

A research paper sent to Hon'ble Supreme Court of Pakistan with a request to place for National Judicial Policy Making Committee (NJPMC).

# **Concept of Community Service As An Alternative Sentence Under Probation of Offenders Ordinance, 1960**

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## **Concept of Community Service As An Alternative Sentence Under Probation of Offenders Ordinance, 1960**

1. *The Probation of Offenders Ordinance No. XLV (hereinafter to be referred the Ordinance) was promulgated on 01.11.1960. Before that this form of dealing with offences and offenders was found in the principles underlying the provisions contained in section 562, Cr. PC which was repealed by section 16 of the Ordinance.*

2. *The Ordinance was a milestone in the progress of modern liberal trend of reform in the field of penology. A study of Ordinance shows the relevant features as under: -*

- a. *Concept of punishment is reformation.*
- b. *Instead of becoming a helping hand to society a convict may not be cause of unrest.*
- c. *To make a convict beneficial instead of harmful for society.*
- d. *Offender may not repeat offence.*
- e. *Application may be keeping in view ultimate good of providing justice to victim, society and offender within the framework of law.*
- f. *To Release offenders on probation or admonition and for matters connected therewith.*
- g. *To emphasis from deterrence to reformation in accordance with modern outlook on punishment.*
- h. *To reform and rehabilitate the offenders.*
- i. *To prevent turning of offenders into criminals by association with hardened criminals inside the walls of prisons.*
- j. *To attempt possible reformation of offenders instead of inflicting normal punishments for crimes.*
- k. *To make the offenders as useful and self-reliant members of society without subjecting them to deleterious effects of jail life.*
- l. *To give a chance to offenders for reformation without even subjecting them to probation system.*

3. *The reformation and rehabilitation of offender is incomplete unless he/her can live a life free from stigma. The stigmatization is bound to occur to offender once a Court convicts him. On conviction, chances of survival through earning are jeopardized largely. Section 11 of the Ordinance gives effect to this rehabilitative concern by removing disqualification attached to the conviction of an offender*

who has been released under section 4 or section 5 of the Ordinance.

4. *Honestly speaking while practicing as an advocate or holding the Court as a Judge, application of provisions of the Ordinance was hardly seen by me for the reasons that either concept was not clear or there were some hidden fears in minds. Effective training to understand the law was also lacking. What happened that jails became overcrowded day by day resulting that once a person was sent there he came out as a hardened criminal and while mixing with large number of criminals he had developed bad habits.*

5. *Sincere efforts were started to be made for implementing the provisions of the Ordinance in 2009 which was a year for focus on justice at the grass-root level.*

6. *Honourable Mr. Justice Iftikhar Muhammad Chaudhary the Chief Justice of Pakistan/Chairman, National Judicial (Policy Making) Committee (NJPMC) in his introductory speeches and remarks during 4 days meeting (18/19 April & 16/17 May 2009) made important observations, that: -*

- 1) *I do not think that the difficulties are insurmountable. We are a tenacious nation, have demonstrated, more than once, our strength and ability to face challenges.*
- 2) *Together we could face challenges and convert them into opportunities. I have full faith in the ability of the people to rise to the occasion and chalk out a future course of action, based on democratic values and constitutional principles.*
- 3) *The people of Pakistan have reposed great confidence in the ability of the judiciary to redress their grievances and grant them relief.*
- 4) *They have very high expectations of the courts to settle their disputes, restore their rights/entitlements and maintain peace in society by sending the guilty behind bars. We must strive to meet their expectations.*
- 5) *We have to operate by remaining within the given legal/procedural framework. The laws are indeed time-tested*
- 6) *We could achieve the results by establishing a society based on the supremacy of Constitution and rule of law. Our aim is to provide Justice for All.*

- 7) *In the Policy, we have set high goals for ourselves. The goals are to initially reduce, and ultimately eliminate, backlog at the level of superior as well as subordinate courts, and further, to fix time frame for disposal of civil and criminal cases. The criminal cases will get priority on account of the sub-human conditions in which under-trial prisoners are kept in jails.*
- 8) *Let us strive to achieve the noble goals, set in Policy. Let us infuse confidence in the minds of our people that the system of administration of justice is capable of meeting the challenges of time and emerging realities.*

7. In NJPMC besides focusing on other areas focal point was also on Probation and Parole laws so following directions were issued to all stakeholders of the Country: -

