

EMPLOYMENT DISCRIMINATION AGAINST EX-OFFENDERS

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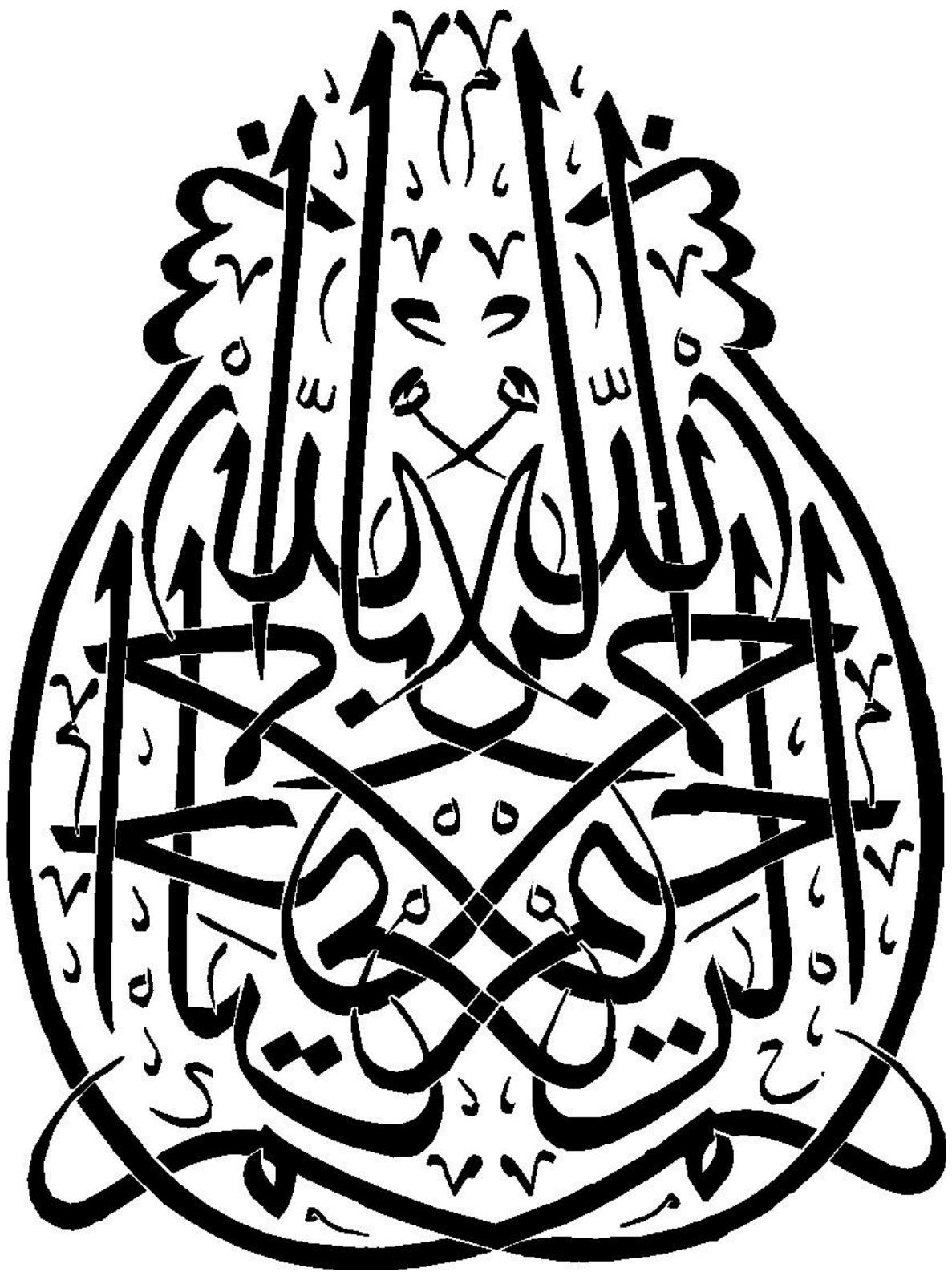
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May Almighty Allah reward them. Ameen!

## **DEDICATION**

My work is dedicated to my late Father. Who was a staunch supporter of female education and to exemplify his effort he had given me every support and courage to pursue my education.

*(My Lord, bestow on them Thy mercy, as they cherished me in [my] childhood).also include Arabic version*

## **DECLARATION**

I declare that this thesis titled “**Employment Discrimination Against Ex-Offenders**” submitted for the degree of Ph. D. (Law) to the Department of Law, International Islamic University, Islamabad. Pakistan is the product of my own and original research and none of any parts has been copied from any published source, except the references. I further declare that this research work has previously been submitted neither by me nor by any other person at any other university, institution or organization.

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## **ABBREVIATIONS**

CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CCP	Competition Commission of Pakistan
CONVENTION NO. 111	ILO Convention Concerning Discrimination In Respect Of Employment and Occupation
Cr.P.C	Criminal Procedure Code
CRC	Community Rehabilitation Companies
CSC	Correctional Service of Canada
DBS	Disclosure and Barring Services
ECHR	European Convention on Human Rights
ERI	Electronic Recyclers International
FRP	Family Re-integration Programs
FCRA	Fair Credit Reporting Act
HCRC	Hawaii Civil Rights Commission
ICC	International Cricket Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights.
ILO	International Labour Organization
ISCOS	Industrial and Service Co-operative Society Limited
JCP	Job Centre Plus

LFS	Labor Force Survey
MANDELA RULES	United Nations Standard Minimum Rules for the Treatment of Prisoners
MAPPA	Multi-Agency Public Protection Arrangements
MCSCS	Ministry of Community Safety and Correction Services
MHA	Ministry of Home Affairs
MOL & MP	Ministry of Labor and Manpower
NAB	National Accountability Bureau
NTC	National Tariff Commission
NPS	National Probation Service
CONSTITUTION	Constitution of Islamic Republic of Pakistan, 1973
PNC	Police National Computer
PPC	Pakistan Penal Code
ROA	Rehabilitation of Offenders Act, 1974
SC	Supreme Court of Pakistan
SCORE	Singapore Corporation of Rehabilitation Enterprises
SPS	Singapore Prison Service
SSTP	Social Skill Training Programs
UNDHR	Universal Declaration of Human Rights
UK	United Kingdom
US	United State of America

## **LIST OF CASES**

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- (1) Plvler vs Doe 457 U.S 202, 216(1882)
- (2) Frontiero vs Richardson, 411 U.S 677
- (3) Procunier vs Martinez 416 U.S 396, 428(1974)
- (4) Charles G. Dicola vs Food and Drug Administration No94-1689
- (5) Sate vs Fisher, 877 N.W.2d 676,682-83
- (6) M/S Dwarka Prasad vs state of U.P (AIR 1954 SC 224)
- (7) R(T) vs Chief Constable of Greater Manchester and others (2013) EWCA Civil 25
- (8) 22 U. HAW. L. REV. 709, 715 & n.36 (2000).
- (9) Fox worth vs Pa. State Police, 402 F. Supp. 2d 523, 545 n.21 (E.D. Pa. 2005)
- (10) Pokalsky vs Se. Pa. Transp. Auth., No. Civ. 02-323, 2002 WL 1998175, at \*5 (E.D. Pa. Aug. 28, 2002)
- (11) Tilson vs Sch. Dist. of Phila., Civ. A. No. 89-1923, 1990 WL 98932, at \*4 (E.D. Pa. July 13, 1990)
- (12) Bartos vs United States District court, District Nebraska C.C.A Neb 19 F, 2d 722, 724
- (13) Marbury vs Madison (1801) 1 Cr.137 (163, 176) C.C.L P408, State of Rajasthan vs Union of India A1977SC 1361.
- (14) State of Maras vs Row (1952) SCR 597(605) Vid 11 Sh. PP258ff.
- (15) Blair vs Defender Servs., Inc., 386 F.3d 623, 628–30 (4th Cir. 2004)
- (16) Kadrmas vs Dickinson Pub. Schs. 487 U.S. 450, 457–58 (1988).
- (17) Heller vs Ross, 682 F. Supp. 2d 797, 803 (E.D. Mich. 2010)
- (18) Lopez vs McMahon, 253 Cal. Rprt. 321, 325 (Ct. App. 1988)
- (19) Carlyle vs Sitterson, 438 F. Supp. 956, 963 (E.D.N.C. 1975)
- (20) M & Z Cab Corp. vs City of Chicago, 18 F. Supp. 2d 941, 951 (N.D. Ill. 1998)
- (21) Cronin vs O’Leary, No. 00-1713-F, 2001 WL 919969
- (22) Young vs Builders Steel Co., 754 F.3d 573, 577
- (23) Ayissi-Etoh vs Fannie Mae, 712 F.3d 572, 576 n.1 (D.C. Cir. 2013)

- (24) Gen. Bldg. Contractors Ass'n vs Pennsylvania, 458 U.S. 375, 387–88 (1982).
- (25) Ricci vs DeStefano, 557 U.S. 557, 578–79 (2009).
- (26) Green vs Mo. Pac. R.R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977).
- (27) Waldon vs Cincinnati Pub. Schs., 941 F. Supp. 2d 884, 889–90 (S.D. Ohio 2013)
- (28) Hill vs U.S. 1283, 1301 (S.D.N.Y. 1981)
- (29) Green vs Missouri Pacific Railroad. 523 F.2d 1290 (8th Cir. 1975)
- (30) EEOC vs Carolina Freight Carriers Corp., 723 F. Supp. 734, 752 (S.D. Fla. 1989)
- (31) Doe vs ATC, Inc., 624 S.E.2d 447, 450 (S.C. Ct. App. 2005).
- (32) Sidabras vs Lithuania (2004) 42 EHRR 104
- (33) Turek vs Slovakia (2006) 44 EHRR 861.
- (34) X vs Iceland (1976) 5 DR 86
- (35) Niemietz vs Germany (1992) 16 EHRR 97
- (36) R(T and others) vs Chief Constable of Greater Manchester and others (2013)EWCA Civil 25
- (37) R(L) (Fc) vs Commissioner of Police of the Metropolis, 2009 UKSC 3

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- (1) PLD1990 SC 295
- (2) 1982 CLC 2369
- (3) Shehla Zia vs Wapda PLD 1994 SC 693
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- (5) PLD 2010 SC 265
- (6) Const. Ps. No. 29-30/2016 & 03/2017 dated 28-07-2017
- (7) Dadullah vs State (2015 SCMR 856 P862)
- (8) State vs Adkin-40 Ohio App 2d 473, 320 NE 2d 308, 3211, 690. O 2d 416
- (9) Ghulam Hussain vs Chairman POF Board (2002 SCMR 1691)

## ABSTRACT

Many countries in the world strived to resolve the issue of discrimination against employability of ex-offenders. They adopted different practices and policies which are workable in prison and outside of it. They also legislated many laws to create balance between rights of employers and ex-offenders. Likewise, the courts have also played active role and interpreted laws to create harmony in applicability of employment laws while protecting rights of all.

While, Ex-offenders ‘condition in Pakistan is not different from rest of the world. The society does not allow them to reintegrate due to their previous criminal record. This is visible at the time of employment, where ex-offenders are not encouraged to apply in private and public sector organizations. The obvious justification for banning their entry in employment is security issues and job requirements. Further, there are laws which clearly impose restriction on employability of ex-offenders without defining the purpose for placement of such ban. Thus these laws and trend in employment to restrict entry of ex-offenders create a class of persons within the society which face discrimination without any justification.

This thesis argues that discrimination against ex-offenders infringes the principle of equality under the provisions of the Constitution of Pakistan and the norms of international human rights law, on the one hand, and leads to the denial of right to work to an essential part of the society, on the other. Accordingly, this study deals with discrimination against ex-offenders as a research study and with equity as a legal principle and a theoretical framework.

This is first substantial study through which issue of employment discrimination against ex-offenders in Pakistan is highlighted. Its primary purpose is to protect ex-offenders' right to work which can allow them to enter in society and enjoy equal rights like rest members of society.

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## **CHAPTER 01**

### **1.1 INTRODUCTION**

A society looks upon ex-offenders as violators of social contract. Ex-offenders face formidable barriers in way of their re-entry in society. They lack education and training and face legal limitation. In addition, to these real issues, the stigma of having criminal record affect ex-offenders' future prospect of employment. The criminology research suggests that employment is affective source to desist from criminal activities. Ex-offenders due to unemployment and unstable economic resources reoffend. Therefore, it is necessary to ensure provision of such conducive environment where ex-offenders find equal opportunities to work.

Pakistan has not legislated any law to tackle issue of employability of ex-offenders. General provisions of Constitution of Pakistan are not sufficient enough to provide protection to ex-offenders' right to work since they do not fall in the category of protected persons for the purpose of exercise of nondiscriminatory provisions. Non-discrimination provision in Constitution of Pakistan does not cover "criminal record" within the list of prohibited grounds. Added to it, unfair recruitment policies in public and private sectors complicated the issue of employment of ex-offenders. This thesis analysis the issue of employment of ex-offenders in Pakistan while highlighting the lacunas in the national laws and their discriminatory effect on ex-offenders' employment.

## 1.2 AIMS AND OBJECTIVES OF STUDY

The states under International law are bound to provide equal opportunity to work to everyone including ex-offenders. In this regard, many states have taken an initiative to streamline their domestic laws in order to bring them in conformity with International obligations to provide equal opportunity to work to ex-offenders. These states through these legislations, tried to create balance between rights of employers and ex-offenders. The Judicial surveillance of these laws played an effective role in applications of these law in order to protect their society from risk of recidivism.

Whereas, no concrete step is taken by many developing countries including Pakistan to provide equal opportunity to work to ex-offenders. Therefore the status of employability of ex-offenders in Pakistan is bleak. This study has focused on issue of discriminatory laws and practices against employment of ex-offenders in Pakistan. This is first substantial study on the topic, previously no such research was conducted in Pakistan on this emergent issue.

Ex-offenders in Pakistan commit crimes due to their economic conditions and social injustices. This situation gets worst when they did not get equal opportunity to work due to their criminal record. Pakistan has not enacted any special law for the protection of ex-offenders. Utmost general provisions of the Constitution of Pakistan, 1973<sup>1</sup> related to fundamental right to equality before law and right of freedom of trade, business or profession can be referred in order to protect employment right of ex-offenders, that too through the intervention of courts.

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<sup>1</sup>The Constitution of Islamic Republic of Pakistan,1973

Further no amendment is carried out in articles 25 and 27 of the Constitution of Pakistan which can include ex-offenders in list of classes of person protected against discrimination in service. It indicates that the legislators are not interested to protect right to work of ex-offenders as they fear that they may not be looked at as having soft corner to criminals. Secondly, banning of employment is still considered as part of policy “tough on crime”. Thirdly, the government is not paying serious attention for provision of proper vocational education and training to the prisoners, therefore, the issue of employment of ex-prisoners further aggravated once they released from prison without any training and education.<sup>2</sup>

According to Central Prison Rawalpindi report, the population of prisoners as on 07-12-2018 for the territory of Islamabad is 1548 and among them convicted 161 while the total prison population of the country is about 83 718<sup>3</sup> , therefore if it is considered that 1/3 of the prisoners are those who have to serve long sentence of imprisonment even then 2/3 of the prisoners have to be released on any point of time. The question then arises that how the influx of these ex-prisoners will be tackled by the government in order to provide them subsistence of life, which is state’s Constitutional obligation to ensure promotion of social justice in society while looking after the social and economic well- being of people.<sup>4</sup>

Pakistan is a poor country, therefore, it cannot afford to pay stipends to ex-offenders and their families during their period of unemployment. Added to it,

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<sup>2</sup> Country Reports on Human Rights Practices for 2018, United States, Department of State, Bureau of Democracy, Human Rights and Labour

<sup>3</sup> Report of Institute of Criminal Policy Research on 12-07-2018 Inspection note submitted to Honorable Islamabad High Court Islamabad.

<sup>4</sup> Articles 37 and 38 of the Constitution of the Islamic Republic of Pakistan

discriminatory practices of employers towards ex-offenders in job advertisement and discriminatory laws and recruitment policies create hurdle in right to equal opportunity to work of ex-offenders. Therefore, these statutes and practices are in clear contradiction to the fundamental rights guaranteed by the Constitution of Pakistan to its citizens.

The superior courts of Pakistan laid stressed on liberal interpretation of fundamental rights in order to extend its protective umbrella. However, article of the Constitution of Pakistan relating to right to work<sup>5</sup> does not include the word “ex-offender” within the class of protected persons for purpose of protection against discrimination, therefore anomaly arises which led to promulgation of such laws and practices of organizations which are discriminatory towards employment of ex-offender. This indicates that Pakistan has not complied with its International obligations to ensure equal opportunity to work for all persons including ex-offenders and this is main reason behind this issue.

