Chapter XIX

OPEN PRISONS

The institution of prison serves a dual purpose of eliminating criminals from society and reformation and rehabilitation the offenders under institutional treatment by blanketing out conditions which in the first place turned them into law-violaters. It has now been generally accepted that After-care service must form an integral part of penal programme. As a part of correctional service it presupposes active help and guidance to the discharged prisoners through counselling and surveillance. The process has, therefore, been called the "released person's convalescence".[1]

The system of parole as a corrective measure and rehabilitative process has now been expanded in the form of open jails and open air camps in recent years. Open air-institutions are essentially a twentieth century device for rehabilitating offenders to normal life in the society through an intensive After-care programme.

Modern Anglo-American penologists have realised that persons convicted for an offence against the laws of their country respond more favourably to humane treatment and constructive rehabilitative process than to the purposeless punishment.[2] Particularly in United States, significant changes have been introduced in the correctional system for treatment of offenders. Besides the system of probation, parole, indeterminate sentence, juvenile courts for young delinquents, open-institutions have been set up for rehabilitation of criminals throughout the country. These open-prisons provide work to inmates in forests, agricultural farms and construction sites instead of allowing them to be idle inside the prison cells.

Open-air prison play an important role in the scheme of reformation of a prisoner which has to be one of the desideratum of prison management. They represent one of the most successful applications of the principle of individualisation of penalties with a view to social readjustment because introduction of wage system, release on parole, educational, moral and vocational training of prisoners are some of the characteristic features of the open-prison system. Besides, open institutions are far less costly than the closed prison establishments and the scheme has a further advantage of Government being able to employ in work, for the benefit of the public at large, the jail population which would have otherwise remained unproductive. The monetary returns are positive, and once put into operation, the open jails acquire financial self-sufficiency.[3]

1. All India Jail Manual Committee Report (1957-59), pp. 70-71, para 121.
2. Sanford Bates : "Anglo-American Progress in Penitentiary Affairs" published in Studies in Penology (IPPF), 1964.
3. B. Chandra : Open Air Prisons (1984) p. 150 cited in *Ramamurthy* v. *State of Karnataka*, (1997) 2 SCC 642 (655).

Definition of Open Prison

Criminologists have expressed different views about the definition of open prison. Some scholars have preferred to call these institutions as open air camps, open jail or parole-camps. The United Nations Congress on Prevention of Crime and Treatment of Offenders held in Geneva in 1955, however, made an attempt to define an open prison thus :

> "An open institution is characterised by the absence of material and physical precautions against escape such as walls, locks, bars and armed-guards etc., and by a system based on self-discipline and innate sense of responsibility towards the group in which he lives".

Thus open prisons are 'minimum security' devices for inmates to rehabilitate them in society after final release. In India, they are popularly called as open jails.

Sir Lionel Fox, Chairman of the Prison Commission for England and Wales described the usefulness of open prison and observed, "of all the methods by which a prison regime may hope to inculcate self-respect and self-responsibility and in other way prepare the prisoners for a rational life in society, the open prison institution appears to be itself the most effective."

Dr. C.P. Tandon, the then Inspector-General of Prisons, Uttar Pradesh defined open prison in 1959 stating that, "it is characterised by (a) the degree of freedom from physical precautions such as walls, locks, bars and special guards; and (b) the extent to which the regime is based on self-discipline and the inmate's responsibility towards the group. The objective of an open peno-correctional institution is to aim at the development of self-respect and sense of responsibility as well as useful preparation for freedom....discipline is easier to maintain and punishment seldom required, tensions of a normal prison life are relaxed and conditions of imprisonment can approximately be more close to the pattern of normal life."[1]

Origin of Open Prisons

The emergence of 'open prisons' marks the beginning of a new phase in the history of prisons. In the closing years of nineteenth century, a semi-open prison institution called the Witzwill establishment was set up in Switzerland. Open-prisons in modern sense were, however, established, in U.K. in 1930's and in United States around 1940's. *Sir Alexender Palerson*, the member secretary of the Prison Commission of U.K. from 1922 to 1927 made significant contribution to the development of open prison in England. The philosopy underlying those 'minimum security' institutions is based on the following basic assumptions :—

1. A person is sent to prison *as* a punishment and not *for* punishment.
2. A person cannot be trained for freedom unless conditions of his captivity and restraints are considerably relaxed.
3. The gap between the institutional life and free life outside the prison should be minimised so as to ensure the return of inmate

1. As quoted by K.D. Gaur in Criminal Law & Criminology (2003) p. 830.

as a law abiding member of society.

4. The dictum 'trust begets trust' holds good in case of prisoners as well. Therefore, if the prisoners are allowed certain degree of freedom and liberty, they would respond favourably and would not betray the confidence reposed in them.

The success of open prisons later on led to establishment of 'hostel system' for prisoners in U.K. and inspired by the English experience, other countries including India adopted the scheme for reformation of offenders.

Open Prisons in U.S.A.

During the nineteenth century open air prisons were in existence in America in the name of prison-farms. The convicts who were nearing the end of their sentence were generally transferred from conventional prisons to these open farms in forests as labourers. But these camps diferred from modern open-institutions atleast in one aspect, that is, they were not the honour camps but were literally the "slave-camps" for prisoners who were made to work under heavy guard and surveillance. Experience with these prison labourers was quite encouraging. It was, therefore, realised that majority of these prisoners could be trusted if engaged in corrective work outside the guarded enclosures under unarmed supervisors. Although the system involved a risk of prisoners escaping from work-site, but the number of actual escapes was so negligible that this mode of helping and guiding prisoners was adopted as an integral part of correctional programme in the United States. The greatest service done to prison community under the system of open-air institution was to develop self-reliance and self-confidence among the prison inmates by resorting to minimum security measures.

There was yet another reason for the evolution of the system of open prison camps. The problem of overcrowding in prisons had been engaging the attention of prison authorities for quite sometime. The problem became more tense in times of war and political upheavals when a large number of offenders were required to be dumped inside the prison cells. With a view to reducing overcrowding, some of the prisoners were picked up to be quartered into open-air camps. It was noticed that the system offered better opportunities to convicts for their rehabilitation and self-reformation. Another advantage of the system was that it achieved economy in expenditure on prisons and thus contributed, substantially to reduce the burden on State exchequer. Initially, only selected prisoners were booked to open-air institutions after a careful scrutiny so that they could be better-risks.

The Californian Prison Farms

A number of open prison camps were operating in Massachusetts and California in U.S.A. as early as 1915. The real beginning of these institutions can be traced back to the year 1935 when a Californian legislation suggested radical changes in prison reforms. It was decided that prisoners should be treated as human beings and that the hopeful cases should be separated from the hardened ones.[1] It was further suggested that prisoners capable of moral rehabilitation and restoration to good citizenship

1. Dressler David : Readings in Criminology and Penology (1964 Ed.) p. 551.

should be segregated from the hardened offenders. With a view to implementing this policy, a farm-type institution with suitable lodging and provision for work was proposed near the town of Chino in South California. The project was under the direction of State Board of Prison Directors. But the Prison Board showed little zeal for minimum security arrangement in prison-farms and preferred the old conventional method of maximum security arrangement in these penal institutions. It was in 1938 that after a serious riot in San Quentin prison, the appointment of a new Prison Board was proposed to convert this farm into a minimum security institution.

The appointment of Kenyon J. Scudder as the Superintendent of open institution for men at Chino (California) brought about a radical change in the administration of open prisons. Ignorant and untrained guards were replaced by qualified and trained young personnel. Scudder's philosophy was that there can be no regeneration except in freedom. The rehabilitation must come from within the individual and not through coercion.[1] The California Institution for men was opened on July 10, 1941 with thirty-four convicts and three officials. The number has now gone to over 2500 of whom many are lodged in forestery camps administered by the institution. The number of escapes from these prisons was negligible, ranging from 4 to 1 per cent.

The Declaration of Principles of the American Correctional Association (1960) spelt out the philosophy of open peno-correctional institutions as follows :—

(1) No law, procedure or system of correction should deprive any offender of the hope and possibility of his ultimate return to responsible membership of the society.

(2) In order to ensure restoration of the offender to the community as a self-restraining member, he must be extended every opportunity to raise his educational level, improve vocational skills and add to his information meaningful knowledges about the world and the society in which he lives.

(3) It would be gross violation of the concept of rehabilitation, if employable offenders in correctional institutions are not offered opportunity to be engaged in productive work.

(4) The open peno-institution underlies the importance of group approach to the problem of correctional treatment of offenders.

(5) In the course of open peno-institutional treatment, the offender continues as a member of the correctional community so that he can develop within him the spirit of energetic, resourceful and organised citizen participation.

The essence of open prison lies in absence of physical restraints against escape by a system based on self-discipline and sense of responsibility towards the group in which the inmate lives. The system encourages the offender to use the freedom accorded to him without abusing it. The prisoners may be sent to open peno-institutions either at the beginning of their sentence or after they have served a part of it in a traditional prison. With a view to ensuring their social rehabilitation, prisoners should be employed in work, which will prepare them for useful employment after

1. Kenyon J. Scudder : Prisoners are People (1952) p. 28.

their release from the institution. The process of rehabilitation and re-socialisation should take place in an atmosphere of **trust**, therefore, the intake in open jail should be on selective basis. The conditions of life in open prison should resemble closely to those of normal life, therefore, inmates should be brought in contact with the outside world so that their links with society are not severed.

During the preceding sixty years, several American States have introduced minimum security institutions. To name a few, Seagoville (Texas) has a minimum security institution of the Federal Bureau of Prison with a carefully selected and well-trained personnel. Wallkill (New York) is another splendid institution where greater emphasis is placed on training and adjustment rather than mere custody. The inmates are afforded adequate opportunity for outdoor life and sense of freedom brings them out as best citizens after they are finally released. The system is otherwise termed as "day-parole" or "work release" and stands in between imprisonment and probation.

It is significant to note that in United States open air institutions are used not only for those who have served a considerable part of their sentence in prison but also for the initial prisoners if they are so recommended by the parole authorities.

International Perspective

The utility of open-prisons as a part of After-care device has been accepted at the International level. The Social Defence section of the United Nations through its literature on the subject has convinced the member nations of the usefulness of open institutions as a measure of prison reform. This has helped a lot in creating interest among professional men in the adoption of new ideas and experiments in the field of prison reforms. The treatment of offenders in open conditions similar to outside world as far as possible has found wide acceptance in recent years. This is indeed a significant contribution to the development of progressive penology and a professional approach to treatment of offenders.

The subject of open-institutions was particularly discussed in the first United Nation Congress on Prevention of Crime and Treatment of Offenders held in Geneva in 1955. The consensus was that minimum security such as absence of prison walls, bars, fence, armed guards gun towers, and voluntary discipline among the prisoners should be the two guiding principles underlying the working of these open institutions.

The system of open prisons was essentially founded on trust and confidence reposed in prisoners and was an intermediary stage between the guarded prison life and the outside life of complete freedom. Five years later, when the second U.N. Congress on Prevention of Crime and Treatment of Offenders was held in London in 1960, open-institutions had become an integral part of Anglo-American prison system for the correctional treatment of offenders. The prisoners are allowed to attend to their ailing relatives and friends and women delinquents are extended certain additional facilities and maternity privileges.

Experience has shown that prisonisation may be appropriate only for certain categories of offenders, but it may produce deleterious effects on

several others and instead of becoming useful citizens, they may become tough and frustrated criminals with rather enhanced propensity for crime. Therefore, 'minimum security' arrangement such as open or semi-open prisons, half-way houses, work release and other semi-institutional methods of treatment have been found useful for such offenders. Thus open prisons have universally been accepted as viable alternative to imprisonment. The object of such a mid-way arrangement between incarceration and complete freedom is to enable the prisoner to maintain contact with outside world and reconstruct his life pattern through inter-personal relationship with the fellow inmates and the members of society.

Open Prison Institutions in other Countries

Reformation of prisoners and their rehabilitation through modern methods of penal treatment has also been engaging the attention of penologists throughout the European sub-continent. With greater emphasis on correctional methods, there has been a general trend towards substitution of traditional prison system by new types of semi-liberty institutions. Different countries have adopted open prisons for their delinquents with varying degree of security measures.

Netherlands

In Netherlands, open prisons were established at Roermond, Hoorn and Warnsveld in 1957, 1959 and 1962, respectively. These were meant to serve as a traditional place within the framework of pre-release treatment between the period of prisoners' detention in a closed institution and his return to free life.[1] The inmates of these open prisons are allowed to mingle freely with members of society while at work as also during leisure. The number of inmates in each of these institutions is limited to a maximum of twenty-five so that their individual progress can be conveniently watched by competent supervisors. The inmates for these prisons are selected from among the prisoners of different prisons on the basis of recommendations made by the Central Selection Committee which meets monthly. These open prisons are meant only for those inmates who are recidivists and have served a part of their sentence in well guarded prison. The inmate's stay in the open camp cannot exceed five months. These open prisons are located in nearby provincial towns so that the prisoners have adequate chances of being engaged as wage-earners by the private enterpreneurs. Of the total wage earnings of the inmate, thirty per cent is deposited in his name to be paid to him at the time of his final release whereas ten per cent is paid to him for his pocket expense. The inmates are, however, expected to spend their leisure time within the institutional framework with opportunities to visit the places of entertainment and recreation. They can meet their friends and relatives without any supervision and are also free to put on clothes of their choice.

France

France has an open prison institution in Casabianca and a semi-open Institution in Oermingen. The inmates in these institutions go for work as free workers without any supervision and they return to the prison every

1. Ernest A.M. Lambers "Mr. Prisoner goes to Town" Studies in Penology (1964) p. 126.

evening or during non-working days. The scope for expansion of open air camps in France is rather limited because the traditional prison system of this country allows prisoners to work outside the institution with private employers under proper supervision. This makes the system less expensive and prevents undue exploitation of the inmates.

Norway and Sweden

Norway and Sweden have also established open prisons for their offenders. There are special arrangements for lodging the drug addicts, habituals and drunkards. Separate institutions called "Educational Centres" have also been set up for the treatment of the young delinquents. The inmates are trusted and their sense of honour and self-respect is stimulated. This helps in bringing about their reformation.

Educative Reformative Work in Hungary

The Republic of Hungary has adopted educative reformatory work as a punitive measure to deal with grown up inmates whose term of imprisonment does not exceed five years. Under the system, the convict is not committed to a prison but is sent to work with a view to re-educating him. The term of punishment served at the place of work in educative reformatory system is not to be considered as a principal punishment but it is rather a clandestine fine to be paid in instalments. The substance of the system is that when engaged in work as a punishment, it does not entail any loss of freedom and at the same time enables the convict to re-educate himself in supervision of his fellow workers. They find the work profitable and advantageous to themselves and begin to realise that they are still useful to society.

Belgium

The system of open institutions is being extensively used for the rehabilitation of juvenile offenders in Belgium. Adequate facilities are provided for their education and they are offered suitable employment after release from the institution. The purpose of these open institutions is socialisation of inmates which broadly connotes the social and moral rehabilitation of the offenders. It enables the inmate to return to normal social life in spite of his early deviance.

Australia

The first open prison camp was started in the State of Victoria in Australia in 1939. The system worked so well that it has now been adopted as an integral part of the penal-programme of that country. Recidivists who have served a considerable part of their sentence in a closed prison are brought to open-prison camp for rehabilitation before their final release. The number of escapes from these institutions has been negligible and those who absconded were duly apprehended.

Thailand

Thailand has adopted United Nations Standard Minimum Rules for the treatment of prisoners and has started open prison system from 1960. The main reason attributed for starting of such system was to reduce

overcrowding in prisons which made it difficult to organise correctional programmes in an orderly manner. It was found that the system of open prison is more economical than the closed institution system. The services of volunteer chaplains and teachers are utilised to impart moral and religious teachings to the inmates. The inmates are freely allowed to meet the public. Outdoor games are organised between inmates and school and community teams. Boy Scout Camps are organised in the open prison area. Job guidance or placement assistance is also rendered after release of inmates. The services of inmates are utilised for construction of bridges, roads and community projects etc. During the final month before parole, each prisoner has to go to temple compulsorily twice a week to purify his mind. Thus, an endeavour is made to create a 'social climate' in open prisons with a view to breaking up the traditional way of life in the prison culture.

Middle-East Countries

The system of rehabilitation of criminals through open-institutions has gained momentum in middle-east countries as well. Israel,[1] Iran and Iraq have made commendable progress in this direction. The hand-cuffing of prisoners is discouraged and there is greater emphasis on the freedom of prisoners from physical control so that they can turn out to be disciplined citizens in their future life.

Open Air Camps in India

Taking inspiration from Anglo-American developments in the correctional field of penology, the Indian penologists were convinced that India also cannot successfully tackle its crime problem by putting criminals in prison cells indiscriminately. Experience has shown that dumping the convicts in overcrowded prison cells serves no useful purpose.

It is a known fact that Indian prisons are overcrowded.[2] The percentage of overcrowding, however, varies from prison to prison. It has been observed by the Supreme Court that overcrowding *per se* is not constitutionally impermissible, there is no doubt that it contributes to a greater risk of disease, higher noise levels, surveillance problem etc. That apart, life becomes more difficult for inmates and work more onerous for prison staff when prisoners are in overcapacity. Yet another baneful effect of overcrowding is that it does not permit segregation among hardened offenders and first offenders who are generally corrigibles. The result may be that hardened criminal may spread their influence over others.[3] The institution of open prison seems to be a viable alternative to reduce overcrowding in prisons. The whole thrust in these open-prison institutions is to make sure that after release the prisoners may not relapse into crimes and for this purpose they are given incentives to live a normal free life, work on fields or carry on occupation of their choice and participate in games, sports or other recreational facilities. It is thus evident that the object of the open-prison system is to inculcate in the prisoners a sense of self-discipline

1. In Israel no juvenile is hand-cuffed and taking their photographs or finger-prints is also prohibited.
2. To illustrate, in Tihar Jail there were 8500 prisoners in 1994-95 as against the intake capacity of 2500 inmates.
3. *Ramamurthy* v. *State of Karnataka*, (1997) 2 SCC 642 (653).

and social responsibility and at the same time, ease the burden of overcrowded prisons.

It has now been generally accepted that primary function of law and punishment is to protect the society from criminals and this can best be achieved by bringing a change in the attitude of offenders towards their fellowmen. Open air camps have been used as one of the best tools for rehabilitation of offenders in society.[1]

The modern prison policy and techniques of handling criminals are by no means new to Indian penology. In ancient India, the emphasis was on reformation of the offender rather than punishing him indiscrimately. In ancient times, the eminent Hindu jurist *Manu*, through his famous writings made it clear that unjust and harsh punishment makes the criminal more dangerous to society and also brings disrepute to law-administrators.[2] He, therefore, strongly pleaded that offenders should be placed in such surroundings that they can think and realise for themselves that what they did was not in the interest of society nor was it in their own interest. This sense of self-realisation would make the offenders responsive to reformative methods of treatment in prisons. Thus *Manu* strongly pleaded that an effective scheme of After-care can certainly help in bringing about rehabilitation of even the most dangerous and hardened criminals.

The development of open prison institutions in India can be traced back from the middle of the nineteenth century when the first All India Jail Committee was appointed in 1836 to review the prison administration of this country. The Committee, in its report did not favour employment of prisoners on major public works and therefore the system fell into disuse during the next twenty years. The Second Jail Committee was appointed in 1864 to review the Jail administration. It was in 1877 that the question of employing prisoners on major work sites such as digging of canals or dams etc. was reopened in the Prison Conference of that year. The Conference strongly recommended that employment of prisoners as labourers on large public works was not only valuable but also a necessary adjunct to jail administration. This recommendation was subsequently accepted and followed in practice.

The All India Jail Committee of 1919-20 re-asserted the need for humane treatment of offenders. The Chairman of the Committee, Sir Alexender Cardew observed that the most critical moment in a convict's life is not when he goes into the prison but when he comes out of it. Having lost his character and social standing, he finds it difficult to adjust to the normal life of a free society.

The Committee expressed a view that the open air life and employment in the form of labour were not antagonistic to reformatory influences. Construction of jail buildings was considered as a suitable form of such work for prisoners. Though this Committee thought that the employment of prisoners on agricultural farms was the most natural and appropriate form of labour especially for prisoners who were largely drawn from agriculturists but such employment involved distribution of labour over a very wide area which made guarding and supervision difficult. Hence the idea was dropped.

1. Sethana M. J. : Society and the Criminal (2nd Ed.) p. 295.
2. Sen, P. K. : Penology Old & New (1943) p. 12.

During 1920-27 several provincial governments appointed Committees to review prison administration. They recommended changes of a far-reaching nature. But the question of prisoner's employment did not go beyond expansion of cottage industry in prisons.

The post-independence period in India witnessed a radical change in the prison policy and techniques of handling offenders. The old method of confining prisoners inside well guarded prisons was discarded as it served no useful purpose for the rehabilitation of criminals after their release. With the advancement in knowledge of human behaviour, the part played by psycho-social environment in the development of offender was emphasised. It was realised that inmates should be afforded fullest opportunity to associate themselves with free society and the gap between the life inside and outside the prison should be narrowed down as far as possible. Open air Camps have done commendable service in achieving this objective.

The first scientific effort to modernise prison in India was made by *Sir Walter Reckless*, the U.N. Technical Expert who visited India in 1952 when he submitted an excellent report on prison administration in India. As a result of this, All India Jail Committee was appointed in 1956-57 which worked for three years and made useful recommendations for prison reforms. One of the recommendations of the Jail Committee was to set up open jails for the rehabilitation of prisoners. The emphasis under this system was on self-discipline and self-help. These open jails were characterised by the absence of material and physical precautions against escapes so as to inculcate a sense of responsibility among inmates towards the group in which they live.

It must be stated that the basic philosophy behind the working of open prisons is utilisation of prison labour for employment in open conditions. It is also worth mentioning that even though the employment of prisoners in open conditions is more than a century old, but the objectives of such employment have vastly changed in the sense that originally it was meant to take hard work from prisoners under conditions which were humiliating and dehumanising while today it is aimed at providing them with useful and meaningful work under conditions which help them in restoring their self-respect and self-confidence.

Main Characteristics of Open Prisons

The main features of an open prison institution may be summarised as follows :—

(1) Informal and institutional living in small groups with minimum measure of custody.

(2) Efforts to promote consciousness among inmates about their social responsibilities.

(3) Adequate facilities for training inmates in agriculture and other related occupations.

(4) Greater opportunities for inmates to meet their relatives and friends so that they can solve their domestic problems by mutual discussion.

(5) Liberal remissions to the extent of fifteen days in a month.

(6) Proper attention towards the health and recreational facilities for inmates.

(7) Management of open Jail institutions by especially qualified and well trained personnel.

(8) Improved diet with arrangement for special diet for weak and sick inmates.

(9) Payment of wages in part to the inmates and sending part of it to his family.

(10) Financial assistance to inmates through liberal bank loans.

(11) Free and intimate contact between staff and the inmates and among the inmates themselves.

(12) Regular and paid work for inmates under expert supervision as a method of reformation ; and

(13) Avoidance of unduly long detention.

Advantages of open prisons

The utilisation of open prisons during post-independence era has been most spectacular, and elicited much interest among penologists because of the realisation that a substantial proportion of prison inmates do not need retention in guarded prison enclosures. Instead, those who are carefully selected can be placed in open air camps, farm colonies or other outside work with a reasonable degree of safety. The obvious advantages of the open prisons as compared with the conventional prisons may be briefly stated as follows :—

1. They help in reducing overcrowding in jails.
2. Construction cost is fairly reduced.
3. Operation cost of open prisons is far less than the enclosed prisons.
4. Engaging inmates of open air prisons in productive work reduces idleness and thus keeps them physically and mentally fit.
5. Open prisons offer opportunities for self-improvement and resccialisation to the inmates.
6. Removal of prisoners from general prison to an open prison helps in conservation of natural resources and widens the scope of rehabilitative process.

The scheme of open jails for prisoners is essentially based on the twin system of probation and parole which have gained enough popularity as correctional techniques of reformation in modern penology.

The State of Uttar Pradesh was first in point of time to set up an open air camp attached to Model Prison at Lucknow in 1949. Andhra Pradesh followed the suit and started Mauli Ali Agricultural Colony for convicts in 1954. A year later, Maharashtra started an open air prison at Yarvada as a part of its correctional programme. The success of open prisons in these States encouraged other States to set up open air camps for the rehabilitation of their offenders by providing them employment on agricultural farms, industrial establishments and construction sites. At present there are many open prisons operating in the country, the more

important among them are as follows[1] :—

Name of State	Name of the open prison(s)	Year of establishment
Andhra Pradesh	Mauli Ali Colony	1954
	Prisoner's Agricultural-Colony, Anantpur.	1965
Assam	Open Air Agricultural-cum-Industrial Colony, Bagbheta, Jorhat.	1964
Gujarat	Open Prison, Amreli	1968
Himachal Pradesh	Open Air Jail Bilaspur (Himachal Pradesh)	1962
Kerala	Open Prison, Nettvketheri	1962
Madhya Pradesh	Nav Jiwan Shivir (Open Jail) Mungaoli, (Dist. Guna)	1973
	Nav Jiwan Shivir, Lakhimpur (Dist. Panna)	1975
Maharashtra	Open Prison, Yarvada	1955
	Open Prison, Paithan	1968
Mysore	Open Air Jail, Soundatti	1968
Punjab	Open Air Agricultural Prison, Nabha	1970
Rajasthan	Prisoner's Open Air Camp at Agricultural Research Farm, Durgapur (Rajasthan)	1955
	Shri Sampurnanand Bandi Shivir, Sanganer (Jaipur)	1963
	Prisoner's Open Air Camp, Central Mechanised Farm, Suratgarh	1964
Tamil Nadu	Open Air Prison, Singanallur	1956
	Open Prison attached to Central Prison, Salem	1966
Uttaranchal	Sampurnanand Agricultural cum Industrial Camp, Sitarganj (Dist. Nainital)	1960
Uttar Pradesh	Sampurnanand Open Air Camp at Chakia in Varanasi district	1952
	Sampurnanand Camp, Ghurma (Dist. Mirzapur)	1956
	Open Prison attached to Model Prison, Lucknow	1949

There has been some confusion about the exact nature and scope of open prisons. Some people treat these open institutions as places of employment to prisoners while others characterise them as an integral part of pre-release programme. Some scholars are of the opinion that such open institutions are places where convicts who were victims of circumstances

1. Information collected from the Central Bureau of Correctional Services formerly called the National Institute of Social Defence, New Delhi.

could be given greater freedom and responsibility as near normal living conditions of society as possible so that they may reform themselves and become fit to lead a normal life in society after their release.

Be that as it may, there is no denying the fact that open prisons differ from conventional prisons in atleast two fundamental aspects, namely :—

(i) absence of maximum security arrangements, such as, walls, barbed wire-fencing, locks, bars, hand-cuffs and special armed guards ; and

(ii) greater contact of inmates with the outside world so as to develop among them a sense of responsibility towards the community.

The utility of open jails in India has been commended by the Supreme Court in *Dharmbir* v. *State of Uttar Pradesh*,[1] wherein the Court held that open prisons had certain advantages in the context of young offenders who could be protected from some of the well-known vices to which young inmates are subjected to in the conventional jails. The Apex Court, therefore, directed the State Government to send two young accused prisoners who were in their early twenties to one of the open prisons in Uttar Pradesh without adhering to the technicalities of law.

