoring case committees in NWFP. In short, the probation officers in the province are not monitored either internally or by any external (national or independent) body.

3.7 Summary

The probation service in Pakistan is in its fifth decade. Since its establishment, the RPD has made significant progress in its work in Pakistan and in the NWFP. During 2000-2004, on average, 2000-2500 offenders were placed under the supervision of Probation or Parole officers working with the RPD, NWFP.

It is important to mention that the probation system was introduced in Pakistan at a time when Britain was in its second phase of probation development. Therefore, most of the characteristics of the current probation system in Pakistan more closely resemble the second phase of probation development in Britain. Probation officers in NWFP and Pakistan are not volunteers. The probation service in Pakistan is a professional service. Probation officers are paid public servants working in established probation departments, with a philosophy of punishment that is centred on helping offenders to address their offending behaviour and rehabilitation. However, unlike Britain where probation has transformed into a law enforcement agency, the probation system in Pakistan has remained as a social work activity based on the principles of ‘advice, assist, and befriend’.

It will be argued in this thesis that the problem of the probation service in Pakistan could be said to be similar to those experienced in Britain during the second phase (1907 – 1967). To repeat the words of Leeson in 1914, the problems result from defects of administration, rather than of principle or are ‘administrative rather than ideological’ (McWilliams, 1985:271); unsuitable appointment of probation officers in respect of their education and training; the selection of unsuitable cases; the making of a probation order with very little information about the offenders and the lack of facilities to facilitate the resettlement or rehabilitation of the offenders on probation.

Probation in its true sense is yet to be recognized as a fundamental institution for crime control and for reformation of offenders in Pakistan and in the NWFP. So far, no major step has been taken by any government in Pakistan to improve the outdated colonial legislation and to improve the quality of work of the RPD. This clearly shows the lack of interest on the part of the government towards probation and the RPD. Political instability, frequent takeover of government by the army and appointment of serving army generals in civil departments has badly affected the institutional development in the country and RPD is one of them.

Chapter 4

The Research Methodology

4.1 Introduction

In Chapter 1, I examined the concept of punishment. That chapter set the background to this thesis. In Chapter 2, I discussed the concept of probation, using Britain as a framework for the discussion of how the idea has evolved since the 19th century. Chapter 3 looked at the development of the probation system in Pakistan generally and the NWFP in particular. This chapter (Chapter 4) will discuss the methods that were used for carrying out the empirical part of the research. It will explain how these methods were selected, the way the research was carried out, the reasons for adopting the different techniques of data collection employed and how the information was used. In the following chapters (Chapters 5, 6 and 7), I shall discuss the findings of the research.

4.2 Research Aims

Research is the process of locating and evaluating information. Central to the research process is the formulation of research aims and objectives. These provide the researcher with a direction and framework for the research in the field (see Francis, 2000). Research aims are the targets a researcher wants to achieve by the end of the research journey. Therefore careful consideration is required during the formulation stage, otherwise, the study could mislead the researcher and the research findings as well (Punch, 1998).

The aim of this study is to explain the operation of the probation service in North West Frontier Province, Pakistan. The study seeks to address the following research questions:

1. What philosophy of punishment, if any, guides the use of probation orders in NWFP Pakistan?
2. What input do probation officers have in the court decision-making process?
3. Who gets a probation order and why?
4. What does probation supervision entail in NWFP Pakistan?
5. Is the probation system in the province effective in rehabilitating offenders and re-integrating them back into their communities?
6. What does being on probation mean for the offenders themselves?
7. How are breach cases dealt with?
8. What are the reasons, political, historical, legal or social, why probation in NWFP Pakistan has taken the form that it does take?

The study sought to achieve these goals through an analysis of

- (a) the perspectives and experiences of all those involved in the probation system, including the judicial magistrates who grant the orders and the probation officers who have to execute them.
- (b) the views and concerns of these respondents on the ability of the probation service to rehabilitate offenders and re-integrate them back into their communities.
- (c) the views, experiences and problems faced by the probationers themselves during the course of their sentence.
- (d) cases where offenders have breached their orders, their reasons for doing so and the attitudes of the judicial magistrates and the probation service to breach cases.

4.3 Research Design and Process

One of the most difficult parts of doing research is to get started. The two major questions that seem most troublesome are:

- a) How do I find a *researchable problem*?
- b) How do I *narrow* it down sufficiently to make it workable? (Strauss and Corbin, 1990:33)

Cooper (2001) argued that good social research involves more than the identification of an important topic along with the selection and competent use of suitable methods. There are three major steps in social research: the construction of theory, the collection of data, and no less important, the design of methods for gathering data. All of them have to be right if the research is to yield interesting results (Peil, Mitchell and Rimmer, 1982; Gilbert, 2001). Research design, according to Kerlinger (1973) is:

A plan, an outline and scheme which elaborates what the investigator will do from formulating the hypotheses to the analysis of data (Kerlinger, 1973:300-1)

At the designing stage of this study, I took great care in the selection and utilization of those ways and means that could meet the requirement of this study. I was aware of the difficulties and technicality of the designing stage, which according to Punch (1998) requires more care, for otherwise it can jeopardise the results of the study. According to Punch (1998):

At the centre of the concept of the design of a study is its logic or rationale - the reasoning, or the set of ideas by which the study intends to proceed in order to answer its research questions (Punch, 1998:66).

This study was therefore carefully designed taking into consideration the nature and dimensions of the problem under study and the appropriate methods that would be adopted and utilized in order to meet the stated research aim. The decision to undertake research on probation in North West Frontier Province of Pakistan has already been explained at the beginning of the thesis (see Introduction). However, it is important to mention that the selection of the topic was not an easy task. No research has been conducted on the probation system in NWFP, Pakistan. This is unlike in many western and developed countries where research on probation is widespread. The probation system in Pakistan is structured on the British model, which prides itself in the focus that is given to the rehabilitation and resettlement of offenders, crime control and public protection. Thus, this study is designed to see whether the probation system in the NWFP is achieving its similarly stated objectives of rehabilitating offenders and re-integrating them back into their communities.

After the selection of the topic, the next step was the selection of the study area. The decision to undertake this study in the NWFP is due to the familiarity of the study area, feasibility and costs. Furthermore, I am a resident of the province. After deciding on the study area, the next stage was the selection of the subjects of study. Many studies on probation have looked at the performance of the system from the perspectives of the offenders themselves (see for example, Calverley et al, 2004) or that of the practitioners. This study is perhaps one of the very few that looked at probation from the perspectives of all that are involved in the executing of a probation order including the judicial magistrates who issue the probation orders, the probation officers who enforce the order and the probationers who are the beneficiaries of the order. It is believed that this approach would present a comprehensive picture of how the probation system works in NWFP Pakistan.

After deciding on the study area and the subjects of the study, the next step was how to collect relevant data.

4.4 Research Strategy

Every research has its own strategy, which varies according to the nature of the study (Punch, 1998). The research strategy employed in this study is based on *triangulation*. Triangulation can be defined simply as ‘the use of different methods of research, sources of data or types of data to address the same research question’ (Jupp, 2001:308). It is quite common in social sciences that researchers use multi-methods whereby along with the main method of choice, other subsidiary methods are also used to collect as much information as possible (Maguire, 2000; King, 2000). The advantage of triangulation is to reduce any drawbacks in using a single method of data collection.

The decision to employ a specific research strategy was not easy as various research methods have their own merits and demerits. I was interested in capturing the views of the research participants as well as acquiring knowledge about the sentencing and supervision processes. Obviously, not all these could be achieved by using a single research method. Therefore, I decided on using various methods selected on the basis of their suitability for answering the research questions. I used mainly qualitative methods but in the analysis of data, some quantification was done. Maguire (2000) advocated the use of diverse research methods especially in criminological researches and argued that these will counterbalance any bias present in individual methods or sources and will produce more reliable and accurate information.

4.5 Tools for Data Collection

The methods of data collection used in this study include:

1. In-depth semi-structured interviews
2. Documentary Data (including official statistics obtained from the probation offices and the Director and Deputy Directors' offices)
3. Observation and Field Notes

Thus, I was able to obtain as near a comprehensive picture as possible of how the probation system works in the province from the combination of information obtained from the interviews with respondents, the case files of the RPD and my own observation field notes.

4.5.1 In-depth Semi-Structured Interviews

An interview is a verbal interchange in which an interviewer tries to elicit information, beliefs or opinions from respondents (Moser and Kalton, 1971; Fielding, 1993). According to Rossman and Fallis (1998):

Interviewing takes you into the participants' worlds, at least as far as they can (or choose to) verbally relate what is in their minds (Rossman and Fallis, 1998:124).

Interviewing is the most widely used method of research. It varies from 'highly structured, standardized, quantitatively oriented survey interviews, to semi-formal guided conversations and free-flowing informational exchanges' (Holstein and Gubrium, 1997:113). Payne and Payne (2004:131-32) classify interviews into two categories: 'semi-structured' and 'unstructured' interviews'. *Semi-structured (or focused) interviews*, on the one hand, are based on a small number of open-ended questions, the answers to which are actively and freely probed by the interviewer for elaboration. Often, a sub-set of topics is listed, to help

the interviewer concentrate on the main issues. *Unstructured (or non-directive) interviews*, on the other hand, have no pre-defined questions and no ordering of topics. Instead, topics are simply listed as *aide memories*; the aim being to enable respondents give their accounts of experiences, opinions, and feelings in their own way (Payne and Payne, 2004).

In this research study, three separate semi-structured interview questionnaires were constructed for the probationers, probation officers and judicial magistrates respectively. These questionnaires included both closed and open-ended questions. The closed questions were designed to obtain generic information such as the demographic characteristics of the respondents as well as answers to questions that demand factual responses (see Simmons, 2001). The open-ended questions were designed in such a way as to allow the interviewer to probe the respondents for answers to questions that required more in-depth information including personal opinions and views on relevant issues (see Burns, 2000). All the questions (although written in English) were asked in the languages that the respondents were most comfortable with, including Pashto and Urdu. In addition, the questions were arranged in such a manner that they provided a logical sequence and flow (Bell, 1999).

Considerable attention was given to the length of the questionnaires. Researchers like Goode and Hatt (1952:134) and Simmons (2001:98) suggested half an hour or less to complete a questionnaire. The time that it took to complete the interviews varied between 30 minutes with judicial magistrates to up to an hour with probationers.

After the initial drafts of the questionnaires were constructed, copies were distributed to colleagues in the Social Work Department of the University of Peshawar, Pakistan for their comments. These drafts were accompanied by a covering letter, explaining the general aim of the study and a request that specific attention be paid to whether or not the questions cover

the aim of the study. Good comments and valuable suggestions were received in response. For example, it was suggested that the questionnaire be divided into sub-sections with each sub-section clearly focused on a particular relevant theme. All the valuable suggestions were incorporated into the final draft of interview schedules.

All the interviews were conducted face-to-face. The decision to conduct all interviews face-to-face as opposed to sending the interview questionnaires to respondents by post was because the former is more reliable in terms of success rates than the latter. Moreover, as the majority of offenders on probation are illiterate (that is, unable to read and write in any language), sending the interview questionnaires to them by post, in any language, would have produced no response. Even where the sending of questionnaires by post to respondents would have produced some positive results (for example in the cases of judicial magistrates and probation officers) there was no guarantee that the responses would be returned within the time limit that was set for the fieldwork.

For successful interviews, it is often suggested to use a tape recorder. Barnard (2000) advocated the use of tape recorders with the permission of the respondents and warned researchers not to rely on their memory because people often forget things. However, there are situations where the use of tape recorders would be impracticable or raise suspicions amongst the respondents as to the reasons why they are being used. I am of the opinion that offenders are more likely to be suspicious of the use of tape recorders; hence, they were not used for the interviews with probationers. Judicial magistrates also declined to have their interviews tape-recorded. It is not unusual in developing countries for persons holding official or judicial positions to refuse to have their interviews tape recorded (see Cole, 1990b).

However, the Director and Deputy Director of the RPD NWFP, Pakistan gave permission for their own interviews to be tape-recorded. I followed the suggestions made by Bernard (2000) regarding the use of tape recorders. In addition, as suggested by Janesick (1998:31-32), the date, time and venues for the interviews were agreed with these respondents and a copy of the interview questions was given to each of them prior to the interviews taking place. This is simply to give the respondents time to gather any relevant policy data to support their answers.

All the probation officers and the Director and Deputy-Director of the RPD were interviewed in their respective offices. Magistrates were interviewed in court, mainly in their chambers. However, interviews with probationers took place in a variety of settings. The majority of probationers in Group A - the on-going cases - were interviewed in the offices of their probation officer but without the probation officers being present (that is, in privacy). However, some of these probationers were interviewed in their homes whilst others (those who wanted more privacy) were interviewed in various local restaurants. Probationers in Group B – completed cases - were interviewed mainly in their homes but some of them chose to be interviewed in the offices of their ex-probation officers. With regard to the four probationers in Group C – breach cases - two probationers were interviewed in prison whilst they were awaiting trial for new offences and the other two were interviewed in their own homes.

Interviews with the Director and Deputy Director of the RPD covered issues such as the relationship between the Head Office and the probation offices in the districts, the problems facing the probation service generally and policy and political issues affecting the performance of the service. Interviews with probation officers covered issues such as their

perceptions of their job as probation officers, their views on their probationers and their problems; their working relationship with judicial magistrates, their role in the sentencing process, their attitude to breach cases and their perception of the ability of the probation service to rehabilitate offenders and re-integrate them back into their communities. Probationers were asked what they felt about probation as a form of sentence, what their expectations were and the problems that they have faced in the process of complying with their orders. Those who breached their orders were asked to explain their reasons for doing so. All probationers were asked to state whether being on probation has produced any positive developments in their lifestyles or helped them to re-integrate back into their communities. Finally, magistrates were asked questions about the probation law and their sentencing powers. More importantly, they were asked about their views of probation as a sentence, the reason why they would or would not impose a probation order on an offender and what they thought about the probation service in the province. All respondents were asked to offer suggestions on how the service could be improved.

4.5.2 Documentary Data

The review of official documents in the shape of reports, case files and statistics is an important research tool. Official documents could provide relevant background information on the topic under study or the research subjects. The use of official documents in research will depend upon the nature of the study. In this study, the aim was to supplement the information about offenders and the probation system gained through the interviews. The documents reviewed were official documents, statistics and case files on offenders that were in the possession of the probation service.

The case files contain information about each offender including their socio-economic backgrounds, education, crime history, the nature of the current offence, their pre-sentence reports from the police, the family's crime history, employment status, the date when probation was granted and the supervision arrangements with their probation officers. Other documents reviewed include the probation registers which contain the statistics on the number of probationers in each district and other personal information on each probationer listed. The information acquired from these documents enabled me to have some idea of who the probationers were before actual contact with them was made. They also served as a guide on what additional questions to ask individual probationers during their interviews.

4.5.3 Observations and Field Notes

Observations have a key role in qualitative research. Flick (1998) stated that besides the competencies of speaking and listening which are used in interviews, observing is another everyday skill, which is methodologically systematized and applied, in qualitative research. Not only visual perceptions but also those based on hearing, feeling and smelling are integrated.

Observations played an important role in this research. One of the reasons for using observation as a research method was the sensitivity of the many issues related to the topic of the study, which direct questions might not have answered. It is common that respondents sometimes skip information on purpose or unconsciously. I believe that this is particularly the case where the subjects of the research are criminals or offenders. The role that I played was simply that of a complete observer. I did not participate in any of the activities observed, other than to ask questions to clarify any ambiguity or uncertainty. What was observed

included the nature of the interaction between probation officers and their clients during supervision meetings.

Information obtained from the observations was recorded in Field Notes. Field notes are not simply a means by which the field researcher jots down observations in order not to forget them later. In other words, field notes are much more than a memory tool. Their creation is part of the analytic process (Bailey, 1999). Field notes have their own importance in social research. Maykut and Morehouse (1996) have stated that keen observations and important conversations one has in the field cannot be fully utilized in a rigorous analysis of the data unless they are written down. Bell (1999) argued that the data collected via observations are often used to validate or corroborate the message obtained in the interviews. Furthermore, according to Burns (2000:430), 'field notes should concentrate on answering *who, what, where, when, how and why* questions'. Most importantly, I found field notes a useful tool for filling gaps and obtaining explanations of issues that could not be obtained via formal interviewing.

I kept a research diary for recording the dates of the observations and planning future movements during the research period.

4.6 Access to the Study Area

One of the key issues likely to confront researchers as soon as they begin to consider collecting data for their project is how to gain access to the study area and subjects. In order to gain access to the study area, it is important to identify who the 'gatekeepers' are. Gatekeepers, according to Burgess (1984:48) are those individuals who have the 'power to

grant or withhold access to people or situations for the purpose of research'. It is important for the researcher to know who has the power and authority to open up or block access to this area of study in order to negotiate with them (see Hammersley and Atkinson, 1995). Usually in organization-based studies, access can be negotiated with the top-level management (Punch, 1998).

In this research study, both formal and informal means were adopted in order to negotiate access to the research settings and the subjects of study. The negotiation process for accessing probationers and the officials of the RPD, NWFP Pakistan started with an initial letter followed by face-to-face meeting with the Director of the Department. I gave the Director clear indications of those aspects of the research settings that would be focused upon and the individuals that I would like to work with. I knew that every research has certain implications for the research setting and for those involved in it (Burgess, 1984). Therefore, I made realistic demands in accessing the study area. In this regard, Bell (1999) has argued that if:

Colleagues or other research workers ask for your cooperation with a project, would you be willing to give the same amount of time and effort as you are asking for yourself? If not, perhaps you are asking too much (Bell, 1999:46)

After explaining the overall purpose of the study, I requested the Director to inform all the regional offices of the RPD and prisons about the purpose of this study. The Director was kind enough to grant permission to me to interview probationers and probation officers and also to access the official records.

To access judicial magistrates, informal personal means were used. In Pakistan, a lengthy bureaucratic procedure is involved in gaining access to magistrates for interview purposes and I was unable to spare the time needed in order to get formal approval to interview

magistrates. Therefore, informal personal means were employed and those magistrates were interviewed who were dealing with criminal cases including probation. Throughout the period of fieldwork, I continued using my personal means of contacting different magistrates for interview. Using these informal methods, I was able to interview ten judicial magistrates, all of whom had sentenced offenders to probation during their career on the bench.

4.7 The Research Population

The research population, according to Lin (1976) is ‘the total group of people which meet certain criteria of interest to the researcher’ (Lin, 1976:146). The research population serves a number of functions. It tells the reader where the study was conducted or where the sample is drawn. It is expected that the results of the study can be used to generalise on the entire population (Bryman, 2004). Ideally, the whole research population should be studied. But this is not often possible, hence the need for a sampling frame. The research population in this study is all those involved in the probation process in NWFP, Pakistan. For the purpose of analysis, the research population is categorised into four groups. These include.

1. The beneficiaries of the system or service users (the Probationers)
2. The practitioners (Probation Officers)
3. The decision makers (Judicial Magistrates)
4. The policy makers (Director and Deputy Director, RPD, NWFP, Pakistan)

4.7.1. Probationers

The reason for selecting probationers for interview purposes is obvious. This research intended to study the types of offences for which an offender would be placed on a probation

order in NWFP Pakistan. In addition, it intended to find out whether the facilities provided by the RPD to probationers under their control are capable of ensuring the rehabilitation or re-integration of these offenders back in their communities. From the interviews with probationers, it was hoped to be able to obtain perceptions of probation from those who use the service; their experience of the order, their criticisms (if any) of the system and their views on how the probation system might be improved. In order to get a comprehensive picture of probation from probationers' perspectives, the population of probationers was divided into three categories or groups, namely:

Group – A *Those who are currently under supervision during the period of the research (on-going cases)*

Group – B *Those who have successfully completed their sentences and are living in the community (completed cases)*

Group – C *Those who have violated their probation orders or dropped out (breach cases)*

This division made it possible to get various perspectives on probation from those who were still within the system, those who had finished and those who, for some reason, had failed to complete their sentences. It was envisaged that the *third* group of probationers (the recidivists) would be the most difficult to track down because they would be more likely, compared with the other two categories, to want to conceal their identities. This situation was made more complicated by the fact that the RPD, NWFP, Pakistan does not keep information about recidivists. If a probationer 'disappears' there are no means of finding him unless and until he commits another offence and is brought to court. However, the value of this group to the research cannot be underestimated. They are the ones who have been through the criminal justice system more than once and are more likely to be critical of the system than the other two categories of offenders.

4.7.2. Probation Officers

The NWFP Probation officers, like probation officers everywhere, have a key role to play in the probation system in Pakistan. They are the ones responsible for ensuring that the order of the court is carried out. Specifically, their role includes the supervision and guidance of probationers and the provisions of facilities to ensure their rehabilitation. Thus, it is important to get their expert opinion on how the system works and the practical problems associated with the operation of the probation system in the province.

4.7.3. Judicial Magistrates

Judicial magistrates make the decision on whether an offender should be placed on probation or given any other sentence. In this regard, their expert opinions on the value of probation as a sentence and, more importantly, the practical issues involved in the decision to grant a probation order and how the system might be improved are valuable to this study. Furthermore, in Pakistan, as in most countries, the judiciary has discretionary powers with regards to sentencing. A probation order may not be granted to offenders even where it appears to the court that they might benefit from it. These factors make the views of the judicial magistrates' essential in this study.

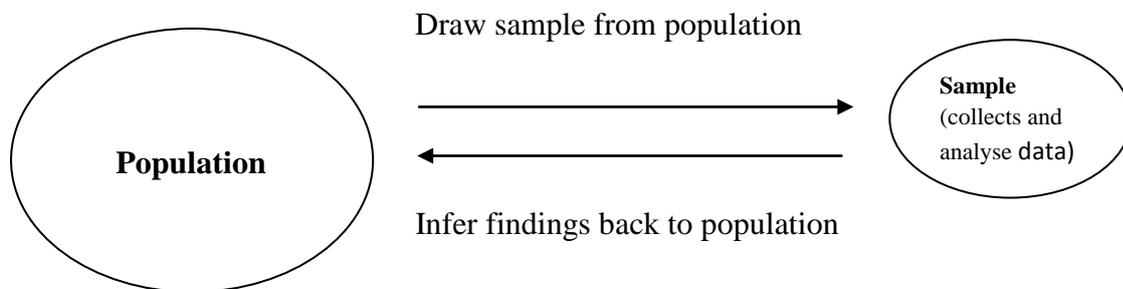
4.7.4. The Director and Deputy Director, RPD, NWFP, Pakistan

These two officials are important figures in relation to policy matters. They are the ones who receive orders from the government to pass on to their probation officers. Interviewing these two officials will enable us to gain useful information on government policy on crime control, punishment, probation and rehabilitation of offenders. The views of these officials on

the condition of the probation service in NWFP Pakistan, the problems currently faced by the service and how the system might be improved are valuable information for this study.

4.8 Sampling Procedure

Sampling is an important technique in social research, used only where the research population is large. The main idea behind sampling is to study a representative small group of a population and to generalise the findings for the original population as a whole (Burns, 2000; Akber, 1993). Generalization is a necessary scientific procedure. Since it is rarely possible to study all members of a defined population, our only hope of making any generalisation from the sample is if the latter is a representative of that population.



(Source: Punch, 1998:106)

Burns (2000) believes that sampling takes place in everyday life and business. For example, a food purchaser examines a sample of displayed food and decides to buy or not. A teacher tests a portion - sample- of students' abilities in exams and generalises their learning ability. Peil, Mitchell and Rimmer (1982) added that sampling takes place in the selection of the research topic, the research site, the people to be studied, the concepts and variables that

are used, the data that are collected, the methods employed, and the relationships on which the analysis is focused.

Keeping in view the importance of sampling in the research process, a proper sampling procedure has been employed in this study. The sampling technique was used in the selection of the probationers and judicial magistrates because practically, it was impossible to interview all of them. Furthermore, the field work of this study was designed to be completed within six months and was self funded. Therefore, the sampling decision was made on the basis of time and cost (see Bernard, 2000). However, it does not mean that sampling is a ‘necessary evil’ (Babbie, 1973:73). Bernard (2000) argued that if samples were just easier and cheaper to study but failed to produce useful data, there would be little to say for them. Very useful analysis of data can result from a very well-selected sample (see Miller, 1991). The sampling procedure adopted in this study is explained in the following sections.

4.8.1 Sample Size

It has been highlighted that to get representativeness of a sample for a study does not depend on the number, but rather on the effective way of the selection. Whilst much depends upon factors such as time, accessibility and finance, the most important factor in determining the sample size is the nature of the population (See Peil; 1982: 26). Peil (1982) asserted that a small sample size is best for a homogeneous population, because even a single element can rightly reflect the characteristics of the whole easily. In the case of a heterogeneous population, the sample size needs to be large enough to represent the whole accurately.

At the time of this study, NWFP Pakistan was divided into seven divisions which changed during the course of this study. However, this study is based upon the previous

administrative structure that was based upon divisions. The RPD, NWFP, Pakistan has eleven regional offices in the province. These include two in each of the Peshawar, Mardan, Hazara and Malakand divisions and one in each of Kohat, Bannu and D.I.Khan divisions.

As mentioned and explained earlier, this research study involved four different categories of respondents namely: the probationers, probation officers, the judicial magistrates and the policy-makers (Director and Deputy Director of the RPD, NWFP). As can be seen in Table 4.1 below, the total populations of probation officers and policy makers were interviewed. With regard to the judicial magistrates, the intention was to interview all 34 magistrates but only 10 were available for interview at the time of the study. The rest were either not sitting at the time that I was available or, because of the slowness in the informal networking that was being used to get magistrates to be interviewed, it was not possible to get some magistrates during the time limit specified for the fieldwork.

Table 4.1: The Research Population

S.No	Category of Respondents	Total Population	No of Interviews Achieved
1	Probation Officers	14	14
2	Judicial Magistrates	34	10
3	The Director	1	1
4	The Deputy Director	1	1
	Total	50	26

Thus, sampling took place only in the case of probationers. The sample size drawn for each group of probationers is shown in Table 4.2

Table 4.2: Categories of Probationers

Categories of Probationers	Sample Size per division	No of divisions	Targeted Sample	No of Interviews Achieved
➤ <i>Group - A</i> (Ongoing Cases)	5	x 7	35	35
➤ <i>Group - B</i> (Completed Cases)	3		21	21
➤ <i>Group - C</i> (Recidivists)	2		14	4
Total no of Probationers	10		70	60

4.8.2. The Sample of Probationers

For the selection of probationers, two different sampling techniques were employed. The probationers for the first two categories, the ongoing cases and completed cases, were selected by using a Simple Random Sampling technique. This is one of the most widely used techniques of probability sampling in social research. Miller (1991) stated that a random sample is one that is drawn in such a way that every member of the population has an equal chance of being included. The most rigorous method of random sampling employs a table of random numbers. In this method, a number is assigned to each member of the population. Members whose numbers are taken from the table of random numbers in succession are included in the sample, until a sample of predetermined size is drawn.

