EFFECTING CHANGE IN KHYBER-PAKHTUNKHWA'S PROBATION REGIME

January 2015

For review by the Home Secretary, Government of Khyber-Pakhtunkhwa, Pakistan

“This report has been prepared by the Research Society of International Law (RSIL) through Aitebaar for the Reclamation and Probation Department, Home & Tribal Affairs Department of Khyber-Pakhtunkhwa.”

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INTRODUCTION

International perspectives on domestic criminal justice regimes have experienced a shift away from historically retributive models in the past two decades to more contemporary, rehabilitative approaches. At the international level these changes have been reflected by international legal instruments such as the 1990 United Nations Standard Minimum Rules for Non-custodial Measures – also referred to as the 'Tokyo Rules'; the Kadoma Declaration on Community Service and Recommendations of the Seminar Entitled "Criminal Justice: the Challenge of Prison Overcrowding" of 1997; the 2010 United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders – also referred to as the 'Bangkok Rules'; and several texts promulgated by the Council of Europe including Recommendations 1257 and 2018 as well as Resolution 1938. These instruments, as well as several others, inform the international legal discourse on criminal justice and promote alternative, non-custodial sanctions over traditional incarcerative punishments.

This shift is of particular significance in the domestic criminal justice context of Pakistan, where prison overcrowding is an acute issue. Recent estimates place prison populations at 30,000 over maximum capacities, with almost a third of the country's prisons holding over twice the number of prisoners authorized.[1] Custodial sentences are also far less likely to effectively rehabilitate and reintegrate offenders into mainstream society, with offenders far more likely to reoffend if they are incarcerated in overcrowded prisons with hardened offenders; cut off from all social networks outside the prison; and stigmatized as criminals even after their release. This

[1] The International Crisis Group, (2011). *Reforming Pakistan's Prison System*. Asia Program Report. [online] The International Crisis Group, pp. i, 12. Available from http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/current_situation_of_prison_overcrowding_paper.pdf

perpetuates their cyclical incarceration, effectively condemning them to perpetual exile from mainstream society.

In the broader context of Pakistan the province of Khyber-Pakhtunkhwa [KP] represents an area wherein exists considerable potential for criminal justice reform. According to data provided by the Office of the Inspector General of Prisons, GoKP, at the beginning of September 2014 the total prison population stood at 8870.[2] Of this number only 2878 were actually convicted and in prison to serve out their sentence. The remaining were primarily under-trial prisoners. Data from Directorate of Reclamation and Probation, GoKP [RPD] reveals that for the same time period, 1892 people were on probation. That represents an approximate 40% reduction in the prison population of convicts. Furthermore, members of the RPD are quick to boast the 0% reoffending rate of probationers released from their charge. While independent verification of this statement is not available at this time, it is clear that a rehabilitative model may go a long way in improving the Province's response to crime. In order to transition the provincial criminal justice system from its historical reliance on the deterrence and retributive theories of justice towards a more rehabilitative model the probationary regime needs to undergo considerable reform.

The RPD in KP, itself remains a smaller directorate, tasked with the rehabilitation of probationers that often number more than 2000.[3] At current strength the RPD has 21 sanctioned posts of male Probation Officers and seven sanctioned posts of female Probationer Officers. Of these four posts of male Probationer Officers and one post of a female Probation Officer lie

[2] Office of the Inspect General Prisons, KP. *Monthly Population statement of Prisoners Confined in the Jails of Khyber Pakhtunkhwa as Stood on 01-10-2014.*

[3] Historically, the number of probationers has crossed 2000; however, as of September 2014 there were 1892 individuals on probation in KP.

vacant.[4] Furthermore, for administration and supervision purposes only the single posts of Superintendent, Deputy Director, and Director exist. Due to inadequate manpower, several districts often share the same Probation Officer. Only a third of the probation officers are female, further compounding the difficulties faced in adequately addressing the particular needs of female offenders in an underdeveloped country. Furthermore, the legal instruments informing the probationary regime in KP are decades-old, with the Probation of Offenders Ordinance 1960 deeply rooted in pre-independence legislation.[5] Given the fact that this legal framework underpins the probationary regime in the province, and recognizing the reformatory and rehabilitative value effective probation regimes add to the overall criminal justice system of a jurisdiction, any reform of the broader criminal justice system in KP must prioritize probationary reform.

Probation is, by its very nature, an incredibly flexible tool to effect positive criminal justice outcomes. In addition to the mechanistic benefits of lowered prison populations – and their attendant financial burdens – probation also allows the jurisdiction's penal regime to distinguish between different offenders and provide sentences to each based on their particular circumstances and tailored to ensure the best possible outcome for the justice system at large as well as the offender himself. Custodial sentences isolate the offender from mainstream society, sequestering him to a confined space – often in the company of hardened criminals. The distance this creates between the offender and the broader community 'other-izes' him, placing a stigma upon him retained even after his release and making it more difficult to re-enter the polity. This

[4] Internal RPD Document titled, 'Sanctioned, working and vacant posts/strength of the parole/probation officers in the Directorate of Reclamation & Probation Khyber Pakhtunkhwa' on file with RSIL

[5] The Probation of Offenders Ordinance 1960 was strongly influenced by the All India Probation Bill of 1931, which was never enacted.

makes an offender more susceptible to subsequent criminal behavior by divorcing him from the shared, societal normative regime. Probation, on the other hand, allows offenders to serve out their sentences embedded within the broader community and – in the case of community service and restorative justice sentences – even allows them an opportunity to redress the wrongs they've committed.

As discussed in the UNICRI's publication *Promoting Probation Internationally*,[6] probation as a sentencing option proves to be far more flexible in its application relative to other sentences – such as fines or imprisonment – which are currently in use in the province. A criminal sentence "must reflect contemporary political aims and cultural norms if it is successfully to solve local problems of criminal justice and diversify the range of sentencing options available to the courts…"[7] and in this regard probationary sentences enable the criminal justice system to pass sentences which adequately reflect the seriousness the community attaches to any particular offence.

This flexibility of probation as a criminal sentence also reduces the inherent resistance changes to the criminal justice system provokes in rural and isolated communities. The contemporary criminal justice framework extant in KP is derived largely from colonial-era legal instruments, drafted in the language of the colonial regime – that is, English. Thus, to the indigenous population this universally imposed and enacted legal framework is still considered to be 'foreign' and 'alien'. This issue is further compounded by low prevalent literacy rates and access to legal aid or education, isolating the polity from the provincial criminal justice system.

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[6] United Nations Interregional Crime and Justice Research Institute, (1997). *Promoting Probation Internationally*. [online] Commonwealth Secretariat. Available at: http://www.unicri.it/services/library_documentation/publications/unicri_series/Probation_international.pdf.
[7] *Ibid* at p.40

The corpus of criminal law applicable throughout Pakistan is predominantly predicated upon colonial-era legislation. Thus, the concept of probation as expressed in the Pakistani – as well as the KP – criminal justice system rests upon the dominant normative framework informing criminal justice in 19th century UK. Given this alien conception of probation, as framed in the KP criminal justice context, it is thus understandable why generations of probation officers have struggled in the pursuance of their duties and despite the more-recent promulgation of the Probation of Offenders Ordinance of 1960, the overall systemic perception of probation in the Pakistani criminal justice context is anachronistic. In order to effect meaningful reform in the probationary regime in KP policymakers must thus base their recommendations for reform not only on contemporary conceptions of criminal justice and non-custodial sentencing but also on indigenous normative frameworks. At present, however, the manner in which criminal justice outcomes are achieved leaves a great deal to be desired *vis-à-vis* community expectations.

Accordingly a reformed probation system is deemed necessary in our assessment, which would provide criminal justice outcomes far more amenable to the polity; by allowing offenders to serve out their sentences within their communities of origin, enabling the community to police these offenders, and allowing opportunities for restorative justice, the sentencing diversity probation provides holds far more potential for long-term rehabilitation and reform than 'traditional' forms of criminal sentences such as fines or imprisonment.[8]

AIM OF RESEARCH:

To this end RSIL, in collaboration with the *Aitebaar* Rule of Law Programme, is engaged in an examination of the prevailing probationary regime and how it intersects with the broader

[8] *Ibid* at p.108

criminal justice framework in the province of KP. The aim of this investigation is to identify areas where, by means of legislative and regulatory reform, the probation service of KP can be remodelled to not only comply with international best practices regarding non-custodial sentencing, but also effect positive rehabilitative and reintegrative outcomes for the probationers themselves. Identifying these areas for reform, RSIL is also developing viable, indigenous solutions to these issues which are both feasible and will potentially address the current issues plaguing non-incarcerative sentencing in the province.

These solutions are extrapolated from a cross-jurisdictional analysis of successful probation regimes around the world and international probationary best practices, and will be framed in a manner consistent with both Pakistan's international legal obligations and the domestic legal and constitutional contexts. As a common-law jurisdiction the Pakistani legal system places a tremendous amount of significance on judicial precedent and so this initiative is intended to address pre-existing jurisprudence as it relates to probationary practices in the country generally and in KP particularly. Furthermore, recognizing that domestic acceptance and stakeholder support is critical to any reform programme, RSIL is also tailoring its recommendations to reflect feedback and address concerns raised by stakeholders in GoKP's probationary regime.

The long-term goals of this initiative are to establish a viable and effective probationary regime in KP which addresses the community's expectations *vis-à-vis* criminal justice outcomes, safeguard the rights and interests of offenders serving probationary sentences, effect the rehabilitation and reintegration into mainstream society of the same, and reform the RPD, KP into a model organization which could, potentially, be replicated in other parts of the country.

After the 18th Amendment to the Constitution of Pakistan, the provinces stand fully competent to enact legislation in the area of criminal justice. Given the proactive approach adopted by the current provincial government, reforming vitals laws such as those on probation seems a logical next step. Furthermore, adopting legislation at this critical period would allow KP to be the first province to unshackle itself from the outdated legal regime of the 1960s and usher in a new era of effective, compassionate, and rehabilitation orientated criminal justice reform. This report aims to provide KP policy makers the necessary research and recommendations to make informed decisions regarding any reform effort in this area.

METHODOLOGY:

This report is based on research conducted between October to November 2014. This research consisted of the following components:

Review of Literature: Research papers, reports, studies, monographs, essays and articles pertaining to probation internationally and domestically. We also conducted a thorough review of international best practices and guidelines published by international organizations, think-tanks and international NGOs. The list of documents reviewed can be found in Part A of Annex I of this report.

Statutes and Case Law: The entire statutory framework relating to probation in Pakistan generally and KP specifically was reviewed by the research team. A list of the relevant

legislation can be found in Part B of Annex I of this report. In addition, 109 cases on probation in Pakistan were reviewed and analyzed. This include 18 reported judgments of the Appellate Courts spanning the period 1971-2009 and 91 judgments of Judicial Magistrates (First Class) in Peshawar, KP delivered in 2014. The legislative frameworks of multiple foreign jurisdictions was analyzed which included the United Kingdom, Canada, Australia, India, Bangladesh, United States, South Africa, Malaysia, Singapore and the European Union. Selective case law from the UK, Australia, Canada and India was also examined. A list of the material consulted in this regard can be found at Annexes I and III of this report.

Primary Data: Primary data was collected from various offices of the Government of Khyber Pakhtunkhwa [GoKP]. This included the Reclamation and Probation Department, Office of the IG Prisons, Office of the Director General, Prosecution Department, Home and Tribal Affairs Department, Magistrates Courts and the Provincial Police Department.

Interviews: A range of officials from different departments and offices in the GoKP were interviewed by the research team in preparing this report. List of the persons interviewed is at Annex II.

Focus Group Discussions: Three focus group discussions (FGDs) were conducted during the course of our research. Two FGDs were held with probation officers from various districts of KP. One of these FGDs was arranged at the RPD headquarters in Peshawar on 20 October, 2014.

The second FGD was held on the sidelines of a conference organised by the Dost Foundation in Shelton Greens Hotel, Peshawar on 25 November, 2014. The third FGD was held with probationers themselves and was organised by the RPD at the Judicial Complex, Peshawar on 11 November, 2014.

STRUCTURE OF THE REPORT

The report is divided into four chapters. The first chapter looks into the context of probation in KP. This involves a historical assessment of probation in the provinces followed by a brief discussion on the contemporary operation of the probation regime. The second chapter looks at the approaches to probation adopted in various foreign jurisdictions. Furthermore, this chapter also looks to the international standards established on non-custodial sentences. The third chapter is a review of the existing KP probation regime. Here we review the structure and administration of the probation regime and also conduct a section by section analysis of the Probation of Offenders Ordinance 1960 and its corresponding West Pakistan Probation of Offenders Rules of 1961. Chapter three is where many of the primary defects of the legislation are highlighted. Chapter four focuses on providing recommendations to address the various problems of the probation system in KP.

CHAPTER ONE

CONTEXT

In order to better comprehend the context of probation as a means of rehabilitating and reintegrating an offenders in Pakistan, it is imperative to understand the origins of the contemporary law in Pakistan. Given Pakistan's status as a former colony of the United Kingdom, a significant corpus of the country's legal system – most particularly its criminal justice architecture – is derived from or predicated upon colonial-era legal instruments. In certain instances, such as the Penal Code of 1860 [PPC] or the Criminal Procedure Code of 1898 [Cr.P.C], these statutes have been retained – albeit with subsequent amendments. In other instances, such as the Evidence Act of 1872, these have been replaced by statutes promulgated by the post-independence legislatures. Thus, the architecture of contemporary criminal law in Pakistan remains firmly embedded in 19th century British conceptions of criminal justice. This is significant as, in the specific context of criminal probation, while the operant act – the Probation of Offenders Ordinance of 1960 – was promulgated post-independence; it is nonetheless firmly embedded in the historical colonial legal context.[9] This historical conception of probation trended towards a more 'social work' approach to probation, with the aim being to "advice, assist, and befriend" the probationer.[10] Contemporary perspectives on probation are concerned less with 'saving the souls' of offenders and more with effecting tangible, meaningful reform and rehabilitation aimed at the probationer's reintegration into society.

[9] Hussain, Basharat. *Social Reintegration of Offenders: The Role of the Probation Service in North West Frontier Province, Pakistan.* Ph.D. thesis. The University of Hull (2009). pp. 1-2.
[10] *Ibid.* at pp.61, 67, 119, and 229.

Thus, to assert that the criminal probation regime in effect in Pakistan today is an entirely indigenous legal solution is misleading; at present the regime is predicated upon the *Raj*-era Criminal Procedure Code of 1898 and the draft All India Probation Bill of 1931. Although the aforementioned Probation of Offenders Ordinance of 1960 ostensibly repeals provisions of the Criminal Procedure Code of 1898 that dealt with probation, it may be considered to – substantively at least – be a mirror of its predecessor. Even the reforms it did bring about, such as reducing the focus of probation on first-time offenders, were rendered neutralized by the intransigent legal culture and judicial attitudes that continued beyond the repeal. As such, most provisions of Pakistan's contemporary probation law are either adaptations of earlier bills made under the colonial system, or are deeply embedded in the jurisprudence of the same. This is significant as the earlier laws were framed under the normative framework of the colonial regime rather than the indigenous population; these laws were also intended to be employed within the context of a colonial subject and not a constitutional democracy. As such, incorporating laws made for the benefit of a now-defunct colonial regime, or predicating new legal instruments upon that regime's normative and jurisprudential underpinnings cannot suffice for a constitutional democracy with significant ethnolinguistic and normative diversity. Furthermore, the historical 'missionary' conception of probation – now obsolete in the UK – still informs much if not all of contemporary domestic probationary practice.[11]

More alarmingly, the constitutive instruments of the Pakistani criminal justice framework – namely the Cr.P.C and the PPC - were promulgated over 100 years ago. The genesis of contemporary probationary practices in Pakistan can be traced back to these instruments as, in 1923, the British colonial government added three sections in the Cr.P.C relating to 'first

[11] *Ibid* at pp.61-63

offenders' 562, 563 and 564. Sections 562 through 564 granted courts the power to release those convicted the first time and of minor offences on probation for good conduct. The concept underlying the inclusion of these sections was to avoid sentencing offenders to punishments and ensure their reintegration into society based on good behavior and conduct. In 1926 the colonial regime for the province of Punjab enacted the Good Conduct Prisoners Probational Release Act which provided for reformatory and rehabilitative initiatives aimed at reintegrating offenders into society.

As the primary legal instrument in matters of criminal procedure, the Cr.P.C included concepts of probation well before Pakistan's independence. These provisions were repealed following the promulgation of the Probation of Offenders Ordinance of 1960, which attempted to provide the domestic criminal justice system with a consolidated instrument on probationary sentences. The Ordinance removed references to first-time offenders; despite this exclusion however, the ethos of granting probation to first-time offenders persisted, with judicial officials in KP continuing to prioritize this requirement when making orders under the Ordinance.[12]

As discussed above, most laws enacted post-independence are based upon the pre-independence normative and legal framework of the British colonial regime. Transposing foreign legal principles, such as the probation of offenders, into domestic law without assessing first their viability or implementation mechanisms may have seemed appropriate during the colonial

[12] Of the 47 cases analyzed, 96% of the offenders were first time offenders. 21% of first offenders were simply sentenced to three days of imprisonment with a fine varying from Rs. 500 – Rs. 1000. 45% of the remaining first offenders were sentenced to a three-year simple imprisonment with the same fine.

period; in practice however, such laws have yet to be analyzed in detail, particularly with reference to their operation in the indigenous sociocultural context.

The probationary regime in Pakistan today still relies on the same law it incorporated in 1960. By contrast, the probationary legal framework of the UK – the jurisdiction from which Pakistan derived its probationary regime - now stands as an example of one of the most progressive models for the probation of offenders through their rehabilitation and reintegration into broader society. The primary reason for this is the fact that the UK's probationary regime has – and continues to be – in a state of near-constant reform and upgradation, incorporating contemporary international legal norms, novel research into 'what works' in criminal probation, and practical and administrative developments in the area of criminal probation.[13] By way of contrast, the domestic stasis in domestic probationary reform and evolution has only been broken by the promulgation of the Juvenile Justice System Ordinance of 2000 [JJSO] which extended the existing probation regime to juvenile offenders. In light of the abovementioned historical context, probation laws in Pakistan have yet to undergo major – and necessary – reform. While an immediate overhaul is required, steps must be taken by the relevant departments to be seen as working progressively for the probation of offenders and their rehabilitation.

The RPD is the provincial body responsible for the probation of offenders within KP. Initially established as a department for parole cases, the RPD operated post-independence as a federal body based in West Pakistan. After the abolishment of the One Unit programme in West Pakistan in 1970, the concept of probationary sentencing gradually emerged in the provinces,

[13] Ministry of Justice, United Kindgom, (2013). *Transforming Rehabilitation: A Strategy for Reform.* The Stationery Office Limited on behalf of the Controller of Her Majesty's Stationery Office.

where the scope and ambit of the department were widened. In 1957, the RPD was officially established in the areas of Peshawar and Dera Ismail Khan in KP – then referred to as the North-West Frontier Province [NWFP] – for the purposes of carrying out parole work. Subsequent to the promulgation of the Probation of Offenders Ordinance, 1960 the RPD expanded its scope to include the probation of offenders as part of its mandate. This enabled the appointment of probation officers in all provinces, including the NWFP, to carry out probation orders by the courts. Like any new department, the RPD too suffered from initial teething problems in KP; there were already various criminal justice agencies well established within the province at the time, and adding another to treat offenders was not received with much warmth.[14] After having interviewed several probation officers in KP, the matter still remains of much concern. Despite the lack of a coherent service structure and the uncomfortable manner in which the RPD is embedded in the provincial criminal justice framework, the department and its officials continue to carry out their duties. It is important therefore, to understand the gap which has persisted between the police department, the judiciary and the probation department.

With regards to probation, offenders are not, in the strictest of sense, sentenced to punishment but are made instead to undergo a process whereby they are guided by Probation Officers to better themselves. This particular concept, where offenders are released on probation for the crime they have been convicted of did not sit well with existing law enforcement agencies in KP. A number of probation officers interviewed shared reservations regarding the roles of police officers and judicial magistrates in the administration of criminal probation. According to several probation officers in Peshawar, despite judicial magistrates sitting mere floors beneath them, there still exists a major communication gap. Few judicial magistrates require – or even request –

[14] Hussain, *supra* at 9. pp.111-112.

the assistance of a probation during the trial, nor do probation officers receive any information *vis-à-vis* open cases from police officials.[15] Only once a probation order has been made does a probation officer obtain information about the case and the crime the defendant is accused of. In essence, this means that probation officers are made aware of potential probationers only after a conviction has been secured and a sentence granted. Their role during the trial remains, at present, minimal or even nonexistent.

Despite these problems, however, the RPD remains clear in its mandate[16]:

- The reduction of crimes, especially with regard to first offenders, so that they do not become professional criminals.
- The re-socialization of offenders by probation officers so that they can reintegrate them into the society outside the confines of the penal system.
- The reduction of prison populations. Prisons in KP are currently accommodating more prisoners than their maximum capacities would allow. In this regard, it is imperative to reduce the number of prisoners held in jails by filtering those who are viable cases for probation and those who would be better suited to incarceration.
- The reduction in expenditure of the National Exchequer in maintaining prisons and their populations.

[15]Focus Group Discussion with Probation Officers at Workshop organised by the Dost Foundation (25 November 2014)
[16]Khyberpakhtunkhwa.gov.pk, (n.d.). *Objectives*. [online] Available at: http://www.khyberpakhtunkhwa.gov.pk/Departments/Reclamation-Probation/Objectives.php.

As can be noted from the above, RPD's mandate and objectives remain beneficial towards both the offender as well as the community. However, while the commitments made are laudable their practical implementation remains a primary concern.

During interviews with probationers it was surprising to note that they were unaware of the rationale behind probation. According to them they simply appeared before their designated probation officer to mark their attendance and check in so that their name would be recorded on the register maintained by the RPD. This is strangely both patronizing as well as ineffectual; probationers are made to behave as though they are attending a class, where their absence would be reflected poorly on their final grade, without gaining the benefit of any form of value-addition.

Having an outdated law which fails to incorporate contemporary principles of probation will inevitably prove unsuccessful, and the lack of awareness regarding the concept of non-custodial sentencing further compounds the difficulties faced by the RPD in ensuring an effective administration of criminal probation in the province. The concept of probation in general and community service in particular, must therefore be addressed with more seriousness at both the institutional as well as the broader societal levels.

There are various models of non-custodial sentencing internationally; however, even if the basic concept were to be coherently introduced in the legal context of KP it would benefit thousands of offenders, providing them with a chance to spend their sentences without being isolated from the community.

CHAPTER TWO

APPROACHES TO PROBATION AT THE INTERNATIONAL LEVEL

Given the realities involved in the criminal justice system and the normative and cultural diversity present in KP a uniform and rigidly applied probation mechanism is not feasible. Even when controlling for sociocultural externalities, criminal justice outcomes often vary on a case to case basis, with sentences being affected by the facts of the case, the demographics of the defendant, and the applicable sentencing guidelines among others. Internationally, a shift towards 'tailored' probationary sentences for each offender has been witnessed. This is arguably a more appropriate mechanism, allowing the courts to accommodate normative diversity and address specific rehabilitative needs when issuing sentences. This approach and the specific models adopted by various foreign jurisdictions when indigenized for KP can provide critical solutions for the reform and upgrade of province's probation regime.

2.1 INTERNATIONAL STANDARDS: THE UNITED NATIONS

2.1.1 Sentencing Flexibility of Probation:

As discussed in the UNICRI's publication *Promoting Probation Internationally*[17], probation as a sentencing option proves to be far more flexible in its application relative to other sentences – such as fines or imprisonment – which are currently in use in the province. A criminal sentence "must reflect contemporary political aims and cultural norms if it is successfully to solve local problems of criminal justice and diversify the range of sentencing options available to the

[17] UNICRI, *supra* at 6.

courts…"[18] and in this regard probationary sentences enable the criminal justice system to pass sentences which adequately reflect the seriousness the community attaches to any particular offence.

2.1.2 Contemporary Focus on Rehabilitation:

As per the UNICRI, "[t]he primary aim of dealing with criminal offenders in the modern context is social re-integration of the offender and the prevention of recidivism, while retribution and deterrence have assumed secondary positions."[19] This position is predicated upon the United Nations Standard Minimum Rules for Non-Custodial Measures, also referred to as the 'Tokyo Rules'. Under this model of criminal justice the focus of the criminal justice system shifts away from the 'traditional' priorities of retributive justice towards the reintegration of offenders into mainstream society[20]. While the interests of the community must certainly be a priority when engaging in criminal justice reform, community perspectives – particularly in the context of developing States – tend to trend towards more retributive models of justice. Thus, when emphasizing probation as a viable alternative to custodial penalties the community's desire for retribution must be tempered by rights guarantees extended to the offenders and the offender's potential for reform. While legitimate community concerns *vis-à-vis* the risk a probationer poses must indubitably be addressed when issuing a probationary sentence, negative societal perceptions of probation and probationers must also be challenged and dispelled.

