PROBATION ACT —A SOCIOLOGICAL APPRAISAL

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The Central Probation Act operating in India since 1958 needs evaluation and amendment in some of its provisions for widening its legal and operational scope. The provisions that need to be examined pertain to the legal definition of probation, release without supervision, social investigation of cases, appeal against trial courts, conditions of release, duties of probation officers and the term of probation. Assessment of criminal legislation has to be linked with new consciousness, critical philosophy and humane policies.

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Of the few fields in which close working cooperation and coordination of law-framers, law enforcement agencies and academicians is needed, the field of crime and deviancy is a significant one. But these groups are so greatly atomised today that each considers other's work as intrusion in its specialism. Each group embodies its own epistemology and ontology, its own way of thinking and its own assumptions about reality. Judicial and police officials condemn the views and reject the research findings of sociologists as academic huffings and puffings and sociological gimcrackery. Against this, most criminologists regard judiciary's philosophy as unrealistic and police attitude toward crimes and criminals as one that contaminates the society. These ideological gaps among correctional researchers, practioners and administrators have to be bridged, and all groups have to be bound by an oppressive reality, if rational socio-political and legal order is to be established in the contemporary society. Since law enforcement officials have to operate under legislative regulation and are distinctly limited in what they can undertake, official, legal ideology must be evaluated from time to time. It is high time that all correctional systems, particularly the probation system which has been operating in many states in our country for the last eighteen years, and in some states even longer, and which is regarded as a system that is generally effective in producing positive effects on deviants, should be comprehensively examined and if need be, some of its provisions be amended.

This paper does not debate the question of probation versus imprisonment because it assumes that for certain types of offenders, community correction is more effective than custodial imprisonment. Knowing the detrimental effects of institutionalisation, the criminologists always advocate for the expanded use of probation services both for juvenile and adult offenders. There is no doubt that many of the common human situations leading to deviant behaviour will always be with us and many people would succumb to these situations; but all these people need not be condemned to negative sanctions through confinement to penal institutions. That is why criminologists with an advance knowledge of humanitarian penology do not recommend imprisonment for all wrongdoers but insist on giving the benefit of release on probation. The central problem of this paper is to analyse and evaluate the various provisions in the Central Probation Act of 1958 and ascertain the need for some alterations in the Act for changing its legal and operational scope.

Change in Concept

The first contention is that it is now necessary to change the underlying philosophy and the legal definition of 'probation'. Sub-section 4 of Section 4 of the Probation Act provides for releasing the

offender on his entering into a bond to appear and receive sentence when called upon by the court for violating the probation conditions. Section 9 of the Act refers to the procedure to be adopted for dealing with the offenders failing to observe the conditions of the bond. According to this procedure, if the probationer fails to observe any of the conditions of the bond, the court may either issue warrants or summons requiring him to attend the court on a fixed day. When he appears, the court may remand him to custody until the case is concluded or may grant him bail. On hearing the case, it may sentence him for the original offence or impose penalty of not exceeding Rs. 50/- and if he fails to pay the fine, the court may sentence him for (he original offence. This shows that probation is legally viewed as "suspension of sentence" or "postponing punishment." This author's contention is that, instead of viewing probation as suspended sentence, it should be considered as a "substitute of imprisonment". When probation is so viewed, the probationer will not have to face the threat of punishment by the court for the original offence for which imposition of punishment was temporarily deferred but has only to bear the threat of punishment by the probation officer for the breach of probation conditions. After the release from the custodial institution, when a person commits a new offence, he is reconvicted for his new offence and not for the first one for which he has already undergone the penalty. If within the prison, the prisoner violates the prison rules, he is dealt with by the prison officials for this violation and not by the court. The same pattern should be adopted in the probation services too. Instead of reporting the violation of the conditions of probation to the courts, the probation officer should himself be authorised to deal with such cases of violation. The legal argument that threat of punishment for original offence is to give the probationer another chance to imporve his behaviour in the society and escape commitment and its stigma is not very sound because "prescribing conditions" on which the offender is placed on probation is in itself a punishment since he looses his liberty. The effectiveness of treatment in probation system being based on the concept of manipulation of the offender into good behaviour by the use of psycho-sociological devices, the need for removing the "threat of punishment" is very essential to make probation a more effective treatment system.