After getting formal permission from the Director of the RPD NWFP, to access official data, case records and also to interview probationers and probation officers, a covering letter was sent to all the probation officers explaining the nature of the study and the type of help needed. All the district probation officers were instructed by the head office in Peshawar, to make available to me case files and statistics on all offenders who were currently on

supervision and those who had completed their sentences. Where possible, the probation officers were asked to supply me with names of known breach cases.

Probation officers keep separate records of all the current and completed cases of probationers under their supervisions. Therefore, for the first category of probationers, the targeted sample was drawn randomly from the available lists of offenders currently under supervision in each 'division'. The sample size of 5 per division was chosen at random, giving a total sample size of 35 on-going cases for the whole province.

The probationers in the second category (the completed cases), were also selected randomly from the registers containing the information about all completed cases. Due to the fact that this group of offenders would be more difficult to locate, compared with the on-going cases, a sample size of 3 per division was chosen for the group, giving a total targeted sample size of 21 completed cases for the whole province.

In contrast, a purposive sampling technique was adopted for the selection of the recidivists or breach cases. Miller (1991:61) stated that when practical considerations preclude the use of probability sampling, researchers may seek a representative sample by other means. They may look for a subgroup that is typical of the population as a whole. Observations are then restricted to this sub-group, and conclusions from the data obtained are generalized to the total population. David and Sutton (2004:152) stated that in purposive sampling, the units are selected according to the researcher's own knowledge and opinion about which ones they think will be appropriate to the topic area. The strength of purposive sampling is that it provides more detailed and accurate information to the research study. Patton (1990:169) argued that 'the logic and power of purposive sampling lies in selecting

information rich cases for study in depth'. The choice of any sampling method, according to Sapsford and Jupp (1996) involves compromise in balancing considerations of precision, feasibility and costs.

In this study, the main reason for using a purposive sampling technique for selecting the recidivists was the unavailability of the total number of offenders in this category. The RPD, NWFP, Pakistan does not keep statistics or data on recidivists. (see Chapters 3). If a probationer has stopped attending or has committed an offence during their probation period, the probation officers have no means of tracking him or her unless he or she is arrested and brought to justice for a new crime. In addition to the absence of official records, there was a lack of interest on the part of probation officers to report breach cases to the head office in Peshawar (see Chapter 6). Therefore, the only way of locating recidivists was by asking probation officers if they knew any recidivists who had recently been re-arrested by the police for another offence. In addition, sampled probationers in categories A and B were asked, in confidence, during their interviews, if they knew of any offenders who was previously on probation but had disappeared or had failed persistently to attend their probation meetings. The proposed sample size for this category of offenders per division was two, the intention being to attain a targeted sample for the whole province of 14 recidivists. As indicated in Table 4.2, I was able to interview only four probationers in this category, two of whom were interviewed in prison whilst awaiting trial for new offences. The other two offenders had previously been on probation but committed a second offence and were put back on probation.

As shown in Table 4.2, the targeted sample was 70 probationers but the final sample was 60 probationers consisting of all the targeted samples in groups A and B but only 4 probationers in Group C.

All the probationers in sample Group A (35) were interviewed. All of them were half-way through their probation periods and were coming to see their probation officers on routine monthly visits when requests for interviews were made. As mentioned above, some volunteered to be interviewed in their probation officers' offices whilst others were interviewed in their own homes and restaurants in the local area. For probationers in Group B, home addresses were obtained from the RPD, NWFP, and these probationers were visited and interviewed at their homes. The probationers in this group were those who had successfully completed their probation orders and had not committed another offence since completion of sentence. All the offenders in this group sample (21) were also interviewed. As mentioned above, only four out of the target sample of 14 recidivists (Group C) were interviewed.

4.9 The Field Work

The fieldwork was divided into three phases: the preparatory stage, the pilot study and the main fieldwork.

4.9.1. Preparatory Stage

The aim of the preparatory stage of fieldwork was to introduce the research objectives to the officials of the RPD NWFP, Pakistan and to seek permission for the interviews. It was also important to obtain the officials' opinions about the interview schedules and my approach to data collection. It took a month to get permission from the Director of RPD,

NWFP, Pakistan to interview probationers and probation officers and to access the official records. The Director sent official letters to all the regional offices and prisons under his control asking them to extend their help and support to me. In the meantime, I frequently visited the offices of the Deputy Director and a Probation Officer based in Peshawar, with whom I had personal familiarity and who assisted greatly in the designing of the interview questionnaires and in explaining the daily routine activities of probation officers to me. In the process, I was able to make some preliminary observations of a few supervision meetings between some probation officers in Peshawar and their clients. In addition, whilst in Peshawar, a letter was drafted to all the probation officers explaining the purpose of the study with a request of appointments for their interviews. All probation officers responded positively and gave various appointment dates which were finalised before the actual interviews started.

4.9.2. The Pilot Study

It was decided to have a pilot study in order to check the workability of the research instrument (the questionnaire) and its ability to achieve the aim of the study and answer the research questions. Pre-testing is an important step in empirical research. It is often seen as good practice in research to pre-test questionnaires before using it in a main research (see Burns, 2000). Through the pilot study, I wanted to see whether the respondents would understand the questions. This was particularly necessary in the case of the illiterate probationers. Furthermore, it was important to check what time it would take to complete a questionnaire (Borg and Gall, 1983).

The pilot study involved the interviewing of two probationers, one probation officer and one judicial magistrate. From the pilot study, it was found that the questionnaires for the probationers and probation officers were too lengthy while that meant for the judicial magistrates was far too short. Additional questions were needed for the magistrates in order to make their interview more relevant to the aim of the study. Some of the questions in the other questionnaires were found to be irrelevant to the overall purpose of the study and had to be reworded. Furthermore, some repetition of questions was found in the questionnaires for both probationers and probation officers. All the interview questionnaires were reshaped according to the feedback from the pilot study before they were used for the main study.

4.9.3 The Main Study

The main study started with interviewing the probationers and probation officers in Peshawar. This was simply because I reside in the city. Interviews in Peshawar division were followed by those in the Mardan division, which is the next closest division to Peshawar. The data was collected from all the divisions, keeping in view the appointments given by the probation officers. For most part of the research, I resided in Peshawar. This location enabled me to spend more time with the officials of the RPD, based in the city, and to get as much information as possible such as official records.

4.10 Timing of Fieldwork

Every research project needs to be planned and completed within a certain time frame. In this regard Kumar (1996) has suggested listing all the major operational steps along with their completion time. He, however, warned researchers to keep some time towards the end of the

research project as a 'cushion' because the research process does not always go as smoothly as planned (Kumar, 1996:84).

In this study, I followed the suggestion made by Kumar (1996). The field work was planned to be completed within four months but it actually took six months to complete. The first month of the field work was spent in getting formal permission for data collection from the Director of the RPD, NWFP. In the same month, I was unable to work for almost a week due to the holy festival of Eid-ul-Adh when Muslims around the world sacrifice animals to celebrate the sacrifice made by Prophet Abraham. In addition, I had to spend some extra time in travelling and in finding the home addresses of those probationers to be interviewed at their homes. The fieldwork started in January 2005 and was completed in June 2005.

4.11 Transcription, Interpretation and Analysis of Data

The process of transcription, interpretation and analysis started soon after the completion of data collection. For this purpose, each interview was typed in a separate computer file in detail. Each file contained personal details of each interviewee, other information relevant to the case (in the cases of probationers) and full transcripts of the interviews. Transcribing information from tape recorded interviews (with the Director and Deputy Director) took longer than those from the other respondents that were hand-written. I tried to incorporate information that were obtained from the respondents and from their respective files (see Strauss and Corbin, 1990).

As said earlier, the questionnaires were constructed in English but the interviews with the probationers were conducted in Pashto and Urdu languages. Extreme care was taken in

translating words from the local languages into English. In some cases where I was not able to find the exact equivalent word in English, the original local words were used in the interview transcripts, with an explanation provided in English in order to convey to the reader, what the respondent meant (see Strauss and Corbin, 1990).

An important requirement of research is that respondents in an interview should be given the opportunity to read or inspect transcripts of their interviews in order to make sure that the transcripts are true and accurate recordings of what transpired. However, in the case of probationers, who were mainly illiterates, this was not possible. In order to address this problem, I read back the responses to the respondents and got their approval that the recordings were accurate before leaving the scene of interview.

After the completion of the transcription, the process of interpretation and analysis started. In this stage, the researcher systematically arranged and presented the information so that comparisons, contrasts and insights could be made and demonstrated. There are no hard and fast rules on how to present field data. There are, however, some guiding principles for researchers on how to present data. As Bailey (1999:89) argued, making sense out of all one's field experiences is difficult, and there are few rules to guide one's analysis and writing and to help the researcher gain analytic insights into the contours of everyday life in the setting. On understanding data analysis, Rossman and Fallis (1998) stated:

Imagine a closet full of clothes; these are your data. You can organize the clothes by colour (blue slacks and sweaters together), by type (all the slacks in one pile), by season for use (heavy winter clothing), or by fabric (cottons all on the same shelf). Each organization (your analysis) is valuable and justifiable, depending on your purpose (Rossman and Fallis, 1998:171-2).

4.11.1 SPSS Analysis

There are several computer packages, which assist in the coding of empirical data. Dey (1993:61) stated that ‘the computer may be able to handle an enormous amount of data, but the analyst may not’. SPSS is one of the most frequently used computer packages for analysing quantitative data. NVIVO is the package that is used to analyse qualitative data. As said earlier, the research methods adopted in this research are ‘qualitative’ in nature. Because of the relatively small number of respondents, I did not think that the use of NVIVO would be necessary. Moreover, I was not looking for commonalities in responses. I worked on the premise that each individual would have a different story to tell. However, I considered it necessary to obtain some frequencies, for which SPSS was used. These relate, for example, to the demographic characteristics of respondents, the percentages of probation officers with qualifications and so on.

4.12 Validity of Data

The issue of validity of information is also given due attention in this research study. Validity of data, according to Hammersley (1990:57) means ‘the extent to which an account accurately represents the social phenomena to which it refers’. He added that an account is valid or true if it precisely represents those features of the phenomena that it is intended to describe. Reliability, on the other hand, is the ‘extent to which a test or procedure produces similar results under constant conditions on all occasions’ (Bell, 1999:103).

As was explained earlier, this empirical study employed a variety of research techniques for the data collection. The decision to employ triangulation of research techniques was to ensure validity and reliability of the data (see Burgess, 1984; Campbell and Stanley, 1963;

Hughes, 1981). These research techniques were employed in order to compensate for the weakness of any individual research tool and to ensure the validity of data. In this way, I was able to maintain checks and cross check upon the information obtained from different research techniques.

4.13 Ethical Considerations

Ethical problems were carefully taken into consideration in this research study. Ethics, according to Jupp et al (2000:171), 'is about the standards to be adopted towards others in carrying out research'. For Davidson and Lunt (2003:143), 'ethics is about safety, respect, comfort, dignity and confidentiality'. Ethics or the rules of conduct in social research are mainly concerned with the question of what is morally right for the research subjects or participants, not what is convenient for the researcher. Ethical questions in research could be related to the subject matter of the research, its conduct, application and subsequent consequences. Therefore, ethical problems should be addressed at a very early stage of the research process. These questions are usually pertaining to the purpose of the study, gaining consent of the participants, their confidentiality, and anonymity and in the dissemination of the results of the study (Robson, 1993).

One of the ethical issues addressed in this study was related to informed consent (Noaks and Wincup, 2004; Blumer, 2001). Before gaining information from the respondents, they were informed about the nature of the study and research aim. Furthermore, respondents were free either to participate in the research process or not.

Different procedures were adopted to gain consent of the respondents in the three different categories. For example, the officials of the RPD NWFP, Pakistan were informed through a covering letter about the nature of the study along with a request for their interviews, which was accepted. The probationers were informed about the nature of the study and only those probationers who showed their willingness to be research participants were interviewed. The judicial magistrates were also consulted first and interviewed only when they showed their willingness. As mentioned earlier, the interviews with the Director and Deputy Director, of the RPD were recorded but only after they showed their willingness for the interviews to be tape recorded (see Bernard, 2000).

Another ethical issue was that of ensuring the anonymity and privacy of respondents (Norris, 1993; Punch, 1998). One way of ensuring anonymity was to conceal all information that could reveal respondents' identities. In this context, Noaks and Wincup (2004) argued that:

All research participants should experience an approach that gives attention to protecting their rights, seeks to achieve informed consent and respects promises of confidentiality. While such requirements are an imperative for all those involving themselves with research, particular attention is required in the case of the potentially vulnerable participant (Noaks and Wincup, 2004:43).

Furthermore, Gill (1977) argued that:

The sociologist's responsibility to his subjects is therefore a continuous one and does not stop once he returns to the sheltered employment of the university to write about his findings (Gill, 1977:196)

In practice, it was hard to convince some respondents of confidentiality. It was not unusual for offenders to be suspicious of me asking questions about their offending behaviour or other information that they would rather keep private. I was able to convince the

probationers that any information that could reveal their identities would not be published. Moreover, as the questions related not to their reasons for offending but the value of probation for them, they were more willing to offer information. The same approach was taken with respondents who were working in identifiable key posts; for example, in the RPD, efforts were made to avoid using information that could reveal their identity. Thus, all the research participants have been given numbers instead of using their real names. In the cases of the Director and Deputy Director, the designated posts were used instead of the names of the persons holding those positions. In addition, the places of work for both the probation officers and judicial magistrates have also been concealed in order to maintain their anonymity. The home addresses of all those probationers interviewed at their homes were also omitted in the report on the findings. To include home addresses would, obviously, be an invasion of privacy.

4.14 Summary

This chapter explains the research methods used in carrying out this study. The chapter highlights the aim of the study and the research questions. It discussed the various parts of the research including the definition of the study area (NWFP Pakistan) and the respondents namely officials of the RPD, probation officers and probationers. Three qualitative research methods were used: in-depth interviews, documentary analysis and observation. I explained the benefit of a mixed method approach to research and the relevance to this study. In addition, I explained the sampling techniques used and how the data was analysed. Finally, the ethical considerations taken and issues of validity and reliability of data were discussed. I am confident that the methods used were adequate for this research, although other methods are possible. The research methods were selected on the basis of their relevance to the aim of

the research and their workability in the research environment. I have no reasons to suspect that any of the information obtained was unrealisable. Whilst the quantitative data provided useful information on potential interviews and workload of probationers, the qualitative data provided in-depth information of the respondents' views on how the system operates and affect them.

Chapter 5

Probation Practice: Probationers' Perspective

5.1 Introduction

Punishment has meaning if it is tailored to a particular offence or offender. The person for whom a particular punishment is intended tells us a lot about the offence and the value that is attached to that punishment in terms of what it might do for the offender or society as a whole (see chapter 1). In chapter two, I have shown how perceptions of probation have been dictated by who it is meant for and what it is believed it could do for the offenders and society as a whole. In Pakistan, there is a long list of offences for which an offender can be placed on probation in Pakistan (see Appendix – A).

This chapter presents the information collected from the sample of sixty probationers who were interviewed during this research study. First, I shall discuss the demographic characteristics of these probationers. Next, I shall look at the type of offences for which offenders were granted probation orders. The experience of the probationers during their trials will also be described. More importantly, the chapter will discuss the perceptions of the probationers of a probation order, the problems that they were encountering in the process of complying with the requirements of their order and their views as to whether or not being on probation had helped in any way towards their rehabilitation or re-integration back into their communities.

5.2 Demographic Characteristics of Probationers

Fifty-nine of the probationers (98.3%) were men whilst only one (1.7%) was female. The minimum period of a probation order in Pakistan is one year and the maximum is three years. The majority of the sample of probationers (34; 56.7%) was granted probation orders for the maximum period of three years, whilst nine probationers (15%) had a two year probation order and 17 (28.3%) had the minimum of a one year probation order. The age distribution of the probationers was such that 27 (45%) were aged between 21 and 30 years, 21 (35%) were aged between 31 and 40 years and the rest (12; 20%) were aged over 40 years. In terms of their geographical distribution, 53 (88.3%) probationers were residing in the rural areas of NWFP at the time of the study whilst only seven (11.7%) were living in urban areas. This reflects the geographical distribution of the population in NWFP and Pakistan where about 68% of the population resides in rural areas and 32 % are in urban areas¹⁰. Twenty-nine of the probationers (48.3%) were illiterate whilst 31 (51.7%) were literate. I use the word 'literate' to refer to a person who can read and/or write in Urdu, Pashto or English. It includes all those who claimed to have had some formal education.

The indigenous people in NWFP are, like their neighbours in Afghanistan, Pakhtoons. Pakistani society in general and Pakhtoon society in particular is strongly patriarchal, where men (as fathers or older brothers), being the head of the family, manage all the family affairs. There are three main types of 'families' in Pakistan: the nuclear, joint and extended families. The majority of people in NWFP, especially those in rural areas, live in joint families. A joint family is one where a couple lives with at least one of their married children (usually married son(s), as the daughters moved to their husband's house after their marriages) sharing the same house. The joint family signifies solidarity. It also ensures economic security and

¹⁰ For further details, see the official website of Population Census Organization, Pakistan on <http://www.statpak.gov.pk/depts/pco/index.html>

interdependence of the family members. The majority of the probationers in this research (32; 53.3%) lived in joint families; 25 (41.7%) lived in nuclear families¹¹ whilst 3 (5.0%) lived in extended families¹². Thirty-eight (63.3%) of the probationers were married whilst 22 (36.7%) were unmarried. A significant number of the probationers belonged to economically disadvantaged groups, mainly in terms of low pay and being peasant farmers. Thirty (50%) were daily paid workers¹³ and 12 (20%) were unskilled labourers. The majority of the probationers (31; 51.6%) earned less than Rs. 4000¹⁴ per month. This is low pay by Pakistani standards.

5.3 Types of Offences for which Offenders were on Probation

The probationers received probation orders for a variety of offences. The most frequently occurring offence was possession of illegal¹⁵ or legal but unlicensed weapons (section 13 AO¹⁶). A significant number of the probationers (38; 63.3%) fell into this category; that is, they were found guilty and placed on probation for keeping unlicensed or illegal weapons. The second largest category of offenders were those who received a probation order for using illicit drugs, where the quantity of drugs found on them was relatively small (sections 3 and 4 of the Prohibition order of 1979).¹⁷ Thirteen probationers (21.7%) fell into this category. A further three offenders (5.0%) were on probation for violating section 9 of the

¹¹ By nuclear family I mean 'husband and wife along with their unmarried children (if any) living in a separate house or flat and economically self-sufficient or independent'

¹² By extended family I mean 'married brothers/cousins (with or without their children) sharing the same house but independent economically from each other'; in other words, a collection of small nuclear units associated by blood or clan living within the same four walls of the house.

¹³ This category includes drivers, salesmen, tailor, shoe makers, furniture makers and so on.

¹⁴ Rs. means 'rupees' the official currency of Pakistan and one pound sterling is equal to 120 Pakistani rupees. However, this exchange rate often fluctuates.

¹⁵ Illegal weapons are heavy weapons like a Kalashnikov (AK 47) for which the government will not issue a licence

¹⁶ Prohibition of going armed without a licence (Section 13 of Arms Act, 1878)

¹⁷ Section 3 (Prohibition of manufacture, etc., of intoxicants) and section 4 (Owning or possessing intoxicant) of Prohibition Order 1979.

Control of Narcotics and Substance Abuse Act of 1997 which deals with drug trafficking. Two probationers (3.3%) were on probation for consuming alcohol, illegal under section 11 of Prohibition Order 1979;¹⁸ one probationer was on probation for having ‘gay sex’ with another man;¹⁹ two (3.3%) were on probation for fraudulent activities²⁰ and one for using fake currency notes.²¹

An obvious observation is the wide range of offences for which probation orders were granted, especially as some of these offences (for example, possession of illegal arms and drug trafficking) are also imprisonable offences.

5.4 Guilty or Not Guilty?

When asked why they had committed their offences, different reasons were given. Amongst those who were arrested for being in possession of illegal and unlicensed weapons, 15 (25%) replied that they needed the weapons in their homes for their personal safety and the security of their families. It is important to mention here that the keeping of weapons in homes is a part of the Pakhtoon culture and is common in the rural areas of NWFP. For example, probationer no. 17 was arrested because his friends and relatives were firing in the air during the marriage ceremony of the probationer’s younger brother. This was a mark of honour to the couple – a common tradition in NWFP where guns are fired ceremoniously in the air during a wedding, on the birth of a son or to celebrate the arrival of Eid-ul-Fitar,²² after the Moslem fasting month of Ramadan. However, indiscriminate gunfire is prohibited

¹⁸ In Pakistan, the consumption of alcohol is forbidden (*haram*) for all Moslems and is also prohibited by law.

¹⁹ Section 377 (Unnatural offence) of Pakistan Penal code prohibits ‘carnal intercourse against the order of nature with any man, woman or animal’.

²⁰ section 419 (Punishment for cheating by impersonation) and 420 (Cheating and dishonestly inducing delivery of property) of Pakistan Penal Code

²¹ section 489-A (Counterfeiting currency notes or bank notes) of Pakistan Penal Code

²² Muslims around the world celebrate Eid-ul-Fitar after the fasting month of Ramadan.

under the law. All efforts by the Pakistani government to control use of illegal and unlicensed weapons in the Province have yielded very little success as guns are readily available across the border with Afghanistan and in the Tribal Areas. In addition, the areas where the majority of the probationers lived are dangerous areas (close to the Afghan Border). This has made the keeping of weapons for personal and family security a necessity. Furthermore, these areas are notorious for criminals, some of whom operate in gangs; but the police have not been able to control these criminals. Thus, some of the probationers argued that it was their loss of confidence in the ability of the police to ensure safety for their families and general security in their area that compelled them to own the weapons for which they were arrested and sentenced. It also needs to be mentioned that, in the rural areas, family feuds are common and the possession of guns was considered a necessity for the protection of family members and the defence of their honour. Family feuds involving the use of firearms are common in most part of the NWFP. Many family members have been killed over minor issues. There is a common saying in the region that people develop enmities because of *zan, zar our zamin* (woman, money and land). These enmities may continue from generation to generation. Thirteen of the probationers (21.7%) said that they kept weapons because of family enmities. As probationer no. 23 put it:

We have family enmity over a land distribution issue now. I don't have any other option but to carry guns, otherwise my enemies will kill me (Field Notes, March 5, 2005)

Probationer no. 13 lost his elder brother in a family feud with their cousins. The probationer's family wanted to take revenge for this murder, and in order to be able to do this, they felt that they needed to have guns. Unfortunately for him, he was arrested for being in possession of illegal arms. Probationer no. 46 and 57 were actually arrested by the police during a cross-fire incident with "their enemies". According to probationer no 46:

I was on my way to the bazaar (market) then my enemy started firing on me. I replied as well. After some time, the police came on the crime scene. My enemy managed to escape but the police arrested me (Field notes, May 5, 2005).

In circumstances such as these, it is extremely difficult for the police to manage and control the crimes associated with firearms, where on the one hand it is illegal to keep these firearms but on the other hand, there is a 'weapons culture' in the area. This is a case of the criminal law criminalising an act that is culturally acceptable. This raises important questions as to cultural acceptance of the punishment and the insensitivity of the law to cultural issues. As probationer no. 56 explained:

If you don't have any weapon at home, it means you are living in an open street completely exposed and insecure. (Field Notes, May 31, 2005)

The second largest category of probationers – the drug addicts – all blamed peer pressure for their offending behaviour. For example, the case histories of probationer no. 31 and 53 showed that they both started using drugs in the company of friends. Probationer no. 24 – a college student – also admitted to acquiring the habit in the company of friends at school but, unlike probationers 31 and 53, denied being an addict. The drug (narcotic) for which all 16 probationers were arrested was chars or 'hash'. This drug is cheaply available in the province because of its border with Afghanistan, from where the drug is smuggled into Pakistan. The war in Afghanistan and the weak border control, especially in the Tribal Areas, have led to the easy availability of drugs and illegal arms in NWFP.

The majority of the offenders admitted to the charges against them, even though some of them believed that their actions were reasonable under the circumstances mentioned above. However, 21 probationers (35%) did not accept responsibility for their crimes. They alleged that they were wrongfully arrested by the police. The accusations against the police ranged

from mistaken identity to police corruption and malicious arrest. Examples of cases where the probationers claimed that they were wrongfully arrested include that of probationer no. 28, the only female probationer in the sample. She was convicted for being in possession of illegal drugs. According to her:

I was travelling from Peshawar to Sawabi to see my relatives. On the way, the police stopped the bus for a search. A teenage boy sitting next to my seat suddenly ran away when he saw police entering the bus and managed to escape the police. The police recover two kg of chars (hash) under his seat. They arrested me believing that he was my son (Field Notes, March 15, 2005).

Other examples include the cases of probationer no. 39 and 40, both father and son, who were also arrested for being drug dealers because large quantities of illicit drugs were found in a property owned by the father. According to him:

I had rented my property and I did not know that the tenant was a drug dealer. The police raided the house but the tenant disappeared before the police came to the house. They recover drugs and wines from the house and being the owner of the property, they arrested me and my son. Now, whatever the police recovered from the property was not mine, then why should I take the responsibility? (Field Notes, April 8, 2005).

Probationer no. 51, who was on probation for illegally consuming alcohol (section 11 of Prohibition Order, 1979) did not admit the offence but alleged that his uncle bribed the police to arrest him. Probationer no 27 claimed that on the two occasions when he was arrested, the police were bribed by an influential landowner with whom he had an on-going land dispute to arrest him. On the first occasion it was for keeping an illegal weapon and the second (for which he was on probation) was for being in possession of illicit drugs. According to him, he had never used illegal drugs. He explained:

In order to pressurise me, this is the second time that he asked the police to put me in lock up. I don't use drugs. Last time the police charged me with keeping illegal weapons and this time on drugs case. I did not commit any of these offences (Field Notes, March 10, 2005)

Allegations and accounts of corruption by the police in developing countries are many, to the point that it has become an accepted fact (For example, see Cole, 1990b on Nigeria; Nalla & Kumar, 2005 on India; Bin Kashem, 2005 on Bangladesh; and Nadeem, 2002 on Pakistan). Although the meaning of corruption is culturally relative, it is reasonable to assume that there is an international condemnation of corruption by public officials, especially the police (see Sarre et al, 2005).

An interesting case was that of probationer no. 14, the brother of a local councillor, who swapped places with a voter who was arrested by the police for 'aerial firing' during a public celebration of the probationer's brother's election victory. In other words, the probationer took responsibility for an offence that he did not commit, was arrested for it and sentenced. He explained his reason thus:

This person was our political supporters and was celebrating the victory of my brother. I had to sacrifice myself and take the responsibility for our supporter's offence. If I didn't do this, we would have lost a future voter (Field Notes, February 17, 2005).

