

Evolving Mechanisms for Rehabilitation of offenders through Probation as an alternative to Punishment in Judicial system of Pakistan

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Abstract: *Crime and punishment have always been considered as two sides of the same coin. In the primitive legal systems, the real object of inflicting punishment was deterrent and retributive, however, with the evolution of concepts of rights and civil liberties the restorative justice movement started gaining momentum in criminal administration of justice, the need to reconsider the objects of punishment has arisen and various theories were evolved to juxtapose these two extremes in such an optimum manner that ends of administration of justice could best be achieved. This article aims to find out the ways for proper implementation of probation laws to make community service as an alternative to crude punishment which seemed to have ignored the very object of punishment i.e., reformation for the betterment of society.*

Key Words: Corrective Justice, Rehabilitation, Probation and Reformation, Retribution, Alternative to Conventional Sentence.

Introduction

Criminals are not born but made, when an offence is committed it occurs because of diversity of reasons, these factors can be social and economic constraints, wearing a way of moral virtues and other circumstances which act as an impetus to commit deviant act which entail liability. Justification of punishment has always been a debate for critical thinkers and researchers, diverse approaches were evolved and implemented in various legal systems to ascertain the real object of punishment. The yardstick was to create a balance between the nature of offence and the quantum of punishment which is to be inflicted upon to justify a particular punishment as a means to the end or the end itself. It has been laid down by the honorable court in a leading judgment that “the greatest virtue of the law was its flexibility and its adaptability; it must change from time to time to answer the demands of the people.”

Numerous ideals have been evolved based on the idea and presumption that not all offenders are same. From strict enforcement of deterrent approach to preventive and from retributive to reformative with the sole object to serve the ends of law. It is an established fact that variables exist not only in the nature of crimes but also in the motive and intention behind these crimes, therefore, they cannot be treated in same manner. Even persons committing the same crime may be poles apart in terms of personal traits, motivations, and likelihood of committing crimes in future. This variance was aimed to be controlled through application of various techniques in deterrent, retributive, restorative, and corrective justice in administration of Criminal justice.

It becomes evident in contemporary criminal justice system that the rationale to inflict punishment is a multi-facet phenomenon, it envisages within it the reformation, restoration, and prevention aspects of a punishment. Restorative justice movement developed as a modus operandi to tone down the consequences of severe punishment, as the goal of restorative justice is to revive the offender’s mind to take him into mainstream of life through some means and it can be achieved by rehabilitation measures including probation and community service.

In contrast to the retributive approach which provided that every wrong entail liability and offender must be punished so that crime can be avenged, restorative justice is based on a philosophy which states that “that infliction of penalty is only defensible if it effectively promotes the interest of society in general and individuals in particular.”

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It implies that offender ought not to be an adversary to overpower in mind, body but merely a dilemma, a disease which is to be resolved by reformation, prevention, and deterrence. In its functional standpoint, punishments are to be taken to set and achieve higher and nobler goals than merely being vindictive on the victim. It is revealed by several studies that "the relationship of harshness of punishment with its deterrence is still dubious, the effective deterrence is to increase the probability of detention and conviction rather the harshness of punishment". The restorative justice approach believes that crimes are wrong committed against the state yet all the stakeholders i.e., State, victim, offender must deliberate to evolve mechanisms wherein some more appropriate ways to address the crime besides imprisonment be employed to restore the damage done.

The fundamental notion behind the concept of probation is the consciousness by the law and society that the offender in imprisonment is still the member of his family and society and the need is to understand and acknowledge his human needs obligations and rights and help him to become an effective member of the society rather to become cause of concern for it.

Evolution of Restorative Justice to Complement the Traditional Mode of Punishment.

The doctrine of rehabilitation of offenders has emerged as one of the most viable and effective aid in the enforcement of reformatory theory of punishment in the administration of criminal justice. Restorative justice has gained momentum as "a rapidly growing national, and international social movement that aims to bring together all the stakeholders to address the harm caused by crime." It is recognized not only as a theory but an effective alternative to conventional punishment, based on practice-oriented attitude, a best amalgam of idealistic and utilitarian approach. It encompasses in it the shades of all approaches behind the infliction of punishment.

The idea behind making a transition from retributive punishments to reformatory approach is to take all stakeholders on board in the administration of justice and for proper understanding of their mutual rights and obligations. It affords an opportunity to the offender to not only indemnify the loss caused to the victim but also to redeem themselves so that not only a deterrent effect be created but also offenders can be prevented from committing further crimes. According to "John Braithwaite restorative justice is about the idea that because crime hurts, justice should heal."

