

PROBATION — THE HEART OF BUDDHIST DISCIPLINARY LAW

by

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Abstract

The Buddhist Law, although it came into being with the establishment of the Buddhist Monastic Order (the bhikkhusamgha), has in it a corpus of well-developed legal concepts and practices reminiscent of modern legal practices. One such concept is that of Probation available to the western world in the form it is found today from the activities of John Augustus (See John Augustus, First Probation Officer, reprint of a report by Augustus with an introduction by Sheldon Glueck, New York 1939). In the Buddhist legal system there are concepts and practices that one could apply in the case of a lay society (For more details on this see the forthcoming publication, Nandasena Ratnapala, Crime and Punishment in the Buddhist Tradition). In the Buddhist Tradition, Probation is defined in all its legal as well as social ramifications. The Buddhist Disciplinary Texts in the Pali Language describe how, when and why a person should be kept under Probation and finally how such an individual would be integrated into the society after the successful completion of the required Probation period. The responsibility of the one coming under Probation is placed in the hands of the individual and community of monks. This article looks at this Buddhist concept and practice from the point of view of modern criminological knowledge and experience.

Probation is regarded essentially as a modern method of treatment and as such "it is vested in the broader social and cultural trends of the modern era" (U.N. Probation, 1951¹ : 15). Although attempts are made to identify precedents for Probation in medieval and early modern European Law, it is agreed that Probation as we find it today is "derived from the practical extension of the English common law" and its origin is associated with England and the United States (Ibid. : 16).

The Probation of Offenders Act (U.K.), 1907², defines Probation in the following manner : "When a person is brought before a court of summary jurisdiction and the court thinks that the charge is proved but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation, (1) the court may dismiss the information or charge ; (2) the court may discharge the offender conditionally

on his entering into a recognizance with or without sureties to be of good behaviour and to appear for conviction and sentence when called on at any time during such period not exceeding three years as may be specified in the order ; (3) such a recognizance may contain a condition that the offender be under the supervision of such person as may be named in the Order and such other conditions for securing such supervision as may be specified in the order requiring the insertion of such conditions in the recognizance is referred to as a probation order” (U.N. Probation, 1951 : 291)³.

The meaning given to Probation in the U.K. Act of 1907 is far from precise and the confusion arises from the three differing forms of treatment referred to. Although the term ‘Probation’ is usually applied to all three of these methods the usual practice is to associate it with the third method, i.e. the release of the offender under supervision. “In our view this is the proper use of the term, because however important and valuable the other two methods may be, it is the idea of supervision which underlines the creation and development of the method of dealing with offenders which is generally known as the probation system” (Home Office Report, 1927 : 51-2)⁴.

Probation is also singled out as the only method available to the courts to provide a means of re-education to the offender without a break in his normal life and without removing him away from the natural surrounding of his home (Elkin, 1938 : 162)⁵.

In Buddhist Law Probation is stipulated as a form of discipline to be exercised on certain kinds of offences. A monk who is guilty of any of the thirteen Sanghādisesa offences (i.e. those offences categorised in the second order) could be dealt with by Probation. According to the Buddhist Tradition this sort of Probation is introduced under the term *Mānatta* and *Parivāsa*. When an offence belonging to these thirteen is confessed, the two measures are inflicted together. When there is immediate confession of the offence, only *Mānatta* is imposed. When both are imposed, usually *Mānatta* follows *Parivāsa*. The distinction between the two is that *Mānatta* is for a definite period of time (six days) while *Parivāsa* is for an indeterminate period, i.e. depending on the nature of the offence.

Mānatta is described as a form of discipline under probation for six days. As to what exactly discipline here means is not made clear in the Buddhist Law. It is interesting to note how in certain countries (e.g. Sweden, Act of 1939)⁶ certain conditions or provisions are imposed in conjunction with probationary supervision. These include the complying with special conditions with respect to the offender’s education, employment, residence and the use of leisure time ; to abstain from the use of intoxicants ; to submit himself to treatment ; to submit to restrictions in the use of earnings or other income ; and to make restitution for loss and damage occasioned by his offence (also

cf. Thorsten Sellin, 1948, 239-51)⁷. In Probation under Buddhist Law we observe how such restraints are exercised and under Mānatta it could be the discipline expected is more strong and concentrated and imposed within a definite period of time.