Another interesting case is that of probationer 10 whose daughter-in-law killed herself using a Kalashnikov but in order to keep the honour of the families involved, the case was not reported to the police. Somehow, the news was leaked to the police but instead of instituting an enquiry for suicide, they arrested probationer no 10, as head of the family, and he was arrested and found guilty of keeping a Kalashnikov in his home, for which he was placed on probation (Field Notes, February 9, 2005).

When asked why they admitted to offences that they allegedly did not commit, the majority of the 21 probationers who denied responsibility for their offences answered that they were advised to plead guilty by their lawyers. It will be shown in chapter 7 that the majority of offenders who pleaded guilty to their offences were advised to do so by their lawyers. This is a common occurrence in terms of the nature of legal transactions in magistrates' courts. It will be shown that for the majority of lawyers who practise in the magistrates' courts in NWFP Pakistan, a plea of guilty was seen as a quick solution to the case. The lawyers used an early guilty plea as a means of negotiating for a lenient sentence. As the offences for which the majority of the offenders received probation orders (keeping unlicensed or illegal weapons) were also imprisonable offences, they were glad (and grateful to their lawyers) that they got probation instead of prison. All the probationers were of the opinion that being granted a probation order was a lenient gesture by the courts; even those who claimed that they were being punished for offences that they did not commit welcomed a probation order.

5.5 Crime History of the Probationers

In terms of criminal histories, the majority of the probationers (50; 83.3%) were first offenders whilst 9 (15%) had criminal records. The 60th probationer was an offender previously on probation for two years for possessing an illegal weapon but he breached his order. He was later arrested for the breach and placed back on probation for the same number of years but with an additional Rs. 1000/- fine.

Amongst those with criminal records, probationer no. 8, a drug addict, was fined for his previous offence, which was possession of illegal drugs. He was on probation for a second drugs offence. Probationer no. 27 was also on probation for the possession of drugs, but his

previous offence was possession of an unlicensed weapon for which he received a fine. Probationer no. 11's previous offence was assault against person but the matter did not go to court. It was resolved by Jirga²³. He was also on probation for possession of illegal drugs. Probationer no. 18 was serving his second probation sentence; the first order he received was for being in possession of illegal drugs and the current one for keeping unlicensed arms. Similarly, probationer no 51 was serving his second probation sentence for illegal use of alcohol. Probationer no. 22's previous offence was possession of unlicensed weapons for which he received a fine. He was on probation for the same offence.

When asked the reasons behind their offending behaviour or re-offending, three of the probationers on probation for keeping illegal weapons (including probationer no 22, who had been sentenced twice for possession of illegal weapons) said that it was simply because the family feuds that led to their offending were still on-going, therefore, they had no option but to carry on keeping weapons in spite of their sentences. Probationer no 51, who was serving his second probation order for illegal consumption of alcohol, probably had an alcohol abuse problem which, presumably, was not addressed during his first probation order (the possible reasons for this are discussed in chapter 6). Similarly, probationer no 18 received his first probation order for possession of drugs but went on to commit a more serious offence – possession of an illegal weapon – for which he was serving his second probation order. Probationer no 18 committed this crime whilst still on probation for possession of illegal drugs. His defence was that his maternal uncle had been killed in a family feud and in order to take revenge, he purposely travelled to Afghanistan to buy an 'AK47'. Unfortunately he was arrested by the police on his way back from Afghanistan, with the weapon in his

²³ Jirga is a group of responsible people in a tribe or village who settle minor and in some cases major disputes among people or tribes.

possession. Like the other three probationers on probation for possession of illegal weapons, probationer no 18 felt strongly about keeping weapons to protect one's family and maintaining family honour where a family member had been abused or even murdered by a rival family. As he explained:

It is a matter of prestige and ego that if someone kills your family member you should take revenge (Field Notes, February 23, 2005)

The majority of the recidivists were either on probation for possession of illegal drugs or had a previous conviction for possession of illegal drugs. It is a known fact that drug dealers or misusers have one of the highest rate of criminal recidivism. However, research evidence in the United Kingdom has shown that offenders who have been on probation or community penalties generally, have a much lower reoffending rate than offenders who were sentenced to imprisonment. There are no such studies available on Pakistan. However, it needs to be said that as probation claims to be a punishment that focuses on rehabilitation, the reoffending rate of offenders on probation will depend on the opportunities or facilities that are available for such offenders to address their offending behaviour and criminogenic needs whilst on probation. Where these opportunities or facilities are ineffective or unavailable, the reoffending rate is more likely to be high.

However, a reduction in reoffending could also be due to other factors beyond the opportunities provided by the punishment received, to address offending behaviour. Where families and communities welcome back and do not stigmatise offenders, recidivism is more likely to be low. In other words, the social support received whilst being punished may be more important in terms of the rehabilitation of an offender than the provision for rehabilitation or reformation provided by the punishment.

5.6 On Detention Awaiting Trial

According to section 61 of the CrPC 1898, the police must bring an accused person before the courts within 24 hours after their arrest. Thirty-nine probationers (65%) were brought to court within 24 hours whilst the remaining 21 probationers (35%) were detained in police custody for more than 24 hours before their trial. These probationers spent varying lengths of time in police custody without charge. Probationer no 7, of Afghan origin, spent three days in police custody without charge. He recalled:

The police beat me for three days, consecutively. They were asking me about the contacts of big drugs dealers. I told them that I smuggled clothes, not drugs, but they did not believe me (Field Notes, February 3, 2005).

In fact, 26 probationers (43.3%) alleged that they were ill-treated by the police, both physically and verbally. According to some of them, they were slapped and assaulted by the police at the time of their arrests and whilst in police custody. Probationer no. 1 claimed that the police did not even let him inform his family about his arrest, which is a violation of his legal rights as a suspect in police custody. Blatant and public use of unreasonable force by the police is a common feature of policing in developing countries (see Cole, 1990b). An explanation has been provided in the colonial origins of the police in many post-colonial countries, when the police were seen as part and parcel of the colonial administration and a symbol of colonial power and authority (Cole, 1990b).

More significant is the fact that 26 probationers (43.3%) had spent some time in prison on remand awaiting trial. There are several reasons why a suspect could be denied bail by the police and the courts, the most important of which are the seriousness of the offence and the likelihood of absconding, tampering with evidence or committing further crimes whilst on bail. In addition, bail could be refused if suspects had no fixed address or did not have

persons of substance to stand surety for them in court. Forty-one of the probationers committed offences for which imprisonment is an option, that is, being in possession of illegal or unlicensed weapons and drug trafficking. However, only 26 of the probationers were denied bail and remanded in prison custody by the courts. They had committed less serious crimes. Thus, technically, they should have been granted bail. It became clear that the only reason why all the 26 probationers were denied bail was because they came from poor economic backgrounds, meaning that their denial of bail was based on their inability to provide acceptable persons as surety to the courts. Some of these probationers, like those in police custody, recalled experiences of abuse and ill-treatment by prison officers whilst on remand. For example, probationer no 2 recalled being made to undergo the punishment of ‘sit and stand’ whilst in prison awaiting trial²⁴ (Field notes, January 26, 2005). Similarly, probationer no. 3 recalled being slapped on six occasions by a prison officer. Use of unnecessary violence by police and prison officers on suspects and detainees is a common feature of the criminal justice system in developing countries (see Cole, 1990a).

Similarly, denial of bail to poor people and detention for long hours awaiting trial is common features of the criminal justice system in developing countries (see Cole, 1990a; Cole, 1990b). This is quite worrying as many such suspects have committed minor crimes and would have spent time in prison, possibly longer than they would have if eventually imprisoned for their offences. Unfortunately, many, like the probationers in this study, ended up with non-custodial sentences at the end of their time in prison.

²⁴ It is one of the common physical punishments which prison staff give to prisoners if they are not cooperating with the prison staff or if they argue on something, which the prison staff do not like. The accused prisoner is forced to continue the physical drill of stand and sit until he collapses.

5.7 Probationers' Understanding of Probation

An offender is eligible for a probation order if the nature of the charge is minor or the magistrate is of the opinion that imprisonment is unnecessary. In addition, a probation order may be granted where a magistrate believes that the offender will benefit from it. The decision is usually at the discretion of the magistrates. Probation officers do not have a part to play in the decision-making process. Probation officers in NWFP Pakistan do not have to prepare reports to the magistrates on defendants to aid the sentencing process or the decisions on remand and bail (See chapters 6 and 7). However, before an order is given, a judicial magistrate will normally explain to the defendant the purpose of the order. Further explanations are expected from probation officers, usually during the first scheduled meeting.

When asked how probation was explained to them by the judicial magistrates, 20 probationers said that they were told that it means 'kor quaid and not to re-offend in future'. 'Kor quaid' means 'prisoner at home'. The majority of probationers said that probation was explained to them as regular attendance at a probation office, usually once a month. None of them had an idea of what to expect from these meetings. For them, it was simply a routine exercise, on the orders of the magistrates. As probationer 25 explained:

The magistrate did not say anything to me. He told everything to my solicitor who later on asked me to report to the probation officer and to obey whatever the probation officer says to me (Field Notes, March 9, 2005)

The probationers who were given these explanations and instructions were mainly illiterates. The action of the magistrates is defensible as there are no cultural equivalents of a probation order in Pakistan. However, it needs to be said that that there are no other options to the magistrates in terms of explanation, as that is all that is offered by the probation service in the province. (See chapter 6).

Another interesting discovery is that some of the probationers did not know the difference between a magistrate and a probation officer, since both the magistrate courts and the offices of the probation officers were located in the Kachehre²⁵. Some probationers considered probationer officers as magistrates and their offices as courts. As probationer no. 20 puts it:

The office of the probation officer is a court where I have to report once a month (Field Notes, March 2, 2005)

Thus, for the majority of probationers, the attendance at the probation office was the punishment. As long as one remains at home or in a place where one is contactable, attends regularly as required, does not abscond and does not commit further crimes during the full length of the sentence, then the punishment is served. This is not a perception that is peculiar to Pakistani probationers alone. It would be reasonable to say that it is a perception of probation that is common worldwide, at least in the United Kingdom (see Calverley et al, 2004). This is what is often referred to as traditional probation practice structured along the philosophy of ‘advice, assist and befriend’ (See Chapters 2, 3 and 6). As probationer no 11 simply puts it, “Probation is government supervision” (Field Notes, February 15, 2005)

5.8 Problems Encountered by Probationers

The main aim of probation is to provide an opportunity to offenders to think about their crimes and offending behaviour and to refrain from re-offending. In addition, offenders on probation get an opportunity to continue their daily routine work and live with their families.

²⁵ The Kachehre is a place where the session and district magistrate courts operate. The lawyers who practise in lower courts and district courts reserve their desks/offices in the Kachehre. Generally, before the introduction of the Local Government Ordinance 1999, the offices of the former Commissioner (administrative head of a district) and Deputy Commissioner of the district were also in the Kachehre. All probation officers reserve their offices in the Kachehre due, to which some probationers could not differentiate between a court and the office of a probation officer.

However, probation does not mean a total letting off. As mentioned above, there are restrictions on the mobility of the offenders plus monitoring in the form of regular meetings with their probation officers. The majority of the probationers (51 out of 60) found these two important conditions of a probation order difficult to comply with. With regard to attendance, the problem arose from the fact that the probation offices to which they had to report were located many miles away. Meeting the attendance requirement, therefore, meant leaving families, friends and jobs, to travel long distances in order to see their probation officers. Seventeen of the probationers had to endure 2-3 hour journeys from their homes to their probation officers' offices. For these probationers, the majority of whom were poor, these journeys are time-consuming and expensive. Probationer no 50 and 57 both lived in remote villages in the Province. They had the additional problem of lack of adequate transport facilities to enable them travel into the city to see their probation officers.

Six probationers who were involved in family feuds (and the disputes were still on-going at the time of this study) said that they were constantly worried about leaving their families behind and about being harmed themselves by rival families, on their way to attend their probation meetings. As probationer no 23 put it, 'Attendance dates always keep me under stress' (Field notes, March 5, 2005)²⁶. For probationer no. 33, a college student, the regular attendance requirement was seriously affecting his studies. As he explained:

I have to take leave from school on the day of attendance to the probation office. My exams are in progress these days. Tomorrow I have a paper. Instead of preparation for the exam, I am here for attendance with my probation officer (Field Notes, March 22, 2005)

²⁶ The Probation Officer Charsadda District told me that 'a few years ago, one probationer under my supervision was killed by his enemies on his way back home, after attending his probation supervision meeting (Field Notes, 2005).

However, the only female probationer in the sample said that she did not mind undergoing the 3-hour journey from Peshawar to see her probation officer in Swabi. Her reason was that she wanted to keep her offence (which she denied) and punishment secret from her family and relatives. There is a strong cultural resentment of female offending in Pakistan. She explained:

It is difficult for me to travel far away from Peshawar to Swabi. But so far, my relatives don't know that I am on probation. I always tell them that I am going to Swabi to see relatives. I want to keep this probation secret from my relatives; otherwise it will create many problems for me being a woman (Field Notes, March 15, 2005)

In addition, 26 probationers complained about loss of wages as a result of having to take a day off work to attend their probation meetings. This was mostly felt by the probationers who were daily-paid workers, labourers, taxi drivers, construction workers, shop assistants and agricultural workers (farm hands). Some of the probationers found the residency requirement that probationers should reside at the addresses given to the courts when the order was made, far too restrictive. These were probationers whose job required them to work in other parts of the country for long periods of time or were international traders. For example, probationer no. 2 and 30 could not take up appointments in Dubai because of the residency restrictions. In this respect, they saw the restrictions as counter-productive in terms of not enabling them to get good jobs and live law-abiding lives.

It will be shown in chapter 6 that in spite of these difficulties, very few probationers in NWFP Pakistan reappear in court as breach cases. The probationers in this study had made effort to attend their probation supervision meetings; although some of them said that they had genuine reasons for non-attendance. However, because of general telecommunication problems in the Province, especially in the remote villages, these probationers had not been able to contact their probation officers to inform them of their situation. For example,

probationer no. 6 felt compelled to attend his probation supervision meeting even though his child was sick and needed hospital treatment. According to him, he had to forgo the hospital visit in favour of his supervision meeting. As he put it, “I am spending all my day here now worrying about my son” (Field Notes, 2005).

All the probationers interviewed said that they would do their best to attend their scheduled supervision meetings; even those amongst them who were illiterates (that is, could not read or write in English) got someone to read the probation letter (the probation order Form B) for them and tell them the dates of their next scheduled meetings. As probationer 34 explained:

I always remain tense not to miss my attendance date. I am an illiterate person. How am I supposed to read this paper? (Probation Order Form B). Every time I have to show this paper to people and beg them to tell me the date of my attendance (Field Notes, March 22, 2005)

The probation service in NWFP Pakistan does not have facilities that would enable probation officers to chase up or communicate with their clients in order to ensure their attendance. None of the probation officers visited had telephones (see chapter 6). If a probationer failed to turn up for a scheduled supervision meeting, there was no way of finding out the reason why. Thus, unless probationers re-offend and re-appear in court, probation officers can only assume that they are complying with their orders.

5.9 Experience of Probation

Section 13 (a) of Probation Ordinance 1960 requires probation officers to visit their clients at their homes. However, none of the probationers in this study was receiving visits

from their probation officers at the time of this study. All the probationers in the sample were interviewed whilst in attendance at their probation officers' offices. None of the probation officers visited had transport facilities that would enable them to visit clients at home or in their communities. Thus, the only experience of probation by the probationers was the supervision meeting with their probation officers.

Probationers are required to report to their probation officers in a designated probation office for periods ranging from once a month during the early stages of their order to once in two months towards the end, until the sentence is spent.

As will be shown in chapter 6, the RPD in NWFP Pakistan does not run any rehabilitation programmes for offenders; not even a drugs treatment or rehabilitation programme for offenders on probation as a result of drugs misuse problems. As discussed in chapter 3, the probation system in Pakistan is based on the 'advice, assist and befriend' model of probation. Probationers are expected to get general advice and counselling from their respective probation officers. However, there are no specific rules on how these advice sessions should be structured. It is totally up to the discretion of the probation officer and their personal assessment of what an offender requires in terms of advice, to help them refrain from future offending and live peaceful lives.

I observed a few of these advice sessions during the course of data collection. They were informal in nature and took the form of a one-way flow of information dominated by the probation officer and which lasted for only a few minutes. Although the discussions often related to the offender's well-being, they were not always related to the probationers' offending behaviour and criminogenic needs. The offenders on probation for illegal drug use were surprised that there were no treatment programmes arranged for them, to help them

address their drug addiction or habits. Those on probation for possession of illegal or unlicensed weapons saw the sessions as being much better than being in prison. For those who had spent some time in prison awaiting trial, being on probation was a relief. According to probationer no 49:

Probation is a good system. We just come for attendance and within five minutes, we are free to go (Field Notes, May, 10 2005)

However, a significant majority (33; 55%) had the expectation that being on probation would give them the opportunity to reflect back on their offending and resolve not to re-offend. Those who were breadwinners in their families (21; 35%) were happy that they could continue their jobs because of probation; even those who had lost their jobs and businesses whilst in prison awaiting trial were optimistic that they would be back on track soon and therefore saw being on probation as an opportunity to get back on their feet. As probationer no. 12 simply put it:

I am happy to be placed on probation because I am doing my business and I am with my family too (Field Notes, February 15, 2005).

Two probationers who were still in education liked probation because they could continue their studies while on probation. So, even if probation does not offer the offenders rehabilitation, it at least offers them some hope. There is no doubt that for the majority of probationers, the most obvious benefit of probation was their perceived freedom.

However, one of the main purposes of placing offenders on probation is to bring some positive changes in their offending behaviour and reintegration. Therefore it was important to know if probationers of this research study had felt any positive changes regarding their

offending behaviour while they were/are on probation. Sixteen probationers (26.7%) said that they had realised their mistakes and would probably not re-offend in future. Five of the probationers accused of using or trafficking in illegal drugs (8.3%) replied that they would not use or traffic drugs in future. Thirteen probationers (21.7%) probationers said that they would no longer keep unlicensed weapons in their homes. One probationer said that he had stopped fighting and misbehaving. However, seven of the probationers who were also on probation for possession of illegal and unlicensed weapons (11.7%) replied that it was not their fault that they offended; therefore there was no question of whether probation was going to change them or not. Fifteen probationers (25%) were not sure of what probation could do for them to address their offending behaviour. Probationer no 23 saw only the 'negative' aspects of being on probation. He said:

I don't like probation at all. I believe a person on probation loses money, liberty and respect. Probation is to increase the headache of the offender (Field Notes, March 5, 2005)

5.10 Issues Surrounding Reintegration of Probationers

The concept of reintegration could be defined in several ways. Generally it is used to refer to being in a more settled or stable state after a period of unsettlement. For example, it could mean:

- To have a meaningful, responsible activity derived, for example, from an employment that gives a purpose to daily life.
- To function or participate effectively within one's immediate family or community.

The term is sometimes used in a medical sense, to explain the successful outcome of a treatment or medication; or even in post-conflict discourse, to refer to a return to a pre-war peaceful situation after a military conflict. In criminology, the term re-settlement is often preferred to 'reintegration'. It means to return to being a useful member of one's community and, more importantly, participate in the community's activities. Reintegration may be seen as the opposite of social exclusion. Probation is one of the key punishments that is focused on the reintegration or re-settlement of offenders consequent upon the delivery of effective offender programmes that fully addressed the offender's criminogenic needs and the provision of skills to enable offenders return to their communities as law-abiding citizens able to contribute to and participate in the community's legitimate activities. Literally, it is about being given a second chance.

However, reintegration may not succeed if there is no support or acceptance by the community into which the offender returns. Offenders may need an 'after-care' support in the community, to aid the process of reintegration. More importantly, offenders need to earn back the trust of families, relatives and the community for the reintegration process to succeed. So, whilst probation may prepare the offender for reintegration, it is the acceptance of the offender by the community that is important if reintegration is to be realized. Offenders are said to be re-integrated when they are accepted by their communities during or after the completion of a sentence. The reintegration of an offender will, therefore, depend on two factors: the change in attitude and skills that were achieved during the punishment process and how the offender is perceived whilst serving the sentence and upon release.

As discussed above (see also Chapter 6), the probationers in the study sample have not undergone any rehabilitation programmes. This raises the question of what is expected of

these offenders in terms of their rehabilitation, which is what probation should be about. However, the majority of the offenders (42; 70%), when asked, said that they were welcomed by their families, friends and even their communities, when they returned from court and prison. These included those who were sentenced for being in possession of illegal or unlicensed weapons. The reason was simply because they were not seen as criminals by their families and communities. As said before, the possession of arms is part and parcel of Pakhtoon culture and the reasons why these offenders owned their weapons (to protect their families, defend their honour and for ceremonial purposes such as weddings) are acceptable behaviours in these communities.

It is commonly believed that the more cohesive a community is, the easier it would be for the offender to successfully integrate back into it. In Pakistan, the family and the community play an important part in the socialisation of individuals. The religion of Islam also provides a unifying force. As said earlier, the majority of people in NWFP Pakistan live in joint families. Due to the cohesive nature of families in Pakistan, members are supported by their families even when they are involved in serious crime such as murder. However, whilst offenders on probation for unlawfully owning weapons were easily assimilated into their communities with no stigma attached to the punishment, those whose crimes were of a moral nature were not.

Fifteen probationers (25%) experienced rejection, shame and social exclusion when they returned to their communities. This was particularly the case with those on probation for smoking chars (hash) and for gay sex. Although chars (hash) is commonly used in Pakistan, it is neither legal nor socially acceptable behaviour. There is social stigma attached to drug use and trafficking. As probationer no 1 explained his experience:

I know that people don't like those who smoke/use drugs. Therefore I believe they would not like me as well. Drugs are bad not only for health, it brings bad name to the family too (Field Notes, January 26, 2005)

Probationer no. 8 also recalled his experience:

People don't give me respect. They call me Podaree (meaning a druggie or drug addict). It really hurts me. Now I have decided to leave using drugs as it degrades the person (Field Notes, February 5, 2005)

For this probationer (as probably as many in the same position) the desire to desist from future offending came from shame and exposure resulting from his arrest and conviction. It did not result from the experience of being on probation.

Probationer no. 25 and 26 also recalled similar experiences when they returned to their families. They were both sentenced for drug trafficking. Probationer no 26's case was more serious because he was a young person and his parents did not know that he was taking illegal drugs. He explained:

I used to smoke chars with my friend but my parents did not know that. For the last six months, I have stopped smoking chars. Unfortunately, on that day; I was bringing chars (hash) for my friends when the police recovered drugs from me. My parents are unhappy knowing that I was involved in a drugs case. I have brought shame to the family, especially to the elders of my family (Field Notes, March 9, 2005).

Probationer no. 40 – another student – arrested along with his father also for a drugs trafficking offence, was refused re-admission by his former school because of his drugs conviction. He said:

This case has spoiled my career. I was studying science at level 10 at the time of my arrest. I spend 14 months in prison during trial period. After being placed on

probation, I went back to the school to continue my studies; they did not accept me back. Now I am studying as private student, but as a private student I cannot study science courses (Field Notes, April, 8, 2005)

The gay probationers encountered problems of re-integration simply because Pakistan is an Islamic country. Gay sex is forbidden (*haram*) in Islam. Probation no 36 talked about people looking at him suspiciously and making fun of him in public. Because he was alleged to have had sex with 'old men' he was considered a disgusting gay man! However, probationer no. 11, who was a good looking young person, said that although his offence was abhorred by society, his punishment had not diminished other gay men's interest in him. As he put it:

I face a problem because of my good looks. There are still some men around me who want to have gay sex with me (Field Notes, February 15, 2005).

The only female probationer in the sample, as mentioned earlier, was doing all she could to keep her offence and punishment secret from her family (and community) because of the social stigma attached to female offending in Pakistan. A female offender is believed to have let her family down and to be a disgrace to womanhood. Even though she might have been forgiven by her immediate family, she would still be regarded as having brought shame to the entire family.

Where the offence involved death of a victim, probationers had problems of reintegration. Probationer no 60, whose brother-in-law killed himself using the probationer's gun, was excluded from his community because the villagers believed that it was not suicide but murder. Similarly, probationer no. 55, whose offence also included a killing by a member of

his family, used to lead the daily five time prayers as Imam²⁷ but lost his position as a result of the incident. As he explained:

After this case, I cannot go back to my village. Now, nobody accepts me as Imam
(Field Notes, May 31, 2005)

Finally, probationer no 48 raised an important issue about the barriers to reintegration. He was on probation for the possession of illegal arms. He said that whilst he was not particularly keen on re-offending, the family feud that led to his offending in the first place was still in existence. Thus, he felt that the pressures were still there for him to re-offend in future and there was nothing he could do about it. As he put it:

I don't want to indulge in any crime but my enemies are dragging me into crimes
(Field Notes, May 10, 2005)

5.11 Summary

The majority of the probationers in the research sample came from the rural areas of NWFP Pakistan and could be described as of low socio-economic status. All but one of the 60 probationers in the sample were men. The offenders were on probation for a variety of offences but the majority were on probation for being in possession of illegal or unlicensed weapons. The second largest group consisted of those on probation for use of illegal drugs or drugs trafficking. There appears to be a weapons culture in the Province with citizens owning guns for security reasons, due to the geographical location of the provision which is next door to the Tribal Areas and the country of Afghanistan. People also felt the need to have weapons because of the prevalence of family feuds, some of which had led to deaths. So,

²⁷ The Imam is the person who leads the daily five time prayers. Purity, modesty, kindness and good moral character are some of the characteristics expected from a person to be Imam.

the possession of weapons provides a means of protecting one's family against rival families and of carrying out revenge in the event of the death of a family member. In addition, the carrying of guns has a social value, as the firing of guns during social events and ceremonies like weddings is common in the province. However, there are two categories of weapons: those that are legal and for which a licence is required and those that are illegal (for example, an 'AK47'). All the probationers arrested possessed their weapons unlawfully. It has to be said that the border with Afghanistan has made guns and illegal drugs (hash) easily available in the province. Unfortunately, border checks are ineffective and the war in Afghanistan is believed to have made the problem even worse.

Many of the probationers had spent time on remand in prison awaiting trial. This could be due to the fact that the offences committed were imprisonable. However, as some of those remanded in prison had committed less serious crimes, it became clear that the reason for their detention was their inability to provide acceptable surety to the courts. The denial of bail to poor people awaiting charge or trial is a common feature of the criminal justice system in developing countries (see Cole, 1990a).

It was revealed that none of the offenders were on probation programmes. The only requirement of a probation order in NWFP Pakistan, it appeared, was that offenders attend scheduled supervision meetings with their probation officers. It will be shown in chapter 6 that the RPD does not run any rehabilitation programmes for offenders, not even those on probation because of drug addiction.

Many of the probationers had problems attending their scheduled meetings, mainly because of the distance between their homes and the probation offices. Inefficient transport services and no telecommunication network meant that probationers were not able to contact their probation officers whenever they had genuine reasons for non-attendance. Some resented the residential abode restriction as it meant that they could not travel out of Pakistan in search of better jobs. Probationers, who were illiterate, had problems reading letters from their probation officers, which are written in English. However, it was shown that probationers made every effort to attend their scheduled supervision meetings.

