V. Alternatives to Imprisonment: The Case for Probation in Water Law

There are two major approaches of punishment - hardnosed approach and the treatment approach. The first approach revolves round the deterrent principle and is based on the idea that punishment deters crime. Thus punishment, under this approach, is considered as an end in itself. In all our laws in general and water law in particular, deterrence is the basic social objective for discouraging large populations from committing crimes. However in this approach we fail to distinguish the personality of the offender - i.e. those who may be dangerous to community and who may not be so. We also fail to appreciate the social objective of the punishment itself - i.e. not merely punishing the offender but after taking account of his social and economic factors, reforming him by giving value to his dignity and self worth. Therefore in the treatment approach the fundamental objective of punishment is not merely deterrence but an improvement or alteration in the unacceptable modes of convict's behaviour. In this way the treatment approach balances both the rights of the community as well as those of the convicted person. The system of treatment in our law which has the potential of carrying all these possibilities is probation.

Before analysing the suitability or viability of probation in water law it would be better to appreciate the fundamental principles of probation as we have adopted in our criminal justice system.

Probation is derived from the latin word Probo meaning I prove my worth. The reasoning for the incorporation of the concept of probation in the criminal justice system is best stated by the Marison Committee in the following words:

> Society must protect itself against the wrongdoer. It must show its disapproval of crime. But we take it as axiomatic that a society whose morality acknowledges the worth and dignity of each of its members must seek, in fulfilling these objective, with minimum interference with life and liberty that is consistent with them. We see probation as epitomizing society through the supervision to which the offender is required to submit. It both minimizes the restriction placed upon him and offers him the help of society in adjusting his conduct to its demands. It seeks to strengthen the offender's resources

so that he may become a more responsible member of the community which must also play a part in rehabilitating him. The offender is conditionally entrusted with freedom so that he may learn the social duties it involves.[72]

Moreover imprisonment can never be a correct device for punishing all deviant behaviour. Imprisonment may be appropriate to deal with certain class of offenders who are a risk to the society at large, but there are several specific cases where imprisonment may be counter productive. In such cases instead of becoming a useful citizen, the offender may become a tough and frustrated individual.[73]

Though in India the idea of releasing an offender after admonition was envisaged by the writers as early as 300 B.C.[74] it was crystallized into actual legal principle by its adoption first in the criminal procedure code 1898[75] and more truly with the enactment of the Probation of Offenders Act, 1958. Under the Act neither the ingredients of the offence nor the units of sentence are disturbed, but a provision is made to help the reformation of an accused through the agency of the cousn.[76]

Probation is not specifically defined under the Act. It was, however, defined by the English standard Probation Act of 1955 in the following words:

> Probation is a procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the coust without imprisonment, subject to the conditions, imposed by the court and subject to the supervision of the probation service.[77]

The probation of offenders Act 1958 has removed the limitations based on age, sex and repitition of offences contained in section 562 of the Cr.P.C. 1898. Now release on probation is available to all offenders provided they are considred suitable by the court for such treatment regardless of age, sex and previous conviction if the offences committed are not punishable with death and life imprisonment. The rationale for exclusion lies in the fact that the offences excluded from the scope of the Act are more serious and heinious offences.

The court can release an offender on probation of good conduct after due admonition.[78] Following are the conditions on which discretion for such release is to be exercised by the court:

(i) that no previous conviction should have been proved against him;

(ii) that the convicting court should be of the opinion that having regard to the circumstances of the case including the nature of the offence and the character of the offender it is expedient so to do.

(iii) that the offender should have been found guilty of one of the following offences:

(a) theft under section 379 IPC;

(b) theft in building under section 380 IPC;

(c) theft by servant under section 381 IPC;

(d) dishonest inappropriation of property under section 404 IPC;

(e) cheating under section 420 IPC;

(f) any offences or with or with both under the IPC or any other law.

An order of admonition is the final order against the convicted person and puts an end to the case.

The Act vests in the court a discretion to release a person found guilty of having committed an offence not punishable with death or imprisonment for life on probation of good conduct.[79] The bond to be taken should be not only to keep the peace and be of good behaviour during probation period, but to appear and receive sentence when called upon during such period on his failure to observe the

conditions of the bond.[80] It is, however, necessary that the offender or his surity has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction before it releases him on probation.[81]

The Act also empowers the court to require released offender to pay compensation and costs to the injured party. Section 5 provides that the court directing the release of an offender under section 3 or 4, may, if it thinks fit, make at the same time a further order directing him to pay:

(a) such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of an offence; and

(b) such costs of the proceedings as the court thinks reasonable.[82]

The Act provides for restrictions on imprisonment of offenders under 21 years of age. Such a person can not be sentenced to imprisonment unless he is considered unsuitable for being dealt with in any other manner after due consideration of a report from the probation officer.[83]

Since the main purpose of the Act is reformation and rehabilitation of the offender as a useful and reliant member of the society and to bring social tranquility, section 12 of the Act removes disqualification, if any, attached with a conviction. Thus the offender is saved not only from the deleterious affects of jail life but is also assured that he shall not suffer from any disqualification consequent to such conviction. This benefit is available to all offenders released on admonition or on probation of good conduct under this Act, notwithstanding anything contained in any other law. Moreover the section is also applicable to service cases and thus serves the accused from suffering the consequences of conviction.[84]

A perusal of the salient features of the Probation of Offender Act clearly indicates that the Act has a very good potential for water related offences. Following are the four solid reasons on the basis of which the application of probation in water related offences may strongly be argued:

1. Most of the water related offences under I.P.C. water pollution Act, irrigation and fishery statutes etc., are not heinous in nature. They are rather the product of socio-economic conditions. For example under section 430 of the I.P.C. the case law

indicates that the diminution of water supply was caused not with an intent to injure the other party but to fulfil one's own genuine needs. In such cases imprisonment is not the right thing to be inflicted on the accused and the imposition of fine alone may not have any real deterrent effect on the offender.