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[18] *Ibid* at p,40

[19] *Ibid* at p.107

[20] The rehabilitatitve focus was explicitly delineated in the 'Fundamental Aims' expressed in Rule 1 of the Tokyo Rules. Rule 1.5 specifically states: "Member States shall develop non-custodial measures within their legal systems to provide other
options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender".

Offenders who serve community sentences are more amenable to rehabilitative efforts than those isolated from mainstream society by custodial sentences, and with prison overcrowding fast becoming a critical issue in jurisdictions across the world, probationary reform in KP would represent a shift away from domestic, historical perspectives on penal sentencing towards a perspective more consonant with international best practices. The issue of overcrowding in KP prisons touches directly upon the subject matter of the United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955; while these Rules do not discuss forms of non-custodial sentences they nonetheless provide guidelines – or 'best practices' – regarding penal sentences. Under the section titled 'Accommodation', the Rules discuss prison overcrowding and provide that "each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room…"[21] From the language of the instrument alone it is clear that overcrowding in the penitentiary system is to be prevented and that such may only be allowed under specific, extraordinary circumstances and not be the norm. While the Rules do not constitute binding legal obligations on Pakistan they nonetheless represent the institutional perspective of the UNICRI – and the UN as a whole – on the matter, and with regards to prison conditions this perspective is manifest.

2.1.3 Probation and Juvenile Offenders:

The 'Beijing Rules' – more formally known as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice – are similarly non-binding in nature, but instead "reflect the aims and spirit of juvenile justice and set out desirable principles and practice for the

[21] United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *United Nations Standard Minimum Rules for the Treatment of Prisoners*, (Geneva: United Nations, 1955), Rule 9

administration of justice for juveniles… [representing] the minimum conditions internationally accepted for the treatment of juveniles who come into conflict with the law…"[22] Rules 17(1)(b) and (c) of the same provide that "[r]estrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum…" and that the "[d]eprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response…" These rules, much like the Rules of 1955, represent the trajectory of criminal justice normative reform of the UN and while they might lack the binding nature of a treaty obligation, they nonetheless represent international consensus on the 'best practices' regarding national juvenile justice frameworks. Given this status, it is pertinent to note the amount of emphasis the Beijing Rules place on precluding – as much as possible – the custodial sentencing of juveniles.

Much like the international instruments discussed above, the United Nations Guidelines for the Prevention of Juvenile Delinquency[23] – also referred to as the Riyadh Guidelines – represent non-binding – arguably aspirational – perspectives on national criminal justice systems. Nonetheless, these instruments can be relied upon to construct a contemporary probationary regime in KP, one which emphasizes rehabilitation over retribution. The Guidelines, recognizing the nexus juvenile justice has with several other tangentially-related fields, advocates an interdisciplinary approach to juvenile justice, emphasizing community engagement, diversionary programmes, and rehabilitation. The Guidelines also note that youthful behavior generally tends

[22] Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing: United Nations, 1985), retrieved from the United Nations Criminal Justice Information Network Compendium on the United Nations Standard Minimum Rules, available at http://www.uncjin.org/Standards/Compendium/pt1e.pdf

[23] General Assembly resolution 45/112, *United Nations Guidelines for the Prevention of Juvenile Delinquency*, A/RES/45/112 (14 December 1990), available from http://www.un.org/documents/ga/res/45/a45r112.htm.

to be inconsistent with the dominant cultural normative framework, and advocates the differential treatment of juveniles.[24] This principle, in particular, provides fertile ground within which to embed probationary regimes catering particularly to juvenile offenders. While national – or provincial – probationary regimes should cater to the needs of offenders of all ages, there exists a significant corpus of international instruments advocating the special treatment of juveniles in the criminal justice system.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty[25] speak more specifically to the topic of criminal probation, encouraging member states to refrain from imposing pretrial detention or remand on juveniles awaiting trial. This is particularly relevant in the national context of Pakistan, where the vast majority of those incarcerated throughout the country are under-trial,[26] and thus their guilt remains to be established. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders – also known as the Bangkok Rules – express similar principles *vis-à-vis* female offenders, calling upon UN member states to recognize the particular issues female prisoners face while incarcerated and to prioritize non-custodial sentences over incarceration.[27]

2.1.4 Other International Perspectives on Probation:

The Caracas Declaration, while not discussing probation *per se* – or even custodial conditions for that matter – touches upon a number of core principles which guide not only this Project but also any form of criminal justice reform worldwide. The Declaration emphasizes the need for

[24] General Assembly resolution 45/112, *United Nations Guidelines for the Prevention of Juvenile Delinquency*, A/RES/45/112 (14 December 1990), paragraph 5, available at: http://www.un.org/documents/ga/res/45/a45r112.htm
[25] General Assembly resolution 45/113, *United Nations Guidelines for the Prevention of Juvenile Delinquency*, A/RES/45/112 (14 December 1990), available at: http://www.un.org/documents/ga/res/45/a45r113.htm.
[26] ICG, *supra* at 1
[27] General Assembly resolution 2010/16, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, A/RES/2010/16, available from http://www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf.

indigenous solutions to crime in any particular national context,[28] as well as the necessity for conducting research into novel means to address crime and crimogenic factors. These two notions will be elaborated upon below but it is cogent to note the value the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Others placed upon evidence-based perspectives towards criminal justice.

2.2 APPROACHES TO PROBATION IN SOUTH AFRICA

2.2.1 Sentencing Flexibility of Probation:

South Africa represents another jurisdiction wherein recent probation reforms have effected positive change on the overall criminal justice system. While the South African context does not directly translate to the KP context – given differential crimogenic and demographic factors – useful inferences can still be extrapolated and indigenized to fit the KP context. The reformed South African probationary regime[29] allows for significant sentencing diversity through probation; under this regime probationers are subjected to one of five different "phases" of probationary terms, each of which corresponds to differential degrees of severity for the terms of the probation imposed.[30] This diversity in sentencing options allows judicial and probation officers to 'tailor' sentences to suit the crimogenic or demographic characteristics of individual

[28] Caracas Declaration of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, General Assembly resolution 35/171, *Report of the 6th United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, A/RES/35/171, paragraphs three and seven, the available from http://www.refworld.org/docid/3b00f47832.html

[29] ISS Africa, (n.d.). *ISS Africa | CHAPTER 5 Probation Services*. [online] Available at: http://www.issafrica.org/chapter-5-probation-services.

[30] National Commissioner of the South African Police Service, (2005). *South Africa Country Report to the 11th United Nations Congress on Crime Prevention & Criminal Justice*. Bangkok: United Nations Congress on Crime Prevention and Criminal Justice, p.86.

offenders, and suggest alternatives to incarceration – such as substance rehabilitation or mental health services – that would be best suited to effecting that particular offender's rehabilitation.

2.2.2 Sentencing Input from the Probation Department:

Under the South African probationary framework probation officers are officers of the courts,[31] and are responsible for investigating the circumstances of the offender following trial proceedings.[32] This investigation is intended to provide the court with an assessment of the probationer's progress towards rehabilitation – include any progress made under diversion programmes – as well as any assistance the probationer's family might require while the offender is serving his or her sentence.

The statute allows for pre-sentencing input, including an assessment of the probationer's suitability for non-custodial sentencing, to be provided by the probation service to the courts in order to assist the latter in sentencing;[33] the statute, however, does not create a positive obligation on either the probation service to provide this assessment to the courts, or the courts to incorporate such assessments in their sentencing methodologies, allowing instead for the Minister responsible to institute 'pre-sentence evaluation committees.'

It is observed that this might not provide an ideal model for probationary reform in KP; given the non-binding nature of such an assessment and the skepticism towards probationary sentences demonstrated by judicial officials in the province, it is uncertain how much traction a provision of such a non-binding nature would gain in effecting positive outcomes for non-custodial sentencing. Deviating from the South African model slightly, it is recommended that the KP

[31] §2(2) of the Probation Services Act of 1991, as amended by the Probation Services Amendment Act of 2002
[32] §(4)(1)(a) of the Probation Services Act of 1991, as amended by the Probation Services Amendment Act of 2002
[33] §5 of the Probation Services Act of 1991, as amended by the Probation Services Amendment Act of 2002

probationary regime effect amendments to the extant law to both establish a mechanism for such pre-sentence evaluations to be conducted as well as ensure that such assessments are treated with the appropriate *gravitas* during the sentencing phase of proceedings.

2.2.3 Uniform National Policy on Probation:

The South African government also instituted a National Policy on Corrections,[34] emphasizing the rehabilitation of offenders and their reintegration into mainstream society. Given the effects of the 18th Amendment to the Pakistani Constitution it is still unclear as to the nature and form a national correctional policy would take; however, in this regard KP can take the lead in instituting a unified provincial policy on corrections. At present KP has already taken certain positive steps towards a more inclusive approach to criminal justice by establishing a series of 'model police stations' in the province. At present three such stations have been instituted, with plans to establish four more,[35] and they represent a new initiative on behalf of the GoKP to foster greater community involvement in criminal justice. This institutional shift in perspectives away from a historical, 'force', conception of policing towards a 'service' model represents a watershed in criminal justice administration in the province and the GoKP can capitalize upon these new reforms to institute an overarching provincial addressing all elements of the province's criminal justice architecture, including its correctional facets.

Such a provincial policy on corrections would homogenize probationary services provided throughout the province, ensuring the uniform and nondiscriminatory provision of correctional

[34] National Commissioner of the South African Police Service, (2005). South Africa Country Report to the 11th United Nations Congress on Crime Prevention & Criminal Justice. Bangkok: United Nations Congress on Crime Prevention and Criminal Justice, p.79.

[35]Department for International Development and DFID Pakistan, (2014). *Changing Times: Women Police Officers Breaking Barriers In Pakistan*. [online] Government of UK. Available at: https://www.gov.uk/government/case-studies/changing-times-women-police-officers-breaking-barriers-in-pakistan.

services and precluding criticisms of differential treatment. Furthermore, this policy would unify the disparate segments of the provincial criminal justice framework, ensuring greater collaboration between the several actors in KP's criminal legal framework. At present, perceptions within the KP criminal justice regime are skeptical towards both the probation department in particular and inter-departmental collaboration at large; this state of affairs compromises the effectiveness of the KP probationary regime, rendering poor criminal justice outcomes.

The South African Correctional policy also emphasizes the value the offender's sociocultural network adds to the overall rehabilitation process, positioning the Government – that is, the correctional framework – as a tertiary actor in the offender's rehabilitation, following the probationer's family and community.[36] This reflects the fact that custodial sentences, which isolate the offender from his or her social network and the community at large, often prove inadequate as a means of precluding recidivism and effecting rehabilitation. By contrast, by re-embedding the offender within his or her native sociocultural context and allowing the community as a whole to enforce the sentence of probation itself as well as the broader shared normative framework, probationary sentences enable the community to also participate in the enforcement of the society's shared morality as expressed by the extant legislative framework. This level of enforcement, however, is far more constant and consistent in its enforcement, as opposed to the often sporadic interventions of actors of the criminal justice system.

2.3 APPROACHES TO PROBATION IN AUSTRALIA

[36] National Commissioner of the South African Police Service, (2005). South Africa Country Report to the 11th United Nations Congress on Crime Prevention & Criminal Justice. Bangkok: United Nations Congress on Crime Prevention and Criminal Justice, p.83.

2.3.1 Sentencing Input from the Probation Department:

The state of New South Wales in Australia incorporates mechanisms for classifying probationer based on a pre-sentencing report. Prepared by the probation service, this report informs judicial decision-making at the sentencing stage, enabling the courts to rely on the expertise of the probation department in determining the risk the probationer poses to the community and delineating the terms of the probationary sentence accordingly.[37]

Other Australian legislation also emphasize the value of presentencing reports, allowing probation officers to assist the courts in determining whether a particular offender is a suitable candidate for non-custodial sentences, and constructing the terms and conditions of the sentence best suited to effecting the rehabilitation and reintegration of the offender.[38]

2.3.2 Sentencing Flexibility of Probation:

Sentencing guidelines in other jurisdictions in Australia also operate to grant the courts with discretion when passing probationary sentences: for instance, under the Penalties and Sentences Act, 1992 courts in the state of Queensland, Australia are empowered to not only impose differential terms for probationary sentences but are also able to pass orders in instances where convictions have not been secured, diverting defendants away from the criminal justice system towards rehabilitative programmes. As touched upon above, sentencing diversity allows actors operating in the jurisdiction's legal framework to 'tailor' criminal justice outcomes to best suit

[37] Figgis, H. (1998). *Probation: An Overview*. [online] NSW Parliamentary Library Research Service. Available at: http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/15941CFB434F3EA7CA256ECF0009F73F/$File/probation.pdf.

[38] §344 of the Corrective Services Act, 2006); §9(2)(m) of the Penalties and Sentences Act, 1992; §147(3)(a)(v)(D) of the Penalties and Sentences Act, 1992.

both the expectations of the community at large as well as the specific, individual needs of convicted offenders.

The versatility of probation as a penal sentence allows for its application not only in widely disparate politico-legal and sociocultural contexts, but also to the particular case of a diverse array of probationers. Thus, building upon these models the probation regime in KP could similarly first distinguish those offenders who would prove viable candidates for probation and then further differentiate the probationers amongst themselves based on an assessment of what restrictions may best be imposed on them as part of the terms and conditions of their sentences. Furthermore, given the postcolonial critique which may – deservedly – be levelled at the *Raj*-era criminal legal framework extant in KP, a flexible sentencing regime – emphasizing community sentencing and non-custodial penalties – would prove a better model for criminal justice than the current 'one size fits all' approach currently *en vogue.*

Since 1998, New South Wales has also established Drug Courts in order to reduce criminal activities resulting from excessive drug usage – Drug Court Act, 1998. The purpose of the act is to ensure that courts take into account the amount of drug-dependent adults who are facing custodial sentences, using the threat of imprisonment as an incentive for treatment entry and the fear of return to prison as a reason for adhering to drug tests while on probation.[39] While the prospects of similar courts to be established in KP are slim, the existence of such courts does intrigue the possibility of setting up a drug bench within existing courts in KP. Given that possession of drugs by offenders is a common crime in KP, and one for which probation is often granted, drug benches within courts could prove productive in rehabilitating an addict.

[39] Taplin, S.(2002). *The New South Wales Drug Court Evaluation: A Process Evaluation*. Sydney: NSW Bureau of Crime Statistics and Research.

2.3.3 Technical Training and Reintegration of Probationers:

In certain jurisdictions probationary sentences are employed as a means of directly effecting the reintegration of sentenced offenders back into mainstream society: most recently the government of Western Australia, Australia instituted a "Sentenced to a Job" programme aimed at the Aboriginal community in the State.[40] Under this programme offenders from the Aboriginal community are 'sentenced' – if the term can be disengaged from its historically-negative connotations – to a six month programme during which they are provided with technical training and education. Following their successful completion of the programme, offenders are guaranteed employment with local private-sector mining concerns and, given the fact that mining constitutes a significant sector in the Western Australian economy, ensures them continued employment.

Furthermore, probationary programmes such as these promote greater community engagement with the broader, national polity – particularly in the case of ethnic minorities; given the historical disenfranchisement of the Aboriginal community in Australia and their status as an ethnic minority group in the country, programmes such as these divert Aboriginal offenders away from reoffending and promote broader societal engagement. Such programmes also help in redressing historical marginalization, helping address the underlying crimogenic factors precipitating crime in minority communities. The Northern Territory of Australia also incorporates a similar programme into its probationary regime,[41] providing employers in the

[40]Correctiveservices.wa.gov.au, (n.d.). *News and Media Releases | Sentenced to a Job Programme*. [online] Available at: https://www.correctiveservices.wa.gov.au/_news/default.aspx?id=1135&page=1.

Correctionalservices.nt.gov.au, (2014). Prisoner employment programmes - Sentenced to a Job - Department of Correctional Services. [online] Available at: http://www.correctionalservices.nt.gov.au/AboutUs/BusinessWithUs/Pages/Prisoner-employment-programmes.aspx

jurisdiction with incentives to hire probationers and providing probationers with a mechanism to ensure their continued employment and engagement with non-penal society.

A model derived from the two aforementioned Australian jurisdictions could prove critical not only to instituting criminal justice reform but also in boosting the provincial economy. According to official statistics the unemployment rate in KP is at almost 27% – a figure which rises to over 30% if one also takes into consideration the provincially-administered tribal areas.[42] Given the nexus between unemployment and non-violent crimes[43] – those which are generally most suited to probationary responses – such a regime could provide the GoKP with a silver bullet to affect positive outcomes for the community ranging far beyond solely criminal justice outcomes. Furthermore, given the ethnolinguistic diversity in KP, incorporating 'sentenced to jobs' and community service programme into the provincial criminal justice architecture allows historically disenfranchised communities to become included into the broader fabric of life in the province

2.4 APPROACHES TO PROBATION IN THE STATE OF CALIFORNIA, USA

2.4.1 Context of Probation in California:

Despite the marked economic and demographic differences between the two it becomes clear that the KP probation service is today plagued by many similar issues which afflicted the Californian probationary regime half a decade ago, and while directly 'transplanting' solutions

[42] Kpcci.org.pk, (2014). The Sarhad Chamber of Commerce & Industry [online], Available at: http://www.kpcci.org.pk/Premsg.htm.
[43] Raphael, S. and Winter-Ebmer, R. (2001). *Identifying the Effect of Unemployment on Crime*. The Journal of Law and Economics, 44(1), pp.259-283.

from one jurisdiction to the next is untenable the RPD can, nonetheless, draw upon the Californian experience to develop viable indigenous solutions to its own problems.

Recently, the state of California in the US engaged in probationary reform, seeking to ease its crippling penal budget and better manage the hundreds of thousands of offenders serving community sentences.[44] While a comparison between California and KP might, at first blush, appear unfair California does, in fact, represent a viable and potentially-useful standard for comparison. Prior to the recent probationary reforms, the probation system in California could be described as "broken",[45] with no overarching state-wide oversight; a lack of uniformity in process and policy from county to county; inadequate and often piecemeal funding; critical understaffing and a lack of training; and the probation service's incapacity to adapt to the rapidly-changing demographics of the state. These failings of the Californian correctional framework lead to a dismal state of affairs where, at the time, almost half of all probationers violated the terms of their sentences;[46] these probationers would then be sentenced to harsher and harsher sentences, further burdening the penal system and rendering it increasingly difficult to rehabilitate the offenders.

In order to combat its downwardly-spiraling probationary regime California's state legislature promulgated the Community Corrections Performance Incentives Act [CCPIA],[47] which incorporated a number of reformatory initiatives; it is pertinent to note that not all of these initiatives are directly relevant to the KP probationary context however and as such only those which would prove most effective in upgrading the RPD are elaborated upon here. As the goal of

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[44] U.S. Department of Justice, Bureau of Justice Statistics, Bulletin, (2009), *Probation and Parole in the United States, 2008*, p.17.
[45] Feinstein, J., (2011), *Reforming Adult Felony Probation to Ease Prison Overcrowding: An Overview of California S.B. 678*, 14 Chap. L. Rev. 375
[46] Taylor, M., (2009), *Achieving Better Outcomes for Adult Probation*, California Legislative Analyst's Office, p.20.
[47] Community Corrections Performance Incentives Act, S.B. 678, §§1228 *et seq*, (2009).

this exercise is to construct solutions which would be best suited to the unique politicolegal and sociocultural context of KP, a piecemeal – or even comprehensive – 'transplant' of legislation from a foreign jurisdiction would, at best, be merely problematic.

2.4.2 Recognizing the Value of Probation in Criminal Justice:

Even prior to the reforms the probation service in California – dysfunctional as it was – was recognized as "link[ing] the [criminal justice] system's many diverse stakeholders, including law enforcement; the courts; prosecutors; defense attorneys; community-based organizations; mental health, drug and alcohol, and other services providers; the community; the victim; and the probationer…"[48] This recognition, that the probation service ties together the disparate elements of the criminal justice system to one another, as well as to the broader community itself, is critical if the service is to be able to perform its functions. At present the sentiment from non-RPD actors in the KP criminal justice system is unsympathetic towards the operation of the KP probation service, despite the fact that a probation service – much like any other institution operating within the broader criminal justice system – cannot function without collaboration from the other actors extant in the regime at large.

As discussed above, the South African government instituted a nation-wide correctional policy which tied the separate – yet interconnected – goals of the disparate institutions operating within the national criminal justice system. This policy had the intended effect of fostering greater collaboration between the various criminal justice institutions and homogenizing the administration of justice. The balancing act in such an endeavor is to ensure that 'equally just'

[48] Administrative Office of the Courts, (2003). *Probation Services Task Force Final Report.* [online] California State Association of Counties. Available at: http://cdm16254.contentdm.oclc.org/cdm/ref/collection/p178601ccp2/id/558.

outcomes are ensured for all offenders while, at the same time, accommodating each one's differential circumstances.

In the context of California, this recognition provided the core for the reforms effected by the CCPIA; prior to the Act's promulgation the California Legislative Analyst's Office noted that while processes were in place to conduct evidence-based risk and needs assessments of probationers; contribute to the court's deliberations at the pre-sentencing and sentencing phases of trial; and identify probationers in need of special rehabilitation, such mechanisms were not being employed effectively by the probation service. The uniform provision of correctional services was also an issue: given California's unusual take on non-custodial sentencing, the implementation of probation mechanisms was left to the individual counties.[49] This lead to differential criminal justice outcomes, with sentences for probation – and the treatment of probationers – varying dramatically between counties with differential socio-economic contexts.[50]

2.4.3 <u>The Best Practices of the Californian Probation Service</u>:

Thus, by examining the Californian context a set of 'best practices' can be extrapolated; these modalities are universal in nature enough to be able to incorporated into the KP legal context, allowing for positive change to be effected to the province's probationary regime:

i. Relying on a combination of surveillance and intervention for probationers, rather than on one or the other alone: by engaging probationers in 'prosocial activities',

[49] *Ibid* at p.40
[50] Taylor, *Supra* at 45, pp.16-17.

encouraging their engagement with the community at large significant reductions in the rates of recidivism can be achieved;[51]

ii. Employing evidence-based practices, and risks and needs assessment tools: by incorporating empirical research into the sentencing and probation-management processes, more positive outcomes for both probationers and the overall administration of jurisdictional criminal justice can be achieved. This research feeds into developing mechanisms by which targeted probationary sentences can be developed, tailored to suit the circumstances of each case of probation;[52]

iii. Enforcing probationary sentences by employing swift, certain, and proportionate punishments for all probation violations, with a parallel range of graduated sanctions[53] as well as positive incentives for probationers:[54] one of the issues plaguing the Californian probationary regime was that in counties lacking adequate resources, probationers were often left inadequately supervised. As a result probationers would repeatedly reoffend or violate the terms of their probation without consequence until hitting a 'tipping point', at which they would be incarcerated.[55] By establishing the reality of the consequences associated with probation violations probation services

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[51] Petersilia, J., (1997), *Probation in the United States*, 22 Crime and Justice, pp.149-150, at p.149
cf.
Petersilia, J., (1999) *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?* Corrections Management Quarterly (1999), at p.23.

[52] Crime and Justice Institute & the National Institute of Corrections, *Implementing Evidence-Based Policy and Practice in Community Corrections* IX (2009, 2nd Edition).
cf.
AOC, *Supra* at 47, p.81
and
Taylor, *Supra* at 45, p.13
and
Demichele, M., *American Probation and Parole Association, Probation and Parole's Growing Caseloads and Workload Allocation: Strategies for Managerial Decision Making*, pp.8, 10, 21, 30. Available at: http://www.appa-net.org/eweb/docs/appa/pubs/SMDM.pdf.