- 1) *The Courts/Government should make use of the Probation of Offender Ordinance 1960 as well as the Good Conduct Prisoners Probation Release Act 1926 to extend benefits of the said laws by releasing the deserving convicts on parole/probation in accordance with law.*
- 2) *The Probation and Parole Officers should be activated and be asked to visit jails frequently for conducting inquiry and submission of reports to facilitate the courts and provincial governments to consider the cases of deserving convicts.*
- 3) *The Provincial Home Departments should ensure the presence of Probation and Parole Officers in jails during the visits of the Sessions Judges and Judges of the High Court.*
- 4) *In proper cases the Sessions Judges should exercise powers under Probation of Offender Ordinance 1960 or make recommendations to concerned government to extend favour to the convicts/UTP under Good Conduct Prisoners Probation Release Act 1926, as the case may be.*

8. *It was subsequent thereto when Members of District Judiciary started to apply the provisions of Ordinance in appropriate cases. Results were encouraging but to the extent of decreasing the numbers of inhabitants of jail. Orders were passed for release on probation on submission of surety bonds for the satisfaction of Court*

or Probation Officers for good behaviour for a particular period as provided under the Ordinance.

9. I cannot stop myself to say that true spirit of provisions of Ordinance was not adhered to. There may be some cases in which Probation Officers had reported about violations of conditions of bond for good behaviour or discharge of offender before period of bond expired. There may be few Sessions Judges or Judges from District Judiciary who were and are in habit to call for registers of Probation Officers for examination and to monitor their performances. Reality is that convicts appear before Probation Officers periodically, get mark their attendances and are asked to appear on next date. During intervening period of two dates what a convict had been doing? What his behaviour remained? And how he acted in society etc? For that there remain only presumptions nothing more nothing less. My opinion is supported from a hard fact that at least till 2011 in province of Sindh there were only two or three Probation Officers so what an effective monitoring could be expected from them.

10. The origin of probation can be traced to English criminal law of the middle ages. Harsh punishments were imposed on adults and children alike for offenses that were not always of a serious nature. During the time of King Henry VIII, for instance, no less than 200 crimes were punishable by death, many of which were minor offenses. This harshness eventually led to discontent in certain progressive segments of English society that were concerned with the evolution of the justice system. Slowly but resolutely, in an effort to mitigate these inhumane punishments, a variety of measures were devised and adopted. Eventually, Courts began the practice of "binding over for good behavior," a form of temporary release during which offenders could take measures to secure pardons or lesser sentences.

11. In England, sentencing of youthful offenders to one day terms on the condition that they be returned to a parent or guardian who would closely supervise them was witnessed. If offenders demonstrated a promise for rehabilitation, they were placed in the hands of generous guardians who willingly took charge of them.

12. John Augustus, the "Father of Probation," is recognized as the first true probation officer. Augustus was born in Woburn, Massachusetts in 1785. By 1829, he was a permanent resident of Boston and the owner of a successful boot making business. It was undoubtedly his membership in the Washington Total Abstinence

Society that led him to the Boston courts. Washingtonians abstained from alcohol themselves and were convinced that abusers of alcohol could be rehabilitated through understanding, kindness, and sustained moral suasion, rather than through conviction and jail sentences

**13.** In 1841, John Augustus attended police court to bail out a "common drunkard," the first probationer. The offender was ordered to appear in court three weeks later for sentencing. He returned to court a sober man, accompanied by Augustus. To the astonishment of all in attendance, his appearance and demeanour had dramatically changed. Augustus thus began an 18 year career as a volunteer probation officer. Not all of the offenders helped by Augustus were alcohol abusers, nor were all prospective probationers taken under his wing. Close attention was paid to evaluating whether or not a candidate would likely prove to be a successful subject for probation. The offender's character, age, and the people, places and things apt to influence him or her were all considered.

**14.** Augustus, who kept detailed notes on his activities, was also the first to apply the term "probation" to his method of treating offenders. By 1858, John Augustus had provided bail for 1,946 men and women. Reportedly, only 10 of this number forfeited their bond, a remarkable accomplishment when measured against any standard. The first probation statute, enacted in Massachusetts shortly after his death in 1859, was widely attributed to his efforts.