Albert Eglash, (1977) while describing the object of justice states that there are two different approaches to address justice, one is retributive justice which consider sanction as the sole object to indemnify the loss sustained by the victim, the reformatory justice which aims to involve the healing treatment of offenders which is "based on the restitution of the stakeholders with the help of the input from victims and offenders."

The core idea behind the concept is to restore the aggrieved and the offender as well by affording the later an opportunity to modify his conduct and to become an effective member of society. With the mounting recognition of corrective justice as an effective mechanism to reform the penal system and to deal with crime and criminals with a different perspective to ensure a more rational sentencing system, the need to evolve mechanism to ensure its implementation has also arisen. Probation as a mode of corrective justice is one of such effort to draw an apt balance between crime and punishment. Rehabilitation is based on the fundamental notion of humanistic principle which envisages that if a wrong is committed the wrongdoer for this reason does not cease to be a human, if cannot be prevented it can be cured by adoption of corrective measures as an alternative to conventional method of sentencing, wherein offenders can be transformed in such a manner so that he may not repeat the offence. The law of probation works ideally within a protective model to watch and safeguard the interest of offender and society in general. It offers an apologetic reparation approach by covering in its ambit the core objectives of punishment i.e., reparation, restoration, deterrence, and rehabilitation. The concepts of punishment were to reform an offender so that after serving out sentence he should become a beneficial member of the society, however, the state of affairs in the jails represents an antithesis to this aspiration and it is believed that when a person once entered into a jail which is considered as factories of crime, then instead of coming out as a reformed person, he turns out to be a hardened criminal and labeled as a prisoner for rest of his life. Keeping in view basic principle of punishment, legislature had enacted various laws and provision in laws to give new dimension to the very object of punishment and that is corrective justice. The main object of these enactments is reformation and rehabilitation. The process of rehabilitation comes into play when regular performance of an individual is disrupted due to some episode, that is when a person commits an offence and is put behind the bars and during this imprisonment, he is either completely or temporarily cut off from the society, rehabilitation probation and parole aim to help that person to adjust in the society and to reintegrate into community."

The object of punishment, before the advent of 20 century, was to punish the criminals as a probable consequence of his wrong doings, as a retributive, deterrent, and punitive measure in prevalent justice systems without considering that what impacts it leaves on the mind and life of the offender and society. As the purpose was only to create a deterrent effect and ensure retribution for the offender as well as potential offenders, however, a vital transformation has been made in the judicial systems of the world by acknowledging the growth of rehabilitation justice movement. As has been remarked by Bokail, M.K (1995) that if the aim of criminal justice were to protect the community that aim is best achieved by a constructive community correctional programme. It is further stated by honorable Court that probation and community service orders save the State from the cost of keeping the offender imprisoned and to prevent the congestion in prisons. The rehabilitative processes save the family of the offender from ordeals they must undergo if the earning hand of the family is imprisoned. The offender may continue to support his family financially by being engaged in some employment or paid tasks. Moreover, it shall help the offender to preserve his dignity and self-esteem. It is also noted through various research that the likelihood of repetition of offence is more when the accused of offender is mixed with hardened criminals or habitual offenders. Another very vital issue to which these correctional measures address is the social stigma, which an under trial accused or therefore the correctional measures in the form of probation community service benefits both the offender and society and to help him to adjust within conventional social norms of the society.

Probation as an Alternative to Conventional Sentencing in Criminal Justice system of Pakistan.

With the evolution of reforms in justice systems specifically at the end of 19th century alternatives to incarceration and imprisonment such as reprimand and imposition of fine were being encouraged as a counter measure to tackle with the rigours of retributive approach to punishment. In Pakistan, a shift in understanding the rationale behind infliction of punishments has been observed in recent past by virtue of legal frameworks in the forms of laws on probation and its implementation by the Courts. It is pertinent to mention here that the rehabilitative processes find their place in the legal framework of every welfare state, which aims to rectify offender behavior by providing him means and opportunity to mend his ways, and to ensure compliant behavior. The basic idea behind rehabilitation is to trust the offenders and give them an opportunity to cure themselves from the devastations of their ill deeds and to offer an opportunity to become an effective member of the society and to transform himself. In the words of Ahuja Ram (1979) probation is the deferment of sentence in a criminal case, giving the offender a chance to improve his conduct, subject to conditions imposed by the court and under the supervision and control of probation officer.