An examination of the Buddhist Laws shows that when Acts of Punishment are imposed, probation is introduced as a penalty. Here it is comparable to a modern court of law which suspends its final imposition of the sentence in the case but involves a judicial warning and a period of probation providing the offender with an opportunity to readjust himself and making amends while living in the community subject to conditions imposed by the court and under the supervision and guidance of the court (i.e. 'Probation Officer' in the form of his teacher or preceptor in the Order of Monks) (cf. U. N. Probation, 1951 : 292)⁸.

As in the case of a modern court, when it is reported back that the probationer has violated the conditions under which he received his probation (i.e. the failure of the probationer to fulfil the terms of his probation), the original sentence stipulated to be imposed is to take effect. We observe this in the case of the monks on whom an Act of Banishment was passed and who by the imposition of this Act were placed under probation (temporary banishment) during which they could go to another place of stay and mend their ways. But as they did not "conduct themselves properly not subdued did not ask for forgiveness abused and reviled" the Order did not revoke the Act of Banishment (BD, V : 20-1)⁹.

Under modern proceedings Probation could be imposed with the conditional suspension of the sentence or with the conditional suspension of the execution of the sentence. The former is supposed to be U.S. and English in origin while the latter is associated with Belgian and French legal practices. In Buddhist Law Probation actually started with the conditional suspension of the imposition of the sentence. We see this when the accused were charged with an offence and when it is proved how the sentence as stipulated involving them in Probation was carried out. Probation was thus part of the legal requirements and, if violated, the higher penalty as stipulated by the sentence has to follow.

The offender under Probation is not totally removed from his environment. Even in the case of the monks who were temporarily banished from a place, they were able to go together into another monastery and quietly mend their ways. They could live there under the tutelage of teachers and preceptors and gradually re-educate themselves, leading to their eventual rehabilitation. The two essential elements of the suspension of punishment and opportunity to reform themselves under personal supervision are provided by Probation in Buddhist Law (cf. Max Grunhurt, 1948 : 297)¹⁰.

Except for the four serious or major crimes of which if an offender is guilty and he is automatically expelled from the community of monks, all the other crimes, including Grave offenders but with the exception of those minor ones for which the penalty is forfeiture, expiation or confession etc., could be dealt with by Probation. The importance of Probation is understood when one observes the role it plays in Buddhist life, particularly the life of a Buddhist monk. Furthermore, as Buddhist ecclesiastical or lay life contains the structure or components necessary and helpful to work out the system of Probation, it appears that the principle worked successfully in Buddhist life without serious contradictions.

It must be mentioned here that, although the penalty for all other offences are stated in the Buddhist Law, those for Grave offences which according to their seriousness come after the Sanghādisesas are not found stipulated. The omission is understandable because for all offences except the major four, Probation with a specified discipline (Mānatta) could serve as a fitting form of sentencing. Probation was sometimes a penalty itself to be undergone for the offence committed or imposed in lieu of the sentence which is removed on the successful completion of Probation. If the Probation is not successful, as mentioned earlier the original sentence would be re-imposed.

Whenever a novice is ordained, a form of Probation, ritual in character, is carried out. The stipulation that a monk should spend a number of years (five to ten) in a state comparable to Probation (Nissaya) again reminds us of the value attached to this form of discipline in Buddhist life and the maximum period of Probation thought necessary. When a person who had gone over to another sect desired to re-enter the Buddhist Order, a form of Probation up to four months was imposed upon him (BD, IV : 85).¹¹

The nature of Probation in Buddhist Law is seen when the disabilities imposed on a person under Probation are examined. "A monk under probation should conduct himself properly . . . he should not ordain, he should not give guidance to a novice, should not attend him, he should not consent to an agreement to exhort nuns, even if agreed upon he should not exhort nuns, he should not fall into that same offence for which he was granted probation, nor into another that is similar, nor into one that is worse, he should not find fault with the act (or) . . . with those who carry out the act . . ." (BD, V : 45) (cf. Laws of Probation Act 1939, Sweden).¹²

