Judge

PROBATION

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EDUCATION MINISTER,
INDIA

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FOREWORD

I welcome this publication which brings together speeches delivered by Senior Members of the Judiciary in India on various occasions during the Probation Year—1971.

An important outcome of the observance of the Probation Year has been to bring together various agencies like the police, the judiciary, probation officers, prison officers, administrators and non-governmental agencies concerned with the criminal justice system. During the year, discussions were held at various levels on problems of probation.

It is hoped that the process of thinking initiated during the Probation Year will be continued so as to generate a greater awareness of the need for modernising our approach to and techniques of handling the offenders. Sympathetic treatment and rehabilitation of offenders needs to be recognised as essential parts of our criminal justice system. This publication, I hope, will make a positive impact in this direction.

S. Nurul Hasan

BACKGROUND

In the field of criminal justice, 'Probation' means the conditional suspension of imposition of a sentence by the court, in selected cases, especially of young offenders, who are not sent to prisons but are released on probation, on agreeing to abide by certain conditions. Ideally, probation is granted only after careful investigation and the probationer is subjected to supervision by a public or a private organisation or by individuals. It is a very interesting development in the criminal justice system, wherein within the confines of the penal law and procedures, the probation officers place before the judiciary a report on the socio-economic background, personality, behaviour and antecedents of the offender and the judiciary may decide whether the offender will benefit by a prison term or can be safely allowed to remain in the community, on certain conditions. The judiciary is periodically informed of the progress of the probationer. In case of the failure of the probationer, the initial sentence, which was suspended, can be imposed without further trial. Probation, as sometimes misconceived, is not leniency or "let-off".

Probation is a method of penal non-institutional treatment of offenders developed as an alternative to imprisonment out of a realization that short-term sentences, especially in case of juvenile and youthful offenders, were not only ineffective, but also harmful, as these brought the young offenders in contact with the confirmed criminals in prisons and most of all, removed their fear of the unknown, *viz.*, prisons. Probation is one more step in the progressive realisation that the sentence should fit the offender and not the offence.

Probation-year, 1971 was initiated by the Central Bureau of Correctional Services by a circular letter to all concerned, giving a variety of programmes by which probation, as prescribed under the Probation of Offenders Act may be used as widely as possible in the disposal of criminal cases. The call given evoked very enthusiastic response and the leadership was extended to this progressive movement by the seniormost judges in the country.

Shri Justice S. M. Sikri, Chief Justice of India, gave a clarion call to the judiciary all over the country at a formal central inauguration of the Probation-Year 1971, in May 1971. He re-

ferred to the need for training and research in this subject and appealed to the Judiciary, Prosecution and the Bar to become votaries of Probation.

The learned Chief Justices of the High Courts in several States took the leadership at various state-level functions in connection with the 'Probation Year'. Several other Justices of the High Courts also followed the lead and gave expression to views which were very refreshing for the Criminal Justice System traditionally reputed to be orthodox all over the world.

The programme for the Probation Year culminated in a National Conference on Probation and Allied Measures held at New Delhi in October 1971 where a large number of representatives from the Judiciary, Social Welfare, Probation, Prisons, Police, Bar and Non-official Agencies participated. The Valedictory Address given by Dr. P. B. Gajendragadkar, Chairman, Union Law Commission is a distinct milestone in the progressive movement of judicial and correctional reforms in India.

The High Courts of Andhra Pradesh, Assam and Nagaland, Delhi, Kerala, Punjab and Haryana, Rajasthan and Orissa, issued meaningful directions to the subordinate courts as regards more liberal use of the discretionary powers given to the Judiciary under the various Probation of Offenders Acts.

The talks given by the learned Judges and the Directives of the High Courts have been brought together in this compilation so that they may serve as a constant source of reference and inspiration to the Trial and Appellate Courts, the Bar, the Prosecution, the Probation Officers and the Probationers themselves.

The Central Bureau of Correctional Services will like to acknowledge its gratefulness to all the distinguished Judges for their unstinted support to the Movement for Social Defence in India, which aims at the protection of society and the prevention of crime through individualized services for the treatment and rehabilitation of offenders.

Our grateful thanks are also due to Professor Nurul Hasan, Union Minister of Education, Social Welfare, Youth Services and Culture for his continued guidance to the field and also for his valuable Foreword to this Publication. The Union Department

of Social Welfare and Shri P. P. I. Vaidyanathan, Additional Secretary gave us continued support for the various programmes and I am grateful for the same.

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PROBATION—A METHOD OF REHABILITATION OF OFFENDERS AND PREVENTION OF CRIME

Shri Justice S. M. Sikri
*Chief Justice of India**

The Ministry of Education and Social Welfare has done me great honour in requesting me to inaugurate the Probation Year 1971. I am very glad that I was asked, because I must confess I did not quite know before the fine work that is being done by the Ministry through its two agencies, the Central Advisory Board on Correctional Services and the Central Bureau of Correctional Services.

What is the advantage of placing an offender on Probation? This question used to be asked to a few years ago expecting that the answer would be : "Not much." The question is still asked in India though not in England, U.S.A. or some other countries. From all one reads, the opinion abroad is almost unanimous that it is a wonderful instrument for achieving a double objective. It not only rehabilitates the probationer but it prevents recurrence of crime. This is at least the view of all serious students of criminology and social welfare. I like the definition of 'Probation' as given by the Morrison Committee :

> "The submission of an offender while at liberty to a specified period of supervision by a social case-worker, who is an officer of the court; during this period the offender remains liable, if not of good conduct, to be otherwise dealt with by the Court."

I see from a note that the probation system was not the outcome of any deliberate legislative or judicial action but grew gradually as a result of some kind-hearted ordinary citizens' concern for young offenders in custody. John Augustus, a local cobbler in Massachusetts, developed interest in such kids and offered bail to the courts to get them released to his care and supervision (1841—59). Gradually, the number of such boys increased to more than 2,000, most of whom never went the way of crime. And that is how the system started and gradually grew in the United States of America, England and elsewhere.

*Inaugural Address of the Probation Year 1971 on the 8th May 1971.

History in England on this subject is given by Delvin thus: Before 1907 many courts adopted a kind of voluntary probation with the assistance of the voluntary societies although it was employed without legal authority. The system was first given legal effect by the Probation of Offenders Act, 1907 (subsequently amended by the Criminal Justice Administration Act, 1914) and its administration put on an organised basis by Part I of the Criminal Justice Act, 1925. These enactments were repealed by the Criminal Justice Act, 1948 and for England and Wales the relevant provisions are now contained in Sections 3—12 and the first and fifth Schedule to that Act, and in the Probation Rules, 1965. An interesting account of the history is given by J. E. Hall Williams in his book entitled "The English Penal System in Transition" which I read this morning. According to him it was as early as 1820 the Warwickshire Quarter Sessions adopted the expedient in suitable cases of passing sentence of imprisonment upon condition that he returned to the care of his parent or master "to be by him more carefully watched and supervised in the future."

In India the first legislative effort seems to have been the enactment of Sec. 562 in the Criminal Procedure Code 1898. This section applied to offences of theft, theft in a building, dishonest mis-appropriation, cheating or any other offence under the Indian Penal Code punishable with not more than two years' imprisonment. In 1923 a new Section was substituted for the old Section and this Section embraced more serious offences. Various States enacted special laws on the subject. Bombay seems to have been the first to enact a law in 1938 called the Bombay Probation of Offenders Act. It was followed by U.P. First Offenders' Probation Act, 1938.

In 1958 the Indian Parliament passed a comprehensive law, the Probation of Offenders Act, 1958. In the Objects and Reasons it was stated:

> "In several States there are no separate probation laws at all. Even in States where there are probation laws, they are not uniform nor are they adequate to meet the present requirements. In the meantime, there has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effects of a jail life. In view of the widespread interest in the probation system in the country, this question has been re-examined and it is proposed to have a Central law on the subject which should be uniformly applicable to all the States.
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> It is proposed to empower courts to release an offender after admonition in respect of certain specified offences. It is also proposed to empower courts to release on probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life. In respect of offenders under 21 years of age, special provision has been made putting restrictions on their imprisonment. During the period of probation, offenders will remain under the supervision of probation officers in order that they may be reformed and become useful members of society. The Act seeks to achieve these objects."

Who can say that these are not laudable objects :

The law seems adequate. But is it enough to pass a law and say that probation is a good thing? Not only should the serious student and Probation Officers be convinced of its advantages but the Judiciary and the Bar must also become its votaries. Unfortunately, at present, very little serious attention is paid to this aspect by the Judiciary and the Bar. As a matter of fact I was shocked to see that in a number of cases, which came to the Supreme Court recently, even the existence of the local Probation of Offenders Act was not known, or easily ascertainable. No reference to the relevant Probation Act was made in the courts below but the point was for the first time taken in the grounds for special leave to appeal to the Supreme Court.

I am very glad that the Ministry of Social Welfare has thought of having this year as a Probation Year. It will give wide publicity not only to the desirability of helping the probationers but to the fine work that is being done by this Ministry through its agencies, the Central Advisory Board on Correctional Services and the Central Bureau of Correctional Services. I have seen some of its reports and pamphlets. They show keen awareness of the problems involved. I have no doubt that the Judiciary would like to actively participate in the observance of the Probation Year. However, I think that as a part of the activities in connection with the observance of Probation Year-1971, research and dissemination of it is necessary on the lines undertaken recently in England. Should a Probation Officer prepare a pre-trial report on every accused who has not been previously convicted of an offence punishable with imprisonment or is not over

25 years old? What is the proportion in India of Probationers who commit offence either after say 3 years, or during the period of probation? What is the number of cases or the proportion in which Magistrates, Sessions Judges and the High Courts exercise the power of asking for a report from the Probation Officer? Is it necessary to have an 'after-care service'? In England, it appears, that there is a great deal of variation of the extent to which offenders are placed on probation, between court and court. Is the same situation prevalent here in India? Why are some Judges not probation-minded?

It is stated in a report of the Home Office (U.K.), published in 1966—Trends and Regional Comparisons in Probation—that "studying sentencing practice in twelve magistrates courts", Hood found that the proportion of adults put on probation varied from 1% to 24%. Six of the courts put fewer than 5% of offenders on probation and only two more than 15%. He suggested four factors which influence the use which is made of probation.

(a) The attitude of the justices towards the concept of probation as being useful for adult offenders.

(b) The use made by the magistrates of the service for adding to their knowledge of defendants.

(c) The belief that officers are already overworked by the great load of cases from the juvenile court and with matrimonial cases.

(d) The confidence which justices have in the ability of the probation officers."

A similar study in India would perhaps be extremely useful. A comparative study of the organisation, staffing and the working of the Probation Services in England and in India may reveal useful information and leads.

I have ventured to speak of research because it struck me that the results of research would convince not only the Judiciary but also the Bar and the public of the great utility to the society of the system of placing offenders on probation. If necessary, research organisations like the Indian Law Institute may be requested to undertake research in this matter.

It appears that the prosecution itself never moves the court in the matter at all. A question which may be considered is whether it should not also be the duty of the prosecution, which

is a limb of the State, to draw the attention of the Courts to the provisions of the Probation of Offenders Act in suitable cases.

As far as I am aware, we have no statistics as to the kind of offences in which courts have been placing offenders on probation. Such statistics are available in England and it will be useful to have these statistics in order to improve the present working. As far as the Probation of Offenders Act is concerned, it does not throw much light on the kind of offences and the kind of circumstances which a court should take into consideration. If these statistics do become available the matter may perhaps be codified and some guidance given to the Magistrates. The case law on Sec. 562 Cr.P.C. and the Probation of Offenders Acts shows great variation in the attitude of Courts. One Judge would exclude cases under the Food Adulteration Acts. Surely, each such case should be examined on its own merits without disqualifying persons committing certain type of offences.

One thing which struck me as odd was, that in the cases which have recently come to the Supreme Court, the exact age of the accused had not been ascertained. In one case, the accused, in his statement under S. 342 Cr.P.C., merely stated that he was 19. Nobody took further notice of this till the case came before the Supreme Court. Was that enough proof of age? The State Counsel insisted that the matter be remanded. He argued that the defence counsel did not draw the atention of the Court to the Probation of Offenders Act because he knew the accused was over 21.

It seems to me that if an accused person is likely to be covered by the Act, and his age appears to be about 21, efforts should be made by the investigating agency or the prosecuting counsel to collect material regarding the age. You are all aware that the exact age is known to very few persons living in rural areas.

I also think that a Magistrate should himself try this question early, if there is any possibility of the applicability of the Probation of Offenders Act.

I am doubtful if the Magistrates can effectively supervise the working of Probation Officers. For one thing, their calendars are full. Secondly, for close supervision, a higher officer, who has had training and experience both in Law and Social Welfare would be better. Does the working of higher Probation Officers in India throw any light?

I have no doubt that the Judiciary will participate and participate actively, in this movement which is not only humanitarian but also serves society itself by preventing recurrence of crime. A serious seminar on the topic would not only help greatly in the propagation of its value but show the defects in the present system. I am not competent to speak to you about the technical details and I will leave this to the experts who follow me. Unfortunately, I have had no personal experience about this noble work and I can give you no advice. But I can, and I do wish the Ministry and its Central Advisory Board on Correctional Services and the Central Bureau of Correctional Services, my best wishes for the successful achievement of the 15 objectives listed in their pamphlet which has been supplied to us.

PROBATION—A HUMANISTIC APPROACH OF CRIMINAL JURISPRUDENCE

Dr. P. B. Gajendragadkar
Chairman, Law Commission

You have just listened to the detailed recommendations made by the different Study Groups. You have also listened to Mrs. Jyotsna H. Shah, Director of the Bureau, describing the highlights of this Conference. With the speech of Mrs. Shah, and after the reading of the Reports, the substantial, significant and fruitful part of the proceedings of the National Correctional Conference on Probation and Allied Measures has, in fact, come to an end.

As you know, every age has its own rituals, and the present age is no exception. Today, we have developed a ritual, which requires, that no conference, whatever its character and whatever subject it has met to discuss, is supposed to be completed without, what is traditionally described, a Valedictory Address. That is how I have been persuaded to participate in this ritual of delivering today's Valedictory Address. Since I have accepted the invitation, I think I should share some of my thoughts with you.

The reports which we have heard just now clearly indicate that for the last two days and a half, there has been intensive dialogue between participants inter-se who are earnestly committed to the task of making correctional measures a success in our country. The highlights of discussions, as described by Mrs. Shah, give one the feeling that this dialogue was not only intensive in character, but was purposeful; the proceedings and conclusions of different groups, which have been recorded in such eloquent terms by the respective reports, give me the confidence that the year 1971 will be marked not merely as a year dedicated to probation, but, as Mrs. Shah fondly hopes, it may turn out to be the beginning of a new era in the administration of criminal justice in our country.

Probation, as you know, is described by specialists, as conditional suspension of the imposition of sentence by the Court. One would have thought that this concept of probation and

Valedictory Address delivered at the Concluding Session of National Correctional Conference on 27th October 1971.

allied measures might have arisen out of some judicial pronouncements, or legislative enactments or juristic expositions. That, however, is not true. You must have heard an English saying that from very small streamlets mighty rivers flow. The growth and development of the doctrine of probation illustrates the soundness of the same.

It was given to John Augustus of Boston to initiate, though unknowingly, this concept, when in 1841, he persuaded a Criminal Court to release one habitual drunkard from jail on his personal responsibility. John acted in this manner purely on humanitarian grounds. He was not a lawyer, or a Judge or a Jurist, but was a mere cobbler. His humane instinct told him that it was worthwhile trying to help a habitual criminal to rehabilitate himself. Acting on this human impulse, he took, what turned out to be, a momentous and a historic step. The person released on the undertaking of John was rehabilitated and lived a normal, innocent and honest life thereafter. John pursued in his course, and during the next few years, he tried the experiment in regard to two thousand convicts. Efforts made by John in this direction constitute, in a sense, a foundation of the whole concept of probation, as we know it today.

You have, no doubt, discussed all problems in relation to probation and allied measures, comprehensively and scientifically. May I, however, with your permission, request you to treat the problem of probation and allied measures as a part of our national effort to place our criminal jurisprudence on sound, rational and moral basis?

Lawyers may be aware that Ruscoe Pound was once asked a question: "Can you give a precise, clear and final definition of law", and he answered "No". He explained that law cannot be defined in decisive and finalistic terms because law is a living institution and like all living institutions, it is dynamic and changes from time to time; as such, he refused to give a final and clear definition.

Let me illustrate this point. In England, a large number of petty offences connected with property used to be punishable with sentence of death. At one stage, when a proposal was being considered to relax the said rule in respect of thefts of articles worth not more than 2 shillings, the Lord Chief Justice of England expressed in strong and indignant terms his disapproval of the proposal. The learned Judges, he said, are

unanimously agreed that the expediency of justice and public security require that there should be no remission in the power of the criminal law. In other words, the Lord Chief Justice of England felt that an offence of theft of property worth not more than 2 shillings had to be punished with a sentence of death in the interest of public security. From that concept to the deliberations of your Conference, there is a very big jump. Young boys who join in committing the offence of petty thefts were liable to be sentenced to death in England and the Lord Chancellor of England thought it was a just thing to do. On the other hand, you, Ladies and Gentlemen, are earnestly engaged in the task of popularising the principles of probation and allied correctional measures in dealing with juvenile offenders. Does it not show that Ruscoe Pound was right when he refused to give a final, decisive definition of law?