Since the corrective and restorative justice approaches are being applied in all prevailing legal systems of the world, Pakistan as a welfare State has also adopted legal Framework for probation and parole system in Pakistan as alternative to conventional sentencing. Following laws have been enacted to enforce the spirit of the restorative justice in Pakistan.

- The Code of Criminal Procedure (Cr.P.C), 1898.
- Good Conduct Prisoners' Probation Release Act, 1926.
- Punjab Youthful Offenders' Ordinance, 1983.
- Sind Children Act, 1955.
- Probation of Offenders Ordinance, 1960
- The West Pakistan Probation of Offenders Rules 1961
- Juvenile Justice System Ordinance, 2000.

The laws stated above are considered as a milestone in the evolution of shift of approaches in criminal administration of justice in Pakistan. All these enactments have one object in common and that is to prevent the first-time offenders, or the category of offenders mentioned in these laws juveniles from becoming hardened and habitual offenders by their association with hardened criminals in prisons. Moreover, to give them an opportunity to reform themselves and to include them in the mainstream of society and to protect them from the stigma of jail life and all the adverse influences they may get affected with under the company of jail inmates. It also serves the interest of the state by preventing overcrowding in jails and to reduce burden from the state exchequer.

In the existing criminal justice system of Pakistan alternative to imprisonment have been found in various stages of crime i.e. before commencement of trial in the form of pre-arrest bail; at trial stage in

the form of post- arrest bail and in the post-trial stage as punishment of fines and by way of probation ,however, probation and parole system are most neglected and least practiced modes of inflicting punishments due to improper implementations mechanisms and enforcement .The reason is deeply rooted in very understanding of the concept of crime and punishment, crime is associated only with punishment only which could be either punitive or retributive so that the wrong and harm could be properly addressed to create a deterrent effect ,however, with the passage of time the retributive model of punishment is dying out due to its absurdness and uselessness on the parameter of cost and benefit analysis and this gave way to the adoption of alternate approaches to deal with the crime and criminal became indispensable.

There seems to be a consensus between the law makers and law enforcing agencies that rehabilitation and restorative justice help effectively to rejuvenate and reinvigorate the offender in the community by introducing him reformative tools to adopt and alter his behavior accordingly so to prevent the negative effects of crime and to benefit the society by preventing repetition of the offence. In Pakistan, the conditions in jails are not at all conducive to the rectification of behavior of accused rather they come out as hardened criminals by being in the company of habitual offenders. Since prisons are filled, this adds up to the state of poor health and living conditions of prisoners, poor prison management and want of proper rehabilitation mechanisms to reform the juveniles and first-time offenders to recommit the offence. As has been laid down by the court that “the present conditions of the jails are such where once a person is sent, he will come out as a hardened criminal, instead of becoming a helping hand to the society he will become a cause of concern to it.

From the perusal of the laws on probation it is evident that the sole reason for releasing offender on probation is rehabilitation of the offender subject to conditions imposed by the Courts. As these laws highlight on the restoration and healing of the offenders so that society may get benefitted from them and they may not repeat the offence without subjecting them to toxic effects of life in jail. The Ordinance was enacted with the object to enforce the spirit of reformative justice in legal system of Pakistan. The honorable High Court in PLD 2007 Karachi 103 laid down that “the system of probation serves the purpose of community rehabilitation and reintegration of offenders.” The enactment extensively describes the procedure for the appointment of probation officers and the procedures to be followed by them. It is also categorically mentioned that probation Order must be subject to condition precedents, based on which probation be granted as well as conditions subsequent to be followed by the probationer in compliance with the order of the Court.

In Pakistan “Probation of Offenders Ordinance, 1960”, empowers the Court to give conditional discharge or to make order of probation with or without sureties to an offender, who is guilty of having committed the offence of the description mentioned in Ss.4 & 5. Section 5 of the Ordinance empowers the courts to pass orders of probation under the supervision of probation officer. The paramount consideration before the court is to appraise the age, character, intention of the offender as well as the nature of offence being committed and the attendant circumstances which led to the commission of the offence. It is stated by the honorable Court that “Section 11 of the Ordinance gives effect to the rehabilitative concerns by removing disqualification attached to a conviction of an offender who had been released on probation.”

In order to implement the mandate of law, “The West Pakistan Probation of offenders rules 1961”. (herein after to be referred as rules) were accordingly framed to give effect to the provisions of the Ordinance.

Rule 10 of above stated rules provides the duties of the Probation Officer as under.