So the aim of this study is five folds: firstly to highlights the ambiguity and vacuum in the Constitution of Pakistan, 1973 with respect to protection of ex-offenders’ right to work; secondly to draw an enhanced understanding that right to work has close nexus with the right to life ; Thirdly, to provide Islamic injunction on the denial of right to work to ex-offenders; Fourthly, to provide relevant international instruments along with obligations of Pakistan being member of these instruments; Lastly to highlight role of courts to treat ex-offenders equally and extend suitable interpretation of statutes barring employment of ex-offenders.

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<sup>5</sup> Article 27 of the Constitution of the Islamic Republic of Pakistan.

These aspects of study help to answer the thesis statement that ex-offenders are treated differently from the rest segment of society owing to their previous criminal record. Hence, are discriminated at the time of employment; in spite of the fact that the Constitution of Islamic Republic of Pakistan is designed, intended and directed to bring about egalitarian society based on Islamic concept of social justice and provide freedom of trade, business or profession and safeguard against discrimination in service.

### **1.3 LITERATURE REVIEW**

International Labour Organization (ILO) in International Labour Conference 91<sup>st</sup> Session 2003 published a Global Report in follow-up to the ILO Declaration on Fundamental Principles and Rights at Work titled “Time for equality at work” wherein it laid down the boundaries of discrimination at work. It stressed that the abilities and attitude of individuals coming from different social set up give rise to discrimination in labour market. The report declared that the discrimination is a complex and moving target which is sometime invisible and hence difficult to combat.

Later on, a report was prepared by Debbie Ryan, Director of Market Development Working Links on employer's attitude towards ex-offenders. The purpose of the report was to build understanding of behavior of employers towards ex-offenders. The report reveals that conviction is mostly used by employers at U.K to expel ex-offenders from recruitment process. Therefore, he called for review of the Rehabilitation of Offenders Act (ROA) of U.K and laid stress on enactment of new

Discrimination Act.<sup>6</sup> This report is relevant for this study, its suggestions are useful to recommend steps required to be taken by Pakistan in order to resolve issue of discrimination against ex-offenders.

Andrew Gale in his article “square with the house: the case for ending ex-offender employment discrimination” concentrated on the reasons for and against allowing employment discrimination against ex-offenders. He also pointed out to the stereotypes players who are affected by the discriminatory practices. He set out an analytical framework describing how offenders should be punished and explored that employment discrimination is both a common practice and a bad idea. He analyzed the existing solutions that address ex-offender discrimination and why they have failed and recommended new solutions, but the paper has not discussed the efficacy of the legal system to provide protection to the ex-offenders against discrimination.<sup>7</sup>

John A Humphrey and Peter Cordella in their book” Effective Interventions in lives of criminal offenders” discussed “ three turning points” which had impact on the life course of ex-offenders . These turning points were discussed in the book under the heading ‘structure location’ which is a social status of an individual in society such as his marital or occupational status etc. It indicates about human agency which is the willingness of individual to leave life of crime and change his behavior and lastly point out to choice which is related to co-ordination between human behavior and social structure. This book deals with key interventions which are helpful to change the

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<sup>6</sup>Debbie Ryan, “Market Development Working Link, Prejudged :Tagged for life, a research report into employers attitude towards ex-offenders” available at [www.workinglink.co.U.K/media\\_centre/latest\\_news/Prejudged\\_tagged\\_for\\_life.aspx](http://www.workinglink.co.U.K/media_centre/latest_news/Prejudged_tagged_for_life.aspx) last visited on 16-07-2016

<sup>7</sup> Andrew Gale, “square with the house: the case for ending ex-offender employment discrimination” available at <https://www.kentlaw.iit.edu>. last visited on 12-08-2016

criminal behavior of offenders. This book is helpful for the study as change of behavior of ex-offenders can change the scenario of his entry in the society.

R.L .Pelshaw has touched an important topic in his book “Illegal to Legal: Business Success for (ex) Criminals”. He has given practical and immediate steps to encourage offenders and ex-offenders to utilize their street skills and life experience to set up a small business for themselves. He considered this as a mean to combat vicious circle of crime and recidivism and change life of millions of people who remained associated with world of crime. Most of the studies conducted so far on the employment of ex-offenders have ignored this aspect of issue. Therefore the solutions provided in this book is significant for this research.

Christine Neylon O’Brien and Jonathan J. Darrow had a research paper on “Adverse Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination”. The Article concludes that existing protections in American statutes are both inconsistent and, in many cases, insufficient, and suggests that existing federal laws be amended to bring people with criminal histories more directly within the scope of their coverage. Relevant issues to the research are discussed in this article.<sup>8</sup>

Michael Carlin & Ellen Frick discussed in their research work the current problem with the misuse of criminal records in hiring and highlights two solutions under federal law: Title VII of the Civil Rights Act (Title VII) and the Fair Credit Reporting Act (FCRA). This research work is based on American laws, however it is

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<sup>8</sup> Christine Neylon O’ Brien & Jonathan J. Darrow, “adverse employment consequences triggered by criminal conviction: recent cases interpret states statutes prohibiting discrimination”, *Wake Forest Law Review*, Vol 42 (2007)

helpful to analyze whether laws in Pakistan allow excess and use of criminal record by employers for purpose of hiring and whether the same is protected under right to information provided under Constitution of Pakistan.<sup>9</sup>

Georgetown Journal on Poverty Law & Policy published an article by Jocelyn Simonson in which he developed a link between rationality and morality and presented an analysis of the concept of “rationality” in federal employment discrimination law, specifically focusing on the implications of the concept of rational discrimination, an effort is made to increase employment opportunities of ex-offenders. He also presented a case study of New York’s Article 23A and suggests that statutory language alone is not enough to protect ex-offenders from employment discrimination and timid role of courts in its application. The article is revolved around the application of federal statutes of America and its restricted enforcement by the courts of law.<sup>10</sup>

Jordan Segall considers the limited effectiveness of legal antidiscrimination remedies to the problems posed by ex-felon discrimination, and concludes that a vigorous antidiscrimination regime aimed at promoting hiring of ex-felons cannot be rooted in either contemporary antidiscrimination jurisprudence or in laws that seek to conceal criminal records from employers. Instead, such an effort would require substantial new legislation, predicated on accommodations antidiscrimination norm and reflecting a new national consensus about how to weigh the benefits of post-prison

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<sup>9</sup> Michael Carlin and Ellen Frick, “Criminal Records, Collateral Consequences, and Employment: the FCRA and Title VII in Discrimination against Persons with Criminal Records”, *Seattle journal for social justice*, no12 (2013), 109

<sup>10</sup> Jocelyn Simonson , “Rational Discrimination Against Ex-Offenders”, *Georgetown Journal on Poverty Law &Policy* XIII, no 2, (Summer 2006), p 288

social reintegration against the rationality of discrimination against ex-felons. This article is of significance to analyze this issue from Pakistan prospect.<sup>11</sup>

Justice. Syed Mansoor Ali Shah, Judge of Lahore High Court, Pakistan in landmark judgment in case titled Faisal Sultan v. E.D.O. (Education) and others has interpreted the right to life that it also includes right to livelihood. He further stated “With appointment comes an expectation of a lawful livelihood, hopes of a successful carrier, sense of well-being and security, social recognition and economic independence. Any process that derails a person from his path of social progress and economic self-sufficiency violates social and economic justice thereby violating Article 9 of the Constitution.” This interpretation of law by court is helpful to establish that denying of employment to ex-offenders is snatching their right to life.

Similarly, a celebrated case titled Ms. Shehla Zia and others vs. WAPDA,<sup>12</sup> the Supreme Court of Pakistan has extended the definition of the word 'Life' that it is not restricted only to the vegetative or animal life or mere existence from conception to death but also includes all such amenities and facilities which a person born in a free country is entitled to enjoy. This pronouncement of court is helpful to build an argument in favour of ex-offenders to have right to enjoy all amenities and facilities since it is related to their right to life.

While in case titled “Inamullah Vs Government of KPK through Chief Secretary and 3 others” has protected right of employment of convicted person. The court has elaborated the refusal of employment to the petitioner and placing ban for life time on him to enter the government service as offending his most fundamental right to life

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<sup>11</sup> Jordan Segall, “Mass Incarceration, Ex-Felon Discrimination, & Black Labor Market Disadvantage”, *University of Pennsylvania of Law and Social Change 14*, no.1 (2011) page 171.

<sup>12</sup> PLD 1994 Supreme Court 693

which was cherished by the Constitution.<sup>13</sup> This judgment is relevant to the topic under discussion. It will help to argue about right to employment of ex-offenders.

Muhammad Masood Khan in his article “The Prison system in Pakistan” has given the oversight about the current situation of jails and their problems such as overcrowding, mal-administration and outdated methods of treating prisoners. However he ignored to give any insight about the relevancy of training of prisoners with the requirement of jobs outside the prison.

The Ministry of Labor and Manpower (MOL & MP) prepared a report in 2013 on “Pakistan Employment Trends” which indicate towards key indicators defining the formation of market trend. However, the report is not comprehensive since it does not take into account ratio of persons who are unemployed due to their criminal record. Hence there is no statistics that how many ex-offenders are unemployment.

Shahryar Rizwan, published a news article “Condemned to Life” in *The Daily Dawn*, on June 16, 2019 where he interviewed ex-offenders and raised issue of their employability and re-integration in society due their criminal record. This article is significant to present research to highlight issue of employment of ex-offenders.

There is no concrete study found on the issue of employment of ex-offenders since it is an emerging issue which has not caught sight of socialist and legal experts in Pakistan as compare to other countries which are considering problem of discrimination against ex-offenders as a social issue need to be addressed through formulation of laws.

## **1.4 HYPOTHESIS**

Hypothesis Statement after scrutinizing the foregoing literature, the following hypothesis has been developed:-“The current national legal regime is not

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<sup>13</sup> Peshawar High Court decided Writ Petition No.480- M/2014 Inamullah Vs Government of KPK and others on 25.06.2015

comprehensive enough to provide equal treatment to all individuals and therefore failed to protect right to work of ex-offenders. For that reason, the same can be made significant if amendments are brought in order to be in conformity with the international standards.”

## **1.5 ISSUES AND RESEARCH QUESTIONS**

The study will address the following issues in the chapters mentioned against each:

1. What is relationship of right to work with discrimination and equality? Whether anti discriminatory provisions are properly incorporated in international law to provide sufficient protection to right to work of all without any discrimination? How right to work is available under Constitution of Pakistan and whether ex-offender enjoys a status of a legal person to claim his right to work? What consequences criminal record check has on ex-offender, employer and society? (Chapter 02, Chapter 03, Chapter 04).
2. Whether the equality and anti- discriminatory provisions in the Constitution of Pakistan Comprehensive enough to cover all possible grounds of discrimination? Whether ex-offenders constitute a separate class on the basis of their criminal record, therefore they are entitled to be protected against discriminatory behavior of employers? What are the hiring policies in Pakistan? Whether they have discriminatory impact on ex-offenders? Where restrictions are justified on jobs of ex-offenders? (Chapter 05).
3. What are remedial measures available in Pakistan’s criminal Justice system which can positively impact on offenders and help them to reintegrate in society? Whether these correction measures are sufficient or they need improvement? What remedial measures adopted by foreign countries which have helped ex-offenders to

reintegrate in society and get chance to avail opportunities of work? (Chapter 06, Chapter 07).

4. Whether Pakistan has fulfilled its international obligation to provide right to remedy to ex- offenders? Whether approach of courts in interpretation of statutes was stringent or liberal for protection of rights of ex-offenders? How courts in other countries decided cases of discrimination against ex-offenders and what standards they have set in this regard? (Chapter 08).

## **1.6 METHODOLOGY:-**

This research sets out an analytical study of Pakistan's legal framework in relation to ex-offenders' right to work. The research examines collateral consequences of discrimination. The social and economic cost which is borne by society and ex-offenders due to discrimination. The efficacy of existing laws to provide protection to ex-offenders and what are the legal forums available to enforce right to work of ex-offenders. The impact of current employment policies on employability of ex-offenders. The research also examines different laws enacted by developed countries to safeguard right to work of ex-offenders. Moreover, in current legal regime, role of courts in Pakistan was evaluated on the basis of case laws and what standards were set out by courts of USA and U.K to handle cases of discrimination against ex-offenders. Findings are drawn on the basis of analysis carried out in each chapter and then recommendations are given with respect to necessary measures need to be taken by employers and government for redressal of issue of discrimination against ex-offenders' employment

The study is focused on the primary sources i.e. international conventions and treaties of all relevant branches of international law and particularly key human rights instruments UDHR, ICESCR with respect to right of every person to be treated equally

and have equal opportunity to work without any discrimination. The current research has only to rely on equality and nondiscriminatory provisions of Constitution of Pakistan to argue issue of employability of ex-offenders since there is no separate law enacted which protect right to work of ex-offenders. The study also included secondary sources along with other informative sources like articles, newspapers, magazines, websites on the subject issue and reports of the seminars and conventions, jail visit reports.

## **1.7 SCHEME OF STUDY**

While writing this dissertation, following scheme is adopted in order to meet the requirement of the study:-

The whole thesis is divided into three parts excluding the first introductory chapter.

The first chapter is an introduction about the topic containing significance, which compromises of key issues to be discussed in the dissertation and also included the literature review, research methodology, hypothesis and the scheme of the study.

The first part covers second, third and fourth chapters. The second chapter highlights the concept of discrimination and equality contemplated in international human rights instruments and domestic law of Pakistan. What are instances where discrimination is justified by law and whether discrimination against ex-offenders at time of employment is covered under these justifications? The study also encompasses different theories of equality and which theory best suited for purpose of equal treatment of ex-offenders at work. The role of natural justice for grant of equal opportunity of work to ex-offenders.

The third chapter encompasses study about the universality of human right to work, therefore international law has made it obligatory on states to ensure, respect, protect and provide this right to all without any discrimination. Different theories which

describe nature of right to work whether it is will or interest is also discussed and which theory is best suitable to explain right to work for purpose of current study. The legal status of ex-offenders is also discussed in light of jurisprudential theory and court decisions to recognize them as “freemen” after paying their debt to society and therefore entitled to be treated with dignity.

The fourth chapter deals with criminal record checking and its collateral consequences on the life of ex-offenders. The discrimination towards ex –offenders is not only derogatory to their basic right to get opportunity of employment but also has social and economic cost which is to be borne by society. The legislative aspect of the restriction is discussed and its consequences on the life of ex-offender. The conflict between policy tough on crime and policy of rehabilitation is also deliberated. The effectiveness of new policy “ban the box”, adopted by many countries to eradicate the mania of discrimination against ex-offenders in employment is also analyzed.

The second part consists of fifth, sixth and seventh chapters. The fifth chapter deals with the issue of discrimination against ex-offender particularly focusing Pakistan legal system. What rights available to ex-offenders being citizens of Pakistan. The study also maps the nature of jobs which are banned on ex-offenders. The Study further indicates that Pakistan’s current employment policy for ex-offenders violates international standards. Lastly the study argued that disclosure of criminal record is first step towards discrimination.

The sixth chapter focuses on the correctional system in criminal justice system of Pakistan. It discusses that laws in Pakistan provide for probation and parole of offenders, however these processes are rarely exercised by courts and thus are of no significance for rehabilitation of offenders. The study also shed lights on the conditions of jails which lack basic facilities and thus cannot be considered as an effective place

for rehabilitation of offenders. The study argues that Pakistan failed to abide by international obligation for rehabilitation of offenders which has drastic effect on the chances of employability of offenders.

The seventh chapter deals with legal frame work of other countries and how they dealt with the problem of discrimination against ex-offenders at time of employment. The study suggests that Pakistan can take help from legislation of other countries to devise a law for protection of right to work of ex-offenders.

The third part covers eighth chapter of study which deals with comparison of legal frameworks of other countries with Pakistan on the issue of discrimination against ex-offenders. It helps to understand where Pakistan lacks behind the world for protection of right to work of ex-offenders. The study also shed lights on the role of courts in other countries and Pakistan while interpreting laws for protection of rights of ex-offenders for employment.

Finally, conclusion is drawn while suggesting measures need to be taken by employers and government and it is recommended that amendments need to be carried out in laws of Pakistan. It is further suggested that courts need to play effective role to draw attention of government towards the resolution of issue of employability of ex-offenders.