Criminal jurisprudence now realises that in a large majority of cases, commission of an offence is the result of sociological and environmental factors. No one is born a criminal; all persons have born innocent. It is this belief which is the foundation of the doctrine of the presumption of innocence on which we act in the administration of criminal law. Why does a person, born innocent, commit the first offence ? In a majority of cases, the commission of the first offence by a person who was initially innocent, is due to adverse economic circumstances, hostile environment, emotional mal-adjustment, unhealthy family surroundings and other sociological and psychological factors. If that be the true position, it should not sound too idealistic to suggest that the administration of criminal law should regard itself as a branch of social service.

In our criminal trials, we are apt to treat the ciminal as a mere exhibit in the Court, and we concentrate our attention on the proof about the commission of the offence. We rarely ask ourselves why a person, born innocent, was disposed to commit the offence. Unless we change the focus of judicial attention from the narrow point of view which concentrates on the proof of the commission of the offence, and take within its purview the larger human problems of the personality of the criminal, our criminal trials and the imposition of sentences are apt to work in a blind and mechanical way. That will not rehabilitate individual offenders, but, on the other hand, will make first offenders confirmed criminals.

In this connection, I would like to narrate my experience of witnessing a trial in a People's Court in Moscow. Along with

the other members of the Indian Delegation, I attended a trial in the People's Court at Moscow in 1965. When the offender was tried for committing the offence of theft, the trial was conducted by a Lady Magistrate, who presided over the Court with remarkable dignity and ability. The procedure adopted at the trial was a revelation to me. In trying the offender, the Court appeared to be concerned to find out why the accused person at the dock who was the first offender, committed the offence. Questions were asked in regard to the past career of the offender. It appeared that the offender was a good worker in his factory and had an unblemished record. Questions about the antecedents of the accused would normally be treated as irrelevant in our criminal trials; but not so in U.S.S.R.

Evidence led at the trial showed that the accused was married, had two children, and his mother-in-law stayed with him. It also appeared that the mother-in-law used to instil in the mind of her son-in-law that without a Refrigerator and Radio-set, the house was incomplete and life was dull. This repeated suggestion from the mother-in-law, it appeared, led to the commission of the offence. The accused stole two bags of sand, and the investigation disclosed, that with the money realised by the sale of two sand bags, he purchased a Refrigerator and a Radio-set. It was in the light of these background materials that the offence was tried and the accused was ultimately sentenced to a certain term of imprisonment.

However, the sentence imposed on the accused was conditional and it was directed that the accused should not be sent to jail, but should go back to his factory; his work should be watched for a year and if satisfactory reports were received about his work in the factory and about his behaviour in the community, the sentence imposed on him would be quashed. That is how modern criminal jurisprudence tries to see that criminal trials and the sentences imposed on the offenders at such trials do not convert the offenders into hardened criminals, but give them an opportunity to rehabilitate themselves.

I recognise that if evidence about the antecedents of an offender is taken at the outset of the trial, it may conceivably introduce an element of prejudice against him. Nevertheless, what I wish to emphasise is that in trying the offence, we should not lose sight of the human aspect associated with the commission of the offence, and should try to save the personality and the integrity of the accused, as far as we can. It is this human

approach to the problem of criminal trials, which is the foundation of the philosophy of probation.

Thus, the consideration of the problem of probation in its proper perspective should lead us to the consideration of a much larger problem of basing our criminal jurisprudence and our administration of criminal law on humane, scientific and rational lines. If such an approach is adopted, we would find that in many cases, the offender commits the offence not because he is born a criminal, but because he is an ailing citizen; and, criminal trials must, therefore, assume the role of helping the ailing citizen to rehabilitate himself. In this context, what Gandhiji said assumes significance. Said Gandhiji, 'our jails must function as hospitals and must cure the ailing citizens'.

Let me narrate a personal experience. In my early days as a Judge, the case of a young habitual offender was brought before me in a criminal revision application; the offender was 21 years old, and had nine previous convictions recorded against him. His statement before the trial Magistrate showed that he began his criminal career out of poverty and was imprisoned for 3 months for his first offence. When he came out of jail, he tried his level best to get a job, but failed. Every time, when a job appeared to come his way, and an inquiry was made about his past, he had honestly to intimate to his prospective employer the fact of his conviction, and the employer invariably turned his back on him. The result was that the only way he could manage to live was to commit an offence and to go back to jail. I do not wish to over-simplify the problem involved in the administration of criminal justice by narrating this experience. I only wish to emphasise one aspect of the problem because it seems to me that it is this aspect with which we are concerned as persons interested in popularising the practice of probation and allied correctional measures.

I am aware that the scope of your deliberations is confined to juvenile offenders; but, I thought it may not be irrelevant to request you to treat the problem of probation as a part of a larger problem of humanising the administration of criminal law in our country. From this point of view, the humanitic approach of criminal jurisprudence will take within its beneficient sweep, not only juvenile offenders, but all offenders who deserve to be treated in a humane way so as to rehabilitate them and bring them back to the honest, normal way of life.

I confess that though I had been a Judge for nearly 21 years, I did not come across pre-sentencing record in many cases; and,

it seems to me that the reproach may not be unjustified that some, if not many, Judges are indifferent to the application of the doctrine of probation. The task of the Probation Officer as well as the task of the Investigator, the Judge, and Prison authorities is very onerous indeed. All these persons who are concerned with the administration of criminal law, must not be inspired solely by the view that crime should be sternly put down. They should share the belief that punishment is no longer regarded as retributive or deterrent, but is regarded as reformative or rehabilitative. In the process of popularising this concept and giving full scope to the doctrine of probation in respect of juvenile offenders, all of us, including the members of the general community, must be emotionally involved. For the success of the programme, a total dedicated effort is required.

I feel confident that when the proceedings of your Conference and the conclusions reached by you are duly circulated all over the country, they will strengthen the efforts of Mrs. Shah and her colleagues in making 1971 as a year which heralds a new era in the administration of criminal justice so far as juvenile offenders are concerned. It is in that prayerful hope and expectation that I decided to join this gathering on this occasion. I feel very happy that I was given this opportunity to meet this distinguished gathering and to place before it some of the thoughts which are passing in the mind of ordinary citizens of this country. I have shared my thoughts with you in my capacity as an ordinary citizen, and I trust that all ordinary citizens will join me in wishing your movement every success in the near future.

THE ROLE OF JUDICIARY IN PROBATION PROGRAMME

Shri Justice V. R. Krishna Iyer
Member, Law Commission

This Conference on Law, Courts and Probation seeks, I fancy, to civilise and sophisticate the penal law, to educate the criminal judiciary and allied agencies with a new accent on rehabilitation of delinquents, to broaden and deepen the probation system and diversify punitive processes, to strengthen and modernize social defence, saving the public Exchequer good money in the bargain, as probation is certainly less expensive and, wisely used, more effective than the prison cells in certain areas of crime. These blessings need to be understood in the proper perspective by those in charge of the nation's policy-making and applied by those charged with enforcement of the relevant laws. More than all, the new philosophy and benefits of non-institutionalised treatment need to be publicised so that intelligent public opinion and popular goodwill may be mobilised in support of the theory and practice of Probation as an alternative to jail terms. In a democracy, sound is the medium of light (and sometimes of murkiness) and so the spoken word through seminars and conferences must spread the message of the probation system to all parts of the country. Delhi is not India and it is appropriate that the know-how on probation, in its wider connotation, is discussed by the concerned agencies—the police, prison and probation officers, the prosecuting staff, the lawyers and the judiciary, drawn from the far corners of the country.

Social defence, wherever possible through reformation of the delinquent, is the keynote of modern penology. Conventional punishment inflicts injury and no one is improved by injury. Therefore, different measure must be adopted to improve the convict which is a major objective of modern criminal justice. The current coin in criminology is neither horror nor terror, neither retribution nor deterrence—concepts which have been demonetised by penological research, prison statistics and psychiatric studies. In their place, the more humane, scientific and rewarding method of correction through carefully supervised conditional freedom, which inhibits the individual from repetition through resipiscence, and protects the community from recurrent incursions into its peace and safety, has been substitut-

Speech delivered on the 25th Oct. 1971 at the National Correctional Conference on Probation & Allied Measures.

ed. Faith in man and his essential goodness—a Gandhian creed—leads to the theory that criminality is ordinarily but a deviation from normality and therefore a disease, which, in turn, warrants the thesis that sentencing strategy must be geared to the task curing the culprit of the criminal kink by personalised prescriptions, environmental change and social control. A prison has social significance mainly as a stiff house of mental—moral redemption, a stern hospital for remedying anti-social propensities and none as about closing institution which suppresses crime by breaking the spirit. In practice, reformation of the young delinquent, the first offender and the victim of criminal company and socio-economic pressure is not only better accomplished by non-institutionalised treatment but jail term is a remedy that aggravates the malady. For instance, U.S. prisons—not more dehumanised than ours, I presume—have been regarded by thinking Americans as schools of crime. As a one-time Minister who sought to humanise Kerala jails with some measure of success and as one who has visited some prisons abroad, I must confess that a jail is a jail and in the case of new-comers particularly, heals less than it harms. So much so, Superintendents of prisons should be the hosts only of hardened hostiles and dangerous deviants—the hard core criminals who require long term and rigorous reformatory regimen under the controlled conditions of incarceration. Of course, a humanising programme must figure importantly in the jail menu also. The large residue of guilty persons made of softer or reformable stuff must receive domiciliary or other types of extra-mural treatment, and here is the relevance of probation as a rehabilitation regime. Probation embraces a wide variety of non-institutionalised disciplining devices and stems from the realisation of the self-defeating features of imprisonment, long term and short term. Let me drive home my point by two recent excerpts from "Time Magazine" revealing the correctional sense and sensitive resceefulness of the American criminal court.

Time, November 9, 1970—

"The New Jersey Supreme Court last week handed down a pioneering decision in the case of Stephen Ward, 20, a college student convicted of possessing $ 2.50 worth of marijuana in his home. Ward had received a two-to three-year sentence in notoriously archaic Trenton State Prison. Within two weeks, he suffered a mental breakdown and during the next year, had to be transferred three times to a hospital for the criminally insane.

To prevent such 'devastating' experiences in the future, the high court suspended Ward's sentence and recommended an end to jail terms in New Jersey for anyone convicted of using or possessing marijuana for the first time. From now on, said the court, a suspended sentence and probation should suffice. The decision is likely to influence courts in many other states."

Time Magazine, June 7, 1971—

Better Than Prison

"Though the sentences for many crimes are prescribed by law, judges often have enough leeway to offer a choice between prison and other punishments with all sorts of strange conditions attached. It is not clear weather or not those conditions are always legal, but defendants faced with a recent spate of such unusual choices have consistently rejected prison.

In Miami, Mrs. Mary Louise Patterson, 38, mother of six, was being sentenced in a misdemeanor assault case. She explained that at 315 lbs. she was too fat to work. The judge put her on probation for three years on condition that she lose 3 lbs. a week under a supervised diet until she had dropped 65 lbs. If she falls off the diet, she could go to jail. Mrs. Patterson accepted her sentence happily, saying, 'Oh good. Now I'll finally lose weight'.

In New York..... Chairman of the city's board of corrections, suggested that many petty offenders be required to do various socially beneficial jobs like cleaning up their neighbourhoods instead of serving short jail terms. Underlying it all seems to be a tacit recognition that almost anything is better than doing time in the current U.S. prison system."

Trust begets trust and the freshmen in crime, as distinguished from seasoned repeaters and chronic anti-social elements may favourably response to external stimuli and internal pressure and thus be saved. This twentieth century approach to crime and punishment is, 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 Macaulay and men of his ilk haunt our criminal courts still, so much so, probation still fares ill in the law-courts. Twenty-five years of freedom have not freed our udiciary from the obsolescent British Indian ideology bearing on suppression of

crime. And it is time our magistracy bends to the winds of socio-legal change which have been blowing for a long time now. Orthodoxy and ignorance die hard—even among judicial personnel. The awareness of the need to be educated in the current thought on the causes, syndrome and treatment of crime and criminal is the beginning of the forensic appreciation of probation and allied methods. Indeed, modern criminal jurisprudence and other relevant social and psychiatric disciplines have gone so far ahead of the lagging Indian courts, entombed in their outworn ideas, that a national training or refresher programme for the criminal judiciary, from the lowest to the highest echelons, is an imperative need. How else can we produce a dynamic change among them who are but lay men in this new field?

Judge Parker who was Chairman of the Judges Committee which reported on the correctional system for adult and youth offenders convicted in Courts of the United States said :

> "No judge, however learned, however wise, can acquire in the short period he devotes to sentencing sufficient knowledge of the defendant and his surroundings to be sure that he imposes the sort of sentence that is best in the premises. Then, we have this fact that we might as well face; some of the judges in the Federal Courts are not men who have given their lives to the practice of criminal law, and are not at all experts in the matters of criminology. They are successful civil lawyers and they come to this problem of crime late in life with little knowledge of its background. That, I think has been recognised by every Attorney General of the United States for the last twenty years".

The pivotal role of the magistracy in implementing intelligently and compassionately a comprehensive programme of probation involves new learning, new techniques, new responsibilities and new areas of decision-making. It is heartening to know that the Central Bureau of Correctional Services is thinking in terms of training camps and refresher courses for the criminal judiciary in the country. I hope that full advantage will be taken of such facilities and no stand-offish attitude will inhibit the learned men of the law from becoming short term students for better professional competence. I do not believe in the myth of judicial omniscience and I do know as a Judge myself that the new frontiers of legal knowledge must be discovered by

us if we are truly to fulfil our national role. And there is so much of new law to be learnt, so many new crafts to be mastered and a re-orientation of penal objectives to be acquired, if we are to be judicial activists. Justice is not a cloistered virtue and the robes of the profession do not mark the end of the journey.

I beg of the learned men of my fraternity to be pardoned for these blunt words. Three extenuating circumstances operate in my defence. The judiciary has, as part of its professional insulation often declined to listen to what goes on around, that sharp speech has a better chance of being at least part-heard. Secondly, platitudinous avalanches of speechification abound so much in our country that seminars and conferences are indifferently undergone as rituals and the only way to awaken even the scholarly community to attention is to shock them by barbed words. And more substantial than all these is the alarming escalation of young crime in Indian society today that the problem with those who will not obey the law has never loomed so large as it does on the contemporary scene and instead of petty tinkering, comprehensive reform of the criminal law and its administration is the answer to this explosive challenge. Judicial technology in controlling crime through scientific sentencing procedures is thus a national issue, immense, urgent and complex. Let us, the judicial wing of the nation, play our part.

Before I make any further point pertinent to the discussion, I would like to draw attention to the built-in difficulties in the way of prevention and prosecution of crime and the punishment and correction of the criminal. Today, we have ideological criminals who defy the law on principle. The Father of the Nation in the militant days of the Freedom struggle declared war on the satanic British Government and swore that sedition was his religion. Unmindful of the fundamental fact that we are a free democracy today and changes in the political and socio-economic order can be brought about without violence, the angry youngmen amidst us understandably fed up with the stagnant conditions around them—and some political groups and parties also speak the same language—shout that they have more faith in the bullet than in the ballot and some preach the dual creed of the ballot and the bullet, with the result that wilful violations of the law are committed in the name of ideological conviction. What are we to do with this category? Again, we have political parties who as men in the Opposition defy bans and laws, not

with the ordinary criminals' motive but so further political ends. Can we classify them as criminals and deal with them as such? The embarrassment is that even if the Courts convict and sentence, Governments withdraw cases or remit sentences, indirectly conniving at, or condoning the challenge, to the law—of course, for other valid reasons of policy. A kindred group of offences is committed by the working class and student communities christening them strike, picketing, gherao and bundh. Going by the definitions in the book, these activities, when they become criminal transgressions, are punishable but prudence and a more pragmatic outlook lead to a different diagnosis and treatment. A sizable number of cases in the law courts can be traced to these species of crime and so long as confusion prevails about what should be done in such crime situations, it is not possible to give guidelines to the police, the probatoin officer and the magistrate who are confronted daily with challengers of this type who are not strictly criminals but are breakers of the criminal law all the same. We have to deal with these quasi-criminals and not play hide and seek with them. Not perhaps the prison bars but other punitive resources may have to be innovated but a solution which has a broad backing from the community is the desideratums.

Even here, a note of caution has to be sounded. Industrial communities, urban populations and the iniquities and inequalities of capitalist society spawn crimes which cannot be checked without re-ordering the socio-economic set-up altogether. Socialists and sociologists regard a society of the few rich and the vast masses below the poverty line as crime-prone, the laws themselves being viewed as calculated to protect the exploiters at the expense of the toilers. The problem of the haves and the have-nots is too deep and fundamental for solution at seminars and symposia and if struggles are being launched and national policies are being outlined sympathising with the slum dwellers, the homeless and the hungry, the law is in a dilemna when the disadvantaged and desperately poor commit acts regarded as offenses. Necessity knows no law and acts which have the look of crime are not that immoral when viewed against the back-drop of socio-economic deprivation. Law enforcing agencies are in a quandary in these sensitive regions of criminal behaviour. My intention is only to highlight the important fact that the job of the policeman, the probation officer, the judge and the social worker is delicate, perplexing and unenviable when law-breaking is labelled differently and dealt with by the political government and the public—whose support is sought for the

commission of the crime itself—upon the contraventions as necessary evils in an unjust society.