As regards the utility of open prisons the Supreme Court in *Ramamurthy* v. *State of Karnataka*,[2] has observed that open-air prisons play an important role in the scheme of reformation of a prisoner which has to be one of the desideratum of prison management. They represent one of the most successful application of the principle of individualization of penalties with a view to social readjustment. It is so because release of offenders on probation, home leave to prisoners, introduction of wage-system, release on parole, educational, moral and vocational training of prisoners are some of the features of open-air prison (camp) system. That apart, in terms of finances, open institution is far less costly than a closed establishment and the government is able to employ in work, for the benefit of the public at large, jail population which would have otherwise remained unproductive. The entire functioning of the open air prison is based on the philosophy that after release, the prisoners may not relapse into crimes, for which purpose they are given incentives to live a normal life by training them in the fields of agriculture, horticulture etc. Games, Sports, and other recreational facilities, which form a routine life at the open-air camps, inculcate in the prisoners a sense of discipline and social responsibility and the prayers made regularly provide them spiritual strength.

The Apex Court further observed, "though open-air prisons, create their own problems which are basically of management, we are sure that these problems are not such which cannot be sorted out. For the greater good of the society, which consists in seeing that the inmates of a jail come out, not as a hardened criminal but as a reformed person, no managerial problem is insurmountable. So let more and more open-air prisons be opened. To start with, this may be done at all the District Headquarters of the country".[3]

With a view to appreciating the usefulness of open-prison as a

1. (1979) 3 SCC 645.
2. (1997) 2 SCC 642 (659).
3. *Ramamurthy* v. *State of Karnataka*, (1997) 2 SCC 642 (659) para 50.

correctional measure of treatment of offenders, it shall be pertinent to discuss in detail the working of some of the leading open prisons of India.

Early Sampurnanand Camps in U.P.

The State of Uttar Pradesh was the first to initiate steps to set up open prisons in the name of Late Dr. Sampurnanand who was the then Home Minister of the State.

1. Sampurnanand Camp, Chakiya

The first open air camp was started in Chakiya in the Chandauli District of Uttar Pradesh. It was set up on October 1, 1952 on the left bank of river Chandraprabha. The nearest police station was at a distance of 20 km. from the camp. The inmates of the open prison were provided job on the dam construction site near village Jamsatti. The camp was located in natural surrounding of ravines and dense forest. The then Chief Minister of Uttar Pradesh who inaugurated this camp was so much impressed by this idea of Dr. Sampurnanand that he announced that all the camps to be established in future will be named as Sampurnanand camps.

The prisoners kept in the camp were no longer called prisoners and they were paid wages for the labour done by them on dam site. There were lesser fetters on the inmates and the life-style in the camp was so modelled as to inculcate the spirit of self respect and self-reliance among the inmates. The camp functioned for about one year and was wound up in October 1953 on completion of the construction of dam on the river Chandraprabha.

During this period about 4200 prisoners were brought to live in the open camp from time to time. They lived in batches of 20 each under a canopy. The results were so encouraging that only 19 out of 4200 prisoners escaped from the camp and 2 died of some disease. The warders in the camp were plain clothed supervisors without any uniform.

The remarkable achievements of the Chandraprabha Open Air Camps inspired the Government to expand the scheme further. Therefore, on completion of the work on the Chandraprabha dam the inmates were sent to three different work sites in three batches each having 200 inmates.

The first batch of 200 inmates was sent to a place 3.2 km. from Chakiya to work on a canal which was being widened to a stretch of 2.5 km. They worked as labourers and were paid wages for their work.

The second batch of 200 inmates was deployed for construction of a new road from Chandraprabha to Naugarh after cleaning the forest by felling trees etc.

The third batch was utilised to construct an earth dam at Kamla Bundhi, which was about 6.5 km. from the camp to provide support to the old dam.

2. Sampurnanand Camp, Naugarh

Most of the inmates of Chandraprabha were sent on October 4, 1953 to another dam site on the river Bulanala, a tributary of river Karmansa about 30 km. further deep in Vindhya Ranges. The Open Air Camp here was well organised and equipped with necessary training facilities for inmates. The camp lasted till January, 1955 and during this period about 3900 inmates

were lodged in the open prison camp. They were accommodated in barracks and tents spread over 'U' shaped area which was 500 ft. wide and 500 ft. deep. The number of escape from the camp was only ten out of which three had escaped because of some family problems. The camp had its own hospital and post-office for the facilities of the inmates.

3. Sampurnanand Camp, Shahgarh

The Naugarh camp was wound up due to completion of the Bulanala dam in January, 1955. The inmates were, therefore, sent to work in a project under work for construction of a subsidiary canal to carry waters of Sharda Sagar to be discharged into Sharda Canal. This project was located in district Pilibhit about 8 km. away from Shahgarh.

The earlier two open air camps were operating in dense forest areas but this was the first camp to be established in the vicinity of plain area. It was surrounded by several villages and the location of the project was close to Shahgarh railway station. There was 2303 inmates living in this camp. The duration of this open prison was a little over one and a half year (January 19, 1955 to November, 15, 1956) and there were only seven escapes recorded during this period. The inmates were allowed to send their earnings and savings to their families.

4. The Saraya Ghat Camp (Varanasi)

A bridge was being constructed at the river Varuna to link Sarnath (the ancient seat of learning where Lord Buddha give his first sermon) with Varanasi city. The construction of the said bridge was completed within a record time of a little over four months as the work was started on February 1, 1956 and completed on May 31, 1956. The inmates of the open prison worked in shifts of 400 each day and night and completed the work much ahead of the scheduled time. They lived in tents pitched in the campus and were paid wages. Only one warder supervised their work. The inmates were free to visit adjoining villages without fetters. Women also moved about freely without any terror or fear from these prisoners. The then President of India, Dr. Rajendra Prasad visited this camp and was so impressed by the attitudinal change of the inmates of the camp that he was pleased to remark, "In the soul of an Indian even today social values are alive, even if that Indian is a prisoner". Despite the open atmosphere of the open air camp, only one prisoner escaped which itself speaks of the success these open camps were achieving.

Sampurnanand Agricultural-cum-Industrial Camp, Sitarganj (District, Nainital), Uttaranchal

This open prison was started in February 1960 in the tarai region on Nainital district near Kichha which is now in Uttaranchal State. It was one of the largest open prisons in the world which was spread over seven adjoining villages, namely, Kalyanpur, Merabararara, Prahlad Pulsiya Lalarpatti, Barn, Lalarkhas and Rudrapur of Sitarganj Tehsil.

The camp was located near Sitarganj town. In the beginning the camp had the status of a District Jail which was subsequently raised to the status of a Central Jail.

The camp was started on 5965 acres of land out of which 2000 acres of reclaimed land was handed over to the Government for rehabilitation of displaced persons. The forest land was cleared by the inmates for agricultural purposes since the inmates and camp officials lacked technical knowledge and practical training, hence a joint venture was started on October 2, 1975 with the partnership of Pandit Govind Ballabh Pant Agricultural University. It worked for twelve years with substantial agricultural growth and profit. In addition to cultivation of land, the inmates were trained in carpentry, masonary work, dairy farming, poultry farming, sheep-rearing etc.

Initially, only long-term prisoners were brought to this camp to work on agricultural farms. The inmates were paid for the day's wages and some of them were also engaged in cottage industries such as spinning, weaving, gur-making etc. The camp accommodated several long-term prisoners as wage-earners. The life inside of the open camp was perfectly routined and inmates hardly thought of escaping from there. Greater emphasis was laid on the character building of the inmates so that they could become law-abiding citizens, after their return to society.

Originally, the criterion for eligibility of prisoners for Sampurnanand open prison camps was highly selective. In the beginning 500 inmates were brought to this came. The casual prisoners and habituals belonging to Uttar Pradesh with not more than one previous conviction between the age group of 21 to 50 years and sentences for one year or more with unexpired sentence of atleast six months were eligible after they had spent one-eighth of the sentence including remission. Their conduct should have been good and they should not have got more than one punishment for prison offences per year of the period undergone and they were to be physically and mentally sound, free from any physical deformity and infectious disease. Their consent for being booked to the open prison was necessary. Returnees and ex-convicts as also the political offenders and those committing offences under Sections 153A, 216A, 231, 232, 295, 298, 303, 309, 328, 364, 386, 389, 396, 417, 489A of the Indian Penal Code were ineligible for being sent to open air camp.

The life in the camp began with mass prayer early in the morning. This was followed by a mass-drill. Thereafter, the inmates were to attend their work at work-sites. While at work, the officials of the camp constantly kept on reminding the inmates of the virtues of honesty, sincerity and truthfulness and appealed them to keep up the name and dignity of the camp and not to bring disrepute to the institution. For this purpose, they made extensive use of amplifiers and loud speakers. This had a tremendous psychological impact on inmates as it enabled them to appreciate the virtues of an upright and honest living. During leisure hours the inmates were imparted religious and moral education through casual talks, discourses, lectures, films etc. with a view to impressing upon them the virtues of ideal life. The craft teachers employed in the camp imparted vocational training to inmates in different trades and cottage industries. Adequate recreational facilities were also made available to the inmates of the camp. On festivals and occasions of national importance, special programmes were arranged for inmates and they were served special diets to mark the occasion.

Another significant feature of the camp was that all possible efforts were made to keep inmates away from the evils of incarceration. Even the use of conventional terms such as "convict", "jailor", "warden", "prison", etc. were avoided to protect the inmates from stigmatisation of prison life. The inmates were called "mazdoor" instead of convict. The warden, head warden, deputy jailor and jailor were called the 'supervisor', head supervisor, welfare officer and the chief welfare officer, respectively. The object was that while in the camp, the inmates are made to forget about their past prison-experiences so that they can resume normal life in society after their release from the camp without any stigma.

This open air camp was without any physical barriers and the inmates enjoyed complete liberty of movement without any guard or watch on them. The attendance record and other particulars about the inmates were maintained by the official of the camp called the Group Officer. Each Group Officer was in charge of one hundred and fifty inmates. Mutual trust and confidence was the central principle underlying the working of Sampurnanand Camps.

The inmates were neither searched nor counted during night. Their attendance was taken only once while they presented themselves for work. They could meet their friends and relatives without any restrictions. They were also eligible for periodical home-leave. The maintenance charges of inmates were recovered from the wages earned by them as "workers" on work-sites.

The number of escapes from the camp was negligible and those who absconded were apprehended. For breach of camp discipline the inmates were nominally fined and the amount so recovered was to be credited to the amenities fund which was utilised for the welfare of inmates.

The special feature of the camp was that one of the group of the inmate volunteers (*Swayam Rakshaks*) guarded the camp day and night and lived in open without any security arrangements. The construction of the building etc. of the camp was done by the inmates themselves under the supervision of a junior engineer. It had as many as twelve perfectly skilled mason to do the work. The inmates were called 'shivir-niwasi' so that there was no stigma of being called as prisoners.

Open Air Camp at Durgapur

Durgapur Open Air Camp in Rajasthan is again a unique venture of the Government of Rajasthan in the field of correctional services and rehabilitation programme for offenders. This is an agricultural colony about nine kilometres away from Jaipur and is spread over an area of 116 acres of land. This open prison camp was started in 1955. To begin with, only a limited number of long-termers (usually 6 to 8) were sent from Jaipur Jail to work in this open farm without any escort or supervision. The inmates stayed in the farm along with their families in the residential quarters provided for this purpose. They received wages for daily work. The camp worked so successfully that there was only one escape in the first ten years of its working.

Open Prisons in Maharashtra and Andhra Pradesh

An open prison was established at Yarvada in Maharashtra in 1955. The inmates in this open prison were put to farming on co-operative basis. Another such open prison camp was started at Swantrapur in Satara district of Maharashtra. This prison farm is extended over nearly 50 acres of land. The inmates in this prison farm lived with their families in huts constructed for the purpose without any surveillance or supervision.

An agricultural colony for convicts is also at work under the name of Mauli Ali colony in Andhra Pradesh. The colony covers about 93 acres of land and allows inmates to live with their families. This open institution is particularly suited for convicts with agricultural background.

Nav Jiwan Shivir[1] at Mungaoli in Madhya Pradesh

An open jail for the rehabilitation of hardened and habitual criminals was set up at Mungaoli in Guna District of Madhya Pradesh in November 1973. The idea of setting up this open jail was mooted after the mass surrender of dacoits of Chambal Valley on advice of Sarvodaya leader Late Shri Jai Prakash Narayan. The surrender was led by Mohar Singh and Madho Singh, the notorious dacoits of Chambal ravines who carried rewards of 2 lakhs and 1.5 lakh dead or alive. Out of 550 surrendered dacoits, more than 400 were released after completion of their term of imprisonment in 1980 and only those serving imprisonment for life were retained. But the number of such convicts has never exceeded 20 or 25. Presently, this Jail houses only 13 prisoners with a staff of 35 looking after them. The intake capacity of this open jail is, however, about 150 inmates. This jail is housed in old building of Basic Training School with necessary alterations and modifications. It has eight barracks for prisoners excluding accommodation for jail staff. These barracks are not locked in night nor are there any walls around the jail compound. The jail is spread over an area of about one hectare of land fenced by three metres long wire-fencing.

The inmates are paid wages for their work so that they can support their families. They are granted bank loans for starting certain occupations such as dairying, poultry farming, tailoring, agricultural farming etc. The earnings of inmates through these occupations are credited to their bank accounts. The peculiar feature of this open-jail is that the inmates have their own canteen run on co-operative basis. The inmates also have their own panchayat for settling their mutual disputes and maintaining discipline inside the institution. There have been only three or four escapes from this jail and the absconders were promptly apprehended. The working of this open-jail for the last so many years has shown that even the most hardened and professional criminals can be returned to society as law-abiding citizens if they are properly trusted and taken into confidence.

The inmates in Nav Jiwan Shivir at Mungaoli are allowed fifteen days parole in every six months to meet their relatives and members of the family. They can write four letters in a month free of cost and any number of letters at their own cost. There is a common mess. The life inside the *shivir* is well regulated and disciplined.

All said and done, it is rather unfortunate that after the mass release

1. The word *shivir* stands for 'camp'.

of dacoits in 1980, the State Government is spending lakhs of rupees per year on this jail. Since the dacoit menace is now almost non-existent, the lifers lodged in this jail can be conveniently transferred to the nearest central jail and this jail may be converted into an open prison for women prisoners.

Nav Jiwan Shivir at Lakhimpur

Encouraged by the success of Mungaoli Open Jail, the Government of Madhya Pradesh started another open Jail at Lakhimpur in Panna district of the State in 1972. This open jail is established primarily for the rehabilitation of surrendered dacoits from Bundelkhand region. At present there are arrangements to accommodate only fifty surrendered dacoits in this open jail. The jail extends over 124.75 acres of land, of which 12.75 acres is used for buildings and structures while the remaining 112 acres is meant for agriculture. Adequate irrigation facilities are available to carry on farming on this land.

The major objectives of the Nav Jiwan Shivirs at Mungaoli and Lakhimpur are individualised treatment, resocialisation and rehabilitation of surrendered dacoits and hardened offenders. These Shivirs permit freedom of movement to inmates in local society subject to limitations of prison-rules. These open-prisons offer adequate opportunities to inmates to restructure their lives under trained and experienced prison personnel. Expert guidance is provided for vocational and industrial training and physical fitness. It even helps in strengthening the familial and public ties of the dacoit-prisoners.[1]

The life in the *Shivirs* seeks to develop self-discipline among the inmates thus enabling them to lead a disciplined social life and shed off their aggressive attitude.

Despite clear-cut rules and well routined life in Nav Jiwan Shivirs, the dacoit-inmates flout these regulations with impunity. The prisoner-dacoits are often seen roaming about in the nearby towns and treat Shivir as a resting place for their peripatetic routine in Mungaoli market. The officials in fact have no practical power or machinery for strict enforcement of prison-rules. If some official reports about indiscipline to higher authorities, he is rediculed and harrassed by inmates.[2]

The Madhya Pradesh Jail Committee, in 1974 had recommended the setting up of a third Nav Jiwan Shivir in Bastar District of Madhya Pradesh.[3] It was to be set up exclusively for women prisoners. But keeping in view the financial implications and also non-utilization of the existing two open jails to their full capacity, the proposal has finally been dropped.

Critical Appreciation

Though the working of open-jail during the first two decades of its beginning in India proved to be useful and showed some positive results but there has been a sharp decline in the popularity of these prisons in the recent past. Perhaps it is for this reason that there has been no significant

1. Singh R. G. : Terror to Reform (Ist Ed.) p. 128.
2. *Ibid* p.128.
3. Now, the State of Chattisgarh.

addition to the existing open jails after 1980. Even the idea of an exclusive open jail for women did not gain much public support. Perhaps the true reason for public apathy for open prisons is the extensive use of probation as a measure of individualised treatment of offenders which seeks to bring about reformation and rehabilitation of criminals within the community itself. Resort to semi-open technique of open Jail is, therefore, not mustering the desired public attention.

Another serious allegation against the working of open prisons is that they are looked upon as taming places of miscreants. Many have questioned the advisability of maintaining them at the cost of public exchequer. It is alleged that in an anxiety for reformation of prisoners the basic fact that they are notorious and formidable criminals, is lost sight of. The inmates more often than not, flout prison rules blatantly and even dictate terms to the prison officials. In order to avoid "trouble" and confrontation with dreaded offenders, the prison officials choose to do nothing but transfer their right and responsibilities to the powerful "criminal chief" who commands power over his fellow-inmates because of his muscle power or past status. This deliberate malingering of duty in the name of promoting self-discipline and self reliance among the inmates, defeats the very purpose of open prisons. The need of the day, therefore, is to review the functioning of the existing open prisons and introduce reforms which would be really beneficial to the inmates as also those coming in contact with them.

That apart, the Jail Reforms Committee has expressed a view that Section 433-A of the Code of Criminal Procedure, 1973 which provides for a minimum imprisonment of fourteen years for life convicts negatives the benefit of curtailment in the sentence of inmates of open jails which they earn by way of good conduct in prison. Thus it defeats the very purpose of open prisons.

The Jail Reforms Committee has suggested two kinds of open prisons, namely, open, and semi-open jails and the criterion for booking prisoners to these open jails should not be long-termers or short-termers but overall possibility of prisoner's propensity to reform and re-socialisation.

Despite certain shortcomings in the working of open prisons, it must be accepted that these open jails have become a part and parcel of the present day prison system. They have rendered commendable service to society in general and prison community in particular. The working of open prisons over the years has proved beyond doubt that 'help' and not 'hate' should be guiding principle underlying modern prison administration. At the same time it also reflects upon the futility of long term incarceration as a measure of punishment. The directives of the Supreme Court contained in *Ramamurthy's* case[1] should have been viewed seriously by the States and they should have initiated steps to set up open air camps at least in each District Headquarter for the resocialisation of corrigible prisoners. The apathy of the State Governments in this regard has led to overcrowding in prisons which contributes to a greater risk of disease, surveillance and disorder among the prison inmates resulting in manifold problems for the prison management.

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1. (1997) 2 SCC 942.

Chapter XX

EXECUTIVE CLEMENCY, GOOD TIME LAWS AND INDETERMINATE SENTENCE

Even the most rigid systems of criminal justice on the globe have found it necessary to accept such concepts as mitigating circumstances and suspended sentence for circumscribing discretion and setting limits to disparities that are possible in judicial sentencing. Penologists all over the world have always expressed a doubt about the efficacy of fixed sentence for offenders. They have persistently argued that greater discretion in judicial sentencing is absolutely necessary for treatment of offenders through modern rehabilitative methods. Some discretion in mitigating the rigours of punishment should necessarily be vested in the head of the executive in the form of granting pardon, amnesty, reprieve or respite and commutation of sentence of the offender. In India, the President of India and the Governors of the States respectively, are empowered to grant pardon, reprieve, or commute the sentence of any convict. Similar provisions exist in the constitutional documents of certain other countries which empower the executive head of the State to grant pardon or alter the sentence of the convict.[1] The King in England and the President of United States of America also exercise powers to pardon in criminal cases.

Pardon

The term "pardon" has been defined as an act of mercy by which the offender is absolved from the penalty which has been imposed on him. In other words, grant of pardon wipes off the guilt of the accused and brings him to his original position of innocence as if he had never committed the alleged offence.[2] The grant of pardon may, however, be absolute or conditional. Under conditional pardon, the offender is let off with certain conditions, the breach of which will result into revival of his sentence and he shall be subjected to the unexhausted portion of the sentence.

Pardon as a mode of mitigating the sentence of the accused has always been a controversial issue since long. Some authorities consider its retention in penal system essential as it may substantially help in saving an innocent person from being punished due to miscarriage of justice or in case of doubtful conviction. Moreover, the hope of being pardoned itself serves as an incentive for the convict to behave himself in the prison institution and thus helps considerably in solving the problem of prison discipline. During the medieval period, pardon was extensively used as a method of reducing overcrowding in prisons during war, political upheaval and revolt. Those who

1. Article 60(d) of the Constitution of erstwhile U.S.S.R. and Article 48 (1) of the Constitution of Ghana.
2. Sutherland and Cressey : Principles of Criminology (6th Ed.) p. 544.

reject pardon as an effective measure of mitigating sentence argue that the power to pardon is often misused by the executive. There is a possibility that the convict may secure his release from prison by exerting undue influence on the executive authority. Another evil that follows as a result of 'pardon' as a measure of undoing the guilt of the convict is that it has an adverse effect on prisoners because they invariably try to secure a 'pardon' rather than reforming themselves. Despite these shortcomings, the greatest advantage of pardoning powers of the executive lies in the fact that it is always preferable to grant liberty to a guilty offender rather than sentencing an innocent person.

The power to grant pardon is conferred on the President of India and the Governors of States under Articles 72 and 161 of the Constitution of India. Article 72 empowers the President to grant pardons etc. and to suspend, remit or commute sentences in certain cases. The Article reads as follows :

> 72 (1) the President shall have the power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—
>
> (a) in all cases where the punishment or sentence is by a Court Martial;
>
> (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
>
> (c) in all cases where the sentence is a sentence of death.

In *Maru Ram* v. *Union of India*,[1] the Constitution Bench of the Supreme Court held that the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the head of the Republic.

In *Dhananjoy Chatterjee* alias *Dhana* v. *State of West Bengal*,[2] the Supreme Court reiterated its earlier stand in *Maru Ram's* case and observed as follows :

> "The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group."

In the instant case, the Deputy Secretary, Judicial Department, Government of West Bengal informed the Court that after examining and considering the prayer the State Government rejected it, thereafter, it was transmitted to the Governor only because it was addressed to him, and therefore, the Governor in his turn, rejected the convict's prayer which was duly communicated to the convict.

Later, convict's special leave petitions having been dismissed by the

1. (1981) 1 SCC 107.
2. Criminal Appeal Nos. 394-394 of 2004 decided on 26-3-2004.

Supreme Court, he filed a mercy appeal to the Hon'ble President of India under Article 72 of the Constitution but that too was rejected by the President *vide* his order dated 4th August 2004. The appellant then applied to the Supreme Court for review of President's decision of rejection of his appeal which the Court declined on August 12, 2004. Consequently the convict Dhananjoy was hanged till death on 14th August 2004 in Central Jail, Alipore in West Bengal.

The Supreme Court, in *Ranga Billa* case[1] was called upon to decide the nature and ambit of the pardoning power of the President of India under Article 72 of the Constitution. In this case the death sentence of one of the appellants was confirmed by the Supreme Court. His mercy petition was also rejected by the President. Thereupon, the appellant filed a writ petition in the Supreme Court challenging the discretion of the President of India to grant pardon on the ground that no reasons were given for the rejection of his mercy petition. The Supreme Court dismissed the petition and observed that the term "pardon" itself signifies that it is entirely a discretionary remedy and the grant or rejection of it need not be reasoned.

The Supreme Court was once again called upon to decide the justiciability of President's power to grant pardon, reprieve or remission or to suspend, remit or commute the sentence of death passed against the condemned prisoner under Article 72 of the Constitution in *Kehar Singh* v. *Union of India*.[2] Reiterating its earlier stand, the Apex Court held that grant of pardon by the President is an act of grace and therefore cannot be claimed as a matter of right. The power exercisable by the President being exclusively of administrative nature, it is not justiciable. The President can scrutinise evidence on record and may come to a different conclusion from that of the Court regarding the guilt or sentence of the accused but his decision in this regard cannot modify the Court's judicial record. Again, the condemned prisoner is not entitled to oral hearing from the President as the matter is entirely within the discretion of the President under Article 72 of the Constitution. In the instant case the mercy appeal of the accused Kehar Singh was rejected by the President of India.

Experience has shown that pardon is usually administered to persons who are punished for disregard of political or religious affiliations. The psychological and emotional condition of the criminal is taken into consideration before granting him pardon[3] and he is admitted to this clemency only if his institutional record shows that there are better chances of his reformation after release. Commenting on this point *J. L. Gillin* observed,

> "If the pardons are administered with care and solely to correct injustices, they certainly do not diminish respect for law. They, on the other hand, will infuse confidence in the machinery of justice".[4]

It must be stated that the system of parole which is nothing but a modified form of conditional pardon has mitigated the risks involved in

1. *Kuljeet Singh* alias *Ranga* v. *Union of India*, AIR 1980 SC 898.
2. *Kehar Singh* v. *Union of India*, AIR 1989 SC 653.
3. *K.M. Nanavati* v. *State of Maharashtra*, AIR 1962 SC 605.
4. Gillin, J. L. : Criminology & Penology (3rd Ed.) p. 308.

pardoning the offender outright. It is, however, suggested that a pardon pre-conditioned by a system of parole appears to be an ideal policy best suited to both the law-abiders as well as the law-breakers. It would further be wise to relieve the executive authority of this arduous task of administering pardons and this function be assigned to the agency of Parole Board. This has already been done in some of the American States.

In *Swaran Singh* v. *State of U.P.*,[1] the Governor of U.P. had granted remission of the life sentence awarded to the Minister of State Legislature of Assembly upon being convicted for the offence of murder. The Supreme Court, however, interdicted the Governor's order and observed that it is true that it has no power to touch the order passed by the Governor under Article 161, but if such power has been exercised arbitrarily, *mala fide* or in absolute disregard of the "finer canons of constitutionalism", such order cannot get the approval of law and in such cases the "judicial hand must be stretched to it". The Supreme held that the order of the Governor was arbitrary and hence needed to be interdicted.

In *Gentela Vijayvardhanrao* v. *State of Andhra Pradesh*,[2] the two appellants were dalit boys, who set afire a bus for the purpose of robbery. This resulted in the death of 23 passengers and serious burns to a number of other passengers. Taking into consideration the barbarity of crime, depravity in the manner of its execution, the number of victims and greed as aggravating factors, they were sentenced to death and the sentence was confirmed by the High Court. Even while mercy petitions were pendings human rights groups took to campaigning against the death sentence awarded to the two boys. Attempts were made to bring back the issue to the Supreme Court by way of writ petitions, but without success. The President of India, however, deemed it a fit case to grant pardon and commuted the death sentence of both the boys to one of imprisonment for life.

It is submitted that in the absence of the requirement to give reasons for such decision, it is difficult to know what exactly weighed with the President in commuting the sentence. If such decisions were made public, it would help people to know the factors which made President to commute the sentence, which would provide guidance for future. Otherwise the exercise of power of clemency will give rise to the reasonable apprehension that it is capable of being arbitrarily used, more so because the President in exercise of this power acts on the advice of the Cabinet hence the possibility of political considerations weighing with the decision cannot be ruled out.