Probationers had different perceptions of what being on probation meant. For the majority, it meant being a “prisoner in your own home and don’t offend again”. Many of them saw being on probation as having a lenient sentence. More importantly, they saw it as being free to carry on their normal lives, look after their business, jobs and families. So, even though they had not been exposed to any rehabilitation programmes, they saw probation as having given them some freedom and hope for the future. For that reason, perhaps, the majority said that they would probably not re-offend. This would normally be seen as the offenders having been re-integrated. However, it is shown that for many, their reintegration was brought about by the support that they had from their families and the acceptance of their communities instead of the experience of being on probation.

Chapter 6

Probation Practice: Probation Officers' Views

6.1 Introduction

In the previous chapter, I explained the socio-economic background of probationers and the nature of the offences for which they were granted a probation order. The chapter also discussed the offenders' perceptions of the probation service, and the attitude of probation officers towards them. In addition, the problems that the probationers were facing as a result of the restrictions placed on them by their probation order were discussed.

Probation serves the dual purpose of protecting society well as providing opportunities for those who offend to address their offending behaviour through change of behaviour and acquiring skills that would enable them to be 're-settled' in their communities as useful and law-abiding citizens. The ultimate aims are to reduce the incidence and impact of crime on society and safeguard society from those who are likely to pose harm to its members. Probation relies on the premise that not all types of offences are serious enough to require costly incarceration. Instead, probation provides opportunity for offenders to continue to live a normal life within their communities under supervision and constant monitoring, caring for their families and carrying out their financial responsibilities, without becoming a burden on the state.

This chapter discusses the information obtained from the 14 probation officers who worked in the RPD of NWFP Pakistan, the Director of the Department and his Deputy. The chapter starts with a demographic profile of these respondents. It then highlights important

issues relating to the working conditions of the probation officers, their relationship with judicial magistrates, their views on their probationers/clients and breach cases; and their views on the performance of their service in terms of its ability to help offenders re-integrate back into their communities.

6.2 Demographic characteristics of the Probation Officers

The Director, Deputy Director and all the probation officers who were working with RPD, NWFP Pakistan at the time of this study were men. There was no female probation officer in NWFP Pakistan. As far as the qualification of the probation officers is concerned, section 7 (d) of Probation Rules 1961 simply requires a probation officer to have ‘working knowledge and practical experience of social work’. Hence, seven of the probation officers (50%) had a Master degree in Social Work. The other probation officers had various educational backgrounds, including one with a Master degree in economics; two with law degrees; two with Bachelor degrees in various subjects; one with a Master degree in Pashto language; and the last one with an intermediate qualification. The Deputy Director had a Master degree in Sociology whilst the Director was a bureaucrat with a Master degree in International Relations. In terms of work experience, eight of the probation officers had worked as probation officers for more than 10 years. The rest (six officers) had worked for less than 10 years. The Deputy Director also had more than ten years experience on the job and the Director of the Department was a well-experienced bureaucrat who had worked in different key administrative posts during his career.

6.3. Training and Working Conditions of Probation Officers

The RPD, NWFP does not offer any training to newly appointed probation officers, nor does it have any in-service training programmes for the serving probation officers. Until 1995, the RPD, NWFP used to send serving probation officers for a short-term training programme at the Police Training Institute in Lahore. Therefore, only probation officers who were in employment before 1995 would have had any training. The training was a one-month course on the probation ordinance and the roles and responsibilities of probation officers, delivered by police law instructors. Probation officers in NWFP Pakistan post-1995 have not had any formal training that is relevant to their work as probation officers.

Administratively, the NWFP is divided into 24 districts. The RPD has regional offices in only 11 districts but it serves all the 24 districts in the province. This means that some probation officers have responsibility for more than one district or work across districts. In this regard, five of the probation officers were each working in two districts whilst a further three probation officers were each working in three districts. Two probation officers shared one district (Mardan) whilst the rest (four probation officers) each had responsibility for one district. The probation officers working across districts have to attend court in the outlying districts. In addition, they are expected to make weekly or monthly visits to all the districts within their jurisdiction in order to be able to see all the probationers under their supervision.

The working conditions of the probation officers could only be described as poor. All the district probation officers consisted of a one-room office accommodation housing all the probation officers in the district. Most of the probation officers did not have support staff. Those that did, shared their single-room offices with their support staff. None of the probation officers had telephones, computers or fax machines. There were no official vehicles

to enable probation officers visit their clients in remote areas of the district. When asked, the Director of the RPD simply blamed the unsatisfactory working conditions of the probation officers to lack of funds from the government. He said:

The government provides a very limited budget to the RPD, which hardly cover staff salaries. I am trying to get more funds for the RPD but so far, I have not succeeded. I understand that probation officers lack basic facilities. I know their problems, they are genuine, but I have nothing to offer them (Field Notes, June 13, 2005).

This view was echoed by the Deputy-Director who claimed to have resorted to donations from Non Governmental Organisations in the effort to improve the conditions of the probation officers.

6.4 Dealing with Judicial Magistrates

This section highlights some of the important issues surrounding the working relationship between probation officers and judicial magistrates during the sentencing process. It discusses the perception of probation officers regarding their role before a probation order is granted to offenders and their views of the discretionary powers of the judicial magistrates in the granting of probation orders.

6.4.1. Working Relationship with Judicial Magistrates

Section 12 of Probation of Offenders Rules 1961 requires the RPD to communicate the names and addresses of the Probation Officers attached to each district to the relevant District Magistrate courts. Normally, a probation officer is attached to 6-8 courts in a district. However, the number of courts is greater if a probation officer works in more than one district. It is, obviously, impossible in practice for a single probation officer to appear

simultaneously before different courts. Therefore, it is not uncommon practice that judicial magistrates issue a probation order in the absence of a probation officer in court. Where a probation order is granted in the absence of a designated probation officer, the court would release the offender on bail and order him to report to the probation officer the next day or remand the offender in prison whilst the relevant probation officer was notified to take the offender from prison into supervision. As discussed in Chapter 5, some probationers had spent significant periods of time in prison on remand before starting their probation order. This was sometimes due to the problem of lack of effective coordination between the probation offices and the courts, whereby relevant information was not passed on to the probation offices on time. In addition, the probation officer would have to find time and resources to enable him to visit the prison in order to 'retrieve' his client into supervision. This is not often a priority for probation officers, who are usually busy with other clients.

All the probation officers interviewed said that it is essential to have a good (personal) working relationship with judicial magistrates. According to some probation officers, a good relationship with judicial magistrates is beneficial in terms of getting more offenders placed on probation. As probation officer no. 2 explained:

We have to keep a good working relationship with the judicial magistrates because our work [getting offenders on probation] depends upon the positive attitudes of the judicial magistrates towards probation (Field Notes, May 19, 2005).

This view was echoed by probation officer no. 1 who said:

A probation officer can make good progress if he keeps good working relationships with the judicial magistrates by regularly informing them about the positive aspects of the probation law for the offenders and for the society as a whole (Field Notes, February 10, 2005)

Probation officer no 9 explained the relationship with judicial magistrates as a responsibility.

He said:

It is our duty to keep good working relationships with judicial magistrates because they are the ones who use the probation law (Field Notes, March 24, 2005)

These probation officers were worried that if the judicial magistrates were not fully informed about the benefits of probation or the relationship between themselves and the judicial magistrates were strained, then judicial magistrates were more likely not to grant a probation order, even in cases where probation was a sentencing option. It will become clear in Chapter 7 that judicial magistrates preferred to use the fine where the offence was minor, even in cases where it appeared that the offender was in need of some help or treatment and there was an option of a probation order for the offence. The probation officers preferred that more offenders be placed on probation, especially where the offences committed come within the remit of the probation law. However, some of the probation officers felt that some judicial magistrates, especially the newly appointed ones who were not familiar with the probation law, were being easily persuaded by defence lawyers to fine their clients instead of ordering probation. For the lawyers, the fine is a less severe punishment compared with a probation order (see Chapter 7). As probation officer no. 5 put it:

People want a shortcut solution to their problems including for their offences. They do not think about reformation. They like to pay fines instead of being placed on probation which takes a longer time (Field Notes, February 24, 2005)

Probation officer no. 11 added:

Lawyers prefer to avoid probation because it affects their performance in front of their clients (Field Notes, June 3, 2005)

In addition to the pressure from defence lawyers (see Chapter 7), some of the probation officers felt that the reason why the judicial magistrates were not using the probation order ‘as they should’ is simply because they were not fully aware of the benefits of probation as a punishment. Thus, they felt that it was their duty to educate the judicial magistrates and encourage them to use probation more often. Probation officer no. 4 puts it in business terms, thus:

We, the probation officers, are just like sales persons whose job is to explain the qualities of their product. Our job as probation officers is to keep drawing attention to the qualities of our product, the probation order, to these busy judicial magistrates. Now it is up to the judicial magistrates whether to make use of the probation law or not. Probation officers cannot force judicial magistrates to make use of the probation law (Field Notes, February 8, 2005)

According to probation officer no 13, there is pressure from the Head Office on probation officers to encourage judicial magistrates to increase the number of offenders on probation “by convincing the judicial magistrates to make extensive use of the probation law in all minor offences” (Field Notes, 2005).

However, when asked whether they had good working relationships with their respective judicial magistrates, only half of the sample of probation officers (50%) said that they had good relationships with judicial magistrates whilst the other half (50%) said that they did not. The probation officers who claimed to have bad relationships with judicial magistrates blamed these on the condescending attitude of judicial magistrates towards probation officers. These officers recounted occasions when judicial magistrates were rude to them or insulted them in court. Probation officer no. 10 recalled an occasion when a judicial magistrate told him:

You [the probation officer] should be thankful to us because your shop [the RPD] is running because of us. If we stop placing offenders on probation, you will lose your jobs (Field Notes, April 14, 2005)

The view that the granting of probation orders only keeps probation officers in employment delimits the value of a probation order and shows a lack of understanding of the meaning of this type of punishment by those in a position to impose it, that is, the judicial magistrates. The reasons for the judicial magistrates' apparent negative attitude towards probation as a sentence in NWFP Pakistan are further explained in Chapter 7.

6.4.2 Probation Officers' Reports and Recommendations

A major complaint by all the probation officers interviewed is what they saw as a deliberate flouting by judicial magistrates of the provision in the probation law that requires judicial magistrates to consult with probation officers and obtain a probation officer's report before deciding on sentence. As probation officer no. 2 explained:

The probation officers should get a proper role before the court passes a probation order. The judicial magistrates must ask the probation officer to prepare a social inquiry report on the offender and if the probation officer recommends a probation order, the court must acknowledge their recommendations (Field Notes, May 19, 2005)

Similarly, probation officer no. 3 put it in this way:

In my opinion, all petty cases should go through the recommendation of the probation officer and the court should have less discretionary powers in this regard (Field Notes, June 7, 2005)

Thirteen out of the 14 probation officers interviewed had never had the experience of being asked by a judicial magistrate for a report or recommendation before sentence was

passed, even in cases where the offenders were eventually placed on probation. In the one case where the probation officer was asked to present a report, the report was rejected by the judicial magistrate because the judicial magistrate “did not agree with the personal characteristics of the offender” presented in the report. As a result, the judicial magistrate refused the probation officer’s recommendation to place the offender on probation but issued a fine instead.

The probation officers were dismayed that judicial magistrates were relying far too much on section 5 of the Probation law which gives judicial magistrates discretionary powers to issue a probation order in respect of an offender if they are of the opinion that imprisonment is unnecessary for such offender. As shown in Chapter 7, this is often interpreted as superseding the provision that a judicial magistrate must obtain a probation officer’s report before making a probation order. Judicial Magistrates appear not to have faith or trust in probation officers. As probation officer no. 7 summed up:

So far in my career, none of the judicial magistrates have asked me for any recommendations before placing offenders on probation and I am not expecting anything in future as well. I believe, if I gave my recommendations, the judicial magistrates would question my interest. That’s why I visit court only if the judicial magistrate orders me to come (Field Notes, February 26, 2005)

The downside of the lack of probation officer input in the decision making process is that the onus is then placed on the judicial magistrate to explain to an offender why he or she is being placed on probation and what the probation order would involve. Usually, the judicial magistrates simply pronounce sentence. Where a probation officer is in court, the offender is simply handed over to the probation officer. It is expected that the probation officer would explain to the offender what he or she would be required to do whilst on supervision. As said earlier, in the absence of a probation officer, the offender is either

released on bail to ‘find’ his or her probation officer or detained in prison whilst his probation officer is contacted to ‘take him out’ and into probation supervision. The result is that many of the offenders in this study, when sentenced to probation, had no clue of what the order entailed (see Chapter 5).

6.5 Working with Probationers

6.5.1. Probation Officers’ Perception of their Clients

All the probation officer interviewed said that their clients were mainly poor people. However, this is not because they commit more crimes compared with the higher social classes. Probation Officer no. 14 added that the rich are more likely to bribe the police in order to avoid arrest or prosecution. Although this statement appeared like an unsubstantiated allegation, it was echoed by Probation Officer no. 2 who said:

Look, if a rich or influential person commits a minor offence, the matter is resolved and the case is never registered with the police. However, if the police register the case, it is decided in the favour of the rich person in court. The offenders we receive on probation are *be mura be plara* which means people ‘without mother and father’. (Field Notes, May 19, 2005)

Probation Officer no. 8 was even more direct in his accusation of the police taking bribes from rich people to let them off and punishing the poor. As he put it, “the laws are made for the poor people.” Although there was no evidence to substantiate these probation officers’ views, it has already been mentioned in Chapter 5 that police corruption is a significant criminal justice problem in developing countries. However, the majority of probation officers believed that the majority of the probationers were guilty of the crimes for which they had been sentenced, although some may have been pressurised to plead guilty by their lawyers (see Chapter 7).

6.5.2. The Supervision

This section discusses two central features of probation. The first relates to the way offenders on probation were supervised by their probation officers. The second relates to the issue of the rehabilitation of offenders on probation in the NWFP.

A probation order in Pakistan, like its counterparts elsewhere, including the UK, includes an attendance provision or a restriction imposed on the offender during the period of the order. The law also requires probation officers to make home visits or supervise offenders in their communities but as mentioned earlier, probation officers in NWFP Pakistan do not make home visits to offenders due to lack of resources (for example, transport facilities) that would enable them to do so. All offenders on probation are expected to attend supervision meetings with their probation officers at a designated probation office (section 13 (a) of the Probation Ordinance, 1960). Attendance requirements vary between once a fortnight during the first two months of sentence and once every month afterwards until the expiry of the order (section 10.b of the Probation of Offenders Rules, 1961). Generally, probationers are required to be of good behaviour and be in regular contact with their respective probation officers, to inform them of changes in their residence, employment or any other problem that could affect their attendance or compliance with the order.

The main task of a probation officer is to build a positive relationship with probationers and encourage positive changes in their way of life, in such a manner that they are able, willingly, to address the causes of their offending behaviour. In addition, probation officers are expected to look for signs of potential dangers or barriers to the offenders' successful rehabilitation or reintegration and to try to overcome them. The ultimate aim, as in the UK, is to prevent offenders from reoffending.

Probation programmes

This section discusses what provision, if any, in terms of programmes are available to aid the rehabilitation or resettlement of offenders, address their offending behaviour and reduce their likelihood of reoffending.

Unfortunately, the probation service in NWFP Pakistan does not run any offender programmes for its clients. The Department does not offer any treatment or rehabilitation programmes to its probationers. When asked why no offender/rehabilitation programmes were being offered, eight probation officers (57.1%) replied that it is simply because the government gives little priority to the probation service. The Director of the RPD agreed with this view. According to him:

Health and education are top of the priority list of this government; they get more funds from the government. Unfortunately, probation is in the lowest category of priorities of this government.. My predecessors and I have requested numerous times for more funds in order to run some rehabilitation and treatment programmes for probationers. The government always made excuses of difficulty in sparing more money for the RPD every time we have requested it (Field Notes, June 13, 2005).

One probation officer (probation officer no. 5) ascribed the government's lack of interest to the fact that people on probation are mainly of low socio-economic status. According to him:

[This] government doesn't care for the welfare of illiterate and poor [criminals] (Field Notes, February 24, 2005)

The Deputy Director, in his own view, attributed this problem to the fact that the RPD in the NWFP is still struggling to establish its own identity. He said that since the RPD is attached to the Prisons Department and the Inspector General of Prisons is also the Director

of the RPD (see Chapter 3), it is no wonder that when it comes to criminal justice policy making and funding that affect both departments the Prison often takes priority over Probation. The Deputy Director, who is solely in the RPD, said that he had, on several occasions in the past, criticized previous and present Directors for doing nothing to carve out a distinct identity for the probation service. According to him:

Why would successive Inspectors-General of Prisons bother to improve the RPD when they do not belong to us? For so many years, we are suffering because nobody speaks for our problems to the government. Every successive government increases the budget for the Prison Department. The RPD gets nothing. We are struggling to create an independent Directorate of RPD in NWFP free from the influence of the Prison Department, but the present Director of the RPD, who is also the Inspector General of Prisons, NWFP, is a strong opponent of it (Field Notes, June 9, 2005).

All the probation officers interviewed supported their Deputy Director's position; that is, that working under the Prison Department is hampering the growth of the RPD in NWFP Pakistan. They all wanted a separate and independent probation service for the province. The Director, obviously, disagreed with this view. He said:

The probation officers are wrong to suggest that working under the Prison Department is affecting the growth of the RPD. We, the Prison Department are actually facilitating the activities of the RPD (Field Notes, June 13, 2005).

On the issue of whether a separate probation directorate was necessary for the NWFP, he said:

These people [probation officers and their Deputy Director] are not interested in the benefit to the public of the creation of an independent Directorate of Probation in NWFP. They just want to create some high paid posts for themselves. I know that the government lacks funds. Therefore, instead of creating an independent Directorate of Probation, I have requested the government to appoint more probation officers, especially female probation officers one in each district. The important thing at this stage is the facilitation of the existing RPD because the government cannot afford to create another independent department for financial reasons (Field Notes, June 13, 2005).

All the probation officers interviewed said that they believed that it is the lack of political will or interest in probation by the government that is responsible for the probation service not having any offender rehabilitation programmes to offer to their clients. Probation officer no 10 explains the impact of the lack of adequate funds on probation work. He said:

To run any kind of rehabilitation programmes, whether educational, skills training, counselling, drugs rehabilitation and so on needs the funds that we don't have. Our budget is so limited that the Head Office discourages probation officers if they want to make just two visits in a week to the other district for which they are responsible. Furthermore, we have clear directives from our Head Office that any family or community visits to any probationer will not be financed (Field Notes, April 14, 2005).

What is interesting is the fact that the Social Welfare Department in NWFP Pakistan runs drugs rehabilitation centres and has skills training centres and welfare homes. However, the Social Welfare Department will not allow the RPD to send their probationers to any of these institutions. The Deputy Director of the RPD expressed his dismay at this situation. He said:

I have had correspondence with the Social Welfare Department on numerous occasions but they are not cooperating with us. For example, they prefer to take drug addicts from the streets and hospitals to attend their treatment and rehabilitation centres, but they do not want our probationers to use the same facilities (Field Notes, June 9, 2005).

It will be shown in Chapter 7 that judicial magistrates' unwillingness to place offenders on probation and preference, instead, to give them fines, is partly due to the 'common knowledge' that the RPD does not run any rehabilitation programmes for offenders. In the absence of rehabilitation programmes, most of the judicial magistrates interviewed did not see any reason for placing offenders on probation. Probation Officer no. 6 recalled what a judicial magistrate once said to him, thus:

If you do not have any rehabilitation programmes, not even for drug addicts then why are you here asking me to place offenders on probation? (Field Notes, February 25, 2005)

More importantly, perhaps, is the possible explanation that this provides with regards to why offenders in possession of illegal and unlicensed weapons are the ones mostly placed on probation – they are offenders who do not need ‘rehabilitation’ in the probation sense. However, as shown in Chapter 5, some offenders with drugs problems were also placed on probation, in spite of the knowledge by the judicial magistrates that the probation service had nothing to offer them.

6.5.3. A Case Study of an ‘Advice and Counselling session’ in a Probation Officer’s Office

The advice and counselling session is the only rehabilitation service being provided by probation officers to the offenders under their supervision. During the course of data collection, I attended many ‘advice and counselling sessions’ carried out by different probation officers in different parts of the study area which were similar in their arrangements and contents. These sessions were carried out in the office of probation officers and were one-to-one sessions instead of group session.

In the following section, I illustrate an example of ‘advice and counselling session’ between a probation officer and an offender on probation.

Probationer Salam-O-Alikum Sahib (Sir)

Probation Officer Walik-um-Asalam

Probationer How are you Sir?

Probation Officer I am fine. How are you?

Probationer Fine, Thanks

The probation officers takes Form – B – the copy of the probation order – from the probationer, on which he writes the date of attendance during the whole length of probation period.

Probation Officer You wait outside the office. I will call you back in a few minutes. (These few minutes vary from five minutes to half an hour depending upon the workload of the probation officer). The probationer is called back in.

So, how is everything, your job and family?

Probationer Everything is fine Sir, thanks

Probation Officer Look, we are here to help you. The court has given you a chance to reform and to refrain from offending in future by giving you the probation order. It is important that you take advantage of this opportunity and do not commit any crime in future. It is just like when you commit a sin and pray to God to forgive you. God forgives you for your past sins but you have to promise that you will not repeat the same in future. Similarly, the court has given you this opportunity through probation that you will not commit any crime in future.

(After this, the probation officer may or may not discuss the particular nature of the offender's case such as family enmity, job etc. which mainly depends upon the interest of the probation officer in every particular case)

Probation Officer I have given you this date (mentioning the date) of next month to come back to my office for attendance. Now you are free to go.

Probationer Ok Sir, thanks, Khuda Hafiz (bye) (the offender take back the form – B from the probation officers).

Probation Officer Khuda Hafiz (bye)

6.5.4. Dealing with Breach Cases

According to all the probation officers interviewed, probationers generally comply with the attendance requirement of their order. The reasons for compliance vary. However, whilst the majority of offenders said that they would do all they could to attend supervision meetings because they did not want to break the terms of their order (see Chapter 5), some probation officers said that the probationers complied because they felt better treated by probation officers compared with the other agencies of the criminal justice system, namely the police and the judicial magistrates. As probation officer no. 4 put it:

The majority of the probationers are regular in their attendance because they have been badly treated by the police and in the court, and they find refuge with us (Field Notes, February 8, 2005)

A recent UK study on black and minority ethnic offenders' experiences of probation and the criminal justice system revealed that offenders on probation found probation officers to be the fairest compared with the other agencies of the criminal justice system that they had been in contact with since arrest (Calverley, 2004).

However, some probationers do fail to turn up for appointments but the numbers are usually very few (see Chapter 5). According to the probation officers, only four probationers breached their orders during the previous year. The reasons for non-attendance are varied,

some of which were discussed in Chapter 5. As far as the probation officers were concerned, they resented the fact that they do not have the power to force probationers to attend meetings. Probationers will not be reported as having breached their orders until they have missed three consecutive meetings; that is, non-attendance in three months.

The Probation of Offenders Rules 1961 have clearly established procedures for probation officers to follow where a probationer violates the conditions of a probation order by not attending meetings. Section 24 of the 1961 Rules asks a probation officer to inform his immediate superior of all suspected breach cases. The superior will then inform the court that passed the sentence on the offender. Before 2000, the immediate superiors of probation officers were the seven Assistant Directors in each of the seven divisions in the NWFP. At that time, probation officers simply reported breach cases to the Assistant Directors in charge of their districts. It was the job of these Assistant Directors to report the breach cases to the courts and to the Head Office in the provincial capital city, Peshawar. However, the Devolution Plan 2000 of the military government of General Pervez Mushraf changed the entire administrative structure of the provincial governments. The divisions were abolished and a new provincial structure was set up based on districts. As a result, all divisional level posts were abolished, including the seven Assistant Directors posts in the RPD.

As the posts of Assistant Directors no longer exist, there is a huge communication gap between the probation officers and their immediate superior, who is now the Deputy Director based at Head Office in Peshawar. Since probation officers are not allowed to report breach cases directly to the courts, the new administrative structure, according to all probation officers interviewed, has caused a lot of delays in the process of reporting breach cases and ensuring that the culprits are arrested and brought back to trial. The problem was particularly

acute in the cases of probation officers who lived in the remote rural districts, far away from the provincial capital city, Peshawar. The Deputy Director RPD summed up the situation thus:

We cannot bypass the probation law. Rule 24 of Probation of Offender Rules 1961 has clear directives on the procedure to take in all breach cases. I agree that for some probation officers working in far-flung districts, reporting a breach case and getting feedback from the Head Office is a time-consuming task. However, we have to follow the law (Field Notes, June 9, 2005)

According to the probation officers, the time spent going through this long bureaucratic procedure has meant that breach cases are either ignored or lost in the process. It is no wonder, then, that very few breach cases reach the courts (see Chapter 7). There are no other means of ensuring that breach cases reach the courts, unless a probationer re-offends and ends up in court on another charge, and the court is made aware of the fact that he or she is currently on probation, hence a breach case.

The majority of probation officers interviewed said that before the abolition of the Assistant Directors posts, they were made aware of the progress and outcome of their reported breach cases. However, these probation officers said that since the new structure had been in place, it had been difficult tracking down the progress of breach cases reported to the Head Office. Some probation officers believed that nothing really happens to breach cases reported. According to probation officer no. 5:

Some probationers disappear after their first attendance. I normally inform their sureties and our Head Office. However, so far, I cannot remember any action being taken against any of them. The only way we know anything about our breach cases is when they commit a second offence and are caught by the police and brought before the court (Field Notes, February 24, 2005)

Thus, a significant majority of the probation officers (10, 71.4%) said that they were not particularly keen on reporting to the Head Office whenever any of their clients ‘disappeared’

After further interview, it became clear that the Head Office sometimes blame probation officers for their clients’ non-attendance or breach of their probation orders. As probation officer no. 2 explained:

If we report any breach case to the Head Office, they blame us for the probationer’s non-compliance with the probation order. Instead of appreciating our efforts, the Head Office pressurizes us for the probationers’ absence. Therefore, if we believe that the offender will not commit any further offence and he remains absent from attendance, we do not report the case to the Head Office (Field Notes, May 19, 2005)

Probation officer no. 9 added:

We are often hesitant to inform the Head Office if a probationer is irregular in his attendance because it increases not only our headache, but that of the judicial magistrates too and the Head Office blames us for their irregularities (Field Notes, March 24, 2005)

Thus, the probation officers do not feel under pressure to report a probationer who ‘disappears’, as long as he or she does not reoffend. This further explains the low number of breach cases that reach the courts.

Generally, the probation officers felt powerless and uneasy when it came to breach cases.