A large margin for these ambiguous areas of crime may be left and still wide stretches of real crime, with anti-social impulses and motivations remain to be considered and controlled in the halls of justice and after. Juvenile delinquency has acquired a new tempo and intoxication. Boys and girls in moral danger are increasing rapidly and even child offenders, waifs and strays are snowballing daily. The alarming escalation of consumption of LSD and allied items and the crime market around them corrupt the youth of our cities and special laws and correctional agencies are urgently needed. The vices of a traditional society and permissive society are visited on us, stimulated by drugs and drinks, celluloid crime stories and night club morals. The most disturbing thing is that adult indiscipline serves as alibi for ubiquitous teenage crime which has reached such crescendo that if the soul of the emerging society is to be saved homes, parents, schools, unions and local communities must organise Operation Youth Salvage. Putting all the punitive eggs in the prison basket is disastrous. New therepeutic measures, new skills and new institutions must be created. It is here that criminal law, psychic medicine and correctional supervision at home and outside meet at the sentencing level. Here does the judge play a diminishing role or rather lean heavily on psychiatric and other experts, social workers and probation officers. It is a pity that the Indian criminal justice system does not, except to a little extent, in a few special statutes, provide for post-conviction, pre-sentencing collection of data and consultation with specialists so as to prescribe personalised judicial directions, potent from a reformatory angle. This deficiency is all the more regrettable in that even the draft Criminal Procedure Code Bill does not deal with the requirement; and any criminal justice law enacted by the State, mandated as it is by the Constitution to assure the dignity of the individual, should endeavour not to stigmatise the target of punishment but to chasten him even by chastisement. I regard it as flowing from the Preamble to the Constitution that non-institutionalised and semi-institutionalised care and after care must find expression in the laws of crime and punishment. Here a gap is visible in the existing Codes and the bill before Parliament. Yet it is not too late to mend.

Another chink in the wall. May be, it is a moot point whether a Code, being comprehensive to a degree and in practice consulted frequently by prosecutor, counsel for the accused and the

court, should deal, chapter-wise, with the law of probation, parole, juvenile courts, children's courts and the special treatment of under-graduates in crime. It is wrong in principle and practice to relegate these vital sectors of criminal law and procedure to minor statutes. For, they become neglected in the courts, a sort of legislative Cinderellas. The sapient words of the Chief Justice of India inaugurating the Probation Year bring home the tragic import of my point. The distinguished Judge said :

> "Is it enough to pass a law and say that probation is a good thing ? Not only should the serious student and Probation Officers be convinced of its advantages but the judiciary and the Bar must also become its votaries. Unfortunately, at present, very little serious attention is paid to this aspect by the Judiciary and the Bar. As a matter of fact, I was shocked to see that in a number of cases, which came to the Supreme Court recently, even the existence of the local Probation of Offenders Act was not known, or easily ascertainable. No reference to the relevant Probation Act was made in the Courts below but the point was for the first time taken in the grounds for special leave to appeal to the Supreme Court."

Probation must form part of the mainstream and not stagnate in the backwaters of the legal system and this is best achieved by becoming an integral part of the basic code.

Speaking of the Code of Criminal Procedure it is slightly mystifying why section 368 of the new bill, the counter-part of sections 562, 563 and 564 of the existing Code, should at all linger there and it is a little stultifying that no reference whatever to the Probation of Offenders Act, the Children Acts and other 'juvenile' statutes has been made. The progressive concepts in sentencing, based on correctional theory, are, I humbly submit, conspicuously absent in the Indian Penal Code and the Criminal Procedure Code and the pity is that the new bills are, perhaps, largely innocent in this regard. No longer can our laws fail to speak the language of current thought on social defence. Imprisonment, simple and rigorous, and fine were good enough hundred years ago but we cannot, except at national peril, rob our criminal jurisprudence or modern penal wisdom gained by advances in psychiatry and other sciences. Therefore, I advocate overhauling of the Penal Code to diversify sentence procedures, abandoning the obsolete dichotomy of simple and rigorous imprisonment. We want correctional centres where work not degrading but dignified suited to the convict's aptitude and background—will be undertaken by every prisoner for which he will be paid. The barbarous system of solitary confinement must go. Imprisonment in lieu of fine is a savage survival, which should be replaced by recovery from wages earned and, where he is unemployed, by being sent to work centres to be established by the State. The two Codes must provide for other sentencing devices which will help the delinquent and the community. With your permission, I quote what I had said elsewhere on this topic :

> "In the larger scheme of things a curative process for the criminal must have regard to the offender and the offence. They interact. My point is that probation orders must be flexible; the judge and the officer must study the offender vis-a-vis his offence and prescribe conditions in the order which will heal the wound. Let me illustrate. Supposing the delinquent is a young devotee of marijuana or old addict to other intoxicants. He needs medical treatment to withdraw him from the vice and a mere judicial admonition or whisperings and warnings of a probation officer will be ineffectual. Similarly, the offender may be a sex pervert and may require hormone treatment or psychoanalytical sessions with a specialist. A rash driver may have to go through a fresh drill in correct driving in a driving school. A juvenile cast away from home, a motherless child beaten out of the house by the step-mother and a poor family forced to keep its head above water by occasionally diving into the under-world to help itself with others' belongings may need help of different type. A college girl, to apo the expensive or erotic habits of fellow girls, may end up as a call girl. She needs a different set of court directions and probation assistance. A good doctor, in a fit of anger, may have stabbed another. He should be allowed to work as a doctor but under a moral preceptor—each case calls for a specialised prescription when the judge must possess jurisdiction to issue directions to Government hospitals, private clinics and colleges, employment exchanges, churches, mosques, driving schools, social organisations and obligate the probationer to subject himself or herself to a variety of activities including even playing games or going through a gentle surgical operation. The statutory power must be wide and flexible but should be exercisable not only in consultation with specialists, social workers or others working in hte particular field. A judge, by himself, is largely a quack in these areas and his role

in sentencing is diminishing these days when other specialised agencies, men with expertise and sophisticated instruments are more competent therapists."

Many other shortcomings in the existing laws on rehabilitation of criminals may easily be pointed out but the Conference, I dare say, will turn the critical and constructive focus on these aspects and I shall stop with showing up a big gap in the twin codes.

Children form a distinct group even with regard to crime and punishment. The under twentyone bracket also constitutes a separate class, from the view point of guilt and rehabilitation. First offenders, political offenders, ideological criminals also can be categorised onreasonable differentia for penal purposes. Unfortunately, our Penal Code and, so far as I am able to gather, even the proposed Bill do not make these significant and sophisticated categorizations. I would go further and say that we need to have different types of courts dependant upon the age and other special features of the crime and criminal. It is wrong to march a child into a Magistrate's Court even as it is improper to take a teen-ager for trial in the ordinary way before an ordinary criminal court. Children's courts and juvenile tribunals composed of social workers who are given some training in relevant laws must be erected. Women must figure prominently among these classes of judicial personnel. Boys and girls who are in moral danger or have been guilty of fugitive lapses should be brought before humane benches of magistrates composed of men and women with some legal and practical experience. It is a misfortune that the procedural structure visualized by the relevant Code on the anvil of the Legislature does not take note of these refinements. The treatment to be meted out to children and adults radically differs from what may be imposed upon adults, when found guilty. I have no time or space to elaborate this point but I wish to highlight the incompleteness of our criminal justice system, as outlined in the two Codes.

Non-institutional treatment of offenders, everyone agrees, must occupy an important place in the sentencing programme. But there is insufficient attention paid to this aspect of the subject even in the new Code under way, although there is some provision for conditional sentences. It is interesting to notice that in the Soviet Union a convicted person is sometimes enlarged on the undertaking of the organisation in which he works that

they will ensure his good behaviour. This principle can be applied in our country to workers, peasants, students and officials in the public and private sectors. Even conditional sentences have dual facets—suspension of sentence which permits positive action to be taken, may be either a suspension of the imposition of a sentence or suspension of the execution of a sentence. In the former case, when a violation of the conditions of probation takes place, the Judge has the advantage of additional information upto the date of violation on which to base a decision, regarding the sentence which would be appropriate to the case. In the United States, both these methods, as a substitution for imprisonment or other penalty, have been tried. I see no reason why we should not benefit by their experiment and experience. In the model Penal Code prepared by the American Law Institute an amount of flexibility is found which I think deserves close study and adaptation to Indian conditions. The idea is to impose conditions on the convicted person who is placed on probation to ensure that he leads a law-abiding life. Section 301 of that Code states :

The Court, as a condition of its order, may require the defendant :

(a) to meet his family responsibilities;

(b) to devote himself to a specific employment or occupation;

(c) to undergo available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose;

(d) to pursue a prescribed secular course of study or vocational training;

(e) to attend or reside in a facility established for the instruction, recreation or residence of persons on probation;

(f) to refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;

(g) to have in his possession no firearm or other dangerous weapon unless granted written permission;

(h) to make restitution of the fruits of his crime or to make reparation, in an amount he can afford to pay, for the loss or damage caused thereby;

(i) to remain within the jurisdiction of the court and to notify the Court or the probation officer of any change in his address or his employment;

(j) to report as directed to the Court or the probation officer and to permit the officer to visit his home;

(k) to post a bond, with or without surety, conditioned on the performance of any of the foregoing obligations;

(l) to satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.

The Soviet system on conditional conviction is also quite edifying and worth learning from. The essential points are brought out in Article 44 of the R.S.F.S.R. Criminal Code which I may excerpt here :

Article 44 : Conditional conviction : "When assigning the punishment of deprivation of freedom or correctional tasks, if the Court, taking into consideration the circumstances of the case and the personality of the guilty person, becomes convinced that it would be inappropriate for the guilty person to serve punishment, it may decree the conditional non-application of punishment to the guilty person, but it shall be obliged to indicate in the judgment the reasons for the conditional conviction. In such event, the court shall decree that the judgment not be executed if in the course of the probation period determined by the court the convicted person does not commit a new crime of the same kind or of equal gravity."

When there is a conditional conviction supplementary punishments, with the exception of a fine, may not be assigned.

"Taking into consideration the circumstances of the case, the personality of the guilty person, and also the petitions of social organisations of the collective of workers, employees, or collective-farm workers at the guilty person's place of work concerning his conditional conviction, the court may transfer the conditionally convicted person to these organizations or to the collective for re-education and correction."

The English experience under the Criminal Justice Act, 1967 is also worth a study so that we may avoid difficulties noticed there and draw the dividends of their better provisions. But Indian conditions must be remembered, for we are not an affluent society but an indigent one. We are an unlettered community and are a vast country of villages. Naturally, our procedures must be simple and the rules of evidence far less sophisticated; there should be legal aid to every child, youth and first offender brought up before a criminal court. The trial should be simple and quick. We must have far more children's courts and other tribunals so that no case lasts more than a few days where the sensitive category of accused are involved. Appeal and revision provisions should neither be elaborate nor expensive nor dilatory. Summary procedures, where substantial compliance with natural justice is provided for, must be written into a law.

It is painful to observe that we do not have sufficient specialized institutions for care and after-care; nor have we enough probation officers who can do justice to the expanding duties both at the pre-trial and post-conviction stages. Another disquieting feature is the absence of uniformity in the law relating to children and teen-agers and, for that matter, in the institutions which are to take care of them. It is true that our Constitution relegated legislative power in regard to prisons and other like institutions to the State, but I do not think our national spirit is so poor or our Constitution so bankrupt as to prevent uniformity among the States in regard to laws and institutions which are to take care of special classes of delinquents. That will be an unjust price to pay for a federal polity.

I was very much interested to see a suggestion which appears to have been put into practice in Tamil Nadu for probation officers to assist the Court in working out proper arrangements in petitions under section 488 Cr.P.C. which deals with neglected wives and children. It is a case of sad omission that with this experience before us the idea has not been incorporated in the corresponding provision of the new Cr.P.C. Bill.

Another drawback in the law which I may glance at is parole for the treatment of offenders already undergoing imprisonment. Instead of this power being left to executive caprice there should be a scheme based on humanism and caution which provides for parole release of convicted persons. Here the Judge must associate in the process of premature release

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and other types of parole. I have a feeling that we require to have a second look at our Penal and Procedural law so that radical changes which incorporate thought,research and experience in the socialist and non-socialist parts of the world may be written into our criminal jurisprudence. We also need judicial activists whose role must be statutorily widened and made more dynamic so that their share in upholding legality in the community may be heavier: indirectly, it will be a tribute that the nation pays to the judicial instrument.

I am glad that quite a few Ministers have found time and interest to attend the Conference which is being inaugurated by our revered President Shri V. V. Giri, a champion of noble causes in his own right. But I have an unhappy feeling that these grand national meets hardly crystallise into legislation or concretise into administrative schemes. The remedy is to involve the legislators and politicians on both sides of the House in these serious discussions. At present, our honourable political members—important as their functions are—live in a sound system all their own and are consumed by political programmes. Society lives not by politics alone and we want our parliamentarians to be absorbed in legislative schemes of social welfare which have no political flavour and, towards that end, to get educated in areas outside their ordinary orbit.

I once again crave the indulgence of the audience and organisers for the critical remarks I have made and hope that they will be taken in good part and in the spirit of law reform that having been my only motive and justification.

I thank the Central Bureau of Correctional Services for having given me this opportunity to share my thoughts with this distinguished gathering.

PROBATION AND THE COURT PROCEDURE

Shri Justice S. P. Kotwal, Chief Justice
Bombay High Court

Though you have been good enough to invite me to this Seminar on "Probation and Court Procedures", I must confess that there is very little with which I have equipped myself in the past to speak with any authority on Probation—though I was a student of Psychology in my early days and now know a little about court procedures. But when the Secretary of the Council of Social Welfare invited me to speak to you on the subject I felt I could atleast offer as my contribution the sum of my experiences in the administration of our laws concerning probation.

To begin with, I must stress that in the more highly developed countries, probation and parole procedures have today reached such a standard of perfection as to become a science by itself. This is, of course, neither compliment nor a criticism of these highly developed countries. Because the higher the development and the sophitication of civilized life, the greater also is the sophistication of the offender or the delinquent, in his anti-social activities. Happily we in India have neither reached that degree of sophistication in civilized life nor that degree of sophitication in our crimes.

Most of you, who work in the correctional field, are acquainted with the broad distinction between probation and parole. A person "on probation" is a person who has been convicted but has never undergone the sentence. The judge merely sentences him and immediately suspends the execution of the sentence or as happens in India, without pronouncing the sentence releases the offender on probation of good conduct for a certain period. In parole, the offender is sentenced and sent to jail or a house of correction and serves part of his sentence. But if his behaviour is good during the period of his incarceration he is let out on parole subject, of course, to his being of good behaviour. This power in some countries is entrusted to the executive officer himself (of course of sufficiently high rank) and in some countries it is entrusted to the Court which convicted the offender or to both the executive and the judge in consultation with each other

Inaugural Speech at Seminar on Courts & Probation held at Bombay on 20th March 1971.

Now how does this distinction operate in Indian law? That is the important question I wish to place before you.

When a delinquent is brought before the Court the first thing to determine is whether he is guilty of the offence charged and that is purely the function of the law Court *i.e.* the Magistracy. We have certain general principles to guide us. No conviction can be made unless there is evidence to prove it. The only exception is where the person charged pleads guilty. Even if there is evidence the Court must see to it that upon that evidence there is no manner of doubt left as to the guilt of the accused. If there is the slightest doubt the court must acquit him. This practice is based upon the fundamental principle of our Criminal Jurisprudence that it is better that ten guilty persons should be acquitted than that one person who is innocent should be convicted. It is often the application of this principle that makes the public feel so annoyed with some of the acquittals of our Courts in the more serious cases, but so far as I can see it is a beneficial principle and there are no better principles and no better system of administration of justice known to man.

Once a conviction is made the question of sentence arises. In perhaps 99% of the cases the Courts merely pass an adequate sentence and there the case ends. Even in appeal the only question which arises is whether the offender's conviction is based on adequate evidence or the sentence is proper. The only power under general law to release the accused without a sentence is conferred upon the Courts under the Bombay Probation of Offenders Act in our State or section 562 of the Code of Criminal Procedure. The powers under the Probation of Offenders Act are extremely limited. The limitations are to be found in sections 4 and 5 as follows :—

(1) The Court has the power to admonish a person and release him after due admonition only in case where he is convicted of an offence "punishable with not more than 2 years' imprisonment or fine or both and no previous conviction is proved against him after recording his reasons in writing".

(2) In cases where any male person is convicted of an offence not punishable with death or imprisonment for life or a woman is convicted of an offence of any kind.