Commutation of Sentence

Besides pardon, commutation of sentence and reprieve or respite are yet other methods of easing the problem of prison discipline. Commutation of sentence implies reduction in the term of imprisonment but it does not wipe out the guilt of the accused. It is thus a substitute of a lesser punishment for a longer one. Reprieve or respite signifies temporary postponement of the execution of sentence generally for the purpose of further investigation into the guilt of the offender and is often used with reference to death sentence. The principle underlying reprieve or respite is that it enables the executive

1. (1998) 4 SCC 75. *See* also *Harbans Singh* v. *State of U.P.*, (1982) 2 SCC 108.
2. (1996) 6 SCC 241.

to make sure that the offender is rightly being committed according to the law of the land.

Amnesty

In addition to the abovementioned modes of mitigating sentence, certain categories of prisoners are also admitted to "mass-release" with a view to restoring civil rights to them. The system of mass-release of prisoners is called 'amnesty'. Thus, in United States, amnesty was granted to all federal ex-prisoners who worked in the Armed Forces of that country atleast for a period of one year. Similar amnesty was granted to English war-time deserters of Armed Forces in February, 1953.

"Good Time" Laws

The introduction of "good time" laws in prisons can be traced back to early decades of nineteenth century. Under the system an inmate could earn certain reduction in his term of sentence provided he behaved well inside the prison. Thus the system of good time laws was introduced to ease the problem of discipline inside prisons and make the custody, security and control within the institution more meaningful and effective. Good time laws authorised the prison officials to cut-short the period of sentence awarded to prisoners by law courts in fixed proportions, usually one month for every year upto a maximum period of six months. This discretion to make an allowance in the term of sentence of the prisoner lies with the Prison Board or the Parole Board provided, however, the inmate has a good record of his conduct in prison. The system of good time laws was adopted in France in 1846. In America the system became so popular that by 1860 it was adopted in almost all the States. Besides the ordinary good-time laws, there are also "merit good-time laws" which entitle the inmate to earn additional reduction in his term of sentence by his exceptionally good behaviour during the institutional life. Likewise, "Industrial good-time" is allowed to an inmate who actively participates in prison industries during his stay as a prisoner.

"Good time" Laws in India

Before reviewing the position of good time laws in India, it must be stated that reduction of sentence under "good-time" laws is different from the commutation of sentence. While reduction in prisoner's term of imprisonment depends on the discretion of prison authorities, the commutation of sentence is a prerogative of the executive Head of the State. It must also be noted that reduction in the term of sentence under good-time laws is invariably granted to almost all inmates as a matter of course, therefore, its significance seems to have been lost in the present penal system. Any misconduct on the part of inmate inside the prison may, however, entail certain reduction in his good time allowance. The system of allowing prisoners the benefit of good time allowance is prevalent in India ever since the British rule and it has undoubtedly proved a successful measure insofar as maintenance of discipline inside the prison is concerned. The "honour system" which implies associating deserving inmates with the prison administration has acted as an efficient substitute for the system of good time allowance. The provisions relating to these curtailments in the term of prisoner's sentence are contained in the Prison Act and Jail Manuals

of the States.

It must be stated that executive clemency, good conduct laws, holiday benefits, amnesty and other curtailments in the prisoner's sentence are directed as a part of reformative techniques of prisonisation but its extensive use over the years has an adverse impact on the judicial determination of the appropriate punishment for a specific offence. With the result there is no co-relation between the Judge's sentence and the actual period of imprisonment in jail which is generally much less than the awarded sentence. In other words, increasing use of the discretionary powers of prison management and correctional authorities tend to restrict the powers of the sentencing Courts.

Indeterminate Sentence

Yet another penal device which marks a radical departure from the traditional concept of punishment is the system of indeterminate sentence. The system originated from the west and was overwhelmingly favoured by most European countries. The success of probation and parole as a measure of treatment reaction to crime, has, however, overshadowed the system of indeterminate sentence which is fast losing its significance in modern penology.

The first manifestation about the abhorrence of retribution and deterrance and inclination for individualisation and reformation came in the shape of protest against fixed sentences. Flexibility and elasticity in penal sentence was deemed necessary for proper rehabilitation of inmates through treatment methods. The reformation of prisoners could not be possible if the sentences were determinate and the term of imprisonment fixed and definite. The system of indeterminate sentence was therefore regarded quite consistent with the requirements of the principle of individualisation. Under this system the Penal Code prescribes a minimum and a maximum sentence for a particular offence thus leaving sufficient scope for the discretion of Prison Board to release the offender on parole if he reacted favourably to treatment methods of the prison. Speaking about indeterminate sentence, *Sanford Bates* the former Minister of Federal Prison Bureau and Commissioner of Institutions and Agencies of New Jersey observed, "apart from the inducement to good behaviour in prisons such as good-time laws, etc. if best results are to be obtained from the prison sentence and the ensuing parole period, the date of release must be a flexible one".[1]

Although flexibility in punishment carries with it an element of uncertainty and a consequential increase in the potential of disparity but if the Prison Boards and parole authorities make right use of discretion regarding the release of inmate after he completes the minimum sentence prescribed in his case, there is no reason why the scheme should fail. Some penologists argue that it is a misnomer to call such a sentence as indeterminate, particularly when the minimum and the maximum limits are set out under the law. In their opinion, it ought to be called as 'indefinite sentence'. But it is difficult to agree with this view because the word 'indefinite' carries with it an impression that the sentence is to continue for an inordinately longer period which is certainly not the object of

1. Sanford Bates' article published in Studies in Penology (IPPF) 1964 p. 34.

indeterminate sentence. The term "indeterminate sentence" therefore seems to be fitting and appropriate.

There is no denying the fact that rehabilitation is the prime object of sentencing process particularly in case of juvenile and young offenders. The system of indeterminate sentence first began as an agency of correctional method for young offenders so that they could be released earlier if they responded favourably to the rehabilitative processes during the period of custody and control in the institution. The maximum limit of confinement in their case could be the age of attaining majority. The pre-mature release secured under indeterminate sentence could be with or without parole depending on the requirement of the institutional 'After-care' of the inmate concerned. The main object of indeterminate sentence is to inculcate hope rather than fear in the mind of inmate undergoing imprisonment. It also makes the inmate realise that his future lies in his own hands and he could secure an early release from the institution if he showed interest and sincerity in work and labour allotted to him. The greatest advantage of indeterminate sentence lies in the fact that it is aimed at correcting the inmate rather than ill-treating him.

Origin of Indeterminate Sentence

Historically, the system of indeterminate sentence is known to have originated from Spanish prisons in 1835. The practice of lodging young offenders in work-houses till the time they were completely reformed was, however, prevalent in certain American States even a century earlier. Under the Spanish system, the prisoners were organised into groups of 1000 to 1500 called a "company". One of the prisoners was to lead the company and control and supervise the prisoners under him. He was called the Commander of the company. Thus, the system was modelled on military pattern. Under this arrangement good behaviour of the prisoner entitled him to proportionate reduction in his sentence to the extent of one-third. Later, Bolivia also adopted a similar system and established Prison Aid Societies to supervise the released prisoners.

Dr. Marsongy, a French penologist wrote his 'Preparatory Liberation' in 1846 which contained an elaborate discussion on topics connected with the power of pardon, conditional liberation, ticket on leave system aid to the discharged prisoners, etc. In this work he pointed out that detention of inmates in prison was rather inhuman and at the same time an additional burden on the State exchequer. He, therefore, supported indeterminate sentence on the ground that it gave moral courage to the offenders and offered them opportunities for proper education and discipline, thus helping them to improve their socio-economic condition. With the introduction of the system of probation in 1859, France succeeded in amalgamating suspended sentence with probation.[1]

The Irish penal system also preferred indeterminate sentence to determinate one. The inmates were kept in reformatories for an indeterminate period till they were reformed for normal life. The system was greatly appreciated in U.S.A. and subsequently it received statutory

1. Manual Lopez Rey : Analytical Penology, an article published in Studies in Penology (1964), p. 139.

recognition in New York State in 1867. *Brookway* tried to mobilise public opinion in favour of indeterminate sentence through his learned paper entitled "The Ideals of Prison System" read before the National Prison Association in 1870.

The Elmira Reformatory accepted indeterminate sentence as an essential part of its correctional programme in 1869. The offenders between the age group of 16 to 30 years as well as the first offenders were committed to indeterminate sentence, the term of which was finally to be decided by the Board of Managers of the Reformatory. Relapsed criminals were also admitted to indeterminate sentence in exceptional cases. The Board of Managers consisted of a General Superintendent with five other members to be appointed by the Senate for a period of five years. They were all honorary officials and received no salary for this job. It was thus a social service agency associated with the Reformatory which functioned to consider the cases of prisoners to be discharged on parole. The Reformatory provided education to the inmates in various disciplines such as religion, morality, social culture, science, physical education etc. The period of indeterminate sentence usually varied from 14 to 24 months. While in custody, the inmates were to be kept under supervision and monthly report was to be submitted in each case. The report was to be attested by a clergy or a teacher. The period of indeterminate sentence prescribed for the first offenders varied from a minimum of one year to a maximum as fixed for particular crime under the State law.

In 1928, *Prof. E.V. Burgass* in his work entitled. "The Working of the Indeterminate sentence, Law and the Parole system in Illinois" surveyed the entire functioning of these corrective measures and the extent to which they succeeded in bringing about rehabilitation of offenders in the State. This was a substantial contribution to the available criminological literature on correctional penology in early twentieth century.[1]

The Congress of United States in 1958 enacted uniform laws which provided that an inmate could be released on parole any time after he had spent at least one-third of the maximum sentence imposed on him. This was intended to give expression to society's disapprobation for a given act as also to minimise the chances of securing early release by bringing undue pressure on the Administrative Boards. This at the same time enabled to the Parole Board to observe the inmate and diagonise the course of action in his case.

Indeterminate sentencing in USA came under severe attack from most quarters in late 1960's and early 1970's because of its over-emphasis on individualised justice. It was criticised mainly on two grounds, namely, (i) whether sentencing should be based on rehabilitative considerations ; and (ii) procedure to determine the form and length of sentence leaves sufficient margin for miscarriage of justice.

As to the desirability of indeterminate sentence *Dr. Sutherland* observed that as a treatment reaction to crime this mode of sentence is essentially selective in nature as its application is restricted only to a few categories of offenders, mostly juveniles and the first offenders. It has

1. Leon Radzinowicz : In Search of Criminology (1961 Ed.) p. 195.

generally been argued that indeterminate sentence is most unsuited in case of serious offenders and habituals or recidivists and those who are guilty of white collar crimes. The reason being that in such cases deterrence still remains a most significant sentencing factor. Again, like the need for laying down a minimum statutory sentence, the need for a legal maximum sentence is justified on the ground that in absence of such a maximum limit, the Administrative Board may by mistake or inadvertence, keep certain prisoners confined for unduly long period though they might otherwise be well suited for an early release. In other words, the discretionary power of Prison Board cannot be circumscribed under the law.[1] But *Dr. P. K. Sen* has expressed a contrary view in this regard. In his opinion, it would suffice to lay down only the maximum limit of sentence for a particular crime and no minimum need be laid down.[2]

The Indian penal law, however, does not provide for indeterminate sentence for the reason that similar objective is attained by resorting to certain other correctional techniques such as probation, parole and open air camps for prisoners. In fact, the system of parole is itself a modified form of indeterminate sentence. Moreover, certain Indian penologists have expressed a view that adoption of the system of indeterminate sentence would extend the scope of discretion for the magistracy which might be detrimental to the interests of criminal justice. But it must be stated that this apprehension is rather misleading because the Judges in India have accepted sentencing as a part of their solemn duty towards law and discharge their obligation in a realistic manner so as to attain the objective of social defence.

Critical Appreciation of Indeterminate Sentence

Indeterminate sentence as a method of punishment has certainly delivered the goods as it is founded on solid principle of social security. The greatest advantage of the system is that the inmate is placed for his own salvation and he contributes to a considerable curtailment of his own sentence by good work and effective change in his mentality. Indeterminate sentence bears testimony to the fact that at times judicial individualisation may fail but the administrative individualisation may work successfully. The system seeks to adjust the treatment of the offender according to his personal traits. From this standpoint, indeterminate sentence has been rightly recognised as a progressive measure. It has affinity with good time laws and indirectly prepares the offender for a better life in future. *Lord Clove* of the International Penal and Penitentiary Commission, the oldest inter-governmental agency in the correctional field, in his address on 'Indeterminate Sentence' in London Conference made the following observations with regard to this mode of sentence :[3]

(i) petty offenders should not be subjected to prolonged sentence ;

(ii) determinate sentence be limited to offenders above twentyfive years of age whereas those below this age should invariably be

1. Surtherland and Cressey : Principles of Criminology (6th Ed.) p. 551.
2. Sen, P. K. : Penology Old and New (1943) p. 183.
3. IXth International Penitentiary Congress held in London in 1925 was addressed by Lord Clove in which he detailed out his views on indeterminate sentence (*See* pages 259 to 267 of the Congressional Address).

awarded indeterminate sentence unless they are habitual criminals or guilty of a serious crime ;

(iii) no minimum sentence need be prescribed but only a legal maximum limit may be laid down ;

(iv) lastly, the Administrative Boards or the Parole Boards which are entrusted with the arduous task of releasing the prisoners undergoing indeterminate sentence, should include well-qualified and experienced staff.

Though the concept of indeterminate sentence stands in direct conflict with the principle of impartiality because the custodial sentence, corrective training and committal to prison under the system permit sufficient discretion with the Administrative Boards to mitigate the rigours of prison life, the method has been treated as one of the most urgent priorities in the development of individualised prison programmes. As a matter of fact, the system of parole cannot function without indeterminate sentence.

The principle of the indeterminate sentence is closely connected with the improvement in prison management. If best results are to be obtained from the prison sentence and the ensuing parole period, the date of the release must be flexible one.

In practice, very few countries use a completely indeterminate sentence—that is a sentence without minimum or maximum. Legislations generally prescribe a minimum time to be served as a part of sentence and also provide protection to the inmate against his being held in prison for an extraordinarily long time. It is preferred to set the time of release based somewhat upon the attitude of the prisoner and conditions of the society in which he is to be sent and the assistance, advice and control that may likely be afforded to him.

Indeterminate sentence is further preferred to definite sentencing which creates problems because the standards of judicial sentencing may depend on the predilections of the judges. Since inequalities of sentences create problems in prison, correctional administrators have always preferred alternatives to definite sentencing. Indeterminate sentence being one such alternative, would help in subsiding prison unrest to a considerable extent.

Despite the merits of the system, indeterminate sentence has been criticised on many counts. The main objections to this system are as follows :

The first and the most potential objection so often raised against this system is the uncertainty about the exactness of the sentence which in itself is a severe punishment from the psychological standpoint. Most persons would certainly prefer a longer but a definite term of sentence rather than a shorter but an uncertain period of anxiety and agony. Moreover, prisoners with indeterminate sentence always suffer from a feeling of injustice about their sentence in absence of any specified pre-determined definite rules. During the term of their sentence, however short it may be, they remain completely in dark about the exact time of their release.

Secondly, mistaken judgment of the Prison Board about the fitness of a particular offender for release is likely to result into his stay in the prison institution for a longer period than that actually necessary in his case.[1]

1. Fedrick Howard Wines "Prison Reforms at Home and Abroad" Chapter IX, pages 190-208.

Thirdly, in absence of any satisfactory method to gauge with accuracy the offender's fitness for release, it might happen that a prisoner is released prematurely or conversely, he might be detained for an unduly longer period.

Fourthly, since the release under indeterminate sentence generally depends on the reports of the prison wardens the prisoners who antagonise the wardens are likely to be held in prison for a longer time due to adverse reports against them. Conversely, those who flatter the wardens may manipulate an early release through favourable reports.

Fifthly, indeterminate sentence produces sycophancy among the prisoners thus making them to work for securing early release rather than to reform themselves sincerely for a normal life.

Last but not the least, the prisoner undergoing a determinate sentence knows it for certain that after he completes the term of his sentence he has a right to claim release legitimately. The satisfaction of having completed the full term of sentence assures him that his guilt has been washed off and he no longer remains a guilty person. The element of self-satisfaction is totally missing in case of indeterminate sentence.

Some penologists have suggested that periodical judicial review of sentence by the courts can be an effective substitute for indeterminate sentence. This assertion is founded on the belief that Judges are less prone to external influences than the Prison Administrative Boards. But the greatest difficulty in the judicial review of sentencing lies in the fact that it is difficult to convince the court that earlier sentence was erroneous or excessive unless they are made to visit the prisons periodically and contact prisoners to know the effect of sentence on them. The views expressed by the eminent French criminologist *Gabriel Tarde* deserve particular mention in this context. He observed that the existing criminal procedure should be suitably amended so that the courts are asked merely to decide the guilt or innocence of the accused and leave it for specially constituted committee of experts to determine the responsibility of the accused and the punishment to be awarded to him after taking into consideration his antecedents and mental attitude. This is indeed a good suggestion but the fact remains that the change in procedure would mean entrusting judicial functions to non-judicial bodies such as Parole Boards etc. which will be derogatory to the accepted principles of penal justice.

Suspended Sentence

There is yet another method of social rehabilitation of offenders which has assumed great importance in recent times. It is commonly called the method of "suspended sentence". The method of suspended sentence is different from that of indeterminate sentence. In the former, the offender is prosecuted for his guilt but he is not institutionalised while in the latter he is sentenced for an uncertain term with at least the minimum for that particular offence after which his release depends on the Administration Board's reaction to his good behaviour. Since the courts are motivated by humanitarian consideration, they prefer to punish the offender with suspended sentence rather than with the indeterminate one, and this has eventually led to the evolution of system of parole, probation and other correctional methods of treatment of offenders.

It must also be stated that just as the system of parole is based on indeterminate sentence, the system of probation is based on suspended sentence. Besides parole and probation, there are a number of other quasi-penal institutions such as Reformatories, Borstals and Rescue Homes which are engaged in the task of bringing about rehabilitation of offenders in society.

More recently, there has been a growing tendency to relieve the courts of their power and control over the punishment and treatment of offenders and pass it on to the professional bodies or Administrative Boards. In Scandinavia and some States of America as also in England and Scotland, the decision about the treatment of young offender is taken out of the criminal courts and handed over wholly to the professional experts in correctional services. Even in matters of adults, the power of the court to control the duration, nature and security of confinement has been considerably curtailed and in some cases even withdrawn. With the introduction of probation, parole and indeterminate sentence, the actual date of release of offender is determined by those who are in charge of his custody. Thus, the object underlying these correctional measures is to co-relate sentence to reformation of the offender and ensure protection of others rather than the old fashioned ideas of retribution cherished by the courts.[1]

Indeterminate sentence has not been accepted in the Indian penal system although it is being extensively used in the United States and some of the European countries. In the strict sense, the sentence is 'indeterminate' when no minimum or maximum limit is laid down by the penal law, but in actual practice the court invariably sets out the minimum and maximum period of sentence leaving it with the prison authorities to retain the offender in jail only for the optimum period until he is reformed and responds favourably to rehabilitative process.

It hardly needs to be stressed that mechanical apportionment of punishment to guilt would serve no useful purpose in the modern context. The correct approach to the problem of sentencing has been rightly expressed by *James Mills* in his celebrated article in *Encyclopaedia Britannica* wherein he stated that "whatever punishment is to be inflicted, it should be determined by its adaptation to crime.[2] The progressive trends in penology in form of probation, parole, indeterminate sentence etc. should not lose sight of this fundamental principle of penal law.

Finally, it must be stated that the ultimate justification of all sentencing is the protection of society and rehabilitation of the offender. At times, a prolonged confinement of offender may be necessary in the interest of society's protection and no rehabilitative technique may suit the offender in view of his anti-social behaviour. In such cases definite sentencing alone seems to be the only viable alternative. Even in cases where there is probability of the offender responding favourably to flexible sentencing, the problem to determine the appropriate time of release may pose real difficulty. Therefore, theoretically the technique of indeterminate sentence

1. Leon Radzinowicz & Joan King : Growth of Crime (1977) p. 27.
2. James Mills : Prisons And Prison Disciplines in *Enyclopaedia Britannica* (6th Ed. Vol. VI), p. 387.

may appear to be ideal one, but the risk of arbitrary discretion of the prison authorities involved in it, may frustate the benevolent principle underlying this mode of sentencing.

The principle of justice demands that the like cases be treated alike. As *H.L.A. Hart* rightly contended "injustice arises when equals are treated unequally and also when unequals are treated equally."[1] Disparity in sentences defeats the object of modern correctional penology. In India, the provisions relating to appeal, revision as well as hearing on the point of sentence under Section 235 (2) of Cr.P.C. are meant to mitigate the disparity in sentences as far as possible.

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1. Hart H.L.A. : Punishment and Responsibility (1968) p. 24.

Chapter XXI

PAROLE

K.F. *Rustomji*, while he was a Member of the National Police Commission, in one of his tour-notes described the pathetic condition of Indian prison and observed that the personality of a man behind walls and bars disintegrates under the strain of waiting for a decision in his case, or an order on his premature release from jail. Over-crowding in prisons and increasing versality of prison torture in utter disregard of the Standard Minimum Rules for the treatment of prisoners approved by the U.N. Congress on Treatment of Offenders held in Geneva in 1955 is a serious cause of concern for those who believe in correctional penological philosophy. In the subsequent U.N. Congress held in London in 1960 it was stated that it should be customary that prisoners should spend later part of their sentence on parole or in open institution where they can live with their families.

One of the appropriate method for prisoners to be able to enter community and participate in constructive work is to place them in open prison or release them on parole. Of these two, a parole is perhaps more effective and popular.

Though open prisons have been found to be useful for the rehabilitation of the incarcerated prisoners but in view of its limited scope, the system of parole has proved to be a better substitute for easing the burden of prisons and reducing over-crowding of prisoners.

The release of prisoners on parole is, therefore, one of the most important but at the same time, controversial devices for reducing pressure on prison institutions. It is commonly believed that a prisoner who is released from a prison institution is a danger to society. Ex-prisoners are generally feared, shunned, discriminated and exploited and thus they are compelled to go wicked rather than being assisted to lead an upright life.

A prisoner may be released after he has completed his full term of sentence. He is then a free man without any restraint against repeating crime. He may feel that he has paid off his debt to society and, therefore, is ready to have another offence debitted to his account. Some corrective methods have been devised to bring about the rehabilitation of inmates so that they can adjust themselves to free society after their final release from the prison institution. Parole is one such device which seeks to protect society and assist the ex-prisoner in re-adjusting himself to a normal free-life in the community. Thus, it has a dual purpose, namely, protecting the society and at the same time bringing about the rehabilitation of the offender.

The Concept of Parole

Historically, parole is a concept known to military law and denotes release of a prisoner of war on promise to return. These days parole has become an integral part of the Anglo-American criminal justice system, inter-twined with evolution of changing attitudes of the society towards crime and criminals.

As defined by *J. L. Gillin*, "parole is the release from a penal or reformative institution, of an offender who remains under the control of correctional authorities, in an attempt to find out whether he is fit to live in the free society without supervision.[1] It is thus the last stage of correctional scheme of which probation may probably be the first. The life in a prison is so rigid and restrictive that it hardly offers any opportunity for the offender to rehabilitate himself. It is, therefore, necessary that in suitable cases the inmates should be released under proper supervision from the prison institution after serving a part of their sentence. This may serve a useful purpose for their rehabilitation in the society. This object is accomplished by the system of parole which aims at restoring the inmate to society as a normal law abiding citizen.

Another criminologist, *Donald Taft* characterises parole as a release method which retains some control over prisoners, yet permits them more normal social relationships in the community and provides constructive aid at the time they most need it. Thus, according to him, "Parole" is a release from prison after part of the sentence has been served, the prisoner still remaining in custody and under stated conditions until discharged and liable to return to the institution for violation of any of these conditions.[2]

The ultimate significance of parole lies in the fact that it enables the prisoner a free social life yet retaining some effective control over him. Every prisoner is carefully watched and one who shows potentiality for correction and responds favourably to the disciplined life inside the prison, is allowed considerable liberty and finally released to join the society conditionally. Thus, parole is essentially an individualised method of treatment of offenders and envisages a final stage of adjustment of the incarcerated prisoner to the community. *Dr. Sutherland* considers parole as the liberation of an inmate from prison or a correctional institution on condition that his original penalty shall revive if those conditions of liberation are violated.[3] The conditional release from prison under parole may begin anytime after the inmate has completed at least one-third of the total term of his sentence but before his final discharge. The object is to adjudge the adjustability of responsive inmates to normal society by offering them suitable opportunity to associate themselves with outside world.

As a result of the introduction of parole into penal system, all fixed term sentences of imprisonment above 18 months are subject to release on licence. Parole is taken as an act of grace and not as a matter of right and the convict prisoner may be released on condition that he abides by the promise. It is a provisional release from confinement but is deemed to be a part of the imprisonment. Release on parole is a part of the reformative

1. Gillin J.L. : Criminology and Penology (3rd Ed.). p. 339.
2. Taft & England : Criminology (4th Ed.) p. 485.
3. Sutherland & Cressey : Principles of Criminology (6th Ed.), p. 575.

process and is expected to provide opportunity for the prisoner to transform himself into useful citizen. Parole is thus a grant of partial liberty or lessening of restrictions to a convict prisoner, but release on parole does not, in any way, change the status of the prisoner.[1]

Sir Robert Cross has observed that parole is the release of a long term prisoner from a penal or correctional institution after he has served a part of his sentence under the continuous custody of the State and under conditions that permit his incarceration in the event of misbehaviour.[2]

In some countries like Britain, prisoners are released from prisons on parole and licence and kept under supervision till the term of imprisonment expires. During this period, the released prisoner has to abide by the rules and regulations prescribed under the law. It is high time when such a system with necessary legislation should be introduced in India as a part of After-Care programme for the rehabilitation of released offenders.

Parole and Indeterminate Sentence—Distinguished

Parole is closely linked with the system of indeterminate sentence under which instead of being compelled to serve a definite term of sentence, the offender is sentenced to a minimum and a maximum period of sentence and after he has finished the minimum term, usually one-third of the maximum prescribed, he is set at liberty with or without conditions. It, therefore, follows that the system of parole cannot function successfully without having indeterminate sentence. This does not, however, mean that these two systems are identical. Indeterminate sentence carries with it an element of uncertainty about the exact period of sentence which in itself is a great punishment to the offender ; while on the other hand, the system of parole serves a kind of pre-intimation to the parolee that he is nearing his final discharge. Again, in case of indeterminate sentence no specific period of sentence is ever laid down whereas the convicted prisoner who is released on parole is always initially committed to definite term of sentence and while undergoing the punishment, if he is considered fit for release on parole, he is so released for the remaining portion of his sentence as a parolee.

It is significant to note that grant of parole is a quasi-judicial function performed by the Parole-Boards. Before allowing a prisoner to be released on parole, the Parole Board has to ensure that the parolee has a suitable abode to live in and a satisfactory job to do. The Parole Officer has also to undertake a pre-parole orientation programme for the prisoner and make sure that he is well prepared to adjust himself to normal life and at the same time the conditions outside the institution are conducive to the development of his personality.[3]

Parole and Probation Compared

Although parole, like probation is based on the principle of individualisation of treatment of offenders and both include a programme of guidance and assistance to the delinquents, yet the two differ in many aspects. The fundamental points of difference between parole and probation

1. *Smt. Poonam Lata* v. *Wadhawan & others*, AIR 1987 SC 1383.
2. Sir Robert Cross : The English Sentencing System, pp. 31-34.
3. Sen P. K. : Penology Old and New (1943) p, 182.

are noted below :—

(i) As to their historical evolution, the system of probation owes its origin to *John Augustus* of Boston (U.S.A.) who around 1841 tried to convince the Judge of the Magistrate's Court that certain offenders would respond well to his supervision if committed to his care rather than jailed. The parole, on the other hand, came into existence much later somewhere around 1900.