2. Restitution to the injured party by way of awarding him compensation to be given by the accused as a condition of probation assures greater social tranquility, provides instant relief to the injured and breeds strong sense of social justice. While the accuses is conveyed the message that he must play the game by society's rules or be prepared to suffer the consequences, the injured

is also assured at the same time that the accused is not only convicted, but the damage inflicted on the injured will also be compensated by the accused. On the contrary the [illegible] institutional structure of correction i.e. prison, if prison can at all be considered as a correctional institution, only segregates and insulats the offender and thus merely reinforces the negative values.

3. In our social structure the institution of imprisonment itself contributes to the convict's poor self image. He is aware that he is part of a small minority of caught criminals out of a number of persons uncaught for similar circumstances. This may develop a keen sense of injustice in him. In the context of water law violators this sense of injustice might be very strong. If we encourage probation in their area the probation officer should be able to appreciate the convict's feelings and provide him the right counselling. This will help in dissolving social tension in many areas.

4. The present legal regime of water law does not take into account the real practical problems especially faced by the government and corporate officials. Probation will not only save them from loss of job and other hardships but also provide them an opportunity to utilize their potential more constructively and persuasively.

The viability of probation in commercial sector may be well illustrated by a recent case of 1989 in which the sub-divisional magistrate of Patna convicted the unit manager of Bata India Ltd., Patna under sections 41 and 44 of Water (Prevention and Control of

Pollution) Act, 1974, for discharging effluents of the factory into the Ganga without prior permission. However, keeping in view the fact that the accused had installed a treatment plant and there was nothing on record to show against his previous anticidents, the court released the unit manager on probation under section 360 of the Cr.P.C. 1973 on the execution of a bond of Rs.2000 for a period of two years. He was directed to maintain peace and good conduct during that period. At present he is the manager (environment) and advisor in the company at Calcutta.

The detailed facts of the case are as follows:

The complaint was filed by the then member secretary of the Bihar State Water Pollution Control and Prevention Board, Mr.Nagendra Das, against the manager of the Patna unit of the Bata stating that the Board had given notices to each establishment, including the accused company to furnish the information in the prescribed form about their installation, system of discharge of effluents, if any, etc. Since the accused company was situated by the side of the Ganga, it discharged large amounts

of effluents without proper treatment directly into the river. The Board had asked the accused company to file an application and the project report of the treatment plant, if any, for the approval and consent of the former.

The accused company on Dec.15, 1979, filed an incomplete and irrelevant consent application to the Board. An engineer of the Board, Mr.Shiv Shankar Singh who verified the application, found it faulty and not in accordance with the particulars required by the Board through its letter No.215 dt. 23.1.1980. The Board rejected the consent application and communicated findings to the assured company in due course. The accused was asked to submit a detailed project report regarding the effluent treatment plant.

But the company did not file any application, despite repeated reminders, sent by the Board. The company continued to discharge polluted waste without any regard to the requirement of the law.

The Board, thereafter, sent a registered letter to the company on 11 September 1980 requesting it to submit the project report at the earliest. But no project report was sent. The company, however, promise to install the treatment plant very

shortly in its letter dated 26 Sept. 1980. However, it failed to keep its promise and no treatment plant was installed. An assistant chemist of the Board, Mr.Binod Bihari, made analysis of the water discharge of the company. In his report dated 5 Jan., 1980, the chemist stated that the effluen discharged by the company was highly polluted. The same day the Board sent a registered letter to the company giving it one month's time, as last chance, to install the treatment plant. However, nothing was done. Thereafter, the Board in its meeting on November 21, 1980 passed a resolution and accordingly a complaint was filed in the court against the company, since it had failed to submit a detailed report regarding effluent treatment plant. In spite of several letters of the Board and publication of laws items in a local daily, the company did not repond. The cognisance was taken and the accused was summoned for trial. Changes under sections 41 and 44 of the Water (Prevention and Control of Pollution) Act were formed against the company and its unit manager.

The Patna case illustrates the application of probation in water law especially in the field of water pollution. The data released by

various agencies do indicate that all the companies, big or small, are interested in paying fines, in lieu of imprisonment or any other penalty. Therefore the imposition of monetary penalty alone has lost its credibility so far as the compliance of law is concerned. The imposition of imprisonment in such cases will also not serve any fruitful purpose because basically it will be a waste of valuable human resource and his productive potential. In such a situation the application of probation, as a middle approach, may serve the goods.

VI. Liability of Government Departments

In India the liability of Government is governed by the doctrine of sovereign immunity, which was based on the English rule of sovereign immunity. The sovereign immunity rule at common law had its roots in two maxims - first, the king by his writ cannot command himself, and second the king can do no wrong. "As the King can do no wrong it follows that he cannot authorise a wrong; for to authorise a wrong to be done is to do a wrong. As he cannot authorise a wrong, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown."[85]