In both these cases it must appear to the Court that having regard to the age, character, antecedents and physical and mental condition of the offender and to the nature of the offence or any extenuating circumstances under which the offence was committed it is expedient to release him on probation.

Under section 562 of the Code of Criminal Procedure the limitations are these :

(1) It applies to a person not under 21 years of age who has been convicted of an offence punishable with imprisonment of not more than seven years, or

(2) To a person under 21 years of age or a woman who has been convicted of an offence not punishable with death or imprisonment for life.

(3) and who in each of the above cases is a first offender.

In all such cases the power of the Court is "if it appears to the Court before which he is convicted, regard being had to age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on entering a bond... to appear and receive the sentence when called upon during such period (not exceeding 3 years) as the Court may direct and in the meantime to keep the peace and be of good behaviour". At present it is only after the Courts have exercised any of these powers, that the probation services like yours come into their own. Till then you can do nothing.

Now you will see at once the limitations of this law and the great difference between the correctional procedures prevailing in other countries about which you read so much. Section 562 of the Code of Criminal Procedure has remained practically the same since it was enacted in 1898. In those days sociology was hardly a science and in any case our British rulers were not interested in the sociological aspects of crime at all. They were only concerned with law and order and knew only of punishment. The Bombay Probation of Offenders Act passed in 1938 (Act 19 of 1938) is somewhat wider in scope, but no less inflexible.

Having regard to recent developments in correctional science you will notice the following deficiencies :—

(1) The law speaks of "character and antecedents of the offender" but there is absolutely no scope for prior consultation on these points with any body of expert opinion. In our country even today the judge has very little to make up his mind upon. There is no scope for consulting any body, expert in psychology or psychiatry, as in the West where the offender can be sent to such an expert or body of experts, be examined by them and their opinion as to the character of the offender, the causes and possible motivation for the crime can be determined.

(2) Secondly, I do not see why the law should be limited to only first offenders. It is now well recognized that the only reason for recidivism in crime is not just moral turpitude but a variety of other causes some of which are more sociological than defects in character.

(3) Thirdly, these general provisions leave little scope for case study and application of different correctional modes to a particular case.

The law thus requires to be streamlined and brought into a state of greater modernity in at least three important aspects :—

(1) The establishment of special courts dealing with cases in which the ordinary Courts consider that the application of some correctional procedure will be of use.

(2) Collaboration and consultation between the correctional Courts and a body of experts who can be consulted or serve as assessors before the question of sentence or probation is determined;

(3) Greater discretion to the judges in dealing with individual cases and a more liberal choice of correctional methods.

(4) A set of trained correctional officers who will implement the orders of a correctional court with sympathy and understanding of human nature;

(5) In this Seminar we are only concerned today with subject of probation but I would go a step further

and say that even in the matter of parole, consultation with the court which convicted and the parolling authority would not be out of place and would achieve much good.

These are only emperical suggestions that I make before a body of experts like you. It is for you to deliberate upon such topics, determine how you will be liable to improve conditions and what steps—legislative or otherwise—should be taken and what is most important, provide the machinery *i.e.*, a set of well-trained probation and parole officers who can deal with delinquents in the spirit in which these laws are conceived and formulated

In suggesting these changes I may also utter a word of caution As I said at the beginning, our correctional science is still in its infancy and has not reached the high development and sophistication it has achieved in the West and that is because crimes in our country are also of a comparatively simple type. Most of you have studied western science but a great deal of care must be used before it is indiscriminately applied in India.

In the West for instance the following questions are considered very important :—

(1) Do broken homes produce delinqueney and crime ?— But in India there are very few delinquents who ever have a home.

(2) Is absence of economic security a factor in the production of criminal behaviour ? In India there is no question of economic security at all in most cases because whole families for generations live at a level of starvation. Food and clothing is, to many, more than economic security.

(3) Or the question, "Is there a positive correlation between the business cycle and crimes against property without violence ?" The average delinquent knows nothing of the ups and downs of business and does not depend on it. Therefore, such studies in the conditions in India are of little value.

The prime causes of crime in our country are illiteracy, poverty, starvation and want and to the extent that these are eradicated, crime of the sort known to us at present will be lessened. Therefore, when you frame your objects, your laws and

your correctional methods, do not forget the special peculiarities of our problem. Mere blind following of western science and methods of correction may prove more harmful than useful.

And in the end may I say that you will achieve great success in what you seek if you always remember that you are first of all social workers and next only law enforcement or correctional officers. May success crown your endeavours.

THE PROBLEM OF JUVENILE DELINQUENCY AND THE PROBATION SYSTEM IN INDIA

Shri Justice S. K. Varma, Chief Justice, Uttar Pradesh

The infliction of harsh and savage punishments whether it be on adults or non-adults, has systematically come to be regarded as a relic of less progressive times. Modern Jurisprudence is obsessed with the propriety of abolishing death penalty to persons guilty of reprehensible criminal activities. It is argued that reprisal does not settle anything, since life is stilled for ever. The objective should be to reorganise or reshape a person who is dominated by perverse, criminal instincts. The United States Supreme Court recently set aside thirty nine death sentences and "agreed to consider whether capital punishment is cruel unusual and therefore unconstitutional". The Tennesse State Supreme Court is also likely to review the issue strictly from a consideration whether the death penalty constitutes a violation of the Eight and Fourteen (Constitutional) Amendments. Speaking for myself I would not endorse complete abolition of capital punishment. In my opinion the only way of dealing with a congenital or hardened criminal is to wipe him out; he cannot be reformed and society cannot tolerate him. Even Barnard Shaw who made a loud protest against what he called the diabolical treatment of criminals, conceded the "liquidation' of all incorrigible, living nuisance." I am inclined to agree with him, but this is a matter really beside the subject of the present Seminar and I will not dilate on it.

The other form in which the persistent cry for more humane punishments has manifested itself is a more sympathetic treatment of young delinquents. That is an aspect which is directly the theme of this Seminar. The imposition of the sentence of imprisonment on juvenile offenders has been censured by enlightened and progressive thinkers as the worst barbarity of our criminal codes. The ideological bedrock of the Probation movement is the undesirability of sending young delinquents to jail. Charles Dickens echoed the feelings of civilised humanity

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when he thundered against the deleterious effect of the jail system in the immortal pages of 'Nicholas Nickleby'. With profound indignation he declared "Away with him to the deepest dungeon beneath the castle moat". It aroused the conscience of another great idealist William Blake who was provoked to remark, "Prisons are built with stones of Law, brothels with bricks of Religion." Oscar Wilde, who had personal experience of incarceration, highlighted the baneful effect of prison life in the "The Ballad of Reading Gaol" : —

"The vilest deeds like prison weeds
Bloom well in prison air :
It is only what is good in Man
That wastes and withers there."

The result is still more corroding in the case of tender and young delinquents, who are naturally in the most formative and impressionable period of their life. The world-thinking has consistently veered round to the view that juveniles should not be sent to jail.

If they are sent to prison, they are likely to fall into bad company and be converted into hardened criminals. "It is no more desirable to break a child's spirit by punishment", said Shaw, "than to break its limbs." Speaking again of British jails he observed, "Thirteen years in Dartmoor is much more cruel than breaking on the wheel." "Our prisons", he declared, 'are artificial hells for which there is no excuse; all the physical brutalities of concentration camps and torture chambers are trivial and temporary compared to the routine of imprisonment."

It is these diatribes against jail misery and their psychological impact on young and immature minds which are at the back of the demand for abolition of the penalty of imprisonment on young offenders. Juvenile delinquency poses a formidable problem in India. The statistics on the subject are alarming. Annually a total of 13.5 lakhs of people approximately pass through the Indian prisons as undertrials or convicts and of these about 20 per cent are children and young persons below twenty-one years of age. In other words, as many as 2.70 lakhs of young persons pass through jails. The terms 'juvenile delinquency', 'maladjustment' and 'anti-social behaviour' are interchangeable concepts. Juvenile delinquency involves two elements :—

(a) the non-adult status of the person concerned, and

(b) an act on the part of such a person which amounts an offence under the laws of his country.

The important factors which lead to such maladjustment have been analysed as follows :

(a) Mental defectiveness or psychological breakdown.
(b) Retarded intelligence.
(c) Physical defects.
(d) Physiological defects.
(e) Poor health.
(f) Faulty parental control.
(g) Broken homes.
(h) Poor homes.
(i) Lack of recreational facilities.
(j) Environmental influences.

In India juvenile delinquency has recently shown a marked increase. The joint family system and the compact self-sufficient pattern of the traditional Indian village offered a kind of automatic check on the growth of delinquency in the past. But as an aftermath of the First World War, as a result of the impetus to urbanisation and industrialisation coupled with the after effects of World War II, social conditions have radically changed and accentuated delinquent trends amongst the juvenile population. The rowdy behaviour of the school-going population, the students' unrest and the gross indiscipline rampant in educational institutions are indicative of the stress and strain on the minds of the juveniles of the country. The two principal remedies of this situation are :

(i) improving the living and social conditions of the juveniles, and

(ii) guaranteeing special consideration and treatment to offenders below a specified age.

A proper rehabilitation of the children is the prime duty of the State. It is reassuring that all over the world increasingly great attention is now being paid to it. The United Nations Congress on the Prevention of Crime and Treatment of Offenders at the Geneva Sessions (1955) made important recommenda-

tions on the reformative aspect of the treatment of juvenile offenders. In India there has been considerable legislation to improve the lot of delinquents, to rehabilitate them and absorb them in the society as useful members. I may refer to the Apprentices Act of 1850, The Indian Reformatory Schools Act, 1875, The Children's Pledging of Labour Act, the Abolition of Whipping Act and the adoption of the Children Acts & Probation of Offenders Acts by various States.

Probation is a method of non-institutional treatment of offenders. It implies the conditional suspension of imposition or execution of a sentence by a court, specially of young offenders who are not sent to prisons but are released on probation, *i.e.* on agreeing to abide by certain conditions and in some cases, to be placed under supervision. In India the first legislative step in this direction seems to have been the enactment of section 562 of the Code of Criminal Procedure, 1898. This Section applied to offences of theft, theft in a building, dishonest misappropriation, cheating or any other offence under the Indian Penal Code punishable with not more than two years' imprisonment. In 1923 a new section was substituted for the old Section and this embraced more serious offences. Then followed a series of State legislations. Bombay enacted the Bombay Probation of Offenders Act. In the same year, U.P. First Offenders' Probation Act, 1938 was enacted.

There was, however, no comprehensive law on the subject until the Indian Parliament passed 'The Probation of Offenders Act 1958 (Act No. XX of 1958). The Objects and the Reasons set out in the Act underlined the core of the Probation movement. It was stated :

> "In several States there are no separate probation laws at all. Even in States where there are probation laws, they are not uniform nor are they adequate to meet the present requirements."
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> "In the meantime, there has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effect of jail life. In view of the widespread interest in the probation system in the country, this question has been re-examined and it is proposed to have a Central law on the subject which should be uniformly applicable to all the States."

The 1958 Act made several landmarks in the progress and practical application of the Probation system in India :—

(i) It empowered courts to release an offender after admonition in respect of certain specified offences. (Section 3).

(ii) It empowered courts to release on probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life. (Section 4).

(iii) In respect of offenders under twentyone years of age special provision has been made under section 6, imposing restrictions on their imprisonment.

(iv) During the period of probation, offenders have to remain under the supervision of probation officers in order that they may be reformed and become useful members of society.

(v) Before making an order of probation it is obligatory for the Court to take into consideration the report, if any, of the probation officer concerned in relation to the case (Section 4).

(vi) The Court releasing an offender on probation on his entering into a bond, with or without sureties, may in addition pass a supervision order that he shall remain under the supervision of a Probation Officer during such period (Section 4).

(vii) The Court making a supervision order shall require the offender before he is released to enter into a bond to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the Court may consider fit to impose. It is the duty of the Court making a supervision order to explain to the offender the terms and conditions of the order. (Section 4).

(viii) The Act casts very important duties on the probation officers which are defined in Section 14. They are *inter alia* :

(a) to inquire, in accordance with any directions of a Court, into the circumstances or home surroundings of any person accused of an offence with a view to assisting the Court in determin-

ing the most suitable method of dealing with him and submit reports to the Court.

(b) to supervise probationers and other persons placed under his supervision and where necessary, endeavour to find them suitable employment.

Although the Probation of Offenders Act, 1958 provided an elaborate machinery for dealing with probationers, it has not yielded its maximum benefit owing to several reasons. Firstly, in my opinion the judiciary has not been sufficiently alive to the utility of the probation system. It is my experience that in a large number of cases which came to the High Court no reference to the Probation Act was made in the courts below and the point was raised for the first time before the High Court. It is desirable that the Bar and the judiciary should be 'probation minded' and Magistrates, Sessions Judges and High Courts should exercise more frequently the power of asking for a report from the Probation Officers. The ideal thing would be that a Probation Officer should prepare a pre-trial report on every accused who has not been previously convicted and whose case can come within the ambit of the Probation Act. It is pertinent to suggest whether it should not also be the duty, of the Prosecution, which is a limb of the State, to invite the attention of the Courts to the provisions of the Probation of Offenders Act in suitable cases. If an accused person is likely to be covered by the Act, and his age appears to be about 21, efforts should be made by the investigating agency and the prosecuting counsel to collect material regarding the age. It is common knowledge that exact age is known to very few persons living in rural areas.

The apathy of the public has also in a way impeded the flowering of the probation system. The community has a vital role to play in the prevention of crime and the reformation of its delinquent members, specially non-adults. The intelligentsia can give a lead by forming voluntary associations for the purpose of helping offenders in offering bail, by offering surety for bonds to the courts, by working as voluntary probation officers to help them in seeking suitable jobs and readjustment to the normal life in the community. It is learnt that in countries like Japan there are thousands of voluntary probation officers, who help the rehabilitation of the offenders in various ways without any

monetary gain for themselves. We might marvel at the near absence of such phenomena as juvenile deliquency and student unrest in the U.S.S.R. I wish our people followed their example.

Seminars like the one that you are holding today are the most efficacious means of making the public as well as the judiciary probation oriented. It will, I have no doubt, result in creating in our country a greater awareness of the fact that the Probation movement is not only humanitarian but also serves the society itself by preventing recurrence of crime. Children are the nation in embryo; if we reform them, we would have reformed the nation: and if we thus liquidate crime, we would have perfected the political liberty which we wrested from our foreign rulers and ushered in that real freedom which was cherished by Mahatma Gandhi and sung by Rabindra Nath Tagore in his immortal poem :—

"Where the mind is without fear and the head is held high :

Where tireless striving stretches its arms towards perfection :

Into that heaven of freedom, my father,

Let my country awake."

('Geetanjali')

JUDICIAL OFFICER AND PROBATION OFFICER IN THE SCHEME OF PROBATION

Shri Justice Gopalrao Ekbote, Chief Justice Andhra Pradesh High Court

I am happy to be associated with this training programme organised jointly by Government of India, the Department of Prisons and College of Social Work. I am grateful to the organisers of this training programme for giving me this opportunity to share some of my views on Probation.

