

## **Probation of Civil Servants: Context and Challenges in Pakistan**

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### **Abstract**

*A probationary appointment is deemed to be a preliminary step towards the permanent appointment of a person to a particular post and in this way, the employer is enabled to judge the appointee within the scales devised for this purpose. The exacerbatory aspect of the law relating to probation of civil servants in Pakistan is that it potently armors the employer to control a new entrant into the arena of civil service and leaves little room for the probationer to galvanize his fragile position. The conclusions inferred and suggestions made don't but rather demonstrate an effort to unearth hidden aspects of the law for creating balance on both sides of the equation. With this end in view, the author relies not only on primary sources but benefits secondary sources as well.*

**Keywords:** Civil Service, Civil Servant Challenges, Pakistan

### **Introduction**

Human dignity at the workplace requires just treatment by those holding authority. At the crux of this matters is protection from arbitrary action—action that is based upon personality rather than merit, and is not predictable on any reasoned basis. When human being is treated merely as a means to an end or a thing to be employed by others, rather than as a person deserving justice, justice does indeed weep. This is especially true where a person's job is at stake. (Wheeler, Klaas & Mahony, 2004) The concept that the Corporations social organizations arranged in a hierarchy in which those at the top exercise authority over those at the bottom forces us to believe that control must be exerted over those who are employed by others. In such circumstances, both human nature and differing interests between employed and the employer give rise to a situation in which an abuse of power is not only possible, but highly likely. (Wheeler, Klaas & Mahony, 2005) In such circumstances, both human nature and differing interests between employed and the employer give rise to a situation in which an abuse of power is not only possible, but highly likely (Wheeler, Klaas & Mahony, 2005).

The idea of probation in service jurisprudence was alien when the relationship of master –servant was governed by the old-fashioned law of hire and fire. (Mst. Abida Parween v high Court of Sindh, 2007) However, it began to make inroad onto statutes as and when the concept of security in public service started gaining roots; termination or removal became a bit difficult and order of

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termination or removal from service became the subject-matter of judicial review. (Mst. Abida Parween v high Court of Sindh, 2007) If the services of an employee could not be dispensed with by way of punishment from service unless he is given an opportunity to meet the allegations, if any, against him which necessitates his removal from service, rules of natural justice postulate an enquiry in to the allegations and proof thereof. This developing master-servant relationship puts the matter on guard. In order that an incompetent or inefficient servant is not foisted upon him because the charge of incompetence or inefficiency is easy to make but difficult to prove, concept of probation was devised. To guard against errors of human judgment in selection suitable personnel for service, the new recruit was put on test for a period before he is absorbed in service or gets a right to the post. Period of probation gave a sort of *locus poententiae* to the employer to observe the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserved a right to dispense with his service without anything more during or at the end of the prescribed period which is styled as period of probation. In this context, the commentators reiterate that the level of protection enjoyed by the public sector employees is far greater than those employed in private sector and it is, perhaps, owing to this factor that the employers in public sector are unable to discharge employees who perform poorly or otherwise engage in misconduct (Cooper, 2012).

### **Constitutional Context**

Subject to the qualifications, constitutional safeguards have been guaranteed to all citizens of Pakistan regarding equality of opportunity in the affairs of appointments in the service of Pakistan. (Constitution, 1973) In order to regularize the matters of appointment, Civil Servants Act, 1973 has been enacted which enjoins that the appointment to all Pakistan service or to a civil service of the Federation or to a civil post in connection with the affairs of the Federation, including any civil post having nexus with the defense affairs, shall be made in the prescribed manner by the President of Pakistan or by any person authorized by the President in that behalf. (Civil Servant Act, 1973) Like contemporary jurisdictions, in Pakistan, the pleasure doctrine has received legislative sanction to the effect that every civil servant has to hold office during the pleasure of the President. (Civil Servant Act, 1973) It should not loose sight that the said doctrine is not subject to any law promulgated either by the federal legislature or any of the provincial legislatures rather the same has been made subject to only what the constitution expressly provides. The *raison deter* of the limitations on the operation of the said doctrine is the public policy and the same are imposed in the interest of public and public good as they foster a feeling of security of tenure in the civil servant. (Union

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of *India v Tulsiram Patel*, 1985) As a result of 18<sup>th</sup> amendment in the constitution of 1973, the affairs of the state have been bifurcated into two legislative lists, namely, Federal legislative List and Provincial Legislative List.