(ii) A prisoner can be released on parole only after he has already served a part of his sentence in a prison or a similar institution. Thus, it essentially involves an initial committal of offender to a certain period of imprisonment and a conditional release subsequently after serving a part of the sentence. But in case of probation, no sentence is imposed, or if imposed, it is not executed. This, in other words, means that probation is merely the suspension of sentence and is granted as a substitute for punishment whereas parole is granted to a prisoner when he has already lived in prisons or a similar institution for a certain minimum period and has shown propensity for good behaviour.

(iii) As rightly pointed out by *Dr. Sutherland*, a probationer is considered as if undergoing "*treatment*" while he is under the threat of being punished if he violates the conditions of probation, but a parolee is considered to be in "*custody*" undergoing both *punishment and treatment* while under threat of more severe punishment, *i.e.*, return to the institution from which he has been released.

(iv) Another notable distinction between probation and parole is that former is a judicial function while the latter is essentially quasi-judicial in nature. Probation implies a procedure under which a person found guilty of an offence is released by the court without imprisonment subject to conditions imposed by the court and subject to supervision of the probation staff. In case of parole, a prisoner is released from prison to the community prior to the expiration of his term of sentence subject to conditions imposed by the Parole Board. Thus, the release of a parolee is not the result of a judicial decision.

(v) It has been alluded by *J. L. Gillin* that probation is probably the first stage of correctional scheme, the parole being the last stage of it.

(vi) Probation and parole also differ from each other from the point of view of stigma or disqualification attached therewith. There is no stigma or disqualification attached to an offender who is released on probation of good conduct,[1] but a prisoner released on parole suffers stigmatisation as a convicted criminal in the society.

Parole Distinguished from Furlough

Undoubtedly, parole and furlough are parts of the penal and prison

1. Section 12, Probation of Offenders Act, 1958.

system for humanising prison administration but the two have different purposes. Furlough is a matter of right but parole is not. Furlough is to be granted to the prisoner periodically irrespective of any particular reason merely to enable him to retain family and social ties and avoid ill-effects of continuous prison life. The period of furlough is treated as remission of sentence. Parole, on the other hand, is not a matter of right and may be denied to a prisoner even when he makes out sufficient case for release on parole if the competent authority is satisfied on valid grounds that release of a prisoner on parole would be against the interest of society or the prison administration. Thus, it could not be contended that a prisoner released on parole and surrendering later, is disqualified for furlough only and he is not disqualified for parole. His application for release on furlough has to be considered on merits and cannot be rejected at the threshold.[1]

Origin of Parole in U.S.A.

The origin of parole in United States of America can be traced back to the earlier system of indenturing prisoners which meant removal of prisoners and handing them over to the employers for work and supervision on condition of being returned back to prison if they did not behave properly.[2] Soon after, few State officials were associated with prisons for supervising and guiding the prisoners in their rehabilitation. By the end of eighteenth century, many Prison Aid Societies were formed to assist and help the ex-convicts in their rehabilitation in the society. By 1840's similar functions were assumed by the Federal States. Experience, however, showed that the commutation of the period of good-time allowance should only entitle a prisoner his release from the institution and not from the custody and supervision. This idea gained momentum through successful working of the system of parole in England. The Elmira Reformatory in New York State was the first to adopt the system of parole in 1869. This system was subsequently adopted by other States in America.[3] The main objectives of parole today are rehabilitation of the offender and at the same time protection of society from his anti-social acts. The United States Board of Parole Research unit is engaged in working out standard rules for parole to be applicable throughout the United States. With the passing of the Parole Reforms Act, 1977, a uniform system of parole has been implemented throughout the country so as to do away with inequalities of sentencing and its evil effects on prisoners.

The Educative Reformative Scheme in Hungary

The successful working of the system of parole as a corrective measure in America and Middle-West, inspired socialist countries to adopt similar measures for their prisoners. Experience with the system was very encouraging because it produced excellent results in the correctional field so far the rehabilitation of offenders was concerned. Particularly, Russia and Hungary found the system most workable and effective.

1. *Bhikhabhai Devshi* v. *State of Gujarat*, AIR 1987 Guj. 136.
2. Barnes and Teeters : New Horizons in Criminology (3rd Edn.) p. 423.
3. The Prisoners Rehabilitation Act in U.S.A. authorises furlough, a system of work release, which allows an inmate to participate in unsupervised employment in the community while residing in the institution during his leisure hours.

The preponderance of socio-economic conditions as the sole cause of crime has furnished fertile grounds for the effectiveness of reformative scheme in Hungary. The Hungarian jurists have evolved a system called "Educative Reformatory Work" as a punitive reaction to crime. The scheme corresponds to many institutional systems which undertake to reform the offenders. The Educative Reformatory Act, 1950 was passed by the Hungarian Parliament for individualised treatment of inmates. Under the system, the investigations are made by social agencies but the ultimate decision whether the offender should be put to educative reformatory work, rests with the Judge. Thus the system envisages a peculiar combination of administrative and judicial functions.

Under the Educative Reformatory Scheme, the prisoner is set free on parole and the period of parole ranges from a minimum of one month to a maximum of two years depend on the propensity of the prisoner. During this period the inmate is assigned specified compulsory work for which he is paid diminished wages. Thus he no longer remains a burden on the State and seeks to rehabilitate himself at his own cost. The system, however, does not work successfully if the period of inmate's sentence exceeds five years.

The ultimate object of the scheme of educative reformatory work under parole is to provide for the prisoner's socio-economic needs which contributed to his delinquent conduct. This does not, however, mean that these countries consider law merely as an instrument of satisfaction of human wants. They rather interpret law as a pre-condition for social defence meaning thereby that the society itself is nothing but a creation of law and each individual is contributing a part of his liberty by subjecting himself to social control.

The British Parole System

The failure of the British system of penal transportation and its unsatisfactory consequences led to the origin of parole in England. The abolition of the system of transportation of prisoners as a penal servitude resulted into overcrowding of British prisons. Consequently, a new method known as 'Ticket on Leave' was introduced in the later decades of eighteenth century as a measure for reducing the prison population. Unfortunately, the system did not yield good results because prisoners were discharged from prisons merely on surety for good behaviour without being prepared and trained for a disciplined life in the community. In absence of adequate After-care, these discharged prisoners often developed recidivistic tendencies thus rendering public life more insecure and unsafe. Therefore, it became necessary to introduce radical changes in the method of release under the system of 'Ticket on Leave' and this finally led to the evolution of modern system of conditional release on parole towards the first quarter of the nineteenth century.

The British penal system admits the following categories of persons for parole :—

(a) Those who are convicted for serious offences for which sentence exceeds three years. The parolees in such cases are to report to the police every month during the period of parole.

(b) Those who are habitual offenders and sentenced under the preventive detention laws.

(c) Juvenile delinquents who are institutionalised in Borstals, Reformatories and Rehabilitation Centres.

The utilisation of British convicts as labour in Australian farms was first started on an experimental basis. This generated a feeling that prisoners could be paroled out for a useful purpose rather than being confined in closed prison cells. But the conditional release granted to prisoners under parole necessarily implied their return to the prison if they acted in derogation of good behaviour. Thus the efficiency of parole essentially lay in two fundamental considerations, namely,—

(i) there must be disposition of good behaviour on the part of the prisoner ; and

(ii) conditional release under parole was in fact a reward for good behaviour in prison.

The release of prisoners on parole has now been accepted as a part of the rehabilitative programme in Britain. It affords an opportunity to the convicted prisoner to prove that he can return to community as a law abiding citizen if trusted and allowed to forget that he is an ex-convict.

The task of rehabilitation which was once left wholly to the voluntary organisations and agencies has now become a State responsibility. The Report of the Advisory Council on Penal System in England in 1973 recommended that the State should assume responsibility for the After-care of every inmate imprisoned by it.

The parole practices in United Kingdom have been criticized on three major grounds. *Firstly*, it is alleged that the system of parole does not work well because too many inmates enter from front door and leave through the backdoor unreformed and bent on new criminal activity. *Secondly*, indeterminate sentence leaves every one in the dark regarding the inmates' release. No one knows how long a person shall be in the prison. *Thirdly*, Parole decision-making policy is not explicit. In other words, Boards and Commissions responsible to release operate in secret according to tacit policies unknown and unknowledgeable to public and the offender. This contributes to cynicism.[1]

Parole, as a technique of correctional measure has been criticised by *J. Edgar Hoover,* the former British Director of FBI on the ground that mal-administration in making proper selection of prisoners and then pursuing their cases with vigour and proper attention frustrates the nobel objective underlying the scheme and ill-advised clemency granted to incorrigible convicts by way of release on parole does more harm than good to the community.

Parole In India

In India, prison reforms did not emerge out of the social movement but were necessarily an outcome of the worst conditions of treatment faced by the political sufferers in prisons during the period of their imprisonment. They repeatedly launched protests with the prison authorities and made all possible efforts to see that the rigours of prison life are mitigated and prisoners are humanly treated. In the meantime, the reformative trend

1. Martin L. Forst : Sentencing Reform in Reducing Disparity (Lon. 1982) p. 91.

which was gaining momentum in the field of penology all around the world also gave filip to the cause of correctional method of treatment of offenders in India. It was realised that confining convicts in closed prison cells hardly serves any useful purpose. The overall effect of these changes brought about significant reforms in prison administration in India during the later half of the twentieth century. But there has always been a lack of planned penal programme in this country. To take a concrete example, the system of probation is in practice in India for quite some time but it has always progressed in a haphazard manner without clear cut idea as to its ultimate goal. It is well known that probation implies supervision and control of probation officer over the probationers but today this task is entrusted to the Central Welfare Boards. This obviously throws a challenge to the legality of probation system insofar as entrusting the judicial functions to a non-judicial body like Welfare Board is concerned. However, it is not so with parole which is fully in conformity with the existing Indian penal laws.

It must be accepted that post-Independence era in India brought in its wake a growing realisation of the need of change in attitude towards the treatment of offenders. With advanced knowledge of human behaviour, the role of psycho-social environment in the correctional field cannot be under-estimated. The institutions such as parole and open air camps occupy a significant place in the correctional treatment of offenders inasmuch as they are directed towards narrowing down the gap between the prison life and the free life of the outside world.

Structural set up of Parole Boards and their Functions

The Parole Board consists of parole administrators who are from among the respectable members of society. Since the police is looked with bias and distrust in India and elsewhere, the police opinion about an inmate is not considered to be valid ground for allowing a particular offender on parole. The members of Parole Board are assigned the function of discharging convicted prisoners on parole after careful scrutiny. Thus, the Parole Board takes administrative decision on paroling out prisoners and while acting as such, they are performing a quasi-judicial function.

Another important function assigned to the parole personnel is to prepare a case history of parolees and help and advise them in the process of their rehabilitation.

Besides Parole Board, there is also a set of field workers functioning outside the prisons. These field personnel keep a close supervision over parolees and report the cases of parole violations to the parole authorities.

Thus the parole organisation by large, consists of three agencies, *viz.* the Parole Board, the Case Investigators and the Parole Supervisors ; all of them work in close liaison with each other.

In United States, the task of granting parole is handled by the expert psychologists and psychiatrists who subject a prisoner to a psychological test to determine his suitability for being paroled out. No such method, however, exists in India and the prospective parolee is given a simple hearing in prison itself to assess his feasibility for discharge on parole. The Indian law provides for parole only in cases of serious offenders who are committed to long term sentences. It has now generally been accepted that if at all the

prisoners are to be released prior to their final discharge, they must be released on parole so that they could be kept under proper supervision and guidance.

Conditions of Parole

It must be reiterated that the purpose of parole is not leniency towards the prisoner but to seek his rehabilitation in future life. Like probation and other forms of clemency, parole is a rehabilitative phase of law enforcement. The system essentially involves two considerations, namely :

(i) watchful control over parolee so that he could be returned to prison institution from which he was paroled out if the interest of public security so demanded ; and

(ii) constructive help and advice to parolee by securing him suitable work so as to develop self-confidence in him and finally to guard him against exploitation.

The success or failure of parole generally depends on the following factors[1] :

(1) It has generally been accepted that the offenders committed for crime against person are more suited for parole than those committing crime relating to property. The latter, often resort to recidivism and do not respond favourably to the conditions of release on parole.

(2) Family circumstances of the offender have much to do with the success or failure of parole. The noted criminologist, *Donald Taft* rightly contends that prisoners with domestic liabilities and family responsibilities are "good-risks" as compared to those who are bachelors or without family liabilities.

(3) Recent methodical researches on parole clearly demonstrate that recidivists often derogate from parole conditions and have to be brought back to prison sooner or later. The first offenders, on the other hand, are usually good parolees and readily adjust themselves to the conditions of normal society.

(4) Social status of the offender also has a direct bearing on the parole success. It is generally observed that offenders who belong to higher socio-economic strata or those who have a better educational background, respond favourably to the system of parole. The obvious reason for this is that such persons are generally committed to prison for an act which they might have committed due to sudden impulse or emotional disturbance for which they are usually repentant.

(5) At times, certain parolees prefer to waive off their clemency of being paroled out if their final discharge from prison or similar institution is not far off or if they feel that their release on parole under the supervision of parole staff is indirectly an expression of distrust for them.

(6) As a matter of policy, parole should be administered only to those prisoners who display an inclination for good behaviour and

1. Taft and England : Criminology (4th Ed.) pp. 504-5.

show respect for law and justice. The adaptability of prisoners can be assessed through a method of careful diagnosis by trained and qualified parole staff.

Modern penologists have suggested that correctional agencies administering parole must make use of *prediction procedure* to study the effectiveness of its decisions relating to parolees. Present day management training course stresses that mere experimentation is not enough but social agencies should get closer to their clients to understand the whole personality of the inmates.[1] These agencies have to perform the twin functions of keeping case-records and making decisions. The two activities are performed by different personnel whom *Duglus Grant*[2] calls information collectors and decision-makers. There is lack of proper coordination between the two functionaries. This does not, however, mean that the Parole Board is totally unconcerned about these facts but rather no adequate means of bringing the two together have yet been devised.[3]

Judicial Trend

The courts in India have generally favoured the view that the prisoners who have been incarcerated or kept in prison without trial for a long time, should be released on parole to maintain unity of family. It may be useful to refer to some of the decisions to support this contention.

The need to paroling out long-term prisoners periodically for reasonable spells, subject to sufficient safeguards ensuring their proper behaviour outside and prompt return inside, was highlighted by the Supreme Court in *Hiralal Mallick* v. *State of Bihar*.[4] In this case the appellant was found guilty of the offence under Section 326 (causing grievous hurt) of the Indian Penal Code and sentenced to eight years' imprisonment. He was only 12 years of age at the time of commission of the offence. The High Court reduced the sentence to 4 years keeping in view the tender age of the accused. The Supreme Court, in appeal directed release of the appellant on parole for reasonable spells so that his family ties are not snapped for long being insulated from the world and he does not become beastial and dehumanised. The Apex Court, however, noted that granting of parole for reasonable spells is subject to sufficient safeguards ensuring prisoner's proper behaviour outside the prison and prompt return inside on completion of parole term.

The Supreme Court, in *Dharamvir* v. *State of Uttar Pradesh*,[5] was once again called upon to consider the desirability of release of long-term prisoners on parole at regular intervals so that they are not totally cut-off from the society. In the instant case, the appellant was found guilty of murder and convicted for imprisonment for life. There being no scope for reduction of period of sentence, the Apex Court found parole desirable in such cases. It, therefore, issued directions to the State Government and the

1. Dressler David : Readings in Criminology And Penology, (1964) p. 599.
2. Former Chief of the Research Division of the California Department of Correctional Services.
3. Mannheim & Wilkins : Prediction Methods in relation to Borstal Training London, His Majesty's Statutory Commission.
4. AIR 1977 SC 2236.
5. (1979) 3 SCC 645.

jail authorities that such prisoners be allowed to go on parole for two weeks once in a year, throughout the period of imprisonment, provided they behaved well while on parole.

The Apex Court, in *Suresh Chandra* v. *State of Gujarat*,[1] has stated about the penological innovation in the shape of parole to check recidivism. It recommended liberal use of parole as a viable alternative for reducing overcrowding in prisons.

In *Krishanlal* v. *State of Delhi*,[2] the Supreme Court refused to accept economic necessity as a relevant factor for reducing the period of imprisonment for the offence of forgery. The Court, however, agreed that the accused could be released on parole for reasonable spells in such cases.

In *Babulal Das* v. *State of West Bengal*,[3] Mr. Justice Krishna Iyer of the Supreme Court (*as he then was*) struck a discordant note in adopting the observation made by the Calcutta High Court and observed :

> "It is fair that persons kept incarcerated and embittered without trial should be given some chance to reform themselves by reasonable recourse to parole power under Section 15 of the Maintenance of Internal Security Act, 1971."

In *Samir Chatterjee* v. *State of West Bengal*,[4] the Supreme Court however, set aside the order of the Calcutta High Court releasing on parole a person detained under Section 3 (1) of MISA and disfavoured the observation that long term preventive detention can be self-defeating and criminally counter-productive.

In *Smt. Poonam Lata* v. *Wadhawan and others*,[5] where a person detained under COFEPOSA Act of 1974 was released under an order of the Supreme Court on parole, the period of parole has to be excluded in reckoning the period of detention. In the instant case, the detenu was engaged in receiving smuggled goods from across the Indo-Nepal border and was making payments in foreign currency and remitting the sale proceeds of such smuggled goods out of country in shape of U.S. dollars with the help of others. The Counsel for the detenu Shri Jethmalani had contended that preventive detention was not a sentence by way of punishment and, therefore, the concept of serving out the sentence which pertains to punitive jurisprudence, cannot be imported within the realm of preventive detention.

This decision (*i.e., Smt. Poonam Lata's* case) has, however, been overruled by the Supreme Court by its judgment in *Sunil Fulchand Shah* v. *Union of India & other*,[6] which decided that parole may be granted by way of temporary release as contemplated by Section 12(1) or 12(1A) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (COFEPOSA) where detenu has approached the Government for securing release on parole. The grant of parole to such detenus under COFEPOSA Act is an administrative decision to be taken by the

1. (1976) 1 SCC 654.
2. (1976) 1 SCC 655.
3. AIR 1975 SC 606 (608).
4. AIR 1975 SC 1165.
5. AIR 1987 SC 1383. (Now overruled by decision in *Sunil Shah* v. *Union of India.*)
6. AIR 2000 SC 1023.

Government or its functionaries and the courts cannot, generally speaking, exercise the power to grant temporary parole because of the bar of judicial intervention under Section 12(6) of the COFEPOSA. This bar, however, does not affect the jurisdiction of High Court under Article 226 or of Supreme Court under Arts. 32, 136, 142 of the Constitution of India. The Supreme Court further ruled in this case that the period of detention under Section 10 of COFEPOSA has to be computed from the date of actual detention and not from the date of order of detention. This in other words, means that an order made under Section 12 of the temporary release of a detenu on parole does not bring the detention to an end for any period and does not interrupt the period of detention. It only changes the mode of detention by restraining the movement of the detenu in accordance with the conditions prescribed in the order of parole. In short, the period of parole has to be counted towards total period of detention unless rules prescribe otherwise.

In *Gurdeep Bagga* v. *Delhi Administration*,[1] a petition by life convict for parole on ground of illness of mother was rejected by the High Court on the ground that the petitioner was earlier continuously on parole for more than two years and had two elder sisters to look after the ailing mother. The Supreme Court, however, took a lenient view and recommended annual leave for life convict to maintain unity of family.

In *Veerumchanni Raghvendra Rao* v. *State of Andhra Pradesh*,[2] the Supreme Court ruled that release on parole and suspension of sentence during pendency of appeal in Supreme Court is liable to be struck down being *ultra vires* the statutory powers of State Government. The Andhra Pradesh Parole Rules, 1981 (Rule 23), and Andhra Pradesh Prison Rules, 1979 [Rule 974 (2)] were struck down in this case being inconsistent with Section 432(5) read with Section 389 of the Code of Criminal Procedure, 1973.

In its landmark decision in *Kesar Singh Guleria* v. *State of Himachal Pradesh*,[3] the Supreme Court observed that for exercising the power, function and duty to temporarily release the prisoners on parole, the paramount consideration which the releasing authority shall bear in mind is that the right to be released is not defeated merely because the prisoner on account of his impecunious condition is unable to offer a security bond or surety bond. The discretion to waive the requirement of furnishing bond should be exercised in cases of poor prisoners bearing in mind other relevant considerations of family-ties, roots in community and social conditions etc.

In a criminal appeal[4] decided by the High Court of Punjab & Haryana on 15th November, 1994, the question in issue was about the release of a Army Prisoner on Parole. It was held that when an Army personnel is convicted by a Court Martial and undergoing sentence in civil jail and is dismissed from service as a result of this sentence, or ceased to be subject to the Army Act, 1950, it would be erroneous on the part of the Army authorities to think that the prisoner having been handed over to civil (police and jail) authorities, they (*i.e.*, military authorities) had no authority

1. 1987 Cr. LJ 1419 (SC).
2. 1985 Cr. LJ 1009 (SC).
3. 1985 Cr. LJ 1202 (SC).
4. *Ex-Capt. P.S. Gill* v. *Chandigarh Administration*, 1995 (1) Crimes 622.

to release him on parole. The High Court ruled that despite the fact that the prisoner has otherwise ceased to be subject to Army Act, he could be still kept, removed, imprisoned and punished by the Army authorities as if he continued to be subject to Sections 179 and 123-B of the Army Act. The Court, therefore, issued a direction to Army Authorities to release the petitioner on parole for a period of four weeks to the satisfaction of the District Magistrate, Chandigarh. In this case, the Jail authorities had declined to release the prisoner on parole on the ground that he had been convicted by the Court Martial and, therefore, civil authorities had no jurisdiction to release him.

The Supreme Court in its decision in *Ramamurthy* v. *State of Karnataka*,[1] has observed that overcrowding in prisons can be considerably reduced by release of prisoners on parole, which is a conditional release of an individual from prison after he has served part of the sentence imposed upon him. Recommending liberal use of parole, the Court referred to the Report of All India Committee on Jail Reforms headed by *Justice A. N. Mulla* (1980-83) wherein the Committee has stated that the effect of parole is premature release which is an accepted mode of incentive to a prisoner, as it saves him from the extra period of incarceration and at the same time also helps in his reformation and rehabilitation.

Parole Violation

The release of a prisoner on parole though meant for his own rehabilitation, may not necessarily always be a success. At times, the parolee may deviate from the conditions on which he was released. This results into parole violation and he is liable to be returned to the prison or the institution from which he was parolled out. At first, a warrant of arrest is issued and served to the parole-violator and he is finally arrested and brought back to the prison or the institution by the parole authorities without the necessity of a fresh trial in his case. He is then given a 'parole-violation hearing' and offered every opportunity to defend his case in person or through a counsel. If he is unable to justify his conduct, he is made to undergo the unexpired term of his sentence. If he has violated parole conditions by committing another crime, then in that case, he shall be tried for the new offence and sentenced accordingly. But he shall not be committed to parole second time, *i.e.*, while undergoing a term of sentence for his subsequent offence.

In India, the Prisons Act (IX of 1894) expressly provides that if any prisoner fails without sufficient cause to observe any of the conditions on which his sentence was suspended or remitted or furlough or release on parole was granted to him, he shall be deemed to have committed a prison offence under Section 48-A of the Act. Such parolees shall be proceeded against under the appropriate law for parole-violation.

The American correctional system, however, provides for the return of parolees to the institution even without the parole law having been violated. This is intended either to enable the parolee to complete his industrial or technical training which he had to leave incomplete because of his discharge on parole or to offer him an opportunity to pick up new trade or a job or to

1. (1997) 2 SCC 642 (655).

complete the course of medical treatment and for similar other reasons. The practice of voluntary return of parolee to the institution for any of the aforesaid reasons is unknown to the Indian law of parole.

Essentials of an Ideal Parole System

It must be emphatically stated that reformation of the parolee through surveillance and assistance is the foremost object of parole. But neither supervision nor the assistance alone can make the system effective. The system must, therefore, inevitably include a combination of the two for its successful implementation.[1] Excessive supervision over parolees without proper guidance would virtually mean that the parole authorities are performing the police functions of keeping a close watch on the prisoner under threat of punishment taking it for granted that the later would definitely repeat the crime if not kept under surveillance. Conversely, assistance to parolees without proper supervision will also yield poor results. It is erroneous to think that parolees can reform themselves merely by affording them "easy freedom". It is a part of parole officer's duty to ensure that the parolee makes the best use of the opportunities placed before him after his release from prison. While handling parolees, priority should be on the protection of society against crimes rather than undue leniency towards the parolees. The essential requisites of an ideal parole system may briefly be summarised thus :—

(1) Emphasis must be on supervision as well as guidance and assistance to parolees so as to make the system useful to the society in general and the parolees in particular.

(2) Before release on parole, the parolees must be thoroughly prepared for parole administration. This task can be assigned to Classification Committees functioning under the parole system.

(3) The criterion governing selection of prisoners for grant of release on parole should not be the particular category to which the offender belongs nor the length of his sentence, but his suitability to respond favourably to the rehabitative processes and the fact that his social re-adjustment is more likely to be achieved by allowing him the benefit of parole than by treatment under detention in prison.

(4) The parolees must be assured an honourable employment and favourable surroundings at the time of their release on parole. This will inculcate hope, confidence and social responsibility in them. It would also help them in overcoming their inferiority complex for being ex-convicts.

(5) Since the parolees have to be rehabilitated within the society through various social agencies, it is desirable that the parole authorities should seek active co-operation of the public in this task.

(6) Parole Boards should be completely free from political pressures and only persons of proven ability and integrity should be inducted in these Boards. They should be well qualified full-time

1. Sutherland & Cressey : Principles of Criminology (6th Ed.) p. 586.

officials.

(7) The staff associated with parole agency should also be whole-time workers. Experience alone should not be the criterion for selecting field officials but well qualified and trained personnel should be recruited for this job.

The Object of Parole

As already stated, parole is a penal device which seeks to humanise prison justice. It enables the prisoner to return to the outside world on certain conditions. The main objectives of parole technique as stated in the Model Prison Manual are :—

(1) to enable the inmate to maintain continuity with his family life and deal with family matters ;

(2) to save the inmate from the evil effects of continuous prison life ;

(3) to enable the inmate to retain self-confidence and active interest in life.[1]

The Jail Reforms Committee (1983) recommended that besides the system of parole, there should also be the system of release of prisoners on furlough under which well behaved prisoners of certain categories should, as a matter of right, have a spell of freedom occasionally after they undergo a specified period of imprisonment, so that they may maintain contact with their near relatives and friends and may not feel uprooted from society. The furlough period should count towards the prisoner's sentence.

Thus it would be seen that the system of parole aims at meeting the ends of justice in two ways, namely, it serves as an effective punishment by itself inasmuch as the parolee is deterred from repeating crime due to threat of his return to prison or a similar institution if he violates parole conditions ; and secondly, it serves as an efficient measure of safety and treatment reaction to crime by affording a series of opportunities to the parolee to prepare himself for an upright life in society.