**15.** Community service or social service is a mode of punishment provided by law which the offender can escape imprisonment or fine. Community service acts as an alternative to criminal punishment. Generally, community service can be handed down by a Judge or Magistrate to the first time offender or teenage offender etc. Court may require minor offenders to perform work for city or county agencies often on weekends, as an alternative to confinement in jail. The offender is required to perform unpaid work or other activity in the community under the supervision of a Probation Officer. Meaning to say, community service is designed to ensure that the guilty party is punished in some way other than simply paying a fine which can be nothing in the way of a deterrent. Many individuals convicted of a crime and have to pay a fine simply done the same offence again and this leads only to their continual committing of crime. The community service is imposed for a specific period which measured by hours of service. The hours imposed is vary, depending on the nature of the offence.

**16.** *Community service is a healthy alternative mode of punishment and has lots of advantages. It is seen to benefit a country and the government in so many ways. Firstly, community service provide for less expensive punishment compared to imprisonment. It takes a lot of money to send a person in jail. The court may allow the convicts to choose their community service, which then must be documented by "credible agencies", such as non-profit organizations, or may mandate a specific service. In many of the countries kinds of community services are: -*

- a. Cleaning up roadside or parks.*
- b. Attending educational programs and presenting speeches and seminars concerning the negative effect of crime.*
- c. To appear before school groups to explain why drunk driving is a crime.*
- d. Light manufacturing.*
- e. Repair work.*
- f. Office work on labour camps or farms or on land conservation projects.*
- g. Cleaning up graffiti.*
- h. Working with a charity.*
- i. Teaching a law school course.*
- j. Tutoring children.*
- k. Building homes in low income areas.*
- l. Assisting the elders.*
- m. Socializing animals at animal shelters.*
- n. Contributing to the operations of volunteer fire departments and emergency services.*
- o. Helping with civic beautification.*
- p. Raking leaves.*
- q. Mowing the grass.*
- r. Washing the windows.*
- s. Cleaning the house.*
- t. Putting up and taking down Christmas decorations.*
- u. Theatre and work as backstage running the lights and sound.*
- v. Working at a breast cancer awareness organization.*
- w. Working with a group that promote water conservation.*

**17.** *Whether the Ordinance permits a Court to release on probation on the condition of community service? My humble answer*

is “YES”. Sections 4 and 5 of the Ordinance are relevant to be reproduced and same is as under: -

**4. Conditional discharges, etc** (1) Where a Court by which a person, not proved to have been previously convicted, is convicted of an offence punishable with imprisonment for not more than two years is of opinion, having regard to:

(a) the age, character, antecedents or physical or mental condition of the offender, and

(b) the nature of the offence or any extenuating circumstances attending the commission of the offence, that it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may, after recording its reasons in writing, make an order discharging him after its admonition, or, if the court thinks fit, it may likewise make an order discharging him subject to the condition that he enters into a bond, with or without sureties, for committing no offence and being of good behaviour during such period not exceeding one year from the date of the order as may be specified therein.

(2) An order discharging a person subject to such condition as aforesaid is hereafter in this Ordinance referred to as “an order for conditional discharge”, and the period specified in any such order as “the period of conditional discharge.

(3) Before making an order for conditional discharge, the court shall explain to the offender in ordinary language that if he commits any offence or does not remain of good behaviour during the period of conditional discharge he will be liable to be sentenced for the original offence.

(4) Where a person conditionally discharged under this section is sentenced for the offence in respect of which the order for conditional discharge was made, that order shall cease to have effect.

**5. Power of court to make a probation order in certain cases** (1) Where a Court by which

(a) any male person is convicted of an offence not being an offence under Chapter VI or Chapter VII of the Penal Code, or under sections 216-A, 328, 382, 386, 387, 388, 389, 392, 393, 397, 398, 399, 401, 402, 455, or 458 of that Code, or an offence punishable with death or imprisonment for life or



*(b) any female person is convicted of any offence other than an offence punishable with death, is of opinion that, having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so, the court may, for reasons to be recorded in writing, instead of sentencing the person at once, make a probation order, that is to say, an order requiring him or her to be under the supervision of a probation officer for such period, not being less than one year or more than three years, as may be specified in the order:*

*Provided that the court shall not pass a probation order unless the offender enters into a bond, with or without sureties, to commit no offence and to keep the peace and be of good behaviour during the period of the bond and to appear and receive sentence if called upon to do so during that period:*