So, like the Federal Legislature, the Provincial Legislatures have also been given constitutional mandate to make laws with reference to the appointment, probation, promotion, confirmation and removal of the civil servants. In the Provinces of Sindh and Balochistan, the appointment with respect to the affairs of the province is to be made by the Government or by any person authorized by the Government (Civil Servants Act, 1973 and Balochistan Civil Servants Act, 1974) and every civil servant holds office during the pleasure of the Government. (Sindh civil Servants Act, 1973 and Balochistan Civil Servants Act, 1974) On the contrary, in the Provinces of Punjab (Civil Servants Act, 1974) and Khyber PakhtoonKhwa, (Khyber PakhtoonKhwa Civil Servants Act, 1974) the authority to appointments with reference to the affairs of the provinces lies with the Governor or any other person authorized. Contrary to the arrangements made in the provinces of Sindh and Balochistan, in the province of Khyber PakhtoonKhwa, a person has to hold office during the pleasure of the Governor, a condition which is completely missing in the province of the Punjab.

### **Definition**

The word probation means a trial period during which a new employee is observed on the job, to confirm whether or not he can do it satisfactorily. (*Mst. Abida Parween v High Court of Sindh*, 2007) It has also been stated to be the initial period of service during which a new, transferred, or promoted employee has to establish that incumbent is capable of performing the duties attached with the employment or position before he will attain permanent footings in such position. Similarly, the term means suspension of a final appointment to an office until a person temporarily appointed (who is called a probationer) has by his conduct termed himself to be fit to till it.

A probationer has been stated to be a person who is taken in service subject to the condition that it will attain a sure footing only if during the period that he is on probation he shows that he is a fit person to be retained in service. A person who is on probation is subject to all checks to which a permanent servant is subject. He cannot, for example, refuse to obey orders, keep his own hours of duty, or indulge in any malpractice. (*Muhammad Siddique Javed Chaudhary v Government of West Pakistan*, 1974) Therefore, for a society to be managed justly, the substantive rules of workplace behavior must be just, and there must be mechanisms in place that deliver procedural due process. (Wheeler, Klaas & Mahony, 2005)

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The probationary aspect of a civil servant has been controlled by the Civil Servant Act, 1973 by laying down: firstly, first absorption into a service or post, not being an *ad hoc* appointment would be on such probation as might be prescribed by rules; secondly, appointment of a civil servant by promotion or transfer to a service or post might also be made on probation as might be prescribed; thirdly, in case the law on the subject renders it necessary to qualify any subsequent examination, test, course training as *sine qua non* for the termination of probation period, the person appointed on probation shall not be entitled to be retained on the incumbent post unless he has passed or completed prescribed examination or training and fourthly, in case of initial appointment, satisfactory verification of character and antecedents by the appointing authority is prerequisite for termination of period. (Civil Servants Act, 1973)

Added to this inventory are the probation rules framed by the Provincial Governments, which are as follow: a person appointed to a post by initial induction has to be on probation for a couple of years, and a person appointed otherwise, if the appointing authority so directs, will be on probation for a period of one year, secondly, service on deputation to an equivalent or higher post is to count towards the period of probation; thirdly, the appointing authority may, for reasons to be recorded in writing, curtail the period or extend period of probation by a period not exceeding one year at a time; fourthly, during or on the expiry of the extended period of probation it may pass such orders as deemed necessary; fifthly, if ,after the completion of initial period of probationary period, no orders are passed by the competent authority by the day following, the period of probation is to be deemed to have been extended automatically for one year and lastly, as to the extended period, it has been held that during such period the appointment is to be deemed to be continued till further orders.

### **Kinds of Probation**

The law on the subject has contemplated two kinds of probation: original probation and extended probation. The former is deemed to be the integral part of every initial appointment and varies in duration while the later encompasses a situation in which an employer has the authority to extend the probation period at the expiry of the original period. It is the initial period of his employment during which his erstwhile status is to be converted on permanent footings. (Mst. Abida Parween v high Court of Sindh, 2007)

### **Instances of Probation**

A civil servant, in Pakistan, has to undergo the trial of probation on three occasions; at the time of initial appointment, at the time of promotion and at

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the time of transfer. It is interesting to note that in case the probationer fails in successfully completing the period of probation in initial appointment, he is to be discharged from the service, however, in case he is undergoing probation as a result of promotion or transfer and fails to complete the said period satisfactorily, first, he is to be reverted to his original post and against which he holds lien and in case of non availability of post he is to be discharged. (Civil Servants Act, 1973)