It is generally argued that the efficiency of parole administration is seriously jeopardised due to undue political and executive pressures being brought on the Parole Boards. In result, many undeserving prisoners procure their release on parole and thus the object of the system is completely defeated. It is to be noted that these undesirable influences find their way through the parole administration only because of the quasi-judicial nature of the Parole Board. A definite judicial policy is, therefore, much needed in matters of parole. But again, if the functions of parole are entrusted to the judicial machinery, it might create new problems because the courts are likely to take shifting stands on the question of fitness of the inmates for release on parole due to lack of proper psychological insight into human behaviour. Moreover, parole being a treatment reaction to crime, it will be grossly unjust to confine the system strictly within the frame of legal limits. This will eliminate the chances of reasoned discretion which shall be derogatory to the interests of justice. Therefore, as a workable alternative, it would be expedient that the executive functions performed by the Parole Board should be subject to

1. *Bhikhabhai Devshi* v. *State of Gujarat*, AIR 1987 Guj. 136.

judicial review. This, in other words, would mean that the Parole Board should assess the suitability of prisoners for release on parole and provide guidance to the judges in taking final decision in the matter. This would certainly help in making parole a real success in reducing the strain on the prisons and at the same time provide adequate after-care for the released prisoners. The primary goal should be to make the entire system more equitable. This can be achieved by enhancing the rule of law within the judicial and prosecutorial rank.[1]

It must be reiterated that a great majority of persons sentenced to imprisonment want to return to society as law-abiding citizens and only a few are anti-social and have no intention of changing their lawless attitude after their discharge from prison. Therefore prisons do not serve the purpose of training and rehabilitation of all categories of offenders, particularly those who are long-termers or hardened criminals. Further, it is also realised that mere treatment in prison or a similar institution does not help in the ultimate rehabilitation of offenders. The stigma which the society attaches to the released inmates, makes it difficult for them to return to community in spite of their sincere desire to live honestly. Thus an ex-convict finds himself handicapped and stigmatised. Therefore, release of prison inmate on parole may help him in solving his socio-psychological problems and make his social rehabilitation possible without much difficulty. It is thus evidently clear that parole as a part of the after-care programme, serves a very useful purpose for the resocialisation of convicted prisoners, making them lesser risks for the society. It is not only more favourable to the social readjustment of the prisoners but at the same time it is also more conducive to their mental and physical health, since they get an opportunity to live in free and normal life. Besides, it also relieves the State of its burden of expenditure on prisoners to a considerable extent.

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1. Martin L Forst : Sentencing Reform : Experiments In Reducing Disparity, p. 96.

Chapter XXII

PROBATION OF OFFENDERS

The problem of easing pressure on prisons has been engaging the attention of penologist throughout the globe. Undoubtedly, probation is one of the measures which may be used by courts as an improved form of non-custodial alternative in place of incarceration. This correctional device is being increasingly used by the magistracy in modern times.

The age old custodial measure and institutional incarceration presents two crucial problems, namely, it increases the dependence of offender and at the same time decreases his capacity to readjust to normal society after release. Conformity with the strict prison discipline is no guarantee that the prisoner has really transformed into a law abiding citizen.[1] Other inevitable consequences that flow from prisonisation of offender are loss of job, separation from family and contamination due to association with other professional delinquents.[2] On the other hand, reformative treatment measures in the form of guidance and supervision have proved effective in meeting the needs of delinquents for their rehabilitation in the community. Probation of offenders has been widely accepted as one of the non-institutional methods of dealing with corrigible offenders, particularly the young offenders and the first offenders. It aims at rehabilitation of offenders by returning them to society during a period of supervision rather than by sending them into the unnatural and socially unhealthy atmosphere of prisons. The offender is allowed to remain in the community and develop as a normal human being in his own natural surroundings. With the help of advanced techniques of social case-work, the probation officer endeavours to bring about the desired change in offender's attitude to life and his social relationship with the community.

Concept and Definition of Probation

The release of offenders on probation is a treatment device prescribed by the court for persons convicted of offences against the law, during which the probationer lives in the community and regulates his own life under conditions imposed by the court or other constituted authority, and is subject to supervision by a probation officer.[3]

The term 'probation' is derived from the Latin word '*probare*' which means 'to test' or 'to prove'. Etimologically probation means 'I prove my worth'. *Homer S. Cunnings* observed, "Probation is a matter of discipline and treatment. If probationers are carefully chosen and supervision work is

1. Jyotsna Shah : Studies in Criminology & Probation Services in India (1973) p. X.
2. Nigel Walker : Sentencing in a Rational Society, p. 101.
3. Probation and Related Measures (New York) United Nations, Department of Social Affairs, (1951) p. 287.

performed with care and caution it can work miracles in the field of rehabilitation.

Don M. Gottfriedson observed probation as "a procedure by which a convicted person is released by the Court without imprisonment subject to conditions imposed by the Court. Thus probation is part of the decision-making process of Judges at the time of sentencing". The object of probation, as of all methods of treatment, is the ultimate rehabilitation of the offender in the community.

Donald Taft defines probation as the postponement of final judgment or sentence in a criminal case, giving the offender an opportunity to improve his conduct and to readjust himself to the community, often on condition imposed by the court and under the guidance or supervision of an officer of the court. In case of juvenile-probationers, non-criminal procedure is adopted and it is less formal. Thus the system of probation involves restrictions on the liberty of probationer and refrains him from disapproved behaviour, or conversely, compels him to perform certain required acts which may be irksome or even painful to him.[1] The basic purpose is to keep the delinquent away from evil consequences of incarceration and offer him an opportunity to lead socially useful life without violating the law.

The philosophy underlying probation is based on the assumption that most men who become criminals do so because of their environment and special circumstances and that in suitable cases it is possible to change the conditions which led to a man's fall from proper standards and reclaim him as a sound normal citizen.

Thus it can be said that probation is a treatment reaction to law-breaking and an attempt to mitigate the rigours of the offender rather than making him suffer incarceration in the prison institution.

Some penologists have defined probation as a method of dealing with specially selected offenders and consists of conditional suspension of punishment while the offender is placed under personal supervision and is given individualised treatment.

Probation is often misconceived by some people as an easy let-off or a form of leniency and not a punishment. But this notion is rather misleading. Probation, whether it is for juveniles or adults, permits a more normal social experience than institutionalisation and makes possible varying degrees of control over delinquents together with the option of sentencing him to an institution if he violates probation conditions. In other words, probation enables the delinquent to maintain contact with his family and other social agencies. It means a less routinised and more self-directed existence. Unlike imprisonment, it makes the offender independent and leaves him responsible for self-support. It enables the probationer to keep himself away from criminogenic atmosphere of prison and earn his living rather than leading an idle and wasteful life. He does not remain a burden on his family or society because he can earn his living himself. In short, probation offers an opportunity for the probationer to adjust himself to normal society thus avoiding an isolated and dull life in the prison.

Probation is a conditional release of an offender under supervision. As

1. Taft and England : Criminology (4th Ed.) p. 375.

a corrective measure, supervision can be used in two ways, namely, before or after the custodial sentence. If it is applied to an offender before custodial sentence, it is known as 'probation' but if it is applied to an offender who has just been released from a custodial sentence, then it is known as 'parole'. Undoubtedly, probation is an embodiment of a progressive criminal policy based on individualisation of treatment. It is rather a selective measure depending on the discretion of the court. The actual selection for release on probation depends on the careful investigation of personal case-history and social circumstances of the offender. The investigation is done by a Probation Officer who prepares a pre-sentence report[1] to be filed before the trial court prior to the final disposal of the case.

The system of probation involves conditional suspension of punishment. An offender may be released on probation either after the sentence is passed in his case or without passing of a sentence. In the former case, the sentence is suspended and delinquent is placed under probation while in the latter, he is put under probation straightway without any sentence being passed on him. Thus, the suspension of sentence may refer either to the suspension of the execution of sentence as in the former case or suspension of imposition of sentence as in the latter case, depending upon the discretion of the court.

From the constitutional standpoint, "probation is a status of a convicted offender during the period of suspension of his sentence in which he is given liberty conditioned on good behaviour and the State helps him in such an instance of good behaviour". This is rather a guiding policy in implementing probation.

The offender may be released on probation after the suspension of his sentence on following two considerations, namely,—

(i) his case may be considered as really hopeful when judicial leniency is expedient ;

(ii) probation may be intended to serve a positive role as a method of guidance, assistance and supervision of the probationer so that he may rehabilitate himself for the normal law-abiding life. The suspension of probationer's sentence is conditioned by his good behaviour during the period of probation and therefore it acts as a sufficient deterrent for the offender and thus serves as a punitive reaction to crime. In other words, the system of probation serves to bridge the gap between punishment and measures of safety, that is, the moral responsibility and the social defence, and thus it seeks to combine the *punitive* and the *treatment* reaction to crime.

Without under-rating the merits of the system, it must be conceded that from the legal standpoint it is difficult to conceive of a system in which judicial powers can be fettered without taking the risk of value considerations.

According to *Howard Jones*, the following conditions must be fulfilled before allowing the benefit of release on probations to an accused person :—

(1) No punishment should be imposed initially ;

(2) The offender should be given a definite period to redeem himself ;

1. Section 7 of the Probation of Offenders Act, 1958.

(3) During this period, delinquent should be placed under supervision of a probation officer for two obvious reasons :—
   (i) in order to keep the court informed about his progress ; and
   (ii) to help him to make the best use of the opportunity given to him.

(4) If the offender responds favourably, his initial crime should be deemed to have been scrapped, but if he fails to do so, he may be brought back to court and sentenced for the original crime as also for any other crime which he might have committed.

It is thus evident that probation is not a "let-off" as alleged by some critics because the probationer must either respond favourably to reformation or suffer imprisonment later. The original offence remains punishable throughout the period of probation and the offender is liable to be punished in case he violates the conditions of the probation order. Again, probation is also not a compulsive measure as it rests on voluntary acceptance of conditions by the probationer. Thus it depends on the willing co-operation of the probationer to refrain from violating probation law and abide by the terms of probation order.

Object of Probation

The Supreme Court has spelt out the object of the Probation of Offenders Act, 1958 in the following words :

> "The purpose of the Act is to stop conversion of youthful offenders into stubborn criminals as a result of their association with hardened criminals of mature age in case of youthful offenders are sentenced to undergo imprisonment in jail. Modern criminal jurisprudence recognises that no one is born criminal and that a good many crimes are the result of socio-economic milieu. Although not much can be done for hardened criminals, yet a considerable emphasis has been laid on bringing about reform of young offenders not guilty of very serious offences by preventing their association with hardened criminals. The Act gives statutory recognition to the above objective."[1]

Thus, ultimate purpose of this progressive legislation is to reclaim back those young and first offenders to orderly society who have for certain reasons fallen into bad company or gone astray and landed into criminality. The Act is not meant for hardened and habitual offenders who are beyond redemption and are incorrigible.

Probation and Suspended Sentence—Distinguished

Although probation to some extent has its historical roots in suspended sentence and both of them are closely linked with court procedure but the two materially differ in many aspects. All suspended sentences are not probation. The probation must carry with it some degree of supervision which is not necessary in case of suspended sentence. As regards the suspended sentence, Judges are restricted by statute in invoking it. In some cases *imposition* of sentence is suspended while in others its *execution* is

1. *Ramji Missar* v. *State of Bihar*, AIR 1963 SC 1088; *Ram Naresh Pandey* v. *State of M.P.*, (1974) 3 SCC 30; *Jagdev Singh* v. *State of Punjab*, AIR 1973 SC 2427; *Musa Khan* v. *State of Maharashtra*, 1976 Cri. L.J. 1987 (SC) etc.

suspended. As to the desirability of one of these forms over the other, general view is that out of the two, the suspension of imposition of sentence is preferable. This is because of the fact that in this case there is lesser stigma attached on the offender. Commenting on the suspended sentence, *Barnes* and *Teeters* observed that suspended sentence is vestige of the era of retributive justice and should either be abolished or reinterpreted in the light of the newer philosophy of probation. In their view, when certain jurists began to place restrictions on the quasi-freedom of the recipients of the suspended sentence, the rudiments of probation began to emerge.[1]

Distinguishing probation from suspended sentence, *Sir Leon Radzinowicz* observed that probation is far more ambitious and adaptable idea than discharge or suspended sentence. Under probation, the court prescribes no sentence but instead, requires the offender to be under supervision of a probation officer and maintain contact with him for a prescribed period. In England, this period may vary from one to three years and in parts of United States it may be upto five years. The probationer becomes liable to sentence for original crime only when he fails to keep the requirements or commits another offence. Probation is essentially selective, designed only for those who have prospects to reform.[2]

Origin of the Probation System

The history of probation can be traced back to the medieval concept of 'benefit of clergy' surviving in England and America until the middle of the nineteenth century. The privilege of 'benefit of clergy' permitted clergy and other literates to escape the severity of the criminal law.[3] It meant suspension of the execution of sentence for sometime which could gradually be extended to suspension of sentence for an indefinite period as long as the delinquent behaved well.

Probation in U.S.A.

It is generally said that great ideas often have modest beginning. This is true with the origin of probation as well. In America *John Augustus*, a shoe-maker of Boston in 1841 volunteered to stand bail for a person charged with drunkenness in a local court. The defendant showed signs of reform. The Judge ordered a nominal fine and released the offender. Fascinated by this incident, *John Augustus* started standing bail for more and more offenders and took upon himself the duty of helping and supervising them during the period of bail. Subsequently, he helped delinquent women and children also in their rehabilitation. Thus he saved over two thousand persons from the rigours of prisonisation. It is from here that the system of probation began. *John Augustus*, was, however, cautious in selecting offenders to be accepted under his charge. He picked up only those delinquents and accepted them as apprentices who were not totally depraved but showed signs of reformation. He arranged to send them to school and provided them with some honest employment and lodging. He maintained an up-to-date record of all the cases he had handled. This provided a blue-print

1. Barnes & Teeters : New Horizons in Criminology (3rd Ed.), Chapter on Probation.
2. Radzinowicz Leon : The Growth of Crime, p. 308.
3. F. W. Grinel—"The Common Law History of Probation" Journal of Criminal Law, Vol, XXXII (No. 1), May-June 1941, p. 15.

for modern probation system. Later, *Father Cook* of Boston also took keen interest in the rehabilitation of young offenders. He drew attention of the courts to the fact that these offenders were mostly the victims of their circumstances and were corrigible if placed under proper supervision and guidance. He associated himself with the criminal courts of Boston to advise the Judges in matters of juvenile trials.

Probation law was formally enacted in Massachusetts State for the first time in 1878 and probation officers were appointed for the city of Boston. The probation programme was subsequently extended to other cities in the State of America. In course of time juvenile courts were established and the system of probation was extended to these courts also. By the middle of the twentieth century probation became so popular that it began to be extensively used in cases of adults, juveniles and women in most parts of the United States.

Expressing his views about the extension of probation system *Donald Taft* rightly observed that other States were rather slow to follow the Massachussett's example. Illinois adopted the system of probation in 1899. Thereafter, other States followed the suit and by the year 1956 all States accepted probation for rehabilitation of their delinquents. Under the American probation law, the benefit of release on probation extends to following offences :—

(i) crimes of violence ;
(ii) crimes involving use of deadly weapons ;
(iii) sexual offences ;
(iv) crimes against the Government or treason ;
(v) offences for which specific mandatory punishment is provided ; and
(vi) recidivists.

In some of the American States probation is being extensively used for all offenders excepting the recidivists who are excluded from being admitted to the benefit of probation law. The jurisdiction of Federal Courts as regards admitting the offenders to the benefit of probation is, however, narrowed down by several statutes passed during the preceding few decades.

Probation in U.K.

In U.K. the system of probation received statutory recognition in 1907 with the enactment of Probation of Offenders Act in that year. At Birmingham, however, a separate court for the trial of teenage criminals was established earlier in 1905. The Probation of Offenders Act, 1907 provided that an offender could be discharged on probation either after certain sentence being imposed on him or even before the imposition of the sentence. His release on probation could either be absolute or conditional, depending on his antecedents, character, age, physical and mental condition and the circumstances which prompted him to commit the offence. Probation Officers were separately appointed for adults and children.[1] The Act was amended in 1908 and again in 1914. With the enactment of the Criminal Justice Act

1. Section 3 of the English Probation of Offenders Act, 1907.

1948, probation was extended throughout England[1] as a measure of correctional method of treatment. The entire country was divided into a number of probation areas for this purpose each having a fixed number of probation officers to help and advise the courts. Although probation for women was introduced in England at a much later stage than for adult males but it has yielded wonderful results so far rehabilitation of women offenders is concerned.

The Brooklyn Plan which recommended differed prosecution for delinquents provided that a juvenile offender charged with an offence is to be admitted to probation without being convicted.

Probation of offenders has been considered as an effective method of easing pressure on prisons. The Courts are provided with an improved range of non-custodial alternatives to avoid unnecessary incarceration of offenders.

The English Criminal Justice Act, 1982, however, suggested reorganisation of Probation Committees for the purpose of redressing the situation created by House of Lord's decision in *Cullen* v. *Rogers*.[2] The opinion of House of Lords that there was no power to include in a probation order a requirement that the probationer should attend a day-centre caused considerable alarm. There are at present hundreds of such centres operating in Britain. Thus the system of probation, supervision and conditional release on licence is now practised as an effective After-care programme for treatment and rehabilitation of offenders in United Kingdom.

In deciding whether an accused should be allowed or denied the benefit of release on probation, the English courts are generally guided by policy considerations. This contention finds support in the decision in *Pickett* v. *Fesq*[3] wherein an elderly woman of small means pleaded guilty of a charge of having attempted to take out of the country £ 85 sterling knowing it well that she could take only £ 5 sterling under the Exchange Control Act, 1947. She pleaded that the money had to be taken to Italy where her son was without any work and was in great financial distress. She was released on probation but in appeal it was held that respondent's offence being a deliberate one, should not have been taken lightly by the trial court. The case was, therefore, remitted to trial court with a direction that the probation order be withdrawn and respondent should be punished for the offence which related to country's economy.

Probation in European Countries

Probation as a measure of treatment of delinquents is practised in several other countries of the world in different forms. It is being extensively used as an effective After-care remedy for the treatment of juvenile offenders. In France, Germany and Russia, probation has been adopted as a measure of social defence. In Austria, probational remedies are mandatory for offenders under eighteen years of age. Greece accepted probation as a correctional measure in 1951. Similar system is adopted in Ireland, Israel,

1. Section 56 (a) of this Act enables the British Prison Commissioner to apply a system of release on licence to persons who were below 18 years of age at the time of commencement of the sentence.
2. (1982) 1 WLR 729.
3. (1949) 2 All ER 705.

Italy, Switzerland and Netherland also.

Probation in Sweden

Sweden is internationally known for its progressive penal philosophy and initiative in the correctional field. Only twenty per cent of the total number of offenders are sent to prison while the remaining 80 per cent are subjected to correctional treatment method such as probation, parole, half-way houses, work centres etc. Even the cases of those who are sent to prison are constantly reviewed so that they can be transferred to non-institutional service as soon as possible. The supervision of offenders under probation is entrusted to the "Commission of Trust" consisting of volunteers who seek advice from probation officer. Efforts are also being made to intensify treatment and supervisory services through probation in non-institutional sector.

Probation System in Japan

Progressive treatment system for offenders has found statutory recognition in the administration of criminal justice in Japan. The Japanese Code of Criminal Procedure, 1922 expressly stipulated the discretionary power of the public prosecutors in matters of suspension of prosecution and execution of sentence. The offenders, particularly the juvenile delinquents, are placed under probationary supervision.

The system of granting probationary supervision to those who are granted suspension of the execution of sentence was fully introduced in Japan in 1955. Almost twenty per cent offenders are allowed probation under supervision while eighty per cent are given probation without supervision. There is a network of probation supervision officers to look after the probationers.

Probation in India

In India, probation is used as an institutional method of treatment which is a necessary appendage of the concept of crime. The western view disfavours the use of institutional methods in a legal system because it is likely to create problems. In their opinion probation service should be exclusively administered by voluntary organisations and welfare boards comprising sociologists, psychologists, psychiatrists, etc. and the Judges should not be associated in the functioning of these agencies. The objective of the institutional treatment through probation is to correct the effects of the causative factors of criminality in the controlled atmosphere of probationary supervision, utilising the helpful factors in the offender's personality, his family situation, attitude etc. This approach helps the probationer to restructure his life-pattern with renewed vigour and adjust himself in the community through healthy inter-personal relationships.

The Indian probation law provides that judicial power should be solely vested in the judiciary. The reason being that if the power of probation is delegated to extra-judicial agencies which lack judicial techniques, it would create serious problems as these agencies will be guided by their own value considerations. That apart, sociologists and psychologists would be concerned only with the problem of offender's reformation and would not be able to appreciate the legal implications of reformative measures. Thus, entrusting,

probation service to social agencies will mean delegating judicial functions to non-judicial bodies which is against the accepted norms of justice. Even assuming that probation is highly skilled technique which needs to be handled by specialised agencies, the fact that it is subject to judicial review under Art. 226 of the Constitution of India, would make it obligatory for the Judges to finally take it up for judicial scrutiny.

All correctional measures in the field of penology essentially involve individualized diagnostic formulation of each delinquent which will determine the nature of the control and treatment plan for him. This, in other words, equates an offender to a patient who needs to be cured rather than punished. Probation as a correctional measure undoubtedly lays greater emphasis on treatment methods. But from the legal standpoint it is not the question of putting the delinquent in a hospital, instead it is rather question of initiating judicial investigation and surveillance in offender's case under a definite legal procedure. The procedure established under judicial system requires that once a person is held guilty, the sentencing process in his case must begin forthwith.

Historical Perspective of Probation Law in India

In India, probation received statutory recognition for the first time in 1898 through Section 562 of the Code of Criminal Procedure, 1898[1]. Under the provision of this section, the first offender convicted of theft, dishonest mis-appropriation or any other offence under the Indian Penal Code punishable with not more than two years imprisonment could be released on probation of good conduct at the discretion of the Court.[2] Later, the Children Act, 1908, also empowered the court to release certain offenders on probation of good conduct. Similar provisions existed in the Children Act, 1960 which now stands repealed consequent to passing of the Juvenile Justice Act, 1986.

The Central Government appointed a committee in 1916 to consider the provision of the Criminal Procedure Code. Particularly, it suggested revision of Section 562 and extension of its provisions to other cases also.

The scope of probation law was extended further by the legislation[3] in 1923. Consequent to Indian Jail Reforms Committee's Report (1919-20), the first offenders were to be treated more liberally and could even be released unconditionally after admonition. The first offenders were now classified under two categories, namely :—

(i) male adult offenders over twenty-one years of age ; and

(ii) young male adult offenders under twenty-one years of age and female offenders of any age.

The release of offenders on probation could now be extended not only to offences under the Indian Penal Code but also to offences falling under special enactments. To cope up with the extended probation, a number of Remand Homes, Rescue Homes, Certified Schools and Industrial Schools

1. Now Section 360 of the Code of Criminal Procedure, 1973.
2. As many as 156 offences came within the ambit of probation law under the provisions of that section.
3. Section 157 of the Amending Act No. XVIII of 1923.

were established in Bombay, Madras and Calcutta.[1]

The Government of India in 1931, prepared a draft of Probation of Offenders Bill and circulated it to the then Provincial Governments for their views. The Bill could not, however, be proceeded further due to pre-occupation of the Provincial Governments.[2] Later, the Government of India in 1934, informed the local governments that there were no prospects of a central legislation being enacted on probation and they were free to enact suitable laws on the lines of the draft Bill. Consequently some of the Provinces enacted probation laws[3] which assumed considerable importance because they introduced for the first time provisions regarding pre-sentence enquiry report of probation officer, supervision by paid and voluntary probation officer and compensation for injury caused to a person by the offender's delinquent act. The probation laws enacted by Provinces, however, lacked uniformity.

After the Indian independence, certain concrete steps were initiated to popularise probation as a correctional measure of treatment of offenders. A Probation Conference was held in Bombay in 1952 on the advice of *Dr. Walter Reckless*, the United Nations Technical Expert on Correctional Services. This Conference was a milestone in the progress of probation law in India. The noted American criminologist, *Dr. Walter Reckless* addressed the Conference as a U.N. technical expert and gave valuable suggestions on Prison Administration in India. Consequently, All India Jail Manual Committee was formed to review the working of Indian jails and suggest measures for reform in the system. The Committee in its Report[4] of 1957 pointed out that there was no liaison between the government, the probation personnel, the police, and the prison administrators in implementation of the probation law. The Committee also highlighted the need for a central law on probation with greater emphasis on release of offenders on probation of good conduct so that they are reclaimed as self-reliant members of society without being subjected to deleterious effects of prison life.

Legislative History of Probation law in India

Consequent to the Report of the Jail Manual Committee (1957-59) the Government of India decided to have a comprehensive legislation on probation of offenders. To accomplish this objective, a Bill on probation was introduced in Lok Sabha on November 11, 1957. The motion for consideration of the Bill was moved in the House[5] by late Shri B.N. Datar on November 14, 1957. The Bill was referred to a Joint Select Committee of the Houses headed by Sardar Hukum Singh as Chairman.

The Joint Committee held seven sittings in all. The first sitting was held on December 18, 1957 while the last sitting was held on February 19,

1. Sen P. K. Penology : Old and New (1943), p. 169.
2. Kulkarni R. A. : Probation of Offenders in India, (1971) p. 5.
3. The C. P. & Berar : Probation of Offenders Act, 1936 ; The Madras Probation of Offenders Act, 1937 : The Bombay Probation of Offenders Act, 1938 ; The United Provinces First Offenders Probation Act, 1938 ; The Mysore Probation of Offenders Act, 1943 ; The Hyderabad Probation of Offenders Act, 1953 and the West Bengal Offenders (Release on Admonition and Probation) Act, 1954.
4. All India Jail Manual Committee Report (1957) Para 135.
5. Parliamentary Debates dated 14 November. 1957.

1958. The Bill was handed over by the Joint Committee to the Lok Sabha on February 25, 1958 which passed it and it became an Act after President's assent on May 16, 1958.

The Probation of Offenders Act, 1958

The Probation of Offenders Act[1] (Act No. 28 of 1958) contains elaborate provisions relating to probation of offenders which are made applicable throughout the country. The Act provides four different modes of dealing with youthful and other offenders in lieu of sentence subject to certain conditions. These include :—

(1) release after admonition[2] ;

(2) release on entering a bond on probation of good conduct[3] with or without supervision, and on payment by the offender the compensation and costs to the victim if so ordered, the courts being empowered to vary the conditions of the bond and to sentence and impose a fine if he failed to observe the conditions of the bond ;

(3) persons under twenty-one years of age are not to be sentenced to imprisonment unless the court calls for a report from the probation officer or records reasons to the contrary in writing ;[4] and

(4) the person released on probation does not suffer a disqualification attached to a conviction under any other law.[5]

Thus it would be seen that the provisions of the Probation of Offenders Act are not confined to juveniles alone, but extend to adults also. Again, provisions of the Act are not only confined to offences committed under the Indian Penal Code but they extend to offences under other laws such as the Prevention of Corruption Act, 1947 ; the Prevention of Food Adulteration Act, 1954 ; the Customs Act, 1962 ; the Prevention of Black Marketing & Maintenance of Supplies of Essential Commodities Act, 1980 ; the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974, Narcotic Drugs & Psychotrophic Substances Act, 1985 etc.