*Provided further that the court shall not pass a probation order under this section unless it is satisfied that the offender or one of his sureties, if any, has a fixed place of abode or a regular occupation within the local limits of its jurisdiction and is likely to continue in such place of abode or such occupation, during the period of the bond.*

*(2) While making a probation order, the court may also direct that the bond shall contain such conditions as in the opinion of the court may be necessary for securing supervision of the offender by the probation officer and also such additional conditions with respect to residence, environment, abstention from intoxicants and any other matter which the court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or a commission of other offences by the offender and for rehabilitating him as an honest, industrious and law abiding citizen.*

*(3) When an offender is sentenced for the offence in respect of which a probation order was made, that probation order shall cease to have effect.*

**18.** *Section 4 of the Ordinance deals with conditional discharge in certain cases if probation order is not appropriate. Under this provision Court can make such order subject to the condition only that offender enters into a bond for committing no offence and being of good behaviour during specified period and no*

other power is available to court to impose any additional condition on offender.

19. However language of section 5 which deals with order of release on probation instead of sentencing is quite different. Court can make an order requiring convict to be under the supervision of a probation officer for particular period but this order cannot be passed unless an offender enters into a bond to commit no offence and to keep the peace and be of good behaviour during the period of the bond. So there are minimum three conditions which have to be imposed on offender and all those have to exist simultaneously and those are (1) to commit no offence (2) to keep peace and (3) to show good behaviour.

20. Words used in sub section (2) of section 5 are of much importance on the basis of which I have an opinion that court can pass an order of community service. At the cost of repetition it says that “while making a probation order, the court may also direct that the bond shall contain such conditions as in the opinion of the court may be necessary for securing supervision of the offender by the probation officer and also such additional conditions with respect to residence, environment, abstention from intoxicants and any other matter which the court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or a commission of other offences by the offender and for rehabilitating him as an honest, industrious and law abiding citizen”.

21. Under the above provision there are two kinds of powers to court. First is about conditions only for securing supervision of the offender by Probation Officer and for that court cannot go beyond that. But the second position is very wider. It says about additional conditions and those conditions are with respect to: -

- 1) Residence.
- 2) Environment.
- 3) Abstention from intoxicants.
- 4) Abstention from and any other matter which court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or a commission of other offences by the offender.
- 5) For rehabilitating him as an honest, industrious and law abiding citizen.

**22.** *The most important consideration is to ensure the offender to be an honest, industrious and law abiding citizen. Therefore the best mode is to engage a convict in community service under the supervision of relevant Heads of concerned departments and ultimate supervision of Probation Officer.*

**23.** *In Pakistan there are many areas where a convict can be directed for community service like: -*

- a) Hospitals.*
- b) Educational Institutions.*
- c) Educational Institutions for Special Children.*
- d) Religious Educational Institutions.*
- e) Special Disease Centres.*
- f) SOS.*
- g) Old Houses.*
- h) I.T Departments.*
- i) NGOs providing social services.*
- j) Edhi Welfare Trust and many others.*
- k) Pakistan Green Task Force.*
- l) Jail Reforms Organizations.*

**24.** *In my humble view this is the need of the hour that we must enter in this area of true reforms for convicts so as to make the wisdom and intention of Ordinance meaningful and result oriented. We must realize that we have not only to decrease the populations of jails but we have also to change the minds of criminals who may be supporting element for them, their families, community, society, nation and the Country.*

**25.** *At the end I will like to submit following proposals provided that my view on law is endorsed: -*

- 1)** *All the High Courts may select a model district for this assignment.*
- 2)** *Before Judicial Officers are entered in this legal exercise a joint training program for one or two days may be held at Federal Judicial Academy Islamabad so as to apply one and the same policy with reference to procedure etc.*
- 3)** *If possible in that training session Probation Officers, DCOs of relevant districts, Heads of Departments /Institutions/Organizations/NGOs as mentioned in paragraph no. 23 may also be invited so as to remove possible barriers in the way of implantation of new strategy.*

- 4) District and Sessions Judges may be directed: -
- i. To personally supervise the performances of Judicial Officers under their respective control.
  - ii. To hold meeting on fortnight basis with all concerned for examination of working of each individual.
  - iii. To issue necessary guidelines time to time to all the officers.
  - iv. To remain in touch with D&SJs of other districts for sharing of results of strategy time to time.
  - v. To send monthly progress reports to Secretary NJPMC and Registrars of High Courts.

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