The Probation did not in fact start with any legislation. It started, as was said, with a humanitarian approach on individualistic basis. But slowly and perhaps surely gathered momentum and climate was created wherein it became a compelling necessity to enact that kind of legislation to regularise this movement of rehabilitating the offenders and assimilating them in the society. About a year before, I had the occasion to read an educational report from the United States. They carried on a kind of sample survey in about two hundred or more schools to find out as to what is the most powerful influence upon the minds of the students. At the first item on the list of the powerful influencing factors was the Sunday School. They wanted to find out whether the Sunday religious schools which are conducted in the States of America practically in every lane and bylane had any impact upon the minds of the students. And they also wanted to find out ultimately as to what is the source which influences the formative mind of a young child, so that they can trace the facile and attend to it. And you will be surprised that the result of the sample survey was that the Sunday Schools whose teachers happened to be mostly priests were found to have absolutely no influence upon the minds of the students. Naturally your curiosity gets increased that if the religious preachers by their conduct, by their character, by their preaching and precepts—if they are not in a position to influence these young and formative minds, what are the other forces which influence the formative minds. And I am not at all surprised to find the mother as the first factor who influences this young mind. But surprisingly enough the second item was not the school-mates or the school teachers even. But the locality mates of that particular youngman. And

Inaugural Address at the Orientation Training Course of Probation officers on the 27th March, 1972 at Hyderabad.

it was said that about more than 50-60% of the impact on the young mind comes not from his class-mates or school-mates but the friends with whom he comes into contact and plays in his own locality. And therefore that report suggested that the boy wherever he moves in such a society should be so brought up that the entire atmosphere in that locality is changed. And it is then that they came to the conclusion that the education should be child centred and not curriculum or syllabi centred. And the whole approach or the whole concept of education thereafter changed. Now applying the same test to the field of Probation one can easily say that instead of trying to concentrate upon the offences or the crimes committed by the youngsters or the adults, if we concentrate more upon the individual who commits the offences and try to find out his motivation, his atmosphere, the whole climate in which he moves and then try to find out the various remedies and apply them, you will not only be correcting that particular individual but at the same time correcting the whole atmosphere which compelled him to be what he was found to be. If that is so, then the whole system of punishment instead of centering round the crime or the offences as the penal code really does, the whole philosophy of punishment should centre round the person who has committed the guilt or committed the offence. Once you accept basically this principle then all the correctional methods do not only spring from the person who commits this offence but they really spring from the atmosphere which compelled this man to commit the offence. Therefore, the source or the facile from which their criminality grows has to be detected. And that could be found in the houses where from the delinquents come, the locality where the delinquents are bred and that part of community which has its own impact upon the growth of delinquent tendencies of this particular boy or the girl. If that is so the latest trend in the correctional methods is to pin-point the facile *i.e.*, the source from where this criminality grows or had the tendency of growing, and start, the preventive measures at that. And now the child centred correctional methods have slowly shifted to the source from where this criminal tendencies grow and prevent the delinquent tendencies. I do not want to indulge in giving the definitions of delinquency or in giving the definition of Probation and all that because all of you if already do not know you will come to know during the course of training about the various aspects of the definition of probation. But one thing is sure that the latest trend is not to centre one's attention only on the child who is found to be delinquent but also to address oneself more to the atmosphere which is more responsible for creating these

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delinquents. And then correctional measures are applied. This can be kept as an ideal in so far as our Indian Society is concerned because although this has been very old thing we have not reached a stage where we can take a leap in that direction immediately. But this can be constantly kept in view at least by those who are connected with the Probation Services. Then, instead of trying only to find the sources from which this particular man has committed a particular crime but try to find out from a survey of a larger field as to what are the factors which must have had their own impact upon the mind of the particular offender. Therefore as Mr. Patil broadly defined, probation is not only a suspension of the punishment or sentence but is trying to put that man under the supervision of a Probation Officer whether it is a voluntary Probation Officer or a Government employed Pobation Officer, whether it is an institution or an individual. The Judge makes up his mind to hold him guilty of the commission of the offence on the basis of evidence available. But when the time to sentence him comes, it is there that the Magistrate has to make up his mind whether the particular person should be sentenced to a particular period and sent to ordinary prison where adults are also kept or he should be let off on admonition or released on Probation. Now this releasing the offender on admonition is one of very important functions of the Judicial system. And it is there that even judicial officers at that level require really some human approach, some kind of sociological or even psychological approach to the case of that particular offender. And if he is really trained in that particular atmosphere he can take an intelligent decision whether he should be admonished and sent back to the society or in alternative should be released on probation. It is a very difficult decision to make not a very ordinary decision and I do not think every Magistrate can very easily take the decision, because it involves various questions. And that is why he requires a guidance, he requires an assistance and that is why our Probation of Offenders Act says that he shall consider the report submitted by the Probation Officer. And that report is really a very important document which goes into consideration of the Magistrate. And the future of the offender really depends upon how the Probation Officer surveys the whole field intelligently and understandingly and submits the report and it is the Magistrate when he reads the report, assimilates it, understands it carefully and then takes a decision whether the offender should be released on probation or not. Secondly whether he should be released on security or without securities. Thirdly whether there should be restrictions or conditions put

upon his release on probation or there should be absolutely no restrictions. *Nextly* he should be placed under the supervision of a Probation Officer or not. And what is the period for which this offender should be placed under the supervision of the Probation Officer. At that stage he has to take several and series of decisions and every decision in that series is a very important decision which is likely to have tremendous effect upon the future of this particular offender. One must remember that is a formative mind the way in which you mould that mind would work if you want to make useful citizen out of a delinquent. And I remember in one case at least it was brought to our notice that to become a delinquent requires perseverance, requires intelligence, requires a kind of training and requires a kind of bold and courageous attitude on the part of the delinquent. Every body cannot be a successful delinquent. If a novice tries to cut the pocket of somebody he gets caught. But if he is a person trained in that field and if he had perseverance in that skill then it is very difficult to catch that man. So it is not that every body who commits the offence becomes automatically a delinquent.

Coming back to Probation, I should say that attempts have been made right from the Pre-Independence days to have an uniform Act throughout the country on probation. In the year 1931, Government of India seems to have circulated a Draft Bill for the States. Although a Central Act did not materialise at that time, many of the States enacted legislations on Probation. It was only in the year 1958, the Parliament passed the progressive Act of 1958 which I am told was brought into force in many of the States including Andhra Pradesh. Just passing a Bill is not enough and its successful implementation depends upon the Judicial Officers who have to understand its philosophy and Probation Officers who have to assist and guide the Judicial Officers.

I am glad that the Central Bureau of Correctional Services have taken the lead to organise Orientation Training Programmes for Probation Officers. Such training is very essential to equip the officers with current developments and better skills. I am sure that the officers attending this course would go back to the field well equipped and with better capacities to deal with multifaced problem of correcting and rehabilitating offenders.

PROBATION—A SAVIOUR OF YOUTHFUL OFFENDERS

Shri Justice G. K. Misra, Chief Justice
Orissa High Court

I am very glad that I have been asked to inaugurate the Orientation Training Programme of all the Probation and other Correctional Officers of the State which is being held at the instance of the Central Bureau of Correctional Services, New Delhi. It is in the fitness of things that this Orientation Training programme is taking place at Bhubaneswar after the year 1971 was observed as "Probation Year" throughout India so as to give an opportunity to the Probation and Correctional Officers of the State to make themselves acquainted as to what Probation means, its implications, the treatment of juvenile delinquency by modern methods and also to enlarge their sphere of knowledge and understanding to successfully tackle the problem for the real benefit of the first offender and the juvenile delinquents. At the same time, I believe, they will have a thorough idea of the intricacies of law relating to probation matters.

In criminal law, the word "Probation" means the conditional suspension of imposition or execution of sentence by the court in selected cases, especially of young offenders who are not sent to prison, but are released on Probation either after simple admonition or on a bond with or without sureties. The idea originated in 1841. John Augustus, a cobbler in Massachusetts in America developed an interest in youthful offenders and offered bail to the courts to get them released to his care and supervision. Gradually, the number of such boys increased to more than 2000, most of whom never went the way of crime. It was then realised that most offenders needed no more than human sympathy, understanding and guidance by a friendly person for correction. Gradually, the spirit of Probation services found its way to the western countries and probation became a part of law.

In India section 562 Cr. P. C. was enacted in 1898. This section applied to offences of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Panel Code punishable with not more than two years imprisonment.

Inaugural Speech delivered by Hon'ble Chief Justice in Rabindra Mandap at Bhubaneswar on 6th March 1971 at 6 P.M.

In 1923 a new section was substituted for the old one and it embraced more serious offences. Later in some States Probation of Offenders Act was enacted. But in the year 1958 a revolutionary change was made as the Probation of Offenders Act, 1958 (No. 20 of 1958) was passed by the Parliament and thereby gave statutory recognition in India to an idea that germinated in 1841 for reformation of Juvenile criminals. The Central Act was adopted in most of the States. In Orissa it came into force in the year 1962 in the districts of Cuttack, Puri, Ganjam, Koraput, Sambalpur, Balasore and Mayurbhanj and during the same year State Government framed Rules. In the year 1966 the Act came into force in the districts of Bolangir, Dhenkanal, Keonjhar, Kalahandi, Sundargarh and Phulbani. Thus the provisions of the Probation of Offenders Act 1958 are available for being exercised in courts in suitable cases in the entire State of Orissa.

The objective of Probation services is two-fold-rehabilitation of Probationers and prevention of recurrence of crimes. The basic idea is that the offender redeems himself and is purged of the offence. The law helps him to help himself to erase the stigma of conviction and gives him the guidance of the Probation Officer. The agencies concerned with the achievement of the above objectives are the police, the judiciary, the prisons and the community at large. It is the police who arrest the young offenders. Proper understanding of the young offenders by the police is very necessary. Instead of subjecting them to improper treatment to elicit information about the alleged crime, the police should try to ascertain what led the youthful offender to commit the alleged crime and trace his entire history and background so as to know whether the youthful offender can be suitably rehabilitated after going through the period of probation. It is also the duty of the police to see that the youthful offenders are not mixed up with hardened criminals during the first stages for fear of contamination of criminal ideas from them. During investigation, the police should try to know the actual age of the offenders, so as to place the same on record for use in judicial courts. This is more so because a young man below the age of 21, may appear as a young man of 25 due to developed physique, in which case, the protection guaranteed by the Probation of Offenders Act may not be available to him. It is unfortunate that a large number of children and young persons are still finding their way to prison. It is a matter for consideration whether some special legislation like the Children Acts of other States and the Children Act of 1960 applicable to the Union Territories

should not be enacted in this State so that no child is ever tried by an adult court or sent to an adult prison.

The Judiciary has got a great role to perform to make the provisions of the Probation of Offenders Act available to Juvenile delinquents as well as, to the first offenders. The Magistrates should not fail to apply the provisions of the said Act in suitable cases and should treat the youthful offenders with kindness and sympathy they deserve. The judges and Magistrates should educate themselves in the latest and progressive aspects of criminology and methods of treatment of offenders and in particular with the idea and system of Probation. It is only when a Judge or Magistrate knows and understands what Probation means in theory and practice that he will be able to do justice to a case with the necessary sympathy and understanding. This will have a great beneficial effect on the minds of the youthful offenders so as to correct themselves in future. But a harsh sentence to a youthful offender shall have a total undesirable effect of turning him into a hardened criminal. So, while the Magistrates deal with the cases of the youthful offenders, their responsibility is unlimited and it extends not only to the youthful offenders themselves but also to the society at large.

Here I may also point out the role, the Bar has to play While prosecuting or defending the case of youthful offenders, it is necessary for the lawyers to trace the history and background of the offenders in order to place on record as to how they took to crime at an early age. Through examination they shoud not only elicit information as above, but also the age of the offenders and the inclinations of their minds for the purpose of rehabilitation. Once the malady is known, the remedy can be easily available.

The role of the prison is no less vital. In the 'Harijan' of 5th May, 1946 Gandhiji wrote "what should our jails be like in free India? All criminals should be treated as patients and the jails should be hospitals admitting this class of patients for treatment and cure. No one commits crime for the fun of it. It is a sign of diseased mind. The causes of particular disease should be investigated and removed. They need not have palatial buildings when their jails become hospitals. No country can afford that, much less can a poor country like India. But the outlook of the jail staff should be that of physicians and nurses in a hospital. The prisoners should feel that the officials are their friends. They are to help them regain their mental health and

not to harass them in any way. The popular Governments have to issue necessary order, but meanwhile the jail staff can do not a little to humanize their administration".

Nothing is more apt than what the Father of the Nation said. In prisons the youthful offenders should be kept aloof from the hardened criminals. They should be given proper teaching to make their lives useful to the society at large. Vocational training should also be imparted to them, so that afterwards they will not find it difficult to earn their livelihood. If they are reformed, they will have no inclination to commit further crime. Indian prisons as we see them today came into existence during the British period. We are still acting upon the 19th century legislation governing prisons. Even after independence no rapid strides have been taken in developing this sector. After independence, prison becomes the State subject. Every State may therefore take up legislation for modernizations of prisons. The objective of punishment is not simply punishment but treatment and correction of offenders. The process of correction is of individualised treatment which includes changing the attitudes and behaviour of an offender and equip him with knowledge, skills and habits which can help him in his economic and social rehabilitation in the society. This new outlook requires an over all change in our prison laws, manuals and methods of handling the prisoners.

The community has also a vital role to play for prevention of crimes by juvenile offenders. A child is not born a criminal. He takes to crime by force of circumstances. After birth and during childhood, his mind is shaped according to the environment he lives in. If his parents have unbounded love and affection for the child and bring him up in the correct manner, there may be hardly an instance of the child going astray. So, role of the parents for prevention of Juvenile delinquency is no less great. Unfortunately in India, parents being themselves ignorant, poor, subjected to innumerable hardships and exploitation do not properly rear the children. The schools are of no help because multitudes of children in India do not even get primary education. Therefore, it is high time to consider ways and means to educate the parents adequately by methods to be devised for the purpose. The role of the primary and secondary teachers is also no less important. It is they who build the character of the young and so the objectives of the probation and correctional services should be brought home to them. It is also the duty of the people of the community to take note of

unsocial elements in society who are engaged in trafficking in children and minor girls for criminal and immoral purposes. They should not hesitate to offer bail for the youthful offenders and work as volunteer Probation officers, so as to rehabilitate the youthful criminals in the society. They should not also hesitate to employ the youthful offenders in various trades and jobs, so as to divert their minds from crime and make useful citizens of them.

Last of all it is the Probation and correctional officers, who work as links between the Juvenile deliquents and the various agencies referred to above. They should remain in constant touch with the probationers and law courts. It is up to them to prepare the social investigation reports on the background of the offenders and make suitable recommendation about their release on probation. They are also responsible for the supervision of the probationers for the prescribed period and for their rehabilitation, socially and economically.. With professional background and training in social work, they should function as friends, philosophers and guides for the youthful offenders. It is their sincerity and hard work that will make a great success of the object. An important aspect of their work is the preparation of a factual, comprehensive unbiased and objective report. The report is expected to help the Judge to decide whether the offender should be placed on probation or not.

As the head of the Judicial Administration of the State, I place on record that we have taken keen interest in the matter and suitable instructions have been imparted to the subordinate judiciary of Orissa to follow the provisions of the Probation of Offenders Act, 1958 and the rules framed thereunder and also to make full use of the probation hostel set up at Angul. Recently the Sessions Judge of Ganjam has been instructed to impress upon the judicial magistrate of Berhampur to take advantage of the Remand Home established at that station by remanding Juvenile undertrials in the age-group of 10 to 18. It is necessary that such Remand Homes should be established in many more stations and probation hostels should also be established elsewhere. The Sessions Judges and the A.D.Ms(J) of the State have been instructed that during their periodical inspections they should discuss with the Magistrates posted at the particular station the usefulness of the provisions of the Probation of Offenders Act and the rules framed thereunder and impress upon them to make full use of the said provisions for the benefit of the first

offenders and juvenile delinquents. It has further been arranged that the Sessions Judges will preside over the Probation meetings at stations like Cuttack, Puri, Berhampur, Koraput, Balasore, Bolangir, Sambalpur and Baripada and the A.D.Ms (J) will preside over such meetings at Dhenkanal, Kalahandi, Sundargarh, Phulbani and Keonjhar.

I assure you of my full co-operation to make the scheme a grand success. With this I inaugurate the Training programme and believe that during the short course of training the probation and other correctional officers of the State will imbibe a new spirit of dedication to forge ahead the object of prevention of Juvenile delinquency and rehabilitation of Juvenile delinquents for the benefit of the society at large.

PLACE OF PROBATION IN CRIMINAL JUSTICE SYSTEM

Shri Justice O. Chinappa Reddi
Judge, Andhra Pradesh High Court

The idea of 'Probation' appears to stem from a realisation by the conscience of the community that Criminal Justice is not a mere legal machine but that it deals with human problems and human beings, human beings who are like the rest of us, who play and work, who laugh and mourn, who love and hate, who think, learn and forget, who yearn for affection and approval as all of us do. Every human being is the creature of circumstance. Heredity, upbringing, environment, home, school, the neighbourhood, the character and behaviour of friends, associates, acquaintances and neighbours, the newspapers and books that one reads or has the opportunity of reading, the programmes on radio and television, the games that one plays, even the streets along which one walks, the economics of the household, the political and economic situation outside one's home, the opportunities provided by circumstances, the calamities resulting from circumstances, the success and failure of one's undertakings, including affairs of the heart, these several ordinary incidents of life and such matters influence a person's conduct. Driven by the force of such diverse circumstances a human being faces a variety of complex situations. Everyone reacts in his own manner. Even when faced by identical situations different individuals react differently. There is no common pattern of human behaviour. When a murder is committed in one's presence, one person flees from the scene, while another rushes to protect the victim; one person shouts at the murderer while another wails and weeps; one person stands paralysed and rooted to the spot while another goes to the victim to see if his life can yet be saved; one person pursues the murderer while another runs to the nearest police station. Again take the case of a clerk who handles cash in a society and who lifts a few tens of rupees from the till in the hope of replacing the money before the loss is discovered.He may take the money because his children are ill and he wants money to buy medicine. He may want the money to buy a sari to please a nagging wife. He may take the money

Valedictory Address on Seminar on Courts & Probation on the 28th March 1971 at Hyderabad.

because somebody has given him a hot tip of the day's races and he feels certain that he is going to make a lot of money. The criminal act is the same in all the cases, namely the lifting of the money from the till. The offence committed by each of these persons is clearly criminal misappropriation. But can any one say that the degree of guilt is the same? Can any one say that the punishment should be the same? Can any one say that all of them should be sent to prison? Is there not one at least among them who deserves sympathetic treatment and who may yet be a worthy citizen, if given a chance. That is where the idea of probation comes in. A sentence of imprisonment may be the only appropriate method of dealing with an offender in certain cases. But there are several cases where the crime or the lapse from the code of social behaviour is not so seroius or is so conditioned by circumstances that the stray offender does not merit punishment but really requires sympathetic treatment to enable him to stand up again as an upright citizen and take his due place in society. To impose a sentence of imprisonment on such a person would have a deleterious effect. Instead of becoming an useful citizen he may become a tough and frustrated individual, with a propensity for further crime. The judge or magistrate imposing a sentence of imprisonment on such a person and who thus pushes him into the path of crime would be committing an unpardonable sin. After all, it must be remembered that criminology has progressed and the primitive retributive theory of punishment has long since given way to the reformative theory. Reformation and rehabilitation of offenders are now among the most important objectives of the administration of Criminal Justice.