Section 11 of the Probation of Offenders Act, 1958 widens the scope of probation by adding an enabling provision regarding the competence of the courts to make order under the Act in appeal and revision and powers of the appellate and revisional courts in this regard. The higher courts have been empowered to grant probation in appropriate cases, which was denied to the accused by the lower court. They may also cancel probation granted by the trial court, where it is expedient in order to prevent the misuse of probation.[6]

As to the release on probation, the Supreme Court in its decision in *Ramamurthy* v. *State of Karnataka*[7] observed that it really results in

1. For the text of the Act, *See* Appendix V.
2. Section 3.
3. Section 4.
4. Section 6.
5. Section 12.
6. *Mohd. Aziz* v. *State of Maharashtra*, AIR 1976 SC 730.
7. (1997) 2 SCC 642.

suspension of sentence, as the person released on probation is required to execute a bond under the provisions of the Probation of Offenders Act, 1958, requiring maintenance of good conduct during the probationary period, the failure to do which finds the person concerned in prison again. The Act contains provision of varying conditions of probation and also lays down the procedure to be followed in case of the offenders failing to observe those conditions.[1]

Procedure

The appropriate stage at which probation order may be made by a court is at the time of pronouncement of judgment. The Judge may make such an order straightway without calling for a report[2] from the probation officer or he may prefer to call for a report. However, it is always advisable to call for a report from the probation officer because at times material available on record in course of trial is hardly sufficient for the presiding Judge to make up his mind on the point whether the accused should be admitted to the benefit of release on probation or not. The court must record a clear finding about the age of the offender after recording necessary evidence.

With a view to avoiding delay in the disposal of the case, it would be proper to obtain the probation report before the trial is completed. In warrant cases, the probation officer is directed to prepare probation report of the offender right at the time the 'charge' is framed.

Other Enactments

Besides the Probation of Offenders Act, 1958, the provisions of Sections 360 and 27 of the Code of Criminal Procedure, 1973 and the Juvenile Justice (Care and Protection of Children) Act, 2000 also provide for the release of certain offenders on probation. These provisions are as follows :—

(i) Section 360 of the Code of Criminal Procedure, 1973, provides the rationale of protection which is extended to young offenders under the Indian law. *Firstly*, the section excludes certain types of offences (for which draconic punishment is provided) from the purview of the Probation of Offenders Act, 1958. *Secondly*, the section prescribes certain age-limit for offenders to be admitted for release on probation ; and *thirdly*, the section explicitly provides that probation applies only to the first offenders. It is thus evident that the law suggests a selective application of the probation service to only those offenders who are likely to respond favourably to the rehabilitative processes.

(ii) Section 27 of the Code of Criminal Procedure, 1973, provides that any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the court, is under the age of sixteen years, may be tried by the court of a Judicial Magistrate or by any Court specially empowered or any other law for the time being in force providing for the treatment, training or rehabilitation of

1. *Ramamurthy* v. *State of Karnataka*, (1997) 2 SCC 642 at p. 654.
2. *Mohd. Aziz, Mohd. Nasir* v. *State of Maharashtra*, 1976 SCC (Cri) 164.

youthful offenders. It must be noted that the age-limit of a juvenile was raised from 15 to 16 years to avoid inconsistency with the provisions of law contained in the earlier Children Act, 1960 and it is now 18 years under the Juvenile Justice Act of 2000.

(iii) The Juvenile Justice (Care and Protection of Children) Act, 2000 enunciates the measures for custody and control of destitute and neglected children and also provides for the protection and treatment of delinquent children in need of care and protection as also the children who are uncontrollable and victims of one or the other offence. The Act lays down precisely the procedure to be adopted by the Juvenile Court with regard to investigation and trial of juveniles.

(iv) The Juvenile Justice (Care and Protection of Children) Act, 2000 which came into force with effect from December 30, 2000 and extends to whole of India excepting the State of Jammu & Kashmir, further provides for the release of children who have committed offences, on probation of good conduct and placing them under the care of their parents or guardians or other fit persons executing a bond, with or without sureties to be responsible for good behaviour and well being of the juvenile for any period not exceeding three years. Before allowing a child on probation, the Juvenile Justice Board may make suitable enquiries.[1]

Scope of Probation under Section 360 of Cr.P.C. and Probation of Offenders Act compared

Unfortunately, the provision of Section 360 of the Code of Criminal Procedure, 1973, being rigid, permits no discretion whereas there is always a need to investigate in each case whether probation will suit to the requirements of the delinquent or not. There may be a case where a teenager might not be suited for probation, while on the other hand, an offender who is otherwise a recidivist, might respond well if he is admitted to the benefit of the probation law. It is, therefore, desired that an agency of well qualified social workers should be assigned the task of preliminary investigation on the basis of data and record of the offender proposed for release on probation. The Government of India have set up Welfare Boards to undertake the liaison work with the judicial authorities under its Five-Year Plans.

From the foregoing discussion it is evident that the probation law in India permits release on probation of even the adult offenders who are not recidivists and show potentiality for re-adjustment to normal life in society. Obviously, the provisions of Section 360 of the Code of Criminal Procedure, 1973 would not apply in such cases.

Unlike Section 360 of Cr.P.C., the Probation of Offenders Act has done away with the distinction on the basis of age or sex and as such all the offenders whether below 21 or above 21 years of age are equally entitled to avail the benefit of release on probation of good conduct or after admonition.

1. Sec. 15(e) and (f) of the Juvenile Justice (Care and Protection of Children) Act, 2000.

Moreover, grant of probation is not confined to first offenders as in case of Section 360 of Cr.P.C. The Court is competent to release a previous convict on probation if it thinks it proper to do so having regard to the circumstances of the case including the character of the offender and nature of the offence. Thus, the scope of the Act is far more wider than the provisions of Section 360 of Cr.P.C.

It is equally important to note that the power under the Probation of Offenders Act can be exercised by any Magistrate whereas such power under Section 360 Cr.P.C. is restricted to the Judicial Magistrate First Class. However, Second Class Magistrate may also exercise the power to release an offender on probation if he is specially authorised by the High Court in this behalf.

One of the important features of the Probation Act is the provision regarding placement of the offender under the supervision of a Probation Officer. But there is no such supervision provision under Section 360 of the Code of Criminal Procedure, 1973.

The power to grant probation under the Probation of Offenders Act is discretionary. But Section 6 lays down a restriction on the Court not to impose a sentence of imprisonment on offenders below 21 years of age when found guilty of offences not punishable with imprisonment for life. The Section provides :

"When any person under 21 years of age is found guilty of having committed an offence punishable with imprisonment (but not with life imprisonment), the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that having regard to the circumstances of the case including the nature of the offence and character of the offender, it would not deal with him under Section 3 or Section 4 (release after admonition or release on probation of good conduct) and if the court passes any sentence of imprisonment on the offender, it would record its reasons for doing so."

It has been held that the sentence of imprisonment imposed on the young offender below 21 years of age without compliance with the aforesaid provision of Section 6 would be wholly illegal.[1]

It may further be stated that provisions of Section 10(6) and 10(7) of the Immoral Traffic (Prevention) Act, 1956, which were inserted by the SITA (Amendment) Act, 1978 also constrain the Court from imposing sentence of imprisonment on first female offenders found guilty of having committed an offence under Section 7 and Section 8 of the Act unless it records reasons for doing so on the basis of probation officer's report and other materials which justifies female's imprisonment.[2]

After the enactment of law of the Probation of Offenders Act, 1958, most of the States introduced probation law for their offenders. Section 18 of the Act, however, provides that nothing in the Act shall affect the provisions of the under mentioned Act :—

(1) The Reformatory School Act, (Sec. 31).

(2) The existing State laws relating to juvenile delinquents and

1. *Jai Gopal* v. *State*, 1975 Cri. L.J. 921 (P. & H.).
2. *Bishnu Deo* v. *State of West Bengal*, AIR 1979 SC 971.

Borstal institutions.

(3) The provisions of the Immoral Traffic (Prevention) Act, 1956 ; and

(4) The Prevention of Corruption Act, 1988 [Sec. 5 (2)].

Section 14(a) of the Probation of Offenders Act contains a mandatory provision that whenever the court in its opinion considers it reasonable to admit an adult offender above the age of 21 years to the benefit of release on probation, it must first secure a pre-sentence report from the Probation Officer[1]. This report may not be necessary in case the offender is below twenty-one years of age, but if at all the report is submitted by the probation officer, it must be taken into consideration. The pre-sentence report prepared by the probation officer usually contains the details about the antecedents of the offender, his life history, family background, marital status, educational standard, social and economic background and the circumstances which led him to commit the offence. The report is to be treated as a confidential document[2] by the court.

After receiving a favourable report from the probation officer about the prospective probationer, the presiding Judge determines the exact period of probation for the delinquent. The period of probation may vary from offender to offender depending on his potentiality for readjustment to normal life in society. Thus, for some probationers a period of six months or so may suffice while for others even a period of a year or two may be insufficient. It has been generally accepted that keeping the delinquent under supervision for an indeterminate period until his rehabilitation, seems to be the best policy in this regard. In India, the maximum limit for the release of an offender on probation is three years.[3] The probationer can be set at liberty any time during the period of probation as soon as he is considered fit for release in the opinion of the probation officer. But this provision has been criticized for two obvious reasons. *Firstly*, leaving the probationer entirely at the mercy of the probation officer has its own disadvantages ; and *secondly*, it creates resentment among the probationers as they feel that they are being unduly discriminated by the probation authorities. To obviate these possibilities, some countries have prescribed a minimum and a maximum limit during which the probationer is kept under supervision and he can be discharged any time after he has completed the minimum period.

Judicial Trend

The role of courts in bringing about rehabilitation of offenders need not be over-emphasised. The final verdict as to whether an offender deserves to be admitted to the benefit of release on probation or not, lies with the court. Obviously, the decision as regards the release of an offender on probation is to be taken only after his guilt is proved. Probationary disposition being a post-conviction process, depends largely upon the probability of the offender to reform himself. Therefore, the Judge has to use his discretion in the matter most judiciously.

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1. *Ratanlal* v. *State of Punjab*, AIR 1965 SC 444. *See* also *Ramji Missar and others* v. *State of Bihar*, AIR 1963 SC 1088 and *Suja* v. *State*, AIR 1964 Raj. 72.
2. Section 7 of the Probation of Offenders Act, 1958.
3. *Ibid* Sec. 4.

Socio-legal researches on probation reveal that the factors which influence judicial sentencing, by and large, include age, sex or maturity of the offender, his family and educational background, nature of crime and the circumstances under which offence is committed and previous criminal record of the offender, if any. Experience has shown that youth, unblemished previous record, immaturity etc. are quite often good grounds for leniency while recidivism, violence, sex-perversiveness, etc. are sufficient to warrant severe punishment. These are, however, mere generalisations and do not in any way fetter judicial discretion in sentencing the offender. The Judge while considering the punishment can hardly afford to overlook the modern correctional trends in the field of penology. His decision, therefore, plays a vital role in deciding the future of the offender.

A survey of the available case-law on probation would reveal that before 1970's the courts were hardly responsive to changing trends in modern correctional penology due to lack of adequate professional training in rehabilitative measures. This contention finds support in some of the observations made by judicial elites of the country. Thus, *Mr. Justice S. M. Sikri*, the former Chief Justice of the Supreme Court of India, in his inaugural address at the eve of Probation Year on May 7, 1971, *inter alia*, observed :[1]

> "Not only the probation officers should be convinced of the advantages of the probation but the Judiciary and the Bar must become its votaries. Unfortunately, at present very little serious attention is paid to this aspect by the Judiciary or the Bar."

Again, *Mr. Justice V. R. Krishna Iyer*, former Judge of the Supreme Court, expressing his views on probation and other correctional services in the National Correctional Conference on the Probation and Allied Measures held in October, 1971 at New Delhi observed :[2]

> "Twenty-five years of freedom have not freed out Judiciary from the obsolescent British Indian penology, bearing on suppression of crime. And it is time our magistracy bends to the winds of social changes....."

Similar views were expressed by *Mr. Justice K. Sadashivan* of the High Court of Kerala while addressing the National Conference on Probation in October, 1971. He reiterated the need for the Judges and the magistrates to be solicitous to implement the penal reforms envisaged by the law of probation which is a correctional measure.[3]

Commenting on the theme of probation law, *Mr. Justice P. B. Gajendragadkar*, the former Chief Justice of India, observed :[4]

> "Probation in its proper perspective should lead us to the consideration of a much larger problem of basis of our

1. Social Defence Quarterly Vol. VII No. 25 (July 1971), pp. 6-7, published by Central Bureau of Correctional Services, New Delhi.
2. *Ibid.* Vol VIII No. 27 (January. 1972), pp. 26-27.
3. Social Defence Quarterly, Vol. VII, No. 27 (January, 1972), published by Central Bureau of Correctional Services New Delhi, p. 4.
4. Valedictory address before the National Correctional Conference on Probation held at New Delhi in October, 1971.

> jurisprudence and our administration of criminal law on human, scientific and rational lines.....punishment is no longer regarded as reformative or retributive, but is regarded as rehabilitative."

Expressing his concern for the problem of releasing offenders on probation, *Mr. Justice O. C. Reddi* of Andhra Pradesh High Court pinpointed the need for judges and magistrates to acquaint themselves with the latest techniques of treatment of offenders, in particular with the system of probation. He warned that mere knowledge about the provisions of probation law is not enough but the magistracy should have a deeper insight into the problems relating to probation and the probationer.[1]

Justice V.R. Krishna Iyer offered a very dismal picture of judicial trend towards probation and observed :

> "The 20th century approach to crime and punishment is, for us, of Gandhian vintage but runs counter to the traditional theory of harsh deterrence writ large in the Indian Penal Code and the Criminal Procedure Code. The ghosts of Macauley and men of his ilk haunt our criminal courts still, so much so, that probation fairs ill in the law courts. Twenty-five years of freedom have not freed our judiciary from the obsolescent British Indian ideology bearing on suppression of crime.[2]

It must be stated that while disposing of the offender on probation the Judges are confronted with the crucial task of striking a balance between the protection of society on the one hand and the correction of offender on the other. The magistracy cannot afford to dispose of the convict without taking into consideration the nature and gravity of the offence and potentialities for reformation of the criminal. Thus it would be seen that though probation as a treatment reaction to crime presupposes greater emphasis on the offender than the offence, in practice it involves equal importance to offence as well. This contention finds support in a number of judicial decisions of the courts.

In *Ranjit Singh* v. *The State*[3] High Court of Patna awarded a sentence of six years' simple imprisonment and a fine of rupees one thousand to the accused for the offence of forgery under Sections 467, 468, 471 and 420 of the Indian Penal Code. Denying the benefit of release on probation to the accused the Court observed that the case deserved no compassion keeping in view the nature and gravity of the offence and the standing of accused as a pleader having a lucrative practice.

Again, in *Kamarunissa* v. *State of Maharashtra*,[4] the Supreme Court confirmed the sentence of accused, a girl below 21 years of age who was convicted for theft and observed that it was not desirable to admit her to the benefit of probation. The Court reiterated similar view in *Prem Ballabh* v.

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1. Inaugural Address read in the seminar on Courts and Probation held at Hyderabad in March, 1971.
2. V.R. Krishna Iyer : Social Mission of Law, (1976) pp. 96-97.
3. AIR 1963 Pat. 262.
4. AIR 1968 Goa 103.

The State.[1]

A review of case law relating to probation of offenders in India would indicate that the courts seem to have exercised utmost caution in interpreting the provisions of probation law and have generally kept in the forefront the public policy and impact of offender's act on society.

In *Sunna* v. *State*[2] the accused aged twenty years was found guilty of an offence under section 380, I.P.C. for committing theft of a bicyle and some clothes. The Court ordered his release after admonition under Section 3 of the Probation of Offenders Act, 1958 because there was no previous conviction of the accused and the theft was committed due to sudden temptation without any premeditation.

In *Uttam Singh* v. *Delhi Administration*,[3] the appellant was convicted under section 292, I.P.C., for being in possession of three packets of playing cards and some obscene photographs. He was sentenced to six months' rigorous imprisonment and a fine of rupees five hundred. Having regard to the age of the accused (he was then 36), and the circumstances of the case, the Supreme Court refused to allow him the benefit of release on probation as he was a potential danger to society.

In *Abdul Qayum* v. *State of Bihar*,[4] the appellant aged sixteen years pick-pocketed rupees fifty-six. Despite probation officer's favourable report for release on probation, he was sentenced to six months' rigorous imprisonment by the trial court because of his association with a seasoned pick-pocket. On appeal, however, the Supreme Court directed the trial court to place him under probation.

The Supreme Court has always taken a stiff line of approach in dealing with the offenders found guilty of premeditated offences. Thus in *Somnath Puri* v. *State of Rajasthan*,[5] the Supreme Court dismissing the appeal observed that the benefit of probation law cannot be invoked in case of offence of fraudulent misappropriation falling under Section 409, I.P.C. and Section 5(2) of the Prevention of Corruption Act, 1947 and the High Court of Rajasthan was right in maintaining the sentence of the appellant passed by the trial court.

In yet another case,[6] the Supreme Court ruled that an accused though under 21 years of age cannot be released on probation if found guilty under Sections 326 and 149, I.P.C. which is a premeditated offence punishable with imprisonment for life.

Again, in case of *Sanchu Ray* v. *State of Assam*,[7] where the accused was about 19/20 years of age and had no previous criminal antecedents, was sentenced to one year's rigorous imprisonment. Keeping in view the fact that the accused was of a tender age and the offence was committed ten years ago, the Supreme Court directed him to be released on probation of good conduct with a bond of Rs. 1,000/- with one surety of like amount.

1. AIR 1977 SC 56.
2. AIR 1967 Orissa 4.
3. (1977) 1 SCC 103.
4. AIR 1972 SC 21.
5. AIR 1972 SC 1490.
6. *Jugal Kishore Prasad* v. *State of Bihar*, AIR 1972 SC 2522.
7. (1987) Cr. LJ 1378.

In a criminal appeal, *i.e.*, *Raju Singh and others* v. *State of Madhya Pradesh*,[1] the appellants were convicted under Sections 325/34 and 148 I.P.C., the criminal act having been committed long back in 1985. There was no previous conviction against the appellants and they had already been in jail for one month. The High Court of Madhya Pradesh held that in view of the long pendency of the case and harassment to the appellants for almost a decade, and the antecedents and sentence awarded to them, the appellants deserve to be enlarged under Section 4 of the Probation of Offenders Act, 1958, on probation on execution of a bond of good conduct of Rs. 3,000/-each with two sureties in the like amount for a period of one year. The appeal was thus dismissed with modification in the sentence and directing the appellants to appear before the ACJM Bemetra on 30 March 1995 to execute the bond.

The benefit of release on probation is specifically denied to cases involving sex perversity. Thus, disposing of an appeal[2] involving an offence under section 377, I.P.C., the Supreme Court observed that having regard to the gravity and nature of the unnatural offence which involved sex perversity, the High Court was right in disallowing the benefit of probation to the accused although he had no previous conviction against him. The sentence of accused was, therefore, upheld but modified and reduced to six months instead of three years.

The Supreme Court took a strict view of the case involving sex-perversity and refused to allow the benefit of release on probation to the accused in *Smt. Devki* v. *State of Haryana*.[3] In this case the petitioner was found guilty of abducting a teenage girl of 17 years and forcing her to sexual submission with commercial object and was convicted and sentenced by the trial court for three years' imprisonment. The sentence was confirmed by the High Court. On appeal, the Supreme Court refused to allow the benefit of probation to the accused keeping in view the moral turpitude and heineousness of the offence.

Again, in *Krishna Chandra* v. *Harbans Singh*,[4] the accused, an educated young man was found guilty of having committed house-trespass in his neighbour's house and committed rape on the said neighbour's wife. The court held that the offender cannot be admitted to the benefit of probation keeping in view the nature of the offence and depravity of the offender.

The decision of the Supreme Court in *Phul Singh* v. *State of Haryana*,[5] is a pointer to the consistency of judicial trend in disallowing the benefit of probation to offender's guilty of offences violating sex or morality. In the instant case the accused Phul Singh, a youth of 22 years of age without any previous criminal record was overpowered by sex urge and entered his next door neighbour's house in broad day light and committed rape on latter's twenty-four year's wife who was alone in the house. The victim complained to her mother, thereupon the accused was presented and sentenced to four

1. Criminal Appeal No. 274 of 1986 decided on 21-2-1995. Reported in 1995 (2) Crimes 700.
2. (1982) 3 SCC 9.
3. AIR 1979 SC 1948.
4. (1967) Raj LW 101.
5. AIR 1980 SC 249.

years' rigorous imprisonment by the Sessions Court. The High Court confirmed the sentence. On appeal, the Supreme Court upheld the sentence but reduced it from 4 to 2 years thus blending deterrence with correctional approach. The Court observed that despite the fact that the accused was young offender, that he had no previous criminal record, that he had committed the crime in a fit of momentary impulse and was repentant for his act, that he was related to victim's family who were ready to forgive the molester keeping in view his relationship with them, no leniency can be shown to the accused in cases of such "lust-loaded criminality".

The judicial attitude has been against allowing the benefit of probation law to persons who are educated and experienced in life and deliberately flout law with impunity. The reason being that if such persons were to be released on probation, the very purpose with which the Probation of Offender's Act was enacted, would be defeated. This view finds support in *Nabin Chandra Das* v. *State*,[1] wherein the petitioner was a grown up man and a journalist who not only used obscene language but assaulted a public servant in a public place. The Court observed that the conduct of the petitioner who was expected to show greater sense of responsibility manifested a very mischievous disposition. Therefore, the provisions of the Probation of Offenders Act cannot be applied to such a case considering the circumstances of the case including the nature of the offence and character of the offender.

In *Siya Saran* v. *State of Madhya Pradesh*,[2] the accused dissatisfied by treatment given to his brother in the Government hospital by the Assistant Surgeon, first insinuated the doctor about the improper manner of treatment meted out to his brother and then gave him a fist blow on his face with the result that a tooth of the doctor was dislocated and his lip was cut. The appellant was tried and found guilty under Sections 333 and 506 Part II of the IPC and was sentenced to three years' and two years' rigorous imprisonment respectively for the aforesaid offences. His appeal to the High Court was dismissed, therefore, he appealed to the Supreme Court.

The Counsel for the appellant pleaded that since the appellant happens to have settled in life by taking the job of a Gram Sevak, he should be released on probation under Section 6 of the Probation of Offenders Act. The Supreme Court rejected the appeal and observed that the behaviour of the appellant cannot be easily condoned as it would adversely affect the morals of doctors and nurses working in hospitals and they would be left prone to such untoward incidents if the appellant was granted the benefit of probation.

It may, however, be stated that the Courts have shown considerable leniency in extending the benefit of probation to offenders guilty of theft, assault etc. with a view to offering them an opportunity to reform and rehabilitate themselves. Thus in *Rajoo* v. *State of Rajasthan*,[3] the High Court of Rajasthan allowed the benefit of release on probation to two accused convicted for offences under Section 323 of the Indian Penal Code.

1. (1979) 48 Cut. LT 466 (468).
2. (1995) Cr LJ 2126 (SC).
3. (1977) Cr. LJ 837 (Raj).

The Supreme Court in *Hansa* v. *State of Punjab*[1] allowed the release of appellant on probation of good conduct although he was found guilty of having committed the offence of causing grievous hurt under Section 325, I.P.C. which is punishable with maximum sentence of seven years. The Court in this case observed that having regard to the circumstances of the case and the nature of the offence as also the character of the offender, it was expedient to allow him the benefit of Section 4 of the Probation of Offenders Act, 1958.

In yet another case of *State of Maharashtra* v. *Ramji Ranchandra Rokade and another*,[2] three accused found guilty of offences under Section 353, I.P.C. were admitted to the benefit of release on probation by the High Court of Bombay. In this case the accused, a cook employed in a Rest House, along with his two sons assaulted a labourer who they alleged had spoiled the drinking water. While the quarrel was going on, the complainant a constable on duty came there and intervened. According to the complainant the three accused gave him blows and abuses, while the version of the accused was that the complainant intervened and gave them blows, the accused were convicted under Section 353, I.P.C. but were allowed the benefit of probation because they had no previous conviction against them.

Again, the Supreme Court in *Prakash* v. *State of Madhya Pradesh*[3] ordered the release of appellant (accused) who was found guilty and convicted for an offence under Section 324, IPC, on probation of good conduct keeping in view the nature of his offence, the circumstances and antecedents of the offender. In this case, the accused was an employee of the Municipality, was a first offender and his offence was not premeditated and the injury caused to the victim was not grave or serious. The Supreme Court ruled that these grounds were sufficient to entitle the accused to be released on probation.

In yet another case, namely, *Rajender Dutt* v. *State of Haryana*,[4] the accused, a subordinate employee was found guilty of causing grievous hurt to his superior officer and convicted under Sections 334 and 353 of the Indian Penal Code. He had assaulted the said official due to erroneous belief that he was instrumental in getting the accused transferred elsewhere. The Supreme Court refused to allow the benefit of probation to the accused as his act was premeditated and could not be said to have been done in excitement or in emotional distress.

In the case of *Mohammad* alias *Bitiya* v. *State of Rajasthan*,[5] the appellant stood charged under Section 302, I.P.C. but the Sessions Judge convicted him under Section 304, Part II, of the Indian Penal Code and sentenced him to four years' imprisonment. Against this order, the State and also the appellant preferred appeals but both the appeals were dismissed. On verification of the age of the appellant it was found less than 21 years on the date of occurrence of crime. In view of this fact, the Supreme Court directed that the appellant be released on probation on executing a bond to

1. AIR 1977 SC 991.
2. (1976) Cr LJ 379 (Bom).
3. (1993) Cr LJ 119 (SC).
4. (1993) Cr LJ 1025 (SC).
5. 1999 (2) C Cr J 766 (SC); C Cr J stands for Current Criminal Judgment.

the satisfaction of the concerned Magistrate for the period of two years.

In *Member* alias *Gudda* v. *State of Madhya Pradesh*,[1] the appellant caused 19 injuries to the complainant and was convicted under Section 323, I.P.C. and sentenced to R.I. for one month and a fine of Rs. 500/-. In default of payment of fine he was to undergo two months' further R.I. An appeal was filed against this order. The High Court of Madhya Pradesh held that it was not known to the Court as to who had caused extra injuries whether it was the appellant or the absconding accused named Vakeel. Be that as it may, there is no dispute that the appellant is a first offender and there has been no previous criminal record. He is, therefore, entitled to the benefit of Section 3 or 4 and 5 of the Probation of Offenders Act, 1958. He should, however, pay a sum of Rs. 5,000/- as compensation to the victim who suffered as many as 19 simple injuries.

The High Court of Madhya Pradesh in *Raju and others* v. *State of M.P.*,[2] decided that the benefit of first offender may not be available to an accused who caused simple hurt to the complainant without any dispute and was convicted for an offence under Section 323, I.P.C. because award of sentence is not mandatory for an offence under this section and it may be punishable only with payment of fine. Thus taking into consideration the totality of the circumstances, the Court held that accused personal who are rustic villagers deserve to be let-off on payment of fine only without extending the benefit under Section 3, 4 or 6 of the Probation of Offenders Act, 1958. Each of the accused was ordered to pay fine of Rs. 1,000/- within thirty days and in default undergo R.I. for 6 months. If the fine is recovered Rs. 3,000/- will be paid to complainant as compensation.