Probation Officer no. 8 summed up the feelings of his colleagues thus:

The RPD is an important part of the justice system but unfortunately, probation officers don’t have any say before the probation is granted. And, if a probation order is violated, our job is only to inform the Head Office. We cannot correspond with the court or the police to arrest a probationer who is not regular in his attendance or a suspected breach. We have to go through Head Office and a lot of bureaucracy. This situation frustrates us (Field Notes, March 10, 2005).

As a consequence, the majority of the probation officers said that they were not particular rigid about clients' attendance at supervision meetings. Many of them said that they were more likely to overlook missed appointments when they were aware that the probationers were facing genuine problems that had prevented them from attending meetings. Lack of resources (transport facilities) makes it impossible for probation officers to check on probationers who are not attending in order to verify their reasons for non-attendance. For example, in relation to missed appointments resulting from a probationer having to travel outside his home district or even outside the country in search of job, Probation Officer no. 14 said:

If a probationer wants to leave his district or even the country for earning, he must go. In my opinion, it is not important that he should come to my office for attendance. The important thing is that we should facilitate his effort by relaxing our restrictions on his probation order if he wants to earn for himself and for his family through proper means. I believe that this is true rehabilitation. Personally, I never report such cases as breach because I do not consider it as breach. In my opinion, a case is breach if a probationer commits another crime (Field Notes, May 14, 2005)

In other words, if a probationer violates the conditions of his or her order by not attending meetings but has not reoffended, probation officers would not necessarily see that as a breach. Probation officers would ignore non-attendance at supervision meetings as long as no further offence is committed. Whereas irregular attendance or non-attendance could happen at any stage of the sentence, the majority of probation officers said that it happens more often during the middle stage of sentence and is highest amongst those on long sentences such as a three-year probation order. There was some indication in the replies of the probation officers that the longer one is on a probation order; the greater the chances are of irregular attendance. Somehow, this is considered 'normal' and might be tolerated so long as the offender commits no further crimes.

6.6 Probation Officers' Evaluation of their Performance

Probation officers were asked how they measured their success rate in these circumstances. The majority of probation officers judged their success in terms of the re-offending rate of offenders on probation. As mentioned earlier, the number of breach cases is small; so, where a probationer has not been picked up by the police for another offence throughout the period of his or her sentence (even though he or she may not have complied with the terms of his or her order throughout the order; that is, has 'disappeared'), this is taken as an indication of success. It is obvious that this crude measure of success is problematic.

However, the probation officers recognised the fact that there are several factors that could make an offender desist from future offending. In particular, they acknowledged family support as a key factor in the rehabilitation and resettlement of offenders. According to 12 out of the 14 probation officers, most probationers are welcomed back into their families and communities (see Chapter 5). There appears to be no general social stigma attached to being or having been on probation. This is unlike having been in prison. This is more the case where the offender was placed on probation for an offence that is culturally justifiable; for example, owning firearms in order to protect one's family honour and security. As already mentioned in Chapter 5, offenders on probation for homosexual offences may be treated differently.

Needless to emphasise is the fact that re-offending rates are based on police arrests. The probation officers were aware that in the case of probationers with drug problems, the fact that they have not been picked up by the police does not mean that they have not been re-

offending. The probation officers acknowledge the failure of the probation system to cater for the needs of this category of offenders.

Generally, all the probation officers, including the Deputy Director, thought that they were doing a good job in spite of their difficulties, constraints and lack of resources.

6.7. Summary

This chapter examined the probation system in NWFP Pakistan from the perspectives of probation officers. It has been shown that:

1. Probation officers in NWFP work under what one might call in modern terms a sub-standard working environment. This is characterised by inadequate office facilities and administrative support and no telecommunication and transport facilities to enable probation officers to contact their clients or supervise them in the community.
2. Probation officers in the province used to receive some training but this stopped in 1995. None of the probation officers employed since 1995 received any training. Section 7 (d) of Probation Rules 1961 requires a probation officer to have ‘working knowledge and practical experience of social work’ but only seven out of the 14 probation officers in the province had social work qualifications. The others had degree qualifications in various ‘related’ fields like law.
3. Whereas the probation law requires judicial magistrates to ask for probation officers reports and recommendations before imposing a probation order, this legal provision is flouted with impunity by judicial magistrates who prefer to exercise their legal power of discretion and impose probation orders without any input from probation officers.

4. It was clear that primarily as a result of the above and the fact that judicial magistrates were using the fine in many cases where a probation order would have been a viable option, the relationship between judicial magistrates and probation officers could not be said to be a cordial one. Probation officers felt that the action of the judicial magistrates could be due to ignorance of what the probation service could offer to offenders. Thus, they saw it as an important requirement of their job to try to persuade more judicial magistrates to place more offenders on probation. Probation officers said that they were under instruction from their Head Office to ensure that more offenders are placed on probation. This placed more pressure on the probation officers to try whatever 'skills' they had to convince judicial magistrates to place more offenders on probation. It was clear from the reaction of some judicial magistrates that their reluctance to place offenders on probation was due to their awareness of the fact that the probation service does not have offender rehabilitation programmes on offer to offenders. However, as it will be revealed in Chapter 7, judicial magistrates placed offenders with illegal drug use problems on probation in spite of their knowledge that such offenders would most likely not receive any help from the probation service for their addiction.
5. Probation officers believe that the majority of their clients are poor. Some attributed this to the fact that rich people are often able to bribe the police in order to avoid prosecution for similar offences. The allegations of bribery by the police were not substantiated but appeared to be based on an already accepted problem of police corruption in the country.
6. Probation practice in NWFP Pakistan is based on the 'advise, assist and befriend' approach. Lack of resources has made monitoring and supervision of offenders in the community impossible. The practice is based solely on probationers attending supervision meetings with their probation officers at designated probation offices. Probation officers in NWFP Pakistan do not make home visits to offenders. Attendance requirements vary

between once a fortnight during the first two months of sentence and once every month afterwards until the expiry of the order.

7. The inability of the RPD to provide offender rehabilitation programmes to its clients was blamed, by the probation officers and their Deputy Director, on the lack of government interest in the probation service. Moreover, the problem is believed to be due to the fact that the RPD does not have an identity of its own. The Department is joined with the Prisons Department and both departments are headed by the Inspector-General of Prisons. Thus, it is believed that where government decisions were made on funding, the Prisons Department is more likely to be favoured.
8. It was revealed that the Social Welfare Department in the province runs drugs rehabilitation centres and has skills training centres and welfare homes but would not allow the RPD to use their facilities for their clients. The reasons for this are not known.
9. Breach cases are usually few (see also Chapter 6). Due to a recent political re-structuring in 2000, the posts of Assistant Directors were abolished. Previously, probation officers reported all breach cases to their nearest Assistant Director. The abolition of the posts of the Assistant Directors has meant that all breach cases from all the districts are to be reported to the office of the Deputy Director stationed in the provincial capital city of Peshawar. This has led to unnecessary delays which have led to the probation officers not taking the reporting of breach cases seriously. Moreover, some probation officers claimed that they were being blamed by the Head Office for numbers of breach cases reported. Thus, unless a probationer commits a crime and is brought back to court, breach cases are rarely reported.
10. In spite of their constraints and lack of resources, the probation officers thought that they had been successful in preventing re-offending. However, they defined their success rates in terms of low breach figures. But, as mentioned above, not all breach cases are reported.

11. Finally, the probation officers accepted that that there are social factors that could aid the process of rehabilitation or reintegration. The acceptance of the offender by the family and community is a strong factor in this regard. There appears to be no general stigma attached to being or having been on probation, compared with imprisonment.

In the next chapter I shall discuss the court processes and how probation orders are made.

Chapter 7

A Critique of the Process: The Role of Judicial Magistrate

7.1 Introduction

The previous chapter covered the major problems facing the probation officers. It also highlighted the reasons for non-availability of rehabilitation programmes and problems of working with probationers. This chapter is about the judicial magistrates who preside over court proceedings and decide on who gets a probation order. Sentencing is guided by several factors, the most important of which are the facts of the cases, the strength of the prosecution's evidence, the type of defence provided to challenge the prosecution's evidence and the mitigation circumstances of the accused. Sentencing normally takes place within the framework of existing criminal laws but there is room for judicial discretion, more so where there is a sentencing tariff to choose from.

Court proceedings are the most visible symbols of 'justice' being done. Judicial Magistrate hold a very important and sensitive position in the criminal justice system as their decisions could have significant consequences for the offenders, victims and society as a whole. Like the United Kingdom, judicial magistrate's courts in Pakistan are mainly courts of summary justice. Judicial magistrates try simple (non-serious) criminal offences and their sentencing powers are lower compared with those of higher court judges. Unless the crime committed is serious enough to warrant a long term of imprisonment, an offender in Pakistan is most likely to be tried in a judicial magistrate's court. The majority of offenders who receive probation orders in Pakistan are most likely to have been tried by judicial magistrates.

This chapter covers information collected from the sample of 10 judicial magistrates sitting in the judicial magistrate's court in NWFP, Pakistan at the time of this study. The chapter starts with demographic information on the judicial magistrates and their daily caseload in courts. With regard to the granting of a probation order, the chapter discusses the judicial magistrates' perceptions of their powers of discretion, their views on police reports and the role that probation officers should play in the sentencing process. In addition, the chapter discusses the judicial magistrates' opinions about probation as a sentence and why they would or would not grant a probation order.

7.2 Demographic Characteristics and Daily Caseload of Judicial Magistrates

Half of the judicial magistrates in the sample (5) were aged between 31 and 40 years. Two judicial magistrates were aged over 50 years whilst three judicial magistrates were aged between 21 and 30 years. More than half of the sample (6) had between five and 10 years experience as judicial magistrates. One judicial magistrate had more than 10 years experience whilst three judicial magistrates had less than five years experience.

The daily working caseload of each judicial magistrate depended on the crime problem in their area and the number of police stations within their jurisdiction. Where judicial magistrates work within a district, they all share responsibility for all the cases from all the police stations in that district.

Judicial magistrates' courts in Pakistan, like their counterparts in the UK, are busy courts. Many factors contributed to their busy schedule. First, they try mainly petty cases which, as in the UK, form the majority of all criminal cases tried by the courts in Pakistan. In addition,

they also try serious cases like murder. Altogether, the majority of criminal charges in Pakistan are tried by judicial magistrates. Second, police delay in submitting the *Challan* (investigation report), which is supposed to be submitted within fourteen days of registering a First Information Report (FIR) as prescribed by law, also increases the work load of judicial magistrates as cases where the courts are waiting for police reports are added to fresh and adjourned cases. Where the police are unable to complete an investigation within 14 days, they are allowed a further three days in which to file an interim report, pending submission of the complete report. This further adds to the case load of judicial magistrates when the reports are finally submitted. At the time of this study, the average daily caseload of six of the judicial magistrates was 40 cases. The remaining four judicial magistrates dealt with more than 40 cases per day. According to Judicial Magistrate no. 3:

On average, the police bring about 30-40 cases daily to the court. These includes new and on going cases. However, the daily caseload fluctuates depending upon many factors, for example, the crime rate in the area, the number of arrests and so on... (Field Notes, March 31, 2005).

Obviously, the judicial magistrates regarded themselves as overburdened and overworked. As Judicial Magistrate no. 1 put it “If you come to my court in the morning, it looks like a *Machlee Bazaar* (means overcrowded)” (Field Notes, March 1, 2005).

7.3 Deciding on the Award of a Probation Order

Before a sentence can be imposed on an offender before the court, the judicial magistrates require the submission of evidence against the accused, which often come in the form of a police report and other evidence or facts that could be produced in support of the defendant, including mitigation circumstances. This section discusses how the judicial

magistrates in this study decided on whether or not to impose a probation order where such is allowed by law.

Probation is one of the two non-custodial sentencing options available to judicial magistrates. The other option is a Fine. Where the offence is a minor one or is a crime that comes under those offences for which a probation order could be granted, a judicial magistrate may impose a fine, grant a probation order or both. The final decision lies with the judicial magistrate. It was observed during the course of data collection that the fine was the most frequently imposed non-custodial punishment by the judicial magistrates for crimes where a probation order was an equally possible option. According to a probation officer, this was simply because the fine is an 'easier' option to impose and it has the added value of increasing government revenue.

As for the judicial magistrates, the decision on whether or not to grant a probation order requires much thought. Whilst the type of case was commonly mentioned, some judicial magistrates claimed that they would impose a probation order for a first offence (for example, Judicial Magistrate no. 2). The judicial magistrates found it easier to make a decision where an offender had pleaded guilty to the charge but more difficult where the defendant had pleaded not guilty and the case had gone into trial (Field Notes, March 29, 2005).

7.3.1. Reliance on Police Report

The police report, which details the nature of the offence, the circumstances under which the crime was committed and other evidence in support of the charge, is a very important document in the sentencing process. The purpose of this thesis is not to assess the efficiency

of the Pakistani Police or how they gather evidence to support a charge. However, it is important to bear in mind that police corruption is a common phenomenon in Pakistan. Physical and verbal abuse of suspects, the demand for bribes and the arrest of people for unknown reasons are some of the documented illegal behaviour of the police in Pakistan (see also Cole, 1999). Therefore, in such circumstances, it is unlikely that the investigation report prepared by the police can be trusted. However, when asked to what extent they would consider a police report before deciding on appropriate sentence, the majority of judicial magistrates (8) replied ‘to some extent’. Two judicial magistrates said that they trusted police report ‘to a great extent’. According to Judicial Magistrate no. 5:

Up to 90%, I trust the police report because they investigate the cases thoroughly. They are the ones who see the crime scene, record the statements of witnesses, and collect all circumstantial evidences. Therefore, in my opinion, the police report can be trusted to a great extent (Field Notes, April 19, 2005).

However, Judicial Magistrate no. 2 maintained that where the defendant “accepts his offence” there would be no need to see a police report (Field Notes, March 29, 2005). Studies on the routine operation of judicial magistrate courts in the UK (Carlen, 1976; Bottoms and McLean, 1976), Canada (Erickson and Baranek, 1982) and Nigeria (Cole, 1990) have shown that police evidence is often believed and unchallenged by judicial magistrates.

However, in making the final decision on whether a person should be given a probation order, further evidence is needed, at least to decide the suitability of the offender for a probation order. In the UK, probation officers play a significant role in this process by providing additional information to the court on the circumstances and criminogenic needs of the defendant in the form of Pre-Sentence Reports (PSRs). When asked what additional

information is required before a final decision on sentence is made, Judicial Magistrate no. 7 said:

I also take into account other evidences, [such as] the age of the accused, appearance, educational background and personal statement of the accused before making a final decision on the case (Field Notes, April 28, 2005)

In addition, Judicial Magistrate no. 10 said that that he would consider ‘the crime history of the accused person and whether he admits his crime or not’ (Field Notes, May 27, 2005)

7.3.2 The Role of Defence Lawyers

A person accused of a minor crime does not have to be legally represented in court. However, the concept of whether a crime is minor or not does not appear to prevail in the minds of accused persons in Pakistan where almost all defendants in court are usually legally represented, irrespective of whether they are pleading guilty or not. The offences for which an offender is eligible for probation are such where the offender does not need to hire an advocate. As shown in preceding chapters, persons charged under section 13AO (being illegally in possession of a weapon) are often placed on probation; thus, they do not require the service of an advocate in court. However, all probationers in this research study were legally represented in court.

Legal representation is often seen as essential to the outcome of the case. Lawyers are believed to have the ability to secure an acquittal, even in a difficult case, or get a lenient sentence. Reliance on the professional expertise of lawyers is a common feature of lawyer-client relationship in lower courts in developing countries (see Cole, 1990 on Nigerian judicial magistrates’ courts). This is often a power relationship in which the client is totally

dependent on the advice of the advocate, even on an important issue such as deciding on the appropriate plea to make in court. During this research, it was discovered that lawyers were constantly pressurizing judicial magistrates to impose fines on their clients in cases where a probation order was an equally valid sentencing option. Of the two non-custodial sentences that could be used in non-serious cases – fine or probation - the fine is often perceived to be the less ‘severe’. This simply explains why lawyers often ask for a fine instead of probation.

According to Judicial Magistrate no. 7:

Most of the lawyers are not happy if I place their client on probation. They always prefer fine punishments for their clients in all minor cases (Field Notes, April 28, 2005)

However, a major concern of the judicial magistrates was that many of the lawyers came to court unprepared and yet were arguing for their clients to be fined. Judicial Magistrate no. 2 talked about ‘lawyers who do not even know the names of their clients or the sections of the law under which their clients have been charged’ (Field Notes, March 29 2005). Judicial Magistrate no. 8 added:

The proportion of those lawyers who prepare their clients’ cases is very low. The majority of lawyers depend upon common sense arguments without providing a legal base for their argument (Field Notes, May 24, 2006).

The reason for this is that the lawyers who practise in the lower courts in Pakistan, like their counterparts in other countries, are usually the least experienced or successful lawyers. For the majority of them, financial considerations are more important than the ethics of the profession. For very brief ‘services’, these lawyers could charge incredible fees (see Cole, 1990). Some judicial magistrates thought that the non-request for probation by the lawyers could be due to their lack of knowledge of the probation law and what probation means

(Judicial Magistrate no 3; Field Notes, March 31, 2005). These decisions may also have been influenced by what the offenders themselves thought probation meant – a punishment similar to prison; whereas, the fine means a once-and-for-all settlement (see Chapter 6).

7.3.3 Role of the Probation Officer

Section 18 of Probation of Offenders Rules 1961 asks the court to order the probation officer to provide a preliminary enquiry report to the court on the nature of the offence, antecedents, and the character of the offender before a final order is made by the court. However, none of the judicial magistrates in this research study made use of this provision. According to them, the role of the probation officer starts after an offender is issued a probation order and then referred to the probation service to serve his sentence. As Judicial Magistrate no. 1 put it:

The probation officers play no role unless the court decides a criminal case on probation. The job of the probation officers starts once the offender on probation is referred to them. The responsibility of probation officers includes filling the surety bonds and keeping regular check on probationers until the expiry of their probation order (Field Notes, March 1, 2005).

Judicial Magistrate no. 9 was also of the same opinion, that probation officers play no role in the sentencing process. According to him:

It is the duty of the judicial magistrates to punish offenders based upon the investigation report and evidences provided by the police. The probation officers have zero roles at this stage. Once offenders are placed on probation, it is the responsibility of the probation officers to keep regular watch on the offender to bring about his reformation (Field Notes, May 24, 2005).

When I pointed out to the judicial magistrates that section 18 of Probation of Offenders Rules 1961 gave them the power to order the probation officer to prepare a preliminary enquiry report as to whether an offender is suitable to be placed on probation, all the judicial magistrates argued that probation officers are unable to prepare such reports because they lack the resources that would enable them to do so. According to Judicial Magistrate no. 8:

It is impossible for a probation officer to prepare a preliminary enquiry report for the court and to recommend if an offender should be granted a probation order. They lack basic facilities. The probation officers sometime brief us about probation law with a request to place more offenders including drug offenders on probation. In many cases, I have granted probation orders for drug addicts (Field Notes, May 24, 2005).

Thus, in Pakistan, the equivalent of the UK Pre-sentence Report (PSR) is not in practice available to judicial magistrates, to aid their sentencing decisions as to whether or not a person should be placed on probation. As shown above, the decision on who gets probation is based exclusively on the facts of the case as presented in police reports, the characteristics of the offenders (for example, age) and their crime histories. Persons are being placed on probation without any professional advice from those to whom they would eventually be referred, as to whether or not they are suitable for rehabilitation.

7.4 Sentencing Philosophy of the Judicial Magistrates

This section discusses how the judicial magistrates view their sentencing role, their powers of discretion, what priorities they keep in their minds while sentencing an accused person and how they make use of the available sentencing options including probation.

The judicial magistrates were inclined to different philosophies of punishment, ranging from strict retributive philosophies to a fervent support for rehabilitation. None of the judicial magistrates thought that punishment can deter offenders but many upheld the consequentialist view of punishment. When asked what priorities they kept in mind before inflicting punishment on offenders, seven judicial magistrates (70%) replied that they always looked for the rehabilitation and reformation of the offender. These judicial magistrates believed that the sentence should benefit offenders and seek to reform or rehabilitate them. However, these judicial magistrates saw the leaning towards rehabilitation as being lenient or even merciful. According to Judicial Magistrate no. 4:

Our God is lenient to us in his natural justice despite the fact that we are committing sins every day. Therefore, we should also be lenient in legal justice by providing opportunities to offenders to think on the adverse affects of crimes (Field Notes, April 2, 2005).

Judicial Magistrate no. 7 argued that people get involved in crimes due to multiple reasons and the majority of them do regret their involvement in crime. The purpose of the legal system, therefore, should be to facilitate offenders' reformation, not to punish them harshly. 'By punishing offenders too harshly' he said, 'you can turn them into professional criminals'. As he put it:

Human nature is always good and it is the environment/society, which compels a person to commit crimes. We need to focus more on the causes of crimes than the crime itself. Therefore, the rehabilitation of offenders is the best policy in the larger interest of the individual and the society as well (Field Notes, April 28, 2005)

Judicial Magistrate no. 10 added:

I am lenient in sentencing. I believe that people are able to change themselves if they get a chance. Furthermore, it is a big risk and responsibility, which rests on the shoulders of judicial magistrates (Field Notes, May 27, 2005).

However, Judicial Magistrate no. 5 argued that being lenient in punishment and focusing on rehabilitation do not work for every offender. Some offenders are too dangerous; they pose a serious threat to society and therefore should not be treated leniently. For him, it is important to be very careful, to ensure a proper balance between the rehabilitation of offenders and public protection. As he put it:

I generally inflict lenient punishment in petty cases and severe punishments for the habitual and hardened offenders; people whose offences are particularly of a heinous nature and those accused of repeated offences (Field Notes, April 19, 2005).

Finally, three judicial magistrates claimed that they dealt with each case on its own merits, without keeping any priority in their minds. Judicial Magistrate no. 3 commented:

I do not make any priorities in my mind before making a sentence. My sentencing decisions are based upon the nature of the case, standard of evidences and circumstances (Field Notes, March 31, 2005).

These judicial magistrates argued that it is hard to keep any priority in mind while making sentencing decisions. There are several factors involved in sentencing which make it difficult for the judicial magistrates to make up their minds in advance about the outcome of a particular case or the approach that they would take in dealing with an offender before the court. According to Judicial Magistrate no. 10:

Our priorities always change depending upon the nature of the case. For first offenders involved in minor offences, I prefer lenient sentence to provide them opportunity for reformation. If the first offender is involved in relatively serious offence, the sentence should not be too strict but strict enough to reflect the seriousness of the offence. For repeated offenders, I would prefer strict punishment, which should be lesson for other professional criminals too (Field Notes, May 27, 2005)

7.5 Attitude towards Probation

This section highlights the attitude of judicial magistrates towards the use of probation. In this regard, the discussion is focused around the discretionary powers of the judicial magistrates in making the sentencing decision on whether or not to grant a probation order, their opinions of the probation system in NWFP Pakistan in terms of its ability to provide rehabilitation for those on probation, and their attitude towards breach cases.

7.5.1 Discretionary Powers of Judicial Magistrate

Section 5 of *Probation of Offenders Ordinance 1960* gave discretionary power to Judicial Magistrate to issue probation orders to offenders who are capable of reformation and do not pose a threat to society. As mentioned earlier, section 18 of *Probation of Offenders Rules 1961* gives to the court, power to ask the probation officer to submit a preliminary enquiry report on the character, antecedents, and other matters related to the case within a prescribed period of time before making a probation order. As also indicated above, judicial magistrates were not complying with this provision.

The judicial magistrates believed that placing offenders on probation is a risky decision that could have serious consequences for the offenders themselves and society as a whole. However, according to Judicial Magistrate no. 8:

There are many middle ranged crimes for which offenders either could be sent to prison or could be placed on probation. Unfortunately, there are no clear guidelines for Judicial Magistrate on how to deal with such offences. Therefore, the discretionary powers of the judicial magistrate is the only means to make a proper decision according to the nature of the crime (Field Notes, May 24, 2005).

In other words, the judicial magistrates believed that the discretionary power of the judicial magistrate is very important in the decision-making process, especially as the law is

quite vague on who should get probation. The judicial magistrates were quite protective of their power of discretion in sentencing. As Judicial Magistrate no. 2 put it:

The judicial magistrates are entrusted with the discretionary powers to make proper decisions based on the facts of the cases. The judicial magistrates are human beings and are likely to make mistakes. However, if someone is suggesting elimination of the discretionary powers of the judicial magistrates, then the concept of justice will also be finished (Field Notes, March 29, 2005).

However, it became clear from Judicial Magistrate no. 3 that the discretionary power of the judicial magistrates in probation-related cases is unchecked. In cases where a probation order could be given (petty/minor cases), judicial magistrates are not accountable for their sentencing behaviour. There are no legal constraints on the sentencing function of judicial magistrates save an appeal, but that is uncommon in minor cases. According to Judicial Magistrate no. 3:

Although I support the discretionary powers of judicial magistrates and the probation system in itself; however, there is one negative factor in the use of discretionary powers in probation related cases. If a judicial magistrate wants to give an undue favour to any accused person, he can, which is a bad thing. Unfortunately, nobody can check this undue favour of the judicial magistrate to the accused offender (Field Notes, March 31, 2005).

However, the judicial magistrates believed that their use of discretion was not often without some justification. According to Judicial Magistrate no. 5:

I send offenders to prison when I feel that no reformation would be expected of the accused if placed on probation. I am not inclined to prefer probation for habitual offenders, robbers, burglars and repeated offenders (Field Notes, April 19, 2005).

In addition, it appeared that “subservience” is another implicit rule used by judicial magistrates to decide on who gets probation. Judicial Magistrate no. 5 continued:

My observation and experience shows that all the accused persons sent on probation are subservient (Field Notes, April 19, 2005).

The point of concern raised by the probation officers (chapter 6) is that the sentencing decision was being made without reference to any other professional input on whether or not probation will benefit the offender. According to the probation officers (chapter 6) the reliance on police reports and the discretionary power of judicial magistrates has meant that people who were not suitable for probation were being granted probation orders. These included professional criminals who often flout their probation order; those against whom probation officers often feel powerless to bind to the restrictions of their probation order. The judicial magistrates denied this allegation.