[53] Michael T., (2006), *Purposes and Functions of Sentencing*, 34 Crime and Justice 1, at p.8

[54] Colorado Division of Criminal Justice, *Evidence Based Correctional Practices*, at p.5

[55] Feinstein, *Supra* at 44, p.10

can disincentivize probationers from violating the terms of their sentences, and by effecting a graduated set of sanctions for probation violators the probation service is able to 'tailor' these sanctions to the circumstances of the offender while, at the same time, keeping them out of the penitentiary system. Conversely, incentivizing adherence to the terms of their probation sentence adds another layer of enforcement for the terms of probation in contradistinction to the traditional inducements of the penal system, which overwhelmingly employs negative reinforcement mechanisms. By bringing both positive and negative reinforcement modalities to bear on probationers provides for clear expectations of criminal justice outcomes to all participants in the regime, ensuring that probationers are fully aware of the consequences of violating the terms of their probation while, at the same time, disincentivizing them from violating these terms;

iv. Promoting greater coordination and collaboration between the criminal justice architecture and the community: given probation's role – as discussed above – as the link between the various institutional actors in the criminal justice system, engagement with key stakeholders in the regime is critical to ensuring the success of any non-custodial alternatives to incarceration.[56] Furthermore, given the fact that non-custodial sentences – by their very nature – necessitate the probationer's and probation service's engagement with the broader community, any non-custodial penal mechanisms which fail to engage the community will be unable to effect positive criminal justice outcomes.[57]

[56] Feinstein, *Supra* at 44, p.18

[57] Petersilia, Joan. *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?* Corrections Management Quarterly, (1999), at p.27

These best practices, while emerging from the particular context of the Californian criminal justice system, are nonetheless equally applicable to the KP context, and provide policymakers in the province with a broad framework within which to embed specific probationary mechanisms best suited to the unique local factors informing the administration of criminal justice in KP.

The CCPIA establishes a funding regime which 'rewards' counties for reducing incarceration and recidivism rates, and ties the disbursement and spending of these funds to the implementation of evidence-based risk and needs assessment modalities. The Act also ties the disbursement of funds to the use of alternative sanctions including diversionary programmes, electronic surveillance methods, mandatory community service, and restorative justice programmes.[58] Furthermore, the CCPIA obliges counties to reserve 5% of the funds disbursed to them to be used to research the effectiveness of their probationary programmes;[59] this encourages probation services to rely on evidence-based practices in performing their duties and developing future non-incarcerative programmes, use such practices to determine whether or not these probationary programmes are achieving the desired effects, and to inculcate an ethos of research and data collection and analysis in the institution as a whole. By developing a database of probationary trends and behaviors the Californian probation services can thus tailor policymaking going forward to address inconsistencies in the administration of justice and adapt to changing crimogenic or demographic patterns.

[58] Feinstein, *Supra* at 44, pp.29-30
cf.
Community Corrections Performance Incentives Act, S.B. 678, §§1228 *et seq*, (2009), §1230(b)
[59] Community Corrections Performance Incentives Act, S.B. 678, §§1228 *et seq*, (2009), §1230(b)

2.5 APPROACHES TO PROBATION IN THE STATE OF HAWAII, USA

2.5.1 The HOPE Programme for Probation Modification:

In 2004, Judge Steven Alm of Hawaii's First Circuit created an experimental probation modification programme. Named Hawaii's Opportunity Probation with Enforcement [HOPE], the programme proved to be a success in effecting probationer compliance and was subsequently expanded with support from the state legislature from 30 probationers at its inception to over 1500 by the end of 2009.[60]

HOPE's success is predicated upon the swiftness and certainty of penal outcomes for violations of probation orders. This is not a novel concept: Cesare Beccaria's *On Crimes and Punishments* discussed the notion almost two and a half centuries prior. In this seminal penological work, Beccaria provided that "[T]he more immediately after the commission of a crime a punishment is inflicted, the more just and useful it will be… An immediate punishment is more useful; because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of crime and punishment; so that they may be considered, one as the cause, and the other as the unavoidable and necessary effect…"[61] Beccaria centuries-old principles have been vindicated by recent studies, which demonstrate that the

[60] Hawken, A., Kleiman, M. (2009). *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE*. [online], United States Department of Justice. Available at: https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf.
[61] Beccaria, C., (1767). *An Essay on Crimes and Punishments.* London.

immediacy of a sanction for wrongful behavior is far more effective a deterrent for future offending than the severity of that sanction[62].

Prior to the HOPE Programme the sanctions associated with probation violations were unclear and the process for affecting these sanctions was slow to address individual instances of violations. Probation officers would often allow ten to 15 probation violations to pass before recommending to a judge that a probationer be incarcerated.[63] These probationers would then be sentenced to a far more severe term than the original offence warranted, overburdening Hawaii's penal system and creating a class of offenders serving inordinately lengthy sentences. The core issue underlying Hawaii's previous probationary regime was the lack of clarity associated with the outcomes of probation violations: probationers were never certain of the consequences of violating probation – or the likelihood of facing such consequences – and, conversely, the probationary regime was ineffectual in ensuring that the terms of probation were maintained. Clarity in expectations from the criminal justice enhances perceptions of the certainty of sanctions which deters future criminal behavior[64]; furthermore, a swift response to offending improves offender's perceptions regarding the fairness of the sanction which, in turn, further deters criminal behavior[65].

Given these theoretical underpinnings, the HOPE Programme seeks to effect clear and certain outcomes for instances of probation violations. In this regard, the HOPE programme's

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[62] Nagin, D., Pogarsky, G. (2001). *Integrating Celerity, Impulsivity, And Extralegal Sanction Threats Into A Model Of General Deterrence: Theory And Evidence. Criminology,* 39(4), pp.865-892.

[63] Kornell, S. (2013). *Probation That Works: Swift and Certain Punishment Reduces Crime*. Slate. [online] Available at: http://www.slate.com/articles/health_and_science/science/2013/06/hawaii_hope_probation_program_reduces_crime_drug_use_and_time_in_prison.2.html.

[64] Taxman F., Soule, D., and Gelb, A. (1999). *Graduated Sanctions: Stepping into Accountable Systems and Offenders*. The Prison Journal, 79(2), pp.182-204.

[65] Book Reviews : *Reclaiming Offender Accountability: Intermediate Sanctions for Probation and Parole Violators*. by Lakes, E. E. Rhine Laurel. American Correctional Association, 1992, 114 pp. (1993). Journal of Contemporary Criminal Justice, 9(3), pp.273-273.

sentencing process, as described by the National Institute of Justice's report *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE*[66], is as follows:

- An initial warning in open court [the "Warning Hearing"]: at this stage the judge impresses on the probationer the importance of compliance and the certainty of consequences for noncompliance, as well as emphasizing personal responsibility and the hope of all involved that the probationer succeeds.
- Monitoring probationers' compliance with the terms of their sentence including randomized drug testing, with the randomization implemented through a call-in "hot line."
- A guaranteed sanction – typically a few days in jail – for each probationer's first violation, escalating with subsequent violations. [The results suggest that varying the severity of the first sanction has no impact on overall compliance].
- Prompt hearings, with most held within 72 hours after violations.
- Compulsory drug treatment only for those who repeatedly fail, as opposed to universal assessment and treatment. This brings in an economy of resources, enabling the criminal justice to ensure that substance rehabilitative mechanisms are employed to those most in need.
- Capacity to find and arrest those who fail to appear voluntarily for testing or for hearings. This provides an additional layer of enforcement to the probationary sentences.

The Warning Hearings provide the criminal justice system – through the judge – an opportunity to impress upon the probationer the seriousness of his circumstances and the need to abide by the

[66] Hawken and Kleiman, *supra* at 59.

terms of their sentence. These hearings thus provide an opportunity to establish, with absolute clarity, the terms and conditions of the probationer's sentence, and the outcomes of violating this sentence. Furthermore, engaging with the probationer at this early stage in the penal process emphasizes personal responsibility on their part, inculcating a sense of moral agency in them and empowering them to work towards their own rehabilitation[67]. This engagement also prompts probationers to view their probationary sentences as a collaborative effort, with both actors in the criminal justice system as well as the probationer himself working towards the latter's rehabilitation. This reduces the often-paternalistic perspective of the criminal justice system towards probationers, which often infantilizes offenders and disregards input from their in the rehabilitative process.

Considering that the consistent application of a behavioral contract improves compliance[68] the HOPE Programme is predicated upon certain and swift responses to violations, with all instances of probation violations – such as positive drug tests or missed probation appointments – are met with a sanction. These sanctions are graduated, beginning with brief periods of incarceration and progressively increasing, with these graduated sentences incorporating incarcerative sanctions as well as referrals to drug rehabilitation facilities.

As discussed above Hawaii's HOPE Programme is based upon ensuring clarity on the outcomes of probation violations, both for the probationer himself as well as for the pertinent actors in the criminal justice system, and ensuring that violations of the terms of probation are met with immediate sanctions. These sanctions are certain and swift so as not to dilute their deterrent effect by rendering these outcomes indistinct or delayed. As discussed above, such clarity proves

[67] McEvoy, K. (2012). *HOPE: A Swift and Certain Process for Probationers*. National Institute of Justice Journal, [online] (269). Available at: https://ncjrs.gov/pdffiles1/nij/237724.pdf.
[68] Paternoster, R., Brame, R., Bachman, R. and Sherman, L. (1997). *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*. Law & Society Review, 31(1), p.163

far more effective in effecting compliance than a sanction that a probationer may or may not face. Furthermore, these sanctions are graduated, allowing probationers to not only associate their continued criminal behavior with negative outcomes but also providing them with several opportunities to redress their continued criminal activity. This graduated response to continuing violations also allows offenders to better gauge the opportunity-costs associated with violating the terms of their sentences, enabling them to better internalize the outcomes associated with recidivism.

2.6 APPROACHES TO PROBATION IN THE UNITED KINGDOM

2.6.1 Reform Modality of the UK Probation Service:

The probationary regime in the UK is, at present, undergoing significant reform; historically, however, the general practice of probation in the UK has prioritized the establishment of 'Probation Trusts', responsible for ensuring the speedy and efficacious rehabilitation and reintegration of probationers during the course of their terms of probation. Currently there are 30 such trusts operating across England, and operate within the rubric of the National Offender Management System. With the new reforms, however, these trusts are being phased out in favor of the National Probation Service [NPS], which is intended be managed directly by the Ministry of Justice. Employees of the NPS will thus be members of the civil bureaucracy, with the reforms accommodating existing probation officers and other staff of the soon-to-be-defunct probationary regime.

This model proves particularly relevant in the context of KP, where – among several areas of reform – a new service structure is critically needed. The UK's new probationary regime thus

provides KP with a viable 'template' for effecting significant vertical and horizontal organizational change while retaining preexisting talent and minimizing the disruptive effect such a transition could potentially have on the current probationary service.[69] Given the degree and nature of the reforms recommended for the probationary regime in KP, adopting the UK's model in transitioning from one non-custodial framework to the next would habituate actors in the provincial probationary regime to the new model, much like the 'model police stations' established within Peshawar have for members of the provincial police force. Additionally, this sort of graduated change would also allow officials of the probation services to examine the changes wrought on the system and to determine whether or not the change being effected achieves the desired outcomes. This organic approach to criminal justice reform would, in turn, ensure the construction of a highly-indigenized probationary regime in the province.

2.6.2 Sentencing Input from the Probation Department:

As touched upon above, presentencing assessments of offenders allow the probation service – the entity responsible for managing probationers – with the chance to weigh in on sentencing and allowing probation officers – who are arguably best equipped to comment on a particular offender's suitability for non-custodial sentencing – to contribute to a court's sentencing decisions. The UK probationary regime is informed by a series of legislations including the Powers of Criminal Courts of 2000 and the Criminal Justice Act of 2003, which allow the probation service to provide input to courts prior to the passing of a sentence; this input informs the sentence passed and is predicated upon evidence-based methodologies, analyzing the circumstances of the case, the probationer, and the offence committed in order to construct a

[69] Ministry of Justice, (2013). *Transforming Rehabilitation: A Strategy for Reform*. [online] London: The Stationary Office Limited. Available at: https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation/results/transforming-rehabilitation-response.pdf.

probationary sentence best suited to effecting the desired criminal justice outcomes. This also allows for a diversity of sentencing discussed above in the South African context, making for more just penal outcomes.

2.6.3 Sentencing Flexibility of Probation:

The extant legal framework informing the criminal justice system in the UK provides courts with a diverse array of probationary orders with which the criminal justice system can effect varying degrees of control and restrictions over the probationer. This is an incredibly versatile tool for effecting positive criminal justice outcomes as it allows the sentencing authority to issue that specific order which would best suit the particular circumstances of the case. Several of these sentencing options cannot be incorporated into the legal context of KP, primarily due to concerns regarding the resources necessary to give effect to them, but several others represent viable models for the terms and conditions placed upon a probationer as part of his sentence.[70] These orders include the following:[71]

1. **Curfew orders:**

   These orders oblige a probationer to remain within their residence – or any designated site – for a certain period of time. In such orders the underlying principle is to dissuade probationers from engaging in illicit activities which are generally conducted after dark.

[70] §§37, 41, 46, 52, 63, 69 Powers of Criminal Courts (Sentencing) Act, 2000, §§205, 212, Criminal Justice Act, 2003.

[71] *cf.* http://sentencingcouncil.judiciary.gov.uk/docs/MCSG_(web)_-_October_2014.pdf for the most recent sentencing guidelines, which provide the mechanisms by which judicial officers select the most appropriate sentence

2. **Probation orders:**

   These orders require a probationer to be supervised by a probation officer responsible for working towards the former's rehabilitation.

3. **Community service orders:**

   These orders oblige probationers to complete a set amount of hours performing unpaid work; these orders tend to emphasize rehabilitative justice and can potentially probationers with opportunities for gaining valuable work experience or technical training.

4. **Drug treatment and testing orders:**

   These orders require probationers to undergo regular – often random – drug tests and complete addiction treatment and rehabilitation programmes. The emphasis in such orders is to ensure that the probationer is weaned off of their dependency and disincentivized from reoffending.

5. **Supervision orders:**

   Similar to probation orders discussed above, these require juvenile offenders to remain under the supervision of a local authority, probation officer, or member of a youth offending team in order to effect their rehabilitation.

6. **Action plan orders:**

   These orders are often more specific than the preceding orders, and oblige juvenile probationers to comply with a series of requirements with respect to their actions and whereabouts during the probationary period. Such requirements could include

maintaining a curfew or refraining from academic truancy during the term of their probation.

7. **Alcohol treatment requirements:**

   These orders require offenders to an alcoholism treatment programme during the course of their probationary term, and in many regards mirror drug testing and rehabilitation orders discussed above.

8. **Exclusion requirements:**

   These orders oblige offenders to avoid a specified location for a term specified in the order, similar to restraining orders in the US legal context.

2.6.4 Sentencing Mechanisms:

In contrast to the opaque sentencing regime extant in KP, the UK relies on clear sentencing guidelines periodically prepared by the Sentencing Council, an independent non-departmental public body of the Ministry of Justice[72]. While these guidelines do allow for judicial discretion if such is "in the interests of justice" their stated purpose is to ensure greater transparency and consistency in criminal sentencing, a particular concern in common-law jurisdictions like the UK and Pakistan.

According to the sentencing guidelines of October 2014 judicial actors are required to engage in a five-stage process to determine the appropriate sentence:[73]

[72] Sentencingcouncil.judiciary.gov.uk, (n.d.). *About us - Sentencing Council*. [online] Available at: http://sentencingcouncil.judiciary.gov.uk/about-us.htm.
[73] Feinstein, *supra* n.44, at p.16

i. Assess the seriousness of the offence and analyze the offender's culpability for the harm and the extent of the harm caused, considering any aggravating or mitigating factors;

ii. Form a preliminary view of the appropriate sentence, then assess mitigating behaviors of the offender;

iii. Building upon the previous stage, consider a further sentence reduction for guilty pleas;

iv. Consider ancillary orders, including compensation. Stages two through four emphasize the premium the UK's criminal justice architecture places on ensuring that as few offenders are sentenced to harsher or custodial sentences as possible, while allowing for as many opportunities for restorative justice as possible.

v. Decide sentence.

These sentencing guidelines also provide clear – though flexible – thresholds for the various sentences, including custodial ones, which inform the courts' risk assessment when determining the appropriate sentence. In addition to the guidelines, the Sentencing Council also issues guidelines for particular criminal legal instruments the most pertinent of which, with regards to non-custodial sentencing, is the one prepared for the Criminal Justice Act of 2003.[74] These instrument-specific guidelines are intended to complement the sentencing guidelines, providing a transparent and comprehensive sentencing regime that restrains judicial discretion while allowing for the necessary flexibility as well. As per the New Sentences: Criminal Justice Act 2003 Guidelines [CJA Guidelines], the thresholds for the imposition of non-custodial sentences are predicated upon the offence's seriousness and the nature of the offender himself – that is,

[74] http://sentencingcouncil.judiciary.gov.uk/docs/web_new_sentences_guideline1.pdf.

whether he is a 'persistent' or 'habitual' offender.[75] These two factors inform the court's risk assessment matrix during the sentencing phase of proceedings, and allow the court to make a considered opinion on the threat the offender poses to the community at large. The CJA Guidelines also recommend specific terms and conditions for non-incarcerative sentences, with these recommended conditions categorized by how far the offence committed exceeds the threshold for community or custodial sentencing.[76]

2.6.5 Judicial Perspectives on Probation:

The UK's institutional emphasis on pre-sentencing input from the probation service has also been expressed in the criminal jurisprudence which has developed. In *Regina v. Jeffrey Peacock*[77] the defendant was an alcoholic who had already served over a dozen custodial sentences. Despite the fact that this was certainly not the defendant's first offence the court, informed by input from the Probation Service regarding the defendant's progress towards rehabilitation, imposed a combination order rather than a custodial sentence. This order comprised of a two-year probation order and 80 hours of community service. In the pre-sentence report the court relied upon, the probation service noted the progress the defendant had made towards curbing his alcoholic tendencies which, in turn, reduced the risk of reoffending he posed.

When considering granting non-custodial sentences, courts in the UK have gone beyond a mechanistic analysis of the offender's criminal past to also examine the nature of the offence itself, as well as the particular relationship between the offender and his victim and the

[75] *Ibid,* at p3
[76] *Ibid,* at pp.9-14
[77] *Regina v Jeffery Peacock* [1994]1994 WL 1060582 (Courtof Appeal Criminal Division).

offender's own circumstances. In *Elizabeth Grant v. Procurator Fiscal Glasgow*[78] the defendant, while working as a home carer for the elderly victim, stole an amount of money from the latter. While considering this to be a gross breach of trust, the court nonetheless also considered the fact that the defendant had been engaged in the home care business her entire adult life. As a result of her conviction however, she was barred from continuing in her chosen line of work. The severity of this outcome, coupled with the court's assessment that she was at low risk for reoffending, prompted the court to issue an order for a non-custodial sentence, with an emphasis on unpaid community work. Interestingly enough, the court also noted the number of letters of support it received on behalf of the defendant, a practice seemingly hearkening back to the historical, 'missionary' perspective on criminal rehabilitation.

In *Regina v. Jason Levelle* the subordinate court had issued a two-year probation order was granted; in passing sentence the court examined the particular circumstances of the defendant, taking into consideration his unhappy childhood, his developmental and psychological disabilities, and his upbringing. The court recognized the difficult circumstances which had prompted the defendant to offend, with the pre-sentence report referring significant impairment of intellectual functioning, low self-esteem, and suicidal thoughts. The report also noted that the defendant's motivation to comply with the terms of the probation order was adversely affected by his reliance upon intoxicants as a means of escaping – however briefly – the unfortunate circumstances he found himself in. In the instant case the defendant was required to appear before the Crown Court for breaching the terms of his probation order, obliging the court to issue a custodial sentence. This judgment, therefore, provides invaluable insight into the judicial

[78] *Elizabeth Grant v Procurator Fiscal, Glasgow* [2012][2012] HCJAC 117 WL 3809302 (Appeal Court, High Court of Justiciary).

treatment of probation cases in the UK, determining – among other factors – the potential for reoffending or the risk posed by the probationer to the broader community. If instituted in KP these, and other evidence-based practices, could prove invaluable in reforming the extant provincial probationary regime.

2.7 APPROACHES TO PROBATION IN INDIA

With a shared sociocultural and historical context – not to mention a significant amount of the colonial-era legal architecture – India represents the closest foreign analogy to the domestic legal framework. Judicial precedent from the superior courts in India holds persuasive value in domestic courts, and many of the statutes in effect in Pakistan which date back to the colonial era are also – or have been – applicable across Pakistan's eastern border. In light of this mirrored legal framework India might, at first blush, appear to be an ideal foreign jurisdiction from which to extrapolate viable recommendations for probation reform in KP; the issue, however, is that the Indian legal context is plagued by many of the same issues affecting the probationary regime in Pakistan.

Section 562 of the Cr.P.C – replicated in section 360 of the Indian Code of Criminal Procedure, 1974 – provides much of the procedural underpinnings of criminal probation in India. Much like its Pakistani counterpart however, this provision over-emphasizes the offender's age - 21 years or under – in its sentencing calculus, minimizing the value other factors – such as the nature of the offence or the risk posed by the offender – hold in this assessment. While juvenile offenders must indubitably be prioritized for non-custodial sentencing, this must not compromise the administration of justice for offenders over the age of 21. It is possible to envision a situation where a younger offender is a less suitable candidate for probation than an adult one.

The Indian Probation of Offenders Act, 1958 is similar to its Pakistani counterpart in that both allow for a report of the probation officer to be considered prior to a sentence of probation. In practice however, courts in both jurisdictions place little weight in these pre-sentence report due to judicial skepticism towards the reliability of the probation service and broader, cultural, perception of probation as a form of leniency towards offenders. In the view of the courts calling for a pre-sentence report results in unnecessary delays, creates risks of exploitation of the offender by the probation officer, and proves contrary to the objectives envisaged by the correctional penal policy.

The Indian probationary regime also suffers from the same inherent lack of consistency and transparency marring the Pakistani regime: for example, variations in the terms of probation as well as the discharge of probationary sentences are based solely on the report of the probation officer. While the courts have tended to be skeptical towards input from the probation service, this nonetheless grants probation officers an inordinate amount of power and influence over offenders. Furthermore, this lack of transparency and an *ad hoc* approach towards probationary input at the sentencing phase creates judicial inconsistencies in sentencing, rendering different outcomes for comparable probation cases. Follow-up conducted by probation officers is also ineffectual, with probationers merely required to check in periodically with their supervising probation officer. Beyond this there is little emphasis placed on evidence-based rehabilitative practices, or on ensuring that probationers are reformed and dissuaded from reoffending or reintegrated back into society.

2.8 CONCLUSIONS

As described above, the subject of criminal probation has been addressed in a variety of different ways in jurisdictions across the world, with these legal systems coming to different conclusions and adopting differential approaches to probation as best suit their own unique sociocultural and legal contexts. In order to draw inferences from these disparate probationary regimes and apply them to the context of KP, it is necessary to first identify those practices which would prove viable in the domestic, provincial, criminal regime. These specific practices have been discussed at length above but for brevity's sake the same have been reproduced below as well. It is important to note that some of these recommendations have appeared in several foreign jurisdictions; this speaks to the universality and efficacy of these practices and as such they might appear several times in the section below:

RECOMMENDATIONS FROM THE UNITED NATIONS FRAMEWORK:

- Employ non-incarcerative sanctions in order to promote sentencing diversity and thus address a wider variety of legal and factual scenarios.
- Emphasize non-custodial sanctions as a better means of effecting the rehabilitation and reintegration of criminal offenders.
- Use probationary sanctions as a means of controlling and limiting prison populations.
- Prioritize – as much as is feasible – the non-custodial treatment of juvenile offenders in order to keep them out of the penal system.
- Recognize the need for differential treatment of juvenile and adult offenders, and emphasize non-custodial sentences for young offenders.
- Deemphasize the practice of pretrial custody and remand.

- Recognize the need for differential treatment of female and male offenders, and construct sentencing regimes which include non-custodial sanctions which take into consideration the particular needs and vulnerabilities of female detainees in a developing country.
- Conduct research into the factors prompting criminal activity and crimogenic trends within the province, and use the data collected to construct evidence-based practices for criminal justice.

RECOMMENDATIONS FROM THE SOUTH AFRICAN CRIMINAL JUSTICE FRAMEWORK:

- Employ non-incarcerative sanctions in order to promote sentencing diversity and thus address a wider variety of legal and factual scenarios. To this end, create a classification mechanism for different 'categories' of offenses and ascribe differential non-custodial sentencing regimes to each.
- Prioritize input from the probation department at the sentencing and pre-sentencing stages of proceedings. This will allow actors in the provincial criminal justice system to better collaborate, will better inform judicial sentencing, lead to more positive criminal justice outcomes, and enable offenders to receive sentences which best effect their rehabilitation.
- Prepare a uniform provincial policy on probation in the KP criminal justice system. This will allow the disparate actors in the provincial criminal justice system to coordinate their efforts at the strategic level and ensure that the provincial penal regime produces the outcomes desired and required by all stakeholders.