The Supreme Court in *Masarullah* v. *State of Tamil Nadu*,[3] allowed the benefit of Sections 4 and 6 of the Probation of Offenders Act to the appellant who was convicted under Sections 452 and 379 of the Indian Penal Code. Taking a lenient view, the court observed that the appellant belonged to a middle class respectable family but unfortunately he fell in bad company of undesirable elements and the criminal influence of movie accentuated the dormant criminal propensity in him and he committed the crime. Under the circumstances, the accused deserved to be treated leniently and released on probation of good conduct.

In *State of Maharashtra* v. *Jagmohan Singh Kuldip Singh Anand and others*,[4] the Supreme Court held that in case of offences under Sections 324 and 452 read with Section 34 I.P.C. (*i.e., marpeet and trespass*), the accused may be released on probation by directing them to execute a bond of good behaviour for one year. In this case, the incident of *marpeet* took place in a fit of anger during the course of a dispute between neighbours. The complainant was beaten by the accused persons causing her four simple injuries. All the parties were well educated and also distantly related. The incident was more than ten years old. The accused persons were sentenced to one month imprisonment with a fine of Rs. 500/- each. The High Court maintained the conviction but in appeal the Supreme Court deemed it a fit

1. 2000 (1) C Cr J 161 (MP).
2. 1999 (2) C Cr J 645 (MP).
3. AIR 1983 SC 654.
4. (2004) 7 SCC 659.

case for allowing the accused the benefit of release on probation and allowed the appeal.

In *Jawahar* v. *State of West Bengal*,[1] the appellant was guilty and convicted for the offence under Section 454 (lurking house trespass with intention to commit theft) of the Indian Penal Code because he entered the watch repairing shop and was caught stealing red-handed by the informant with the help of some other witnesses. The trial court, after applying its mind whether the petitioner should be given advantage of probation law under Section 360, Cr PC assigned reason for having done so because the accused was so dare to enter into the locked shop, he deserved to be punished under Section 454, IPC despite his age being little less than 18 years at the time of occurrence (*i.e.* 4.9.91) and there was no antecedent report against him. The appeal was rejected by the appellate court and the sentence of the accused for one year and to pay a fine of Rs. 500/- in default to undergo rigorous imprisonment for one month more, was maintained. In a further appeal, the High Court of Calcutta modified the sentence imposed against the petitioner and directed that he be released on probation for two years on his entering into a bond of Rs. 3,000/- with two sureties of like amount each, one being his father or near blood relation. The Court assigned following reasons for admitting the accused to the benefit of release on probation :—

1. the accused was aged only about 18 years on the date of commission of the offence ;
2. the occurrence took place in day-light ;
3. the door of the watch repairing shop was so loose that anyone could manage entry into it without breaking open the lock and key ; and
4. no theft had actually been committed.

The Court found it to be a fit case in which benefit of Section 6 of the Probation of Offenders Act could be allowed to the accused.

Removal of Disqualification attached to Conviction

Section 12 of the Probation of Offenders Act, 1958 provides that a person found guilty of an offence and admitted to the benefit of release on probation under Section 3 or Section 4 of the Act, shall not suffer disqualification, if any, attached to the conviction of an offence under such law. It is indeed a salutary provision which facilitates the rehabilitation of the released probationer. The object of this section is to save the probationer from various civil disabilities resulting from his conviction. For example, if a person is debarred from contesting election on account of disqualification, his release on probation will negative this disqualification and he may contest election. Further, the conviction of an employee *simpliciter* without anything more will not result in his automatic dismissal from service if he has been allowed the benefit of being released on probation by the sentencing court. This view finds support in a number of judicial pronouncements of the Supreme Court. However, removal from service or part of it, as a

1. Criminal Revision No. 5 of 1994 decided on 19-12-1994 by the Calcutta High Court *Reported in* 1995(2) Crimes 740.

departmental punishment is not an essential and automatic consequence of conviction on a criminal charge and, therefore, the provisions of Section 12 of the Act relating to the removal of disqualification attaching to conviction are not attracted in case of removal from service of the delinquent employee who is released on probation. The judicial trend in this regard is discernible from the cases cited hereunder :—

In *Kehar Singh* v. *Regional Employment Officer, Chandigarh*,[1] the petitioner was convicted for theft under Section 380 of IPC and was dealt with under Section 4 of the Probation of Offenders Act, 1958. He was removed from service consequent to the decision of the Court. On appeal, he was reinstated on the ground that phraseology of Section 12 of the Probation of Offenders Act is express, explicit and mandatory and seeks to remove disqualification attaching to conviction in probation cases.

In the case of *Divisional Personal Officer Southern Rly.* v. *T.H. Challappan*,[2] the Supreme Court ruled that Section 12 of the Probation of Offenders Act does not contemplate automatic disqualification of a person released on probation. This case involved disposal of three appeals by the Supreme Court in all of which points involved were identical.

In one case a railway pointsman was arrested on August 12, 1972 at Irimpanan railway station in Southern Railway for drunkenness and indecent behaviour and a criminal case under Section 51-A of the Kerala Police Act was registered against him. He was found guilty and was released on probation under Section 3 of Probation of Offenders Act instead of being sentenced to a term of imprisonment. He was removed from service on disciplinary ground on January 3, 1973 for misconduct which had resulted into his conviction. The High Court held that the probationer was removed from service only on the ground of his conviction without being heard and as no penalty was imposed on him, the order of dismissal must be quashed. His writ petition was therefore admitted.

In the second case, respondent Narsingh was a railway Khalasi in Jodhpur railway workshop and was found in possession of stolen copper weighing 4 1/2 kilograms. He was prosecuted and ultimately convicted by Magistrate under Section 3 of the Indian Railway Property (Unlawful Possession) Act, 1916. On appeal, the learned ADJ, Jodhpur while maintaining the conviction of the accused set aside the sentence and ordered his release on probation under the Probation of Offenders Act. The respondent was removed from service on February 26, 1971 on the basis of his conviction. Here also the High Court allowed the writ petition and quashed the dismissal order.

In the third case, one Abdul Hamid, a peon at railway workshop, Jodhpur was prosecuted and ultimately convicted under Section 420 of IPC by Special Magistrate, Jodhpur on September 9, 1970. The Magistrate, however, released him on probation of good conduct instead of sentencing him. The disciplinary authority *i.e.*, Assistant Mechanical Engineer, by an order dated February 13, 1971 removed him from service on the ground of conviction and rejected his departmental appeal. The respondent, therefore, moved an appeal to the High Court under Article 226 of the Constitution

1. AIR 1966 Punj. 336.
2. AIR 1975 SC 2216.

which was allowed by the Court.

In all the aforesaid three cases the Government went in appeal to the Supreme Court. The learned counsel for the appellants (Government) in all these cases raised the issue of Section 12 of the Probation of Offenders Act and stressed that the provision of this section contemplates automatic disqualification attached to the conviction and not the obliteration of misconduct of the accused so as to debar the disciplinary authority from imposing penalty under Rules against employees who have been convicted for misconduct.

The respondent's counsel, on the other hand, argued that if the Magistrate does not choose after convicting the accused, to pass any sentence on him but releases him an probation, the stigma of conviction is completely washed out and obliterated.

The Supreme Court, quoting the phraseology used in Sections 3 and 4(1) of the Probation of Offenders Act held that conviction is not washed out at all. The order of release on probation is merely a substitution of sentence imposable by Court. Section 12 therefore does not afford immunity against disciplinary proceedings for misconduct.

In deciding the case of *Shanker Dass* v. *Union of India*,[1] the Supreme Court took a liberal view of the provision of section 12 of the Probation of Offenders Act, 1958 and ordered the appellant to be reinstated in service. In this case the appellant misappropriated Rs. 500 from the Delhi Milk Service and thus committed breach of trust. He pleaded guilty of the charge and was convicted under Section 409 I.P.C., by the trial court and released on probation under Section 4 of the Probation of Offenders Act. As a result of this conviction he was dismissed from service in April, 1964. The Supreme Court while deciding the appeal, observed that in the instant case the crime was committed under personal misery compounded by the appalling delays of law. The Court further observed that a government servant convicted on criminal charge and released on probation cannot be said to be liable to be dismissed in view of Section 12 of the Probation of Offenders Act which is a beneficial provision. The Court, therefore, set aside the order of the High Court of Delhi and reinstated the appellant in service.

In *Iqbal Singh* v. *I.G. Police, Delhi*,[2] the accused a police head-constable was convicted for an offence under Section 337 of IPC but was given the benefit of the provision of Section 4 of the Probation of Offenders Act, 1958. The accused upon his prosecution was suspended from service and subsequently dismissed from service on the ground of conviction. The Delhi High Court observed that the words "disqualification if any, attaching to a conviction of an offence" in Section 12 of the Act would not include a person's losing his right or qualification to remain or to be retained in service. According to the High Court, Section 12 of the Act clearly saves the convict from suffering such disqualification attaching to his conviction. In respect of his conviction, the accused had the protection of Section 12 and he was saved from suffering any disqualification such as the one which resulted in his dismissal.

1. AIR 1985 SC 772.
2. AIR 1970 Del 240.

Similarly, in *Rajbir Raghubir Singh* v. *State of Haryana*,[1] the accused a government servant was convicted and placed on probation for good conduct under the Probation of Offenders Act, 1958. It was held by the Supreme Court that in particular facts of the case, the conviction should not affect his service.

In *State (Assistant Inspector of Labour, Circle II, Nagar Coil* v. *S. Radhakrishnan*,[2] the accused was convicted under Section 25 of the Tamil Nadu Weights and Measures (Enforcement) Act, 1956, the Madras High Court allowed the benefit of release on probation to the accused under Section 3(1) of the Probation of Offenders Act and held that the release was not to constitute disqualification attached to Section 12 of the Act affecting his service.

But in *Hari Singh* v. *State of U.P.*,[3] it was held that benefit of probation extended to the Government servant, does not exonerate him from disciplinary proceeding only because benefit of Section 4 has been given to him.

In the case of *State of Karnataka* v. *M. Chandrappa and another*,[4] wherein the State filed an appeal against the acquittal order passed by the High Court for release of the accused on probation, the Supreme Court dismissed the appeal and observed that it was a fit case where accused could be released on admonition with direction that conviction would not suffer disqualification for holding post and continuing in service. In this case the accused assaulted a constable who was merely waiting for bus that would reach him to Police Station. He was found guilty of offence under Sections 352 and 353, I.P.C. The accused was a teacher who had come to know that there was some sort of enquiry against him and this constable had enquired about him. Hence seeing the constable he abused and assaulted him under mental pressure. The Supreme Court held that the constable could not be said to be engaged in executing duty at the time of incident and hence the accused was allowed the benefit of Section 3 of Probation of Offenders Act. Similar view was expressed by the Supreme Court in *Rajbir* v. *State of Haryana* also.[5]

In *Trikha Ram* v. *V.K. Seth*,[6] the Supreme Court reiterated that an offender convicted for a criminal offence and released on probation cannot be dismissed by disciplinary authority in view of Section 12 of the Probation of Offenders Act as it will operate as a disqualification for future employment. Hence the dismissal of the accused was converted into removal from service. So that it may help the petitioner to secure future employment in other establishment.

However, in *Union of India and others* v. *Bakshi Ram*,[7] the Supreme Court observed that release of offender on probation does not obliterate stigma of conviction. In the instant case the accused was dismissed from

1. AIR 1985 SC 1278.
2. 1989 Cri. LJ 1161 (Mad).
3. 1990 Cri. LJ 67 (All).
4. (1987) Cr. LJ 950.
5. AIR 1985 SC 1278.
6. AIR 1988 SC 285 (The decision is *Chalappan's* case was overruled by this case.
7. 1990 Cr LJ 1013.

service in view of his conviction under Section 10 of the Central Reserve Police Force Act and the court held that he was not entitled to reinstatement in service upon getting the benefit of probation of good conduct under Section 4 of the Probation of Offenders Act, 1958.

The Supreme Court, in this case asserted that Section 12 of the Probation of Offenders Act clearly directs that the offender "shall not suffer disqualification, if any, attaching to a conviction of an offence under such law". But the section does not preclude the Department from taking action for misconduct leading to the offence or conviction thereon as per law. Thus Section 12 of the Act does not intend to exonerate the person from departmental punishment. In result, the Supreme Court allowed the appeal setting aside the order of the High Court and altered the punishment of dismissal to that of removal from service so that it helps the appellant to secure employment elsewhere.

In *Karam Singh* v. *State of Punjab and another*,[1] the accused was a member of the Punjab Police Force. He was convicted for the offence under Sections 302/34 and 324, 323, I.P.C. by the Sessions Court. In appeal, his convictions under Sections 302/34 and 324 was set aside but conviction under Section 323 was still maintained by the High Court which allowed the accused the benefit of being released on probation. Thereafter, the accused sought reinstatement in service. The Police Dept. declined to reinstate him in view of the provisions of Rule 16.2(2) of Punjab Police Rules as he was already dismissed from service. The accused challenged this order of the Punjab Police in the Supreme Court. The Apex court held that once the accused was convicted, it forms the basis for taking action under proviso to Article 311(2) of the Constitution which will be subject to the ultimate result of the prosecution case. If the case ends in favour of the accused and he gets honourably acquitted, then the authorities are required to consider his reinstatement. In the instant case, the accused is still convicted under Section 323 and it is a disqualification though he was released on probation. Under these circumstances the ratio in *Bakshi Ram's* case,[2] would be applicable to this case. The Court, therefore, dismissed the appeal but his dismissal was converted into removal from service.

In *Dunna Lal* v. *State of Uttar Pradesh*,[3] the Allahabad High Court held that when a convict was placed on probation for good conduct, the employer should not terminate his service on the ground of conviction *during pendency of appeal against conviction.* On application by the employee the employer should review order of termination when probation is granted to the convict in appeal. *Justice S.I. Jafri* of the Allahabad High Court observed, "that once a convict is placed on probation for good conduct under the provisions of the Probation of Offenders Act, 1958, the employee should not terminate his service by virtue of conviction."

In *Sunil Kumar Parida* v. *State of Orissa*,[4] the Supreme Court ordered the release of the accused who had undergone a part of his imprisonment, giving him benefit of Sections 3 and 4 of the Probation of Offenders Act so

1. AIR 1996 SC 3159.
2. AIR 1990 SC 987.
3. 1991 All LJ 48.
4. (1993) Cr LJ 544 (SC).

that he could get the benefit of Section 12 of the Act and may not be adversely affected by the disqualification attached with imprisonment. The Court directed the accused to appear before the Sub-Divisional Magistrate of Neelgirima and receive the probation order within six weeks.

Public Welfare Offences

The judiciary has taken shifting stands in administering probation law to public welfare offences such as food adulteration, smuggling and violation of customs and excise laws, etc. A chronological survey of the cases relating to public welfare offences would bear testimony to the fact that till early seventies the courts responded favourably to the inclusion of these offences within the purview of the probation law and were quite liberal in admitting such offenders to the benefit of probation regardless of the age and nature of the offence. This trend is clearly discernible from the case law discussed in the succeeding pages.

In *Salem Govinda Chetty* v. *State of Andhra Pradesh*,[1] the accused was convicted under Section 16 (1) read with Sections 7 and 2 (1) (g) of the Prevention of Food Adulteration Act, 1954 for selling "Mysore Pak" adulterated with metanil yellow coaltar dye and *kesari dal* which was prohibited. Keeping in view the advanced age of the accused who was a petty shopkeeper over sixty years, the learned Judge set aside the order of the sentence of the trial court and released him on probation.

In yet another case, namely, *Municipal Corporation, Delhi* v. *Rattan Lal*[2] the respondent on a complaint from the Municipal Corporation Delhi, was charged under Section 7 of the Prevention of Food Adulteration Act, 1954, for selling adulterated cream-biscuits and was convicted by the trial court for six months and a fine of rupees one thousand or four months' simple imprisonment in default. On appeal, the Additional District Judge upheld the sentence. The Municipal Corporation filed a revision to the High Court for enhancement of the sentence of the respondent keeping in view the gravity of the offence of adulteration. The respondent pleaded for the benefit of Section 4 of the Probation of Offenders Act. Allowing the benefit of release on probation, the Supreme Court observed that there was no legal bar to release offenders convicted for food adulteration on probation under the Act.

Again, in *Vishnu Moorthi* v. *State of Mysore*,[3] the court observed that even in an offence of smuggling which is an anti-social activity affecting the economy of the State, the offender can be released on probation of good conduct if there are special circumstances to believe that he has potentialities for reformation.

In *State of Haryana* v. *Ramji Lal Devi Sahai*,[4] the respondents were convicted under section 61(1)(c) of the Punjab Excise Act, 1914 for the installation of illicit liquor at their residence. The court allowed his release on probation under Section 562 of the old Code of Criminal Procedure, 1898 (now Section 360 of Cr. P.C. 1973).

1. AIR 1970 AP 293.
2. (1971) Cr LJ 1485.
3. (1971) Mys LJ 451.
4. (1972) Cr LJ 796.

Similar view was expressed by the High Court of Madras in *In re Oil* case,[1] wherein the petitioner was guilty of an offence under the Gold Control Act, 1968 read with Section 61 of the Tamil Nadu Excise Act, 1971. Allowing the benefit of release on probation the Court observed that the petitioner in the instant case was the first offender and the only bread winner of the poor family, therefore, he could be admitted to the benefit of Section 4 of the Probation of Offenders Act and the sentence of imprisonment was set-aside.

In *Rahmatulla* v. *State*,[2] the High Court of Karnataka ordered the release of the appellant on probation despite the fact that minimum sentence of three month's rigorous imprisonment and a fine not less than Rs. 100 was prescribed by the Karnataka Excise Act for an offence under Section 32 of that Act.

The benefit of release on probation was also admitted to an accused who was convicted for an offence punishable under Section 27 (a) (ii) of the Drugs and Cosmetics Act, 1940. Taking a liberal view the Court in *Delhi Administration* v. *Om Prakash*,[3] allowed the benefit of probation to the accused with a note of caution as follows :

> "The provisions of Section 4 of the Probation of Offenders Act are applicable when a person is convicted under the Drugs and Cosmetics Act. Although aware of the provisions of Section 27(a) of the Act, the legislature did not in its wisdom exclude the application of the Probation Act."

The Supreme Court in *Arvind Mohan* v. *Anil Kumar Biswas*[4] decided whether the offenders convicted under the Customs Act and the Defence of India Rules, 1962 could be allowed the benefit of Probation of Offenders Act. Answering in the affirmative the Court observed that keeping in view the young age of offenders who were engaged in agriculture and purpose of purchasing smuggled gold being marriage of the sister of the appellant, the offenders could be released on probation and the High Court's contention that the Probation of Offender Act has no application of offences involving contravention of the Customs Act or Gold Control Rules contained in Part III of the Defence of India Rules, 1962 could not be accepted.

The historic decision in *Ishwer Das* v. *State of Punjab*,[5] however, made a departure from the Court's liberal approach to offenders found guilty of offences involving public welfare. A tendency to keep such anti-social activities outside the purview of the probation law is clearly noticed in the subsequent decisions. Though the Supreme Court allowed the benefit of probation in the instant case, leaving a note of caution, it *inter alia* observed :[6]

> "Adulteration of food is a menace to public health. The Prevention of Food Adulteration Act, 1954, has been enacted with the aim of eradicating that anti-social evil and for ensuring purity in the articles of food. The Courts should not

1. (1976) Cr LJ 1339.
2. (1978) Cr LJ 109.
3. (1975) Cr LJ 177.
4. AIR 1979 SC 1818 (1820).
5. AIR 1972 SC 1295.
6. AIR 1972 SC 1295.

> lightly resort to the provisions of the Probation of Offenders Act in the case of persons above 21 years of age found guilty of offences under the Prevention of Food Adulteration Act."

In *Jai Narayan* v. *Delhi Municipality*,[1] the Supreme Court refused to release on probation the offender who was found guilty of an offence of adulterating 'patisa' with unpermitted coaltar dye on the ground that it was an anti-social activity which was deleterious to consumer's health.

In the case of *Ram Prakash* v. *State of Himachal Pradesh*[2] the Supreme Court ruled that there is no specific bar to extend the application of probation law to offence under the Prevention of Food Adulteration Act, 1954, but it could not be granted if the offender was above twenty-one years of age.[3] In this case the appellant was convicted for selling adulterated milk of cow and buffalo and was sentenced to six months' rigorous imprisonment and a fine of rupees two hundred under the Prevention of Food Adulteration Act. The High Court denied the benefit of probation to the appellant on the plea that Section 4 of Probation of Offenders Act did not cover adulteration cases. The Supreme Court, however, repelled this contention of the High Court and allowed the benefit of probation to the appellant.

In *Piyarey Lal* v. *State*,[4] the High Court of Allahabad stressed that the courts should not lightly resort to the provisions of the Probation of Offenders Act, particularly in case of offenders above twenty-one years of age. The court further observed that although the application of Probation of Offenders Act is not expressly barred by the Prevention of Food Adulteration Act, 1954, but the courts should not brush aside the consideration that the sale of adulterated articles of food have deleterious reaction upon the public health and, therefore, should be sternly dealt with. In the instant case, the accused Piyarey Lal was found guilty of the offence under Section 7 read with Section 16 of the Prevention of Food Adulteration Act selling *Kampats* (a variety of sweets) which were coloured red, yellow, orange and white by coaltar dye containing rhodamine. The argument of the accused that he was not the manufacturer of the sweets and hence did not know about the impurity was not accepted by the Court. Dismissing the revision filed by the revisionist, the Court enhanced the sentence to six months with fine of rupees one thousand and in default to further suffer rigorous imprisonment for six months.

The Supreme Court's decision in *Pyarali K. Tejani* v. *M. R. Dange*[5] further supports the judicial trend for cautious approach to the application of probation law to adulteration cases. In this case the accused was convicted for selling adulterated "*supari*" with prohibited sweetner saccharin and cyclamate under the Prevention of Food Adulteration Act, 1954. Disallowing the benefit of probation to the appellant, *Mr. Justice V. R. Krishna Iyer* (as he then was) observed :—

> "The kindly application of the probation principle is negatived by the imperatives of social defence and the

1. AIR 1972 SC 2607.
2. AIR 1973 SC 780.
3. *Obiter* of Khanna J. in *Ishar Das's* case, *supra* note 2.
4. (1977) Cr LJ 1034 (1036).
5. AIR 1974 SC 288.

probabilities of moral proselytisation. No chances can be taken by society with a man whose anti-social operations guised as a respectable trade, imperil numerous innocents. He is a security risk. Secondly, those economic offences committed by white collar criminals are unlikely to be dissuaded by the gentle probationary process."

In *Public Prosecutor* v. *Nalan Suryanarayanamurthy*,[1] the High Court of Andhra Pradesh taking a strict view held that in a case where the activity of the accused was distinctly anti-social, it would not be expedient to release the offender on probation. The accused in this case was found guilty of the offence under Section 7 read with Section 16 of the Prevention of Food Adulteration Act, 1954.

The Supreme Court took a firm stand in disallowing the benefit of probation to cases involving smuggling activities. Thus in *Maharashtra* v. *Natwar Lal*,[2] the Court refused to extend the benefit of Probation of Offenders Act to a person convicted for smuggling under Section 135 (1) and (2) of the Customs Act, 1962 because smuggling of gold not only affects public revenue and public economy but it is also a menace to society.

The above contention also finds support in the Supreme Court decision in *State of Maharashtra* v. *Kapoor Chand Kesarmal Jain*.[3] In this case the appellant aged 24 years at the time of occurrence of crime, was tried for the offence of smuggling of gold and convicted by the trial court. On appeal, the High Court ordered the appellant to be released on probation for the reason that the gold recovered from his possession had already been confiscated and that he had stood trial for a long period of more than seven years and that he was financially not in a position to pay the fine imposed on him. The State of Maharashtra, however, went in appeal to the Supreme Court against this judgment of the High Court. Allowing the appeal, the Supreme Court observed that keeping in view the nature of the offence, the character of the accused and the circumstances under which the offence was committed, it was not desirable to allow the benefit of probation law to such professional offenders.

In a subsequent case, namely, *State of Gujarat* v. *V. A. Chauhan*,[4] the Supreme Court ruled that the benefit of probation cannot be extended to the accused convicted in an offence punishable with imprisonment for life. In the instant case the accused was convicted under Sections 409, 467 and 471, I.P.C. and Section 5(1)(c) read with Section 5(2) of the Prevention of Food Adulteration Act, 1954. The High Court of Gujarat gave benefit of probation the accused and he enjoyed the benefit for the past six years. In appeal, the Supreme Court observed that "the benefit of probation cannot be allowed to an accused convicted of an offence punishable with imprisonment for life, but in the instant case as the respondent is already given the benefit of the Probation of Offenders Act, we do not think it in the interest of justice to interfere with it at this stage, after so many years. The appeal was, therefore, dismissed and the High Court's decision was maintained by the

1. (1972) 2 APLJ 313.
2. AIR 1980 SC 593.
3. AIR 1981 SC 927.
4. AIR 1983 SC 359.

Supreme Court.

An appraisal of the aforesaid cases involving socio-economic offences would reveal a remarkable change in the attitude of courts towards these crimes. The courts, while accepting in principle the need for liberal application of probation law, have not lost sight of the dangers involved in mild treatment of socio-economic offenders. These offenders cannot be treated at par with other offenders in matters of punishment because of peculiar nature of their offence and the consequences flowing therefrom. These offences being injurious to public at large, need to be tackled sternly. Commenting on this aspect, *Mr. Justice V.R. Krishna Iyer*, the former Judge of the Supreme Court of India observed :[1]

> "Economic offences are often subtle murders practised on the community, sabotaging the national economy. They have to be tackled with a new seriousness..."

The above cases make it abundantly clear that liberal and kindly application of probation law to public-welfare offences would hardly serve the ends of social justice. The Law Commission in its Forty-seventh Report has also reiterated that the Probation of Offenders should not be applicable to the socio-economic offences. The Commission, *inter alia*, observed :—

> "...the justification of all sentencing is the protection of society. There are occasions when an offender is so anti-social that his immediate and sometimes prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way because of the paramount need for the protection of society."

No Probation for Convicted Corrupt Persons

The Supreme Court in *State Supdtt. Police, New Delhi* v. *Ratan Lal Arora*,[2] categorically refused to extend the benefit of release on probation to the offender convicted under the Prevention of Corruption Act, 1988. The accused in this case was serving in DESU and had been convicted for demanding and accepting bribe of Rs. 1,500/- from a consumer and the trial Court had sentenced him to undergo rigorous imprisonment for 20 months and a fine of Rs. 2,000/- for offences under Section 13(2). The benefit of probation had been extended to him by the High Court under Section 360 of Cr.P.C. because of his being in adverse family circumstances and the sum accepted by him was paltry. The other reasons given by the High Court were that the accused had retired during trial itself and turned to be of 64 years of age and had already remained in jail for 22 days. The Supreme Court held that all these reasons are not proper for going below the minimum sentence prescribed for the offence, but confined the awarded term of imprisonment to the period of six months under Section 7 and one year under Section 13(2) of the Prevention of Corruption Act, 1988, both the sentences were to run concurrently.

Again, in the case of *N. Bhargavan Pillai (dead) by L.R's and Another* v. *State of Kerala*,[3] the Apex Court ruled that the benefit of release on

1. V. R. Krishna Iyer : Law, Freedom and Change, (1975), p. 88.
2. (2004) 4 SCC 590.
3. AIR 2004 SC 2317.

probation of good conduct cannot be extended to an accused who is charged of misappropriation of property and corruption under Sections 409 IPC read with Section 5(2) of the Prevention of Corruption Act, 1947.