Such losses of privileges and restraints on the monk under Probation fall into different categories. Firstly, there are ritual powers and privileges which the monk loses. Any ritual act such as ordination, giving guidance etc., now become "not his privilege". Then come the restraints on his personal behaviour : he should not commit the same or a parallel offence again or find fault with the decision to place him on Probation or the Court Order which accomplished this. Then his legal powers and privileges, both as an individual

and as a member of the community of monks are enormously curtailed. He cannot suspend a monk's Invitation or Observance or issue commands, set-up authority, ask for leave, reprove, remember, etc. (in a legal process of questioning), or quarrel with others. His personal behaviour is then equally restrained by specific reference as to how he should conduct himself before the public and when together with the community of monks. He cannot walk in front of a monk or sit down before him. This sort of behaviour imposed on him in public acts psychologically as a constraint on him, making him recollect the offence he has committed and fortifying his mind in not giving in to such offences again. "Whatever is the Order's last seat, last sleeping-place, last dwelling-place, that should be given to him and he should consent to it". (BD, V : 45)¹³.

This sort of public restraint or discipline and obvious loss of privileges portrayed in such action is extended further. He who is under probation cannot approach the families of a regular monk either as a novice of such a monk walking in front or behind him. In addition to loss of such other privileges, he has to publicly announce his arrival at all social and ritual occasions — again a form of disciplining himself in public.

Probation effectively even controls a monk's physical movement from one place to another. He, the monk under probation, cannot go to a place where there are no monks. Even where there is danger, he can go only with a regular monk. This indicates how carefully the mechanism for supervision and guidance is provided to the probationer under the Buddhist Law. When there are monks belonging to a different communion in another place, the probationer is prevented from going there because among such monks he will lose the opportunity necessary for his close supervision.

In public the probationer's conduct is so regulated to make him realise the disadvantages or disabilities under which he is placed. When he sees a regular monk, he has to get up from his seat and offer his seat. He cannot sit on the same seat or high seat with a regular monk or pace up and down in the same place or in a high place. He cannot stay together in a residence under one roof with another probationer or fill in as the last person to make up the minimum number of monks necessary to carry out ritual or legal acts.

The web of legal and ritual relationships established between a teacher/pupil or preceptor establishes the necessary mechanism for supervision and guidance in the case of those coming under probation. The teacher/preceptor and pupil are regarded as possessing a web of relationships comparable to that which exist between a father and sons ("The teacher...should arouse in his pupil the attitude of a father" (BD, IV : 79)¹⁴. A teacher (a preceptor) with ten (five) years standing, with due qualifications, could ordain and provide guidance to pupils. The ritual act of providing guidance necessitated a very

close relationship between the teacher and the pupil. The presence of such webs of already established relationships enabled supervision and guidance of probation to function smoothly within an already established mechanism (BD, IV : 59 ff.)¹⁵.

There appears to be a very careful selection process in the exercise of probation. This is evident from the ritual selections that we observe when a person was ordained or admitted to the Higher Ordination (BD, IV : 120)¹⁶. The questions asked from the candidate and the inquiries made suggest the existence of such a careful procedure in the case of imposing probation. The insistence on a 'competent, experienced monk' for instructing a novice and the emphasis laid on the ritual and legal agreement made ("experienced, competent monk should be agreed upon") suggest the nature of supervision in probation and the manner in which the monks are appointed and their exact role (BD, IV : 121)¹⁷. It is quite possible that in the instance when a person is placed under probation, provision was made to aid and support him by providing a special supervisor (e.g. much like a father). We notice how in the Act of Reconciliation a companion monk was appointed to go with the accused in order to counsel and supervise him (BD, V : 28-9)¹⁸.

Probation appears to have been utilised when the Acts of Punishment were enacted. From the description of the history of the majority of these Acts, it is clear that, when once the particular Act was passed, the execution of the Act was withheld (execution of the sentence suspended), allowing the accused an opportunity to reform himself ; for example, when the Act of Censure was passed and certain disabilities were imposed on the accused (BD, V : 8)¹⁹.

The disabilities that a monk against whom an act of suspension is carried out had to suffer are also stated graphically (BD, IV : 31-2)¹⁹. These are almost identical with the already mentioned loss of legal and social or individual powers and privileges suffered by a person placed under probation. It can be presumed that the Acts of Punishment were passed having examined each individual case. A detailed examination of the cases cited in the Tradition show how in the trial an offender's past history, character, intelligence, conduct and nature of his associates and, further, whether he has confessed his guilt etc. were all taken into careful consideration (cf. also Norwegian Penal Code S. 52 (1))²⁰.