There are certain kinds of criminal acts which no amount of law-making or preventive action can fully eliminate. Likewise, no serious action is desired against all criminals. A substantial shifting of our policy is needed for misdemeanants whose crime is not the result of inherent criminalistic tendencies, and who do not appear to threaten the societal norms or consensus. In dealing with such offenders, our policy needs a certain amount of modification to permit greater flexibility in personal dealings. The obvious case in point here is dealing with the probationers whose offences are unfortunate slips and not very harmful to the society. The flexibility with probationers is possible only when the probation officers are given more powers. In the present structure of the probation services, the possibility of this flexibility is the minimum. A rational crime policy would require us to rethink as to what is intended to be accomplished by employing "conditional release" as a means of social control. If probation is not a punitive measure but reformative process, why should a permanent threat be put over the head of the probationer of sending him back to the court? Why should probation be an instrument of the court? Section 4 of the Probation Act lays down the object

of the Act as preventing the turning of youthful offenders into criminals by their association with habitual and hardened criminals of mature age within the walls of a prison. If this is the feeling at the time of imposing sentence on the offender, why should this feeling be forgotten when a probationer is found violating one or more conditions of the bond? It could, therefore, be maintained that the object of Probation Act would be achieved only by changing the legal definition of "probation" and modifying sections 4 and 9 of the Act.

Supervision

Our other concern is with Sub-Section 3 of Section 4 of the Act regarding placing the probationers on supervision and the suggestions of some Probation Officers that no offender be placed on probation *without supervision* and that section 4 of the Probation Act be amended. The above referred subsection provides that the court *may* pass orders for the supervision of the offender by a probation officer in the interest of the offender and public, i.e.. *all* probationers need not be kept under probation officers' supervision. Some probation officers hold the view that probation not involving supervision is no probation at all and as such *all* probationers must be placed under the supervision. The crucial questions about supervision are: (i) How much supervision do offenders on probation now receive, and how much do they need? (2) What are the techniques of supervision now in use and what effects have they on different types of probationers? These questions must be answered before we are in a position to say that it is probation *with* supervision rather than probation *without* supervision which is responsible for the apparently high effectiveness of the probation.

The fundamental purpose of the supervision is to help the offender in creating within himself the will and ability to employ his capacities for achieving his goals without being in serious conflict with the interests of other persons and the society. Here there is probably an assumption that earlier the person was not assisted by his parents, kith and kin and peers, etc., in developing this will. This assumption is surely not correct. All offenders do not commit crimes only because of socialization defects. Many indulge in deviant acts due to the force of circumstances. But assuming that offender's crime was because of lack of proper counselling, could it be said that the probation officer will definitely give him the required counsel, supervision and guidance? Are all probation officers adequately trained to be counsellors and committed to their occupational roles? Assuming that they are, is it not known that with the present case — load a probation officer hardly gets about two hours or less per month of personal counselling time with each client? Could it be definitely contended that according to the provisions of the Act, all Probation Officers regularly visit the probationers in their home surroundings, and where appropriate, their occupational environment, in order to see that the progress made by the probationers and the difficulties if any are met with by them satisfactorily? The standard probation case-load of a probation officer in India is between 120 and 140 in comparison to 50 and 60 in England and 80 and 90 in the United States. In several states in India, the position is much worse: the probation officers supervise much great numbers. The number of probation cases under supervision at any one time is not, however, an accurate measure of the probation officer's work-load since he has also to perform another important duty of pre-sentence investigation of offenders' social background and submit report to the court. In terms of the time spent, one such inquiry is often equal to the supervision

of five offenders on probation. Moreover, the administrative duties of the probation officers have also increased in recent years. The result is that in many cases, the supervision of offenders on probation occupies only a minority of the probation officer's time. A probation officer, with an active case-load of 150, thus spends very little time per case per month; and, in many cases, the amount of contact between probationer and probation officer is the minimal.