RECOMMENDATIONS FROM THE AUSTRALIAN CRIMINAL JUSTICE FRAMEWORK:

- Prioritize input from the probation department at the sentencing and pre-sentencing stages of proceedings. This will allow actors in the provincial criminal justice system to better collaborate, will better inform judicial sentencing, lead to more positive criminal justice outcomes, and enable offenders to receive sentences which best effect their rehabilitation.
- Employ non-incarcerative sanctions in order to promote sentencing diversity and thus address a wider variety of legal and factual scenarios.
- Employ practices which improve the human capital of offenders – such as educational or technical and vocational training programmes – which help ameliorate preexisting crimogenic factors and disincentivize recidivism. Such programmes will also help destigmatize offenders and aid in their reintegration back into society.

RECOMMENDATIONS FROM THE CALIFORNIAN CRIMINAL JUSTICE FRAMEWORK:

- Recognize and emphasize the valued role probationary services play in the national and provincial legal contexts. While this might seem minor, given the antipathy displayed towards the RPD, instituting a shift in perspectives towards the Department itself as well as the broader role it performs would strengthen the Department as well as its partnerships with other stakeholders in KP's criminal justice architecture.
- Employ strategies and programmes targeting probationers, which aim to engage them with the community at large. Such practices will help destigmatize offenders, aid in their reintegration into mainstream society, and enable the RPD to draw upon the community as an agent of probation and norm enforcement.
- Conduct research into the factors prompting criminal activity and crimogenic trends within the province, and use the data collected to construct evidence-based practices for

criminal justice. These practices will provide actors in the provincial criminal justice system with data which can subsequently be used to develop and refine the provincial non-custodial sanction regime.

- Ensuring that probationary terms are enforced. Ensuring that the consequences of criminal behavior – and violations of probation orders – are made clear and certain will not only assuage community preferences for retributive justice but will also benefit the probation regime as a whole. Ensuring that violations of probationary terms will effect swift, certain, and proportionate outcomes will allow probationers to be fully cognizant of the consequences of – and thus disincentivize – recidivism and will improve perspectives on probationary sanctions from the community and other criminal justice stakeholders.
- Institute positive as well as negative reinforcement mechanisms in the probationary process. By diversifying their 'toolkit', probation officers can employ a wider variety of reinforcement methods which in turn can address the needs of a more diverse probationer population. Given that the criminal justice system predominantly relies on negative reinforcement methods, positive reinforcement can also better effect the offenders' rehabilitation.
- Promote greater cooperation with the community, ensuring that the community's own expectations from the criminal justice system are met while, at the same time, drawing upon the community's ability to enforce the shared cultural and normative framework to reinforce the rehabilitation of offenders.
- Institute transparent and effective performance evaluation methods for district-level probation departments encouraging probation officers to conduct research into crimogenic factors, develop new strategies to reduce crime and rehabilitate offenders,

effect the rehabilitation of offenders, and reduce incarceration and recidivism rates in their respective districts.

RECOMMENDATIONS FROM THE HAWAIIAN CRIMINAL JUSTICE FRAMEWORK:

- Ensure clarity in the sentencing process, especially in determining the particular sentence – along with the terms and conditions of probation – to be applied and ensuring that the probationers themselves are fully aware of these terms as well as the consequences of violating these terms. This will better inform the latter's behavior and could preclude their being re-incarcerated.
- Ensure that the terms of the probationary sentence are enforced promptly; this creates an association between reoffending and the negative consequences thereof, disincentivizing probationers from violating the terms of their probation and creating a greater deterrent effect than deferred – if more severe – consequences.
- Effect graduated sentences for recidivist or violating probationers. This will keep probationers out of the penal system, reducing the burden on the system as a whole. Additionally, as the severity of the initial sanction is less effective in deterring recidivism than the immediacy of that sanction, it is far easier for the criminal justice system to effect positive outcomes by relying on immediate – albeit non-severe – penalties than by employing harsher, though delayed, sanctions.

RECOMMENDATIONS FROM THE BRITISH CRIMINAL JUSTICE FRAMEWORK:

- Institute a mechanism by which the transition from the preexisting probationary regime to the new reformed model. This will reduce the upheaval generally concomitant with such

institutional reform, allowing probation officers to continue to perform their duties and ensuring that probationers are not neglected during this transition.

- Prioritize input from the probation department at the sentencing and pre-sentencing stages of proceedings. This input must be predicated upon evidence-based practices and research into the crimogenic factors underpinning criminal activity in the community.
- Employ non-incarcerative sanctions in order to promote sentencing diversity and thus address a wider variety of legal and factual scenarios. As a criminal sanction probation allows the judiciary to tailor criminal justice outcomes to each offender, allowing for sentences to directly address the wrong committed and best effect the rehabilitation of that particular offender.
- Prepare transparent and comprehensible sentencing guidelines informing judicial actions at the sentencing stage of proceedings. This will restrain judicial discretion allowing for greater systemic transparency, ensuring consistency in outcomes, and enabling offenders and potential offenders to be fully cognizant of the consequences of criminal activity.

RECOMMENDATIONS FROM THE INDIAN CRIMINAL JUSTICE FRAMEWORK:

- Given India's close historic and legal ties to Pakistan it is often the jurisdiction of choice when examining comparable legal regimes abroad. The analogous nature of the Indian criminal justice regime, however, means that the Indian criminal probation service is beset by many of the issues currently plaguing the probationary regime in KP. While important lessons can be learned and parallels drawn from examining the Indian context, it nonetheless does not represent a model of a functional probationary regime.

CHAPTER THREE

LEGISLATIVE ANALYSIS OF THE PROBATION REGIME IN KP

The Probation of Offenders Ordinance of 1960 together with its 1961 rules remains the governing law for the KP Probation regime. More recently, the Juvenile Justice System Ordinance of 2000 has further emphasized the role of probation with regard to juveniles and is an important piece of legislation for the working of the KP Probation regime. In addition to these legal instruments, the Code of Criminal Procedure as well as the Pakistan Penal Code bear heavily on the functioning of the Probation Regime. This section gives an overview of the relevant legislation on probation and highlights areas where the law is defective and needs improvement, upgrading, or revision.

Prior to undertaking an analysis of the relevant legal provisions, this section outlines the hierarchical structure of the probation system under the Probation of Offenders Ordinance 1960 and its 1961 Rules. We then compare this to the existing probation structure in KP.

The section then moves on to a section by section analysis of the Probation of Offenders Ordinance of 1960 and incorporating a discussion on the West Pakistan Probation of Offenders Rules of 1961 where applicable. This analysis will also include a discussion of the relevant provisions of the Code of Criminal Procedure as well as the Pakistan Penal Code as they arise in relation to the 1960 Ordinance. The section culminates with a discussion on the Juvenile Justice System Ordinance 2000 and its provisions relating to probation for juveniles.

As part of our analysis we touch upon certain reform recommendations, however, these are left unelaborated here and will be discussed in more detail in the Recommendations section of this report.

3.1 THE STRUCTURE OF THE PROBATION SYSTEM UNDER THE 1960 ORDINANCE AND THE 1961 RULES

The 1960 Ordinance together with its Rules establishes a Probation Department which is headed by an Officer-in-Charge (OiC) who is the Director of the Reclamation and Probation Department.[79] The OiC is responsible for the 'overall control, supervision and direction of probation work in the Province'.[80] Rule 4(1) mandates that the OiC shall be assisted in the discharge of his duties by Assistant Directors (AD). Rule 4(2) states that the AD shall be in charge of a probation area. The term probation area has only been defined as 'the area in the charge of an Assistant Director'.[81] It is conceivable that this has not be defined more clearly so as to allow the probation area to be determined and modified by the OiC when required and as per the officially sanctioned posts of Assistant Directors available.

Under Rule 4(3) the AD, subject to any general or special orders of the OiC, shall:

(a) Supervise, inspect and exercise general control over the work of the Probation Officers under him;

(b) be responsible for the organization of the Probation Work in the area under his charge; and

[79] Rule 3 West Pakistan Probation of Offenders Rules 1961
[80] *Ibid*
[81] Rule 2(f) West Pakistan Probation of Offenders Rules 1961

(c) advise the case committee for the area under his charge upon matters relating to probation work.

It is evident that the AD has been assigned a critical role in terms of the supervision and control of probation officers operating in his probation area. His powers of inspection and the responsibility assigned to him for all the Probation Work done in his probation area give him a role that, if utilized correctly, can significantly improve the quality of counselling to probationers and their overall rehabilitation. Furthermore, the AD would ensure more effective participation of the RPD at the trial stage of offenders and, importantly, in case committees.

Below the post of AD function Chief Probation Officers to be selected by the OiC. They are envisaged by the Rules to function at the district level, however, the area under their charge may be altered by the OiC. Under Rule 5(3) Chief Probation Officer shall:

(a) be responsible for the organization and supervision of the probation work in the are under his charge, and the distribution of such work among the Probation Officers under him;
(b) guide and advise the Probation Officers under him in the performance of their duties; and
(c) perform such duties of a Probation Officer as may be assigned to him by the Officer-in-Charge of the Assistant Director to whom he is subordinate.

In short the Chief Probation Officer remains a probation officer with additional duties of organization, supervision, and distribution of work. He is also tasked with guiding and advising subordinate Probation Officers. The Rules would thus seem to suggest that Chief Probation Officers would function at the district level with several probation officers under them.

Under Chief Probation Officers, Probation Officers function who may be selected by the OiC. Under Rule 7 as modified by NWFP (now KP) Government Notification No.1/7-

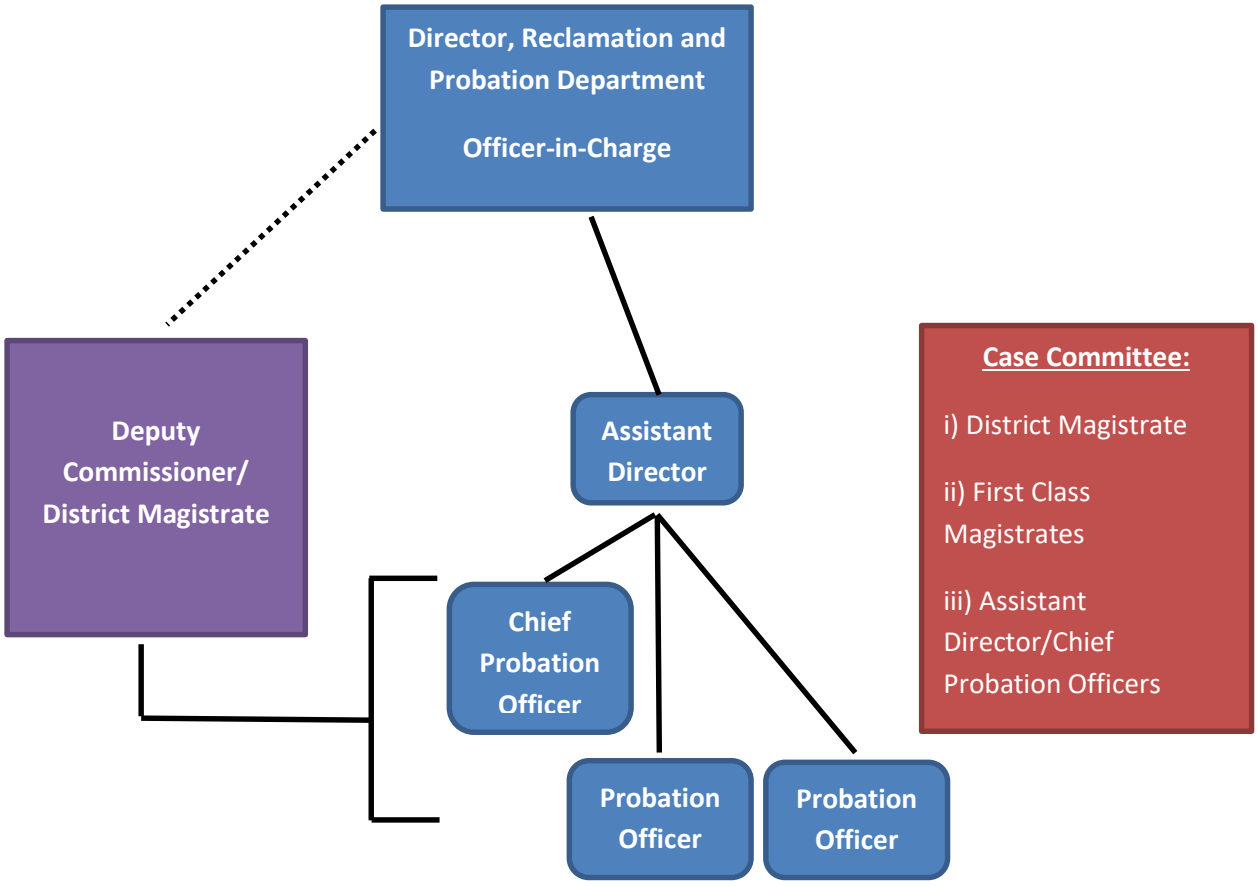
SO(PRISONS)HD/2006, the Probation Officer must be between the age of 21 years and 30, holder of at least a Second Class Master Degree in Social Work/Sociology or equivalent qualification, possesses a good character and is, in the opinion of the OiC, competent by his personality, education and training to influence for the good, and has a working knowledge or practical experience of social work. The duties of such officer are discussed below in relation to Section 13 of the Ordinance.

In addition to the Probation Departments own structure the 1961 Rules also envisages a role of oversight to be played by the Deputy Commissioner sitting as the District Magistrate. Under Rule 15 if the Probation Officer fails to perform his functions and duties, the Deputy Commission or the Court may report such failure to the OiC. Rule 15 does not mention any link to the Assistant Director or even Chief Probation Officers to report a Probation Officers failure of performing functions and duties (discussed below in greater detail).

It merits mention here that the Rules also establish a Case Committee at the District level under Rule 16 to serve an advisory and oversight function. These Committees consist of the District Magistrate, all First Class Magistrates, and the Assistant Director Probation of the District or Chief Probation Officer who are to meet at least once every three months. There is also provision for Probation Officers to be included in such meetings when cases under their charge are being considered. Rule 17 requires the Committees to function as an advisory body in respect of case work and can exercise general guidance over such work. Furthermore, Rule 17 also empowers the Committees to receive and consider written or oral reports from Probation Officers regarding probationers in the District and can review their progress. Importantly, the Committee can also make recommendations or communications to the Court which passed the Probation Order

regarding any specific probationer. The Case Committee thus plays an important oversight function and helps guide and coordinate all work relating to probation in the district.

Structure of the Probation System as envisaged by the Probation of Offenders Ordinance 1960 and the West Pakistan Probation of Offenders Rules 1961



3.1.1 Existing Structure of the Probation Department in KP

Currently, the GoKP RPD's hierarchical structure includes a Director of RPD at Basic Pay Scale 18 (BPS-18). The RPD had seven posts of Additional Directors prior to 2001.[82] These were all abolished during a governmental downsizing policy. The RPD currently has only one Deputy Director in BPS-17. While not specifically mandated under the 1961 Rules, the Deputy Director undertakes all the functions of Assistant Directors. In essence all seven ADs have been replaced by a single Deputy Director. This has created significant problems with regard to internal coordination. Furthermore, under Rule 24 in cases of breach of the conditions of probation, the Probation Officer was required to report to his immediate superior, the AD in his district or division. The AD would then bring this breach to the attention of the Court. With a single Deputy Director now in Peshawar, the officer reporting breach cases to local courts at the district level is geographical removed.[83] Legally, there does not exist a mechanism for Probation Officers to directly inform the court in cases of breach. This problem merits attention in any reform agenda. The GoKP RPD also has a single Superintendent at BPS-17, whereas this post is officially sanctioned at BPS-16.[84]

The abolition of the post of AD in KP is all the more alarming when one considers that all the other provinces still retain the post. Punjab currently has 10, Sindh six, and Balochistan four. This is troublesome especially considering KP has the second largest number of probation officers in the country.

[82] Interview with Mr Niamatullah Khan, Director RPD, (20.10.2014).
[83] Dr. Basharat Hussain, Ph.D. page 114.
[84] NWFP Notification No. 1/7-SO(PRISONS)HD/2006

At the Probation Officer level, there currently exist 28 sanctioned posts (21 male probation officers and seven female probation officers). As of September 2014, three posts of male probation officers remained vacant and one post of female probation officer was vacant.

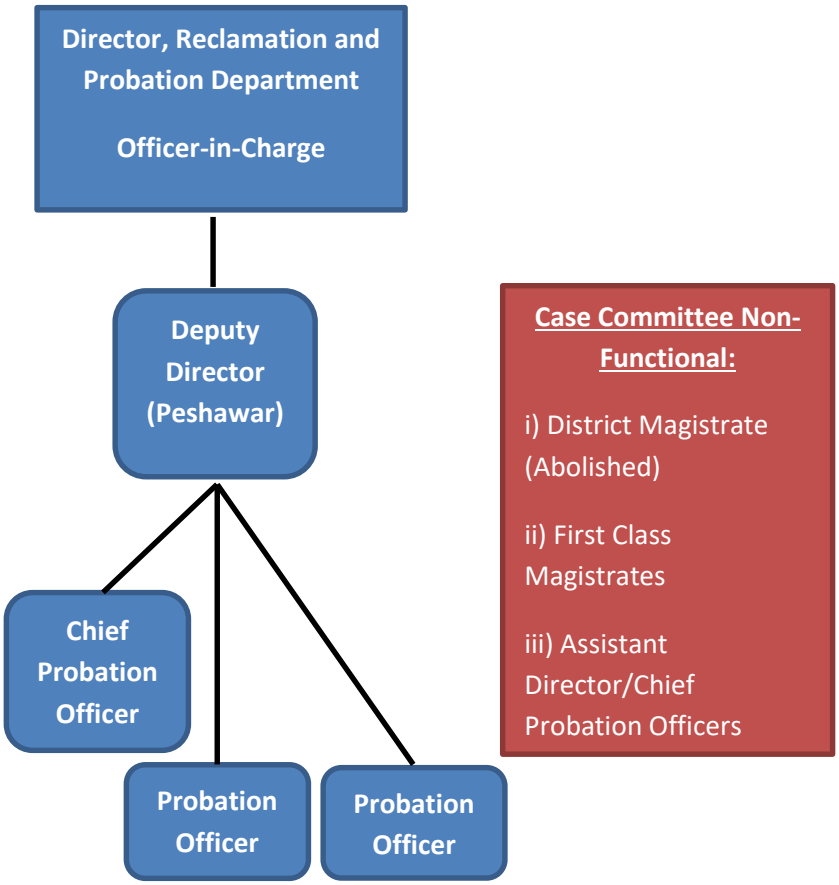
It is important to understand that in addition to abolishing the posts of Assistant Directors, the GoKP RPD is also significantly worse off than its counterparts in other provinces of Pakistan. One example is the downgrading of each post in terms of Basic Pay Scale. In Punjab, Sindh, and Balochistan the Director of the RPD is at BPS-19, where in GoKP the post is of BPS-18. Similarly, Deputy Directors in the other provinces are at BPS-18 whereas in GoKP the single Deputy Director is in BPS-17. Superintendents in each of the provinces are in BPS-17 whereas the sanction in KP is for BPS-16.[85] Only probation officers are of the same pay scale in all the provinces – BPS-16. It is thus evident that the GoKP Probation System is hamstrung at the outset, with inadequate diversion of resources and an inequitable service structure in relation to the other Provinces.

Finally, it is worthy of mentioning that the Case Committees that are established under Rules 16 and 17 are non-functional. This is primarily due to changes brought about by devolutions introduced in 2000-2001 which abolished the post of District Magistrate. Due to this change the Case Committees, whose chairperson was the District Magistrate, cannot function. The unique, executive and judicial function exercised by the Deputy Commissioner/District Magistrate made it particularly suited for dealing with both legal and administrative issues relating to Probation. With the Deputy Commissioners now serving only executive functions as District Coordination Officers, it is inadvisable to retain their role in the probation process. It would be more prudent to include the District and Sessions Judge as the Chairperson of the Case Committees. However,

[85] NWFP Notification No. 1/7-SO(PRISONS)HD/2006

this may lead to significant overlap with the District Criminal Justice Coordination Committees established under the Police Order of 2002, which are also headed by the District and Sessions Judge of the District and include among its members Probation Officers.

Existing Structure of the Probation System in KP



3.2 THE LEGAL REGIME UNDERPINNING PROBATION IN KP

The Probation of Offenders Ordinance 1960 together with its implementing Rules of 1961 form the backbone of the probation system in Pakistan. This section looks to analyze the Ordinance and its corresponding Rules to better determine where reform would best be directed. Given that the Probation system was originally derived from provisions of the Code of Criminal Procedure, we will make reference to it as well and assess any residual link that may still remain. Additionally, Sections 4 and 5 of the Ordinance make reference to offences found in the Pakistan Penal Code which also merit discussion below.

Preamble:

The Ordinance provides the briefest of preambles with the following phrasing:

> Whereas it is expedient to provide for the release on probation of offenders in certain cases and for matters incidental thereto;

Given the importance of preambulatory statements in statutory interpretation, the current formulation seems inadequate. Preambles generally assist the court in discovering the intent of the legislature or the enacting authority behind the statute. It is, thus, often employed to give a gist of the policy considerations underpinning the enactment. Any reform effort ought to utilize the preamble more effectively to give judges and practitioners better policy guidance. This could include mention of the need to prevent offenders from hardening in prison, the need to reduce the overburdening of prisons, a reduction in expenditure on the prison system, effective counselling of first-time or minor offenders, rehabilitation of offenders, and so on.

3.2.1 Section 1 - Short title, extent and commencement:

This section states the short title of the Ordinance, its extension to the whole of Pakistan and the gives guidance as to the date this Ordinance or sections thereof shall come into force.

As mentioned in previous sections of this report, the 18th Amendment to the Constitution of Pakistan has granted wide competencies to the Provinces to enact laws relating to the criminal justice sector. Given that there is significant need to upgrade the Probation regime in KP, it would be advisable to enact KP specific legislation that looks to address the many problems faced by KP's Criminal Justice System.

It is important to note at this juncture, that any province specific reform effort would de-link KP with the probation regime of other provinces which still operate under the Pakistan-wide Probation of Offenders Ordinance of 1960. While there is nothing other than a uniform governing law that links the separate provincial probation services (Directorates of Reclamation and Probation), there do exist certain merits to having a uniform system. Prime amongst these is the policy guidance that the National Judicial (Policy Making) Committee gives through its National Judicial Policy (NJP). Under the existing NJP of 2009 (revised 2012), clause 19 is focused on improving the probation and parole system of the provinces.[86] Guidance has been given in the form of recommending financial reform in line with that offered by the Punjab government. Such comparative guidelines may not be as applicable with entirely different and province specific probation regimes. Nonetheless, this limitation is no reason for abandoning a province specific approach to probation reform as the overall benefits that would accrue to KP would significantly outweigh other considerations. This is emphasized by the fact that after the

[86] National Judicial (Policy Making) Committee, (2009). *National Judicial Policy: A Year for Focus on Justice at the Grass-root Level*. Islamabad: The Secretariat, Law & Justice Commission of Pakistan, clause 19, pp.23-24, available at: http://www.supremecourt.gov.pk/njp2009/njp2009.pdf.

18th Amendment, there is little likelihood of a Federal statute being passed to reform the Probation regime in Pakistan and there is minimal chance of the provinces working together to pass uniform reforms independently.

3.2.2 Section 2: Definitions

The 1960 Ordinance's 'Definitions' section is fairly limited but this is not surprising as the Ordinance is neither lengthy nor particularly complex. As it currently stands the 'Definitions' section adequately addresses terms specific to the Ordinance or those that are assigned specific meaning in its context. However, the definitions section has not caught up to the changes that have taken place in the probation regime. Any reform of this section ought to include reference to the existing and updated functioning of the RPD and the general probation mechanism in KP. This would include using terms such as Director RPD, Superintendent RPD, Deputy Director, and so on. Furthermore, if new concepts are introduced into the probation regime such as community service, curfew orders, drug testing orders, and so forth, then these would have to be accommodated in the definitions sections as well.[87]

3.2.3 Section 3: Courts empowered under the Ordinance

Section 3 empowers a range of courts to exercise powers under the Ordinance including the High Courts, Courts of Sessions, a Magistrate of the First Class, and any other magistrate especially empowered in this regard. Prior to 2002, a District Magistrate and a Sub-Divisional Magistrate were also empowered by the Act, however, this was done away with through the Probation of Offenders (Amendment) Ordinance, 2002 (Ordinance LXVI of 2002). This was due to an overall government policy to de-link the executive from the judiciary.