In the instant case, the accused was working as Junior Manager on deputation in State Civil Supplies Corporation and the stock in the godown in his charge was found short by the vigilance department after due enquiry in the case. Meanwhile the accused retired from service. He undertook to remit the value of shortage and deposited Rs. 50,000/- as part-payment thereof. Since charges were proved against the accused, he was sentenced to undergo RI for two years and to pay a fine of rupees one lakh with a default stipulation of six months imprisonment. Since the accused died during, pendency of the appeal, his legal representatives were impleaded for the payment of fine. The Court held that in view of the specific bar under Section 18 of the Probation of Offenders Act, application of the Act is clearly ruled out in cases of corruption covered under Section 5(2) of the Prevention of Corruption Act, 1947. The appeal was, therefore dismissed.

Age of the Offender

The question which quite often arose for consideration before the courts was whether the age of the offender for the purpose of application of Section 6 of the Probation of Offenders Act should be as on the date of commission of the offence or the date when the offender is convicted. The phraseology used in Section 6(1) of the Probation of Offenders Act makes it clear that the age is to be reckoned at the time of the disposal of the case. The decision of the Supreme Court in *Ramji Missar* v. *State of Bihar*[1] supports this contention. In the instant case, two brothers, Ramji and Baist, were convicted for offences of attempted murder, grievous hurt and hurt under Sections 307, 326 and 324 IPC. The elder brother Ramji was below 21 years at the date of occurrence but above 21 years at the time of sentence. He was, therefore, sentenced to two years' RI under section 324 of the Indian Penal Code. The younger brother, Baist who was 19 years of age, was convicted of attempted murder and grievous hurt under sections 307 and 326, IPC and was sentenced to 6 and 4 years' RI respectively. He could not be admitted to the benefit of Probation of Offenders Act because offences under Sections 307 and 326 are punishable with imprisonment for life. Ramji was refused probation by the trial court because his offence was premeditated. On appeal, the High Court reduced the sentence of both the appellants but refused them the benefit of probation. The Supreme Court, however, allowed both, Ramji and Baist, the benefit of probation since Section 6 of the Probation of Offenders Act was found inapplicable, particularly in case of Ramji.

In a criminal appeal, namely, *Rakesh* alias *Duro Pravinbhai Thakar* v. *State of Gujarat*[2] the High Court of Gujarat held that for enabling the accused convicted under Sections 17 and 18 of the Narcotic Drugs & Psychotrophic Substances Act, 1985, to earn the benefit of Section 33 of the Act, the crucial age of eighteen years should be reckoned at the time when the convict has committed the alleged offence. The crucial question for

1. AIR 1963 SC 1088.
2. 1995 (2) Crimes 129 (Gujarat DB) decided on 2-3-1994.

determination before the Court was whether in order to earn benefit of Section 33 of the NDPS Act, the crucial age of 18 years should be reckoned at the time when the convict has committed the offence or at the time when the court is called upon to grant benefit of probation under Section 33 or the NDPS Act. The Court held :—

> "We are of the view that if at the relevant time when the alleged offence was committed, the accused was under 18 years of age then in that case merely because of the circumstances entirely beyond his control, *viz.*, that the trial could not be proceeded with as expeditiously as possible and terminated within the stipulated period of under 18 years of the convict, he cannot be blamed to deny his precious right of getting benefit of probation available under section 33 of NDPS Act. Such a precious right, as prescribed under the Probation of Offenders Act, can never be permitted to be circumvented or short-circuited where the accused cannot be said to be at fault and the trial gets protracted for unjust reasons."

The Supreme Court in *State of Haryana* v. *Premchand*,[1] upheld the verdict of the Court of Session that since the respondent was less than 21 years of age, the benefit of probation could not be denied to him, particularly, when he was not a previous convict. In the instant case, the accused who was above 16 years of age had committed an offence of attempt to rape under Sections 376/511, IPC which attracted punishment only upto ten years and not imprisonment for life. He was, therefore, allowed the benefit of release on probation by the trial court under Section 360, Cr. P.C. or Section 4 of the Probation of Offenders Act, 1958. The Court of Session and the High Court declined to interfere and upheld the decision of the trial Court. Thereupon, the State of Haryana went in appeal to the Supreme Court, against the sentence of the respondent's release on probation. The Supreme Court dismissed the appeal and observed :

> "If the conviction of the accused were to be one under Section 376, I.P.C., he could have been awarded imprisonment for life or one extending to ten years. But the offence for which the respondent has been found guilty, is for attempt to rape. Therefore, it is idle to contend that the respondent has been held guilty for an offence which would attract imprisonment for life, disentitling him to the benefit of probation under Section 360, Cr. P.C. or Section 4 of the Probation of Offenders Act. Section 57, I.P.C. clearly points out that in calculating fractions of terms of imprisonment, life imprisonment shall be reckoned as imprisonment for 20 years. Thus, on employment of Section 511, I.P.C., the punishment for the offence, for which an attempt has been made, would be for a term which may extend to one-half of the longest term of imprisonment provided for the offence. Therefore, for offence under Section 376/511, I.P.C. the respondent could be awarded imprisonment for 10 years. On

1. (1997) 7 SCC 756.

this reasoning, his case for probation is clearly made out and therefore the appeal is dismissed."

Pre-sentence Report

The Probation Officer is said to be a *linch-pin* in the operation of the probation system. The pre-sentence report of the Probation Officer is the fundamental document for the guidance of the Court whether to grant the benefit of probation to the accused or not. The object of the pre-sentence report as provided in Section 7 of the Act is to appraise the court about the character of the offender, exhibit his surroundings and antecedents and throw light on the background which prompted him to commit the offence and give information about the offender's conduct in general and chances of his rehabilitation on being released on probation. The Supreme Court in the case of *Satto* v. *State of U.P.*,[1] observed that "to deprive the sentencing Judge of the use of the pre-sentence report is to undermine the modern penological procedural policies that have been carefully adopted."

It may, however, be stated that despite the requirement of presentation of pre-sentence report by the Probation Officer under Section 7 of the Probation of Offenders Act, the Courts generally have shown scant regard for the report because of lack of faith in integrity and trustworthiness of the Probation Officers. In their view calling for the pre-sentence report would mean unnecessary delay, wastage of time, undue exploitation of the accused by the probation officer and likelihood of biased report being submitted by him which would jeoparadise the interest of the accused and would be contrary to the object envisaged by the correctional penal policy.

The attitude of the members of the Bar regarding provision relating to pre-sentence report is also generally negative because of their vested interest. They oppose the report on the ground that it is manipulated and wholly unreliable just with the 'sole object of winning more clintage'. Obviously, the prejudice of the Bar for the Probation officers and their pre-sentence report hampers the cause of probation service to a considerable extent.

The Place of Probation in the Penal Policy

Probation as a correctional measure occupies an important place in reformative justice. It seeks to reconcile the conflicting claims of "punitive" and "treatment" reactions to crime. The suspension of sentence under probation serves the dual purpose of deterrence and reformation. It provides necessary help and guidance to the probationer in his rehabilitation and at the same time the threat of being subjected to unexhausted sentence acts as a sufficient deterrent to keep him away from criminality.

Probation is useful to society in general and to the offender in particular. It also enables the probation officer in getting deeper insight of the problem of criminals. It would, therefore, be convenient to assess the utility of probation as a punitive reaction to crime under the following heads :—

1. Utility of probation from the point of view of the delinquent.—The system of probation helps the delinquent in rehabilitating

1. (1977) 2 SCC 628.

himself as a law abiding member of society. It serves the needs of the probationer in the following manner :—

(i) Probation keeps the offender away from the criminal world. If the delinquent is set at liberty without adequate guidance and supervision, he is inclined to feel that his delinquent conduct has been accepted by society and thus he will continue his criminal activities unfettered.

(ii) The fear of punishment in case of violation of probation law has a psychological effect on the offender. It deters him from law-breaking during the period of probation. Thus probation indirectly prevents an offender from adopting a revengeful attitude towards the society.

(iii) Probation seeks to obviate the evils of institutional incarceration and thus prevents the offender from contamination and conforming to a criminal career. Moreover, sentencing an offender to a term of imprisonment carries with it a stigma which makes his rehabilitation in society difficult. The release of the offender on probation saves him from stigmatization and thus prepares him for an upright living.

(iv) Probation seeks to socialise the criminal as the liberty which he enjoys during the probation period enables him to pick up those life-habits which are necessary for a law-abiding member of the community.

(v) Probation enables the offender to attend to his domestic obligations and thus contribute to support his family financially by taking up suitable work according to his capability.

(vi) Probation enables the offender to rehabilitate himself through his own efforts. This inculcates a sense of self-sufficiency, self-control and self-confidence in him which are undoubtedly the essential attributes of a free-life.

(vii) Before the implementation of probation law, the courts were often confronted with the problem of disposing of the cases of persons who were charged with neglect of their family. In such cases there was no alternative but to send them to prison which was an unnecessary burden on the State exchequer. With the introduction of probation as a method of reformative justice, the courts now admit such offenders to probation where they are handled by the competent probation officers who impress upon them the need to work industriously and avoid shirking their family responsibilities.

2. Utility of probation from the stand-point of Society.—Besides the delinquent, probation also serves a useful purpose for the society as a whole.

(i) It is well known that the interests of society are best served when all its members play a positive role by seeking their self-rehabilitation. Since this object is fully achieved by the probation system, it is indeed an effective method of preserving social solidarity by keeping the law-breakers well under control.

(ii) During the probation period, the offender is sent to various educational, vocational and industrial institutions where he is trained for a profession which may help him in securing a livelihood for himself after he is finally released and thus leads an absolutely upright life.

(iii) Whatever work an offender is doing as a probationer, he is contributing to the national economy. Thus, he no longer remains a burden on society.

3. Utility of probation from the point of view of Probation Officer.—Correctional task of the probation staff requires closer contact with inmates during his period of probation. This helps the probation supervisor to get a deeper insight into the real causes of crime and suggest remedies for their eradication. The system of probation enables these officials to approach the problem of crime in a practical manner. Thus it provides an excellent opportunity to the probation personnel to serve the community as also the nation. Commenting on this aspect *J. L. Gillin* rightly observed that probation system if properly administered, can assist the Judge in socialising criminal procedure. If probation officers furnish correct information to the court about the convicted persons through a careful pre-sentence investigation, the Judge may individualise the treatment with greater exactness.[1]

Thus it would be seen that probation as a reformative measure is a milestone in the progress of modern liberal trend in the field of penology. Probation as a measure of rehabilitation shifts the emphasis from deterrence to reformation and from crime to criminal in accordance with the modern reformative trends of punishment. The keynote of the Probation of Offenders Act, 1958 is "reformation and rehabilitation of the offender through the process of individualisation."[2]

Major Functions of the Probation Officer

The relationship between probation service and the delinquent in correctional field implies that a probation officer should have a thorough understanding of the following issues :

(i) the legal implications involved in the case of delinquent to be released on probation and functions of various personnel and major policy issues involved in the system of probation ;

(ii) information about offender's antecedents and social and personal problems leading to his delinquent act. The probation officer should also be in a position to analyse the personality disorders represented by the offender and the sub-culture characteristics of his group ;

(iii) attitudes of the delinquent and his readiness to co-operate with the probation staff ;

(iv) knowledge about the functions and responsibilities as a probation officer and ability to make use of his authority for exercising control over probationers.

1. Gillin, J. L, : Criminology and Penology, (3rd Ed.) p. 321.
2. *Raghunath* v. *Mrs. T. P. Faria*, AIR 1967 Goa 95.

The probation officers employed in correctional services play a vital role in bringing about the rehabilitation and reformation of offenders and making them useful members of society. The major functions of a probation officer may be summarised as follows :—

(1) Investigation and surveillance.—A thorough inquiry into the life history and antecedents of the delinquent is necessary for the purpose of securing information about his failures or successes in meeting the obligations of his legal status. Proper investigation and surveillance will enable further imposition of restrictions on liberty of the delinquent in case he does not respond favourably to the treatment process.

(2) Use of professional control to modify offender's behaviour.—This again is a part of the commonly recognised process of professional control based on the force of State. The control administered by the probation officials over the delinquents under their charge may include :—

(i) revocation of probation order ;

(ii) reporting to the appropriate judicial or administrative authorities the behaviour which constitutes violation of law ;

(iii) making scheduled and unscheduled visits to the place of delinquents ;

(iv) assisting the authorities in making arrest of the delinquent who has proved a failure in the process of probation.

(3) Acting as a legal authority in delinquent's life with responsibility for value change.—This task has important bearing upon the treatment relationship. The probation officials have to associate themselves closely with the delinquent and make use of their legal authority to ensure correctional treatment of delinquent through rehabilitative methods. They should proceed with the basic assumption that delinquent is not one who is to be changed but one whose value considerations need to be changed.

(4) Decision making.—This is one of the most important functions to be performed by probation authorities in dealing with probationers. While taking decisions the probation officials should bear in mind that they are of major importance to the delinquent as also to the community insofar as they affect the freedom of offender on the one hand, and safety of the community on the other. These decisions usually involve calculated risks and must, therefore, be exercised with utmost caution.

According to *David Dressler*, the functions of Probation Officials involve four major techniques to be employed for effective supervision over probationer.[1] They are :—

1. *Manipulative Technique.*—An effort is made to make the offender's environment more conducive in terms of cordial family relationship, employment, social adaptability etc. by adopting this technique.

2. *Executive Technique.*—By employing this technique, the probation/parole officer helps the offender by referring him to appropriate welfare agencies or social service organisation or recreation homes etc.

1. David Dressler : Practice & Theory of Probation And Parole (1959) Columbia University Press, p. 167.

3. *Guidance Technique.*—The probation official renders assistance and guidance to his client by using his professional skill. This technique helps the probationer to develop his personality through self-help, self-reliance and self-discipline.

4. *Counselling Technique.*—The probation officer utilizes this technique in solving the personality problems of the probationers and rendering them necessary advice in times of need.

The success of the probation programme, largely depends on the quality of probation staff deployed to handle the offenders who are released on probation. The probation agents should not only be well trained and skilled but they should also have adequate time to devote to the probationers. Unfortunately, the situation in India in this regard is far from satisfactory because of lack of desired awareness about the probation scheme.

Critical Appreciation Probation as a Correctional Measure

It has now been universally accepted that in order to achieve progressive correctional standards there must be added emphasis on probation. Its exponents must interpret the philosophy underlying probation more clearly and initiate a definite campaign of education that will break down prejudices against correctional methods and explain their wider objectives.

It must not be forgotten that there are always some pitfalls in best of the systems which may pose a threat to the system itself. However, this should not discourage our efforts. Needless to say that probation as a method is much more cheaper and effective than incarceration. It is a modern technique in the field of correctional therapy[1] which must be used extensively for treatment of offenders.

There are some critics who look probation as a form of leniency towards the offenders. To quote *Dr. Walter Reckless*, "probation like parole, seems to the average laymen a sap thrown to the criminal and a slap at society."[2] Some scholars criticise probation because it involves undue interference of non-legal agencies in the judicial work which hampers the cause of justice.

Despite the criticism of probation from certain quarters, the fact remains that it is perhaps the only reformative technique which fully endorses the cause of human dignity. Probation, in fact, is an opportunity to an offender to "struggle to recapture self-respect". It lays greater emphasis on individual rather than his act and desires that potentialities of the offender for rehabilitation must be thoroughly explored before admitting him to the benefit of probation. It is, therefore, evidently clear that the system of probation is fully in conformity with the modern reformative trends of punishment.

In spite of the merits of the probation technique, there are certain pit-falls in the system which need to be mentioned. They are:—

(1) The advocates of probation system assert that this correctional method of treatment of criminals being compatible with the

1. Barnes and Teeters : New Horizons in Criminology (3rd Ed.), Chapter on Probation.
2. Dr. W.C. Reckless visited India in 1952 on the invitation of the Government of India and surveyed the entire field of correctional administration and gave a valuable report on Probation and allied services.

advances in social and medical science, is the only scientific approach and hence the concept of punishment must be modified, if not dissipated. This logic really destroys the very basis of our present sentencing justice. Keeping in view the increasing crime rate and its frightening dimensions, undue emphasis on "individual" offender at the cost of societal insecurity can hardly be appreciated as a sound penal policy.

(2) Probation system lays greater emphasis on the offender and in the zeal of reformation the interests of the victim of the delinquent's act are completely lost sight of. This obviously is against the basic norms of justice.

(3) Admitting all young offenders and first offenders to probation regardless of their antecedents, personality and mental attitude, might lead to recidivism because many of them may not respond favourably to this reformative mode of treatment. Section 3 of the Probation of Offenders Act, 1958 provides that the court at its discretion, can order unsupervised release of the offender after due admonition in offences such as theft, cheating etc. This section does not require the Court to call for a pre-sentence report from the probation officer and, therefore, the court does not possess necessary information regarding character and antecedents of the offender. Consequently, there is possibility of dangerous offenders being released under this provision which may defeat the very purpose of corrective justice.

(4) In many cases it is difficult to ascertain whether the delinquent is a first offender or a recidivist. Therefore, there is a possibility that an offender who is otherwise a recidivist, might be admitted to probation and he may not react favourably to this correctional technique.

(5) Section 4 of the Probation of Offenders Act, which is a key section of the Act, does not make supervision of a person released on probation mandatory when the court orders release of a person on probation on his entering into a bond with or without sureties. This is not in accordance with the probation philosophy which considers supervision essential in the interests of the offender.

(6) Though Section 6 of the Act requires the court to take into consideration the probation officer's report when decision to grant or refuse probation to an offender who is below 21 years is to be taken, but many a times courts do take decision without such report. This is again, against the spirit of the philosophy enshrined in the Probation Act.

(7) Perhaps the lack of real interest for social service among the probation personnel presents a major problem in selecting right persons for this arduous job. *Prof. Chute* attributes lack of properly qualified personnel, want of adequate supervision and excessive burden of case-work as the three major causes of inefficiency of the probation staff. Particularly in India, probation is reduced to a mere farce and the correctional task is being

handled by persons who are mostly inexperienced and inadequately trained for this work. The lack of enthusiasm for social service and inadequate resources for implementation of probation programme are perhaps the two main causes of slow progress of probation service in India.

As rightly pointed out by *Donald Taft* the acid test of success or failure of probation is its effect on recidivism.[1] But this test can never be accurately carried out because of a variety of other factors influencing criminality and the quality of probation also varies according to time and place. It is generally agreed that probation is one of the most promising methods of protecting society against crime and criminals. Studies on probation have shown that the advantages of this correctional method far outweigh its shortcomings. A case study conducted by *Morris Caldwell* on 1800 probationers during his period of probation supervision reveals that a total of only 23.1 per cent either violated probation or absconded. This fairly demonstrates the success of probation as a method of reforming the offender within the community itself.[2]

Some Useful Suggestions

Be that as it may, it has generally been agreed that probation serves as a potential measure of social defence for reformation of offenders. It has now been accepted as the most significant contribution to the new penological practices which is expected to endure, while other methods of treatment may undergo changes beyond recognition. Probation, together with the juvenile court system, has brought to the forefront, the personal needs and social problems behind the concepts of crime and punishment. It has helped in creation of new attitudes towards offenders and extended the function of criminal justice administration beyond traditional sentencing. However, with a view to making the system more effective and efficient, the following suggestions may serve a useful purpose :—

(1) Probation must be based on thorough investigation into the case-history of the offender and the circumstances associated with his crime. While treating the probationer, his physical traits and psychological conditions must be thoroughly considered. It must be remembered that individualised method of treatment essentially implies differed treatment of offenders according to their individual needs and personality. This is an important factor in the process of probation.

(2) The Prediction Tables should be compiled and used for planning probation strategies. Such tables may help in anticipating the probable result of correctional treatment on different offenders. Prediction Tables are being extensively used in the treatment of probationers in United States and they have proved immensely helpful in estimation of offender's personality for individualised treatment.

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1. Taft and England : Criminology (4th Ed.). p. 390.
2. An article entitled, "What is Responsible for Probation and Post-probation Outcome?" published in the Journal of Criminal Law and Police Science (March-Apl. 1957) pp. 667-76.

(3) The merger of juvenile courts with those of family courts seems to be an expedient policy because both of them perform functions which are quasi-parental in nature.

(4) The success or failure of probation in case of juvenile delinquent largely depends on his home conditions and family surroundings. Experience has shown that juveniles from broken homes show scant regard for rehabilitative processes while those having good family background respond favourably to the correctional methods of treatment under probation.

(5) The provision contained in section 5 of the Probation of Offenders Act which provides for compensation by the probation to the victim of his crime is kept in suspended animation. The court should make extensive use of this provision in view of the emerging trends in victimology and it should be made obligatory for the court to record special reasons for not passing order of compensation.

(6) Excessive control and supervision on delinquent tends to make him hostile towards the probation personnel and he may adopt an attitude of indifference and non-co-operation towards them. Obviously, no one likes to be kept under constant surveillance. Conversely, slackness in supervision may also lead to equally fatal consequences which might retard the progress of delinquent under probation. Therefore, a sturdy policy of mutual trust and non-interference with natural processes of growth of the probationer appears to be the best policy so far treatment of offenders under probation programme is concerned. This will enable the probationer to develop the qualities of self-help, self-respect and self-confidence in him. Supporting this contention *Donald Taft* rightly suggests that probation should utilise a balance of watchful control and constructive aid adapted to the individual needs of the offender.

(7) Recidivists have often proved a failure in the process of probation. It has, therefore, been generally accepted that probation should only be confined to the cases of juveniles, first offenders and women offenders. Women delinquents have shown better propensity for rehabilitation and adjustment as compared to their male counter-parts. It is equally desirable to draw a distinction between a casual or incidental offender and a professional criminal for this purpose. Probation is best suited in the case of the former while ill-suited for the latter.

(8) It is generally argued that the system of probation involves discriminatory processes and therefore violates the constitutional provisions contained in Articles 15 and 21 of the Constitution of India. To obviate this charge, it is suggested that a minimum and maximum limit of sentence may be prescribed under the law and release of delinquent on probation should be in between these two extreme limits depending on his corrigibility and response to correctional treatment.

(9) Though probation as a punitive reaction to crime is extensively

being used in India, yet there is an urgent need to extend the system to rural courts where there is general lack of social agencies to undertake the task of rehabilitation of offenders. There are reasons to believe that rural delinquents shall be more responsive to this correctional method of treatment than the urban offenders because of their relatively simple life-style.

(10) The quality of probation service must be improved by making the service conditions of the probation staff more lucrative. This will attract well-qualified and competent persons to the profession. The probation personnel ought to be specially trained so that they can discharge their duty as probation officer competently.

(11) A nation-wide uniform scheme of training for probation personnel with emphasis on social-work and rehabilitative techniques would serve a useful purpose to improve the efficacy of probation service in India. The probation officers should possess legal qualifications so that they are well conversant with technicalities of law and procedure involved in the process of release of offenders on probation. Since the probation work is quasi-judicial in nature, the encumbants to probation service must be duly qualified in legal and social welfare work.

(12) At present the work of probation is assigned to different departments in different States. In some States probation service is placed under the Social Welfare Department while in others it functions under the Panchayat Department or the Home Department. It is advisable to have an independent Department of Correctional Services on the pattern of the State of Gujarat at the national level to exclusively deal with rehabilitation of offenders, of which probation is one of the techniques.

(13) It would be useful to organise probation on national level under State tutelage. International conferences and seminars on probation and its related aspects may help in popularising this reformative method of treating the delinquents. The co-operation of different social agencies such as the schools, the family, the religious institutions and other voluntary organisations including Scout-Guides, Girl-Guides, Salvation Army, Welfare Boards, Mahila Ashrams, Nari-Niketans etc. should be solicited so that rehabilitation of offenders may be possible within the society itself.

Public Participation in Probation Service

Probation as a measure of social defence must involve active participation of voluntary workers and social service organisations. Public representatives should be included in the district-level Correctional Advisory Boards or Probation Advisory Committees, and their co-operation in finalising schemes regarding planning rehabilitation of probationers, supervision of parolees and After-care of released prisoners be solicited. The National Conference on Probation and Allied Measures held in India in October, 1971 identified the need for co-ordinated voluntary action in

correctional field at the district, State and national levels. The assistance from the Central Bureau of Correctional Services, Government of India may strengthen the probation programme in the field of social defence.

Before concluding the discussion on probation, it must be stated that during recent years most countries of the world are striving hard to evolve out an efficient system for treatment of offenders. Highlighting this point *Torston Erkinson*, the Director-General of Swedish Prison Board has observed that the task of correctional system is twofold, namely, to prevent the society from dangerous criminals and to rehabilitate these criminals so that they can return to society as law abiding citizens.[1] Considered from this standpoint, probation as a correctional measure should provide useful After-care to the offenders and satisfactory security to the society. To achieve this objective, it is desired that correctional system should not only be confined to probation officers of the courts but must also seek active participation of publicmen in treatment of offenders. This will help to soften the attitude of common men towards criminals and they would learn to recognise the worth of human being underneath the offender. It must be stated that the Swedish courts have sought to integrate the treatment of offenders with the social order by associating committees of laymen with courts to help the Judges in recording decisions. This collaboration of lay citizens with the functioning of court has tended to create an atmosphere conducive to the reformation of the offenders. In United States, many respectable citizens associate themselves with the problems of inmates and help and advise the latter in the capacity of "Big Brother" or "Big Sister". They visit correctional institutions meant for young offenders to acquaint themselves with the problems of inmates and render them all possible help and guidance.

It is rather disappointing to note that participation of public in the correctional programme for the offenders is completely wanting in India. However, efforts are being made to narrow down the gap between the restricted life of the prison and free life outside it by resorting to open institutions and open air camps for inmates. The inmates are also set at liberty for good behaviour. The offenders who are not a potential risk to society are released on furlough and parole after they have undergone a certain period of imprisonment. Nevertheless, there is yet a greater need for active public co-operation in the field of probation as the probationer has to seek his reformation within the society itself and the probation officers are merely to help him occasionally at certain levels.

Experience with probation in India has not been very encouraging. The application of probation service in this country has rather been fragmentary and, therefore, ineffective. Barring a few States, notably, Maharashtra, Gujarat, Tamil Nadu and Andhra Pradesh, probation has remained a matter of speculation and rare application. Adult probation, in particular has remained fairly neglected and needs to be implemented with rigour and attention. It is high time when working of probation in India must be restructured to make the system more effective and result-oriented.

The success of probation as a non-institutional therapeutic measure

1. Erkinson, T. : Society and the Treatment of Offenders : Studies in Penology (IPPF) p. 86.

would mainly depend on its cautious extension and judicious adaptation to adults. A well organised team of trained probation personnel having aptitude and real zeal for this kind of work and active co-operation of various agencies such as welfare boards, voluntary social workers and correctional institutions can certainly make probation a real success in India. It should, however, be remembered that mere letting off by the courts to keep convicted persons out of penal institutions would not serve any useful purpose unless adequate alternatives for those who need a measure of restraint for their own reformation as also for the security of the public are embodied in the scheme. The reform and rehabilitation processes have to be worked out in context of existing social conditions and for the benefit of the society as a whole. If reformation in fact benefits the society, the conscience of social justice would be satisfied. But if the reformation confines to the benefit of the individual offender alone, social justice shall remain suffocated. This sound note of warning should be the guiding theme of probation scheme which is essentially a part of reformative justice.[1]

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1. Dr. Paranjape N. V. : Law Relating to Probation of Offenders in India, (1988 Ed.) p. 16.