## **PART I**

### **UNDERSTANDING CONCEPT OF DISCRIMINATION, EQUALITY AND RIGHT TO WORK WITH RESPECT TO EX- OFFENDERS**

## CHAPTER 02

### CONCEPT OF DISCRIMINATION, EQUALITY AND ISSUES OF JUSTIFIABILITY

#### 2.1 INTRODUCTION

Right to work is one of elementary right which is protected under international instruments since it is considered as source of subsistence to any person. Jurists have claimed that right to work has a close bond with right to life. Thus denying opportunity to work to anyone means depriving him from his life. Therefore, human right instruments obligated states to guarantee that every individual get equal opportunity to work without discrimination. These instruments have enlisted prohibited grounds for discrimination and strived to eliminate discrimination based on them by enacting specific instruments such as the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Further the International Labor Organization (ILO) Convention No.111 Concerning Discrimination in respect of Employment and Occupation (1958) covered instances of discrimination in work to ensure provision of equal opportunities of work to all persons. Pakistan is signatory of all these international conventions which deal with discrimination. However, ex-offenders still did not enjoy equal protection of law against discrimination. Therefore, the study shed lights on the concept of discrimination adopted internationally and in domestic law of Pakistan in order to analyze the efficacy of these provisions to cover the discrimination against ex-offenders. On the same place the concepts of equality under different theories are also discussed to give insight that which concept of equality fit to the claim of ex-offenders for equal treatment. The study also highlights that ex-offenders can use principle of *audi alterm partem*, a principle of natural justice as

defense to claim right of hearing to explain to employers regarding their previous criminal record collected on their back by employers.

## 2.2 DISCRIMINATION

Before pondering on discussion of right to work of ex-offenders. It is essential to first understand the concept of discrimination and its relation with equality. The term *discriminate* appeared in English language in early 17th century. It is derived from the Latin word “*discriminat*” which means - 'distinguished between'.<sup>14</sup> The word ‘discrimination’ in English language is used in sense of unfair and unreasonable distinction.

Discrimination is defined in Black’s Law Dictionary as:

“*The effect of law or established practice that confers privileged on a certain class*”<sup>15</sup>

The most common meaning of discrimination is hostility or prejudice, however it is required that broad definition of discrimination be incorporated: firstly there are evidences which suggest that differential treatment can occurs in the absence of prejudice or hostility, and secondly it is difficult to define discrimination in definite terms and to prove the same.<sup>16</sup>

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<sup>14</sup> Oxford Dictionaries. Oxford University available at <https://www.lexico.com/definition/discriminate>  
Retrieved 14 December 2019

<sup>15</sup> Brayan A. Garner, *Black’s Law Dictionary* ( Thomson West: 2009),

<sup>16</sup> Li Weiwei, “Equality and Non-Discrimination Under International Human Rights Law” Norwegian Centre for Human Rights, University of Oslo, research notes 03/ 2004, page 14 available at <https://www.jus.uio.no/smr/english/about/programmes/china/avpublisert/china-old-documentation-only/publications/0304.pdf> last visited on 02-02-2020.

It is widely recognized concept that equality and non-discrimination are positive and negative aspects of the same principle<sup>17</sup>. Equality is a positive duty which means all persons to be treated equally and law cannot treat them differently. While discrimination relates to specific group of persons in society who need protection of their rights, therefore, it is a negative duty. In other words, equality signifies exclusion of discrimination, and adopting principle of non-discrimination means sustaining of equality among persons.

Internationally, the United Nation Charter has adopted non -discrimination clauses and made them part of international law. To deal with the question of discrimination U.N has formed a sub-commission on the Prevention of Discrimination and Protection of Human Rights. The Sub- commission did not accede to conclusive legal definition of discrimination and only described “Prevention of discrimination” that it means repudiates any action which disclaims to individuals or groups of people equal treatment. The sub-commission justified differential treatment against individuals when it was exercised in the welfare and interests of the community as a whole.<sup>18</sup> This concept was criticized by some delegates because they considered that it is not possible to achieve equality of treatment without qualification.

Two important international covenants after U.N Charter and Universal Declaration of Human Rights were adopted i.e. International Covenant on Economic Social and Cultural rights (ICESCR, 1966), International Covenant on Civil and Political Rights (ICCPR, 1966) which contain elaborated clauses on nondiscrimination with effective implementation mechanism. Article 26 of ICCP incorporate principal

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<sup>17</sup> Ann F. Bayefsky, “The principle of Equality or Non-discrimination in International Law”, *Human Rights Law Journal* Vol 11: issue 1 (1990), p.1-34.

<sup>18</sup> UN document .E/CN. 4/S.R.32-41 referred in Ann F. Bayefsky, “The principle of Equality or Non-discrimination in International Law”, 11 *Human Rights Quarterly*, 1990, p. 5.

clause on non-discrimination which stipulates “All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Similarly a general clause is found in Article 3 of ICESCR which stipulates: “The states undertake to ensure the equal right of men and women to the enjoyment of all rights in this treaty.” But these two covenants have neither defined “discrimination” nor explained what constitute it.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965) is one of the first conventions which defined ‘racial discrimination’ one of the grounds provided in the UDHR for discrimination. It has defined in Article 1 “racial discrimination” as: “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>19</sup>

Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) related to “ gender base discrimination” has defined “discrimination against women “as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of

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<sup>19</sup> Article 1 on The Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965)

equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>20</sup>

The International Labor Organization (ILO) Convention No.111 Concerning Discrimination in Respect of Employment and Occupation (1958) states “For the purpose of this Convention the term ‘discrimination’ includes: (a) any distinction, exclusion or preference made on the bases of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”<sup>21</sup>

The UNESCO Convention Against Discrimination in Education (1966) define ‘discrimination’ for purpose of this Convention as it “includes distinction, exclusion, limitation or preference which being based on race colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education.”<sup>22</sup>

These covenants are defining discrimination with respect to specific grounds for discrimination. However concrete definition of discrimination and what constitute it is yet to be developed in international law. The Committee on Economic, Social, and Cultural Rights has taken initiative in this regard in year 2009 which stated that “discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the

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<sup>20</sup> Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), promulgated in 1979

<sup>21</sup> Article 1 of International Labor Organization (ILO) Convention No.111 Concerning Discrimination in Respect of Employment and Occupation (1958)

<sup>22</sup> Article 1 of Convention Against Discrimination in Education (1966)

recognition, enjoyment or exercise, on an equal footing, of [human] rights.

Discrimination also includes incitement to discriminate and harassment.”<sup>23</sup>

But still no international convention on nondiscrimination included conclusive definition of discrimination as recommended by the committee. Therefore, international law cannot obligate states to legislate nondiscrimination laws to handle issue of discrimination with regard to all possible grounds for discrimination.

### **2.2.1 Elements of Discrimination**

The conventions referred herein above provide definitions of discrimination which contains three elements: - (a) preferential treatment (b) purpose or effect (c) grounds for prohibition<sup>24</sup>

The preferential treatment does not mean that it is directed against a person or group. It can be caused by giving unreasonable preference to one person or group over the others. It is argued that discriminatory treatment can be measure with correlative treatment to other persons similarly situated.<sup>25</sup>

The Human Rights Committee has stated in General Comment No.18 that “differentiation of treatment is permissible if: (1) the goal is to achieve a legitimate purpose; (2) the criteria for such differentiation are reasonable and objective, as

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<sup>23</sup> CESCR General Comment No. 20, at para 35. Retrieved on January 8, 2018, from <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. Para 7. See also art. 1, ICERD; art. 1, CEDAW; art. 2 of the CRPD; Office of the High Commissioner for Human Rights (OHCHR). (1989). General Comment No. 18, Non-discrimination., paras 6, 7.

<sup>24</sup> Li Weiwei, “Equality and Non-Discrimination Under International Human Rights Law” Norwegian Centre for Human Rights, University of Oslo, research notes 03/ 2004, page 14 available at <https://www.jus.uio.no/smr/english/about/programmes/china/avpublisert/china-old-documentation-only/publications/0304.pdf> last visited on 02-02-2020

<sup>25</sup>, ibid note 29, page 15

illustrated in *Van Oord v The Netherlands*.<sup>26</sup> Mr. and Mrs. Van Oord were previously Dutch nationals who immigrated to the United States and remained there and became its national. Netherlands was imposing tax on their pensions, while contrary to that, former Dutch nationals who had emigrated in Canada, Australia and New Zealand and became their national were receiving pension without tax. Mr. and Mrs. Oord challenged the difference in pension treatment and contended that it violates their rights to non-discrimination under article 26 of the ICCPR. The Human Rights Committee legitimized the difference in treatment on the ground that Netherland has signed bilateral treaties with those countries. Therefore, it legalized this differentiation in treatment on the basis of ‘reasonable’ and ‘objective criteria’ and declared that it did not find violation of article 26 of ICCPR. In the Belgian linguistic case,<sup>27</sup> the court held that “the non-discrimination principle was only violated if the distinction had no reasonable and objective justification.” Meaning thereby that there should be legitimate aim behind the differential treatment and has positive effect. Thus the court itself provided stringent standard to justify discrimination.

The courts in Pakistan have pronounced that discrimination is only allowed if there is legitimate reason behind it. The Court upheld this principle in 2002 PLC (CS) 131 where appellant civil servants along with 427 civil servants were appointed purely on temporary basis and they served for a period of more than ten years in department in various projects, but their services were terminated, whereas, other civil servants were accommodated by placing their service in surplus pool. The court held that the step taken by department did not sound reasonable. Therefore it pronounced that case of civil servants cannot be treated differently from others, as all are circumstanced in

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<sup>26</sup> Ibid note 29 page 15

<sup>27</sup> Richard Townshend-Smith, *Discrimination law: Text, Cases and Materials* ( Cavendish, 1998), p. 137

similar situation. Differentiation so made was not logical and hence contradict article 25 of the Constitution of Pakistan.

The study contends that the state has discretion to formulate policy and defend its rationality, however, it is the role of court to adjudicate about reasonableness of means through which the state achieve objectives of policy. Therefore, policies banning jobs of ex-offenders need to be analyzed on the basis of its objectivity and whether they are beneficial to society or have adverse effects.

The second element of discrimination i.e. purpose and effect. There are four international treaties i.e. CEDAW, CERD, ILO Convention 111, Convention against Discrimination in Education which provide definition of discrimination. The three treaties except ILO convention provide “purpose or effect of discrimination” within the language of article of conventions. While ILO convention does not refer to purpose but to “effect”. Meaning thereby the purpose or intention has secondary value as compare to effect of discriminations, since in the rest three conventions the words “ purpose or effect “ are used instead to “purpose and effect”. To emphasis on “effect” rather than intention is a positive approach to handle issue of discrimination in broader aspect. Any action which on the face of it is neutral can be turned down if it adversely affect any segment of society as compare to others.<sup>28</sup>

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<sup>28</sup> Li Weiwei, “Equality and Non-Discrimination Under International Human Rights Law” Norwegian Centre for Human Rights, University of Oslo, research notes 03/ 2004, page 14 available at <https://www.jus.uio.no/smr/english/about/programmes/china/avpublisert/china-old-documentation-only/publications/0304.pdf> last visited on 02-02-2020

U.K's Employment Appeal Tribunal in case titled Peake v Automotive Products,<sup>29</sup> has enlisted two approaches for prove of discrimination on behalf of employer. The first approach was given by Judge Phillips whereby he held that "motive of employer was immaterial." He stated, "[Sex Discrimination Act] requires one to observe which action constitutes favorable treatment, and whether it is directed to the man or woman because he is a man or woman. If so, it is of no relevance that it is done with no discriminatory motive." While Lord Denning in the same case had a different view, while holding that the employer's worthy motive justified his action.<sup>30</sup> Lord Denning has allowed less favourable treatment of a person of one sex or race than a person of another sex or race, if it is for overriding benevolent purpose. This approach was challenged through tide of case laws in U.K and in case titled R. Birmingham City Council ex parte Equal Opportunity Commission,<sup>31</sup> the House of Lords declared the approach given by Judge Phillips in Peake case as accurate. Judge Phillips in subject case has held that motive is immaterial, and differential treatment need to be analyzed that whether it was based on the target's sex or race.

The Constitution of Pakistan allows discrimination if it has a positive affect over society, as for instance article 27 of the Constitution f Pakistan provides safeguard against discrimination in service. It has made it permissible to government to reserve seats for specific area or class of person belonging from areas which are less developed. The intention behind it, is to provide them equal opportunity to participate in government service. This policy of the government is justified by virtue of reasons

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<sup>29</sup> I.R.L.R 1977, p. 105, cited H. McLean, Discrimination: the Limits of Law Edited by Bob Hepple and Erica M.Szyszczak (London:Manshell,1992), *The Cambridge Law Journal* Vol 52: issue No 1(1992), p. 54.

<sup>30</sup>Ibid, "Discrimination: The Limits of Law", 1992, p. 54.

<sup>31</sup> Ibid , " Discrimination: The Limits of Law", 1992 p. 173

underlying in it i.e. promotion and development of people belonging from less developed areas.

The approach to take into account the effect of discrimination is helpful particularly with respect to reviewing employment policies in public and private sectors. It assists to analyze that employment policies do not create any discriminatory effect on any specific class of persons or group. As for instance policy of insertion of question related to previous criminal record in employment form". Public and private sectors need to device a policy which categorize the posts that require to have criminal record check, to ensure that it does not bear any negative inference on right of employability of ex-offenders. But where the question is inserted in routine manner without job relevance, then in such situation, it leads to differential treatment against ex-offenders.

The legislations dealing with discriminations can be enlisted as (a) legislation which prohibits discrimination without furnishing grounds of it. Here courts have scope to exercise their power to adjudicate upon any action or practice that whether the same constitutes discrimination or not;(b) legislations which provide exhaustive list of grounds for discrimination, in this case no discretion is left with the court to analyze whether the action or practice is discriminatory or not. It has only to examine the action on the basis of grounds for discrimination provided in statute. In such case, other grounds for discrimination can only be considered through amendments in statutes. (c) Legislation which provide list of grounds for discrimination but it is not exhaustive, considers discrimination is complex phenomenon which cannot be easily restricted to limited number of grounds. In such like statutes the words "such as" or "other status" is used in order to indicate that it is not exhaustive. This third form of legislation is

found in the primarily international human rights instruments like the ICCPR, the UDHR. Moreover, article 55 of the United Nations Charter did not restrict the proscribed grounds for discrimination, rather it only enumerates the most common grounds for distinct treatments. The purpose is to keep the provision open ended in order to tackle discrimination which is resulted due to country of origin, nationality or social status.<sup>32</sup>

The Constitution of Pakistan, 1973 falls in the category of legislation which enlists proscribed grounds for discrimination i.e. sex, religion, race, caste, residence or place of birth.<sup>33</sup>

The superior courts of Pakistan have restricted approach to discrimination based on the enlisted grounds mention in Constitution of Pakistan. The Court held:-

“The word” discrimination is derived from the Latin word discrimination which means to divide, separate, and distinguish. This Article is applicable where a discrimination is made against a citizen solely on the basis of religion, caste, sex or place of birth. If a law is based upon several factors and the religion, race, etc. of a person is only one of the factors concerned, the law would be ultra vires.”<sup>34</sup>

It is also held by the court

“The words relevant for understanding the full impact of article 25 (2) of the Constitution of 1973 are “discrimination” and “alone”,

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<sup>32</sup> Li Weiwei, “Equality and Non-Discrimination under International Human Rights Law,” Research Notes No. 3 (2004), P 5

<sup>33</sup> Articles 25, 26 and 27 of the Constitution of Islamic Republic of Pakistan, 1973 can be referred.

<sup>34</sup> 1953 Pakistan Criminal Law Journal 23

the ordinary meaning of discrimination is very inoffensive. It means “ making a distinction or difference between things, a distinction , a difference: a distinguishing mark or characteristic ; the power of observing difference accurately or of making exact distinction; discernment thus the discrimination involves an element of unfavorable bias and it is in that sense that the expression has to be understood in this context . If such bias is disclosed and is based on any of the grounds mentioned in the Articles it may well be that. ”<sup>35</sup>

On the basis of above referred decisions, the study argues that the courts in Pakistan have limited themselves to extend protection against the prohibited grounds for discrimination provided in articles of Constitution of Pakistan. Consequently, if differential treatment is carried out on any other ground or consideration which is not enlisted in the non- discriminatory provisions of Constitution, then courts are incapacitated to provide protection against it. This is one of the reasons that it is difficult to seek protection against discrimination on the ground of criminal record under the Constitution of Pakistan.

### **2.3 TYPES OF DISCRIMINATION**

Discrimination legislation provides protection in broad sense. It encompasses not only general form of discrimination but also various forms of it. Most of these legislations prohibit direct and indirect form of discrimination.

#### **2.3.1 Direct Discrimination**

Direct discrimination essentially involves a situation where a person is discriminated against by treating him differently than a person in similar situation. The

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<sup>35</sup> PLD 1990 SC 295

prohibition of direct discrimination is based on personal trait. Prohibition against direct discrimination requires equal treatment rather than equal distribution of employment because, it is not possible that employers distribute employment to all persons irrespective of their eligibility. The prohibition of direct discrimination demands that employment should not be offered on the basis of personal trait rather merit to be considered. Direct discrimination encompasses causative relationship between discriminatory behavior and proscribed grounds.<sup>36</sup> It focuses on the alleged discriminator's reason for acting so.<sup>37</sup> It does not apply 'but for' test which emphasizes on the impact of discriminatory behavior on the complainant.<sup>38</sup> Most of the discrimination laws require that prohibited grounds to be the 'reason' for discrimination. This means that if there are two or more reasons for discrimination then the focus should be on reason based on prohibited ground, even if that was only a minor reason. As for instance a black ex-offender discrimination is based on the reason that he holds a previous criminal record as well as his race, but he cannot claim protection against discriminatory behavior for holding criminal record, since holding criminal record is yet to be covered under the general prohibited grounds for discrimination. However he can succeed in his claim for discriminatory act on the basis of race even though it was minor reason since race falls within the proscribed grounds for discrimination. Some discrimination statutes emphasize that prohibited grounds should be the prominent reason for discrimination. But this leads to problem of proof, for it is very difficult to determine which among several reasons dominate the discriminatory behavior particularly when the discriminator allege contrary assertions. Hence it is difficult to proof the causation in direct discrimination, therefore in most cases of

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<sup>36</sup> Macedonian Teachers Association of Victoria Inc. v Human Rights and Equal Opportunity Commission, (1998) 91 FCR 8.