- The probation officer is expected to explain to every probationer the conditions of his probation and communicate to him all the repercussions in case of his failure to comply with such conditions.
- It is stated that during the first two months of probation the offender is expected to meet the probationer officer after every fifteen days, and the officer shall inquire about his life, whereabouts, his professional commitments, and other engagements.
- It is the duty of the probation officer to inform the sureties of the probationer in case the later is found to have made breach of any condition or has misconducted himself.
- The probation officer is bound to maintain registers and submit reports periodically to the authority concerned as provided in rules.
- It is a statutory duty of the probation officer to follow the instruction of the court mentioned in the order of probation.

- Rule 19 of the Rules prescribes form of Bond to be undertaken by the probationer.(Form C) which envisages undertakings to be made by the probationer that he shall submit himself to the supervision of probation officer and shall inform such officer about his whereabouts, residence, source of income and shall carry out all such directions as may be given by the probation officer from time to time, and shall not leave the station without the written permission of the officer incharge or other authority appointed in this behalf. It is also mentioned in the bond that in case the probationer makes default of any condition he shall be liable to fine and sentence as ordered by the court.
- Rule 20 of the Rules provides for the reference the (formD),a probation order ,which states that when the court finds it expedient to deal an offender in accordance with the provisions of section 5 of the Ordinance ,and release him with or without sureties ,the order contains conditions such as that the probationer shall commit no offence, and keep good conduct and behavior during the period of bond and appear before Court when called upon, hence placed under the supervision and control of probation officer with the conditions that the probationer shall abide by the all the conditions contained in this order, is thereby released on probation. this probation order can be made with or without sureties.
- It is stated in the law while making an order of probation that the court shall explain to the offender that if he will commit any offence or makes the breach of the conditions of the discharge he shall be arrested again, and this order of probation shall be called off.

However, it is also true that the spirit of the directive given in the law and explained by the rules have not been adhered to in true letter and spirit. The use of probation as a measure has not been made as adequately and properly by the law enforcing agencies as was aspired by the legislature.

Evolving Paradigm for Effective Application and Enforcement of Probation

The efficacy of a law can always be judged on the parameter of its proper implementation and that can only be possible when there are effective enforcement mechanisms. The proper implementation of probation and parole system in Pakistan faces a lot of challenges. The most important consideration is to appraise the risk involved to the society in releasing the offender and whether this risk is worth taking in the context of offender's personality and society at large. Selection of suitable cases for being placed on probation and parole and subsequent follow up through competent supervision of the probationers and parolees are the two basic elements of any effective program of probation. The report of the probation officer is of primary importance as an aid to the courts and this law enforcing agencies to set up rules and procedures regarding probation.

The most important vitiating factor in the implementation of the corrective justice system of Pakistan is the dearth of awareness of rehabilitation justice approach, lack of coordination between law enforcing agencies i.e judiciary, police , Reclamation and probation departments ,absence of standardized models to be followed in the implementation of probation parole and community service, non-availability of optimum resources, dearth of infrastructure, trained and skilled staff and lack of political will to take up this initiative in accordance with the spirit of the law of probation. As stated by [Mazhar Hussain Bhutta \[2019\]](#) that due to want of appropriate training, inspiration, incentive, skills and innovative techniques, heavy workload on staff, under staffing, lack of proper infrastructure, dearth of evaluation reports all these factors leave the probation system an apartheid and handicapped system." Despite of the fact that we have laws on the subjects of probation, Reclamation and probation departments have been established in all four provinces of Pakistan because of lack of will, dearth of proper policies, conceptual clarity, correctional skills and training it is not bearing fruits.

Unfortunately, the Reclamation and Probation departments in Pakistan lack systematic training program for their staffs and effective monitoring system to evaluate their performances and to measure its efficacy. Capacity building of the staff is indispensable if effective implementation of the laws is to be ensured. However, the structure lacks optimum supervision and control which is the backbone of corrective justice system. Without proper supervisory control this system cannot work effectively. As the laws casts an obligation upon the courts to make orders of probation, setting out conditions, to be supervised and controlled by the probation officer. It is very important that proper records' must be maintained of the probationers and efficient surveillance is ensured by the authority so that this whole system can be made transparent and workable. There reports so prepared must be sent to the Court from time to time so that the court may adjudge the performance and effect of the probation. The concerned probation officers must be assigned with this task to maintain proper registers and send report to the Court concerned, and for this very purpose paradigms must be evolved and infrastructure

to be provided, resources must be allocated to the concerned departments and proper training through workshops must be ensured. Before an offender is released on probation it is pertinent to see whether the probation officer is equipped with required skill techniques and resources to take up the supervision and control effectively or not. Probation officers must be properly trained and equipped with requisite executive, administrative and supervisory skills as well as guidance and counseling techniques.