7.5.2 Breach Cases

A breach case is one where a probationer has violated one or more of the conditions of his probation order. Section 7 of Probation of Offenders Ordinance 1960 allows a court that made a probation order to issue a warrant for the arrest of a probationer if the court is of the opinion that the probationer has violated any condition of his bond. The breach case is dealt with by the same court that made the original probation order. The majority of judicial magistrates of this research (9) could not recall having dealt with a breach case. Whilst some judicial magistrates claimed that they were too busy to remember such cases, others blamed it on the inefficiency of the police for not carrying out proper investigation to find out whether or not the person being charged was in breach of a probation order. As Judicial Magistrate no. 1 put it:

Our police are inefficient to properly investigate the crime history of the offenders brought before the court to find out if they were granted probation order. Therefore,

I might have dealt with breach cases, but I am not sure about that (Field Notes, March 1, 2005)

However, Judicial Magistrate no. 5 believed that there is little chance of offenders on probation re-offending or breaching the conditions of their bond. According to him:

My observation and experience shows that all the accused sent on probation are subservient. Therefore, it is unlikely that I have ever dealt with a breached case (Field Notes, April 19, 2005)

Generally, there appeared to be a perception amongst the judicial magistrates that offenders that they had placed on probation were those who were least likely to re-offend. Judicial Magistrate no. 9 was the only judicial magistrate who recalled having dealt with a breach case. The probationer had not re-offended but was constantly missing his probation appointments. In that case, the judicial magistrate said that he simply re-ordered the probation, in addition to imposing a fine:

The probationer was continually absent from monthly attendance to the probation officer. However, he had not committed a second offence. The probationer was arrested on my orders and brought before the court. After taking the personal statement of the probationer and with the consultation of Probation Officer, I fined him Rs. 1000 and re-granted a probation order (Judicial Magistrate no. 9: Field Notes, May 25, 2005).

The above shows that the judicial magistrates had faith in their discretionary powers to decide who they place on a probation order. They did not see the need for any input from probation officers, contrary to what is expected by law. Instead, they rely on police evidence and other 'situational rules' on suitability. In addition to the facts of the case, the seriousness of the offence and characteristics of the offender, judicial magistrates also claimed to consider the possibility that the offender would comply with the order and not re-offend. The

issue of whether an offender would benefit from probation appeared not be a strong reason, although judicial magistrates claimed to be ardent believers in rehabilitation.

7.5.3 Views on the Probation Law

It was revealed during the research that probation officers had monthly meetings with judicial magistrates, to inform them about the state of the probation law and its merits. It was, therefore, necessary to ask judicial magistrates what they thought about the probation law. Six judicial magistrates saw no flaw in the existing probation law. They believed that the probation law could benefit first offenders involved in minor offences. Judicial magistrate no. 1 believed that laws are always good because these are made by intelligent people. Thus, the reasons for not using the probation law had nothing to do with the judicial magistrates' lack of faith in it. For them, the law is good as long as it is not abused.

7.5.4 Judicial Magistrate's Views on the Probation System

As already mentioned, all the judicial magistrates believed in the philosophy behind probation; that is, that it has the potential to reform or rehabilitate an offender and re-integrate them back into their communities as law-abiding citizens. However, all the judicial magistrates criticised the local RPD in NWFP on the ground that it is not effectively administered and therefore incapable of delivering a good service. For example, Judicial Magistrate no. 5 stated:

Probation is a good system. If the probation officers realize their duty and work more efficiently, then it can prove to be one of the best systems for punishment of the accused because it has delivered its dividends successfully in all Western countries (Field Notes, April 19, 2005).

Specific comments included:

In my own opinion, there is no problem with the probation law but the RPD needs to be reformed as it is not capable of ensuring the reformation of offenders (Judicial Magistrate no. 3: Field Notes, March 31, 2005).

The judicial magistrates were particularly worried by the fact that the local probation service does not have definitive rehabilitation programmes for offenders.

Comments included:

I wonder what they are doing with drug addicts because they do not have any rehabilitation or detoxification for them (Judicial Magistrate no. 8: Field Notes, May 24, 2005).

There is no doubt that probation is a good system. However, our probation system is ineffective and is not achieving its objectives. The RPD lacks resources to run proper rehabilitation programmes according to the needs of the probationers (Judicial Magistrate no 9: Field Notes, May 25, 2005).

Judicial Magistrate no. 7 concluded:

In the absence of any rehabilitation programmes, we the judicial magistrates are reluctant to place offenders on probation because the RPD is doing nothing for the welfare of offenders (Field Notes, April 28, 2005).

In essence, it was clear that, under the current circumstances, especially the inability of the local probation service to provide rehabilitation programmes for offenders, probation was not considered an effective punishment by the judicial magistrates. Judicial Magistrate no. 3 stated:

Probation is a low priority for all of us, including the offender, their lawyers and for the judicial magistrates as well. In the absence of any proper rehabilitation programmes, probation work is often taken for granted (Field Notes, March 31, 2005).

7.6 Summary

The sentencing function of Judicial Magistrate is about the most difficult part of their job. People commit crimes for different reasons. Sending offenders to prison, imposing fines or placing them on probation is a matter of great responsibility. The judicial magistrates working in district courts in NWFP Pakistan are generally very busy. They deal with all kinds of cases ranging from simple theft to murder. In this chapter, the following were revealed:

1. Whereas the probation law requires judicial magistrates to consider a probation officer's report before a defendant is sentenced to probation, such documents were not requested by judicial magistrates before sentencing. The judicial magistrates did not have faith in the local probation officers' ability to produce such reports. Thus, the sole legal document considered by judicial magistrates during sentencing is the police report. Judicial magistrates often considered other non-legal factors such as the age of the offender and their perceived risk of not complying with an order, based on their apparent "subservient" nature.
2. Probation in Pakistan is a privilege, not a right that can be demanded by offenders.
3. The decision on who gets a probation order was based exclusively on the unchallengeable discretion of the judicial magistrates. Judicial magistrates did not see anything wrong in basing such decisions solely on their professional judgement as judicial magistrates. In fact, judicial magistrates would like to keep their discretionary powers in probation-related cases, so that offenders do not get the impression that they could get probation automatically.
4. Judicial magistrates claimed to be supporters of the rehabilitative functions of punishment but also saw their granting of a probation order as a gesture of leniency or an act of mercy.

5. Defence lawyers often plead for their clients to be fined where a probation order was an equally viable option. The fine is seen as a less harsh non-custodial option. It was not clear whether the advocates' decisions were based on their informed knowledge of the probation system. It was clear, however, that the bulk of the lawyers who practise in the lower courts in Pakistan are not the most experienced or successful.
6. Judicial magistrates justified their reluctance to sentence offenders to probation on the grounds of a lack of faith in the local probation service. Many of the judicial magistrates said that they did not think that the local probation service has facilities or programmes through which offenders sent to them could be rehabilitated or reformed.

Chapter 8

Development, Post-Colonialism and Probation in Pakistan

8.1 Introduction

The analysis of data in chapters 5, 6, and 7 above presented an overall picture of the probation system in NWFP, Pakistan. In Chapter 5, it was shown how probation was seen by the probationers as a lenient sentence – an alternative to a prison sentence - valued not because it offered them any rehabilitation but because it gave them the freedom and opportunity to live normal lives with their families and friends. Chapter 6 elaborated how probation officers in the RPD of NWFP manage offenders in spite of limited resources and how they measure their own success. Finally in Chapter 7, the overpowering attitude of judicial magistrates was seen, as they willingly decided who got a probation order without any input from probation officers in the decision-making process, as required by law.

The data discussed in these three chapters present a mixed and confused picture of the probation system in NWFP, Pakistan as the concept of probation as a form of punishment is perceived differently by the probationers, their probation officers and the judicial magistrates. In this chapter, it will be argued that one of the reasons for this ambiguity is that the idea of probation as a punishment did not evolve in Pakistan as it did in Britain (see Chapter 2). The probation system in Pakistan is a colonial creation. Like most former colonial states, Pakistan inherited the British idea of probation, first introduced in 1923 when the Criminal Procedure Code of 1898 was amended (see chapter 3). However, after colonisation, Pakistan, again like most post-colonial countries in the developing world, retained its colonial laws as national laws. The retention of colonial (western) laws was generally seen as an indication of ‘development’ or ‘modernisation’.

Thus, the purpose of this chapter is to review briefly the concepts of ‘development’ and ‘modernisation’ in the context of colonialism and neo-colonialism. It will then discuss the passing of the probation law of 1960 in Pakistan, in the context of these concepts. Specifically, the chapter presents a summary of the development theories that emerged soon after the end of World War II. The concept and practice of development is discussed in relation to the experience of the colonised world often called the ‘Third World’ (see Thomas, 2000a:6). It explains the expansion of European political, economic and social control into the ‘developing’ world and presents the nature of power relations embedded in colonial processes. It also describes how the people of the ‘third world’ countries are restricted in determining their own future despite political independence, through processes that have been termed as ‘neo-colonialism’. This term describes power relations between the metropolitan countries and the third world countries.

Furthermore, the chapter discusses development issues in postcolonial Pakistan. It discusses some of the main issues confronting Pakistan, which are restricting the overall development of the country. Since its independence and even after completing sixty years of its establishment, Pakistan is still striving to find a suitable, stable and effective form of government. For the most part of its existence, Pakistan has been ruled by authoritarian military governments and their often corrupt bureaucratic allies. Political instability and frequent takeover by military dictatorships have not only affected the economic development of the country but have also weakened its social institutions. Successive political and military governments in Pakistan have adopted a number of colonial legislations without fully considering their relevance to the social, cultural and economic conditions of the country. Probation is one such colonial legislation. The concept of probation and its approaches towards dealing with offenders has changed considerably throughout the world (see Chapter

2). However, probation law in Pakistan is much like that which was introduced in 1960 and no significant improvement has been made in it.

8.2 Development and Underdevelopment

The concept of ‘development’ is a term that has been put forward by the West as a rationale for the continued domination of their former colonies after their independence from colonial rule. It is characterised by the introduction of western laws, legal systems, education, language, culture, medicine and religion (Christianity) into these countries (see Bernstein, 2000; Thomas, 2000b).

‘Development’ as a concept is ill-defined, vague and lacks an all-encompassing and specific definition. It carries a wide variety of meanings at different times and places and it has had profound implications on the destinies of peoples and countries around the world (Power, 2003; Crush, 1995).

The use of the word ‘development’ has generated a great deal of controversy in political debates. To some, the term can appear patronizing, especially when distinguishing between countries that are ‘developed’ and countries which are described as ‘developing’ or ‘underdeveloped’ (Griffiths and O’Callaghan, 2002: 75). To others, the criterion of measuring development in economic terms is more significant, such as the changes in gross national product (GNP) or per capita and comparative GNP between countries (Griffiths and O’Callaghan, 2002).

People often talk of development in their own context and terms, to the extent that it is not clear whether individuals, groups, firms, states and global institutions understand the notion of ‘development’ to mean the same thing (Potter *et al*, 2004). However, the term ‘development’ is also often used to refer to the vague notion of ‘good change’ (Power, 2003:2). Generally, Western (developed) countries are understood to be advanced and have evolved through defined stages of development. Their input is often seen as paramount in helping the developing countries, by means of development aid, for example, to overcome their underdevelopment. Power (2003) concluded that in many ways, the term ‘development’ is primarily ‘forward-looking’, imagining a better world.

The concept of ‘development’ evolved after the 2nd World War, coined by the USA and its Allies, in recognition of the need for a programme that would spread the benefits of scientific and industrial progress to the newly independent states. About two-thirds of the world was perceived as underdeveloped, traditional and therefore backward. The emphasis was to ‘modernize’ the ‘underdeveloped’ parts of the world. For many writers, the speech made by President Truman in 1949 is often seen as marking the beginning of the era of development when he said:

We must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. The old imperialism – exploitation for foreign profit – has no place in our plans. What we envisage is a program of development based on the concepts of democratic fair dealing (cited in Thomas, 2000a:5)

Jackson and Sorensen (2007) argued that U.S President Truman’s position was that in order to be ‘developed’, ‘underdeveloped’ countries must follow the same path as was taken earlier by the Western developed nations.

By and large, the concept of development is mainly associated with economic development and that was the goal behind the development theories that emerged after World War II (Taylor *et al*, 1995). According to Potter *et al* (2004), development theories provide apparently logical propositions about how development occurred in the past and/or how it should occur in the future. Whereas the early approach towards development was exclusively concerned with promoting economic growth both in theory and in practice, this approach was soon to change its emphasis from economic growth to include political, social, ethnic, cultural, ecological and other dimensions of ‘development’ and change (Potter *et al*, 2004).

8.3 Developing and Modernizing the Former Colonies

Thus, the term ‘development’ is often used to imply both a move by mainly former colonies towards Western systems of economy, government and legal systems or towards Western cultures or styles of living (Griffiths and O’Callaghan, 2002:76). The assumption or theory is simply that Westernisation is the only path to development. Western societies are perceived as modern, in comparison to non-Western countries that are often categorised as ‘traditional’. Thus, the theory of modernization was developed in the USA and Europe, to explain the ‘development’ process in non-Western countries as a modernization process characterised by a transformation from a tradition society to a modern one (see Opello and Rosow, 2004: 217). ‘Traditional’ societies were defined as those characterized by ‘small villages, subsistence agricultural, simple social structure, and particularistic behaviour’ whereas ‘modern societies were defined as those characterized by cities and towns, commercial agriculture, industry, complex social structures, and universalistic behaviour’ (Opello and Rosow, 2004: 217). In essence, modernization theory held that the transition to ‘modernity’, the condition of being modern, would or should recapitulate the European

experience (Opello and Rosow, 2004). Scholars of modernization theory believed that the former colonies would undergo the same developmental processes that European states had experienced and would, eventually, end up looking much like them (Rostow, 1967; Organiski, 1965; Rostow, 1960).

In other words, modernization theory thrives on the idea of the evolutionary progression of societies from a traditional to an advance stage. As Jackson and Sorensen (2007) put it, the basic idea behind modernization theory is that:

Third world countries should be expected to follow the same developmental path taken earlier by the developed countries in the West: a progressive journey from a traditional, pre-industrial, agrarian society towards a modern, industrial, mass-consumption society (Jackson and Sorensen, 2007:203)

Therefore, 'Third World' Countries (most of which consist of former colonies of European countries) must follow the footsteps of the 'West' if they want to 'develop' (Jackson and Sorensen, 2007).

To modernize and/or attain self-sustained growth and development, analysts argued that underdeveloped nations must move through five stages, namely, the traditional society, the pre-takeoff society, takeoff, the road to maturity and the mass consumption society (Rostow, 1960). If these five stages were not followed properly by the underdeveloped countries, it was believed that they would spiral viciously into under-development (Hettne, 1990).

Modernization theory enjoyed considerable value and prestige during the 1950s and 1960s but soon lost its popularity during 1970s, because of the lack of progress in major parts of the Third World countries at that time (Jackson and Sorensen, 2007). Modernization theories are often criticised for being ahistorical, by not highlighting imperialistic exploitation endemic in the European modernization of the Third World. Supporters of modernization

theory see the creation of the state as a universal, inevitable evolutionary process rather than the politico-military solution to a particular crisis situation at a given time and place (Pieterse, 2001).

The assumption that 'Third World' Countries would develop only if they followed the Western model was discredited by some writers. For example, Frank (1969:46) argued that:

If the now underdeveloped [countries] were really to follow the stages of growth of the now developed ones, they would have to find other people to exploit into underdevelopment, as the now developed countries did before them (Frank, 1969:46).

Opello and Rosow (2004) also argued that the generally accepted view of modernisation is ideological in two ways: first it hides from view, and specifically justifies, the power, violence, exploitation and racism through which Europeans imposed the state in non-European areas; second it considers the state's positive features as a gift of rationalist European civilization to the non-European world, and its negative features as the result of the inability of non-European people to live up to advanced European standards. 'Again the result is to justify a global order that either eliminates or co-opts non-European ways of life, transforming them so that they reinforce the European imposed global order' (Opello and Rosow, 2004: 218).

Opello and Rosow's main argument is that although there exists an inevitable, inherent, standard series of stages or crises through which all states must pass, the idea of state building as theorized for developing countries grossly 'distorts the European state-making experience, that is, that modern European states emerged from a more or less common feudal and medieval basis, but owing to different situational factors, different outcomes of political

struggles within them, and different pressures and influences from other states, they followed different trajectories that resulted in different forms of the state' (Opello and Rosow, 2004: 218).

Most non-European postcolonial states, since their independence from colonial rule, have been ruled by authoritarian civilian and military dictators. However modernization theorists prejudge these states by declaring such regimes as normal, natural, and even necessary in the “young” or “politically immature” states outside of Europe.²⁸ Thus, while modernization theorists sanction intervention by “more advanced” or “more developed” states they simultaneously justify military regimes and dictatorships, with all their horror and cruelties, as necessary to these ‘undeveloped’ states’ ‘development’ (see Opello and Rosow, 2004: 218-9).

Another criticism of the development theories is their lack of engagement with cultural diversity around the world. Willis (2007:120) argued that ‘many of the development theories derived from the North have assumed a particular form of social organization, either as a starting point, or as a goal’ without recognizing the religious, ethnic and social diversity of the population of the world. Therefore, such ‘Eurocentric theories’ have been criticised for their culturally-specific definitions of ‘development’, and also for their assumptions regarding the homogenizing nature of development in relation to culture’ (Willis, 2007:120).

Conversely, the advocates of reflexive development argue that development in the postcolonial states must be understood not in terms of a presumed universal process of modernization exemplified by the original European states. Rather it must be considered in

²⁸ Such as in Samuel P. Huntington, *Political Order in Changing Societies*, 1968, Yale University Press. New Haven.

terms of how independence as a political form of politico-military rule in the postcolonial states was imposed and constituted *reflexively* by contending elites as they sought to construct states in the context of the encounter between European and non-European peoples.²⁹ In addition, they suggest that we must take into account the global system of states, as well as the world economy, both of which have pressured the post-colonial states to develop in specific ways as envisaged in the institutions, processes of world economic system including the International Financial Institutions, protectionist trends in trade, arbitrary categorization of commodities markets and preferential treatment generated by the developed states of the North. As a whole, all this has influenced and controlled development within the developing countries of the South. Sovereignty, the development of political institutions, policies, plans and strategies of development, then, in the post-colonial states have been both contested within and limited from the outside (Opello and Rosow, 2004: 219).

8.4 Colonialism

Colonialism refers to ‘the political control or rule of the people of a given territory by a foreign state’ (Bernstein, 2000:242). The political essence of colonialism according to Woddis (1971) was the direct subordination of colonial territories to the dominating foreign powers, which were supported and protected by their armies or sometimes armies of indigenous troops under colonial officers. The European overseas colonial expansions were already inhabited by people of different colours, which reflect variation in the pattern of colonies across the colonized world. In the case of America, for example, settler colonies were established by the Portuguese, Spanish, French and the English soon after the Columbus’s voyage of 1492. However, in Asian colonies, permanent settlements by colonial states were considered

²⁹ On the idea of reflexive development, which draws on the writings of sociologist Anthony Giddens, see Tony Spiby, *Globalization and World Society*, 1996 Polity Press Cambridge, UK

insignificant. The African continent presents both settler and other types of colonies (Bernstein, 2000; Cole, 1999).

To attribute a single motivating factor for the expansion of European colonial empires would seriously restrict discussion on the nature and importance of colonialism. However, it cannot be denied that the overall purpose of the colonial domination was to 'keep the colonial people in political subjection and to make possible the maximum exploitation of the people and the country's resources' (Woddis, 1971:15). In order to achieve these objectives, the colonial powers established administrative, legal and judicial systems and educated a small number of local work forces for their assistance in order to run the administrative machinery of the colony (Potter *et al*, 2004). The educational system introduced by the Western colonial powers was actually to train indigenous people for the lower rank jobs such as clerks, medical assistants, teachers and so on. (Bernstein, 2000). Major institutions and key positions in the judiciary, prisons, civil administration, and education were controlled by the Europeans in their respective colonies. Woddis (1971) argued:

The judges were Europeans and the laws were laid down by Europeans. The prisons were in the hands of Europeans, and so were the higher ranks in the civil administration. Education was controlled by Europeans, based on European history and culture, and limited to the general economic, social and political requirements of the colony-owning power (Woddis, 1971:15)

In addition, Bernstein (2000) argued that colonial powers organized the productive capacity of their colonies in such a way as to generate sufficient income which could not only support their administrative and military expense in the colonies, but also contribute to the economies of the colonized states.

It is interesting how few European colonial states managed to control vast numbers of different races and gained their political support. The vast literature on colonialism shows that European powers used different tactics to control and rule the colonized peoples. Overall, according to Young (2003), the participation of indigenous people in the government affairs under colonial rule was marked by elitism and authoritarianism. The colonial powers allowed limited participation of selected elites in non-crucial areas of decision-making and governmental affairs. However, this participation varied from colony to colony depending on the ways the colonies were handled by the different foreign powers. For example, in African colonies, the Belgians allowed hardly any African participation in the Congo; neither did the Portuguese in Angola nor the Italians in Libya. In contrast, the British colonial governments in Africa allowed limited participation of indigenous people in government affairs in the form of indirect rule via carefully selected groups of indigenous elites (Gann and Duignan, 1967:331, cited in Potter, 2000:275). British India had a more liberal system of political participation of indigenous people in political affairs compared to Africa. Towards the end of British rule in the Indian subcontinent, more popular participation in government affairs was allowed under the Government of India Act of 1935 whereby provincial governments were ruled by elected ministers but ‘under the watchful eyes of the provincial Governors and the colonial Government of India’ (Potter, 2000:275-6). However, for most of its rule until declaring its independence, the British colonial power in India relied on traditional authority figures for political support and where the colonial powers did not find such authority, they created them. The British government preserved and supported the traditional rulers like Rajahs, Princes, Sheikhs and Chiefs who were willing to collaborate with the British rule over India. Potter (2000) stated:

Such 'traditional' political support came primarily from amongst princes in the princely states (occupying about 40% of the area of India from 1858 to 1947) and landlords or peasant proprietors in the provinces of British India (Potter, 2000:278).

By supporting and preserving the traditional authority figures in India, the British rulers achieved many important objectives. Firstly, they were able to rule through these traditional authorities who wielded considerable power and authority over their people (Potter, 2000). Secondly, by supporting the traditional rulers, the British colonial government paved the way for the continuation of traditional ideas, religious superstitions, illiteracy and ignorance and also prolonged their occupation with the support of these local rulers. In this way, the colonial power also excluded the colonial people from the enlightened ideas of freedom, democracy and national independence (Woddis, 1971). As Woddis (1971) argued:

Colonial rule was in reality an alliance - an alliance between the occupying power and the internal forces of conservatism and tradition (Woddis, 1971:25).

Towards the mid-twentieth century and especially after the end of World War II, it was no longer possible for the colonial powers to retain their colonies. Therefore, the colonial powers handed over power into the hands of those on whom they could rely – the emerging local educated elites. Since the early nineteenth century, the British colonial government in India had started to encourage a small Indian elite group of people to be educated in Britain. One of the aims of such an approach according to Woddis (1971:25) was to develop a class of people who were 'Indian in blood and colour, but English in taste, in opinion, in morals, and in intellect, on whose support Britain anticipated it could rely'. Later on, some members of these elite groups of people played an important role in the independence movement of the country. After winning independence from Britain, these (mainly Western educated) elites formed political parties and became the ruling elites. Even after the winning of political independence, the new ruling elites continued to see themselves as allies of Britain. Continued

alliance with Britain was viewed as important for the new state's economic growth and development (Woddis, 1971).

8.5 The Colonial Impacts on Muslim Societies

Western colonialisation in general has devastating impacts on the lives of indigenous people in the former colonies. Colonial rule has transformed the social, political, economic and legal systems in the Islamic societies of the world (Ahmad, 2002; Kincheloe, 2008; Umar, 2006). Kincheloe (2008:105) for example argued that 'Western colonialism had a dislocating impact on Islamic Societies'. Similarly, Ahmad (2002) argued that the Europeans emphasis on the advantages of colonialism in terms of the 'civilisation' and modernisation of their former colonies cannot be justified by ignoring its negative impacts where indigenous societies were destroyed by the imposition of Western systems in all aspects of life and excluding the native people from the decision making process that affects their lives. According to Ahmad (2002);

Colonial rule for Muslims was an unmitigated disaster. No arguments about Europe providing railways and the telegraph, or maintaining law and order, can conceal or assuage this act. Colonialisation affected the Islamic ideal by contorting and smothering it (Ahmad, 2002:117).

As has been stated earlier, the religion of Islam does not separate religion and politics from one another and therefore extends its scope to all aspects of human life (see Chapter 1). Prior to the Western Colonialisation, the criminal justice system of the Muslim societies was based upon Islamic law (Sharia law). However, the 19th century saw drastic changes into the Islamic legal system in Islamic colonial societies. During the process, Islamic criminal law was either completely abolished or reformed by the colonial administrator and their

indigenous modernizing elites (Peters, 2005). According to Yilmaz (2005:127), Sharia law under colonial rule was 'reformulated according to European terms' and was restricted in its scope to personal and family matters.

Peters (2005) identified two key factors that had played important role in the transformation from an Islamic to a Western legal system in the Islamic world. According to Peters (2005)

Westernisation of state and society, which entailed the adoption of Western laws, the other was indigenous: the emergence of modernising states with centralised bureaucracies, both in the colonies and in the countries that had kept their independence (Peters, 2005:104)

According to Umar (2006), the transformation from Islamic criminal law towards adoption of Western laws took place in three different forms namely: by 'suspending aspects of Islamic law, imposing non-Islamic law passed by the British and subordinating Islamic law to British law in cases of conflict of laws'(Umar, 2006:45). This strategy of eliminating Islamic law and replacing it with Western legal system was not exclusive to the British only; other European powers used the same tactics as the British government did. For example, the French in North Africa simply abolished the Islamic criminal law and replaced it by Western statute law, the French Penal Code. Whereas in the British colonies in India and later in Northern Nigeria, Islamic Criminal Law was not completely abolished. It continued to work but was subjected to gradual changes and finally, it was abolished completely and replaced by British statutes law (Umar, 2006; Peters, 2005). According to Peters (2005);

In the process, Islamic law was stripped of those traits that specifically offended Western ideas of justice, or that were felt to be obstacles to the enforcement of law and order. As a result, a type of criminal law emerged that was Islamic only in name (Peters, 2005:105)

Today, the national legal systems of most Muslim countries are predominantly Western in their orientation whereas the Sharia law is operating in a limited specific legal domains through special courts in disputes involving ‘the law of persons (e.g., legal capacity) and family laws (marriage, divorce, paternity, guardianship, inheritance and endowments’(Masud, Peters and Powers, 2006: 42). In countries like Saudi Arab, Egypt, Tunisia, Algeria, Sudan and Northern Nigeria for example, Sharia laws are enforced through special Sharia courts.

Pakistan’s legal system largely reflects colonial features and therefore, there are no special Sharia courts that functions under Sharia laws. For example, the Sharia legal provision on Prohibition (Enforcement of Hadd) Order of 1979 are enforced through the national court system that is inherited from British. However, the Federal Shariat Court which was established in 1980 is responsible for supervising and ensuring that the existing laws and regulations are not against the teaching of Islam. (Masud, Peters and Powers, 2006:42).

8.6 Decolonialisation and the Emergence of Neo-Colonialism

The end of colonialism is one of the important political developments of the twentieth century, which changed the entire shape of the world’s history. This process is also known as ‘decolonisation’. According to Duara (2004), decolonisation is:

The process whereby colonial powers transferred institutional and legal control over their territories and dependencies to indigenously based, formally sovereign, nation-states (Duara, 2004:2).