<sup>37</sup> Purvis v New South Wales (Purvis) (2003) 217 CLR 92, 153 and 162.

<sup>38</sup> W v City of Perth (1997) 191 CLR 1, 12 and 57-8

discrimination the effect or impact of discriminatory behavior is alleged and hence this falls within the scope of indirect discrimination.

### **2.3.2 Indirect Discrimination**

The statute which prohibits indirect discrimination considers such terms and conditions which are *prima facie* ‘neutral’ but have discriminatory impact in application. The concept of indirect discrimination is broad and it can be applied to attend all sort of discrimination which are embedded in recruitment policies of employers. Thus the statutes and employers practices which are banning applicant holding criminal conviction to apply for the posts have separated applicants into two categories those with criminal record and those without criminal record. Thus the requirement for post which ban jobs on ex-offenders has discriminatory impact under the concept of indirect discrimination; as it creates a separate group of people who are holding criminal record and affected due to this condition of employment. It is argued that indirect discrimination provides reasonableness and inherent requirements as grounds for justification of discrimination, but the study contends that these grounds are usually used by employers as defense for their discriminatory actions.

### **Reasonableness**

If discriminatory terms and conditions of employment are reasonable and justifiable, then it is not case of indirect discrimination. It is for the aggrieved person to establish that relevant requirement is not reasonable. But some statutes reverse the onus of prove on the discriminator and treat it as a defense for the complaint of indirect discrimination.

The test of reasonableness was described by Brown C.J and Gummow J in Foreign Affairs and Trade v Styles <sup>39</sup> as under:-

*“Less demanding than one of necessity, but more demanding than a test of convenience ...the criterion is an objective one, which requires the court to weigh the nature and extent of discriminatory effect, on one hand, against the reasons advanced in favour of the requirement or condition on the other. All circumstance of the case must be taken into account.”*

The Supreme Court of Pakistan has tested reasonableness as:

*“What is unreasonable in one given set of circumstances may well be in another different set of circumstances. In order to test the reasonableness of such restriction, therefore, no general standard exist. It depend upon variety of circumstances including interest and urgency of the action proposed and the nature of safeguard, if any, provided to prevent possibility of abuse of power.”*

The Supreme Court of Pakistan has applied the same test to weigh the nature and extent of discriminatory effect while holding:

*“Before us is a female, otherwise eligible on all fours, being denied a position despite having successfully competed for the job as an educator in the same category of post/functional group in Boys High/Higher Secondary School, however, with a relegated opportunity to serve in the same capacity in the primary and middle sections. The foregoing*

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<sup>39</sup> Foreign Affairs and Trade v Styles (1989)23 FCR 251,257

*stipulation/ classification, founded on her gender alone, apparently sans any rational basis except for a dogmatic and subjective belief that she would not be able to handle students placed in a slightly higher age group, an apprehension oriented more chauvinistically than on any objective foundation, therefore, the impugned policy cannot be viewed as prudent or expedient nor reflects intelligible differentia so as to qualify the precondition of being reasonable. On the contrary, it is grievously retrogressive besides being violative of Constitutional commands.”<sup>40</sup>*

These courts pronouncements on “reasonableness” contemplates weighing of all relevant facts such as economic issues or the commercial imperative of employers or the efficiency of business and impact on others at work place while deciding the reasonableness of discriminatory action. In many cases it seems the business requirement is given weightage while analyzing factor in order to determine reasonableness of an action.<sup>41</sup> This approach can legitimize any discriminatory act of employer on the basis of business requirement and thus it violates the safeguard provided by law against discrimination. Further, when equality is conceptualized as a human right then it cannot be brushed aside on the basis of business imperative or necessity. The test of reasonableness is not embedded within the concept of equality. Therefore to examine facts in order to determine their effect and impact under indirect discrimination means that discriminatory practice can be justified on the grounds not available in case of direct discrimination. As for instance economic and financial consideration can outweigh the impact of discriminatory behavior. But this is not case

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<sup>40</sup> Province of Punjab through Executive District Officer (Education) Rawalpindi & another versus Ruqia Islam Civil Appeal No.797 of 2013.

<sup>41</sup> Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University press, 2007), page368

in direct discrimination where exemption for discriminatory behavior can only be possible when statute is amended.

### **Inherent Requirement**

This term variously used in context to “job” or “position” requirement. For example it may focus attention to the requirement of a particular task to be performed or status or position in particular work organization. Legislature has considered inherent requirement as a ground of exemption from claim of discrimination. Article (1) of Convention (ILO 111) states: “(1) any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination. (2) For the purpose of this Convention the terms “employment” and “occupation” include access to vocational training, access to employment and occupation, and terms and conditions of employment”

The article clearly excluded “inherent requirement” of job from domain of discrimination and hence the convention itself provides defense for claim of discrimination. The convention is however silent that what are factors which need to be considered in order to constitute ‘inherent job requirement’. Thus it has provided employers a vacuum to fill the same as per their own whims and wishes to declare any of their discriminatory act as ‘job inherent requirement’.

#### **2.3.3 Formal and Substantive Discrimination**

The international covenant ICESCR describes the types of discrimination while referring to any differential treatment has direct or indirect effect to exclude the recognition or enjoyment of the prescribed rights of the ICESCR. Direct discrimination essentially involves a person is treated differently on the basis of one of the proscribed

grounds for discrimination as compare to other who is similarly situated. The discrimination can be eradicated in both formal and substantive sense. When discrimination appears in the legal text itself such as constitution or domestic laws or government actions or public policy then it is called formal discrimination. Here the law and legal system justify discrimination. While substantive discrimination appears in social practices in the society which treats one group of persons differently from the other in same or similar situation. The discrimination against ex-offenders at work place covers in both sense of discrimination. The government has enacted employment policies for criminal record check and incorporated a clause in employment form that holder of criminal record are not eligible to apply<sup>42</sup> which creates formal discrimination against ex-offenders. Similarly, the preferential discrimination of employers to hire persons without criminal record over one with criminal record demonstrate that their practices constitute substantive discrimination against ex-offenders.

Presence of provisions of equality and non-discrimination in the legal text is not enough rather steps must also be taken in both public and private sectors since discrimination is hidden everywhere in society, The state must ensure that people and parties in the society do not discriminate or suffer from discrimination.<sup>43</sup> It is the imperative on state to ensure that domestic law, public policy and practices are free from discrimination, and to take necessary steps to eliminate such situations and conditions that cause discrimination.

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<sup>42</sup> this is further elaborated in chapter 3 under heading “ banning specific jobs on ex -offenders”

<sup>43</sup> Guðmundur Alfreðsson and Asbjorn Eide, “The Universal Declaration of Human Rights: A common standard of achievement “(1999), p. 477. See also Giorgio Baruchello and Rachael Lorna Johnstone, “Rights and value: construing the international covenant on economic, social and cultural rights as civil commons” (2011).

## 2.4 CONCEPT OF EQUALITY

Islam has established complete code of human rights fourteen centuries back. The purpose of these rights is to confer honour and dignity upon humans being and to abolish exploitation, oppression and injustice. All humans are one family and no one is superior over the other. The Holy Quran and the Sunnah have declared Muslims equal in rights and obligations. The Quran testifies that “the noblest among the believers in the sight of Allah is the one who is most mindful of his duties towards Allah”.<sup>44</sup> Reliance may also be placed on the Khutba of the Holy Prophet (P.B.U.H) at the time of conquest of Makkah as well as in his last sermons. Both the sermons establish charter of human rights freedom wherein and declared liberty and equality are elementary principles of Divine Message. It has also draw a line between equality and classification. Islam negates discrimination and allows reasonable classification.

The principle of equality is distinctive feature of Islamic teachings. Once the Holy Quran declares that every individual is entitled to have respect and dignity,<sup>45</sup> meaning thereby, that all human beings regardless of their creed, sex, caste, colour, place of origin and other man made geo-political divisions are equals. The divine message of Quran<sup>46</sup> that man was formed from clay is a loud and clear affirmation that all human beings are in fact equals. Similarly repeated assertion made in the Holy Quran that the bounties scattered in the cosmos are destined for the consumption of human beings, indicates fundamentally that human beings are not merely equal in status but have right to enjoy equal opportunities. The Quranic

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<sup>44</sup> Al Quran Surah Al- Hujurat ( Chapter 49 verse 13

<sup>45</sup> Al- Quran, Surah Bani Israel (Chapter17.verse70).

<sup>46</sup> Al-Quran Surah Sad ( Chapter 38 verse 76)

principle that ‘those do good shall inherit gardens’ elucidates the concept further by signifying that the standards of success is ‘good conduct’ irrespective that it is performed by someone from lower society or influential person and a blue blooded aristocrat. The question arises that why Islam has given right to exercise choice to all and sundry. The reason behind it that Islam recognizes equal status of all human beings to enjoy the same set of liberties and limitations. These human friendly principles introduced by Divine Message of Quran and practices through the honored Prophet A.S paved the way to flourish humanism and laid down International charter of Human Rights.

Equality is subsequently embedded in international law and is considered as one of the elementary principles of international human rights law. To support this statement, reference can be made to article 1.2 of the United Nations Charter which states that the UN aims to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”<sup>47</sup> and article 13(1) states that “promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”<sup>48</sup>

Article 2 of Universal Declaration of Human Rights (UDHR) does not recognize equality as a human right, rather it is considered as a principle of declaration of equality with respect to the rights and freedoms set forth in UDHR. Therefore inequality is not violation of article 2 if it does not relate to rights defined under the Declaration. However article 7 of UDHR recognizes equality as a human right, it states: “All are equal before the law and are entitled without any discrimination to equal protection of the law.”

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<sup>47</sup> Charter of United Nations, Article 1(2)

<sup>48</sup> Ibid Article 13(1).

Article 7 envisaged two notions of equality:

- (1) Equality of all before the law;
- (2) Equal protection of the law without discrimination;

The article has mentioned two concepts of equality. The notion of “equality of all before law” and “equal protection of law” are not synonymous terms. The former is negative concept whereas the later conveys positive connotation. The first concept discourages and negates all special privileges to any citizen or class and subject them to ordinary law of land. The other declares that citizens should have equal protection if placed in same circumstances.

Dicey theory of “equality before law” explains that “no person is above the law and that every man whatever be his rank or condition is subject to ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunal.”<sup>49</sup>

Sir Ivor Jennings in his book “The Law and The Constitution”<sup>50</sup> had criticized the Dicey theory of “equality before law” while stating that:

“for ‘equality before the law’ in its most obvious sense means an equality of right and duties. In this sense there is no equality, pawn-brokers, money lenders, landlords, drivers of motor cars, infants, married women and indeed most other classes, have special rights and duties. Nor is it possible to affirm that equality exists because any person can legally join one of these classes. A man cannot become a married woman or infant.”

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<sup>49</sup> A.V. Dicey “*Introduction to the Study of Law of the Constitution*” (1885; 10th edn., Macmillan & Co., 1959), pp.187-95,

<sup>50</sup> Sir Ivor Jennings, *The law and The Constitution* (University of London Press Limited, 1938) page 322

He further stated:

*“what Dicey suggests by equality is that an official is subject to the same rules as an ordinary citizen. But even this is not true. An official known as collector of taxes has a right which ordinary person does not possess. A sanitary inspector can enter my house to inspect my drains but my employer cannot.”<sup>51</sup>*

According to Jennings ‘equality before the law’ means that “among equals the laws should be equal and should be equally administered, that like should be treated alike, the right to sue and be sued to, to prosecute and to be prosecuted for same kind of action should be same for all citizens of all age and understanding, and without distinction of race, religion, wealth, social status and political influence”.<sup>52</sup>

It is thus clear that the concept of “equality before law” is susceptible of two interpretation. It could be a formal principle that those persons should be treated equally whom the law regards as equal. Secondly it may imply that the law should treat human beings as equals in respect of those qualities with which need to be emphasized for determination of equal treatment. The concept of equality before law does not involve the idea of absolute equality among human beings which is even otherwise physically impossible.<sup>53</sup>

The safeguard of equal laws does not intend that the laws should be uniform. It points out that among equals the law should be enforced equally and that the like should be treated similarly and reasonable classification is permissible on reasonable account

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<sup>51</sup> Ibid, Sir Ivor, “*The law and the Constitution*” page 323

<sup>52</sup> Ibid Sir Ivor Jennings “*The law and The Constitution*” page 322

<sup>53</sup> The superior court in Pakistan held in 52 CR. L. Journal 1140 (D.B)

in particular set of circumstances. But despite these explanation the chances of amalgamation of these two concepts are there.<sup>54</sup>

This lack of clarity still exist in international law such as International Covenant over Civil and Political Rights (ICCPR). The commentators Professor Robertson examined the alternative interpretation and stated: “Broadly speaking, two quite different meanings seem possible: that the substantive provisions of the law should be the same for everyone; or that the application of the law should be equal for all without discrimination. The former interpretation would seem unreasonable; for example, in most countries women are not required to perform military service, while it is unnecessary that the law should prescribe maternity benefits for men. It would seem therefore that the meaning rather is to secure equality, without discrimination, in the application of the law.”<sup>55</sup>

The concepts of “equality before law” and equal protection of law” are also envisaged in article 26 of the ICCPR which states that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination.....” the article provides broader scope of protection against discrimination as it bound down state to formulate laws which prohibit discrimination. However, the accumulative effect of this provision is that no discrimination is permissible with respect to civil and political rights covered under this covenant. Hence it has narrow down the scope of human right of nondiscrimination by using the words “*in this respect*”. Thus, for protection of rights provided in covenant it can be said that it recognizes independent human right of nondiscriminatory treatment.

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<sup>54</sup> Ibid note 52 , CR. L. Journal 1140 (D.B)

<sup>55</sup> A. Robertson, “Human Rights and the World”, 1972, pp. 86-90, cited in Theodor Meron (ed), “Human Rights in International Law: Legal and Policy Issues,” (1984), p. 132.

However, a contrary view is taken in case of Mrs. Brooks vs. Netherlands. The employer terminated Mrs. Brooks and stopped her unemployment benefit which she was receiving since 1980 owing to the fact that though she was married but did not fall within the definition of “ married man to be considered as breadwinner under Unemployment Benefit Act. Mrs. Brooks challenged the action under article 26 of ICCPR to claim benefit of article 9 of the International Covenant on Economic, Social and Culture Rights (ICESCR). The Dutch government objected to it that ICCPR and ICESCR are independent conventions. The ICESCR has no complaint mechanism for violation in respect of any provision of ICESCR thus the Complaint is not maintainable. The Human Rights Committee held that the Dutch government had violated article 26 since Mrs. Brooke met discriminatory treatment. The Committee stated:-

“although article 26 requires that legislations should prohibit discrimination, it does not of itself contain any obligation with respect to matters that may be provided for by legislation.”<sup>56</sup>

The Human Rights Committee after Brooks’ case confirmed applicability of article 26 of ICCPR for protection of economic, social, cultural and other rights which are not covered under ICCPR. The purpose behind this decision is to safeguard human rights incorporated in international conventions.