### **Factors to be considered for termination of probation period**

Albeit, the law on the subject is silent as to the factors to be considered by the employer for the termination of the probation period and it is the probationer who has to establish that he possesses the required capabilities prescribed for the said post. (Mst. Abida Parween v high Court of Sindh, 2007)

Thereafter, he would be considered to have attained the permanent footings. However, following factors have been stated to be instrumental in pulling a probationer out of the web of probation: firstly, character of the probationer and secondly, antecedents to be verified by appointing authority. However, the existing law seems to be replete with usual passivity as it omits to riddle the employer with the responsibility to provide the probationer job description in clear terms, objectives of the probationary period; ensure that the probationer is familiar with what is expected of him. Similarly, the extant law also omits to make the employer assiduous as to assess the training and development needs of the probationer; hold periodical meetings and discussions with the probationer as to his work and conduct on the workplace. Another area with needs to be addressed on priority basis is the assimilation of probationary period to training period. Albeit the existing law is not attentative to the issue, however, in case decided by the European Court of Justice, it has been held "although the probationary cannot be assimilated to a training period, it is nevertheless impetrative that the official be given the opportunity, during this period, to demonstrate his qualities. This requirement meets the requirements of proper administration and equal treatment, and the duty to have regard for the interests of officials, which reflects the balance of reciprocal rights and obligations established by the Staff regulations in the relationship between the official authority and civil servants. It means in practice that the probationary official must not only be accorded appropriate material conditions but must also be given appropriate instructions and advice in the light of the nature of the duties performed in order to enable him to the specific needs of the post which he occupies". (Trigariventurin v Translation Center, 1999)

### **Length and extension of probationary period**

Initially, a civil servant has to be under period of trial for a period of one year; but, the same is extendable. In case the employer intends to extend the period, he is supposed to be vigilant. Admittedly, extension of probation period has been stated to be the prerogative of the appointing authority, but once the period has expired, it is not lawful for the appointing authority to extend the probation period with retrospective effect. Rather, the law enjoins upon the competent authority to pass orders "by the day on which the maximum period of probation" is expired and in case of failure to do so the civil servant stands confirmed by force of law. (Tehsil Municipal Administrator v Muhammad Saleem, 2004)

Albeit, the extension of probation period depends on the whim and caprice of the employer and maximumly it cannot be extended beyond the original period, but consequent to the termination of the initial span of probation, the appointing authority is prohibited from extending it retrospectively. The existing legislation on the subject doesn't empower the employer, even in exceptional circumstances, to make an extension in the period of probation. In this context, it is, therefore, submitted that an amendment to the existing law will prove a panacea in relieving the aggrieved employee of his grievance. But in case of extension of probationary period, the courts have acknowledged the right of the employee to challenge the same and in case he omits to do so, it will be presumed that he has acceded to such extension. (Ch. Muhammad Hussain Naqshbandi v Government of Punjab, 2004) Another intriguing question which emerges in this context is the right of the employee to get an opportunity to demonstrate his abilities during probationary period. In this respect, the law in Pakistan is silent.

### **Status of Probationer**

The position of a person who has been taken on probation is that he is in service but his service is subject to the condition that he will attain a sure footing only if during the period that he is on probation he shows that he is a fit person to be retained in service. (Muhammad Siddique Javed Chaudhary v Government of West Pakistan, 1974) Thus, the status of a probationer has been equated with that of a permanent servant but only to the extent of checks devised for a permanent servant. It is owing to such status that he is not, for instance, supposed to commit indiscipline by refusing to comply with the orders, observe his own schedule of duty, or engaged in any malpractice. (Muhammad Afzal Khan v Superintendent of police, District Montgomery and others, 1961) The basic reason behind this bar is that a probationer is taken into the service subject to the final approval of the employer, and the question whether he is or is not to be employed remains to be finally decided. There is,

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therefore, an implied condition in such an employment that the employer should be satisfied with the employee after trying him, it is, in a sense, a tentative appointment. (Federation of Pakistan v Riaz Ali Khan, 1958) It is owing to such status of the employee that the law enjoins upon such employee to prove him worthy of being appointed on substantive post, and consequent upon such proof, he may be permitted to fill the permanent post substantively. (Mst. Abida Parween v high Court of Sindh, 2007)