[87] *cf.* the section on Failures and Recommendations below.

It is to be noted that the majority of Probation Orders are made by Judicial Magistrates of the First Class followed by Additional District and Sessions Judges or Additional Sessions Judges. Few, if any, other magistrates are empowered to grant probation throughout KP. Our research also highlights a strong trend amongst offenders handed down probation orders to not appeal the decision.[88] Thus, the High Court plays too minimal a role in the probation process. This may be one reason why there exists only minimal guidance from the High Courts on matters of probation.

Section 3 also outlines a procedure when a Magistrate not empowered by the Ordinance is of the opinion that an individual before him ought to be given a probation order. This entails the Magistrate recording his opinion and forwarding the proceedings to a Magistrate of the First Class. In such circumstances the Magistrate First Class may then pass sentence or grant probation or even order further inquiry into the matter. Given the emphasis on disposal of cases, it is unclear to what extent this procedure is adopted. Furthermore, with the lack of general awareness amongst key actors in the criminal justice process, it is likely that many junior magistrates are simply unaware of this procedure.[89]

3.2.4 Section 4: Conditional discharges, etc. –

This section of the Ordinance provides the Courts with the option of discharging convicted offenders without imposing any penalty. The conditional discharge allows for the release of the offender after admonishing or may require him to enter into a bond, with or without sureties, for committing no offence and being of good behavior for a period of one year. The option to

[88] There are very few reported judgments on probation and almost all of the probation orders reviewed indicate that no appeals were made challenging the probation order.
[89] Interviews conducted with members of the judiciary in Islamabad and Peshawar as well as prosecutors.

sentence the offender for the original offence is retained by the court in case the offender violates the terms of the bond.

3.2.4.1 Scarce Employment of Conditional Discharge

There remain significant constraints on the use of conditional discharge, primary amongst them are the narrow requirements listed in the section. These include that discharge is available only to first time offenders and that too only for offences which carry a maximum penalty of two years imprisonment.

Furthermore, the court is required to examine a number of factors before deciding on discharge which include:

a) Age of the Offender
b) Character of the Offender
c) Antecedents of the Offender
d) Physical Condition of the Offender
e) Mental Condition of the Offender
f) Nature of the Offence
g) Any extenuating circumstances attending to the commission of the offence

Interviews with members of the KP subordinate judiciary reveal that judges are generally reluctant to discharge individuals who are convicted. Where the conditions for discharge are met judges are more likely to impose a fine and occasionally may order probation. Judges had indicated that where crimes are prosecuted to this degree, they generally regard the offender as meriting some form of punishment. Two judges noted that it made more sense to them to

generate some revenue for the exchequer by imposing a fine, however small, rather than letting an individual go free without any penalty.

Despite its scarce employment, it would be ill-advised to do away with the option of a Conditional Discharge. There may indeed be circumstances where an offender may not merit any punishment despite breaking the law, where externalities to the proceedings may necessitate a conditional discharge of sentence, and doing away with the option of such conditional discharges would unduly constrain judicial discretion.

3.2.4.2 Verification of First-Time Offenders

Another issue of some concern here is the ability of criminal justice actors to verify that the offender is indeed a first time offender. In this regard, the Police are the primary body which deals with an offender's criminal record. Each Police Station maintains a register of the *First Information Reports* [FIR] filed at that station; these FIRs record the precise details of the accused, the particulars of the offence committed and often details of the victims and the harm they have suffered.

It is therefore the responsibility of the Investigation Officer and his team to ensure that, when passing information to the Prosecutor for trial, they must also include details relating to an offender's criminal record. Once this information has been conveyed, judicial offices will then be better positioned to make well informed determinations regarding the offender's past record and thus determine whether or not an order for probation is the appropriate sentence. In the absence of any such information by the concerned police officials however, judicial magistrates remain unaware about an offender's past and may grant a probation order in instances where the offender does not merit such a sentence.

Furthermore, even if a probation order has been granted and the Probation Officer, during the course of his counselling, is skeptical about the offender's prior criminal record, he may contact the relevant police official to inquire about the offender's past record. If it is determined that the offender is not a first time offender, the probation officer may then refer the case back to the judicial magistrate for a final sentencing determination. However, our research indicates that this procedure is not pursued in practice.

In 2013 the KP Police reported that they had initiated the digitization of First Information Reports (FIRs) and had placed a record of FIRs since 2009 in the database.[90] The use of this database is likely to facilitate Police-Prosecutor cooperation in this regard.

However, it should be noted that the FIR only indicates an individual's potential involvement in a crime and not his subsequent conviction. Therefore, even if information on an individual's antecedents is provided by the Police to Prosecutors (either manually or by using the new database), it is unclear how Prosecutors actually follow up and verify any subsequent conviction of the said person.

3.2.5 Section 5: Power of court to make a probation order in certain cases.—

This section sets the foundation for the probation regime in Pakistan. Section 5 empowers the courts to order probation of offenders. It creates separate regimes for male and female offenders. For females probation may be ordered for any offence that does not carry the death penalty. This

[90] Kppolice.gov.pk, (2014). *Khyber Pakhtunkhwa Police: Official Web Portal*. [online] Available at: http://kppolice.gov.pk/PoliceModernization/.

is indeed a very wide selection of offences. For males probation is not applicable where the offence carries either the death penalty or transportation for life. The Ordinance limits the application of probation to males even further by excluding certain specific offences of the Pakistan Penal Code 1860 that are deemed particularly serious or heinous, and are listed below:

All offences found in Chapter VI pertaining to Offences Against the State (Ss. 121-130)

All offences found in Chapter VII pertaining to Offences relating to the Army, Navy, or Air Force (Ss. 131-140)

216-A. Penalty for harboring robbers or dacoits

328. Exposure and abandonment of child under 12 years by parent or person having care of it

382. Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft

387. Putting person in fear of death or of grievous hurt, in order to commit extortion

388. Extortion by threat of accusation of an offence punishable with death or imprisonment for life, and so on.

389. Putting person in fear of accusation of offence, in order to commit extortion

392. Punishment for robbery

393. Attempt to commit robbery

397. Robbery or dacoity, with attempt to cause death or grievous hurt

398. Attempt to commit robbery or dacoity when armed with deadly weapon

399. Making preparation to commit dacoity

401. Punishment for belonging to gang of thieves

402. Assembling for purpose of committing dacoity

455. Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint

458. Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint

The list of offences above coupled with those that carry the death penalty or life imprisonment are certainly some of the most serious offences listed in the Penal Code. However, it is unclear on what basis these offences have been included in the list. Clearly, some would argue that more heinous or violent offences exist in the PPC that don't fall within the prohibited category of the Ordinance. This is highlighted by several reported cases before the High Court of Sindh wherein probation was granted for attempt to commit *Qatl-i-amd* (murder) and *Shajjah* (bodily injury on the face and head).[91]

3.2.5.1 Judicial Discretion in Ordering Probation:

Section 5 gives little direction to channel judicial discretion by stating that the court may grant probation "having regard to the circumstances including the nature of the offence and the character of the offender." This phrasing leaves wide discretion in the hands of judges. The only

[91] *Nizamuddin v. The State* [(2007 PLD Karachi 123) – wherein a three year probation order was given to two accused for causing hatchet injuries to the victim]; *Wazir v. The State* (2007 PLD Karachi 113); *Jashan Lal v. The State* (2007 YLR 303).

qualitatively useful terms employed are the 'nature of the offence' and the 'character of the offender'. Without greater elaboration through sentencing guidelines, the judicial discretion leads to differing, arguably arbitrary, results.[92]

Similarly, significant judicial discretion exists in the term of probation imposed. Section 5 allows for probation to be ordered between one year and three years. Recent probation orders have shown that differing probation periods have been granted for the same offence.[93] Again sentencing guidelines would certainly help ameliorate the inconsistencies which arise here.

It is important to note that one factor which often proves critical to the grant of probation is when the offender is a first time offender. While first time offending would seem an important factor supporting the grant of probation, there is no specific mention or special emphasis of these criteria in the Ordinance. Yet in practice the vast majority of probation orders given in Peshawar in 2014 are based on this reason, either entirely or partially.[94] As mentioned earlier, one major issue of concern regarding basing probation on the criteria of first time offending is whether a credible mechanism exists to verify that the offender is indeed a first time offender.

Chance offenders, who commit a crime in the heat of the moment or without premeditation, are also considered prime candidates for probation.[95] Other minor reasons for which probation orders have been granted are confessions of guilt by the offender and acceptance of responsibility[96], age (including both juveniles and significantly older offenders), disruption of

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[94] Of the case law analyzed, in around 76% of the cases, probation was awarded on the basis of the accused being a first time offender and holding no previous record as a convict.

[96] 11% of the offenders made a "clean breast admission" of the offence and this formed the basis of probation being granted by the court.

academic studies if imprisonment was awarded, and, in one particular case, probation was ordered where the offender was the sole breadwinner of the family.

Unfortunately, cases examined do not reveal an active effort by the judges to assess whether probation would be more appropriate for certain categories of offences. However, judging by the trend of probation orders granted in KP in 2014 offences relating to the possession of narcotics and unlicensed weapons seem to have been assessed as most suitable for probation by judges.[97] This may be due to KP specific sociological factors. The prevalence of weapons and narcotics, as well as social attitudes towards them may mitigate the perceived severity of the crime, even amongst members of the judiciary.

3.2.5.2 Social Investigation Report

It was seen in the preceding chapter of this Report that pre-sentencing input forms the backbone of non-custodial sentencing in many prominent foreign jurisdictions, including the UK, Australia and South Africa. Prepared by the probation service, these reports inform judicial decision-making at the sentencing stage, enabling the courts to rely on the expertise of the probation department in determining the risk the offender poses to the community and delineating the terms of the probationary sentence accordingly. This institutional emphasis on pre-sentencing input generates comprehensive criminal jurisprudence through the courts which loops back in the process, providing further clarity.

[97] Under the sampling of case law analyzed by RSIL for this report, 87% of the offenders were accused of possession of Arms while 13% were accused of having drug possession.

The Probation of Offenders Ordinance, 1960 does not mandate pre-sentencing input from the probation department. However, Rule 18(1) of the 1961 Rules provides that where a Court proposes to make a probation order:

> ***…it shall require a Probation Officer, within such period as the Court may fix, to make preliminary enquiries as regards the character, antecedents, home surroundings and other matters of like nature of the offender; and the Court may postpone the passing of the final orders in the case until the Probation Officer has submitted his report.*** (Emphasis Added)

Early in our research, we were introduced to the concept of a *Social Investigation Report* (SIR) as discussed in a variety of academic literature as well as in interviews with several stakeholders. The SIR was discussed as a mechanism where probation officers would provide the courts with information regarding the offender and his characteristics in the form of a report. A common finding was the complete lack of reliance on SIR in practice which meant that offenders in KP are being placed on probation without any professional input from the very department to which they are being referred and who are ultimately responsible for their rehabilitation.

However, it is interesting to note that a '*Social Investigation Report'* in this precise wording is nowhere to be found in the 1960 Ordinance or the 1961 Rules. Further, many probation officers when interviewed complained of the complicated and technical information which is required to be filled in an SIR. Yet, it was perplexing to find no mention of what an SIR should contain in the Ordinance or the Rules, other than the broad language of Rule 18(1) as mentioned above.

Further research revealed two notifications which augment Rule 18(1) and found the legal basis for the SIR. Under notification dated 19-2-1983, the Court may require the probation officer to prepare a report on the offender's characteristics as stipulated in Rule 18(1) of the 1961 Rules[98]. This inquiry by the Court is referred to as a *Preliminary Inquiry Order* (PIO). A sample of a PIO form is found in Annex IV of this report.

After receiving the PIO, the probation officer is required to complete a *Social Investigation Report* as required by notification dated 08 June 1988.[99] This notification also contains the format of an SIR which requires the probation officer to provide details on the personal history of the offender (mental, physical conditions, habits, interests, morals, companions and their influence, civic sense, attitude towards religion, ethical/moral code, attitudes towards wife, children, teachers and their reactions towards the offender, and so on) as well as family history and living conditions. A sample of an SIR form is found in Annex V of this report.

The details required to be filled by a probation officer seem excessively onerous for the officer to fill. Some requirements seem outright unnecessary. Additionally, in its current form the SIR only contains a section regarding the proposed treatment for the probationer. It does not contain any section allowing the Probation Officer to make a recommendation regarding the duration of probation or specific conditions that ought to be imposed on the probationer for his/her rehabilitation. The SIR should be redesigned to provide the judge with the requisite and specific information necessary to make a determination regarding the offender and his/her viability for being placed on probation.

[98] GS&PD-NWFP-609 GP&S-19-2-1983
[99] GS&PD-NWFP.1712 D.R.&P.10,000 F-8-6-88

In our assessment, the lack of an explicit legal basis for an SIR in the Ordinance or the Rules has created major confusion as to the nature and applicability of this key component. While the RPD emphasized on the language of Rule 18(1) as mandating the preparation of an SIR in every case (the Rule states that the 'Court ***shall*** require' the Probation Officer to prepare a report), judicial officers and prosecutors regarded this as a discretionary provision which could not be fulfilled in practice by the probation officer due to a lack of capacity and resources.

The lack of reliance on the SIR mechanism can also be attributed to poor coordination with other criminal justice actors as a result of which the probation officer is kept out of the loop as well as a general lack of capacity and resources of the RPD. Accordingly, it is not surprising that no SIR was filed by any probation officer during the year 2012/2013.[100] This finding is corroborated by earlier research conducted in this area.[101]

3.2.5.3 Conditions of Bond

Section 5 also mandates that probation orders may only be granted if the offender enters into a bond for an amount specified by the Court 'to commit no offence and to keep the peace' and 'be of good behavior'.[102] Again no direction has been given in the Ordinance regarding the monetary value of the bond. Furthermore, the judge may require the bond to be with or without sureties.

[100] Aitebaar, (2014). *Institutional Assessment of Correctional Services Khyber Pakhtunkhwa*.p.vi.

[101]Hussain, *supra* at 9, p.134

[102] §5(1) of the Probation of Offenders Ordinance 1960.

However, recent practice suggests that sureties are often mandated by the court.[103] Sureties are generally required to ensure the following:

a) that he will appear and receive sentence when called upon to do so during the said period;
b) that he will not commit any breach of the peace or do any act that may occasion a breach of the peace; and
c) that he will be of good behavior in all other respects during the said period.[104]

A default of these conditions by the probationer would render the sureties liable to forfeit to the Government a specified sum of money. Additionally, probation cannot be ordered unless the judge is satisfied that either the offender or at least one of his sureties has a fixed place of abode or a regular occupation within the local limits of its jurisdiction and that this place of abode or occupation is likely to continue during the period of the bond. This is reinforced by Clause C (i) of Form C of the 1961 Rules, under which the probationer undertakes not to leave the district or area specified in the probation order without the written permission of the probation officer.

There is no separate provision in the 1960 Ordinance which stipulates the various conditions which may be ordered by a Court in making a probation order. These conditions instead can be determined by reading Section 5(1) and 5(2) of the Ordinance with Forms C & D of the 1961 Rules. Form C sets out the form of the bond executed under Section 5 as required by Rule 19. Form D sets out the form of the probation order under Section 5 as required by Rule 20. Further, Rule 21(2) provides that the conditions of a probation order shall *generally be such as will tend to the moral and social progress and development of the probationer*.

[103] Recent Probation Orders and Interviews with Probation Officers
[104] Conditions listed in Form B and C of the West Pakistan Probation Rules 1961 pursuant to Rule 19.

Importantly, Section 5(2) allows the court to make additional specific stipulations in the bond regarding conditions that:

> 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.[105]

Interestingly, however, while the Ordinance makes the additional stipulations optional depending on the judge's discretion, Form C included in the Rules for all bonds entered into contains certain provisions of Section 5(2). In our interviews with Probation Officers, it was evident that Form C was rarely modified to cater to the needs of specific offenders. Below is a list of the conditions contained in Form C of the 1961 Rules on the form of the Bond:

> (B) that I shall during the said period—
>
> i. Submit myself to the supervision of the Probation Officer appointed by the court in this behalf;
> ii. keep the probation officer informed of my place of residence and means of livelihood;
> iii. live honestly and peacefully and endeavor to earn an honest livelihood;
> iv. abstain from taking intoxicants;
> v. appear and receive sentence whenever called upon to do so;

[105] §5(2) of the Probation of Offenders Ordinance 1960.

vi. be of good behavior; and

vii. carry out all such directions as may, from time to time, be given by the Probation Officer; either verbally or in writing, for the due observance of the conditions mentioned above;

(C) that I shall not during the said period—

i. leave the District of or the area specified in the probation order without the written permission of the probation officer or of any other officer appointed by the Court in this behalf;

ii. associate with bad characters or lead a dissolute life;

iii. commit any offence punishable by any law in force in West Pakistan; or

iv. Commit any breach of the peace or do any act that may occasion a breach of peace.

Of these conditions Section 5(1) only mentions the following as mandatory conditions:

a) not to commit any offence
b) to keep the peace
c) be of good behavior
d) appear and receive sentence if called upon to do so

By comparing Form C to Section 5(1) it seems the only mandatory requirements of Form C would be B iv, B v, C iii, and C iv. All the other requirements of the Form are optional and at the discretion of the Court. However, by making such requirements a part of a standard Form that is rarely modified for specific offenders, the Rules have, in practice, made non-mandatory rules mandatory. This unduly and, arguably illegally, burdens the offender with additional

requirements imposed upon him regarding his rehabilitation. This requires a revisiting of the Rules and a clarification regarding the mandatory and non-mandatory elements of the Bond.

3.2.5.4 Policy Guidance of Section 5(2)

Section 5(2) is an immensely important provision in that it makes direct reference to the rehabilitation of offenders and importantly gives very wide powers to the courts to set the terms of probation and a rehabilitation programme. It is from this sub-section that we can extract the strongest policy direction of the Ordinance. The mention of rehabilitating the offender as an 'honest, industrious, and law-abiding citizen' are very significant and should guide judges in making probation orders and approving bonds with conditions that actually aim to achieve these ends. Several clauses of Form C found in the 1961 Rules reinforce these conditions, such as the requirement to abstain from taking intoxicants (Clause B(iv)), to live honestly, peacefully and endeavor to earn an honest livelihood (Clause B(iii)) and not to associate with bad characters or lead a dissolute life (Clause C(ii)). Unfortunately, there is little in either the Ordinance or its rules that would allow probation officers to verify or ensure that these conditions are being adhered to. The existing burden on probation officers coupled with the limited resources at their disposal make it impossible to practically implement these conditions or even generally to ensure the 'moral and social progress and development' of the probationer.[106]

3.2.5.5 Community Service for Probationers

An encouraging sign is observed in a recent judgment of the High Court of Balochistan – *Ghulam Dastagir v. The State*,[107] which ordered a community sentence to be imposed on two probationers through the mechanism of Section 5(2). The actual community sentence was quite

[106] Rule 21(2) West Pakistan Probation of Offenders Rules 1961.
[107] 2014 PLD Quetta 100.

mild in that the probationers, in addition to the mandatory bond requirements of Section 5(1) also had to plant and nurture 25 tree saplings which amounted to 100 hours of community service as estimated by the Court. However, it was the reasoning behind this decision which is most useful for our purposes as it effectively laid the groundwork for the introduction of community sentences for probationers (the merits of community sentences have been discussed in subsequent sections of this report). Unfortunately, the intrepid decision of the High Court of Balochistan has not been adequately replicated in KP.

3.2.6 Section 6 – Order for payment of costs and compensation. –

Section 6 provides the courts the option to order the offender conditionally discharged under Section 4 or placed on probation under Section 5 to pay 'compensation or damages for loss or injury caused to any person by the offence and such costs of the proceedings as the court thinks reasonable.' However, such amount may not exceed the amount of fine which the court could have imposed on the offender in respect of the offence.

This section is interesting to note and shows an obvious lack of awareness of the extent of the Ordinance amongst the judiciary when judges opted to fine offenders instead of placing them on probation. The reasoning furnished by some judges was that this helped the exchequer and was a lower form of punishment then probation. There may be good reason to distinguish a fine paid to the exchequer, from compensation or damages paid to the victim. However, costs of the proceedings are not so easily distinguished from fines. Regardless, to whom the monetary sum is paid, the impact on the offender is relatively the same. What Section 6 does however, is clarify that probation and monetary penalties are not mutually exclusive. Judges ought not to think of

them in such terms and should rather aim to balance the need to compensate the victim with the aim of rehabilitating the offender.

Any compensation, damages, or costs of proceedings paid by the offender will be taken into consideration in any subsequent civil suit or proceedings relating to the same offence.[108]

3.2.7 Section 7 – Failure to observe conditions of the bond.—

Section 7 deals with the legal repercussions of default of the conditions of the bond entered into under Section 5(1) and (2). If the court before which an offender has entered into a bond relating to probation has "reason to believe that the offender has failed to observe any of the conditions of his bond, it may issue a warrant for his arrest or may, if it thinks fit, issue summons to the offender and his sureties, if any, requiring them to appear before it…"

The offender/probationer may then be either remanded to judicial custody or admitted on bail, with or without sureties, to appear on the date of hearing.[109] If the court then determines that the offender has indeed failed to observe any of the conditions of his bond, including any of the additional conditions imposed under Section 5(2), then it may either sentence him for the original offence or fine him for PKR 1000/-. Any previous compensation, damages, or costs paid will be taken into account at this time.

3.2.7.1 Procedure for Reporting Breach Cases

In practice, it is the duty of the concerned probation officer to report any default of the conditions of the bond. This process is set out in Rules 10(e) and 24 of the 1961 Rules. Rule 10(e) requires the PO to bring such breach or misconduct to the notice of the sureties whereas Rule 24 requires

[108] §6(2) of the Probation of Offenders Ordinance 1960.
[109] §7(2) of the Probation of Offenders Ordinance 1960.

the PO to inform his immediate superior. Section 7 of the Ordinance therefore only provides the procedures to be followed by the Court after it has been informed of a breach (mostly the sentencing process in such cases). However, evidence suggests that this process does not function efficiently. Breach cases appear to be lost in the system and not effectively pursued.[110] Members of the GoKP Reclamation and Probation Department were of the view that when probation officers do report breaches, the judiciary does not adequately address the matter. This, they say, denigrates their status before probationers, highlighting their lack of any real powers to deal with the probationer.[111] Furthermore, Probation Officers cannot inform the Courts directly in breach cases but instead must forward their report through their immediate superior (Rule 24). In GoKP, this is the Deputy Director, RPD who is based in Peshawar. As a result of the abolishment of the post of Assistant Directors below the Deputy Director this lack of efficiency has been further exacerbated.[112]

3.2.7.2 Detecting Breach Cases

In our interaction with RPD officials, it has been stated that breach cases are rare. However, the process for identifying such a case is more or less based on chance, the rationale being that in such a situation, the probationer would not show up for his next meeting with the Probation Officer, thereby, causing them to investigate further.[113] Measures intended to keep probationers within the district are ad-hoc and vary between probation officers, one example quoted to us included psychological deterrents whereby probationers were told that their photographs had been circulated to local police check-posts and any attempt to leave the district would result in

[110] Hussain, *supra* at 9, pp. 114, 223-224, 245-247.
[111] Khan, Naimatullah. (2014). *Interview with the Director, KPK Reclamation and Probation Department*.(November 11, 2014), Peshawar.
[112] Hussain, *supra* at 9.
[113] Shah, Afsar, (2014), *Interview with Probation Officer, Peshawar,* (October 20, 2014), Peshawar

the police arresting them. Mechanisms need to be devised that provide for increased coordination between the criminal justice actors in such instances and are not mere scare tactics that cannot be effectively enforced.

3.2.8 Section 8 – Powers of the court in appeal and revision.—

Section 8 reaffirms the general powers of an appellate court or one sitting in revision of the conviction where either condition discharge under Section 4 or probation under Section 5 has been ordered. Thus, such a court may pass any order it would be entitled to under the Pakistan Code of Criminal Procedure. Additionally, it may set aside or amend the order made either under Section 4 or 5 and instead pass an appropriate sentence authorized by law for the offence. Such court is, however, bound not to impose a penalty greater than that which the court passing the original order would be entitled to give.