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<sup>56</sup> Ibid Brooks case

## 2.5 CONCEPT OF EQUALITY UNDER CONSTITUTION OF PAKISTAN

The doctrine of equality is envisaged in article 25 of the Constitution of Pakistan, 1973.<sup>57</sup> It mandates that every citizen irrespective of his higher status must be treated equally with similarly situated persons. The article 25 of the Constitution enshrines golden rules of equality introduced by Islam which mandate that every individual irrespective of his high social status must be treated equally like similarly placed persons. These principles are also recognized as “golden principle of Modern Jurisprudence” which direct that all individuals are equal before the law and are entitled to equal protection of law. Article 25 is corresponding to the provision of article 7 of Universal Declaration of Human Rights. It also provides concept of equality before law and equal protection of law i.e. all persons are subject to law and entitled to be treated similar under all conditions and situation both in privileged conferred and in the liabilities imposed. Article 25 of the Constitution of Pakistan allows reasonable classification which is founded on reasonable distinction or reasonable basis. Mere differential treatment would not amount to discriminate intrinsically. Differentiation must be shown as arbitrary and unreasonable.<sup>58</sup>

The courts in Pakistan has interpreted the equality principle provided in article 25 to explain the basis of classification. Following cases of Supreme Court of Pakistan can be referred in this regard:-

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<sup>57</sup> **25. Equality of citizens** (1) all citizens are equal before law and are entitled to equal protection of law.  
(2) There shall be no discrimination on the basis of sex (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

<sup>58</sup> PLD 2004 Lahore 305

In Brig (Retd) F.B Ali versus State<sup>59</sup> wherein Justice Hamood –Ur- Rehman has observed as follows:-

*“Equal protection of the laws does not mean that every citizen, no matter what his condition must be treated in the same manner. The Phrase” equal Protection” of the law means that no person or class of persons shall be denied the same protection of laws which is enjoyed by other persons or other class of persons in the like circumstances in respect of their family, liberty property, or pursuit of happiness. This only means that persons, similarly situated or in similar circumstances will be treated in the same manner. Besides this, all laws implies classification, for, when it applied to a set of circumstances, it creates thereby a class and equal protection means that this classification should be reasonable. To justify the validity of classification, it must be shown that it is based on reasonable distinctions or that it is on reasonable basis and rests on real or substantial difference of distinction.”*

The court in case titled Islamic Republic of Pakistan V Abdul Wali Khan<sup>60</sup> decided a reference filed by the government against the National Awami Party on the basis of principle of equal protection of law. The Supreme Court of Pakistan held that “in order to test reasonableness of such restriction, therefore, no general standard exists. It will depend upon variety of circumstances including the interest and urgency of the

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<sup>59</sup> PLD 1975 S.C 506

<sup>60</sup> Islamic Republic of Pakistan V Abdul Wali Khan PLD1976 S.C 57

action proposed and the nature of safeguard, if any, provided to prevent possibilities of abuse of power.”

However, the concept of equality provided in International law and domestic law of Pakistan that all persons alike should be treated alike in similar situation can be confronted on the ground that no universal agreement exists in history to point out what does and what does not constitute inequality. Difference in terms of birth, wealth and sex have been regarded as highly material in some social units and immaterial for others with respect of eligibility for public office. There exist a controversy that what degree of equality and inequality should exist in the social order. This controversy is based on undeniable fact that a strict and absolute equality hardly ever exists in nature of human social life. It is not an admitted fact that no two persons look, behave and act in same way. No two situations are completely alike. The term equality denotes an approximate equality only. When two persons or things are considered equal, some existing differences deemed to be insignificant and inessential.<sup>61</sup>

In all these instances there exist a controversy as to the degree of equality and inequality that should exist in the social order. Hence below different theories of equality are discussed particularly with respect to equality of ex-offenders with ordinary person in order to claim decent work for development of his social status.

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<sup>61</sup> Edgar Bodenheimer, “ Jurisprudence the Philosophy and Method of The Law” Harvard University Press, Cambridge Massachusetts( 1962) page 199

## 2.6 THEORIES OF EQUALITY.

### 2.6.1 Egalitarian Theory.

Egalitarian doctrines emphasize on the notion that all humans are equal in terms of fundamental values and moral status. Egalitarianism is a variable doctrine, since people can be treated the same by several different types of equality, or ways. However “egalitarian” does not essentially mean or hold that it is the conditions of people should be made the same in any respect or they are treated the same in any respect.<sup>62</sup>

The Lockean rights approach named after John Locke,<sup>63</sup> rejected egalitarian approach.<sup>64</sup> Lockean pointed out that every person is in position to determine his action and deal with his person and possession as he deems fit. Further equality requires that no person in this state is subject to will or authority of any other person. All individuals are enjoy equal and independent status, therefore no one is permitted to detriment their life, liberty, health, and possession. Locke further stated that “as far as state of nature exist everybody has right to execute the law of nature and punish offender of it.”<sup>65</sup>

One may argue that lockean theory can be used as defense to establish balance between rights of employers and ex-offenders. Ex -offenders can claim their right to work under this theory and be able to punish it violators. But, the study contends that the Locke theory cause disadvantage and inconvenience in society. Firstly the enjoyment of the right to life, health, liberty is uncertain therefore it cannot be said that

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<sup>62</sup> Wenar, Leif, "Rights", *The Stanford Encyclopedia of Philosophy* (spring 2020 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/spr2020/entries/rights/>>. Last accessed on 12-12-2019

<sup>63</sup> Locke, *Civil Government*, *Every man's Library* ed, 1924 BKII, Chapter .ii Section 4 and 6 cited in Edgar Bodenheimer, *Jurisprudence the Philosophy and Method of The Law* (Massachusetts: Harvard University Press, Cambridge, 1962) , P47

<sup>64</sup> Robert Nozick , *Anarchy, State, and Utopia*( New York: Basic Books. 1974) 134

<sup>65</sup> ibid Bodenheimer, “*Jurisprudence the Philosophy and Method of The Law*”, P47

they are available to all for all time; secondly a person cannot sit as a judge for enforcement of his natural right as it is contrary to the principle of equity that no one can be judge or arbitrator in his own case; furthermore, a person has entered into a social agreement with the community to form a body politics in order to address the disorder incidents of state of nature. This theory if applied in case of enforcement of right to work of ex-offenders; by giving them the authority to punish anyone who offend their natural right of equal share from wealth of society then this lead to a chaos in society. The society is already occupied with a notion that ex-offenders have criminal mindset and they are violators of social norms. In such a situation society will tend to put more harsh conditions for their entry in the society. Hence in the present democratic era Locke approach of absolute enjoyment of natural rights is obsolete.

## **2.6.2 Concept of Formal Equality**

Aristotle was the leading theorist to articulate the relationship between justice and equality. According to Aristotle “equals were to be treated alike and unequal in an unlike manner”. Aristotle's equality concept has a dominantly influenced the formal equality concept embedded in western jurisprudence.<sup>66</sup>

Formal equality signifies that if two persons are alike, then, equity demands that they must be treated equally consistently. But this expression of equality has some draw back as it does not consider the inherent difference of humans on the basis of their race, age, color and tend to give preference to one person over other even unintentionally.<sup>67</sup>

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<sup>66</sup> Aristotle, *The Nicomachean Ethics*, Hippocrates G. Apostle(transl), (Dordrecht: D. Reidel Publishing Company, (1975), p1130

<sup>67</sup> Peter Westen, “The Empty Idea of Equality”, *The Calvinist International* available at <https://calvinistinternational.com/2015/05/05/peter-westens-the-empty-idea-of-equality/> last accessed on 2-07-2020

Rose Mary and Joellen state that this expression of equality which is more focusing on discriminatory rule, norm or behavior, is departing from accepted standard of equality. There are some drawback of such approach. First there are many diversities among people. Some of these diversities appear to be natural and even immutable for example woman can give birth to child, race is something ‘chosen’ but it is something marked a person since birth. Some people are physically disabled while others are not. However, these differences between people are treated irrelevant by formal concept of equality which is not suitable approach to defend the concept of sameness while ignoring differences which do exist between people. The same treatment may not have identical impact on everyone, since treating every individual in the same way may be disadvantageous to some and thus have discriminatory effect upon them.<sup>68</sup>

Ben argues that formal equality at work place appears in different rules, which are formulated in order to treat equally all persons without any prejudices. As for instance every individual has equal right to avail opportunities of jobs. He emphasized that these laws are made with optimistic approach, but their applicability to unequal groups have uneven results. Thus it creates sense of discrimination among groups who are at disadvantage by universe application of rules, because they are formulated without keeping in view diversity of people. Since formal equality theory emphasizes over neutral treatment of all persons is founded on the values of dominating group in society.<sup>69</sup> Therefore it is observed that formal equality concept exist in all employment laws which are articulated in such a way that it provides equal opportunity to work to large segment of society which is without any criminal conviction and hence create

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<sup>68</sup> Rose Mary Owen and Joellen Riley, *The law of work* (Oxford University press, 2007), page 349

<sup>69</sup> Ben Mitchell, “Process Equality, Substantive Equality and Recognizing Disadvantage Constitutional Equality Law”. *Irish Jurist*, n 53, (2015), 36-57

disparity and discrimination against persons holding criminal record at the time of employment.

### **2.6.3 Substantive Concept of Equality**

Substantive concept of equality is a fundamental principle underlying human rights. The concept relates to equal provision of opportunities to disadvantaged group of people in society.<sup>70</sup> Therefore substantive equality emphasizes that laws must take into account elements of discrimination, unequal distribution and marginalization for the purpose of achieving equal effect for basic human rights. Substantive equality identifies the differences among group of people and deals with systemic or structural inequality that exist among people. The substantive equality rejects the assumption that a level playing field already exists for all for treating them the same. The proponent of this concept of equality contends that if diversity of people is not taken into account then treating everyone the same can further lead to inequality in the future. Substantive equality makes an attempt to identify differences and then adjust for them.

The substantive approach to equality is deep-rooted in human rights instruments and jurisprudence. An example of it is article 14 of the European Convention on Human Rights (ECHR), which states that: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>71</sup>

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<sup>70</sup> Sandra Fredman, “Substantive Equality Revisited”, *International Journal of Constitutional Law* Volume 14:Issue 3 ( 2016), Pages 712–738

<sup>71</sup> The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international convention to protect human rights and political freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention. The convention was adopted and opened for signature by the United Nations

Similarly article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines *special measures* as, "securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination"<sup>72</sup>.

These two articles are the fundamental principles which display concept of substantive equality. The party states failed to formulate substantive laws have to face from international community tough restrictions and scrutiny.

Substantive equality in-spite of its international acceptance is criticized on the pretext that all scholars do not agree on one definition of substantive equality. To address this criticism Sandra Fredman has argued that "substantive equality should be viewed as having a four-dimensional i.e. recognition, redistribution, participation, and transformation."<sup>73</sup> Recognition means to identify the disadvantage group in society which are vulnerable to discriminatory treatment. The redistributive dimension deals with affirmative action need to be taken in order to redress discrimination and unequal distribution.<sup>74</sup> The participative dimension employ positive duties to change behavior of persons affected by discrimination as effective members of society. Lastly, the transformative dimension.<sup>75</sup> Finally, the transformative dimension signifies

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General Assembly on 21 December 1965, and entered into force on 4 January 1969. As of April 2019, it has 88 signatories and 180 parties.

<sup>72</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is a United Nations convention. A third-generation human rights instrument, the Convention commits its members to the elimination of racial discrimination and the promotion of understanding among all races.

<sup>73</sup> Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights". *Human Rights Law Review* Vol 16: issue No2 (2016) p 282

<sup>74</sup> See note 65 Fredman "Substantive Equality" at 284

<sup>75</sup> See note 65 Fredman "Substantive Equality" at 285

modification of such societal structures which create discrimination and transform them in such a way that it accommodates differences.

The study argues that substantive equality has not given complete list of attributes which prohibit discrimination, therefore besides common known factors for basis of discrimination such as race, gender and disability another factor i.e. ex-offenders can be included for purpose of elimination of discrimination in all aspect of life. Further, the states should adopt such measures and policies which can create opportunity of equal treatment to ex-offenders and strive for formation such societal structure which can eliminate discrimination against ex-offenders by providing them opportunity to re integrate in society and enjoy their life by providing them means of earning.

Both the formal and substantive equality approaches are usually concern with comparison. Therefore, the question arises, who could be that person or individual to be compared with for the purpose of determining existence of inequality or discrimination factor. Models of equality often incorporate stereotypes that the person with whom they compare is taken as might be a white, middle class, male. The person is considered as one who live out of social context. The equality law is then determined according to the attributes of this stereotypes while neglecting other human characteristics in this process. This is particularly observed in formal equality which ignores attributes which are not present in stereotypes.

Similarly substantive concept of equality usually operates by comparison approach by fixing normative benchmark and then adjudge differences and disadvantages against it.

Sandra Fredman, while addressing these problems argued that there is a great advantage in having more specific approach to the allocation of rights rather than using model of formal equality that is dominant in much discrimination related legislations.<sup>76</sup> The individuals find it difficult to enforce such rights which are not recognized by law. The relevant example in this regard is of ex-offender, who has to face problem of enforcement of his right to work, since it was not defined by law categorically. He even cannot claim general human right to work since he does not fall in the category of ‘ordinary person’ owing to his previous criminal history. Therefore in such eventuality Sandra Fredman approach is relevant to plead case of ex-offenders. Hence, it is argued that legislature has to define ex-offenders right to work in clear words in order to enable them to enforce it.

A transformation of equality from negative concept focused on the eradication of certain, discriminatory rules, norms or behavior to equality as a positive duty make “affirmative action” or positive discrimination is observed. Therefore a new equality approach known as diversity approach was adopted in Post Modern era.

#### **2.6.4 Diversity Approach of Equality**

A diversity approach of equality is now dominating the market place of the global era. The diversity approach conceptualize a work place in which everyone can work and be valued and flourished. This liberal concept of equality embedded the notion of dignity of a man and equality as main idea to allow humans to flourish.<sup>77</sup> It assumes that equal access to basics such as education, housing and work to enable individuals to lead a life according to their own wish and whims. This concept of

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<sup>76</sup> Sandra Fredman, “A Difference With A Distinction: Pregnancy and Parenthood Reassessed”, *Law Quarterly Review* Vol 110: issue no 106 (1994), 111 – 113

<sup>77</sup> Rose Mary Owen and Joellen Riley, *The law of work* (Oxford University press, 2007), page 449

equality is also ‘instrumental’ and ‘procedural’ one as it takes equality as right of all individuals to have access to social institutions including opportunity to work which enable them to spend good life.

Equality at work is particularly important since it commensurate with the neo liberal concept of independence of individual as his active participation in the market place through work indicate his economic independence. Market place is the domain of neo liberal individual. It is the duty of all, social, political, economic and legal actors and institutions whether private or public to play their role in order to achieve equality in work and its benefit.<sup>78</sup>

This emphasis on freedom of individuals to have access to work become instrumental value of equality and it is expressed in ILO’s Global Report, ‘Time for equality at work’, in following words:-

*“Discrimination limits freedom of individual to obtain type of work to which they aspire. It impairs the opportunities of men and women to develop their potential skills and talents and to be rewarded according to merit. Discrimination at work produce inequalities in labor market outcomes and places member of certain groups at disadvantage.”<sup>79</sup>*

According to ILO equality at work secure “values of human dignity and individual freedom, social justice and social cohesion”. This approach to equality not

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<sup>78</sup> Ibid Rose Mary Owen, *The law of work*, 2007- page 499.

<sup>79</sup> Time for equality at work. Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2003, page 15.

only eliminates discrimination among individuals but extends its benefit to the economy and society.

The research explains that the concept of equality does not focus on comparison between groups of workers rather it lay emphasis on strong barriers which lead to discrimination against certain groups. It requires that a law to be formulated to eradicate discriminatory behavior. This law needs to cast positive duty on those responsible for provision of work to prevent discrimination and promote equality. This ensures that all can participate in the world of work.<sup>80</sup>

Equality approach of diversity entails a positive duty on organizations and institutions to accommodate diversity rather than simply responding to individual concept.<sup>81</sup> One can criticize on this diversity approach that it is workable only in large organization where highly skilled workers are employed. In response to this criticism, the study contends that this concept of equality ensure fair participation of everyone in the workforce which can be result oriented. It ensures fair participation which is beneficial to the market place. While by provision of special measures for disadvantage group, it pays attention to the need of all equally in the context of availability of work.

### **2.6.5 Theory of Equal Opportunity**

This theory is essential essence of social justice and it revolves around eradicating stereotypes and sanctioning persons to take part in activities of society on the basis of merits rather than those characteristics endorsed to them generally.

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<sup>80</sup> Sandra Fredman, “ Equality: A New Generation”, *Industrial Law Journal* Vol 30: issue no 2 (2001), 145

<sup>81</sup> Barmes and Ashtiany, “ The diversity Approach to achieving equality, potential and pitfalls”, *Industrial Law Journal* Vol 32, (2003), 284

Aristotle in his estimation mentioned in “some sort of equality”<sup>82</sup> demanded that the worldly things should be divided equally among members of community or state. He also demanded that this distribution should be maintained by law against any violation. Aristotle has given two concepts of Justice: distributive justice. This form of justice is about sharing of offices, rights, goods and honor to members of community on the basis of principle of proportionate equality. Equal things should be distributed to equal persons and unequal things to unequal persons. Aristotle stated that “ There will be the same equality between the shares as between the persons; for if the persons are not equal, they will not have equal shares; it is when equal possess or allotted unequal shares or persons not equal get equal shares, that quarrels and complaints arise.”<sup>83</sup> Aristotle has proposed merit as standard for measurement of equality. While other form of justice is called corrective justice which guarantees, protects and maintain distribution made equally against any illegal attack and restore the distributive equilibrium after it has been disturbed.