The object of probation, as of all methods of treatment, is the ultimate re-establishment of the offender in the community. The basic idea is that the offender redeems himself and is purged of the offence. The law helps him to help himself to erase the stigma of conviction and gives him the guidance of the probation officer. He is not removed from his family and community and therefore he is compelled to discharge his social and economic obligations to them. The feeling of irresponsibility arising from the suspension of one's social and economic obligations is thus avoided. At the same time Probation involves the discipline of submission by the offender to supervision by a probation officer. So it seeks both to protect society and to make the offender a more responsible person and avoids the damaging effects of the traumatic experience of being placed in jail. Probation is thus

the process of the discovery of the man by himself with the help afforded by the law.

It must be apparent that every offender is not likely to be benefitted by an order of probation. Some offenders are more amenable to this form of treatment and more likely to profit by it than others. It becomes necessary for the Court to make a selection of the offenders for the application of probation. That is why probation is often defined as a method of dealing with specially selected offenders by conditionally suspending punishment while the offender is placed under personal supervision and is given individual guidance or treatment. The Court is asked to make the selection having regard to the circumstances of the case including the nature of the offence and the character of the offender. These terms are vague and their very vagueness confers on the Court a very wide discretion. There are no precise guidelines to help the Court to make a selection. There is not and there has never been any mathematical formula for the determination of just and wise sentences. That is why the question of sentence is known as the 'Judge's Dilemma'. Before imposing a sentence a judge must try to answer several questions. Was the offence directed against property only or did it involve danger to human life? Was it committed without premeditation or after due deliberation? Is the offender so perpetually and constitutionally at war with society that there is no hope of ever reclaiming him from being a menace to society? Or is he a person who is patently amenable to reformation? Is he a person on whom a sentence of imprisonment will have a wholesome effect or is he a person on whom a sentence of imprisonment will have a deleterious effect? Will an order of probation have the effect of redeeming the offender and discipline him from the path of crime thereafter or will it have the effect of making him take to a career of crime with impunity? What effect will a sentence of imprisonment or an order of probation have on other potential offenders? The judge must try to find answers to these questions. The questions are difficult to answer and as pointed out by Judge Ulman every judge must know in his heart that there is no absolute answer to them. More than that he must know that our institutions are not yet developed so as to make it possible always to deal wisely with offenders. Well, may one exclaim with Professor Vrij "What audacity is involved in these three tasks: to interpret a life, explain an act, predict the slightest inclination of a human mind"; but, a judge must try to perform these audacious tasks as best as he can.

There are two major drawbacks which come in the way of a Court making a wise selection. One is lack of sufficient knowledge of the offender, his characteristic and his surroundings. Another is lack of knowledge of the progressive aspects of criminology and the practical working of probation. Judge Parker who was Chairman of the Judges Committee which reported on the correctional system for adult and youth offenders convicted in Courts of the United States said—

> "No judge, however learned, however wise, can acquire in the short period he devotes to sentencing sufficient knowledge of the defendant and his surroundings to be sure that he imposes the sort of sentence that is best in the premises. Then, we have this fact that we might as well face; some of the judges in the Federal Courts are not men who have given their lives to the practice of criminal law, and are not at all experts in the matters of criminology. They are successful civil lawyers and they come to this problem of crime late in life with little knowledge of its background. That, I think has been recognised by every Attorney General of the United States for the last twenty years".

The first difficulty may be overcome by requiring the probation officer to make a complete report about the offender. This of course will naturally depend on the availability and efficiency of probation officers. In the Probation of Offenders Act there is provision for the appointment of lay probation officers by the court, but in a country like ours where the citizens look to the Government for everything it is difficult to imagine an effective lay probation officer. Courts must necessarily depend upon stipendiary probation officers appointed by the Government. Having regard to the large number of criminal courts and criminal cases there is a pressing necessity for a number of probation officers. Even in an advanced country like England it has been found that the number of probation officers is wholly insufficient to cope up with the work to be done. I have no doubt that the position in our country is much worse. The problem of insufficient probation officers is a problem which has to be tackled. I have no ideas and no suggestions to make as to how this problem may be tackled. Perhaps Mr. Rami Reddy and Mr. Patil may be able to suggest some solution. Any request for more probation officers will, I am sure, be met by the Government with the usual plea of lack of finance. That would be a short-sighted policy and I will only repeat what judge Ulman

said : "The strange thing is that the public is willing to lose unaccountable sums of money through acts of criminality, and to spend huge sums for the detection of crime and for the incarceration of offenders, but that the economy plea always makes itself heard when anybody suggests plans for so dealing with the offender as to hold out a hope for his regeneration and restoration to society as a law-abiding citizen."

The second difficulty is one which has to be overcome by judges and magistrates themselves. They must educate themselves in the latest and progressive aspects of criminology and methods of treatment of offenders and in particular with the idea and system of probation. It is only when a judge or magistrate knows and understands what probation means in theory and practice that he will be able to do justice to a case with the necessary sympathy and understanding. It is only such a judge or magistrate that can make just and proper orders to suit the requirements of individual offenders. No judge or magistrate who merely reads the Probation of Offenders Act will ever get a true idea or acquire a sufficient knowledge of the theory or the working of the system of probation so as to enable him to make proper and effective orders. Probation Officers can help magistrates to improve their knowledge and understanding by publishing handouts on the working of the system of probation, by having frequent discussions with Magistrates and by holding occasional seminars such as the present in every district. The key note address delivered by Mr. Patil yesterday contains a neat and careful account of what Probation means, its history and what it hopes to achieve. So also the paper read by Mrs. Prem Malhotra this morning. A beginning may be made now by distributing copies of the key note address and Mrs. Malhotra's paper to all Courts. I would suggest that every Probation Officer should publish quarterly or half yearly reports of the work done by him in relation to the offenders entrusted to his care, of his successes and failures and of the methods and techniques employed by him. A perusal of such reports will, I am sure, be an education to the magistrate and it will also enable the magistrate to keep a parental eye on the probationers.

I would like to mention here that it is not merely the judge and the magistrate that should be educated regarding Probation; the Public also requires to be educated. The man in the street, the man whose property has been stolen, the man who was the victim of the assault—these persons must be made to understand that probation is not 'sentimentality run wild' nor 'mercy gone to seed'. It must be remembered that inspite of the advance of Criminology a large body of public opinion knows no other law than a punishment based on vengeance. It is necessary that they should be made to understand the idea of Probation. Unless the public understands what probation means the idea of probation cannot really succeed. Probation Officers must therefore 'sell' the idea of probation by publishing handouts, by discussion with members of the public, by holding conferences, seminars etc.

The task of the probation officer is a very difficult task. Essentially he is a social case worker and, apart from educating the public and advising the Courts, which are difficult tasks in themselves, he must win the confidence of the probationer and his family and develop a relationship which will be a positive influence 'regulating the probationer's behaviour and counteracting and modifying the ill effects of past experiences and of irremovable factors in the present. He has to supervise the probationer, perhaps guide may be a better word than supervise since supervision smacks of superiority and patronage. Superior and patronising attitudes on the part of a probation officer are destructive of the very idea of probation. A probation officer must be a friend, philosopher and guide and not someone whom the probationer should hold in fear. It is true that the probation officer's duty to report to Court the conduct of the probationer may make the probationer look upon the probation officer as a spy and may prevent the establishment of that confidence and trust which are essential to enable the officer to assist the probationer. This difficulty must be overcome by skill and tact on the part of the probation officer. Thus, three things are essential for the success of the idea of probation. (1) A knowledgeable and understanding magistrate, (2) A sympathetic, tactful and dedicated probation officer, (3) A degree of co-ordination between the magistrate and the probation officer. If these things are there the idea of probation is bound to be a success and we may achieve in the administration of Criminal Justice what we are seeking to achieve in other fields—a revolution.

Before I conclude, I will venture to make some suggestoins for your consideration : (1) The Probation of Offenders Act contains no provision for the applicability of the Act to persons who are initially sentenced to imprisonment but who may later

be discovered to be better amenable to the Probationary method of treatment. There is no reason why, on the discovery of fresh material or on the reports of persons who have watched his behaviour subsequent to his conviction, a sentence of imprisonment passed on an offender should not be converted into an order of probation. There is no reason why a sentence of imprisonment once passed should be considered as the last word on the subject. I believe, in some of the States of the U.S.A. there are what are known as Treatment Tribunals who periodically review such cases and report to the Court recommending such treatment. I have not been able to get any literature on the subject though I came across references to such Tribunals in some books. I wonder whether the Probation of Offenders Act cannot be suitably amended to make some such provision. (2). The use of the expression 'if any' in Section 4(2) appears to indicate that a magistrate may or may not seek a report from the Probation Officer before taking action under Section 4(1). I think it will be in tune with the object of the Act to oblige the Magistrate to consider the report of the Probation Officer before he makes up his mind whether to sentence an offender to imprisonment or to make an order of probation. There was considerable discussion this morning as to the appropriate stage at which a pre-sentence investigation report may be called for. Having regard to the thousands of cases in every Criminal Court I do not think it will be practicable to call for such reports in all cases. A vast majority of the cases are cases in which a sentence of fine will meet the ends of justice. There may be a few cases in which action under S. 3 is enough. In all such cases it is unnecessary to call for pre-sentence reports. It is only in other cases that such reports are necessary. The only stage at which a magistrate can appropriately call for a report is when he decides upon the guilt of the accused and is of the view that a sentence of fine or action under S. 3 will not meet the ends of justice. I would therefore suggest that Section 4(2) may be amended in the following manner. "In every case where the Court does not propose to sentence the offender to pay a fine only or take action under Section 3 of the Act, the Court shall consider the report of the Probation Officer concerned in relation to the case before sentencing the offender to any term of imprisonment or making an order under Section 4(1)." (3). Section 9 of the Act provides that a probationer failing to observe the conditions of the bond executed by him may be sentenced by the Court for the original offence. If the failure is for the first time the Court may levy a penalty not exceeding Rs. 50/-. Does this mean that for a second failure

the Court is bound to sentence him for the original offence? That may be rather harsh. The failure may relate to an important or inconsequential condition. To sentence a probationer for the original offence when the second failure relates to a trifling condition may be a harsh way of treating him. I would suggest that the question must always be left to the discretion of the Court whether to sentence an offender for the original offence or to impose some other mild penalty. Once an order of probation is made there should be no statutory compulsion to sentence the offender for the original offence merely on the basis of the number of defaults committed by the probationer. After all reformation is not achieved by the mere making of an order of probation nor are saints made overnight. A child learning to walk is bound to falter. A probationer too may falter but he must have his chance unless the circumstances reveal that he is beyond redemption. (4) As the law now stands a magistrate washes his hands once he makes an order of probation unless the probation officer reports of some breach committed by the probationer. That should not be-the magistrate must maintain an interest and watch the progress of the probationer and the success or failure of the treatment. This he can do only if he receives periodic reports from the Probation Officer about individual offenders. It is a matter for consideration whether some provision should not be made in the Act or the Rules for the submission of such periodic reports to Courts.

5—1035 Deptt. of SW/72

LAW, COURTS AND PROBATION

By

Shri Justice K. Sadasivan, Judge, Kerala High Court.

"Crime may be regarded as a disease of the body politic and social disease, like individual disease, may be studied from many points of view. We may pay regard to its nature, its causes, its conditions, its varieties or to the methods of detecting, treating or preventing it. Majority of men are not criminal; but a minority are. It follows from this, that there are factors at work to produce this difference between man and man and the factors differ from individual to individual. In some, the criminal tendency is a borrowed product of heredity and in some others criminality is brought about by the influence of circumstances." (De Quiros).

Two centuries ago while modern medical science was still young, medical practitioners proceeded upon two general assumptions; one was as to the cause of the disease and the other as to its treatment. It was thought that the disease was sent by the inscrutable will of God. No man could fathom that will, nor its arbitrary operation. As to the treatment of the disease, it was believed that there existed some remedial agents of universal efficacy. Calomel and blood-letting, for example were two of the principal ones. A larger or smaller dose of calomel a greater or less quantity of bloodletting—this indiscriminate mode of treatment was regarded as orthodox for all common varieties of ailment. All this is now past in the realm of medical science. As to causes of diseases we know that they are facts of nature—various, distinguishable by diagnosis and research and more or less capable of prevention or control or counter-action. As to the treatment, we now know that there are various specific modes of treatment for specific causes or symptoms, and that the treatment must be adapted to the cause. In short, the individualisation of disease, in cause and in treatment, is the dominant truth of modern medical science. The same truth is known about crime; but the understanding and the application of it are just opening up to us. The old and still dominant thought is, as to cause, that a crime

is caused by the inscrutable moral free will of the human being, doing or not doing the crime, just as it pleases. As to treatment, there still are just two traditional measures used in varying doses for all kinds of crime and all kinds of persons—jail or a fine (death is employed in rare cases only). But modern science, here as in medicine, recognizes that crime also (like disease) has natural causes—that is, circumstances which work to produce it in a given case. Treatment; modern science recognises that in penal law remedial treatment cannot possibly be indiscriminate and machine-like; but must be adapted to the causes and to the man as affected by those causes. Thus the great truth of the present and the future, for criminal science, is the individualisation of penal treatment. We must study the possible data that can be the causes of crime—the man's heredity, his physical and moral make up, his emotional temperament, the surroundings of his youth, his present home and other conditions—all the influencing circumstances. It took more than 100 years for shaded and vague expressions to emerge into positive assertion by any considerable number of savants that the criminal and not the crime should be the object of investigation and study.

But we see this in ancient India about 2,000 years ago. Brahaspati in his "Dandabhedavyavastha" deals with individualisation rather minutely. The judge had the discretion to give a greater or lesser punishment than that prescribed for the offence. In cases where the punishment was less than what was prescribed for the offence it was known as "Dandapakarsa" and when it was more it was "Dandotkarsa." When it was the same, it was "Dandasamya". In the case of a first offender the punishment was awarded only if there were grounds for thinking that it was calculated to bring about, in him a repulsion from that offence. If it was found, however, that the prescribed punishment was not calculated to deter him from wrongdoing the punishment was made severe. Brahaspati's chapter headed 'Dandanimittesu Dandabhedavyavastha" deals copiously with the interesting subject of individualisation, and will well repay perusal by the modern penologist. The caste and social status of the offender, his knowledge and education, his pecuniary and other circumstances and in fact all that went to make up his individuality were duly considered in moulding the punishment. The essence of "Danda" or punishment was its quality of making the offender desist from committing the offence (punahpravartinivartanasamarthyam). Dandaviveka of Var-

dhamana Upadhyaya is another treatise which deals copiously with the subject. Punishments were of different kinds. Vag-danda was punishment with words or warning or admonition. *Dhig* danda was a strong censure such as, "Shame on thee, thou miscreant," and Dhana-danda, *i.e.*, punishment with fine which itself was of two kinds, fixed, and fluctuating. Vadh-danda, *i.e.*, corporal punishment, was of different kinds and they are : Pidana, Angaccheda and Pramapana. Pidana is sub-divided into four modes (i) Tadana such as whipping or flogging, (ii) Avarodhana or restraint of liberty by means of imprisonment, (iii) Bandhana, restraint of liberty by chaining, fetters and the like, and (iv) Vidambana, i.e., exposing to ridicule. Angacheda or mutilation may be of different limbs and organs of the body. Manu mentions ten kinds of mutilations. Pramapana was capital punishment. It may be of the pure and mixed variety, the former was known as 'avicitram' and the latter 'vicitram.' Thus we see that individualization of punishment was recognised in ancient India in a very detailed form. Criminals were spotted out from their anatomical features also, this method was, however, not free from flaw.

Criminals in modern penology are classified into occasional criminal, emotional criminal, born criminal, moral insane and masked epileptic. These different varieties of criminals require different and varied consideration. Rigid machinery of law in early days seldom took into consideration the offender; always considering the offence that called for punishment. It was a mechanical process. Offences were labelled and punishments prescribed without enquiring into the personality of the offender, his antecedents, heredity and family up-bringing, his early associations, his temptations and trials and lastly his heroic but futile efforts to rise above contaminated conditions. The classical method of punishing the act instead of the actor gradually gave room to the modern method of individualisation of punishment which seeks to investigate the various causal agencies that lead to crime. Social environment is the heat in which criminality breeds; the criminal is the microb, an element of no importance until it meets the liquid that makes it ferment. The purpose of punishment under ancient society was either deterrence or intimidation; or retribution. By the end of the 18th century these purposes fell into dis-repute and instead of the act, the actor came to be recognised as the object of punishment. The bulk of the reform in this branch of the law today has the idea of state-tutelage at its bottom. State tutelage may either be negative in form, *i.e.*,

restricting the criminals' freedom by imprisonment or other means so as to diminish his opportunity for wrong-doing or it may be positive in form, *i.e.*, to protect and foster the development of his freedom. The latter aspect of State-tutelage, is what is reflected in the system of probation. It is a non-punitive method of handling the offender. It does not attempt to make the offender suffer; on the other hand it attempts to prevent him from suffering. Of course some suffering results from the offender being placed in the "probationer-status;" but in theory atleast this sufferance is not intentional and is tried to be avoided as far as possible. Probation, as we know, is the status of a convicted offender during the period of suspension of sentence in which he is given liberty conditioned on his good behaviour and in which the state by personal supervision attempts to assist him to maintain good behaviour. Court decisions based upon information obtained in pre-sentence investigation of the offender's personality and background are implied. The suspension of sentence which permits positive action to be taken may be either a suspension of the imposition of the sentence or the suspension of the execution of the sentence. Most of the American States suspend the execution, but others suspend the imposition of the sentence. Whichever method of suspending the sentence is used, it is a method of suspending punishment.