It is true that all probationers do not require equal attention and that some need much more supervision than others. Nevertheless, keeping in mind the intensive', 'ideal', 'normal' and 'minimum' supervision needed by the probationers, the success of the probation and the development of non-criminal orientations can easily be attributed to 'intensive' supervision only. Without normal or even minimum supervision, the probation officer cannot act as a proper guide and counsellor for the probationer. Assuming that he does, it is known that the probation officer is supposed to secure for the probationer the training facilities, the employment opportunities and the financial aid. In the present circumstances, is the probation officer really able to get him a job? Can he give him the financial assistance? Those people who suggest that no offenders be released on probation without supervision are in fact advocates of 'get tough' approach to crime. These advocates seem to forget that overzealous enforcement methods could well signal a serious curtailment of the individual liberties that we so highly prize. This is not to express sympathy for an offender but simply to restate what should be a governing tenet of democratic justice. In a complex, heterogeneous, rapidly changing, urbanised and largely individualistic society in which individual's dependence on secondary groups is increasing day by day for the satisfaction and fulfilment of his varied needs, the traditional agencies of socialisation often find themselves hard put to maintain an influence on the young. At the same time, there is some confusion as to what is desirable and what is undesirable, which are the crime-encouraging values and which are the crime-preventive values. In such a situation, to have a right attitude towards the violators of the so-called social values and recommend the regular visits of the probationers to the probation officers' office at fixed intervals and function under their guidance for a period of not less than one year would definitely have deleterious effects on the probationers' efforts of adjusting themselves in the society. From all this it appears that the majority of the probationers could be dealt with effectively by measures not involving supervision. Some offenders definitely are able to benefit more from supervision but the majority probably do not need it. In particular, offenders who are good risks can well be dealt with by probation without supervision. Let us, therefore, not indulge in overlegislating because it has its own perils. Seen from an operational point of view, probation has to be quite different from its ideal conception. Sub-section 3 of section 4, thus, does not need any amendment.

Social Investigation

The third point pertains to social investigation. According to the existing provisions of the Probation Act, it is not mandatory for the court to send each case for social investigation to the Probation Officer before releasing the offender on probation. The Act maintains that the court *may* call for a report from a probation officer regarding the character of the accused. Sub-section 3 of section 4 and sub-

section 2 of section 6 provide for court's taking the Probation Officer's report into consideration , *if there is any,* before it makes an order for release on probation. In this connection, we assert that social investigation in all those cases should be made mandatory where the judges plan to release offenders on probation with or without supervision. According to the present Probation Act, the probation officer has to report to the court (i) the character and personality of the offender (ii) the circumstances in which the offender is living (iii) his problems and needs (iv) his relationships with people (v) factors that underlie his specific offences and (vi) such other matters as may, in the opinion of the probation officer, require to be taken into consideration by the court before making the probation order. This clearly points out the use of the pre-sentence investigation report to determine a treatment plan. The diagnostic report is not to assist the judiciary in assessing whether a person accused of committing the crime is to be actually convicted for that crime or not. This is evident from the fact that probation officer's sealed report is opened by the magistrate only *after* the offender is found guilty, to know the character of the offender before making an order of release. For utilising probation wisely, it is essential for a conscientious judge to have at the time of sentence of the offender complete, accurate, reliable and confidential information on which to base his decision. For a judge to merely guess whether the offender should be sent to the jail or placed on probation with or without supervision is almost as futile as to expect a doctor to prescribe medicine without getting details of the disease from the patient. True, it may be pointed out that there are not "enough probation officers and that their ease-loads are too high. But these are the administrative problems which are not difficult to solve. The argument that the probation officer may not be completely objective and impartial in conducting the investigation and in writing the pre-sentence report is irrational and ludicrous because the same argument can be applied to the possibility of the non-objectivity of the judges too. Similarly, the fear that the probation officer may write the report without going to the field and meeting the parents, relatives, neighbours and friends etc., of the offender, merely points out the defect in the process of selecting the probation officers and not in the importance of the pre-sentence investigation report. As such, an amendment in sub-section 2 of sections 4 and 6 for compulsory pre-sentence investigation and asking for the probation officer's recommendation regarding probation or commitment is necessary and highly desirable and should be regarded as an idealistic measure.

An Appeal against Trial Court by the Probation Officer

Let us now take up sections 4 and 6 of the Probation Act regarding the release of certain offenders, particularly juvenile and adolescent delinquents on probation along with section 14 of the duties of the probation officers. Sub-section 1 of section 6 imposes restrictions on imprisonment of offenders under 21 years of age, guilty of an offence not punishable with life imprisonment and necessarily releasing them on probation unless the court feels that the case is not within the purview of release on probation or such release will not be in the interest of justice. In spite of this provision, it is well known that all offenders — adults and juveniles — eligible to be released on probation are not actually so released by the courts. Judges use probation much less frequently than