Theory of equal opportunity is playing a main role in theory of distributive justice. The fundamental question to distributive justice theory is that: under what circumstances society makes just and morally fair distribution of liberties, opportunities, and goods? Arneson, Richard, states that the theorist of distributive

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<sup>82</sup> Aristotle, “Nichomachean Ethics”, translation by H. Racham (Leob Classical Library ed, 1934) BK.V. ii.6 referred in Edgar Bodenheimer, *Jurisprudence the Philosophy and Method of The Law* (Massachusetts: Harvard University Press, Cambridge, 1962), p 191

<sup>83</sup> Aristotle, “Nichomachean Ethics”, translation by H. Racham BK.V. ii.6 Edgar Bodenheimer, *Jurisprudence the Philosophy and Method of The Law* (Massachusetts: Harvard University Press, Cambridge, 1962) p191

justice responded that the distribution is fair and just only if it fulfill standards of equality of opportunity and eliminate all sort of inequalities.<sup>84</sup>

The study explains that the theory of equal opportunity can be used to support argument that equal opportunity of employment should be provided to ex-offenders since the theory pointed out that all applicants should have equal opportunity to apply for positions and posts that confer superior advantages. Applicants should be assessed on their merits and only that applicant would be qualified who meets the appropriate criteria of the post.<sup>85</sup> In this way the theory of equal opportunity ensures that all members of society have equal opportunities of participation.

## **2.6.6 Theory of Social Equality**

Social equality theory is not about distribution of goods equally among equal persons as advanced by Aristotle, rather this theory revolves around compatibility of relationships of individuals with each other in order to form social order based on equality. Social equality determines which kinds of relationships are compatible and exemplify equality; and what type of asymmetrical relationships, social hierarchies should be opposed. The concept of social equality can be illustrated by using words such as “Mr.” or “MS” or “friend” instead of referring to a rank or education or marital status. This indicates that theory of social equality stresses on the elimination of discrimination which is based on in separable part of a man's identity such as social status based on

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<sup>84</sup> Arneson Richard, “ Equality of Opportunity,” *The Stanford Encyclopedia of Philosophy*, Summer Edition (2015) and Edward N. Zalta (ed.), at <http://plato.stanford.edu/archives/sum2015/equal-opportunity> last visited on 12-10-2016

<sup>85</sup> Rose Mary Owen and Joellen Riley, *The law of work*( Oxford University press, 2007), page 355

race, sex, age, origin, caste or class etc.<sup>86</sup> The assertion is that every person as a citizens or even merely as human being should be treated as socially equal. The state and its institutions should not form or support (certain kinds of) oppressive and hierarchical relationship between persons or groups of persons. The study argues that ex-offenders as human beings are also entitled to be treated socially equal, since the discrimination against ex-offenders is solely based on their person identity as “Ex-offenders” which is an inalienable trait since they cannot change their past criminal record.

## 2.7 PRINCIPLES OF NATURAL JUSTICE AND EQUALITY

Before advertig to discussion on the topic it is first necessary to explain what is natural justice?. The expression ‘Principles of Natural Justice’ (PNJ) derivative from Roman law term “Jus Natural”. These principles are not enforceable at law, therefore, it not necessary that they may be found in statutes but they are necessarily to be followed. All civilized states recognize the principles of natural justice, therefore, it is tremendously essential that any quasi- judicial forum while resolving controversy between the parties or any administrative action entailing civil consequences to follow these principles. These principles are well recognized. Natural justice is to confirm administration of law with fairness and to assure justice. Natural Justice consist of those rules are laid down by the Courts for the minimum protection of rights of the persons against any arbitrary procedure which can be adopted by a judicial, quasi-judicial and administrative authority while passing a decision which affect fundamental rights. These rules are meant to preclude such authority from committing injustice. The concept of fair hearing or natural justice is elastic and is not tenable of exact definition.

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<sup>86</sup> Russell. Blackford, "Genetic Enhancement and the Point of Social Equality". *Institute for Ethics and Emerging Technologies*. (July 20, 2006) available at <https://ieet.org/index.php/IEET2/more/689/%20Genetic%20enhancement%20and%20the%20point%20of%20social%20equality> last accessed on 21-12-2019

Natural Justice has two basic principles (i) *Nemo judex in re sua* i.e. the body deciding the dispute should be free from bias and (ii) *audi alterum partem*, i.e. a person likely to be affected by a decision has a right to be heard. Hearing involves many component like sending notice, opportunity to be given to other party to represent its case. These components are not fixed but are flexible and variable depending on nature of case.<sup>87</sup> Natural justice is elementary justice which is distinct from complex justice generally practiced in courts. Therefore natural justice requires an opportunity of hearing to be given to aggrieved person before passing of any adverse order against him.

Principles of natural justice also find their place in international laws as for instance article 8 of Universal Declaration of Human Rights (UDHR) envisages:

“8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.”

Similarly, article 10 of UDHR ensures that “everyone has full access to fair public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge framed against him.”

UDHR is not a treaty. Therefore its provisions do not have force of law. However many of its provisions have obtained status of customary international law, among them the provisions related to right of fair hearing. Furthermore, UDHR is considered as foundation of many international treaties and thus its provisions get force of law through those international treaties. UDHR has recognized the right of every

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<sup>87</sup> M P Jain & S N Jain, *Principles of Administrative Law* (lexisNexis publishers, fourth ed. 2017), Page 219-220.

person to get his remedy from competent national forum if he observes violation of his fundamental right. It also recognizes and establishes right of other party against whom claim is brought in national forum. The use of words “in determination of his rights and obligations” and subsequently following with the words “and of any criminal charge against him” explicitly determine right of defendant party to establish his rights and obligations and face criminal charge framed against him. These provisions of UDHR uphold the principles of natural justice for proper protection of human rights. The International Covenant on Civil and Political Rights (ICCPR) Article 14 specifically impose a duty upon state parties to ensure equal protection of law as well as fair public hearing “in the determination … of … rights and obligations in a suit at law.”<sup>88</sup>

ICCPR which has implementation mechanism of its provisions has obligated the state parties to ensure equal protection before the law as well as fair trial for determination of rights and duties. Therefore, in case of failure of state to ensure provision of fair trial to a person, a claim against the state for enforcement of Provision of Article 14 of ICCPR can be brought before International Human Rights Commission.

Analogous to provisions of UDHR and ICCPR the European Convention of Human Rights and Fundamental Freedoms of 1950 under clause 6(1) also provides that “in the determination of all civil rights and obligations or of any criminal charge against a person, everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Pakistan has signed UDHR<sup>89</sup> and ratified ICCPR. It has incorporated similar provisions to these international instruments in the Constitution of Pakistan.

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<sup>88</sup> Pakistan ratified International Covenant on Civil and Political Rights on 23 June, 2010

<sup>89</sup> Pakistan Signed UDHR on 1948

Constitution recognizes right of fair trial under article 10-A which envisages: “10A. Right to fair trial.—for the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.”<sup>90</sup>

Article 10-A is a comprehensive provision of law on right to fair trial which also ensures “due process of law” which covers all aspect of principles of natural justice.

Supreme Court of Pakistan in Hafiz Juniad case held:

*“16. Our constitution is prefaced by timeless and immutable constitutional values, which reflect the will and resolve of the people of Pakistan these preambular constitutional values provide that principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be observed. Wherein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and morality. These constitutional values inter alia flow from fundamental rights, like the right to life(Article9), the right to dignity (Article 14) and right to equality (Article 25)making our constitution evergreen, organic and a living document”<sup>91</sup>*

The next question for consideration is whether a person can be denied right of employment on the basis of an adverse report gathered behind his back without

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<sup>90</sup> Article 10 of the Constitution of Islamic republic of Pakistan, 1973

<sup>91</sup> Hafiz Juniad Mahmood vs. Government of Punjab and others PLD 2017 Lahore 1.

affording him an opportunity of hearing and whether it constitutes infringement of principles of natural justice. This question depends upon further question that whether the principles of natural justice are part of concept of equality clause enshrined in positive law?

Justice Gwyer<sup>92</sup> in *Re Central Provinces and Berar States of Motor spirits and Lubricants Taxation Act, 1938* addressed this query while holding that “it may be mentioned that it is not explicit that the principle of *Audi alteram partem* is part of equality of opportunity while considering the claims for appointment to an office under the State.”

However, Bhagwathi, J. in *Maneka Gandhi* case<sup>93</sup> has taken a different view while holding that “Fundamental rights create conditions in which every human being can level up his personality to the fullest extent. Take the case of a person who has no property but with governmental benefaction acquired qualifications for instance, Ph. D. in Electronics or Physics or Geology, etc., he is eligible for appointment to a post in the respective branch under the State. He can develop his personality both intellectually and economically and of immense support to his family provided he is given job. When he has applied for and was found eligible but his rival (a hypothetical case of co-competitor or one animated with jealousy or enmity just referred to) maneuvered with the police and procured an adverse report with all false allegations, if the theory of privilege is given credence to it and if the authority relying on the report denies appointment to the candidate, does it not a denial of an opportunity to get an appointment to a post under the State? Does it not in effect and in substance violate the

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<sup>92</sup> *Re Central Provinces and Berar States of Motor spirits and Lubricants Taxation Act, 1938*, AIR 1939 Fed. Court, 1

<sup>93</sup> 1978 AIR 597, 1978 SCR (2) 621

equality clause? Does it not imperil the career of the candidate to develop his personality and thereby defeat the constitutional rights guaranteed to him? In the light of this background the immediate question that would emerge is whether the Executive Government would be given blanket power to deny appointment to the successful candidate or an aspirant, on taking note of such adverse material without affording an opportunity of representation and hearing".

On this principle of *audi alterum partem* (right of hearing to affected person) ex-offenders are entitle to right of hearing to explain to employers regarding their previous criminal record collected on their back by the employers. Employers' action to deny ex-offenders jobs without offering them right of audience is contrary to the principle of natural justice.

There is another argument that the equality clause does not explicitly embodied the principle of natural justice. To address this argument the interpretation of courts on scope and ambit of fundamental right is relevant to be quoted here:-

*"Justice Bhagwathi, has also laid down that: "The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wave lengths of comprehending the scope and ambit of the fundamental rights has been said in Cooper's case and our approach in the interpretation of the fundamental rights must be in tune with the wavelength."*

The constitutional courts in Pakistan also adopted similar approach of liberal interpretation of fundamental rights in order to expand the scope of it. Therefore the

principles of natural justice can be read as part of fundamental right to equality in order to give them an effective enforcement.

## **2.8 CONCLUSION**

The international community adopted many conventions to eliminate discrimination. The definition of discrimination in these conventions provide protection for specific grounds. Therefore, internationally, there is no consensus over a concrete definition of discrimination which is inclusive of all grounds prohibited for discrimination. Resultantly, it proves a research question that international laws are deficient to provide protection to ex-offenders against discrimination. The research defended right of equality of ex-offenders on the basis of different theories of equality which are in one way or other helpful to determine different aspect of equality relevant for purpose of provision of equal opportunities of employment to ex-offenders however it argues that theory of equal opportunities is most relevant to address the present issue in hand. The research on the basis of principle of natural justice i.e. audi alterm partem (no one should be condemned unheard) defended an argument that the employers cannot discriminate and refuse jobs to ex-offenders without providing them opportunity to explain about their previous criminal conduct. This right was recognized by courts and therefore it is suggested that principle of natural justice need to be embodied in all employment laws of Pakistan.

## **CHAPTER 03**

### **A CONCEPTION OF RIGHT TO WORK OF EX-OFFENDERS**

#### **3.1 INTRODUCTION**

The notion of human rights is based on the principle that every individual is titled to enjoy his rights without any discrimination and irrespective of his nationality, sex, language color, religion, place of residence, ethnic origin, or any social status. These rights are all inter-reliant and inalienable.

Human rights are universal and inseparable; they are often stated and ensured by law. International law recognize these rights under treaties, customary Practices, general principles and other sources of international law. It is the duty of state under International human rights law to promote and protect human rights and provide fundamental freedom to persons to enjoy them regardless of their political, economic and cultural system. Right to work is recognized as economic and social right in international law which are enlisted in Articles 22 to 26 UDHR, and further settled as binding treaty norms in the ICESCR. Therefore, it is also incorporated in domestic laws of the states. This study also discuss different theories on nature of right to work whether it is a will or interest and which theory best construct right to work. The study has also highlighted the different international obligations of Pakistan for provision of right to work for all without any discrimination. It also shows that ex-offender enjoys status of “free man” who had paid back his debt to society and therefore he is entitled to be treated with dignity by society.

### 3.2 RIGHT TO WORK IS A WILL OR INTEREST?

Right to work is a will or interest? The will theory and the interest are the major theories in jurisprudence to describe about right are; each of the theory has its own view point and history.

Herbert L.A. Hart (1907-92), a British legal scholar, has developed the will theory of rights. Freedom is the basic right according to theory of will. The theory of will is also called ‘theory of choice’ it gives choice to right holder either to exercise or waive it off.

Example: a person hold a piece of land he has freedom to do with it as he wishes. No one can interfere into the freedom of any other unless he has a right. If someone owns a land he has right to use it and if there is any interference in its enjoyment he has choice either to permit it, or preclude it by demanding security from legal authorities.

The freedom protected by the theory means to waive off the right by his choice. If a person does not has a right to waive off his entitlement, it is argued that then he has no right.

The interest theory argues that. No right exist if it does not protect a certain interest.<sup>94</sup> for example if (A) compels (B) to do something but (A) has no advantage or interest to be protected from it then, according to the interest theory (A) does not has a right. Nevertheless, it is not essential that every “interest” of an individual acquire status of a right. Consequently, proponent of interest theory argues that it is foremost

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<sup>94</sup> Joseph Raz, *Morality of freedom*, ( Published to Oxford Scholarship Online, 1988), p166, 180-183. For Bentham’s version of interest (benefit) theory as the earliest one, see H.L.A Hart, “*The Concept of Law*”, (Oxford: Oxford University Press, 1982), 171-179

important that an interest to be protected, but it is not a sufficient condition for it to determine a right<sup>95</sup>. They argue that only that interest which is worthy of protection become a right.<sup>96</sup>

Employment rights with reference to their existence in legal system are well explained in the interest theory. The theory states that the right to work is not to advantage a specific individual but all persons who are associated with work, hence these interests should be collective to all such persons. This is the reason that the interest theory emphasized for taking into account the person's interests in relation to work for the purpose of determination of their right to work.<sup>97</sup>

Then what the word 'work' means for purpose of determining interest of people?

Work has different meaning in science and social sciences. One of the most frequently used definitions states that work is an activity that transforms nature.<sup>98</sup> But this definition is not appropriate since if a person who has cut trees from jungle and transformed nature in an inappropriate way then he had performed no work. Therefore, it is appropriate to proceed to more common definition of work which is used in everyday i.e. work is a paid activity. However this definition is not conclusive since it leaves out many form of work.<sup>99</sup>

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<sup>95</sup> M. Kramer, N. Simmonds, and H. Steiner, *A Debate Over Rights* (Oxford: Oxford University Press. 1998), 472

<sup>96</sup> Joseph Raz, *Morality of freedom* (Published to Oxford Scholarship Online, 1988), 166, 180-183.

<sup>97</sup> Li Weiwei, "Equality and Non-Discrimination under International Human Rights Law", Research Notes No. 3 (2004), P 5

<sup>98</sup> Keith Grint, *the Sociology of Work* (Cambridge: Polity Press, 2005), p 299—301.

<sup>99</sup> Ibid note 98 Li Weiwei, "Equality and Non-Discrimination under International Human Rights Law",

People have variety of interest associated with work. They choice to select a certain category of work according to their self -interest. They are willing to lead a working life which is compatible with their interests.

### **3.3 WHETHER RIGHT TO WORK IS A PRIVILEGE OF STATE**

Most of countries' Constitutions guarantee protection of rights to work of their citizens. However Constitutional experts view this as a privilege of state to provide this constitutional guarantee to its people. The concept of privilege received considerable attention among eminent writers on constitutional law in allied jurisprudence e.g. United Kingdom, United States of America and continental countries. How the theory of privilege was nurtured and applied by these constitutional scientist, it is necessary to first get to know the concept of privilege in order to have better understanding of opinion of jurists:

The word "Privilege" has been defined in Corpus Juris Secundum<sup>100</sup> to mean as used in its broad and comprehensive sense "an advantage" further defined as: "It has been stated that granting of a privilege may confer a right to hold public office is a privilege."