"In the case of a person without criminal record and of good personal antecedents, who offends through excusable reasons and is not be feared why should the law be inflexible. Why asks Judge Dumontet in his "Mitigation in Repression"—do we not give the Judge the same power of pardoning as is enjoyed by the jury, inspite of the evidence of the charge, the result of the proof, and the confession of the defendant himself?" The idea, therefore, is that the penitentiary treatment adopted in the case of minors should under particular circumstances be extended to adults as well. But there is a strong section of distinguished thinkers who regard the retention of punishment *qua* punishment as necessary for protection of society, as a means of intimidation though not of retaliation. At the first Congress of the Association *Internationale de Droit Penal* at Brussels in 1926 the question came to the fore as to whether measures of security should be substituted for punishment, or should only supplement or complete it. But reports were all unanimous to recognise that punishment in its classical and traditional sense is no longer sufficient for the exigencies of penal Justice, and according to some, there was no substantial difference between punishment and mea-

sures of security, as both remain included in the repressive sanction organised by the penal code. The Congress arrived at an eminently practical conclusion. Leaving to theoretical discussions the question as to the substantial or formal difference between punishment and measures of security, the Congress found that punishment considered as the only sanction of offence was not sufficient for the practical exigencies of social defence, either against offenders the most dangerous by their abnormal state, or by their tendencies or habits of committing offence; or against juvenile delinquents more or less re-adaptable. It proceeded to recommend that the penal code should contain also measures for the delinquent more or less re-adaptable to social life, and that "punishment and measures of security should be acts of jurisdiction with the faculty for the Judge to apply, the one or the other according to the circumstances of the act committed and the personality of the accused." The Judge in this regard must look more to correction than to repression as the object of punishment. Judgment and sentence are suspended, and everything is reduced to a personal conviction of the judge who has the power of collecting the data needed for a sentence which he can pronounce whenever the probation does not meet with favourable results. Short sentences have proved every where powerless to repress small offences; and what is worse, they have greatly and decidedly fomented recidivism. "Not being able to correct—for, what correction can be obtained in their short terms ?—or to intimidate, for modern prisons offer material conditions of life superior to those enjoyed by the lower classes of society from which delinquency is mainly recruited, they offer no hope except to the few who from the point of view of absolute justice believe that the debt is paid and society satisfied from the moment the sentence is served. On the contrary, the punishment itself produces recidivism in the man who enters a prison for the first time. His honourable and industrious existence having been marred and destroyed by a small offence or misdemeanor, the number of which is being constantly increased by the exaggerated activity of the police, turned out from the workshop, and mistrusted by everybody, he will be led back to prison through the paths of idleness and drunkenness, like the unmarried mother who returns to prostitution."

Probation or conditional release, in the circumstances, would provide the best method for reformation of the offender, especially the young and adolescent offenders and the first c ders who show signs of improvement with little tendency to relapse to criminality. Conditional release has to be distinguished from parole or ticket-of-leave system. In this latter system, part of the sentence is served and it is then that the convict is released on parole on condition of good behaviour and if he is found to have improved and has abstained from criminal conduct, he gets remission of the rest of the sentence and for some time atleast a part of the sentence. The dis-advantage of this system is that, here the offender is compelled to serve atleast a part of the sentence and for some time atleast he is compelled to get mixed up with other confirmed criminals and thus contaminate his whole career. Probation, on the other hand, is free from that draw-back. Under S. 4 of the Probation of Offenders Act, the benefit is extended to persons irrespective of age or past criminal conduct, of being released on probation of good conduct. The only restriction is that the offence committed should not be one punishable with death or imprisonment for life. Of course, the character of the offender, as seen from the report of the Probation Officer or otherwise, his antecedents etc., would be taken into consideration by the Judge in ordering the release. In the case of juvenile offenders, there was a time when his age was never taken into consideration in determining the sentence. The charge framed against the child-offender of even less than 10 years ran in the usual form, *viz.*, "with malice, revenge, craft and cunning", set fire to a barn etc, he was convicted of felony and duly hanged. A boy of ten, who confessed to have murdered his bed-fellow, was condemned to death, and all the judges agreed to the imposition of the penalty because the sparing of this boy simply on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity. Another boy of ten was sentenced to death, because it appeared that he hid the body he had killed, which manifested a consciousness of guilt, and a discretion to discern between good and evil.

Now the position is entirely different. The slogan now is that there are no crimes, there are only criminals. Juvenile delinquency is a problem which calls for considerable attention. Magistrates should be given proper training on correctional measures to be employed in the case of such criminals. They should make themselves conversant with the relevant provisions of the Children Act, the Borstal Schools Act and the Probation of Offenders Act and also the scope of the provisions of S. 562 of the Code of Criminal Procedure. A Magistrate entitled to take action under these Acts and provisions of the Code, who abstains

from doing so should be asked to state his reasons for not doing so. It is seen from the Administration Reports of some of the States that Magistrates are evincing a tendency to avoid recourse to the salutary provisions of the Probation of Offenders Act, mainly because it leads to a long drawn-out delay. Further delay is occasioned by a reference to the Probation Officer. The District Magistrate or other superior authority noting such a tendency on the part of the subordinate Magistrate should be firm in correcting such erroneous impression. The authorities also should see that the report of the Probation Officer is received in time without the least delay. In this connection, I must also point out that the status, salary, travelling allowance etc., of the probation officers should be improved, so that young men who enter the service as probation officers may not lose heart and get dispirited. Judges and Magistrates should also remember that it is the accepted principle of a Welfare State like ours that an offender convicted for the first time-and even a repeater who shows signs of improvement should be given a chance to reform himself before being sent to prison. The Children Act applies to young persons who have attained the age of 16 and the Borstal Schools Act applies to adolescent offenders of 16 to 21 who are likely to benefit by the training that they get in the institution. The Probation of Offenders Act, on the other hand, applies to all persons convicted of offence not punishable with death or imprisonment for life, who in the opinion of the court, having regard to the nature of the offence and the character of the offender etc., should be released on execution of a bond for keeping good behaviour. If he is under 25 years of age he may also be placed under the supervision of a Probation Officer as provided in the Act. In places where the Probation of Offenders Act is not in force, action can well be taken under S. 562 of the Code of Criminal Procedure, which applies to the first-offenders. Persons under the age of 16 even if arrested by the police are usually released by the police themselves on bail. Rules and circular directions regarding the keeping of such persons away from other criminals should scrupulously be enforced. Juvenile offenders should always be kept away from jail; whether before or after trial.

In conclusion I would like to observe that much would depend upon the attitude of the court in enforcing the statutes which embody this branch of social reform. In the normal course of things a judge is not expected to be responsive to changing trends in the social or political field around him. His job is to interpret the law, solve legal quibbles and riddles and make the field clear for the executive to enforce the law without obstacle. But in discharging this function Judges have, in the past, done what little they could within permissible and reasonable limits to take away the rigor of the law and alleviate human suffering. The legislature in framing laws sometimes consciously or unconsciously over-steps the bounds of logic and reason and on such occasions the Judge with the instinct of love for fellow-being, strong in him, has always come to the rescue of the society. Instances are numerous in the history of the administration of criminal justice illustrative of this principle. One such instance was the device by which judges salvaged criminals charged with simple theft, from the gallows. Theft of an article above the value of 12 pence was punishable with death. Juries were allowed to assess the value of stolen articles at very much lower than their real value. They had no inhibition or scruples to swear before court that the article was below 12 pence in value even though, in fact it was worth much more. Blackstone, the Law Giver, characterised this perjury as a kind of pious perjury. Judges never took it seriously and had they been strict and stiff-necked this scheme could not have succeeded. Many a thief of petty things was saved from the gallows by this device. To achieve this object, judges were solicitous in the extreme. So also, the present day judges and Magistrates should be solicitious to implement the penal reform envisaged by the correctional statutes. Living, as we do, in a Welfare State it is of the utmost concern of the society to see that the criminals who show tendency to reform are never sent to jail and subjected to the stigma of a convict ever disheartening him. When once a person tastes the experience of jail life, his mental outlook changes and he views society with hatred and disparagement. Such despondency in life can be avoided and the offender brought back to Society and allowed to lead a normal life by the enforcement of one or other of the correctional measures.

HIGH COURT OF ANDHRA PRADESH
AT HYDERABAD

R.O.C. No. 298/72 B 1. *Dated* : 30-10-1972.

CIRCULAR

SUB : *The Probation of Offenders Act,* 1958 (*Central Act 20 of* 1958) *and the Andhra Pradesh Probation of Offenders Rules,* 1963—*Instructions on the use of Probation System to the Subordinate Courts—Issued.*

Reformation and rehabilitation of offenders are now recognised as two of the most important objectives of the administration of Criminal Justice. The Probation of Offedners Act 1958 is one of the enactments aimed at achieving these objectives. Other enactments in force in Andhra Pradesh with such objectives are the two Children Acts and the Borstal Schools Act. The year 1971 was observed throughout the country as 'the Probation Year' in order to propagate the idea of probation. It was then realised that the Magistracy and the Judiciary had not been making due and proper use of the provisions of the Probation of Offenders Act, an aspect which was emphasised by the Honourable the Chief Justice of India. The High Court of Andhra Pradesh wishes to impress upon the subordinate judiciary and magistracy the advantages of making greater use of the provisions of the Act and desire to issue the following instructions for their guidance :—

1. *THE MEANING OF PROBATION* : It is now realised that in several cases, sentences of imprisonment do more harm than good. Often the crime or the lapse from the code of social behaviour is not so serious or is so conditioned by circumstances that the offender does not merit punishment, but, on the other hand, requires sympathetic treatment. To impose a sentence of imprisonment on such a person may have the effect of making him tough and frustrated and push him along the path of crime instead of reforming him and making him a useful citizen. In such cases an order releasing the offender on probation of good conduct is sure to yield better results. Probation is a method of treatment whose object is the ultimate re-establishment of the offender in the community. The basic idea is that the offender redeems himself and is purged of the offence. The law helps

him to erase the stigma of conviction and gives him the guidance of the probation officer. He is not removed from his family and community and therefore, he is compelled to discharge his social and economic obligations to them. The feeling of irresponsibility arising from the suspension of one's social and economic obligations is thus avoided. At the same time probation involves the discipline of submission by the offender to supervision by a probation officer. Thus Probation seeks both to protect society and to make the offender a more responsible person and avoids the damaging effect of the experience of imprisonment.

2. *THE APPLICABILITY OF THE ACT* : It is important to realise that the provisions of the Act are not confined in their applicability to children only. They apply to children and adults alike. The only difference is that Section 6 imposes a ban on persons under the age of 21 years being sentenced to any term of imprisonment (other than life-imprisonment) unless the Court comes to the conclusion, for reasons to be recorded in writing, that it is not desirable to deal with the offender under Section 3 or Section 4 of the Act.

Again the provisions of the Act are not confined to offenders found guilty of offences under the Indian Penal Code only. They extend to offences under other laws also. The restriction is that Section 3 applies to all offenders who are found guilty of offences under Section 379, 380, 381, 404 or 420 I.P.C. or any other offence under the Indian Penal Code or any other law punishable with imprisonment for not more than two years or with fine or with both and, Section 4 applies to all offenders who are found guilty of any offence not punishable with death or imprisonment for life.

Section 3 applies to cases of petty thefts and other trivial offences and enables the Court to release an offender after admonition having regard to the circumstances of the case, including the nature of the offence and the character of the offender.

Section 4 applies to more serious offences also and enables the Court to release an offender on probation of good conduct, having regard to the circumstances of the case, including the nature of the offence and the character of the offender. The Court has very wide discretion which must naturally be exercised wisely with a view to advance the objectives of the Act. No opportunity to make an order under Section 4 should be lost if there is any likelihood of reforming and benefiting the offender.

At the same time there should be no indiscriminate use of the method of probation. Probation is meant to reform and reclaim the individual for society and is not meant to be a lenient form of punishment. Whenever it is appropriate Probation may be resorted to as an effective alternative to a sentence of imprisonment, especially a sentence of imprisonment for a short term, which generally serves little purpose.

3. *THE PROCEDURE* : The appropriate stage at which an order under Section 3 or Section 4 may be made by a Court is at the time of pronouncement of judgment. If the Court considers the case as one in which an order under Section 3 may be made it may straightaway do so without calling for a report from the probation officer. If the Court considers the case to be one in which an order under Section 4 may be made even without calling for a report from the probation officer, the Court may do so though it may be generally advisable to call for a report from the probation officer. Some times the material revealed at the trial is hardly sufficient to enable the Court to decide whether an order under Section 3 or Section 4 may be usefully made. That is why the Court is empowered to call for a report from the probation officer. A report from the probation officer must invariably be called for if the offender is under the age of 21 years. If the offender appears to be about 21 years of age or less the Court must record a clear finding about the age of the offender, after taking evidence, including medical evidence, if necessary.

It will be useful to have the report of the probation officer ready by the time of the conclusion of the trial though the Court may not consult the report until it arrives at the conclusion that the offender is guilty. In warrant cases a report may be called for as soon as the charge is framed. The report of the probation officer must be full and must contain adequate information regarding the age, character, antecedents and physical and mental condition of the offender so as to enable the Court to make a wise selection. The report should be treated as confidential and should not be read out in Court; nor should the probation officer be examined as a witness and subjected to cross-examination. However, in appropriate cases the Court may communicate the substance of the report to the offender to give him an opportunity of producing evidence relevant to the contents of the report. The Court may then pass an appropriate order.

The maximum period for which an order under Section 4 may be made is three years. To make an order for the maximum

period in the case of ordinary offenders may prove intimidating. Shorter periods may therefore, be preferred and where necessary the period may later be extended though not so as to exceed three years from the date of the original orders.

4. *SUPERVISION* : The release of an offender without a supervision order may defeat the very object of the order. It is, therefore, necessary that a supervision order should be made whenever necessary and convenient. A supervision order should not be made for a period less than a year. It should mention the terms and conditions required to be observed by the offender. The terms and conditions should be explained to the offender who should be furnished with a copy of the supervision order. The offender's sureties and the probation officer must also be furnished with copies of the supervision order. The conditions of probation may be varied by the Court at any time during the period for which the order was made.

The Court should call for periodic reports from the probation officer regarding the progress of an offender released on probation of good conduct. Where it is brought to the notice of the Court that the offender has failed to observe any condition the Court may take action under Section 9 of the Act. The Court may not take a harsh view of a breach of every condition and straightaway sentence him. Sympathy and understanding on the part of the Court are essential if the Act is to be a success.

5. *PERSONS UNDER THE AGE OF 21 YEARS* : In regard to offenders under the age of 21 years, it is necessary to bear in mind the provisions of the Andhra Pradesh Borstal Schools Act, 1926 and the two Children Acts in force in the Andhra area and the Telangana area respectively.

Under the Borstal Schools Act when a person above the age of 16 years and below the age of 21 years is convicted of an offence punishable with imprisonment (other than imprisonment for life),the Court is empowered, instead of passing a sentence of imprisonment, to direct the detention of the offender in a Borstal School for a term of not less than 2 years and not more than five years, in no case so as to extend beyond the age of 23 years. Before making an order of detention in a Borstal School, the Court is bound to call for the report of the Probation Officer and may make further enquiry regarding the character, state of health and mental condition of the offender. Thus, in

the case of offenders above the age of 16 years and below 21 years, the Court may proceed under the Borstal Schools Act and order the detention of the offender in a Borstal School or proceed under the Probation of Offenders Act and release him after admonition, if appropriate, or on probation of good conduct. These alternatives are in lieu of a sentence of imprisonment and do not prohibit the Court from imposing a sentence of fine only where appropriate.

In regard to offenders under the age of sixteen years certain special safe-guards are provided by the two Children Acts which, as far as possible, should be scrupulously observed. For example, such a person should be tried by a Juvenile Court or where there is no Juvenile Court, by the ordinary Criminal Court sitting elsewhere than its usual place of sitting or at different times from its ordinary hours of sittings. A magistrate may usefully sit in his chambers when trying a juvenile offender. This precaution is intended to protect the children from contact with other offenders. There are other safeguards which should also be strictly observed. The Children Acts impose a complete ban on passing any sentence of imprisonment on an offender under the age of fourteen years. In the case of an offender who is above fourteen but below sixteen years of age, a sentence of imprisonment may be passed if the Court finds that he is of so unruly or of so depraved character that he is not a fit person to be sent to a Senior Certified School and that none of the other methods in which he may be dealt with is suitable. The various methods of dealing with offenders under the age of sixteen years are catalogued in Section 28 of the Andhra Pradesh (Andhra Area) Children Act and Section 29 of the Andhra Pradesh (Telangana Area) Children Act. No order should however be passed without obtaining a report from the Probation Officer.