The provincial governments must encourage and facilitate their Probation and Reclamation departments to focus on creating awareness and provide infrastructure and resources to make probation as a most efficient and effective alternative to detention and imprisonment. There must be compulsory follow ups with the concerned provincial Governments and with the concerned departments by the Courts. Efforts must be made to create an effective liaison between judiciary, police and probation departments. It is an unequivocal reality that supporting and strengthening the corrective justice system (probation /parole/ community service) shall help reduce the prison population and shall directly enhance the social viability of the offenders. According to an official survey by Arshad Mehmood (2005) "there were 10,362 probationers in Pakistan, while today there are approximately 40 thousand probationers mostly in Punjab and KPK".

An important aid in probation decisions can be made if some data regarding the response of similarly situated offenders to probation and parole program in the past is available. The need is to understand that corrective justice aims to restore both the dignity and rights of the offender but also offers beneficial interest to the society. as laid down in a landmark case by the honorable court (PLD 2014 Balochistan 100) that "law on probation and rehabilitation intended to be constructive and benefits both the society and the offender, it not only saves the state expenses by keeping the offenders in jail but also saves offender's family unit is not to be disrupted, it also develops a sense of social responsibility in the offender."

District Criminal Justice Coordination Committee should evolve paradigms to facilitate the release of convicts on probation and to take upon itself the responsibility to run the probation system effectively. The probation officers must be given proper training to make probation system a success. Government must also play its role in allocating reasonable budget for these departments to have proper facilities and manpower. Non-government organizations must be taken on board to help in the rehabilitation processes for the overall wellbeing of the probationers. Social welfare departments should come forward and cultivate their input in this whole system of corrective justice. Judiciary being the custodian of the rights of the people must play most significant role in adjudging the fate of offenders, it is their duty to see how these offenders could be made viable members of the society by reshaping their personality and mind set, to afford them an opportunity to commit to a life free from stigma yet full of responsibility and conviction.

Conclusion

The concept of probation is based on a rationale that punishment positively does not rectify offenders nor guard the community. Whereas probation provides a valuable progressive approach for attaining the probable aspiration of justice which is reformation of the criminal and restoration of the victim. As has been laid down by honorable court in (2007 PCr.LJ306 Karachi) that "the option between reformation and punishment was the onerous one and it requires a judicious application of mind by the person dealing with the offender." It implies that the reformation is the only explanation of reprimand that obligates the state to be concerned about wrong doer need.

Correctional services as stated by "Noor Alam Khan (2016) are important in the administration of Criminal justice as method of mainstreaming criminals as an integral part of the structure of punishment system in contemporary legal world." The objective of probation is the rehabilitation of the offender and protection of society from his actions at the same time. Probation laws are meant to avoid contamination of relatively soft offenders and first offenders by hardened ones in prisons, however, it does not by any means signify the clearance from the guilt and the legal consequences. This sweeping movement from absolute deterrence to restorative justice has its roots in the essence of rehabilitation. This approach is backed by the urge to ensure the very spirit of administration of justice, to promote the concept of human dignity. It implies that through rehabilitation reformative and preventive aims of punishment can best be achieved without any additional burden on state's exchequer by. By engaging them in employments, they can contribute to the economic mainstream of the country. It helps to prevent overcrowding of prison and prevent escalation of detention costs. It is aptly remarked by the court in (PLD 2007 KAR123) that with corrective justice of parole and probation the "the rehabilitative purpose of sentencing would be promoted permitting the offender to fulfill not only his basic human needs and social

duties but also save him from the menace of stigmatization which he has to bear throughout his life by being in prison.” In order to ensure the proper implementation of the probation rules it is pertinent to evolve a mechanism which can serve the purpose of rehabilitation and to guard the offender against the conditions of probation and in case of breach the matter must be brought in the notice of the Court to order accordingly. Accordingly, the duty of the probation officer should be to see how an effective program for rehabilitation can be ordained and implemented and the response of the offender must be supervised controlled and assessed. The need is to understand that the rationale and moral justification of inflicting punishment can be interpreted in most generic and finest manner to ensure the end of justice to be achieved. Since punishment has not only one object it has multiple aspirations attached with it. The quest for justice will remain unfulfilled if we overlook the restorative aspect of punishment.

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