3.2.9 Section 9 – Provisions of the code to apply to sureties and bond.—

Section 9 makes certain general legal provisions applicable to bonds and sureties in criminal matters also applicable to the bonds and sureties taken under this Ordinance. The specific sections of the Code of Criminal Procedure applicable in this regard relate to:

122. Power to reject sureties.

406A. Appeal from order refusing to accept or rejecting a surety.

514. Procedure on forfeiture of bond.

514A. Procedure in case of insolvency or death of surety or when bond is forfeited.

514B. Bond required from a minor.

515. Appeal from, and revision of, orders under Section 514.

3.2.10 Section 10 – Variation of conditions of probation.—

This section empowers the Court which has granted probation to subsequently alter the conditions of the bond entered in to by the offender. The court may do so of its own accord, or on the request of the probation officer, or even the probationer himself. This power extends to varying any term of the bond, including enhancing or reducing the period of probation. However, the court is bound to allow the probationer 'a reasonable opportunity of showing cause why the bond should not be varied'. Additionally, it may not reduce the period of probation to less than one year or enhance it beyond a period of three years.

The sureties of the bond are to give their consent to such variation, failing which the offender would be required to execute a fresh bond, with or without sureties.

Importantly, Section 10(2) allows the court to discharge the probation order and the bond where it is deemed that the probationer's conduct has been satisfactory and there is no further need to keep the offender on probation. Again this discharge may be instigated by the court on its own motion, upon the request of the probation officer, or on application by the probationer him/herself.

This is a useful section and should be effectively utilized to incentivize maintaining good or exemplary behavior which may lead to an early discharge from probation.

3.2.11 Section 11 – Effects of discharge and probation.—

Section 11 ameliorates the impact of a conviction when instead of a sentence, the court grants conditional discharge or probation. Section 11(1) states that a conviction leading to discharge or

probation, "shall be deemed not to be conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the provisions of this Ordinance…" This is further emphasized and clarified in Section 11(3) which precludes the invocation or imposition of any disqualification or disability which generally arises due to a criminal conviction.[114] If, however, the offender is subsequently sentenced for the original offence, this section will cease to apply and all the repercussions of a true conviction shall be attracted.

By ameliorating the consequences of a conviction, the Ordinance builds probation as an effective tool for the rehabilitation of offenders. Furthermore, Section 11 can play a significant role in improving the perception of probation as a credible reformative tool amongst other members of the criminal justice sector as well as society more generally. Therefore, there needs to be greater awareness about this provision and its potential benefits in rehabilitating and reintegrating offenders

3.2.12 Section 12 – Appointment of probation officers.—

Section 12 of this Ordinance relates to the appointment of probation officers. The provision however is vaguely worded and open-ended and must be read alongside Rules 6, 7, 8, 9 and 12 of the 1961 Rules. These regulate the appointment and prescribe the qualifications of such officers.

Rule 7 is the primary provision regulating the appointment of probation officers. The only objective criteria contained therein however, relate to the age and educational qualification of the probation officers. The remaining criteria are vague and entirely subjective, requiring probation

[114] This would thus include any disqualification for standing for public office, elections, and so forth. for a particular period of time (five years).

officers to ‘possess good character and who, in the opinion of the Officer-in-Charge is competent by his personality, education and training to influence for the good’, probationers placed under his supervision (Rule 7(c)). Rule 7(d) also require a person to have ‘working knowledge or practical experience of social work’ – once again, this criterion seems fairly open-ended.

Rule 8 requires the Provincial Government to frame appropriate rules that regulate the terms and conditions of service of Probation Officers and Chief Probation Officers, these terms and conditions of service are found in Notification 1/7-SO(PRISONS)HD/2006.

An important provision is found in Rule 9 which prohibits officers or employees of the Jail or Police Department to be appointed as Probation Officers. It would seem this rule aims to protect the rehabilitative principles underlying probation. This is achieved by keeping the probation structure and its personnel separate and distinct from the jail/prisons and police systems. There is certainly merit to this approach. Members of the jail staff or police are not necessarily trained in the social work or counselling aspects of a probation officer’s duties. Furthermore, the approaches adopted by the prison system and the police vis-a-vis crime and offenders are very different from the aims of probation. This rule is an important barrier to any contamination of the rehabilitation ideal that underpins probation.

Additionally, Rule 9 protects the service structure of the Probation Department. It allows for induction of only those personnel that are most suited for the job and recruited solely for this purpose. Given the nature of appointments and transfers at the Provincial level in Pakistan, it is important that the limited posts within the Probation sector in KP are not filled by unsuited individuals nor should the probation department be filled by political appointees or become a department where civil servants are posted to as a punishment.

Rule 12 is essentially a coordination provision which requires the Officer-in-Charge to forward to the District Magistrate, the details of every probation officer in a district and inform him immediately when any person ceases to be a probation officer. Naturally, with the end of the district magistrate system this provision would have to be amended to be in line with the Ordinance. It may be prudent to also include a requirement that all judicial officers, police personnel, and prosecutors in the district are also informed of the details of the probation officer. This is important especially in relation to the Juvenile Justice System Ordinance, where probationer officers have been assigned additional duties and are required to be informed when juveniles are arrested.[115]

3.2.13 Section 13 – Duties of a probation officer.—

Section 13 of the Ordinance relates to the duties of probation officers. Four broad duties are outlined by the sub-sections to this provision, with sub-section (e) leaving room for further duties to be specified by implementing rules to the Ordinance. These are set out primarily in Rule 10 of the 1961 Rules which elaborate on the broad duties contained in Section 13. Rules 14 and 15 further prescribe and regulate the duties of probation officers and contain accountability measures in the case of a failure to perform these duties.

3.2.13.1 Meetings, Home Visits, and Security of Officers

Section 13(a) requires the probation officer to visit or receive visits from the offender at such reasonable intervals as may be specified in the probation order or subject thereto, as the Officer-in-Charge thinks fit. Rule 10(b) elaborates on this by requiring the probation officer to meet the offender 'at least once in a fortnight in the first two months of probation and thereafter, to keep

[115] §10 Juvenile Justice System Ordinance 2000.

in close touch with the probationer, meeting him frequently, make inquiries into his conduct, mode of life and environments and whenever practicable, visit his home from time to time.'

RSIL's research indicates that probation officers in practice do keep in regular contact with probationers, meeting with them usually once a month in their offices. However, due to resource constraints, particularly relating to transport and a high case load, probationer officers do not make any visits to the probationer's home. Some probation officers stated that security concerns made them reluctant to make any visits to the homes of offenders. This is a serious concern which is not addressed in either the Ordinance or the Rules. Furthermore, no probation officer is granted any form of hazard pay which is paid to officers in the same district that belong to other departments.

An issue that came to light during our research was the utility of meetings between probationers and probation officers. Sessions observed by the research team, seemed merely like probationers simply 'checked-in' once a month. The GoKP RPD does not run a rehabilitation programme for offenders and the sessions therefore are based on general counselling and advice. However, in RSIL's interviews with probation officers, it became quickly apparent that these supervision sessions are entirely governed by the discretion and personal assessment of the probation officers of how they can advise, assist or befriend the offender in question. Earlier research supports this finding.[116] The lack of official training of probation officers raises questions on the effectiveness of this unfettered discretion.

[116] Hussain, *supra* at 9.*cf. Ghulam Dastagir v. The State*

3.2.13.2 Problems faced by Probationers

Interviews with probationers revealed a general frustration at the long waiting periods involved in their visit to the probation office, usually lasting from early morning to late afternoon.[117] Interestingly, however, almost all of the probationers were not receptive to the concept of community sentence.[118] In their experience, the requirement of occasionally visiting a probation office was preferable to a community sentence, since this only wasted one day whereas a community sentence would waste several days or months.[119]

It was felt that these probationers regarded the probation process as simply a requirement to maintain a regular attendance at the probation office. Interviews also revealed that probationers viewed these regular visits as the 'punishment' for their offence, and did not understand the rehabilitative purpose behind this exercise.[120] This was particularly true for those who had been given probation for possessing unlicensed weapons which constituted the vast majority of probationers interviewed.

3.2.13.3 Ensure the Probationer Observes the Conditions of the Bond

Section 13(b) requires the probation officer to see that the offender observes the condition of the bond executed under Section 5. This is complemented by Rule 10(a) of the Rules, which requires the probation officer to explain to the probationer the terms and conditions of the probation order and bond. Additionally this rule requires the probation officer to endeavor to ensure the terms and conditions of the probation order are observed, with warnings if necessary. Rule 10(e) also

[117] FGD with 11 probationers, conducted on November 11, 2014 at the office of the Probation Officer, Judicial Complex, Peshawar.
[118] *Ibid*
[119] *Ibid*
[120] *Ibid*

requires the probation officer to inform the sureties of the bond executed by the probationer of any breach of the conditions of the bond. As mentioned earlier there are significant problems which relate to detecting such breach cases (see above).

Given the format of probation orders and linked bonds as well as the wide powers to grant additional conditions in the probation order and bond, it is evident that the specific duties of a Probation Officer towards any single probationer can vary significantly.

3.2.13.4 Reporting on the Behavior of the Offender

Under Section 13(c) the probation officer is required to report to the Officer-in-charge regarding the behavior of the offender. The language is vague here but it is assumed this refers to progress reports of individual probationers. Here Rule 23 of the 1961 Rules also allows for Courts to direct Probation Officers to report to them regarding the 'conduct and mode of life of the probationer'. It is unclear in either the rules or the Ordinance, how progress regarding the behavior of the offender is determined. Given the lack of training or curriculum for probation officers these progress reports could vary in quality and depth significantly.

3.2.13.5 'Advise, Assist, and Befriend'

Section 13(d) underpins the model of probation adopted in Pakistan, which requires a probation officer to 'advise, assist and befriend' the offender and where necessary, endeavor to find him suitable employment. Complemented by Rule 10(c) which employs the same language as Section 13(d), and also requires him to 'strive to improve his conduct and general conditions of living'.

Dr. Basharat Hussain of the University of Peshawar has conducted extensive research on the 'advise, assist and befriend' model which used to be the model of probation adopted in 19th century Britain.[121] However, according to Dr. Hussain, in Pakistan the probation system is deluded since it is founded on a rehabilitation ideal[122] but tries to provide an 'advice, assist and befriend' service (a social work activity as opposed to a law enforcement function as is currently operative in the UK and many other countries). His research indicates that in reality even this service is not adequately provided through Pakistan probation regime. How offenders are to be 'advised, assisted or befriended' is entirely up to the discretion and personal assessment of the probation officer. This is acutely problematic when neither pre-service training is given to probation officers nor an established rehabilitation curriculum or guidelines are furnished to them. Additionally, with minimal oversight over how probation officers deal with probationers in their sessions, it is unclear how the probation regime will achieve its rehabilitative aims. Finally, a potential concern is that untrained and inadequately supervised probation officers may be counter-productive in achieving the desired goals of the institution; such officers could inadvertently negatively influence probationers under their supervision.

In addition to the duties expressly mentioned in Section 13, the Rule 10 also requires the probation officer to encourage probationers to 'make use of any recognized agency, statutory or voluntary, which might contribute towards his welfare and general well-being, and to take advantage of the social recreational and educational facilities which such agencies might provide'. This rule in effect authorizes probation officers to enter into arrangements with governmental or non-governmental organizations which may play a part in the rehabilitation of offenders. Unfortunately, without stronger guidance in the rules it is unlikely for such a provision

[121] Hussain, *supra* at 9. pg. 278.
[122] *cf.* Rule 21(2) for a reflection of this rehabilitation ideal.

to have any meaningful impact. Any attempt at reform ought to expressly authorize or mandate probation officers and the RPD in general to enter into arrangements with local NGOs and governmental entities that have the necessary resources and facilities to better allow a probationer to be rehabilitated. Additionally, corresponding governmental entities should also be obliged to grant the necessary support which could enhance the RPD's rehabilitative function.

Under Rule 10(f) the probation officer is required to maintain books and registers and submit reports prescribed elsewhere in the Rules. The specifics under this rule are further prescribed in Rule 14 which require the probation officer to (a) maintain a register of probationers kept in his office; (b) an annual diary of probationer and sureties visits, meetings, work done for the betterment of the probationer with the officer's observations on his conduct and employment; (c) a book with entries on the progress of the probationer; and (d) such other records as the Government or the Officer-in-Charge may direct.

All such records are to be maintained for a period of ten years as per Rule 14(2).

Rule 10(g) requires the probation officer to carry out instructions of the Court in regard to any probationer placed under their supervision.

3.2.13.6 Failure to perform functions

Rule 15 deals with Probation Officers who fail to perform the functions and duties imposed on them by the Rules, Ordinance, Deputy Commissioner, or the Court. Upon a report from either the Deputy Commissioner or Court authorizing probation, the Officer-in-Charge may take such action in the matter as he may deem fit and as he may be authorized.

This rule is vaguely worded and only allows the Officer-in-Charge to take action when he receives a report from the Deputy Commissioner (who was also the District Magistrate) or Court. This does not seem to authorize an Officer-in-Charge to be able to take action of his own accord. Furthermore, the role of Deputy Commissioner, who would also sit as the District Magistrate, does not seem appropriate anymore. This legal anachronism needs to be addressed. It would seem the most appropriate reform would be to replace the position of the District Magistrate with the District and Sessions Judge to allow for greater oversight of the probation officer.

Unfortunately, the overall mechanism provided by Rule 15 lacks an effective system for the RPD to oversee and supervise its various probation officers.

3.2.14 Section 14 – Power to make rules.—

Section 14 grants the Provincial Government to make rules to operationalize and carrying into effect the provisions of the Ordinance, through notification in the official Gazette. Such subordinate legislation may particularly focus on:

(a) regulating the appointment, resignation and removal of probation officers and prescribing the qualification of such officers;

(b) prescribing and regulating the duties of probation officers; and

(c) regulating the remuneration payable to probation officers.[123]

[123] §14(2) of the Probation of Offenders Ordinance 1960.

3.2.15 Section 15 [Omitted by Amendment Ordinance of 1964]. —

This section originally delegated powers to the Provincial Government concerning the Ordinance; however, once rule making powers were specifically granted to the Provinces, this section was deemed redundant.

3.2.16 Section 16 – Repeal of sections 360 and 562-564 of the Code.—

This section repeals the residual provisions found in the Code of Criminal Procedure that dealt with probation.

3.2.17 Section 17 – Provisions of this Ordinance to be in addition to and not in derogation of certain laws.—

Section 17 merely makes the Ordinance complementary to and not in derogation of the following legislation:

i. Reformatory Schools Act 1897
ii. Bengal Children Act 1922
iii. Punjab Borstal Act 1926
iv. Bengal Borstal Schools Act 1928
v. Punjab Children Act 1983
vi. Punjab Youthful Offenders Act 1983
vii. Sindh Children Act 1955

These laws are significantly dated and those enacted more recently have no bearing on KP. Any reform ought to include more recent legislation that does indeed impact the functioning of

probation in KP. These would include the Juvenile Justice System Ordinance 2000 and the Khyber Pakhtunkhwa Child Protection and Welfare Act of 2010.

3.3 JUVENILE JUSTICE SYSTEM ORDINANCE 2000

The Juvenile Justice System Ordinance 2000 (JJSO) was introduced to better the conditions and treatment of persons under the age of 18 at various stages of the criminal justice process. In this regard probation of juveniles was given great importance and the JJSO breathed new life into the Provincial RPDs. Section 11 of the Ordinance deals specifically with probation of juveniles and expands the grounds generally available for probation. However, the JJSO goes further with regard to the probation officers and utilizes them to ensure the protection of juveniles at the time of their arrest and when released on bail or otherwise. We will now examine sections 9, 10, and 11 as they relate directly to probation for juveniles and enhance the duties of probation officers in relation to juveniles.

3.3.1 Section 9 – Probation Officer.—

Section 9 of the JJSO deals with the duty of a Probation Officer to submit a "report on the child's character, educational, social and moral background." The report is to be treated as confidential, however, the Court may furnish the details of the report to the child or his guardian where it deems fit. In such circumstances, the child or guardian may furnish evidence to challenge any part of the report.

The JJSO section 9 report is very much like the *Social Investigation Report/Preliminary Inquiry Order* found in rule 18(1) of the Probation of Offenders Rules 1961. It would seem the JJSO makes the submission of such a report mandatory before sentencing a juvenile for any offence. However, it seems that the Courts deal with Section 9 of the JJSO as they have dealt with Rule 18(1) of the Probation of Offenders Rules 1961 where, despite clear language mandating a report on the background of the offender, no such reports are demanded in reality. In a recent case before the KP High Court in *Naseebullah v. The State*[124] at para 10 the court noted that factors to be taken into account when convicting and sentencing a juvenile were "age, type and seriousness of the offence and past record of criminal activities of the convict, at the time of conviction,". This shows a clear lack of knowledge or appreciation of a *Social Investigation Report*. It seems no report here was even filed. The Judge makes no mention of the juvenile's character, educational, social or moral background as mentioned in section 9. All factors which should play a role in the sentencing of juveniles given the general tenor of the JJSO.

3.3.2 Section 10 – Arrest and bail.—

Section 10 of the JJSO relates to Arrest and bail of juveniles. Sec. 10(1) (a) and (b) mandate that as soon as may be the officer in-charge of a police station shall inform the guardian and the concerned Probation Officer. The Probation Officer will be informed to "enable him to obtain such information about the child or other material circumstance which may be of assistance to the juvenile court for making inquiry." This section is thus complementary to section 9 and as such further enforces the mandatory nature of a *Social Investigation Report/Preliminary Inquiry*

[124] PLD 2014 Peshawar 69.

Order. However, in discussion with Probation Officers[125] it was discovered that Police officials were either completely unaware of these provisions or did not act on them when arresting juveniles. Certain probation officers had taken it upon themselves to give officer's in-charge of police stations their contact information and apprise them of the provisions of the JJSO. This was not, however, officially mandated by the RPD and was certainly not uniformly practiced by all Probation Officers.[126]

Sec. 10(3) relates to the release of the juvenile on bail. For bailable offences the juvenile is to be either granted bail under section 496 of the Code of Criminal Procedure or otherwise under the JJSO, unless it "appears that there are reasonable ground for believing that the release of the child shall bring him into association with any criminal or expose the child to any danger, in which case, the child shall be placed under the custody of a Probation Officer or a suitable person or institution dealing with the welfare of the children if parent or guardian of the child is not present…" This provision significantly enhances the duties of probation officers and imposes a very serious responsibility on their shoulders – maintaining custody of a vulnerable child. As yet no Borstal Institutions have been established in KP, nor would they be appropriate places to house such juveniles pending trial. Furthermore, it is unclear what facilities Probation Officers would utilize to house such juveniles when they are required by the court to maintain custody of vulnerable juveniles. In such circumstances, Probation Officers would do well to involve the Social Welfare Department as well as NGO's providing safe accommodation for juveniles. However, no evidence has come to light whereby such steps are currently being employed.

[125] *Supra n.15*
[126] Ibid.

Numerous other considerations need to be evaluated here as well. There are significant question marks regarding the capacity of Probation Officers to deal with juveniles effectively. Matters of treatment and counselling as discussed above would be greatly magnified when dealing with vulnerable juveniles. Secondly, given how overburdened Probation Officers already are in KP, could they possibly apportion the necessary time and effort needed to deal with juveniles? Currently, this would seem highly improbable especially when a single Probation Officer is sometimes charged with upto three districts of the province. Without increasing the number of probation officers it would seem impossible to deal with cases of juveniles placed under the custody of Probation Officers as mandated by Sec. 10(3) of the JJSO. Interestingly, section 2(g) when defining a 'Probation Officer' states "Probation Officer" means a person appointed under the Probation of Offenders Ordinance 1960 (XLV of 1960), ***or such person as the Provincial Government may appoint to perform the functions of Probation Officer under this Ordinance."*** [Emphasis added}. This certainly seems to open the possibility of specific juvenile Probation Officers being appointed to deal with the duties assigned to Probation Officers under the Ordinance. However, as of yet no such Probation Officers have been appointed in this regard.

3.3.3 <u>Section 11 – Release on probation.—</u>

Section 11 of the JJSO specifically deals with the 'Release on probation' of juveniles. Section 11 empowers a juvenile court to release juveniles on probation in relation to any offence. Thus, the strictures of the Probation of Offenders Ordinance 1960 in relation to what offences are eligible for probation do not apply to juveniles. The court, "if it thinks fit may direct the child offender to be released on probation for good conduct and place such child under the care of guardian or any suitable person executing a bond with or without surety as the Court may require, for the good

behavior and well-being of the child for any period not exceeding the period of imprisonment awarded to such child…" This language also frees the juvenile Court from the mandatory upper and lower time periods that may be awarded for probation that are imposed by the Probation of Offenders Ordinance 1960 (minimum period of probation is one year up-to a maximum of three years). Section 11 (c) also permits the court to reduce the period of probation where it is satisfied that further probation shall be unnecessary.

As of September 2014 in KP there were 77 male juveniles and four female juveniles on probation.

CHAPTER FOUR

AREAS FOR REFORM & RECOMMENDATIONS

This chapter flows from the previous one and highlights specific areas identified for reform. Furthermore, recommendations are made after each thematic area identified. These recommendations stem from RSIL's analysis of various international standards and foreign jurisdictions indigenized for KP's unique context. Many of the recommendations are based on consultations made with various stakeholders, especially, officers of the GoKP RPD. Further still, numerous areas have been highlighted which have not been previously identified as problems but which nonetheless, if reformed, could potentially significantly improve the working of the probation system in the province.

RSIL is firmly of the view that the most effective reform of the KP Probation regime would be achieved through the enactment of a new Probation and Community Service Act for the Province. This would have to be complemented by new Rules which operationalize the Act. Therefore, the majority of our recommendations are proposed through these vehicles. However, we do not limit our recommendations to only these vehicles of reform; rather we look to the entire array of options available to the Provincial Legislature, GoKP and even the KP Judiciary.

In this regard we make certain recommendations that would best be implemented through Notifications issued by the Home Department. Furthermore, in matters relating to the functions and duties of judicial officers our recommendations would be best implemented through the issuance of guidelines by the High Court of KP, these would include Sentencing Guidelines to Judicial Magistrates of the First Class and Sessions Judges. The specific vehicle for reform is

noted at the end of each recommendation in square parentheses, for example, [Act], [Rules], [Notification], and so on.

4.1 LACK OF POLICY AND CLARITY OF PURPOSE

There is an overwhelming need for the probation regime in KP to be made an integral part of an overall criminal justice policy in the Province. Probationers represent approximately a 40% reduction of convicts being sent to prison[127], it is, therefore, imperative that their rehabilitation and reintegration into society be part of a province-wide policy for criminal justice reform. This would allow for a coordinated response by all criminal justice stakeholders to be formulated to address the numerous problems faced by the probation regime in KP. Furthermore, specific policy guidance is lacking within the GoKP RPD. This needs to be addressed by developing a comprehensive Departmental Policy outlining the aims and purpose of the department towards probation.

RECOMMENDATIONS:

i. Probation may be made part of a province-wide criminal justice policy. [Home Department]

ii. A comprehensive departmental probation policy be developed with input from all relevant stakeholders. [RPD Internal]

[127] Statistics received from RPD KP for September 2014 showed that the total number of probationers in KP was 1892 (1773-Adult Male, 77-Juvenile Male, 38-Adult Female, four Juvenile Female). Prison statistics received from the IG Prisons, KP for the same month reveal that 2878 convicted prisoners were in KP jails (These statistics do not include under-trial prisoners, addicts or those that in prison for civil or other categories which amount to 5992 prisoners).

iii. The preamble to the 1960 Ordinance or any new Act on Probation should incorporate significant policy guidance from the legislature to assist judges in interpreting and applying the legislation. [Act]

iv. A section be inserted in the Ordinance or reforming Act which outlines specifically the aims and objectives of the Probation Wing of the GoKP RPD. [Act]

4.2 DEFECTS/OMISSIONS IN THE LAW

Section IV of this report has exposed significant areas of the Probation of Offenders Ordinance of 1960 and its Rules of 1961 that require modernization and upgrade. In this regard we mention here some of the areas that our research has found entirely omitted by the Probation of Offenders Ordinance and its Rules.

4.2.1 Conditional Discharge in the Probation of Offenders Ordinance:

Conditional Discharge is currently available to first-time offenders but only for offences that carry a penalty of imprisonment for not more than two years. In our interaction with the RPD, it was revealed that in inter-departmental consultations over the reform of the Probation of Offenders Ordinance 1960, the RPD had proposed increasing the eligibility of offenders for conditional discharge to anyone who had been convicted of a crime which carried a penalty of not more than three years imprisonment. RSIL has no reservation regarding this proposal as long as the remaining provisions regarding conditional discharge remain intact. However, given the existing limited use of conditional discharge it is unlikely that this will bring any significant change in judicial attitudes or practice.