### Termination during Service

The right of the employees to be heard has been hamstrung to a great extent and acknowledged only in cases of removal and dismissal during probation for misconduct. (Riaz Ali Khan v Pakistan, 1967) For instance, in case the services of the probationer are terminated on account of unsatisfactory work, no show cause notice would be served on him as such termination has not been termed to be dismissal or removal from service and the same is deemed to be within the ambit of contractual covenants or the rules made by the government. (Muhammad Siddique Chaudhary v Government of the West Punjab, 1974) Similarly, the phrase 'dispensing of service' during probation has also been held to be included in terms and conditions of the service and carries no stigma and the same does fall within the discretion of the employer, therefore, doesn't entail show cause notice. (Kh. Ahmad Din v Government of Azad J& K, 1977) However, there seems to be very weak possibility of challenging the action of termination of services of the employee i.e. *mala fide*, a ground which can be asserted easily but difficult to prove. (Punjab Small Industries Corporations v Ahmad Akhtar Cheema, 2002) Furthermore, the general allegation of mala fide is not sustainable in the eye of law (Muhammad Sharif v Chairman Board of Technical Education, 2002) as very strong evidence is to be adduced to establish mala fide and should be substantiated with reality. (Muhammad Saleem Malik v Chairman Agricultural Development Bank Limited Islamabad, 2009) It seems to be relevant to point out that judicial approaches in this context have not been consistent. For instance, it has been held that though words dismissal, removal or reduction in rank have not been used in technical, but what ever the scope of their meaning may be, this has never been doubted that when an action on the basis of misconduct, inefficiency and unsatisfactory service or misbehavior has been taken then definitely It is not a case of simple termination of service, but either of dismissal or removal from service. (Riaz Ali Khan V Pakistan, 1967) As the question of inquiry or issuance of show cause notice is associated with misconduct, therefore, there is likelihood that the employer will try to take, even genuine omission amounting to misconduct, out of the ambit of misconduct. In this context, it is equally relevant to dispel such apprehension. Moreover, provision of pragmatic probation plan-clearly

cataloguing the appropriate targets based on the demands of the job as will be outlined in the job description coupled with a schedule of formal and informal meetings to monitor and review progress will be equally instrumental in vindicating the rights of the employee. It is equally important to note that there is plethora of cases which demonstrate as to the extent the superior authorities decide the fate of their subordinates in a casual and cavalier fashion without the application of mind. With this background, it becomes imperative to make departure from the traditional doctrine of "termination simpliciter" and in every instance of termination of employment, proper inquiry should be held.

### **Confirmation**

Albeit, the law envisages various provisions regarding confirmation of a civil servant, but confirmation as a result of completion of probationary period of a civil servant shall be pondered upon in this segment of the paper. In this respect it has been laid down that a probationer would be eligible for confirmation on satisfactory completion of probation. (Civil Servant Act, 1973) In this context, a couple of propositions require proper elaboration: firstly, whether eligibility of a civil servant for confirmation in a service after expiry of the period of probation means his automatic confirmation and, secondly, whether a civil servant who has not been confirmed by an express order becomes permanent in his appointment merely after the lapse of period of trial. As to the first question, it is submitted that the concept of automatic confirmation is alien to the civil service in Pakistan. (Federation of Pakistan v Hashim Shah Qureshi, 1987) However, a civil servant, on the satisfactory completion of probation period, can only claim to have become eligible for confirmation and nothing more and in case the confirmation is postponed, the same is held not to be an unusual phenomenon (Muhammad Naseem Ahmad v Miss Azra Feroze Bakht, 1968) as the confirmation is not a legal right which can be enforced by the agency of the Tribunal or, indeed, any other legal agency. (Shahzada Shahpur Jan v The Auditor General Pakistan, 1984) The same, it has been held, comes within the discretion of the employer which is to be exercised subject to the availability of permanent post and after the completion of the probationary period. (Federation of Pakistan V Hashim Shah Qureshi, 1987) There is, however, only one possibility of automatic confirmation i.e. if a government servant is appointed against a clear vacancy, even on probation, after lapse of some specified period prescribed for this purpose, if not removed from service, he stands automatically confirmed. (Qaiser Masud v Secretary Law and Parliamentary Affairs, Government of Punjab, 2012)