Charles A. Reich<sup>101</sup> in his "New Property" states that:

*"The distinction between the "right" and "Privilege" is getting blurred in this area. What were considered as privileges are coming to be recognized as interest in the nature of rights to be protected against*

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<sup>100</sup> Corpus Juris Secundum, Volume 72, at page 951

<sup>101</sup> Charles A. Reich, "The New Property" *Yale Law Journal*, , issue 73 (1963)page 741

*arbitrary actions. The Government largesse is gaining recognition as new property requiring legal protection."*

Charles A. Reich<sup>102</sup> a proponent of theory of privilege defines opportunity of getting a job as a privilege of state, he refers getting a job is principal form of wealth in following ways:

*"Today more and more of our wealth takes the form of right or status; rather than of tangible goods. An Individual's profession or occupation is a prime example. To me the job with a particular employer is the principal form of wealth as it is far more valuable than a house or bank account, for a new house can be bought, and a new account opened once the profession or a job is secured."*

Charles a. Reich<sup>103</sup> further defined the role of state as provider of wealth in shape of granting licenses, contracts, jobs offering opportunities for appointment to an office or position under the state to its people. He argued that the state in this way has control over life of people, therefore. He made it mandatory to the state to ensure equality of opportunities in matter of appointment among its people in order to ensure achievement of good life by its citizens. Both by eradicating hindrances in the path of such achievements and in supporting a person in realizing his self-perfection.

Bhagwati, J in Ramanna v. International Airport Authority of India<sup>104</sup> held that:

*"Today with tremendous expansion of welfare and social service functions increasing control of material and economic resources and*

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<sup>102</sup> Charles A. Reich, "The New Property" *Yale Law Journal*, , issue 73, (1963-64)page 733 and 734

<sup>103</sup> ibid

<sup>104</sup> 1979 AIR 1628

*large scale assumption of industrial and commercial activity by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which the ordinary citizen comes into relationship of direct encounter with State power-holders."*

Charles A. Reich in his "New Property"<sup>105</sup> has stated that:

*"In a very real sense, in such a society the benefits received by the individual from the State will represent but his rightful share in the commonwealth itself. Only by transforming such benefits into "rights" will law achieve the goal of providing a secure minimum basis for individuality and dignity in a society where man will have virtually lost the ability to be master of his own economic destiny."*

Bernard Schewartz, in his "A Commentary, of the Constitution of United States of America"<sup>106</sup> opposed the theory of privilege while stating that "Rights of the person, Equality, Belief and Dignity", dealt with the role of the welfare State vis-a-vis the rights of a person. He states that in the welfare state several measures were taken to assure rights to the persons in getting jobs, pensions, welfare aid and other government benefits which are not pre-existing rights. These are all in the nature of privileges or gratuity. Meaning thereby no person has right to claim these privileges rather it is the prerogative of the government to laid down any term and condition on availing these privileges. Bernard argued but this then amount to call something a mere gratuity or

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<sup>105</sup> Charles A. Reich, "The New Property" *Yale Law Journal*, , issue 73, (1963-64),page 733 and 734

<sup>106</sup> Bernard Schewartz, "A Commentary, of the Constitution of United States of America," in Volume II, Part III, Chapter 20, under S. 584 to 586 at pages 871 to 884.

privilege and then at the pleasure of the government to withhold, grant or revoke it. If that power of state is established then the logical consequences would be that the state may completely withhold the benefits without any reason if the person does not accept the conditions. Bernard Schewartz visualizes that most disturbing consequences would ensue to the persons receiving them. The state would compel a citizen even to let go his rights ensured under the Federal Constitution for the sake of receiving assistance from the State. He graphically describes thus: "Practically speaking to exercise his constitutional rights, if the benefactions which he receives are considered only a privilege remains theoretically free to exercise any of his constitutional rights; but he will know that the price of free exercise will be the risk of economic loss and even the loss of livelihood."

He argues that: "In a society in which the public fisc is in one way or other coming to be the principal source of economic support, it is essential that the law transforms the public benefit from a mere privilege to something held as of right. Perhaps in an early day when the scope of the Governmental action in the field of benefaction was much narrower it was not unreasonable to treat the recipients of the State largesse as a mere donee of privileges which might be granted or revoked on any conditions which the Government choose to impose. The same is no longer true in a society in which more and more persons are becoming dependent upon the public purse and which is, in fact, evolving towards a stage in which the economic existence of the entire community will turn upon their relationship to the Government."

He concludes that:

"In a society towards which we are moving the largesse dispensed by the State will be based upon recognition that the economic dependence

of the individual is caused by forces far beyond his control ... In such a situation, the society itself will have to fill in the gap, if human values themselves are to be preserved. The aim of the benefits conferred for the purpose will be to preserve the economic sufficiency of the individual and to allow him to remain a valuable member of the community." To preserve "modicum of dignity of person", he pleads for procedural safeguard to fair play.

Similarly Charles A. Reich also in consensus<sup>107</sup> with Bernard states that the power of government to dispense benefit should not be used to buy up rights guaranteed by the constitution and any condition would be invalid if imposed on something other than privileges.

Douglas J. in Barsky v. Board of Regents<sup>108</sup> held that:

*"The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free to own property ... To work means to eat. It also means to live. For many it would be better to work in jail than to sit idle on the curb. The great values of freedom are in the opportunities afforded to man to press new to horizons to pit his strength against the forces of nature to match skills with his fellowmen."*

The Supreme Court of the United States has considered in many decisions the co-existence of privilege as well as the rights ensured under the Federal Constitution and

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<sup>107</sup>Charles A. Reich, "New Property" at page 779 see note 57

<sup>108</sup> Barsky v. Board of Regents<sup>108</sup> (1954) 347 U.S. 442

held that a citizen cannot be made to deny the privilege in defeasance of the constitutional guarantee.

Sutherland, J. in *Frost v. Railroad Commission*<sup>109</sup> held that:

*"It would be a palpable incongruity to strike down an act of state legislation which by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution but to uphold an act by which the same result is accomplished under the guise of surrender of a right in exchange for a valuable privilege which the State threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may the grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel surrender of one constitutional right as a condition of its favour, it may in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United State of America may thus be manipulated out of existence ... The executory of the State is qualified by the superior right of all citizens of enjoy the protection of the Federal Constitution. The State is without power impose an unconstitutional retirement, as a condition for granting a privilege is broader than the obligation this made by it."*

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<sup>109</sup> *Frost v. Railroad Commission* 109 (1925) 271 U.S. 583 at page 593-594

The Indian courts have not accepted the theory of privilege to interpret its constitutional rights. Mathew, J. in *St. Xavier's College v. State of Gujarat* held therein that the myth of privilege theory, sufficiently and succinctly, was exploded on the Indian soil too and the "principle of unconstitutional constraints" received hospitable transplantation in our judicial dicta replenishing the constitutional contours to enliven the goals set out by the founding fathers of the Constitution. Therein, the question that arose was whether conditions for affiliation of a minority educational institution to a university could be imposed by the statute in derogation of Art. 30 of the Constitution. It was contended that affiliation is a privilege and the conditions could be imposed. A larger Bench consisting of nine Judges, per majority, negative the claim:

*"We think that dangerous consequence will follow if the logic of the argument is accepted in all cases. The rapid rise in the number of government regulatory and welfare programmes, coupled with the multiplication of government contracts resulting from expended budgets, has greatly increased the total number of benefits, or privileges which can be conferred by government, thus affording the government countless new opportunities to bargain for the surrender of constitutional rights. With the growth of spending power of the State - a necessary accompaniment of the modern welfare state potentiality of control through the control of purse has grown apace."*

The Indian court while interpreting the theory of privilege in context of job application had held in *I. J. Divakar v. Government of Andhra Pradesh* that "A hope

was generated in their minds that if they can successfully compete and come within the zone of selection they would be able to secure Government service." <sup>110</sup>

The study explains that the privilege theory though have acceptance to some extent in Pakistan's Constitutional parlance, when it is placed in parallel with the Indian Constitution of interpretation of rights, where some constitutional fundamental rights were not provided absolutely in Pakistan's Constitution and some conditions were imposed on their exercise. However the privilege theory in Pakistan can also be looked upon with care and caution as it does not defeat the purpose of establishing an Islamic egalitarian society.

The study further argues that the state is custodian of rights of people and protectors of their wellbeing under the Pakistan's Constitution. It is bound to provide them opportunity of hearing in order to lead a better life. Therefore to term offering a government job to its citizen is a privilege is not complete right since there is an interest created in favor of citizens once the job is offered. The citizens have developed hope to get job and therefore they apply for jobs or posts. Though by merely applying for job does not create right to any citizen, but he has right to expect that he has to be treated equally at the time of consideration for job uninfluenced by extraneous considerations. Moreover, if the authority deviates and takes extraneous factors into account while considering the claims and qualifications, then a citizen has right to challenge the action of the authority and remind it of his interest or legitimate expectation and insist that the authority to adopt fair procedure as prescribed by law. But if job offering is considered merely a privilege and not an interest, then in such eventuality hope of a citizen to get job can easily be swept away which renders equality clause ineffective. Further courts

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<sup>110</sup> AIR 1982 SC 1555

cannot provide any protection to citizens owing to administrative discretion and efficacy and thus create an impediment in establishing an egalitarian society based on equality.

C. Reddi J in Superintendent of Post Offices vs Kalluri Vasayya<sup>111</sup> has explained the same concept as follows:

*“Thus, I am inclined to take the view that the right to an appointment to an officer or post under the State though is a privilege, in view of the constitutional goal of establishing socialist society assuring citizen of his dignity of persons, it is a new form of wealth. The State having vast power to distribute its largesse in empirical scale, it creates an interest or at least legitimate expectation of an interest or a modicum of right in a citizen in the matters relating to an appointment or employment to an officer or post under the State. The selection of the petitioner though provisional creates an interest or legitimate expectation of an interest inculcating hope to get an order of appointment as timescale clerk.”*

A new concept of wealth in form of availability of job is introduced by the constitutional jurists. The study emphasized that this concept can be used to justify offering of jobs to ex-offenders so that ex-offenders can get their shares in national wealth.

### **3.4 RIGHT TO WORK: UNIVERSAL APPLICABILITY**

“Right to work” is a phrase which denotes that every person freely enjoys his right to adopt any legal profession or trade without interference by any one. A person

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<sup>111</sup> Superintendent Of Post Offices, ... vs Kalluri Vasayya on 22 April, 1983Equivalent citations: (1984) IILLJ 140 AP

can enjoy right to work regardless of gender, origin, religion or language. This right has universal application, as it is available to every person, everywhere, at any time.

According to theory of interest, subsistence of a person is an associated interest in right to work. Sustenance is one of the essential need of human life. Persons requires rudimentary resources, such as food, health care, clothing, and housing for their survival. These resources can only be enjoyed if a person is on work. Work is a principal vehicle of subsistence. This relation of work with subsistence establishes a fact that right to work has nexus with right to life. There is no doubt that life is considered as man's most precious possession, therefore, nothing can be more fundamental than to preserve a life. The fundamental character of right to life is recognized by every legal system.<sup>112</sup> Therefore, it is asserted that right to life is an elementary right and all other rights are based on it. The judicial articulation of the word 'life' does not only means physical existence, rather it includes all those aspects of life, which are relevant to make a man's life meaningful, complete, and worth living.

The Indian Courts have viewed right to life as not merely a physical right but includes within itself the right to live with dignity.<sup>113</sup> Bhagwati J in *Bandhua Mukti Morcha v. Union of India*<sup>114</sup> expanded the meaning of right to life in the following terms:

*"It is the fundamental right of everyone in this country... to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive*

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<sup>112</sup> Muhammad Mahbubur Rehman, "Right to life as a Fundamental Right in the Constitutional Framework of India, Bangladesh and Pakistan: An Appraisal", *The Dhaka University Studies*, Part F, volume 1, (2006), p143-148.

<sup>113</sup> *Maneka Gandhi v. Union of India* 1978 AIR 597, 1978 SCR (2) 621

<sup>114</sup> *Bandhua Mukti Morcha v. Union of India* 1984 AIR 802, 1984 SCR (2) 67

*Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief."*

Further,

*"These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials."*

Initially courts in India did not include right to livelihood as component of right to life for instance in *Re Sant Ram*<sup>115</sup>, a case which was decided before *Maneka Gandhi* case, the Supreme Court of India has not considered right to livelihood falls within the meaning of word "life" mentioned in article 21. The court said curtly:

*"The right to livelihood would be included in the freedoms enumerated in Art.19, or even in Art.16, in a limited sense. But the language of Art.21 cannot be pressed into aid of the argument that the word 'life' in Art. 21 includes 'livelihood' also."*

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<sup>115</sup> AIR 1960 SC 932

Subsequently the court has given broad definition of the word “ life” in case of Board of Trustees of the Port of Bombay ,<sup>116</sup> wherein it is held that “the right to life” guaranteed by Article 21 includes “the right to livelihood”.

The Supreme Court of India in a famous *Pavement Dwellers Case* <sup>117</sup> held that ‘right to livelihood’ is borne out of the ‘right to life’, as no person can live without the means of living that is the means of livelihood. The court in this case observed that:

*“The sweep of the right to life conferred by Art.21 is wide and far-reaching. It does not mean, merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of the right to life is the right to livelihood because no person can live without the means of livelihood.”*

The court further held that “if the right to livelihood is not treated as a part and parcel of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.”<sup>118</sup>

In the instant case, the court further opined:

*“The state may not by affirmative action, be compelled to provide adequate means of livelihood or work to the citizens. But, any person who is deprived of his right to livelihood except according to just and*

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<sup>116</sup>Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nandkarni AIR 1983 SC 109: 1983 1 SCC 124

<sup>117</sup> Olga Tellis v. Bombay Municipal Corporation<sup>117</sup> AIR 1986 SC180

<sup>118</sup> ibid

*fair procedure established by law can challenge the deprivation as offending the right to life conferred in Article 21.”*

Emphasizing upon the close relationship of life and livelihood, the court stated:

*“That, which alone makes it impossible to live, leave aside what makes life livable, must be deemed to be an integral part of the right to life. Deprive a person from his right to livelihood and you shall have deprived him of his life<sup>119</sup>,”*

The Constitution of Pakistan under Article 9 provides protection to right to life. Pakistan's superior courts have also elaborated the right to life in a case titled “The Employees of the Pakistan Law Commission vs. Ministry of Works” wherein the August Supreme Court of Pakistan has held that:

*“Article 9 of the Constitution which guarantees life and liberty according to law is not to be construed in a restricted and pedantic manner. Life has a larger concept which includes the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights.”<sup>120</sup>*

In another case titled Ms. Shehla Zia and others vs. WAPDA,<sup>121</sup> the Supreme Court of Pakistan has held that the word 'life' does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death and life. It includes all such amenities and facilities which a person born in a free country is entitled to enjoy.

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<sup>119</sup> Olga Tellis v. Bombay Municipal Corporation<sup>119</sup> AIR 1986 SC 180

<sup>120</sup> 1994 SCMR 1548

<sup>121</sup> PLD 1994 Supreme Court 693

J. Syed Mansoor Ali Shah gave the following verdict while acting as Judge of Lahore High Court<sup>122</sup>:-

*“Removal of an employee from a public sector employment without due process also offends Article 9 of the Constitution, because right to life includes right to a lawful and meaningful livelihood.*

*Right of life also includes right to livelihood. Without protection of livelihood and job security professional life is sapped of passion and desire to work, which is essential for progress and development. No employment that borders on fear and favour can reap results. Livelihood proves the economic means required to lead a healthy and regular life. Right to livelihood or right to security of tenure, therefore, are integral, innate and inbred in a professional carrier of a public sector employee. Livelihood cannot be deprived unless convincing material is placed on the record that supports a larger public interest of taking such an action. Without the presence and existence of larger public interest, the employee cannot be deprived of his fundamental right. The constitution, therefore, reads fundamental rights to be inclusive of social and economic justice. Social and economic justices are, therefore, indelible, ineradicable, inbred and fundamental parts of a civilized life, more so in an Islamic Republic, and therefore are squarely covered under Article 9 of the Constitution. With appointment comes an expectation of a lawful livelihood, hopes of a successful carrier, sense of well-being and security, social recognition and economic independence. Any process that derails a person from his path of social progress and economic self-sufficiency violates social and economic justice thereby violating Article 9 of the Constitution.”*

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<sup>122</sup> 2011 P L C (C.S) 419 Lahore.

Thus it is well celebrated proposition of law that right to life covers right to work. The courts have explained that the word 'life' means meaningful life. It can be attained by having adequate source of income for full enjoyment of freedom and rights. Since the threads of right to work linked to right to life consequently it was merged in international human rights instruments and domestic law of Pakistan.

It is the responsibility of welfare state to ensure rudimentary economic security to its citizens. It strives to provide infrastructure which can enable its citizens to flourish socially and economically. But, Pakistan economy is not stable enough to provide any such infrastructure, hence no policies at state level is observed which can cater for the employment issues of people generally and of ex-offenders particularly. The economic condition of ex-offenders get effected due to stringent attitude of society and reluctance to offer them employment. Therefore, in such bleak state of affairs ex-offenders become vulnerable to lead life below poverty line which ultimately affect their chances of survival. The poor economic condition create hindrance in way of Pakistan to become a true welfare state, which can cater for need of ex-offenders, by providing them sufficient training, education and conducive environment for development of their skills. Thus ex-offenders lag behind the society in education and experience which ultimately affect their prospective of getting jobs and find source of their subsistence.