Similarly, according to Springhall (2001:2):

Decolonization signifies the surrender of external political sovereignty, largely Western European, over to colonized non-European peoples, plus the emergence of independent territories where once the West had ruled, or the transfer of power from empire to nation-state (Springhall, 2001:2).

The hallmark of decolonisation is the surrender of political sovereignty over the peoples of Africa, Asia, Latin America and Caribbean and the emergence of independent nation-states in these continents where European administrators and settlers had once ruled supreme. The 'third world' replaced the 'colonial world' (Darwin, 1988:6; Young, 2003:16). The term 'third world' was coined to describe those nations that were part of the non-aligned movement and had preferred not to support either the USA or USSR but remained neutral during the Cold War (Willis, 2007).

Darwin (1988) stated that decolonialisation is a complex process and it would be wrong to pinpoint a single factor for the beginning of this complex change in world affairs. The end of World War II is often marked as the beginning of the decolonialisation process. Literature on decolonialisation identifies several reasons for the end of European legacy over their colonies (see Larsen, 2000). According to Springhall (2001), World War II weakened the economic and political conditions of the 'Allies' to the point that they were unable to sustain their colonial empires. The physical occupation of overseas territories by Western powers was no longer required. In addition, the supremacy of the Western powers over world affairs began to decline and disintegrated after 1945. The USA and USSR emerged as two new super-powers who were hostile to the colonial domination by European powers and were looking for their own influence in changing world affairs. The USA in particular encouraged the decolonialisation process partly because it wanted to extend its financial influence to these newly independent states through a process that has been described as 'global capitalism' or 'neo-colonialism'. (Potter *et al*, 2004:71). Referring to the speech of President Truman of

USA in 1949 about the development of newly independent states, Potter *et al*, (2004) stated that:

If *colonialism* is defined as the direct political control and administration of an overseas territory by a foreign state, then effectively Truman was establishing a *new colonial*, or *neo-colonial*, role for the USA within the newly independent countries that were emerging from the process of decolonisation. Truman was encouraging the so-called ‘underdeveloped nations’ to recognise their condition and to turn to the USA for long-term assistance (Potter *et al*, 2004:5).

Another motivation for decolonisation, according to Schwarz (2000), came from the western educated elites in the African and Asian countries who used their skills and education to mobilise the masses against foreign rule, in favour of independence or self-rule. In this regard, the formation of the Indian Congress Movement in 1885 and the intense nationalist movement during 1917 by Gandhi resulted in securing the independence of India in 1947 (Darwin, 1988).

Some critics argue that the end of the Western European colonial empires (decolonisation) was actually a change of tactics by the colonial powers whereby they transferred power to their reliable and trusted local western – educated local politicians. In this way, the colonial powers were able to avoid the political cost of directly controlling their colonies while at the same time ensuring that their vital economic interests were secure (Darwin, 1988). Finally, the incorporation of colonies into the global capitalist economy where the Western companies and capital could move in and out freely of newly independent states, made it less significant to physically occupy those territories (Potter *et al*, 2004; Springhall, 2001). Therefore, the European empires vanished gradually within the next 30 years after the end of the World War II despite the fact that the War had finished with the victory of the Western powers.

It is important to note that political independence from colonial power did not ensure the complete autonomy of the newly independent states (Willis, 2007). One of the reasons for this was that the economic linkage of the ex-colonies kept them in a subservient or dependent position as regards the Western World. Young (2003) argued that the move of the ex-colonies from colonial to independent status actually represents the beginning of a relatively minor move from direct to indirect rule marked by economic dependence on the West (Young, 2003:3). Many writers refer to this new relationship as the start of the process of neo-colonialism which continued the representation of 'Western' or 'Northern' ways of doing things as 'better' (Young, 2003).

One excellent critique of post-colonialism is provided by Edward Said in his famous book *Orientalism* (1978). This book is subtitled *Western Conceptions of the Orient* and deals with how 'the West' has constructed the peoples of 'the East' as being 'backward' and 'uncivilized' (Willis, 2007:121). Consequently, such notions were used to justify military and political intervention by the Western countries in their former colonies. The book reflects on the nature of global power relations at that particular time. Willis (2007) stated that 'Said also demonstrates how the construction of the 'East' as 'Other' and 'different' to the 'West' not only gives the 'East' a particular identity, but also reflects on the identity of the 'West'' (Willis, 2007:121).

Neo-colonialism (or the new colonialism) is marked by the control of the economic and political developments of the newly independent post-colonial states by the USA, Europe, Japan and the Industrialised world (see Potter *et al.*, 2004; Darwin, 1988). In this context, Woddis (1971) argued that developing countries of the Third World of Asia, Africa and Latin America might have taken their first steps towards gaining constitutional independence;

however, they are still subservient to their ex-rulers in terms of gaining economic liberation.

As Woddis (1971:118) puts it:

The path of advance for the countries of the Third World is a difficult, tortuous and complex one. Their economies have been distorted by decades of domination by powerful industrial states. Their people are largely illiterate. They are beset by widespread disease and under-nourishment, by appalling housing, a lack of piped water to villages, a shortage of indigenous technicians (Woddis, 1971:118)

The developed countries still control the underdeveloped countries by means of monetary aid, trade and political relationships. In this regard, according to Potter *et al.* (2004), the World Bank and International Monetary Fund have imposed a wide range of economic conditions on those amongst these poor countries that have sought financial support. Therefore, for Woddis (1971), political independence will never be complete without gaining economic independence from the Western powers. In cases where countries like Afghanistan, Cuba, Iran and Iraq have resisted the European powers, they suffered serious consequences by the imposition of economic embargo or military intervention (Young, 2003).

8.7 Post-colonial Pakistan

The British colonial empire in India came to an end in August 1947. The Indian sub-continent was divided into two countries namely: India and Pakistan. The new state of Pakistan was created in response to the demand for a Muslim state in Hindu majority British India (Ahsan, 2003). Since its independence, Pakistan has undergone a turbulent process of nation-building, seeking to create sufficient consensus and the institutions necessary for stable internal politics. Ahsan (2003) argued that unlike many newly independent countries in the twentieth century, Pakistan did not inherit any established government from the British Raj. India on the other hand, inherited a working federal capital with the majority of the cabinet

members and other public servants willing to continue at their posts. In contrast, Pakistan had to start everything almost from scratch (Ahsan, 2003).

The post-independence political history of Pakistan has been a fruitless search for a stable and effective form of government as it experienced frequent changes of governments and regimes (Talbot, 1998). Acquiring legitimacy, building a new state, the dispute over Kashmir, the division of assets and water, and the settlement of refugees from India were some of the major problems the new state had to tackle immediately after the partition from India (Talbot, 1998; Ahmad, 1997). Further, since its creation, Pakistan has also been in a state of a crisis of identity. The early death of Mohammad Ali Jinnah, the founder of Pakistan followed by the tragic assassination of Liaqat Ali Khan, the first Prime Minister, subsequently led to a leadership crisis. The vacuum of visionary leadership created by the deaths of Mohammad Ali Jinnah and of Liaqat Ali Khan invited non-political forces who gradually shifted the process of governance from democratic leadership to a military and civil bureaucracy (Monshipouri and Samuel, 1995; Asad and Harris, 2003).

As early as 1951, the military and civil bureaucracy in Pakistan assumed effective control of the state. The first military dictator took control of government in Pakistan in October 1958. This laid the foundation for the recurrence of military takeovers. According to Haqqani (2006), military dictators have ruled Pakistan for over half of its political life to date. One index of this perpetual domination of the country by the military-bureaucracy apparatus is reflected in the telling fact that during Pakistan's first decade of independence, defence along with the cost of civil administration swallowed more than three quarters of the central government's revenue budget (Haqqani, 2006).

Hamza Alavi (1972) in his influential article on 'The State in post-colonial societies' has explained contemporary developments in Pakistan and Bangladesh by putting forward a general theory of the state in post-colonial societies. Alavi (1972) argued that the experience of formation of the state in post-colonial states is different from that experienced in European societies. The creation of nation states in European societies is often associated with the emergence and rise of capitalism when the indigenous bourgeoisies, with their economic growing power and influence were able to provide a framework of law and various institutions necessary for the development of capitalist relations of production (Alavi, 1972). In post-colonial societies however, this formation of state was carried out in a somewhat different way.

Alavi (1972) argued that British colonial rule in India required an efficient and effective system of defence, internal security and administration with the sole purpose of subordinating the native social classes. This situation led to the development of two strong institutions: the military and civil bureaucracy. He defined this powerful bureaucratic-military apparatus as 'overdeveloped' in relation to the structure of the colony (Alavi, 1972:58). According to Alavi (1972):

The post-colonial society inherits that overdeveloped apparatus of state and its institutionalized practices through which the operations of the indigenous social classes are regulated and controlled (Alavi, 1972:58)

Thus, Alavi's (1972) general theory on the formation of post-colonial state presents a contrasting picture to the development of ideal capitalist state where the state is subordinate to a strong, unified national bourgeoisie. Crow (1990) stated that Alavi's notion suggests how post-colonial states have opened enough room for neo-colonial domination. According to Crow (1990):

Neo-colonialism is probably the greatest beneficiary of the relative autonomy of the bureaucratic-military oligarchy. It is precisely such a relatively autonomous role that renders the government of the post-colonial society sufficiently open to admit the successful intrusion of neo-colonial interests in the formulation of public policy (Crow, 1990:195)

This is the reason why Crow (1990) argued that the metropolitan bourgeoisies with the association of 'bureaucratic-military oligarchy' are still able to continue neo-colonial domination even after the political independence of the former colonies.

The state power in Pakistan is still concentrated in the hands of the bureaucratic-military oligarchy. There have been movements for the restoration of democracy, for example in 1972 and 1988-1999. However, the state power remained in the hands of the two powerful components of the 'oligarchy'. One of the reasons for this, as has been put forward by Alavi (1990), relates to the lack of effective leadership, which has not been able to mobilize the masses to confront the oligarchic domination. Another reason for this is the fact that Pakistani politics is still dominated by the landlord-dominated factions. This class of politicians is very much interested in finding ways of how to be in power. As a result, they are easily manipulated by those in control of the state apparatus (Alavi, 1990). With such a situation in which the political leadership is constantly manipulated by the state control apparatus, the democratic governments have failed to manage economic reforms and political stability. The state, led by the bureaucratic-military, continued to operate as a cohesive political force. Programmes of political participation and economic development are undertaken which continue to legitimize the authoritarian rule of the oligarchy (Mitra, 1990).

8.8 Colonial Legacies in Post-colonial Pakistan

Although the independence of Pakistan signalled the end of Western colonisation, the reality is that much of the characteristics of the new state were profoundly influenced by the legacy of the colonial era (Cole, 1999). As Willis (2007) argued, the end of colonialism did not ensure the complete sovereignty of the former colonial states. Instead, the experience of colonialism directly affected the social, cultural, economic and political culture of the former colonies, the legacies of which can be seen even after independence (Willis, 2007). Although Pakistan is an Islamic Republic its main legal system and constitution are inherited from the British (see Asad and Harris, 2003).

The judicial system in post-colonial Pakistan has evolved through a process of reforms and developments; however, it has greatly been influenced by the legacy of colonial era. On independence in 1947, the Government of India Act 1935 was retained as provisional constitution until a new constitution was introduced in 1956 (Talbot, 1998). As a consequence, the legal and judicial systems of the British colonial rule continued with certain adaptations and modifications where necessary to be able to suit the requirement of the new state (Gledhill, 1957). The Lahore High Court continued to function and so did the Sindh Chief Court and the Courts of Judicial Commissioner in NWFP, and Baluchistan. A new High Court was setup at Dacca. Similarly, a new Federal Court for Pakistan was also established. The powers, authority and jurisdiction of the Federal Court and High Courts, as prescribed in the Government of India Act, 1935, remained intact (Gledhill, 1957).

The subsequent constitutions of 1956, 1962, and 1973 did not make significant changes in the powers and jurisdictions of the judiciary. The 'Federal Court' was renamed as 'Supreme Court' by the 1956 Constitution (Gledhill, 1957). The Chief Court of NWFP and

Judicial Commissioner Court of Baluchistan were upgraded into full-fledged High Courts, by the 1973 Constitution. Later on, a new Court called Federal Shariat Court was created in 1980 (Article 203-C) which continues to function up till the time of the publication of this thesis.

One of Pakistan's colonial legacies is the adoption of probation as a punishment. As shown in Chapter 3, probation was provided for in the 1898 Criminal Procedure Code (when it was amended in 1923). The practice of probation during the colonial era was stated in Section 562 of the Code thus:

When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour (see Ranchhoddas and Thakore, 1946)

Thus, it is clear that during the colonial era, probation was an alternative to punishment for certain categories of offenders, mainly first offenders, to be used at the discretion of the court. Historical records point to the fact that in Colonial India (Including Pakistan) during the second half of the nineteenth century, thousands of juvenile delinquents, vagrants, prostitutes and mutineers were imprisoned in India's colonial jails (see Sen, 2004). The aim of probation was to prevent from being committed to jail, offenders who may have committed crimes through ignorance or inadvertence or the bad influence of others and who, but for such lapses, might be expected to make good citizens (Trayosha, 2007). For such offenders, committal to

jail may lead them to being associated with hardened criminals, who may lead them further along the path of crime. As stated above, the offender is released on probation upon entering into a bond to keep the peace and be of good behaviour. There was no provision for supervision once the offender was in the community. It was expected that the shame and mental agony of a court trial would be enough to deter such offenders from future offending (Trayosha, 2007).

Pakistan had a choice, after independence, to keep or reject colonial laws, especially as the country established itself as an Islamic Republic. However, Pakistan decided to follow in the footsteps of fellow former British colonies by keeping the inherited colonial criminal and criminal procedure laws. As shown in Chapter 3, further attempts were made by the British colonial government to expand the use of probation by legislation. The 1931 All India Probation Bill, which was not passed into law, became the foundation of the Probation of Offenders Ordinance 1960. In addition, the 1960 Ordinance provided for the appointment of probation officers and the establishment of a probation service in Pakistan.

The reason why the military government of Ayub Khan decided to pass the 1960 Probation Ordinance into law in Pakistan is not clear. As shown in Chapter 2, specific social problems such as alcohol abuse and vagrancy led to the emergence of the idea of probation in England and the USA. There was no indication that at the time that the Probation law was passed in 1960, these or similar social problems were existing in Pakistan. The most pressing problem for post-colonial Pakistan was what was appearing to be a fruitless search for a stable and efficient form of government (Talbot, 1998)³⁰. There was no political debate in government as to the need for a new probation law. However, it is interesting to note that the

³⁰ Like most post-colonial states, Pakistan experimented with different types of governments which, to a large extent, preserved features of the previous colonial government. The country experimented with two constituent assemblies, one constitutional commission and three constitutions during the first two decades of its independence (see Talbot, 1998:4 for details)

1960 Probation Law was introduced at a time when Pakistan was experiencing a relative political peace under the military government of General Ayub Khan (1958 to 1967). Under Khan's government, there was industrial development, economic growth and relative stability in law and order (Nadeem, 2002). It could be argued that legal reform naturally followed.

However, there are more important factors that encouraged the passing of the 1960 Probation law. Firstly, the passing of the law could be linked to the global factor of the rise of the rehabilitation ideal in Europe and the USA in the 1950s and 1960s (see Chapter 2). The 1960 law, therefore, was simply an adoption of the idea of probation at the stage that it was in the UK and USA in the 1960s – the rehabilitation stage - characterised by the establishment of a formal probation service charged with the responsibility of not only assisting and befriending offenders but also providing help towards their rehabilitation and resettlement. Under this philosophy, punishment was inflicted keeping in view the treatment needs of the offenders rather than the seriousness of the offence (Pond, 1999). The advocates of this philosophy believe that external factors like social, economic, psychological, family and peer pressure play an important role in crime. Instead of punishing the offender, external factors which are beyond the control of the offenders should be given due considerations (Hudson, 1996) (see chapter 1). The 1960 law, unlike the previous colonial legal provisions, provided for the supervision offenders on probation by probation officers and the 1961 Probation of Offenders Rules (Rule 10d) made rehabilitation of offenders a key duty of probation officers.

Secondly, as said above, adopting Western European politico-legal structures was generally seen by the newly emerging post-colonial states as signifying their modernisation (Willis, 2005). In order to make Pakistan a modern country, General Ayub Khan cultivated close relationships with western countries and the USA. Khan's modernization programme

centred on social reforms, land reforms, mechanization of agriculture and a commitment to economic development (Talbot, 2000), although some of his social reforms like the Family Law Ordinance 1961, which focused on four main issues of divorce, polygamy, child marriage and inheritance, were strongly criticized by conservatives who regarded the law as un-Islamic. Khan's goal was to project Pakistan as a liberal Muslim country rather than a conservative one (Talbot, 2000). In the same manner, probation as a punishment, supported by a formal probation service, was adopted without serious thoughts as to its relevance to Pakistani culture and society. More importantly, no serious thoughts were given to how the infrastructure would be provided to support the new probation service (see Chapter 6).

8.9 Evaluating the Probation System in Pakistan

The 1960 Probation Law in Pakistan is still largely styled on the Western model and founded upon previous colonial laws. Many of the sections in the law are based on colonial legal precedents. For example, referring to the Code of Criminal Procedure 1898, section 2(g) of the 1960 Ordinance states that:

All other words and expressions used but not defined in this Ordinance and defined in the Code shall have the same meaning as assigned to them by the Code.

Section 562 of the 1898 Code (see above) is slightly extended in Section 4 of the 1960 Ordinance and entitled 'conditional discharge'. The most significant difference between the two laws exists in section 5(b) of the 1960 Ordinance where it states that:

Instead of sentencing the person at once, [the court may] make a probation order, that is to say, 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, as may be specified in the order:

It has been more than four and a half decades since the probation service was established in Pakistan. No attempt has been made to review its operation or assess its effectiveness. This is unlike in the United Kingdom where the probation system has continued to evolve in line with both political directions on punishment and new academic findings on the criminogenic needs of offenders (see Chapter 2). Pakistan, like most post-colonial countries, continues to see the adopted probation system as relevant, perfect and therefore in need of no improvement. More importantly, the probation service in Pakistan operates a confused system whereby the rehabilitation of offenders is expected in theory but probation officers could only offer an ‘advice, assist, and befriend’ service to their clients (see Chapters 5 and 6).

One of the reasons for the non-development of probation system in Pakistan is its lack of historical roots in the society. Probation in Pakistan is like a ‘borrowed robe’ that does not fit the society. The English probation service has sound philanthropic foundations and relevance to its culture and society, which made it easy for the authorities to develop their probation system according to the needs the society (see Chapter 2). The probation system in Pakistan did not evolve in the same way as it did in Britain. There was no systematic political/non political movement or public demand for the welfare of offenders in Pakistan. Furthermore, the rehabilitation of offenders is not a punishment aim upheld in traditional approaches to punishment in Pakistan, not even in Islamic law. The democratic nature of British politics meant that punishment issues are debated in Parliament. Pakistani governments since independence, which have been largely military and authoritarian, could not be seen to be truly democratic. Hence, the scope for public debate or participation in law and order and punishment issues has been minimal (Harrison, Kreisberg and Kux, 1999). Politics of personalities took over party politics, which resulted in mismanagement of government resources and functions (Nasr, 1992). In addition, the military and civil bureaucracy together

continued to operate their authoritarian rule under the military rule of General Zia-ul-Haq (1977-1988) and under General Pervez Mushraf (1999-2008) played a 'guardian role' in the government affairs from behind the scenes (Haqqani, 2006:224). In this context, the 'lure of office' (Alavi, 1990:20), power entrenchment, security and gaining legitimacy for their rule were the main concerns of the politicians, whilst the issues of rehabilitation and welfare of offenders were low on the priority list of both the civilian and military governments in Pakistan.

According to Alavi (1972), the overdeveloped administrative and military institutions in Pakistan continued to operate the colonial practice of emphasizing the requirements of law and order rather than those of popular representation. In the area of criminal justice, the successive governments in Pakistan have continued to emphasize developing the administrative structure and re-structuring rather than working on the philosophy of justice (see Chapter 3).

The existing probation system in Pakistan resembles more the probation system in England and Wales when it was in its second stage. As a result, the Pakistani probation system is also experiencing the same problems that the probation system was facing in England and Wales during its second phase. As Leeson (194) noted in relation to England and Wales, some of the problems currently being faced by the probation system in Pakistan include the unsuitable appointments of probation officers, the selection of unsuitable cases of probation and lack of adequate organization of control (see Chapters 2 and 6). However, there are significant variations/differences between the two probation systems despite their similarities. For example, the probation system in England and Wales developed as an

autonomous criminal justice agency, whereas the probation system in NWFP, Pakistan was established as an arm of the Prison Department.

From the above discussion, it is safe to say that in the context of Pakistan, the probation idea is foreign. It has no historical relevance to the culture and society of Pakistan. It is used to show a global image of a humanistic and modernized state but with no infrastructure to support it in practice. Probation is a symbol of development in post-colonial Pakistan. The fact that the idea did not evolve in the society has meant that not much thought has been given to its evolution or development. Instead, the focus has been on maintaining the administrative base of a colonial system rather than developing a system that meets the needs of the people of Pakistan.

8.10 Summary

The end of European colonial empires was one of the major developments of the twentieth century. Different reasons have been put forward for the decolonialisation process including the effects of World War II, nationalist movements in former colonies, the rise of USSR and USA as new superpowers. However, the phenomenon is not as simple as it looks. Critics argued that the end of colonialism was actually a change of tactics by the Western powers where physical occupation was no longer necessary. This situation gave rise to the growth of ‘neo-colonialism’ where former colonies are physically independent but economically dependent on the other world powers. Even today, it is the rich and powerful nations who are still in a position to dictate the pace of development of the ‘third world’ in a way which ultimately benefits the powerful states more than the third world countries.

Pakistan came into being in extremely difficult conditions, facing serious domestic problems and external security threats from the very beginning. The survival of the new state became the primary concern of the rulers of Pakistan where the emphasis was put on strong defence and monolithic nationalism. Thus, authoritarianism is one of the main characteristics of post-colonial Pakistan where the state and society are far apart from each other. Pakistan inherited an 'overdeveloped' state where bureaucracy and military were more developed than the economic and political institutions. This situation reflects important elements of colonisation where colonial states were equipped with strong military and bureaucratic apparatus, which enabled them to subdue the 'native' peoples. Post-colonial Pakistan inherited that the overdeveloped military-bureaucratic apparatus through which the British colonial power had controlled the indigenous classes during the colonial period.

A key feature of post-colonial states is the adoption of Western political, legal and socio-cultural institutions as symbols of 'development;' or modernisation. The probation law is one such colonial legislation adopted by the Pakistani government. The laws of a society are the manifestation of its cherished values and norms. However, probation as a punishment enforced by law is alien to Pakistan. It is this alienation of the law from society that successive governments in Pakistan have not been able to rectify. The emphasis has been on the administrative set up of the probation service at the expense of a thorough review of its operations. Different perceptions of probation by magistrates, probation officers and probationers themselves are indications of the lack of clarification or guidance given by the government on how the law should be operated in practice. In contrast, in Britain, there is greater political and economic support and commitment to the welfare of offenders. In Pakistan, the probation system is starved of resources and financial support. The philosophy of probation that Pakistan has adopted – to advise, assist and befriend offenders as well as

provide help towards their rehabilitation - is damped by the lack of political support for the idea. This chapter has shown that this situation is not peculiar to Pakistan but is characteristic of most post-colonial countries that see their 'development' or modernisation simply in terms of the adoption of western ideas or concepts without first assessing the relevance of such ideas to their own culture.

Chapter 9

Conclusions

The aim of this study was to evaluate the performance of the probation system in North West Frontier Province of Pakistan. The study examines how probation is perceived as a form of punishment by the probationers, probation officers and judicial magistrates and whether or not the RPD is capable of fulfilling the aims of rehabilitating and reintegrating offenders back to their communities. The empirical data presented in Chapter 5, 6, and 7 suggest that the probation system in NWFP, Pakistan is not helping offenders who may need it in addressing their offending behaviour. One of the fundamental hurdles in this regard is the lack of resources (for example, independent office space, telephone, computers and transport) to enable probation officers to work with offenders. Another hurdle is the lack of access to rehabilitation facilities in the community that offenders on probation could use. As a consequence, the offender work of the probation officers in NWFP has been reduced to the 19th century British version of ‘advice, assist and befriend’.

There are specific features of the Pakistan system that are problematic. First, unlike in Britain, judicial magistrates grant a probation order without any input from probation officers. In Britain, the idea of a PSR is that it offers professional guidance to the courts on why the offender might have committed the crime, the risks of future harm and what the offender might need to aid their resettlement or rehabilitation. Thus, the PSR is a vital document to the sentencing decision of the court. In this study, it is revealed that judicial magistrates made their sentencing decision purely on the basis of police reports without seeking the professional advice of probation officers, which rule 18(1) of probation rules required them to do. Probation supervision cannot be effective if there is no professional input of probation officers at the decision making process in court.

Second, probation supervision in NWFP involves no practical work with offenders. In developed countries like Britain, there are established procedures and frameworks which guide the supervising officer on how to draw up a supervision plan. The main purpose of a supervision plan is to identify criminogenic needs and risk factors, and actions to be taken on breach. Need and Risk Assessment Instruments like OASys (Offender Assessment System) are used for this purpose. However, in Pakistan, there are no need and risk assessment instruments used and there is no provision for the drafting of supervision plans for probationers. The approach of the probation officers in NWFP in dealing with probationers was mainly that of establishing good relationship with offenders in the hope that they would refrain from offending in future. However, researchers like Nash (1999) have warned that when criminogenic factors of probationers are not addressed and/or there is no positive influence by the probation officer, the whole scenario can have a negative impact on offender behaviour. The probation system in NWFP Pakistan has remained virtually stagnant since its inception in 1960. This is unlike in Britain, from where the idea of probation in Pakistan was adopted. No work has been done on the probation system in NWFP Pakistan to move it to higher stages, for example, the introduction of probation programmes, further training to enable probation officers to write and implement supervision plans and provision of access to facilities in the community to aid the rehabilitation of their clients. However, as seen in Chapters 5, 6, and 7 there is a key issue or problem with regard to the selection of unsuitable cases for probation; that is, the overwhelming use of a probation order for persons found guilty of illegal or unauthorised possession of AK 47s.

Third, the probation service in NWFP has no direct access to any welfare facilities provided either by the government or voluntary organizations in the community that they could use to help their clients. For example, as shown in Chapter 6, the Social Welfare Department in NWFP Pakistan runs drugs rehabilitation centres and has skills training centres and welfare homes but

they would not allow the RPD to send their clients to any of these institutions. As a result, the probation officers were unable to carry out their rehabilitation and resettlement duties as required by section 13 and rule 10 of Probation of Offender Ordinance 1960/Rule 1961.