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It is an established proposition of law that all public power has to be exercised for the purposes for which it is conferred. As the power of hiring and firing of the persons is entrusted in public interest, therefore, the same is supposed to be used in public interest and should be devoid of arbitrariness or malice. The expression public interest embraces a matter relating to people at large, nation or community as whole and if interest of general public or community is not involved in matter, it cannot be brought within the ambit of public interest. (Tehsil Nazim Tehsil Municipal administrator Okara v Abbas Ali and others, 2007) As the Tribunal or court ordinarily decline to substitute reasons for public interest and interference in the matter but such rule is subject to certain exception and in service matters, the exception is that the assessment of performance of a person to judge his suitability must not be based on personal reasons or the consideration not related to public interest. Moreover, the requirement of public interest varies from case to case, therefore, in this context; it becomes incumbent upon the competent authority to show reasonable nexus with public interest.

An offshoot of the episode is the date of confirmation. In this context, it has been held that in case some conditions are prescribed for confirmation, a civil servant remains a probationer until he has fulfilled those conditions and could not be treated as a person substantively appointed to a permanent post. (Muhammad Naseem Ahmad v Azra Feroze Bakht, 1968) Albeit, for a considerable period there has not been a rule or practice of general application with regard to confirmation of a civil servant and the confirmation has been a prerogative of the government which is to be exercised subject to availability of permanent post against which the incumbent can be confirmed, satisfactory completion of the period of probation, the passing of departmental examination and the overall policy of the government. So, there have been instances that the government, if all other conditions are fulfilled, has been confirming the employees from the date of their original appointment if permanent posts were then available, as the service abhors a vacuum. As far as the second question is concerned, it has been demonstrated that a civil servant, on probation, is not to be deemed to be confirmed on the expiry of the period of probation provided that if no clear orders of his confirmation in his substantive post or extending his period of probation are passed by the competent authority. (Abdul Ghaffar Malik v Government of Balochistan, 1995) The orders confirming the officer, terminating his appointment, or extending the period of probation may be passed even after the lapse of the his period of probation provided the decision is based on the work and conduct relating to the period of probation and the probationer acquires the status of confirmed government servant on that post only as a result of an affirmative order passed in that behalf by the competent authority.

## Conclusion

It would be appropriate to dispense with the services of a probationer after having recommendations from an inquiry officer or inquiry committee. The extant law seems to be bemused and inhibitory as it omits to cover this aspect of the civil service in Pakistan. For instance, if the probationer's work and conduct is found to be unsatisfactory he would be removed by the appointing authority after giving a notice with reasons. However, at the other end of the spectrum, if the same employee commits any wrong, immediately on the first day after his confirmation, he would be dealt with under Efficiency and Discipline Statutes. Such dichromatic flavor of the law seems to be to the disadvantage of the probationer. The terminations resorted to by the employers, in this context, seem to be whimsical, capricious and in disregard of principles of natural justice. Although the law galvanizes the employer with an unfathomable discretion in assessing the work and conduct of the civil servant and the Tribunals have always been reluctant in substituting their decision for that of the master if the same relates to the outcome of probationary period and the suitability of a probationary official for permanent appointment in civil service, however, an inclination to review to establish that there has been no apparent mistake of assessment or unbridled use of power will be equally efficacious in eroding sense of insecurity of service. As to the applicability of the said principle, it has been established that the concept of natural justice is not limited to proceeding before judicial or quasi-judicial authority but it also extends to those authorities who have been empowered by statute to decide and determine respective rights of parties<sup>1</sup>. (Prof. Dr. Syed Qasim Mehdi v Registrar University of Karachi, 2009) So much so, in case an employer himself has framed rules for its domestic purpose, he comes within the bounds of such rules and any deviation from such rules and regulations would amount to violation of the principles of natural justice<sup>2</sup>. Albeit, right of being heard has been termed as fundamental right of a person against whom an adverse order is likely to be made. So, an adverse order made prejudicial to the interest of such person without affording such person an opportunity of personal hearing has been held to be void. But the same, it is submitted, has been made subject to certain limitations<sup>3</sup>. (Nazir Ahmad Panhwar v Government of Sindh through Chief Secretary Sindh, 2009) For instance, such right wouldn't accrue to a person who has acted in blatant

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contravention of law for securing illegal benefit and gains through a direction obtained with bad intention, influence, pressure and ulterior motive<sup>4</sup>. Similarly, the existing law omits to enjoin upon the employers to chalk out probation plan—outlining the appropriate targets which are deemed to be the requirements of the slot and a schedule of formal and informal meetings to monitor and review the progress of the incumbent.

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