RECOMMENDATIONS:

i. Legislation should expand the offences eligible for conditional discharge to all offences which carry a term of imprisonment of up to 3 years. [Act]

4.2.2 Case Committees Non-functional

The West Pakistan Probation of Offenders Rules of 1961 provides a mechanism through Case Committees for enhancing the district-wide coordination amongst members of the judiciary and the probation department. Rule 19(2) established the District Magistrate as the Chairman of the Case Committee; however, with the abolishment of this post, Case Committees have also ceased to function. At the time of publishing, there have been indications that the District Coordination Officers (DCO) in KPK would have their magisterial powers revived. If this is the case, then Case Committees may be revived under the Chairmanship of the DCO. The following recommendations however, are based on the state of the law as it presently exists.

RECOMMENDATIONS:

i. The Rules must omit any reference to the District Magistrate and replace such references with the District and Sessions Judge of the concerned District. [Rules]

ii. Regular meetings of Case Committees must be held under the Chairmanship of the District and Sessions Judge. [Rules]

iii. The post of Assistance Directors in the RPD needs to be re-instituted so that the RPD can play a more important role in the Case Committees. [Act, Rules, Notification]

iv. All probation officers of the district should be members of the Case Committee, if they are not already. [Rules]

v. Minutes of all Case Committees should be forwarded to the Home Secretary, Director RPD, as well as the Chief Justice of the High Court of KP. [Rules]

4.2.3 District Criminal Justice Coordination Committees:

The Police Order of 2002 through Section 109 established Criminal Justice Coordination Committees (CJCC) at the district level which brought together a variety of criminal justice actors. The Criminal Justice Coordination Committees are composed of:

a) District and Sessions Judge (Chairperson)
b) Head of District Police
c) District Public Prosecutor
d) District Superintendent Jail
e) District Probation Officer
f) District Parole Officer
g) Head of Investigation (Secretary)

In our interviews with members of the RPD GoKP, it was repeatedly observed that Probation Officers were not accorded an equal status amongst the significantly more senior members of the Committee. This left probation related matters inadequately addressed at the CJCC meetings.

RECOMMENDATIONS:

i. Probation related matters be given a definite place on the agenda of each meeting of the CJCC. [Notification]

ii. Probation Officers be required to present their findings at each meeting with a minimum time allocation of 15 minutes. Their findings should be made part of the minutes of each CJCC. [Notification]

iii. Reinstituting the post of Assistant Directors in the RPD would allow a more senior officer to present at the CJCC. Assistant Directors of the RPD should be made members of the CJCC. There are indications that the post of probation officer will be enhanced to a BPS-17 grade position in the KPK. Assistant Directors are generally BPS-17 grade officers themselves. In order to create a cogent hierarchy therefore, the position above probation officers should be Deputy Directors in BPS-18.[128] [Notification, Rules]

4.2.4 Lack of Legal Basis for Coordination with other Governmental Organs (Social Welfare) or NGOs

There is a lack of legal basis in either the Ordinance or the Rules allowing the RPD to engage other government departments involved in activities which could assist in the rehabilitation of probationers. The GoKP Social Welfare Department is a primary example with the resources to significantly enhance the probation regime in KP. Its drug rehabilitation centers in various provinces should be available to Probation Officers to allow for probationers to undergo treatment if it is required. Also employment

[128] This recommendation is based on input provided by the Reclamation and Probation Department, KPK at a consultative workshop organized by RSIL on 18 March, 2015 in Peshawar.

opportunities and vocational training should be an option for the Probation Officers to recommend for certain specific probationers.

Similarly, the RPD should be required through the rules to actively engage non-governmental organizations that provide services which may be of benefit to probationers. Again this may prove useful in the drug rehabilitation of probationers or in providing employment or training.

RECOMMENDATIONS:

i. A general provision in the new Act which authorizes the RPD to engage in collaborative effort for the rehabilitation of probationers with other Government Departments and Non-Government Organizations. [Act]

ii. The above provision should be backed by a requirement for other Government departments to assist the RPD when requested. [Act]

iii. Specific mention of the Social Welfare Department to assist the RPD in matters of Drug Rehabilitation, finding opportunities for employment, providing vocational training, or psychological counselling. In cases of juveniles, the Social Welfare department may be ordered to provide any and all assistance requested by the RPD from including housing, care and counselling. [Rules]

iv. Procedures should be established for the request of assistance from other government departments, especially the Social Welfare Department. [Rules].

4.2.5 Need for legal basis for creating Social Welfare and RPD Coordination Committee

As has been previously noted, the Social Welfare Department in GoKP can play a significant role in the rehabilitation of offenders. Yet no formal mechanism exists to ensure coordination between the RPD and the Social Welfare Department. To bridge this gap and improve coordination between the Social Welfare Department and the RPD it would be necessary to create a coordination committee between these two departments that meets regularly to discuss areas where the two departments can cooperate on.

RECOMMENDATIONS:

i. Establishment of a Probation-Social Welfare Coordination Committee through the vehicle of new legislation. Corresponding Rules be established on the functioning of the Committee. [Act and Rules]

4.2.6 Lack of Legal Basis for Community Service Orders:

As will be discussed in greater detail below, the 1960 Ordinance is deficient in providing the judiciary a variety of non-custodial options which may be utilized to either punish or rehabilitate the offender. Following the decision in *Ghulam Dastagir v. The State*,[129] community service ought to be better utilized as a reformative solution. While the 1960 Ordinance does indeed have language broad enough to cater to such conditions being imposed on the probationer there needs to be express mention of this provision to better allow judges to opt for it. Additionally, no special provision is made for the implementation of such orders or the monitoring of probationers who undertake community service.

[129] 2014 PLD Quetta 100

RECOMMENDATIONS:

i. Specific mention of Community Service should be included in the legislation. [Act]

ii. A mechanism needs to be introduced in the Rules whereby community service can be effectively implemented and monitored by probation officers or a separate category of officers may be tasked to deal with such orders. [Rules]

4.2.7 Lack of Legal Basis for Effective Coordination, Monitoring and Oversight:

External Coordination

At present the RPD suffers from a critical lack of coordination; this coordination gap exists between itself and the other stakeholders in the KP criminal justice regime; between itself and its parent department, the Home Department; and within its own department. This is of particular concern as the probationary service touches upon all facets of the provincial criminal justice system, and as such relies upon the input of the regime's many stakeholders in order to be able to function effectively. Key actors outside the GoKP RPD in relation to the Probation regime in KP include:

a) The Provincial Judiciary
b) Prosecutors
c) Police Officials
d) Home Department Officials
e) Social Welfare Department Officials
f) Correctional Officials

g) NGOs in KP

Instituting better coordination mechanisms between these actors and the RPD/Probation Officers will be significant in improving the functioning of the KP Probation Regime.

Internal Coordination

Given the acute understaffing of the department, individual probation officers are overwhelmed with their caseloads, obliged to juggle numerous cases at once and attend to the needs of all the probationers assigned to them. Compounding this state of affairs is the fact that, under the current administrative regime, probation officers are unable to directly inform pertinent stakeholders – such as the courts or the police – when a probationer they are managing breaches the terms of his probation order. Instead, the officer is obliged, as per Rule 24 of the 1961 Rules, to report cases of probation violations to their immediate superior. In GoKP this used to be the Assistant and Deputy Directors of the RPD; however, with the posts of Assistant Directors [ADs] being abolished due to a combination of the Devolution Plan of 2000 and governmental downsizing policies, the only officer to whom such a report can be made is the Deputy Director, who is based in Peshawar. This dealt a severe blow to the coordinative capacities of the RPD as, prior to this restructuring, the ADs served as the institutional liaisons between the Department and the courts. This restructuring of the RPD also removed the tiers of middle management from the institution, making it difficult for senior officers to effectively manage junior officials.

Monitoring and Oversight

This state of affairs in the RPD also makes it incredibly difficult to monitor the performances of probation officers as well as the rehabilitative progress made by probationers under their

administration. With the abolishment of the posts of ADs, there is now very little internal monitoring and oversight of the work of Probation Officers. Furthermore, external oversight is minimal with the Home Department only nominally overseeing the work of the RPD. Concerns regarding corruption and inefficiency in the RPD abound amongst various key stakeholders, especially, the judiciary. However, our research did not involve an investigation into such allegations and therefore no data is available regarding corruption in the RPD. Nonetheless, greater oversight coupled with the introduction of technological solutions would go a long way in eradicating the negative perceptions associated with the RPD in KP.

RECOMMENDATIONS:

External Coordination

i. Effective communication methods must be instituted: to this effect the Home Department must ensure that any Provincial Criminal Justice Policy include firm guidelines on clear mechanisms and lines of communication between all stakeholders of the criminal justice system. The RPD's role in rehabilitating offenders must be effectively highlighted in such policy and its importance impressed upon all stakeholders through the Provincial Policy. (Home Department)

ii. The GoKP Home Department may notify Standard Operating Procedures (SoPs) for regular coordination meetings between the RPD and other Departments including the Police and Home Department Officials.

iii. Probation officers should also be invited to all Police *darbaars* that are held on a monthly basis by District Police Officers. This will significantly improve cooperation and coordination between the Police force and probation officers.[130]

Internal Coordination

i. If the RPD is to realize its desired institutional goals it must be adequately staffed and its staff provided the necessary training. While other elements of their training as it relates to their probationary work has been discussed in Section 4.4.1 of this Report, this training must also incorporate integral communication and human resource management principles, enabling the RPD to better manage and deploy its human capital.

ii. At present the RPD's manpower is concentrated at the higher and lower strata of its institutional hierarchy; this paucity of 'middle-management' needs to be remedied, creating an intermediary level of oversight and administration. These intermediate officials can also serve as liaisons between the RPD and the courts or law enforcement, reducing the communicative burden on the Deputy Director. These officials can also help manage the Department as a whole, providing critically-vital human resource input to the institution as a whole.

iii. A dedicated probation officer could also be assigned to every judicial magistrate and court operating within the province; this officer could serve as the liaison between the judiciary and the Department for that court's jurisdictional territory and assist the court in probationary matters.

[130] This recommendation is based on input provided by the Reclamation and Probation Department, KPK at a consultative workshop organized by RSIL on 18 March, 2015 in Peshawar.

iv. A monitoring mechanism could be instituted to oversee the performance of both the probationers currently being managed by the Department as well as the probation officers themselves. Such a system will effect greater transparency in the provincial probation regime, reducing the potential for abuse of process and instituting checks upon probation officers. It will also enable the Department to track the progress towards rehabilitation probationers make, as well as the efforts probation officers are making to effect the same; this will prove invaluable in evaluating the current rehabilitative practices currently employed as well as the performance of probation officers themselves.

Monitoring and Oversight:

i. The Home Department may establish a monitoring and oversight cell for probation cases to provide oversight of the various RPD officials and, importantly, Probation Officers. The cell should conduct regular field visits to the Offices of Probation Officers and keep in touch with probationers regarding their progress. The Cell should be required to report every three months on the progress and working of the RPD to the Home Secretary. (Home Department)

ii. Fingerprint biometric identification systems should be installed in all Offices of Probation Officers to effectively monitor the presence of probationers at scheduled meetings with their respective Probation Officers. Probationers would be required to sign in through the fingerprint identification system before and after every meeting. This would both ensure a mechanism to securely verify attendance of probationers at meetings as well as help establish database of probationers. The verification of

attendance would go a long way in allaying concerns about Probation Officers accepting bribes for allowing probationers not to have to attend scheduled meetings. Furthermore, a database of biometric data of probationers would be a useful tool to weed out repeat offenders and may help in the investigation of crimes by other entities such as the Police.

4.3 RECOMMENDATIONS AIMED AT THE PROBATION PROCESS AT THE TRIAL STAGE

4.3.1 Strengthening Mechanisms for the Identification of Offenders suitable for Probation

An immediate observation made upon the commencement of research under this project was the absence of robust mechanisms for identifying whether an offender was suitable to be placed on probation and his subsequent rehabilitation. In our analysis, there are two inter-related reasons for this discrepancy.

Firstly, in practice there is a complete lack of reliance on *Social Investigation Reports* [SIR], which means that offenders are being placed on probation without any professional input from the very department to which they are being referred. As discussed in the preceding section, legislative defects relating to the SIR regime in the probation law have created major confusion as to the nature and applicability of this key component.

Secondly, unfettered judicial discretion has resulted in the haphazard application of the law and, arguably, has also undermined its utility. The impact of the broad judicial discretion in this area has been analyzed in detail in the preceding chapter of this Report relating to Section 5 of the Ordinance. The absence of sentencing guidelines for the subordinate judiciary, lack of input from the probation officer at the trial stage and the poor perception of the RPD in general by the Judicial Magistrates has resulted in probation cases following their own distinctive trend in the KP. Judges have appeared to develop their own criteria for the suitability of probation, primary of which is the consideration of whether the offender is a first time offender, a requirement not explicit in the Ordinance itself. As discussed above, judging by the trend of probation orders granted in KP in 2014, offences relating to the possession of narcotics and unlicensed weapons seem to have been assessed as most suitable for probation by judges. This corresponds to earlier research in this area[131] and may be due to sociocultural factors specific to the context of KP. The prevalence of weapons and narcotics, as well as social attitudes towards them, may serve to mitigate the perceived severity of the crime, even amongst members of the judiciary. The prevalence of this social attitude, however, especially with regards to the possession of illegal weapons, makes the rehabilitation of an offender through probation a questionable choice. The cases examined do not reveal an active effort by the judges to assess whether probation would be appropriate for these categories of offences.

RECOMMENDATIONS:

i. Sentencing guidelines for the subordinate judiciary should be issued by the Chief Justice of the KP High Court under Article 202 of the Constitution regulating the basis on which

[131] According to the findings of Dr. Basharat Hussain's in his PhD thesis on the subject, 85% of cases fell within these two categories – Hussain, *supra* at 9, p.180.

probation orders are to be made. The guidelines would indicate when a probation order would be most appropriate, the range of conditions that may accompany such an order and the length of the probation based on the seriousness of the offence and the effect of aggravating and mitigating factors. Such guidelines would also require the courts to provide reasoning for its sentence in every case. [Sentencing Guidelines]

ii. Any new law on probation in KP should formalize the procedure for the SIR on the following basis:

a. Upon conviction but before a sentence is passed, the Court would be required to request the preparation of a SIR from the concerned probation officer for all first time offenders who are have not committed an offence for which the punishment is the death penalty or imprisonment life or other prohibited offences which may be included in the new law. [Act]

b. The Court may also request an SIR where in any other case where the judge considers probation an appropriate sentence. [Act]

c. Upon submission of the SIR, the Court shall be bound to consider the recommendations contained therein, but will be free to pass any sentence it deems appropriate. However, should it choose to pass an order in contravention of the recommendations of the SIR, it will be required to furnish its reasons for doing so. [Act]

iii. An SIR form should be included in any new rules on probation in KP. The SIR should adopt a two staged assessment. Firstly, the probation officer should make an assessment on whether the offender is suitable for probation. This assessment will include the age of the offender, prior convictions, nature of the crime, family/social background of the offender, education and employment background of the offender. This will also include a risk assessment component which analyses the character and psychological profile of the offender, the risk of harm he poses to himself and others and likelihood of reoffending. If in the assessment of the probation officer, a probation order is deemed appropriate for a particular offender, then under the second stage the probation officer shall provide recommendations on the duration and conditions of the probation order. [Rules]

iv. Since this mechanism will require greater coordination and cooperation between the judiciary and probation officers in particular, and the probation officers and other criminal justice actors in general, robust coordination mechanisms need to be institutionalized. Recommendations on potential coordination mechanism can be found in Section 4.2.7of this Report.

v. The introduction of this regime would necessitate specialized trainings for judicial officers on the concept and value of probation and the new procedures developed by the law. Such trainings may take place at the provincial Judicial Academies. Ideally, this should be in conjunction with trainings given to probation officers on the development and utilization of SIRs. Furthermore, probation officers should be given special training on the manner of interviewing and assessment offenders for the purpose of preparing an SIR.

4.3.2 Restructuring the Conditions of the Bond

There is currently no separate provision in the 1960 Ordinance which stipulates the various conditions which may be ordered by a Court in making a probation order. These conditions instead can be determined by reading Section 5(1) and 5(2) of the Ordinance with Forms C & D of the 1961 Rules. As discussed in Section 3.2.5.3 of the Report above, there is at present, considerable ambiguity on the operation of these conditions. This ambiguity notwithstanding however, the reality in practice is that probationers are simply expected to periodically mark their attendance with a probationer officer, be of good behavior and keep the peace. The value of such an exercise in rehabilitating the offender and preventing him from repeating the offence is doubtful and has even been questioned recently by the Chief Justice of the High Court of Balochistan in *Ghulam Dastagir v. the State.*[132]Accordingly, many of the rather expansive conditions listed in Form C of the 1961 Rules (which in practice are signed in their entirety by probationers) appear to be unworkable in light of the resource and capacity constraints of the RPD and difficult to quantify.[133]

RECOMMENDATIONS:

i. Any new law on probation in KP should contain a separate chapter dedicated to the Conditions of a Probation Order. This chapter should create a category of conditions that are mandatory and which are to be imposed in every probation order. These mandatory conditions would be elementary in nature and derive from many of the existing

[132] PLD 2014 Quetta 100. In response to a query from the Court on how the duties of the probation officer were being carried out under the 1960 Ordinance, the Additional Advocate General and Additional Prosecutor General Balochistan said that 'probationers are basically required to only periodically visit their probation officer'.

[133] For example, the requirement that probationers, live honestly and peacefully and endeavor to earn an honest livelihood, not associate with bad characters or lead a dissolute life, and so on.

conditions found in Form C & D of the 1961 Rules which require the offender to keep the peace and not commit any offence, submit to the supervision of the probation officer, reside within a specified jurisdiction and appear and receive sentence if called upon to do so during the probation period. [Act and/or Rules]

ii. Additionally, the chapter should also contain a second, broad category of *discretionary* conditions which the Courts can impose based on the nature of the case and on the recommendations of the probation officer contained in the SIR. The recommendations of the probation officer will be based on the assessment exercise carried out under the second stage of the preparation of the SIR (see Section 4.3.1 of this Report above) on the duration and conditions of the probation order. [Act and/or Rules]

iii. In formulating these conditions, emphasis should be given to their practicality and enforceability. Accordingly, subjective, vague and unenforceable conditions currently found in many clauses of Form C should be omitted.[134]

iv. The caveat relating to the practicality and enforceability of probation conditions also applies to any attempt to incorporate best practices from other jurisdictions. There is a strong temptation to incorporate unique conditions which are found in jurisdictions with advanced probation regimes. These include concepts such as curfew and restraining orders, supervision orders, action plan orders, mental health supervision orders, and so on. While many, if not all, of these concepts are appealing, their incorporation in a new

[134] In particular, Clauses B(iii), C(ii) of Form C may be omitted in view of their subjective, non-practical and vague nature. The value of Clause B(vi) relating to 'good behavior' is also questionable.

law would not be of much value given the crippling lack of resources of the RPD and the absence of sound supporting infrastructure for rehabilitation and reintegration in KP.

These reservations notwithstanding, several new concepts can be incorporated in a new statutory regime on probation in KP which have their basis in international best practices. These include:

a. Drug offenders may be required to attend the Detoxification and Rehabilitation Centres operated by the Social Welfare & Women Development Department, GoKP. This may however require an amendment in the GoKP Provincial Rules of Business, 1985 relating to the distribution of business of the Social Welfare Department. In their current form, the Rules of Business give this department the responsibility for *'eradicating social evils, welfare of beggars and destitutes, and rehabilitation and education of the socially, physically and mentally handicapped'*. This may be expanded to specifically include the rehabilitation of offenders sentenced to a probationer order when directed by the Court. The requirement of a Court direction would act as a safeguard, preventing the responsibilities of the RPD being subsumed or passed to the Department of Social Welfare.

   Such an amendment is likely to go a long way in improving the perception of probation in the eyes of the judiciary, many of whom currently regard it as an

ineffective measure that does nothing for the welfare of offenders.[135] [Amendment to Provincial Rules of Business 1985]

b. An innovative condition of the probation order can be to require the offender to undergo vocational and skills training. This practice, distinct from community sentencing, is in widespread use in several jurisdictions.[136] This could be achieved by making use of the Industrial Training Centres operated by the Social Welfare Department, GoKP but is likely to also require a change in the provincial Rules of Business as discussed above. Additionally or alternatively, such services could be provided by volunteer NGOs operating in this area. To streamline this process, a registry of qualified and approved NGOs with experience in rehabilitation could be maintained by the RPD. The probation officer can recommend the services of such NGOs in his SIR to the Court subject to the prior acquiescence of the concerned NGO. The formalization of public-private cooperation in this area has precedent in foreign jurisdictions[137] and could exponentially increase capacity in this area as well as increasing the options before the Court. [Rules and potential Amendment to the Provincial Rules of Business 1985]

c. Juvenile offenders currently pursuing academic studies may be required by the Court to maintain a certain level on attendance which could be verified by the probation officer from the school administration.

[135] Hussain, *supra* at 9, p.248.
[136] The best characterizations can be found in the Federal Northern Territory of Australia and the state of Western Australia. For juvenile offenders in particular, South Africa employs a Youth-Empowerment Scheme which provides technical and vocational training to juvenile offenders.
[137] Prominent examples include the UK and South Africa

d. For more serious offences or in instances of habitual offenders, where the Court deems it necessary, the offender may be subjected to more onerous conditions which may include visits at shorter intervals and requiring the probation officer himself to visit the offender at his home from time to time (this would require improving the RPDs logistics resources). The conditions of the bond may also restrict the probation area from the district to tehsil level and require probationers to report to the local police station at regular, short intervals (for example, every week). This however, would require the law or rules to specify the procedure for exchange of information between the police and the concerned probation officer. In our assessment, such a condition is the closest the KP probation in its current stage can come to emulating the curfew order regime imposed in countries such as the UK and Australia.

e. The new law may also make the offender's release from probation subject to the prior approval of the Court after it has received a report from the probation officer on the progress made by the offender at the end of the probation period.[138] This procedure should however, be subject to the discretion of the Court and not constitute the norm for all cases.

[138] Some of the cases relating to Peshawar analyzed for the purposes of this Report contained a direction by the Judicial Magistrates to the probation officer to submit a progress report on the offender at the end of the probation period. However, when interviewed, the concerned probation officers confessed to not complying with this requirement. The recommendation provided above goes further, by making the offender's release from probation subject to the Court's satisfaction of his progress.

f. The new law or rules should also contain a clear statement of purpose which guides the discretion of the Court when imposing these conditions. Presently, a muted statement can be found tucked away in Rule 21(2) of the 1961 Rules, which provides that the conditions of the probation order *'shall generally be such as will tend to the moral and social progress and development of the probationer'*. This constitutes vague and subjective criteria and is based on the 'advice, assist, befriend' or missionary perspective on criminal probation which is now considered obsolete internationally. Perhaps a more useful and transparent criteria would be to give the Court clear factors to consider when imposing the conditions of probation. These could include factors such as protection of the public, the reduction of re-offending, the proper punishment of offenders, ensuring offenders' awareness of the effects of his crime on the victims and the public, and the rehabilitation of offenders.[139]

4.3.3 Operationalizing Community Service Orders

The preceding sections of this Report have discussed at length the global shift from historically retributive models to more contemporary, rehabilitative approaches. The non-custodial option of community sentencing has come to occupy a central position in this paradigm shift as reflected in the international best practices analyzed in Chapter 2 of this Report.

In Pakistan, the use of community service as a condition of probation under the Probation of Offenders Ordinance, 1960 was non-existent until a recent decision of the Chief Justice of the

[139] These factors are derived by the clear statement of purpose/aims set out in Section 2 of the United Kingdom's Criminal Justice and Court Services Act 2000.