Fourth, since its introduction in 1960, the probation system in Pakistan has not been taken seriously by either the civil or military governments in Pakistan. As a result, the probation system in NWFP, Pakistan has failed to develop and establish an identity of its own. It is one of the least developed and most neglected components of the criminal justice system in Pakistan. The RPD works as a corporate body within the prison department in the province. The aims and objectives of both departments are completely different. The prison department focuses on locking people up whereas probation aims to rehabilitate offenders in the community. The conflicting aims of probation with that of prison department have restricted the growth of probation in Pakistan. Whenever criminal justice system policies are discussed at the provincial level, prison issues take priority over probation due to the fact that the Inspector General of Prisons NWFP, Pakistan, who is also the Director of the RPD, takes more interest in resolving matters related to the prison service while probation issues go unresolved. It appears that there is no political will to increase government support to the RPD and to work for the welfare of offenders. In Britain, the probation service has been moved through progressive stages of development with considerable support from the British government (See Chapter 2). It is argued in this thesis that probation was adopted because it symbolises Pakistan's development or modernisation. However, no serious thought has been given to how it could be implemented and adapted to the Pakistani environment.

9.1 'Effectiveness' of Probation in Pakistan

Although probation is a foreign punishment idea in Pakistan, its value as a punishment for simple offences and first offenders cannot be disputed. In this regard, the Probation Ordinance of 1960 could be regarded as a progressive law. However, a law is only as good as the infrastructure that supports it. More importantly, a law will not function properly unless it has a cultural meaning or foundation. Garland (2006), amongst others, has argued that criminological conceptions tend to change their meaning when they are conceived in one culture and then transported to another (see Chapter 1). Probation is one such concept which was conceived in Britain and was transplanted to Pakistan where it has no cultural foundations. Therefore, probation as a form of punishment does not carry the same meaning in Pakistan as it does in Britain. The fact that probation does not have a cultural meaning in Pakistan means that people see it differently. Probation officers (and possibly the judicial magistrates) appear to know what probation means in the modern sense, but they tend to lean to the popular understanding of the punishment by the offenders and society at large for whom probation is a soft sentence ('letting people off'), an alternative for people who, perhaps, should have been sent to prison. In other words, probation is seen as a sentence of mercy.

Most of the debate on probation as punishment have focused on its 'effectiveness' especially as probation does not conform to popular notions of punishment because of its essentially non-punitive nature. The history of probation in Britain, as has been explained in Chapter 2, shows that it is the question of 'effectiveness' which has changed the shape of probation since its introduction in 1907. The introduction of National Standards, the introduction of Needs and Risk Assessment instruments, placement on offender behaviour programmes and New Labour's 'what works' agenda are practical and strategic measures designed to ensure effective probation practice.

It is not surprising, judging by the lack of resources and problems encountered, that the effectiveness of the probation system in NWFP Pakistan is not judged by its impact on the rehabilitation of offenders, the meeting of criminogenic needs and prevention of future risks. The probation officers interviewed measured 'effectiveness' in three ways:

1. The total number of offenders on probation;
2. Low re-offending rate of offenders in the province who had been on probation
3. Low breached cases

The first measurement could be said to be peculiar to Pakistan. Since Judicial Magistrates have the discretionary power to decide who gets probation, and could do so without any help from probation officers, probation officers assess their own performance (or 'effectiveness') by the number of eligible offenders that they were able to persuade the Judicial Magistrates to release to them on probation. This is not often an easy task. It involves explaining to the ever busy Judicial Magistrates the benefits of probation to the offenders and to society as a whole in every case. Thus whenever an offender gets probation it is seen by the probation officers as a success – another offender has been 'saved' from being sent to prison! In this regard, the work of the probation officers in NWFP could be likened to that of the early missionaries in 19th century England – 'saving the sinners' from imprisonment.

The second and third measurements of effectiveness are universal (see Crow, 2001). However, there are serious problems in measuring 'effectiveness' on the basis of low reconviction rates because there are no official data on the re-offending rate of offenders on probation in Pakistan. With regard to breach cases, it was revealed in Chapter 6 that probationers will not normally be reported as having breached their orders until they have missed three consecutive meetings over a period of three months and that, generally,

probation officers are reluctant to report breach cases to the Head Office. Thus, judging performance by the fact that there are low reported breach cases is also problematic.

In this situation, to argue that the probation system in NWFP, Pakistan is effective is doubtful. It is important to mention that I am not suggesting that none of the probationers benefited from the probation in NWFP, Pakistan. Many of the probationers interviewed thought that their experience on probation was much better than going to prison. This was particularly the case with those probationers who had spent some time in prison before starting their probation order and those placed on probation for illegally possessing an AK 47, an offence that also carries a prison sentence. Thus for many of probationers interviewed, being on probation was giving them a second chance. It didn't matter much to many of them, what the probation system could offer them.

9.2 Rehabilitation and Reintegration: Fact or Fiction

In the criminal justice system, rehabilitation and reintegration are two important concepts aimed at helping offenders. Since the 1950s at least, the rehabilitation of offenders has been at the heart of the probation service in Britain (see Chapter 2). In this context, a probation order seeks to rehabilitate offenders by tackling their criminogenic needs and risk factors in order to reduce the likelihood of future offending and thereby protect the public.

In this study, I argued that if probation is about rehabilitation and reintegration and addressing criminogenic needs, then many of the probationers in NWFP at the time of this study, especially those convicted for the illegal or unauthorised possession of AK-47 should not have been granted a probation order at all. It is argued in the thesis that the punishment of these offenders ignores the

‘cultural’ necessity for the carrying of arms in an area where family feuds and personal security, resulting primarily from the Province having a boarder with Afghanistan, are significant problems (see Hilali, 2002). Since the start of the Afghan war in 1979, Pakistan in general and the NWFP in particular have experienced a mass influx of weapons across the border from Afghanistan. There is no doubt that controlling a 2200 kilometre long border with Afghanistan is a difficult task to achieve. The illiteracy and ignorance of the people has intensified the problem to the extent that it is a common practice to prefer an AK-47 to a television or refrigerator, which one could buy for the same amount. While the government is right to attempt to control possession of arms and gun violence in the region, the cultural and other reasons why people in the province carry arms should not be totally ignored.

In contrast, it is revealed in the research that the offenders on probation for drug misuse problems (the second largest group in the sample of probationers), whom one would expect to be given some needed help with rehabilitation, did not get any support from the probation service. As mentioned above, the RPD, at the time of this research, did not have access to the treatment and rehabilitation facilities for drug addicts in the province run by the Social Welfare Department. It was discovered during the research that there was no communication or agreement between the RPD and the Social Welfare Department to allow offenders on probation to use their services. This is a major setback for the RDP as it means that their clients with drug problems have nowhere to go (unless they go privately as non-offenders).

In this thesis, it has been shown that, in Pakistan, the practice of probation is deluded. Even though the system prides itself on offering a service characterised as ‘advice, assist and befriend’, the empirical data presented in this study does not support that claim. Another important issue is the inadequate provision for female offenders. Women constitute more than half of the population

of Pakistan but at the time of this research there were no female probation or parole officers in the RPD of NWFP Pakistan.

It has been shown that there is a huge gap between the theory and practice of probation in Pakistan. A comprehensive research is needed to suggest realistic changes in the probation law with some priority given to what the supervision of offenders should entail, especially how section 10 (d) of the probation rules (the rehabilitation of offenders) would be attained. Whereas the probation idea has no cultural equivalent in Pakistan, it is a type of punishment that has potential in addressing the causes of crimes and to rehabilitate offenders. If people understand the value of probation as a form of punishment and the probation system is given more support by the state, it will become acceptable by the society and the misconceptions encountered during the research will be minimal.

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APPENDIX – A

Offences for which a Probation Order was Granted in NWFP, Pakistan During the Period 2000 – 2004

(A) The Pakistan Penal Code (1860)

Chapter IX: Of offences by or relating to public servants

1. 161 Public servant taking gratification other than legal remuneration in respect to an official act
2. 162 Taking gratification, in order by corrupt or illegal means to influence public servant

Chapter X: Of contempt of the lawful authority of public servants

3. 186 Obstructing public servant in discharge of public functions
4. 188 Disobedience to order duly promulgated by public servant
5. 189 Threat of injury to public servant

Chapter XI: Of false evidence and offences against public justice

6. 193 False evidence
7. 205 False impersonation for purpose of act or proceeding in suit or prosecution
8. 216 Harboursing offender who has escaped from custody or whose apprehension has been ordered
9. 223 Escape from confinement or custody negligently suffered by public servant

10. 224 Resistance or obstruction by a person to his lawful apprehension

Chapter XIV: Of offences affecting the public health, safety, convenience, decency & Morals

11. 279 Rash driving or riding on a public way
12. 283 Danger or obstruction in public way or line of navigation
13. 292 Sale, etc., of obscene books, etc,
14. 293 Sale, etc., of obscene objects to young person

Chapter XVI: Of offences affecting the human body

15. 325 Attempt to commit suicide
16. 337 Physical harm against persons

Chapter XVI-A: Of wrongful restraint and wrongful confinement

17. 342 Wrongful confinement
18. 353 Assault or criminal force to deter public servant from discharge of his duty
19. 354 Assault or criminal force to woman with intent to outrage her modesty
20. 357 Assault or criminal force in attempting wrongfully to confine a person
21. 365 Kidnapping or abducting with intent secretly and wrongfully to confine person
22. 368 Wrongfully concealing or keeping in confinement, kidnapped or abducted person

23. 374 Unlawful compulsory labour

24. 377 Unnatural offence

Chapter XVII: Of offences against property

25. 379 Theft

26. 380 Theft in dwelling house, etc.

27. 400 Belonging to gang of dacoits

28. 411 Dishonestly receiving stolen property

29. 419 Cheating by impersonation

30. 420 Cheating and dishonestly inducing delivery of property

31. 427 Mischief causing damage to the amount of fifty rupees

32. 429 Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees

33. 430 Mischief by injury to works of irrigation or by wrongfully diverting water

34. 431 Mischief by injury to public road, bridge, river or channel

35. 435 Mischief by fire or explosive substance with intent to cause damage to amount of one hundred rupees or (in case of agricultural produce) ten rupees

36. 447 Criminal trespass

- 37. 452 House-trespass after preparation for hurt, assault or wrongful restraint
- 38. 453 House-trespass or house-breaking
- 39. 457 House-trespass or house-breaking by night in order to commit offence punishable with imprisonment

Chapter XVIII: Of offences relating to documents and to trade or property marks

- 40. 466 Forgery or record of court or of public register, etc.
- 41. 468 Forgery for purpose of cheating
- 42. 469 Forgery for purpose of harming reputation
- 43. 488 Making use of any false mark
- 44. 489 Tempering with property mark with intent to cause injury
- 45. 489B Using as genuine, forged or counterfeit currency notes or bank notes

Chapter XXII: Of criminal intimidation, insult the annoyance

- 46. 506 Criminal intimidation

(B) The Arms Act 1878

- 47. 13 Prohibition of going armed without licence
- 48. 14 Unlicensed possession of fire-arms, etc.
- 49. 15 Possession of arms of any description without licence prohibited in certain places

(C) The Explosives Act, 1884

50. 5 Manufacture, possession, use, sale, transport and importation of explosives

(D) The Control of Narcotics Substance Act 1997

51. 9 Contravention of section 6 (Prohibition of possession of narcotic drugs etc.), 7
(Prohibition of import or export of narcotic drugs etc.) and 8 (Prohibition on
trafficking or financing the trafficking of narcotics drugs etc.)

(E) The Prohibition (Enforcement of Hadd) Order, 1979

52. 3 Prohibition of manufacture, etc., of intoxicants

53. 4 Owning or possessing intoxicant

54. 11 Drinking liable to Tazir

55. 14 Things liable to confiscation

(F) The Telegraph 1885

56. 25 Intentionally damaging or tampering with telegraphs

(G) The Motion Picture Ordinance 1979

57. 18 Exhibition of uncertified films

APPENDIX – B

A Copy of Questionnaire for Probationers

Section – A: General Questions

1. Respondent No: _____
2. What is the length of your probation order? _____ Years
3. How long have you been on probation order? _____ Months / Years
4. Categories of probationers
 - a. Ongoing Case
 - b. Completed Case
 - c. Recidivists
5. How old are you (in years)?
 - a) 21-30+ b) 31-40+ c) 41-50+ d) 51-60+ e) Over 60
6. Residence: a) Urban b) Rural
7. What is your educational status?
 - a) Literate b) Illiterate

If literate, what is your level of education?

 - a) Primary b) Middle c) High d) Intermediate e) Graduate
 - f) Higher degree g) other _____

8. What is your family system?

- a) Nuclear b) Joint c) Extended

9. What is your employment status?

- a. Civil Servant (government employee)
b. Self employed professional
c. Private business
d. Unskilled worker (e.g. daily labourer)
e. Unemployed
f. Other _____

10. Did you rejoin your job after being granted probation? a) Yes b) No

11. If no, what was the reason? _____

12. If employed/working, what is your monthly income (In Rs.)?

- a. 2000 – 3000
b. 3001 – 4000
c. 4001 – 5000
d. 500 – 6000
e. 6001 & above

13. What is your marital status?: a)

- Married b) Unmarried c) Widower d) Separated e) Divorced

14. If married, how many children do you have? _____

15. How many family members do you have? _____

16. Are you the only earning member of your family? a) Yes b) No

17. If no, how many earning hands do you have in your family? _____

Section – B: The Case

18. What offence led to you to being placed on probation? _____

19. Why did you commit this crime? _____

20. Do you accept responsibility for this offence? a) Yes b) No

21. If no, why? _____

22. Has any member of your family ever committed a crime? a) Yes b) No

23. If yes, on what charges. Please specify _____

24. For how long did you remain un-arrested after the commission of crime?

25. From the time of your arrest, how long did it take before you were granted probation order by the court? _____

26. How much time did you spent in police lockup (Havalat)? _____

27. Did you spend some time in jail during this process? a) Yes b) No

If no, then go to question no. 32

28. If yes, how much time you spent in jail? _____

29. How did you find the jail environment?

- a) Good b) Bad c) Normal d) Other _____

30. In your opinion, is jail environment suitable for the reformation of offenders?

- a) Yes b) No

31. How was the behaviour of the jail authorities with you?

- a) Sympathetic & Kind b) Harsh c) Indifferent d) Abusive e) Other _____

32. In your experience with the criminal justice system, have you been treated fairly by

The Police	Yes	No	Don't Know	N/A
Your Solicitor	Yes	No	Don't Know	N/A
Court staff	Yes	No	Don't Know	N/A
Magistrates	Yes	No	Don't Know	N/A
The probation officer	Yes	No	Don't Know	N/A
Prison staff	Yes	No	Don't Know	N/A

33. For each of the above, if no, please explain why? _____

34. While you were in jail, did your family members face any problem due to your absence?

- a) Yes b) No

35. If yes, of what type:

- a. Financial
- b. No male member at home
- c. Disturbed by the rival (in case of family enmity)
- d. Any other, please specify _____

36. Have you now realized that you should have avoided the situation that led you to offend?

- a) Yes
- b) No

37. Can you explain this to me please? _____

Section – C: Crime History

38. Have you ever been convicted or sentenced before? a) Yes b) No

If no, then go to Section – D

39. If yes, on what charges? Please specify _____

40. What was the nature of the punishment given to you for your previous offence?

- a) Prison Sentence
- b) Fine
- c) Probation
- d) Others _____

41. If prison sentence, what was the length of your sentence? _____

42. If granted probation order, what was the length of the probation order? _____

43. What was the reason for committing this offence? _____

Section – E: The Probation Order

44. Do you know what the probation order means to you? _____

45. How did you come to know about the services of probation? _____

46. Was the purpose of probation explained to you? a) Yes b) No

47. If yes, by whom _____

48. Do you think you now understand the purpose of probation? _____

Section – F: Supervision Plan

49. Did you see/make an agreement (e.g. supervision plan) about what you would do on probation? a) Yes b) No

If no, then go to question no. 58

50. If you saw an agreement, how much did it take into account your views, concerns and opinions?

a) Fully b) Partly c) Not at all d) Don't know

51. Was there any discussion in meetings with your supervisor about your feelings, expectations and needs? a) Yes b) No

52. If yes, what kind of needs, expectations or feelings did you discuss with your supervisor. (Prompt: Can you give some examples?) _____

53. If no, why do you think this was so? _____

54. Who told you about the restrictions imposed on you as a requirement of your probation order? _____

55. How do you consider the restrictions mentioned in the probation order?

a) Normal b) Good c) Inconvenient d) Other _____

56. Did /Are you face(ing) any problems due to these restrictions? a) Yes b) No

57. If yes, of what type: _____

58. How often do you have to report to the probation officer? _____

59. How do you report to your probation officer?

- a. Visit his office
- b. Telephone him
- c. Inform him through some relatives
- d. Any other _____

60. Does/Did the probation officer ever visit you at your home/workplace? a) Yes b) No

61. If yes, how often _____

62. How did you find the attitude of Probation Officer towards you?

a) Sympathetic c) Strict d) Not Helpful e) Other _____

63. How do/did your probation officer treat you?

a) Fairly b) Unfairly c) Mixed d) Don't Know

64. If unfairly, what was/is the reason? _____

65. If your probation officer treated/is treating you unfairly, did you complain to anyone?

66. To whom? _____

67. What is it that you like / liked (if anything) helpful about your supervision?

68. What is it that you do / did not like (if anything) helpful about your supervision?

Section – G: Services & Programmes

69. What help has your probation officer provided for you?

- a. Helped with job
- b. Vocational training
- c. Counselling services
- d. Drug rehabilitation services
- e. Any other service, please specify _____

70. Did you find this help useful to you? (Please explain) _____

71. Are/were you on probation programme? a) Yes b) No

If no, then go to Section – H

72. If yes, what is/was the programme called? _____

73. In your opinion, why were you put on this programme? _____
74. Were you consulted in this respect? _____
75. Was the purpose of the programme explained to you? _____
76. What was said to you? Please explain _____
77. What do/did you and the group leader do on the programme? _____
78. (For those who finished their programmes) Since you finished the programme, how helpful or otherwise did you find the experience? _____
79. (For those who did not complete their programme). For what reasons were you unable to complete your programme? _____
80. If taken off by the probation services, did you agree with the reasons given? Please explain. _____

Section – H: Role of Family and Society in Reintegration of Probationers

81. After being granted probation order, did you face any problem to re-enter your community. a) Yes b) No
82. If yes, what type of problems you faced? _____

83. After being granted probation order, did you experience any changes in your relationships with the following people?

Change in Relationship With	Response	Direction of Relationship
Wife & children	Yes/No	Positive/Negative/No change
Brothers & sisters	Yes/No	Positive/Negative/No change
Father & Mother	Yes/No	Positive/Negative/No change
Friends	Yes/No	Positive/Negative/No change
Colleagues	Yes/No	Positive/Negative/No change
Other people in your community	Yes/No	Positive/Negative/No change

84. For every negative/disturbed relationship, please explain why _____

85. How would you consider the probation system for the offenders? Please explain.

86. Did the overall process of committing crime and passing through the criminal justice system bring any changes in you? a) Yes b) No

87. If yes, what type of change(s): _____

88. What would you suggest to improve the services of probation department in NWFP, Pakistan? _____

APPENDIX – C

A Copy of Questionnaire for Probation Officers

1. Respondent Number _____
2. Place of posting: _____
3. Marital Status: a) Married b) Unmarried c)Widower d) Separated
4. How old are you (in years):
a) 21–30+ b) 31–40+ c) 41–50+ d) 51-60+ e) Over 60

Section – A: Qualification, Experience and Available Facilities

5. What is your qualification: _____
6. When and on what basic pay scale have you been appointed? _____
7. What is your present Basic Pay Scale (BPS): a)16 b) 17 c)18 d) 19
8. Since how long have you been working as Probation officer? _____ Years
9. Did you receive any special training for dealing with offenders after your appointment or during your service as probation officer? a) Yes b) No
10. If yes, of what type? _____

11. What is your monthly salary in round figure (in Rs.)? a) 4000 b) 5000
c) 6000 d) 7000 e) 8000 f) 9000 g) 10,000

12. What official facilities are available to you now?

S/No	Facility	Yes	No
1.	Independent Office space		
2.	Telephone/Fax		
3.	Computer & printer		
4.	Internet facility		
5.	Transport		
6.	Pen & paper		
7.	Filing system		
8.	Any other, please specify		

13. In your opinion what is lacking? _____

Section – B: Probation Caseload

14. How many districts do you cover? _____

15. How many probationers report to you on daily basis? _____

16. Approximately, how many new cases of probationers do you deal in a month? _____

17. How many cases of probationers did you deal in last five years?

Year	2000	2001	2002	2003	2004
No of Probationers					

18. What is the age group of most of the probationers that you deal with?

- a) 20 – 25 b) 26 – 30 c) 31 – 35 d) 36 – 40 e) 41 – 45 f) 46 – 50
 g) 51 – 60 h) Above 60

19. How would you rate the socio-economic background of your probationers?
a) extremely poor b) poor c) average d) rich e) very rich
20. Do the probationers take the responsibility of their offences? a) Yes b) No
21. If no, generally what did they say _____

Section – C: The Police

22. Do you have access to the police report? a) Yes b) No
23. What information do you normally require from the police report to prepare case file for offenders placed on probation? _____
24. Do the police cooperate with you in providing all those information you need on behalf of the offenders placed on probation? a) Yes b) No
25. If no, what kind of problems do they create to you restricting your access to police report? Please specify. _____

Section – D: Dealing with Judicial Magistrate

26. How do you find the attitude of judicial magistrates towards granting the probation orders?

27. What kinds of problems do you face with judicial magistrates?

28. What legal problems do you face in order to grant probation order from the court?

29. Do you play any role before a court grant probation order? a) Yes b) No

30. If yes, please specify your role before the court grant a probation order to an offender?

31. Do the court order you to prepare Social Enquiry Report as required under Rule 18(1) of Probation of Offenders Rules 1961? a) Yes b) No

32. If yes, how often your recommendations are acknowledged by the judicial magistrates in their sentencing practice? Please explain. _____

33. Do you remember any case where the recommendation for a probation order was refused by the magistrate? a) Yes b) No

34. If yes, what was the argument(s) of the magistrate _____

35. If you have not been asked to prepare the Social Enquiry Report by the judicial magistrates, what is the reason for that? Please explain.

36. On what grounds do magistrates generally refuse to grant probation order?

37. What is the legal procedure to challenge the decision of judicial magistrate in the case of refusal of a probation order? _____

38. Are you in favour of discretionary power of the judicial magistrates to grant probation order? a) Yes b) No

56. What factors do you take into account before placing a probationer on a specific programme? _____
57. If there are no programmes at all, what is the reason? _____

58. After granting the probation order, what do you discuss with probationers in your first meeting? _____
59. Do you tell probationers about the services that probation department will offer them in your first meeting _____
60. Before you tell probationers about what probation actually is? What do they think or know about probation themselves? Please explain.

61. What kind of problems do you face in dealing with probationers? (prompt for as many as possible) _____

62. How do you tackle the problems you faced while working with probationers?

63. Why do you think these problems occur? _____
64. Have you ever been threatened by the victim/enemy of the probationer? (risk assessment) a) Yes b) No
65. What priorities do you keep in mind in working with probationers?

66. Based on your experience of working with probationers, could you please tell me why people commit crimes? _____

67. Generally, what kinds of offences lead people to being placed on a probation order?

68. Do you feel any changes in the attitude and behaviour of probationers after they have been on a probation order? Please explain.

69. What kind of services you offer to probationers with drug addiction problem?

70. In your experience, to what extent are the probationers themselves motivated to abstain from offending after being placed on probation order?

a) To some extent b) To greater extent c) Not at all

71. Would this motivation remain throughout the probation order? a) Yes b) No

72. Could you tell me one biggest change in the probationer's life _____

73. In your opinion, what other offences should also be included in the probation ordinance? _____

74. What changes would you suggest in the procedure of getting probation order?

Section – G: Success or Failure of Probation Service

75. Do you think probation is successful in your area of responsibility? a) Yes b) No

76. If yes, how would you rate this success?

- a. Very successful
- b. Successful
- c. Average
- d. Any Other _____

77. On what basis do you claim success of probation in your area of responsibility?

78. If successful, to whom would you give the credit? _____

79. If not successful, what are the reasons? _____

80. What would you suggest to make probation services successful in your area of responsibility?

Section – H: Rehabilitation of Offenders

81. In your opinion, how would you define rehabilitation of offenders?

82. How probationers can best be re-integrated back into their community?

83. In your opinion, who are the key agents that play important role in the successful re-integration of offenders back to their community?

APPENDIX – D

A Copy of Questionnaire for Judicial Magistrates

1. Respondent no. _____
2. Age : a) 21 – 30 b) 31 – 40 c) 41 – 51 d) 51 – 60
3. What is your qualification? _____
4. How long have you been working as a judicial magistrate? _____
5. What nature of cases are you dealing with? _____
6. What is your daily caseload (including all nature of cases)? _____
7. How many cases of request for probation order do you normally hear in a month?

8. How often do you grant probation order in a month? _____
9. How much time does it take to decide a case for probation order from its first appearance in the court? _____
10. To what extent do you trust on police report?
a) To some extent b) To large extent c) Not at all
11. Does the advocate(s) come prepared to the court to present defendant case(s)?

12. What role do you see for probation officer to play in the whole probation process?

13. Have you ever asked a probation officer to prepare Social Enquiry Report for an offender as per Rule 18(1) of Probation of Offenders Rule, 1961? a) Yes b) No
14. If yes, to what extent, you took into account the recommendations made by the probation officer in your sentencing decision?
 a) To some extent b) To great extent c) Not at all
15. If you do not consider provisions made under Rule 18(1) of Probation of Offenders Rules 1961, why is this so? _____
16. What is your opinion about the discretionary powers of judicial magistrates to grant probation order based upon police report only? Please explain.

17. It is believed that prison population is increasing because the magistrates do not issue probation order for the eligible cases; comment on this statement please.

18. Which philosophy of punishment does the legal system in Pakistan take in to consideration?
 a. Retribution
 b. Deterrence
 c. Incapacitation
 d. Rehabilitation
 e. Just Desert
 f. Other _____
19. Do you personally favour this philosophy? a) Yes b) No

20. What philosophy of punishment you favour in your sentencing decisions and why?

21. What priorities do you keep in mind before passing a sentence?

22. Do you see any flaw in the existing probation ordinance? Please explain.

23. What other offences (if any) do you think should be included in the probation ordinance? _____

24. On which grounds would you normally do not issue a probation order?

25. Have you experienced any legal limitations in this regard? Please explain.

26. Have you ever dealt with offenders who have breached the restrictions of their probation order? a) Yes b) No

27. If yes, how did you deal with the case? _____

28. What is your opinion about the sentence of probation for offenders? Please explain.

29. For which type of criminals would you not prefer a probation sentence?

30. Are you aware of any changes made by Government of Pakistan in the probation law during last ten years? a) Yes b) No

31. If yes, to what extent did these changes have improved the quality of probation service in NWFP, Pakistan? _____

32. If no, what is the reason? _____

33. Please give some suggestions on how to improve the probation services in NWFP, Pakistan.