It is not clearly stated whether for Acts of Punishment such as Total Boycott, the imposition of Probation was included. But from the nature of the punishment which leads a community to boycott an offender dissociating him, i.e. not speaking to the offender, not exhorting him and not admonishing (him) it could be argued that the offender under those disabilities is in a way

a person on whom a sort of Probation is imposed. The other Act of Punishment known as the Act of Information is carried out by dissociating with the activities of an offender, and disowning him. Therefore, obviously probation does not apply in the case of the Act of Information.

Once the Probation was successfully completed, the original sentence hanging over the accused was removed. This is evident in the Act of Suspension carried out in the case of one monk (BD, V : 33)²¹. When he completed his Probation properly, becoming subdued and having mended his ways, he was rehabilitated. On the contrary, when the Act of Banishment was passed on the monks at Kitagiri, they did not conduct themselves properly. The Act only banished them for Kitagiri and they were free to go to any other monastery away from this temporary place of banishment. But "they did not mend their ways" ; they did not ask for forgiveness; instead they abused and reviled others. They followed a wrong course through fear, stupidity and hatred. The result was that the sentence originally passed had its effect. ("Do not let the Order revoke the Act of Banishment" ; BD, V : 21)²².

The duration of the probationary period depended on the nature of the offence committed and the potentiality of the offender to reform himself. The Order (or Court) attempted to look at the individual, assess his potential and afford him with an opportunity to rehabilitate himself. In the Tradition, the period necessary for living in dependence is set down at ten years, while at the same time making it possible for an industrious person to complete it in five years. In the identical way, if the offender is industrious and he shows signs of quick reform, the period of Probation could correspondingly be reduced. The offender enters into Probation voluntarily and the way in which he conducts and disciplines himself under Probation determines his period of Probation. It could theoretically extend from one to six days (with Mānatta discipline) to five or the maximum ten years.

If a monk confesses immediately a fault coming under the thirteen Sanghādisesas, the probationary period is reduced to nil. He has only to undergo Mānatta, i.e. probation for only six days. If the offence is concealed, the probationary period extends over as many days from the date of the sentence as he has allowed to elapse without confession. Usually the period of probation begins after the six days of Mānatta Probation (S. Dutt. 1924 : 169).²³ If the fault is concealed unwittingly, the sentence is confined only to the Mānatta (six days) Probation.

If it is difficult to determine the precise date of the commission of the offence or the number of offences or their nature, the probationary period "extends over as many days as intervene between the date of the sentence and the date of Ordination of the guilty bhikkhu (monk)" (S. Dutt, 1924 : 169).²⁴

“When another offence is committed during the continuance of the Parivāsa (probationary) period, a fresh period begins to run from the date of the commission of the second offence and it extends over as many days as were covered by the Parivāsa period prescribed for the second offence, whichever period may be the longer” (S. Dutt, 1924 : 169).²⁵ “The penalties for the new offence and for the old one were not accumulative but concurrent. The offender lost the advantages of the probation he had already undergone, he was thrown back to the commencement of his term of probation, and had to begin again” This does not affect the six days of Mānatta for which he is liable for the first offence (BD, V : 69).²⁶

The responsibility for determining the nature of his offence rests to a great measure in the hands of the offender. It is he who has to declare as to when his offence really commenced or in other words when he actually committed it. Other than the moral compulsion, there was nothing else to force him to declare his offence. This emphasis on the offender’s responsibility and his free will to reform himself undoubtedly had a fruitful role in this strategy of using Probation as a means of both preventing and regulating crime.

The rehabilitation of the offender after Probation needed a ritual and legal process. The Order or Court should consist of a stipulated number of monks (judges). The “competent and experienced monk” had to move the motion that the offender had successfully completed the Probation. This was all done in a grand legal and ritual style with all members agreeing as to the motion of rehabilitation. The association of the ritual process with the legal problem obviously connected the legal dimension of the law with the spiritual dimension, blending them effectively and harmoniously.

In Buddhist Law a person was placed under Probation only after careful and meticulous consideration of the case. The execution of the sentence was postponed, substituting an alternative to penal remedies represented in drastic action such as banishment or suspension. The inherent attempt is to treat the individual as an individual rather than as a class or concept. The careful judicial process enabled the selection of individuals, a substantial portion of whom “could be assisted while at liberty to form correct habits and attitudes without a penalty, and to use a great variety of methods for this purpose” (Sutherland, 1947 : 383).²⁷

References

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