High Court of Balochistan, Qazi Faez Isa[140] in *Ghulam Dastagir vs. the State,* decided on 29 November 2013.[141]

Ghulam Dastagir vs. the State (PLD 2014 Balochistan 100)

In a seminal decision, the Chief Justice first directed the Additional Advocate General and Additional Prosecutor General of Balochistan to address the query of whether community service could be imposed as a condition of probation for offenders under the Probation of Offender Ordinance, 1960. In response, the law officers informed the Court that to 'the best of their knowledge, ***no court in Pakistan had required an offender placed under probation to render community service, however, the law does not forbid the same*** and they would have no objection if the petitioners are ordered to render community service for the duration of their probation.'[Emphasis Added]

In laying the groundwork for the use of community sentencing in probation, the honorable Chief Justice of Balochistan examined similar regimes in the UK, Australia, Germany, United States and Canada and quoted the research of leading international academics in this field. The honorable Chief Justice also traced the genesis of community service orders to the example set by the Prophet Muhammad (PBUH), after the Battle of Badr (624 AD) whereby each prisoner of war could win his freedom by teaching 10 Muslims to read and write. In the Court's opinion, 'the Prophet's example of granting offenders the option to make reparation by doing constructive work for the community may well be categorized as a community service order'.

<u>Legal Basis for Community Service Orders</u>

[140] Justice Qazi Faez Isa has subsequently been elevated to the Supreme Court of Pakistan in September, 2014.
[141] PLD 2014 Balochistan 100

In the aforementioned case, the Court sentenced the petitioners to probation for a minimum period of one year. A condition of the probation and of the bond was for the petitioners to render community service by planting 25 trees each and to take care of them for the period of probation, which in the Court's estimation amounted to approximately 100 hours of service each. The Court imposed this condition by reading Section 5(2) of the 1960 Ordinance with Rule 10(g) of the 1961 Rules. The probation officer was directed to avail the expertise of the Director Horticulture since he may not have had the knowledge of planting trees.

Reasoning of the Court in imposing a Community Service Order

Several potent arguments in favour of community sentencing in probation cases were made by the Court in its judgment. These are set out in paragraph 16 of the judgment, which provides:

> "A community service order is intended to be constructive and positive, and benefits both the offender and the community. The State is saved the expense of keeping the offender incarcerated and also helps in preventing the overcrowding of prisons. The offender's family unit is not disrupted, he may retain his employment, and if he is studying he may continue to do so. It is less damaging to self-esteem and the offender does not risk exposure to undesirable elements in jail. The offender will be making a contribution to the community and is likely to derive an increased sense of personal achievement. The offender also pays back to society for his wrongdoing and works towards developing a sense of social responsibility."

The Court also gave consideration to whether the petitioners would repeat the offence and be rehabilitated if ***'they were simply required to periodically mark their attendance before their probation officer or is there a better chance to make them law-abiding citizens if they were to***

serve the community'. [Emphasis Added] In the Court's opinion, the latter option with its 'element of reparation/pay-back' would better achieve the stated goal.

Amendment of the Probation Law

It is instructive to note that the Chief Justice of Balochistan sent a copy of the judgment to the Chief Secretary and Secretary Home, Government of Balochistan for information and to consider whether the 1960 Ordinance and its 1961 Rules needed to be amended to *'specifically provide for the making of community service orders in respect of offenders released on probation'*.

RECOMMENDATIONS:

i. In light of the observations of the High Court of Balochistan in *Ghulam Dastagir vs. the State*, there is a need to create a legal basis for community sentencing in any new law on probation. [Act]

ii. This can be done either by specifically including community service within the list of discretionary conditions which the Court may impose when passing a probation order (see recommendations ii, iii and iv in section 4.3.2 above). Alternatively, the Act can introduce the mechanism of a Community Service Order as a *standalone* concept that is distinct from a probation order. In our opinion, this latter option may be preferable for purposes of legislative clarity. It is also beneficial from a policy point of view, since it will clearly underscore a revolutionary approach to criminal justice rehabilitation in the province. [Act]

iii. The Community Service Order will be imposed on an offender convicted of an offence which is punishable by imprisonment. [Act]

iv. When a Community Service Order is imposed, the Court shall require an offender to perform unpaid work for a number of hours or working days as specified in the order. [Act]

v. Since community sentencing would be a unique and wholly untested concept in the KP context, it is important that any potential Act clearly specify the type of unpaid work that can be ordered as part of a Community Service Order. As per the High Court of Balochistan, this may include, but is not restricted to, cleaning, clearing, repairing, painting, decorating and gardening under the supervision of a probation officer. [Act]

vi. The offenders can also be attached with relevant government departments where their services could be of use, for example, by working with the Conservator of Forests, Department of Environment GoKP to help with afforestation or the Works & Services Department GoKP for help in the construction, maintenance and repairs of roads, bridges, ferries, tunnels and government buildings, and so on. This however, would require enabling mechanisms and the consent of the concerned departments. [Administrative Measures]

vii. If the offender fails to comply with the Community Service Order, the Court may issue a summons requiring him to appear in court or issue a warrant for his arrest. If it is proved that the offender has done so without reasonable excuse, the Court may revoke the order and send the offender to jail to serve out the remaining part of his sentence. [Act]

viii. A mechanism needs to be introduced in the Rules whereby community service can be effectively implemented and monitored by probation officers. Alternatively, a separate category of Community Service Officers may be tasked to deal with such orders. [Rules]

ix. The Community Service Order must be imposed with the consent of the offender. In the absence of such consent, the Court may impose a probation order instead. [Act]

x. **Community Service – Operationalization:** Community Service Orders should be implemented by assigning existing probation officers the duty to oversee and implement them. However, given the existing burden on officers, it may be prudent to appoint specific Community Service Officers (CSO) for this purpose. CSOs would be tasked with:

a. Establishing links with government departments and the private sector to find opportunities and placements for community service.
b. Provide judges with several options of community service that would be available at the time of sentencing, to allow for judges to grant informed conditions of probation or community service.
c. Ensuring that probationers or those offenders given a community service order satisfactorily fulfill the orders of the court.
d. Ensure that probationers or those offenders given a community service order, who do not satisfactorily complete their community service are reported to the sentencing court for swift punishment.

4.4 RECOMMENDATIONS AIMED AT THE PROBATION PROCESS AT THE POST-TRIAL STAGE

4.4.1 Enhancing the Capacity of the Probation Officer

The preceding chapter of this report discusses in detail the problems currently pertaining to the capacity of probation officers to perform their duties under the 1960 Ordinance and the 1961 Rules. RSIL's recommendations below attempt to address some of these concerns.

RECOMMENDATIONS:

i. As mentioned in Section 4.2 of this report, there is at present, an overwhelming need for the RPD to adopt comprehensive departmental policy which outlines the aims and purpose of the RPD towards probation. This policy should re-evaluate the usefulness of the prevailing model which is based on 'advise, assist and befriend' and potentially consider a shift towards a public protection and community safety model which puts the protection of the public first and is characterized by the use of restrictions, surveillance, monitoring and control. As discussed in the opening chapter of this report, the 'advise, assist and befriend' model originated in 19th century Britain but has now been replaced with a public protection model based on the principles of 'punish, help, change and control offenders'.[142] This shift is also apparent in many of the foreign jurisdictions studied for the purposes of this report.

ii. It is imperative to include instruction on probation related matters as part of LL.B criminal law courses. Probation laws and ancillary matters may also be part of the curriculum of related fields such as sociology, criminology, rural sociology, psychology, etc.[143]

[142] HM Inspectorate of Probation (2006) 'An Independent Review of a Serious Further Offence case: Damien Hanson & Elliot White', (online) Available at: http://www.justice.gov.uk/inspectorates/hmi-probation/docs/hansonandwhitereview-rps.pdf, Accessed 04 March 2011.

[143] This recommendation is based on input provided by the Reclamation and Probation Department, KPK at a consultative workshop organized by RSIL on 18 March, 2015 in Peshawar.

iii. Since untrained and inadequately supervised probation officers may be counter-productive to achieving the rehabilitative aims of probation, it is imperative that probation officers be provided with pre-service training which equip them with essential skills. Probation officers should be provided formal training on how to effectively communicate with offenders, assess individuals' offending behaviors and preparing reports, enabling individuals to understand and address their difficulties and manage abuse and aggressive behavior, and so on. The trainings should also educate probationers on their day-to-day administrative and procedural functions such as court procedure, how to plan, supervise and enforce probation orders and how to develop effective working relationships between various actors of the criminal justice process. [Trainings]

Such trainings should be based on an established rehabilitative curriculum involving elements of sociology, psychology, criminal justice procedure and criminology and could be provided at designated Government universities to probation officers upon selection but prior to appointment. [MoU's with Universities]

iv. In addition to pre-service training, probation officers should also be provided guidelines on the following areas:

a. **Risk Assessment:** guidelines covering the suitability of an individual for rehabilitation through probation by assessing the risk he poses to himself and the general public. The guidelines should also provide criteria for assessing the individual's likelihood of

reoffending. These guidelines will be critical when preparing the risk assessment component of the *Social Investigation Report*.

b. **Length of Probation and Additional Conditions of Probation:** As part of the proposed scheme of discretionary conditions of probation mentioned in Section 4.3.2 of this report, guidelines would have to be issued to probation officers on how to link their preliminary assessment with appropriate recommendations on the duration and conditions of probation. These recommendations would be provided to the court as part of the *Social Investigation Report*.

c. **Counselling and Rehabilitation Sessions:** The RPD should develop a curriculum on counselling and rehabilitation with clear and measurable milestones that can assess the progress made by individual probationers. This is essential to guard against the unfettered discretion currently enjoyed by probation officers on how to conduct their meetings with probationers. Guidelines on how to implement this curriculum should be provided to probation officers in order to bring a uniform approach to the RPD's efforts in the province.

v. **Home Visits by Probation Officers:** Under the existing legal framework, probation officers are authorized to make home visits where they deem it necessary. Additionally, we propose that for more serious offences or where the offender may be subjected to more onerous conditions of his probation, that the probation officer be authorized to make home visits where necessary. Such visits would also help the officer to better understand the

probationer's background and social circumstances to better mould his counselling and rehabilitation sessions to the probationer. To operationalize this, however, two critical elements are recommended:

a. Transport facility may be granted to all probation officers with adequate provision for car maintenance, fuel and driver. [Finance Department, Logistics and Administrative Measures]

b. In certain circumstances where the probation officer deems there may be concerns regarding his security on such visits, Police escort be provided. These escorts may be provided through consulting the District Police Officer and assigning pre-determined days for such visits. [DPO]

4.4.2 Strengthening Mechanisms for Breach Cases

As discussed in Chapter III of this report, a very cumbersome process exists to effectively deal with probationers who have violated the conditions of their probation. The following recommendations aim to introduce measures to effectively deal with breach cases.

RECOMMENDATIONS:

i. The regime constraining probation officers from reporting instances of probation violations needs to be amended in order to allow officials of the RPD to effectively and quickly respond to these violations. As witnessed in the probationary reforms instituted by the states of Hawaii and California in the US, the consequences of probation violations must be 'swift, certain, and proportionate'. Such a response can only be made

if reporting mechanisms are in place to identify and act upon probation violations. Such mechanisms may take the form of reinstituting the office of Assistant Directors – a post which is extant in all other provinces of the country. Alternatively, probation officers may directly be authorized to approach the court in such circumstances. [Rules]

ii. Certain aspects of the US State of Hawaii's HOPE programme can be incorporated to deal with such cases. These include:

a. An initial warning in open court where the judge impresses on the probationers the importance of compliance and the certainty of consequences for non-compliance.
b. The probation officer must immediately report breach cases which meet a certain threshold (either to the proposed Assistant Director or directly to the Court). Guidelines should be issued by the RPD on when a case should be reported as a breach case. This may include missing two scheduled meetings with a probation officer, not performing community service, and so on. Biometric finger-print machines can be used to verify attendance in this regard. [Rules, Guidelines and Logistics]
c. The courts must ensure prompt hearings upon receiving notice of a breach case.
d. A *guaranteed* sanction – typically a few days in jail for each probationer's first violation. [Act]
e. Upon subsequent violations, the period of incarceration may gradually be increased or the original sentence may be re-instated. [Act]

4.5 ADMINISTRATION AND LOGISTICS

As already outlined in previous sections the RPD suffers from severe constraints in relation to manpower and resources. These have led to overburdening and an inability to focus on the effective rehabilitation of probationers.

RECOMMENDATIONS:

i. **Establishment of a Service Structure for the RPD:** Not enough can be said about the need for a cogent service structure to be established for the RPD. The Peshawar High Court has already mandated the development and notification of the same, however, the Provincial Government has been slow to implement the High Court's orders. The Service Structure must ensure that probation officers have the chance of career progression and that an effective internal oversight setup is established. This would require layered posts with graduated responsibility and oversight powers.

ii. **Hazard Allowance:** The RPD operates through its probation officers in all districts of KP; however, due to the ongoing law and order challenges present in the Province, ensuring the security of government officials has been difficult. Further exacerbating the situation is the fact that no special allowance is given to probation officers to incentivize their working in troubled districts. Officers in other departments, especially those charged with dealing with crime and criminals are offered some form of hazard allowance. This should also be extended to Probation Officers posted in difficult districts.

iii. **Budgetary Allocations:** Budgetary allocations must be ensured for the following items:

a. Vehicles for Probation Officers
b. Fuel allocation
c. Car Maintenance
d. Driver salary
e. Telephone and Internet Facility
f. Mobile Phone Usage Allowance (many of the Probation Officer's duties relate to coordination and require the officer to be out of the office therefore such an allowance should be given to probation officers).

iv. **Reducing the Burden on Probation Officers:** Our research has revealed that the overburdening of probation officers is one of the greatest impediments to improving the probation system in KP. In this regard we propose:

a. Ensure that all vacant posts of probation officers both male and female are filled immediately.
b. Increase the number of Probation Officers across the province. Certain districts such as Peshawar, Charsadda, D.I. Khan, Kohat, would require several more probation officers. A cap on the number of probationers per probation officer should be instituted. Once the cap is crossed by a certain number, automatic recruitment of a new probation officer should be done.
c. Special Probation Officers should be appointed to deal with matters relating to juveniles as mentioned in the Juvenile Justice System Ordinance 2000. Since

there is often a level of urgency when juveniles are arrested, it is imperative that Probation Officers be given the requisite resources to respond quickly to such situations. In this regard vehicles should be provided to the probation officers.

d. Coordination mechanisms between probation officers and juveniles courts (not fully established as yet) as well as Police Station House Officers should be developed and instituted at the highest levels to promote the ends of the Juvenile Justice System Ordinance 2000.

v. **Management Information System (MIS):** The RPD could significantly improve its efficiency by introducing a MIS and establishing a database of probationers. This would help in analysis of counselling and rehabilitative techniques including community service orders and their implementation. It would also assist in information sharing and coordination with other departments, especially the Prisons Department or even within the RPD amongst its various tiers. This system may be linked with the RPD website that is currently under development.[144] Importantly, biometric fingerprint identification system, as discussed in other recommendations in this report, would also be linked to the MIS and help establish a verifiable means of ensuring probationers attend their scheduled meetings.

vi. **Support to Probation Officers:** Provisions should be made to allow for local NGOs to assist the Probation Officer in some of his duties. Such NGOs could also serve as a check on probation officers and ensure that he/her performs his duties effectively.

[144] As of December 2014, a dedicated KP RPD website is under development; however, it has not become operational as yet.

Furthermore, university students in the fields of sociology, social work, criminology and psychology could be given placements with probation officers as part of their mandatory field work requirements.

ANNEX I

LITERATURE AND KEY DOCUMENTS REVIEWED

A. ACADEMIC/ RESEARCH AND OTHER COUNTRIES PAPERS AND DOCUMENTS

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India

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Malaysia

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14. Statement Sowing District Wise Parole Work Female for the Month of October 2014.
15. Statement Showing District wise Statistics/Progress Adult Female Probationers for the Month of October 2014.
16. Statement Showing District Wise Statistics/ Juvenile Female Progress of Probationers for the Month of October 2014

ANNEX II

LIST OF PERSONS INTERVIEWED

Reclamation & Probation Department (RPD)

1. Naimatullah Khan, Director RPD.
2. Alam Zeb (Superintendent)
3. Afsar Shah Mohmand (Peshawar)
4. Ismael (Charsadda)
5. Mohammad Ikram (Mardan)
6. Riaz Ali (Mardan)
7. Ahmed Khan (Nowshera)
8. Mohammad Yousaf (Swabi)
9. Raze Mohammad (Dir)
10. Amiruddin (Swat)
11. Khursheed Khan (Haripur)
12. Farooq Ahmed (Abbottabad)
13. Iqbal Shah (Lakki Marwat)
14. Faisal Yaqub (Bannu)
15. Abdur Rashid (D.I. Khan)
16. Saqib Habib (Buner)

Others

1. Syed Akhtar Ali Shah, Secretary, Home & Tribal Affairs Department, KP
2. Usman Zaman, Deputy Secretary (Judicial), Home & Tribal Affairs Department KP
3. Raja Fazal Khaliq, Deputy Secretary (Admin), Home & Tribal Affairs Department, KP
4. Judicial Magistrate (First Class) Court I Peshawar
5. Judicial Magistrate (First Class) Court VI Peshawar
6. Anti-Terrorism Judge, (ATC-I), Peshawar
7. Accountability Court Judge, Peshawar
8. IG Prisons
9. Asmat Ullah Khan Gandapur, Director General Prosecution, Prosecution Department KP
10. Muhammad Salim, Director Legal, Prosecution Department KP
11. Javed Ali, Assistant Public Prosecutor, Peshawar
12. Dr. Basharat Hussain, Department of Sociology, University of Peshawar

ANNEX III

REVIEW OF PAKISTANI CASE LAW ON PROBATION

Reported Judgments

1. Cr.A.No.512/2008 Peshawar 19 March 2009
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13. 2007 PLD 113 Karachi 11 September 2006
14. 1985 PCRLJ 177 Peshawar 30 May 1984
15. 1985 PCRLJ 167 30 May 1984
16. 1985 PLD Quetta 272 7 September 1985
17. 1976 PLD Peshawar 26 22 December 1975
18. 1971 PCRLJ 1313 28 May 1971

KP Lower Courts Judgments

1. JMIC – II Peshawar Order …1 03-05-2014
2. Judicial Magistrate – V Peshawar Order …39 02-5-2014
3. Judicial Magistrate – V Peshawar Order ..02 02-05-2014
4. Judicial Magistrate – V Peshawar Order … 30-04-2014
5. Judicial Magistrate – V Peshawar Order … 28-04-2014
6. Judicial Magistrate – V Peshawar Order …1 28-4-2014
7. JMIC – I Peshawar Order …1 28-4-2014
8. Judicial Magistrate III Order …1 16-04-2014
9. Judicial Magistrate VII Order … 09-04-2014
10. Judicial Magistrate VII Order …23 03-04-2014
11. ASJ –I JSC Peshawar Order … 02-04-2014
12. Additional District & Session Judge State vs. Waris 01-04-2014
13. JMIC –II Peshawar Order …10 27-03-2014
14. AD & SJ –X Order … 26-03-2014
15. JMIC –II Peshawar Order … 24-03-2014
16. JMIC –II Peshawar Order … 24-03-2014
17. JMIC –II Peshawar Order… 22-03-2014
18. ASJ - IV Peshawar Order … 17-03-2014

19. JM – III Peshawar Order … 12-03-2014
20. ASJ – XIV / JSC Peshawar State vs. Said Agha … 09-12-2010
21. ASJ – XIV / JSC Peshawar State vs. Muhammad Bilal … 06-092011
22. Judicial Magistrate VIII Peshawar Order … 24-02-2014
23. JMIC –II Peshawar Order … 01 25-02-2014
24. JMIC –II Peshawar Order …05 28-01-2014
25. Additional Sessions Judge-XIV / JSC Peshawar State vs. Aurangzeb 19-02-2014.
26. JMIC – II Peshawar State vs. Naseem Gul … 13-02-2014.
27. Judicial Magistrate –III Peshawar Order …15 07-02-2014.
28. Judicial Magistrate –II Peshawar Order … 08 21-01-2014.
29. ASJ – XIV JSC Peshawar State vs. Ihsan ullah … 20-01-2014.
30. ASJ – XIV JSC Peshawar State vs. Sher Afzal … 17-01-2014.
31. Judicial Magistrate –III order … 01 08-11-2014.
32. Judicial Magistrate –V … 05-11-2014.
33. Judicial Magistrate –V … 05-11-2014.
34. Judicial Magistrate –V Order… 01 05-11-2014.
35. JMIC – IV Peshawar Order … 30-10-2014.
36. JMIC – IV Peshawar Order … 23-10-2014.
37. Additional Sessions Judge Peshawar order … 20-10-2014.
38. Judicial Magistrate –V Peshawar Order .. 13-10-2014.
39. Judicial Magistrate –V Peshawar Order …01 13-10-2014.
40. JMIC IV Peshawar Order … 11-10-2014.
41. Judicial Magistrate –VII Peshawar Order… 09-10-2014.
42. Judicial Magistrate –VII Peshawar Order…09-10-2014
43. Judicial Magistrate –V Peshawar Order 1…09-10-2014
44. Judicial Magistrate –V Peshawar Order …09-10-2014
45. JMIC IV Peshawar Order … 04-10-2014.
46. Judicial Magistrate –VII Peshawar Order … 27-09-2014.
47. Judicial Magistrate –III Peshawar Order … 01 01-10-2014.

ANNEX IV

SAMPLE OF PRELIMINARY INQUIRY ORDER

GS&PD-- NWFP—609 GP&SL-- 10,000 forms—19-2-1983--(6)

PRELIMINARY INQUIRY ORDER.

In the Court of .....

District... .....

Court Case No.....year .....19.....

Police Station.....F. I. R. No. ..... Callan No.....

Under Section.....

STATE *Versus*.....

To

.....Probation Officer/Chief Probation Officer,

.....District

.....

WHEREAS, it is expendient that a preliminary inquiry as regards the character, antecedents home surroundings and other matters of like nature should be made about the accused.....

.....

son of.....in custody/on bail.....

.....aged.....caste.....

resident of.....

Police Station.....District.....

who is being tried of the offence of .....

.....

.....

.....(State version of the case,)

Under Section.....of the.....

You are hereby directed to make a preliminary enquiry in the is case as required above and to submit your report to this Court on or before.....

or within such further time as may be allowed to you by the Court.

Dated this.....day of..... 19 .

Signature of the Judge,
or Magistrate.

No.....*dated*.....

Copy forwarded to the Superintendent, Central/District Jail.....

.....to permit the Probation Officer to interrogate the above mentioned under trial in the Jail and to afford all possible facilities to the Probation Offi...

ANNEX V

SAMPLE OF SOCIAL INVESTIGATION REPORT

SOCIAL INVESTIGATION REPORT.

Submitted to the ( ) Court by the Probation Officer/

Chief Probation Officer—District ( )

In the Court of.....

Court case No..... Reclamation and Probation Department Case No.....

Title of the case.....

Under Section.....Police Station.....District.....

Nature of Offence.

Name of the Offender.	..	..	..	Religion.
Father's name.	..	..	..	Caste.
Home district.	..	..	..	Place of birth.
Permanent address.	..	..	..	Year of birth.
Last address before arrest.	..	..	..	Age.
				Sex.

Previous Court record or prison history of the offender, if any :—

FAMILY HISTORY & LIVING CONDITIONS.

Member of Family	Name	Age	Occupation	Monthly earnings
Father.				
Step-Father.				
Mother.				
Step-Mother.				
Brother/Sister.				
Brother/Sister.				
Brother/Sister.				
Brother/Sister.				
Other near relations, if any.				
Whether pertains to any institution or agency.				
Parent's attitude towards religion, moral or ethical code and home discipline.				
Home environment.				
Social and economic status.				
Crime record of the members of family, if any.				
General health or any hereditary disease history of the family.				
Relationship between parents and their children, especially with the person under investigation.				
Other facts of importance, if any.				

Sample of Social Investigation Report

PERSONAL HISTORY OF THE OFFENDER.

Mental conditions past and present.

Physical conditions past and present.

Habits, interests, moral recreational and hobbies, etc.

Outstanding characteristics and personality traits and trends.

Companions and their influence.

Attitude towards religion, ethical or moral code and law and order.

Civic Sense.

Delinquency in childhood, if any.

Education and school reports (attitude towards school teacher class-mates and *vice versa*), if any available.

Work record (Vocational interests, jobs held, reasons fo leaving the job, attitude towards job and employers, earnings or wages).

Attitude towards wife and children and their reactions towards the Offender.

Reactions and responses of the offender about the parent's attitude towards home discipline.

Neighbourhood and neighbours report.

Other facts of importance, if any.

Sample of Social Investigation Report

Analysis of the case giving an idea as to how the delinquency or criminal behaviour developed or the circumstances under which the offence was committed.

Plan of treatment, if the offender is placed on probation.

Dated.....

Probation Officer/
Chief Probation Officer.

GS&PD. NWFP. 1712 D. R. & P. 10,000 F.—8-6-68—(7)

Sample of Social Investigation Report