imprisonment when sentencing offenders. Evidence clearly indicates that our courts consider the type of offence and not the personality of the offender in assessing the risk and imposing sentences. A few years ago, this author had an opportunity of collecting data pertaining to convictions from some courts in two districts of Rajasthan. The collected information revealed that out of 1,836 persons tried by four courts in the two districts, 55.3 per cent were acquitted and 44.7 per cent (or 820 persons) were actually convicted. Out of 820 convicted offenders, 71 per cent were sent to prisons, 14 per cent fined, 6 per cent committed to sessions, 3 per cent released after admonition, 4 per cent given probation without supervision and 2 per cent placed on probation with supervision. It is really strange that our judiciary has not shifted from the age-old purely legalistic attitude to lego-sociological attitude in initiating trials and more liberally using probational treatment. There is a provision in the Probation Act for making an appeal against the trial court. It is not only the convicted person and the prosecution who can file appeal against court's decision of declining to deal with the offender under sections 3, 4 and 6 of the Probation Act and passing the sentence of imprisonment against him, but even the Probation Officer has been conferred power by the legislature to feel aggrieved with regard to the propriety of the imprisonment order passed by the trial court and move the court by way of an appeal against the correctional treatment. But, how many such appeals have been made in the last 15 years? It is surprising that about four lakh offenders are imprisoned and only 35,000 — 40,000 are released on probation every year in our country when more than 60 per cent offenders are eligible for probational release. At present, after submitting the investigation report to the court, the probation officer remains only a passive observer in trial proceedings when he ought to be very active because of his knowledge of offender's background. It could, therefore, be emphasised that it should be the probation officer's main responsibility to get that offender released on probation whose case he has investigated so thoroughly that he really feels the need of his release on probation. By this, no change is being suggested in any section of the Act but only the need of taking section 11 of the Act more seriously by the probation officers is being emphasised.

Conditions of Release

The other problem for analysis is the conditions of release as provided in the bond under section 4 of the Probation Act. In this connection, it could be submitted that *some* of the conditions provided in the bond are extremely superfluous. For example, take the conditions of dissociation with persons of bad character, abstention from intoxicants, abstention from anti-social acts, not committing any offence punishable by law and endeavouring to earn an honest livelihood. In fact, these are the behaviour patterns which are expected of all law-abiding citizens in any society. When an offender is released on probation, the basic assumption is that he is being given one more opportunity to become a law-abiding citizen. When every citizen is expected to abstain from anti-social acts, when every citizen has to earn money by honest means, why these conditions be specifically mentioned in the bond, particularly because even without specifying them, the offender can be penalised for them. What is needed is that only those conditions be prescribed which have a direct effect on the criminal value system of the probationer, which may enable the probation officer to manipulate both the formal

and the informal institutional and group environment in which the probationer is to live during the probation period, and which are appropriate for individualised treatment of the probationer.

Indeterminate Term

The last point deals with sub-sections 1 and 3 of Section 4 of the Probation Act which provides for prescribing the *fixed period* of probation and supervision by the court, ranging from one to three years. Sub-section 1 says that the offender be released on probation of good conduct for a period not exceeding three years and sub-section 3 says that he be kept under supervision for a period of not less than one year. In this connection, it may be submitted that these provisions need a radical change. What is being suggested in their place is the system of *indeterminate* term which provides for fixing the minimum and the maximum period of probation by the court, the exact period being determined by only a Probation Board or a Committee. It may be argued that sub-section 1 of section 8 of the Probation Act provides for variation of probation conditions, i.e. if a probation officer feels that the probationer need not necessarily be kept under supervision any longer, he can request the court for discharging the bond. It is also known that in several cases in India, the probation terms have been reduced on the appeals of the probation officers. But the contention here is, why should this power of reducing the term be given to courts only? If indeterminate term system is accepted, this power will automatically be enjoyed by the probation officers, and it would save them from the cumbersome practice of approaching the courts through their Chiefs and Directors. Convincing the courts for revoking or reducing the probation term is not so easy today since it has already been pointed out that the present judiciary continues to be committed to the old concepts of free will and hedonism in the causation of crime and believes in protecting the interests of only society rather than those of both society and the criminals. Knowing, therefore, that probation officers are definitely more concerned with the criminals' welfare, it is suggested that sub-sections and sections pertaining to the term of probation be amended and the policy of indeterminate term be introduced in this country.

To conclude, it may be reiterated that we should be more pragmatic and rational in making modifications in the various sections of the Probation Act. Only a critical philosophy and a new consciousness should be the basis of assessment, evaluation and amendment. The recourse to negative sanctions must be taken in as rational a manner as possible. We should have sane and humane crime policies and greater caution should be exercised in resorting to criminal legislation. The goal of "protecting the community" — admittedly a commendable one — must not serve as an excuse to ignore and deny the legitimate and substantive rights of the criminals as individuals. The newer approaches represented by casework and its socio-psychoanalytic foundations have to find unanimous approval of legislators, administrators and scholars.