It is essential that in every case where an offender appears to be under the age of 21 years, the Court must enquire into the age of the offender, take medical evidence if necessary and record a clear finding.

Sd/-
K. VENKATESWARA RAO
Registrar

HIGH COURT OF ASSAM AND NAGALAND AT GAUHATI

Dt. Gauhati, the 30th April, 1971.

From :—

Shri B. Goswami, M.A., B.L.,
Registrar,
High Court of Assam and Nagaland.

To :—

(1) The Distt. and Sessions Judges, Kamrup at Gauhati, Sibsagar at Jorhat, Goalpara at Dhubri, Nowgong at Nowgong, Darrang at Tezpur, Lakhimpur at Dibrugarh, Cachar at Silchar.

(2) The Distt. Magistrate, K. & J. Hills, Shillong.

Sir,

I am directed to inform you that the Government of India have constituted a Central Advisory Board on Correctional Services in December, 1969 with the object of advising the Central and State Governments to co-ordinate the working of various agencies and to create public awareness on the problems in the field of Social Defence. The Board feels that there is scope for better utilisation of the probationary services and recommends that the year, 1971 be observed as "Probation Year" in India. It has become necessary to make the Judiciary more intimately involved with the implementation of the Probation programme. The feeling is widely shared that the institutionalisation of youths in prisons damages their personality and future for ever. The Probation of Offenders Act, 1958 is a legislation in the right direction to lead the mis-guided youths on right path. Section 6 of the Act provides for a mandatory calling of social investigation report by the Courts from the Probation Officers in respect of all offenders under 21 years of age and imposes certain restrictions on the imprisonment of offenders below 21 years of age. It appears that proper use of the Act has not been made so far in our State and it is found that the percentage of offenders released on probation compares very unfavourably with the high percentage sent to jail. In order to make the recommendation to observe the year 1971 as "PROBATION YEAR" and the correctional

work effective, it is desirable that the following instructions are carried out :—

1. Seminars on Probation at District levels should be organised by the District Judges and important members of the public including the members of the Bar should be invited to take part in such seminars so that valuable suggestions may come out for treatment of young offenders.

2. In dealing with criminal cases, proper use of Sections 3, 4, 6 and 8 of the Probation of Offenders Act should be made.

3. The Courts should make proper use of Rule 26(1) of the Assam Probation of Offenders Rules, 1962 by directing the Probation Officers to enquire into the character and antecedents of the accused, the circumstances in which the offence was committed and other matters, and of Rule 29 requiring the Probation Officers' to submit reports on the progress, conduct and mode of living of the probationers placed under their supervision for the purpose of sections 8 and 9 of the Probation of Offenders Act.

4. The District Judges should include in their Annual Reports on the administration of Justice the statistics of probation to show the number of cases in which section 3, 4, 6 and 8 of the Probation of Offenders Act and Rules 26(1) and 29 of the Assam Probation of Offenders Rules, 1962 have been applied.

Yours faithfully,

Sd -
Registrar.

HIGH COURT OF DELHI

Copy of d.o. No. 87/Gazette, dated the 14th July, 1971, from Shri M. S. Joshi, Registrar, Delhi High Court, New Delhi, to Shri R. N. Aggarwal, District and Sessions Judge, Delhi.

. . . .

The year 1971 is being observed as "Probation Year". The object of placing an offender on probation is to reform and rehabilitate him so that he may become a useful and self reliant member of the society. The Parliament has enacted Probation of Offenders Act for this purpose. Proper and judicious use of the provisions of the above enactment can go a long way in achieving the object. The success of the scheme underlying the above provisions depends to a great extent upon the trial magistrate and Sessions Court and they can play an effective part in this connection.

I am desired by the Hon'ble the Chief Justice and Judges to request you to impress upon the judicial magistrates to keep in view the provisions of Probation of Offenders Act and to make use of them in appropriate cases. Attention is also invited to the necessity of noting the age of the accused when recording his statement under Section 342 of the Code of Criminal Procedure so that the court of appeal and revision can also make use of the provisions of the Probation of Offenders Act in appropriate cases.

6—1035Dept. of SW/72

HIGH COURT OF KERALA

No. D1-15811/71. ERNAKULAM
Dated 19-8-1971

OFFICIAL MEMORANDUM

SUB : *Probation Year* 1971—*greater need for using probation facilities—message—communication of—*

A Central Advisory Board on Correctional Services has been constituted with the object of constantly reviewing all correctional work including the work undertaken by the prisons, probationary services and special institutions. This Advisory Board felt that there is considerable scope for greater utilisation of the probationary services already in existence and in order to underline the fact they have recommended that the year 1971 may be observed as "Probation Year" in India.

The attention of the criminal judiciary is invited to the greater need for using probation facilities, so that correctional work could be really effective. They are requested to render full co-operation in making the "Probation Year" a success.

(By Order)

Sd/-
Assistant Registrar

To

All District Judges.
The State Transport Appellate Tribunal, Ernakulam.
All District Magistrates.
The Registrar of Village Courts, Trichur.
All Officers and Sections of the High Court.
The Stock file, High Court (2 copies).

PUNJAB AND HARYANA HIGH COURT CHANDIGARH

No. 12944/Rules

From

Shri Pritam Singh Pattar, B.A.LL.B.,
Registrar,
Punjab & Haryana High Court,
Chandigarh.

To

1. All the District & Sessions Judges in the State of Punjab.
2. All the District & Sessions Judges in the State of Haryana.
3. The District & Sessions Judge, Chandigarh.

Dated, Chandigarh the 19th August, 1971.

Sir,

I am directed to say that the Ministry of Social Welfare, Government of India, constituted Central Bureau of Correctional Services and the Central Advisory Board on Correctional Services with the object of preparing public opinion in favour of correctional work. In this connection, 1971 is being observed as 'Probation Year' in the country.

2. The Probation of Offenders' Act, 1958, was enacted by Parliament to provide for release of offenders after admonition or on probation and for matters connected therewith. The Act shifts emphasis from deterrance to reformation and from crime to the criminal in accordance with the modern outlook on punishment. Reformation and rehabilitation of the offenders is the key-note of the Act. These objects of the legislation would be defeated if the Courts were to by-pass the provisions of the Act even when the case of the offender falls within its ambit. The Hon'ble the Chief Justice and Judges would like every Judicial Officer to acquaint himself thoroughly with the important provisions of the Act and to consider the advisability of applying those provisions in suitable cases. Their Lordships are, however,

anxious to avoid the impresson that the provisions of the Act be applied to cases which, according to the indications given in sections, 3, 4 and 6, are not intended to be covered.

3. The Probation of Offenders' Act, 1958 (Central Act 20 of 1958) came into force in all the districts of Punjab and Haryana in driblets *vide* notifications 1.CSR.132/CA-20/58/SI/62, dated 25th July 1962, 2.SO-38/CA/20/58/SI 67 dated 22nd May 1967 and 3.SA-127/CA/20/58/SI/66 dated 28th April 1966. The Governor of composite State of Punjab framed the Probation of Offenders Rules, 1962, which *inter-alia* detail the powers of Court to call for report from the Probation Officer for passing an order under Section 3, 4, 5, 6 and 7 of the Act. Rule 24 empowers the Court to direct a Probation Officer to enquire into the character and antecedents of the accused, the circumstances in which the offence was committed and other matters and submit a report. The report is to be consulted after the accused has been found guilty. The Probation Officer can also be directed to make any further investigations and, where required, to have a medical or psychiatric examination of the offender and to submit a report to the Court for enabling it to decide the action to be taken under the Sections referred to above. Attention may also be invited to the provisions of Section 11 of the Act. The power under the Act can be exercised by any court competent to try and sentence the offender to imprisonment as also by the appellate and revisional Courts.

4. I am to add that all Judicial Magistrates may be directed to separately mention in their usual monthly statements of disposal during the remaining months of 1971 the number of cases in which the provisions of the Act had been applied. I am also to request that you may address the Judicial Magistrates regarding the true scope and purpose of the Act so that the end in view can be achieved.

Yours faithfully,

Sd/-

(*Registrar*)

HIGH COURT OF ORISSA CUTTACK

No. ——————————/XII-4/71.

From

Shri K. P. Mohapatra, B.L.,
Registrar of the High Court of Orissa.

To

The

Dated Cuttack : the 11th October, 1971.

SUBJECT :—*Observance of "Probation Year* 1971"—*Constitution of Probation Committees.*

Sir,

In continuation of the Court's Memo No. 4047(17) dated XII-4/17 the 10th June, 1971 on the above subject, I am directed to say that, in pursuance of the recommendation of the Central Advisory Board on Correctional Services, Ministry of Law & Social Welfare, New Delhi for setting up of Probation Committees in the State and District Level under the Chairmanship of Senior Judges, the Inspector General of Prisons, Orissa, Bhubaneswar proposed that the district level probation meetings may be convened at least once in three months at such time and place as would suit the District Judge or the Additional District Magistrate (Judicial). The District Probation Officer of the respective district would be the convenor of such meetings, who would arrange to convene the meetings in prior consultation with the District Judge or the Additional District Magistrate, (Judicial), as the case may be. He would also be responsible to record the minutes of the decision and prepare the proceedings of such meetings.

The Court after careful consideration and with the view that there should be greater utilisation of the probationary services, agree to the proposal of the Inspector General of Prisons, Orissa and direct that the District & Sessions Judges ordinarily in the headquarters stations like Cuttack, Puri, Behrampur, Koraput, Balasore, Baripada, Sambalpur and Bolangir should preside over the probation meeting. But in the district headquarters at Dhenkanal, Keonjhar, Sundargarh, Phulbani and Kalahandi which

are not headquarters stations of the District & Sessions Judges, the Additional District Magistrates (Judicial) should preside over the meeting. The meetings should be arranged on Saturdays in the afternoon since all the Magistrates should be required to attend the meetings without dislocation of the business of the Court.

I am to request that the above instructions should be strictly followed.

Yours faithfully,

Sd/-
K. P. MOHAPATRA
Registrar
11-10-71

Memo No. 7211(17)/Dated 11-10-71
XII-4-71

Copy forwarded to the District & Sessions Judge
Addl. District Magistrate (Judl.)
of ..... for information and necessary action.

Sd/-
Addl. Asstt. Registrar.

No. ————————/XII-4/71.

From

Shri K. P. Mohapatra, B.L.,
Registrar of the High Court of Orissa.

To

All the Sessions Judges of the State.

Dated Cuttack the 2nd June, 1971.

SUBJECT :—*Observance of the year* 1971, *as "Probation Year."*

Sir,

I am directed to enclose for your information and for communication to all the criminal courts in your sessions division a copy of a 'Note on Probation Year, 1971' issued by the Department of Social Welfare New Delhi.

In order to help achieving the object of the Central Advisory Board on Correctional Services the Court direct that all the criminal courts in your sessions division may be instructed to follow the provisions of the Probation of Offenders Act and of the Rules framed thereunder in suitable cases and also to make full use of the Probation Hostel set up at Angul. At the time of their periodical inspection of subordinate courts Sessions Judges and Additional District Magistrates (Judicial) should discuss with the Magistrates posted at the particular station the usefulness of the provisions of the aforesaid Act and the Rules and they should impress upon the magistracy to make full use of the said provisions to the benefit of first offenders and juvenile delinquents.

I am to request that the above instructions of the Court may be strictly followed.

Yours faithfully,

Sd/-
K. P. MOHAPATRA
Registrar.

Memo No. 4047(17)/XII-4/71.
Orissa High Court, Cuttack.
Dated Cuttack the 2nd June, 1971.

Copy forwarded to the Sessions Judge.....
Additional District Magistrate (Judicial).....
for information and necessary action.

Sd/-
Assistant Registrar.
Orissa High Court.

RAJASTHAN HIGH COURT JODHPUR

Dated 11th May, 1971.

No. 9/P.I
From :
The Registrar,
Rajasthan High Court,
Jodhpur.

To
All Sessions Judges,
All Addl. Sessions Judges,
All Asstt. Sessions Judges,
All Munsif Magistrates,
All Addl. Munsif Magistrates,
All Special Judicial (Rlys) Magistrates.

Sub :—Probation Year—1971.

No. Gen/VC/31/71/3560 Dated 11th May, 1971.

Sir,

I am directed to say that a Central Advisory Board on Correctional Services has been constituted by the Government of India with the object of constantly reviewing all correctional work. The Board felt that there is considerable scope for greater utilisation of the probationary services already in existence and in order to underline the fact they have recommended that the year 1971 may be observed as "Probation Year" in India.

The Probation of Offenders' Act, 1958 (Central Act XX of 1958) was brought into force in this State with effect from the 1st day of January, 1962 and more than nine years have passed since then but there does not seem to be any remarkable change in the pattern of disposal of cases by the criminal courts. Your attention is, therefore, drawn to the salient features and important provisions of the said Act. This Act is a great step

in the advancement of penal law. It contains provisions for new methods of treatment for those offenders who are likely to make good if given a chance of constructive help. Under these new methods of treatment alternatives of imprisonment are given because experience has shown that commitment to prison does more harm than good to a certain type of offenders. The purpose of the Act is not punishment but reform by means of constructive treatment. The Act applies not only to young persons but also to other offenders.

Under section 3 of the Act, a person of any age can be released on admonition (1) if he has committed an offence punishable under section 370, 380, 381, 404 or 420 of the Indian Penal Code, or (2) if he has commited any offence punishable with imprisonment for not more than two years or with fine or with both under the Indian Penal Code or any other law, and (3) no previous conviction is proved against him. Of course the trying magistrate is expected to take the circumstances and the nature of the offence and character of the offender into consideration. The object of this section is to offer an alternative to the courts so that in case of first offenders, the courts may offer them a further chance to turn over a new leaf in life. To send such persons to jail may have the effect of turning them into habitual criminals. It may be noted that this section is not restricted to juvenile offenders only. The first offender may be of advanced age. But so far as juvenile offenders are concerned, before passing an order under this section the trial court should guard against two things, (1) the danger to the public and (2) the danger to the accused himself. The public must not be led to suppose that all juvenile offenders may commit any crime that they like without any fear of punishment, because that course would be an incentive to criminal minded parents to initiate their children into a life of crime. The danger to the children is that they themselves being immune from fear of punishment might be tempted to go astrary into the path of crime. It is obvious therefore that before complying with this section, it should be considered whether there is a good case for its application or not.

Section 4 of the Act empowers the courts in appropriate cases to release any offender on probation of good conduct instead of sentencing him at once to any punishment. Any man of any age whatsoever whether first offender or a habitual offender is eligible to probation under this section in respect of

practically all offences excepting those in which punishment is either death or imprisonment for life. Previous conviction is also not made a condition precedent. However, courts must exercise great care in selecting cases for probation. To place persons on probation where the circumstances do not justify it imposes an unfair burden on the Probation Officer and brings discredit on the system. In addition to considering the past history and past and present surroundings of the offender, the court must take into account the offence which has brought the offender before the court. Where an offender has already been placed on probation without successful result the court should act with great caution before again placing him on probation. Further before making a probation order, the court must take into consideration the report, if any, of the probation officer concerned in relation to the case. In order to ensure that an offender released on probation of good conduct really conducts himself properly and becomes a useful member of the society, sub-sec. (3) of Sec. 4 of the Act enables the courts to pass a supervision order directing that such offender shall be under supervision of a probation officer named in the order during such period not being less than one year as may be specified in the order. The court while making a supervision order should require the offender to enter into a bond with or without sureties to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants etc., as the court may consider fit to impose having regard to the circumstances of the case. The court should also explain to the offender the terms and conditions of the order.

Section 5 of the Act provides for payment by the offender of compensation and costs to the person to whom loss or injury has been caused by the commission of the offence.

Section 6 imposes restrictions on imprisonment of offenders under 21 years of age. This section requires that when any person under 21 years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), 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 the character of the offender, it would not be desirable to deal with him under sec. 3 or sec. 4 of the Act. This section further requires that if the court passes any sentence of imprisonment on the offender it shall record its

reasons for doing so. For satisfying itself whether it would not be desirable to deal under sec. 3 or sec. 4 with an offender under 21 years of age the court should call for a report from the probation officer and consider the same and any other information available to it relating to the (1) character of the offender, (2) physical condition of offender and (3) mental condition of the offender. The provisions of this section are mandatory and the courts should follow these provisions when dealing with accused persons brought before them who are under 21 years of age.

Under section 9, the court is empowered to sentence the offender for the original offence or to impose upon him a penalty not exceeding fifty rupees, in case it finds that the offender has failed to observe any of the conditions of the bond entered into by him under section 4.

I am to request that the provisions of the Act should be carefully studied and cases should be disposed of in accordance therewith.

Yours faithfully,

Sd/
(BRIJ BEHARI LAL)
Registrar
11-5-71

7--1035Deptt. of SW, 2--GIPF.

END