The above analysis can be pacify, if the situation of employment of ex-offenders is taken from another angel i.e. engaging in unskilled labour. The state however need to develop such sectors where employment of unskilled workers are needed, in such way ex-offenders can be accommodated and state's obligation to provide conducive environment for social wellbeing of ex-offenders can easily be complied, without bearing extra expense of education and training of ex-offenders. Nevertheless, Pakistan

has to fix reasonable wage for unskilled workers which can allow them to meet up their family expenses and also allow them to lead a respectable life. Consequently, Pakistan would easily be able to provide them means of survival and thus protect their right to life which is closely associated with right to work. The state then on these basis can formulate a progressive policy in future to ensure gradual development of standards related to minimum wage.

### **3.5 CONCEPT OF RIGHT TO WORK UNDER INTERNATIONAL LAW**

The Universal Declaration of Human Rights (UDHR), is a principal document on human rights, and Article 23.1 of UDHR states that: <sup>123</sup> “everyone has right to work, free choice of employment, to just and favorable conditions of work and to protection against unemployment.”

The right to work is included in International Human Rights Law through International Covenant on Economic, Social and Cultural Rights <sup>124</sup> (ICESCR). The right to work is the first of the detailed rights recognized in the ICESCR. Nature of State obligations are mentioned in Part II of the Covenant, while part III deals with particular rights enforced at once with the right to work (Art. 6). The right to work relates exclusively with access to work and hence individuals who have no approach to work are the main focus of the Covenant.

The ICESCR Article 6(1) states that “right to work, which includes the right of everyone to the opportunity to gain his living by work.” It also says, in article 6(2) that

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<sup>123</sup> Universal Declaration of Human rights.

<sup>124</sup> International Covenant on Economic, Social and Cultural Rights, Part III Article 6

"the full realization of this right shall include technical and vocational guidance and training programs."

This identifies to us a crucial element in right to work i.e. the opportunity of every one to earn his living. Then whether "to earn" means to acquire adequate standard of living. ICESCR explains it in Article 11 that "adequate standard of living includes adequate food, clothing, housing and continuous improvement of living standard", however it is not attached with the condition "to work" hence it can be concluded that right to work does not mean to provide adequate standard of living as it is recognized as a separate human right. Hence "to earn" means participation in activities and services which are rendered for others that is accepted and rewarded by the society. The human right to work also ensures that everyone should have access to resources which could enable him to choose work of his choice freely. But then does this right guarantees that a person can do whatever he feels like and call it work and demands a salary from state for it? The language of Article 6 is explicit on this point as it categories work with "earning to live" in order to constitute a human right to work.

Similarly another International standard ILO Convention No. 122<sup>125</sup> provides in Article 1(2) that each member shall ensure that "there is work for all who are available for and seeking work."

This Article also emphasis on the availability of opportunity to every person to gain an employment and made it obligatory on states to ensure availability of resources for it. Further the state needs to provide training and vocational programs in order to facilitate them to acquire requisite job skills. This Article does not distinguish among

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<sup>125</sup> International Labour Organization, Convention concerning Employment Policy (ILO no. 122), 569 UNTS 65, entered into force 15 July, 1966

persons who can seek work, meaning thereby that right to work is available unconditionally to everyone. The state should take necessary steps to ensure its provision to everyone without any interference by state or individuals. Therefore, the state laws and recruitment policies of private individuals which create barrier over entry of persons such as the case of ex-offenders in employment are in derogation to state obligation under this convention.

### **3.6 PAKISTAN INTERNATIONAL OBLIGATIONS FOR PROTECTION OF RIGHT TO WORK**

Pakistan has ratified the ICESCR in 2008 and committed for implementation of the provisions of the Covenant diligently. It is her international obligation to comply with provision of article 2.1 of International Covenant on Economic, Social and Cultural Rights and to incorporate these rights in its Constitution as well as legal system. Pakistan follows dualistic model system, and therefore Constitution of Pakistan 1973 envisaged ICESCR rights in the first chapter related to fundamental rights for the purpose of effective enforcement.

Pakistan's international obligation to respect, protect and provide to every opportunity to each person to earn his livelihood and ensures that he has full freedom to select work of his choice this safeguard right to work of every person.<sup>126</sup>

This concludes that the state should not place embargo on any person's opportunity to work for example to ban jobs on certain set of persons such as ex-offenders. Protection of Right to work of ex-offenders' works within the domain of the

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<sup>126</sup> International Human Rights Internship Program- Forum Asia, Circle of Rights , Economic, Social and Cultural Rights Activism: A Training Resource “ The Right to work and Right at Work” Human right resource Centre, University of Minnesota available at <http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module10.htm> last accessed on 12-10-2019

state obligation to respect human rights. State's liability to defend right to work from any interference falls in the ambit of state obligation to protect human rights. Finally, state has an obligation to ensure access to opportunities to earn to every person, therefore if anyone has no means of livelihood, then it is state duty to generate opportunities to earn for that person.<sup>127</sup>

The ICESCR bound states to fulfill obligations such as provision of technical vocational guidance and access to training programs and preparation of techniques and policies to attain economic, social and cultural development and industrious employment. The state has an option either to provide these trainings programs free of cost or charge a reasonable fee from the person.<sup>128</sup>

Another responsibility of a state's obligation is to ensure nondiscrimination. Persons must not be denied access to work (or to any policies or programs related to this right) on the basis of gender, religion, color, ethnic or national origin, or social and other status.

The International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant) protects human rights that are central to the dignity of every person. The right to be treated equally and right to non-discrimination are attached with the right to work for the purpose of effective application.<sup>129</sup> Likewise, UDHR envisage that all are equal before law without discrimination and they are titled to equal protection of law.<sup>130</sup> Similar rights are granted under International Covenant on Civil and Political Rights (ICCPR). The Universal Islamic Declaration of Human Rights

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<sup>127</sup> ibid

<sup>128</sup> Article 6 of International Covenant on Economic, Social and Cultural Rights, 1966

<sup>129</sup> Article 2 and 3 of International Covenant on Economic, Social and Cultural Rights, 1966.

<sup>130</sup> Article 7 of Universal Declaration of Human Rights, 1949

provides general guidelines to member states of Organization of Islamic Co-operation (OIC) and its envisages under Article III/C protection to a person's right to work against discrimination in any manner because of religious belief, colour, race, origin, sex or language.<sup>131</sup>

Pakistan is a member state to these international instruments, and also state party to OIC, therefore, right to employment of ex-offenders can be protected under International Standards. The international instruments elucidates that if a state safeguard interest of a specific group of persons who are aware of their rights and they never subjected to the chains of primitive culture and patriarchal tradition, then it is failure of the state to provide equal protection of law to all. The study argues that refusal of any right to a person cannot be justified on the basis of his unawareness of his rights. It is the responsibility of a state to be aware and watchful of such rights on behalf of all the citizens.<sup>132</sup> Member state by placing ban or statutory restrictions on jobs of ex-offenders infringes an international obligation which demands from state to guarantee such measures which provide protection to right of equal opportunities of work.

### **3.7 THE RIGHT TO EQUAL OPPORTUNITY TO WORK UNDER SHARIAH**

In Islam social security means that every individual has equal right to avail opportunity to earn his means except but otherwise stated in the law.<sup>133</sup> For instance, in employment

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<sup>131</sup> The Organization of the Islamic Conference (OIC, now Organization of Islamic Cooperation) adopted the Cairo Declaration of Human Rights in Islam (CDHRI) on 5 August 1990.

<sup>132</sup> National Commission on Status of Women through its Chairman Vs Government of Pakistan through Secretary , C.P No 24 of 2012 decided by August Supreme Court of Pakistan.

<sup>133</sup> Shamrahayu A.Aziz, "Right to equality and justice under international Islamic Instruments and the Shariah: an evaluation" Page 223-232

every person is authorized to have equal opportunity and treatment irrespective of color, region, sex, language, lineage, or social status in an Islamic society. Work or employment is considered in Islam as one of main source of earning ownership and possession of wealth. The Holy Prophet while stressing upon the importance of work has stated “Pray to Allah morning and evening, and employ the day is your avocation.” He also said “He who neither worketh for himself nor for others, will not receive the reward of Allah”. He further stated “Those who earned an honest living are the beloved of Allah”. Further “Allah is gracious to him that earneth his living by his own labour, and not by begging”. Therefore Islam emphasizes on equal opportunity to work without any discrimination in order to ensure that rights of all members of state are not jeopardized to get benefits from national resources. This shows that individuals have an equal right to collect a fair portion of the national Islamic wealth. No individual has supreme right over others owing to his good virtues and deeds. Hence, Persons without criminal record have no preference over persons who remained offenders and repented after receiving of punishment.

The Islam restores the rights of a person if a man amends his subsequent conduct, repents and shows that he is sorry for what he did.<sup>134</sup> The Holy Quran has expressed this principle in its verse “But if the thief repents after his crime, and amends his conduct, Allah turneth to him in forgiveness; for Allah is oft forgiving, most merciful”.<sup>135</sup> The same can be shown from the practice of Holy Prophet during the conquest of Makkah by pardoning the persons who had committed serious crimes against Muslims and the family of Holy Prophet. Those people surrendered before the Holy Prophet, and after their repentance and acceptance of Islam, the Holy Prophet had

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<sup>134</sup> Engr. Akhtar Khalid Bhatti, Dr. Gul-e-Jannat, *The Holy Quran on Human Rights* (Karachi: Royal Book Company Publishers, 1996)

<sup>135</sup> Al-Quran 5: 41,42

given them same status as other Muslims. Similarly in another Occasion Ma'iz Son of Malik came to the prophet and said: 'Make me clean.' The Prophet said: 'Woe to thee, go back, ask for God's pardon and repent before Him.' The man went away a short distance and returned and again said: ' Make Me Clean.' The Prophet gave him the same reply as he had given in earlier stance. The man went away, came back again, said the same thing, got the same reply and went away .He returned for the fourth time and Said: 'Make Me clean.' The Prophet Said; 'of what should I make you Clean?' The man replied: 'Of adultery.' The Prophet said: 'Is the man mad?' People Said he was not. The Prophet then asked: 'Has the man taken any intoxicant?' Thereupon a man stood up and smelled the mouth of Ma'iz and Said: 'No! He is not drunk.' The Prophet asked the man: 'Have you committed adultery?' He replied: 'Yes' The Prophet then ordered that the man should be stoned to death and so he was.<sup>136</sup> In one version of Ma'iz story, it is said that when the people began to stoning him, he ran away. He was overtaken and stoned to death. When the Prophet was informed of all this, he said: "Why did you not let him go?<sup>137</sup> Shafi Says that the exception, in favour of those offenders who repent and reform themselves, made by the Quran in connection with certain offences may be apply to all offences.<sup>138</sup> This concept of repentance is also practiced in common law where the courts have developed jurisprudence to forgive offenders if they repent and remorse sincerely. The notable example in this regard cases of contemnors who surrendered apology for their contemptuous behavior and the courts have acquitted them.<sup>139</sup> This revive the notion that once a person had surrendered himself before the law and left himself at its mercy then after completion of punishment he has returned

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<sup>136</sup> Mishkat, BK.XVI, Ch.1

<sup>137</sup> ibid

<sup>138</sup> Mir Wali Ullah, Muslim Jurisprudence And the Quranic Law of Crime( Lahore: Islamic Book Service, 1982)

<sup>139</sup> 2016 P.Cr.L.J 1694

his debt to society. He is no more an offender unless he commits a new crime, therefore he eligible to be considered trustworthy as others.

Consequently, employers cannot differentiate against ex-offenders due to their criminal record and give priority to persons with clean records. Since ex-offenders for their offences served punishment while any person who had done good deeds and remained law abiding citizen, he is rewarded in hereafter. Thus, ex-offenders and non-offenders are equally eligible to get job opportunities in order to earn ownership and possession of wealth. The equal rights of all individuals in national wealth can be depicted from the situations that happened during the period of the first Caliph; Abu Bakr. He distributed the gifts among the Muslims equally. A group of people differed with him in opinion on this distribution and argued, ‘Oh Caliph of the Prophet (peace and blessings of Allah be upon him)! We notice that you have distributed the gifts in equal shares among people. However, certain individuals have certain virtues and priorities. We wish that you had given a special gift to such individuals. ‘Abu Bakr replied: “How can I tell the specific virtues and privileges of the individuals you mentioned? What I give is merely a living allowance. Offering an equal living allowance to people is better than favoring certain individuals. As for those who presented extra work for Islam, their rewards are preserved with Allah (S.W.T.). As for this worldly wealth, it is here for the good pious person and the evil ones. This wealth is not remuneration for the works they presented”<sup>140</sup>

Islam also acknowledged rights of persons over the buried resources of land such as gold, oil, precious metals etc. without any discrimination. Islamic State should put its efforts to provide job opportunities for its members and apply the national

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<sup>140</sup> Abu Ya’la, “Al-Ahkam al-Sultania (Sultanic Rules)” Page 222, referred in Article of Shamrahayu A. Aziz “Right to Equality and Justice....”

resources in the best interest of the state.<sup>141</sup> It is considered as a public property, which no one has the right to abuse, monopolize, or act according to his personal interest.<sup>142</sup>

This further establishes right of ex-offenders on natural resources of state which is common property of all. Allah (S.W.T.) states that: “It is He Who has made the earth manageable for you, so traverse you through its tracts and enjoy of the Sustenance which He furnishes: but unto Him is the Resurrection”<sup>143</sup> Then whether refusing opportunity to work to ex-offenders and thus depriving them from a source to get their share in national wealth and natural resources has any adverse effect over interest of ex-offenders individually or it also impact interest of society? There is main disagreement in legal theories of west to assess that whether the individual or the community interest is the ultimate value. These theories are based on any of three approaches: Either they subservient the individuals to the community such as modern totalitarianism emphasizes over supremacy of the community by and thus completely neglecting individuals’ rights. Or they subordinate the interest of community to the individuals such as Hobbes who supports individualism. There are theories which try to amalgamate the two opponent claims such as Bentham’s utilitarianism, spencer’s theory of evolution, however these theories could not maintained a balance between the interest of individuals and those of society.<sup>144</sup> While according to Islam individuals are seen as integral part of the totality of mankind, emphasizing the two way relationship between the individuals and society.<sup>145</sup> Individuals are considered collective entity with

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<sup>141</sup> Shamrahayu A. Aziz and A.O. Sambo, “Right to Equality and Justice under International Islamic Instruments and the Shari’ah: An Evaluation,” *Australian Journal of Basic and Applied Sciences* volume 6, Issue no. 11(2012): Pages 223-232

<sup>142</sup> ibid

<sup>143</sup> Al-Qur’ān 67: 15

<sup>144</sup> Dr. Muhammad Muslehuddin, *Philosophy of Islamic Law and The Orientalists* (Lahore: Islamic Publications Ltd, 1985)

<sup>145</sup> J.J. Rousseau, *The social Contract* (English translation by Maurice Cranston). Harmondsworth (Middlesex), U.K: Penguin Books. 1968

reference to social responsibility, as they are required to participate actively in human affairs in order to establish direct link with their environment.<sup>146</sup> Islam does not recognize isolation of man from society.<sup>147</sup> Therefore individuals are offered full opportunities in Islam to develop their personality so that they may be better qualified to serve community interest.<sup>148</sup> Therefore, if ex-offenders are not offered jobs this would lead to their isolation from society.

Ex-offenders are sufferers of an injustice caused to them by discriminatory behavior of employers and state policies limiting their entry in employment. Hence, they have right to protest and demand for their rights from any government, institution, person or group of persons reign due to injustice done by them while they are at the helm of affairs. Islam does not permit anyone to infringe inalienable right to earn livelihood. Any endeavor to deny individual of this right is defiance from command of Allah (S.W.T.). Islam considers violation of the nature and ability of the individual by the society is kind of social repression.<sup>149</sup> It is an injustice to the individual as well as to the society. Refusing job to individuals affects and suppresses their activity by destroying their natural trends and capabilities which tantamount to hinder individuals from exceling their ability which ultimately affect the whole society and deprived it from benefiting of maximum abilities of that individual.<sup>150</sup> Therefore, the social system needs to vouch for the rights of the community in the efforts and abilities of individuals and while imposing limitation on the freedom and ambitions of individuals it should not ignore the rights of individuals concerning the freedom of action within the limits

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<sup>146</sup> Syed Nawab Haider Naqvi, "Ethical Foundation of Islamic Economics" *Islamic Studies (Journal of the Islamic Research Institute, Islamabad, Pakistan)*. Winter 1978, page 4

<sup>147</sup> Anwar A. Qadri, *Islamic Jurisprudence in the Modern World* (Lahore: Ashraf printing press, 1981)

<sup>148</sup> Dr. Muhammad Muslehuddin, *Economics and Islam* (Lahore: Islamic Publications Ltd, 1974)

<sup>149</sup> Masood Ali Khan, Shaikh Azhar Iqbal, *Islamic Thoughts and its Philosophy* (New Dehli: Common Wealth Publisher, 2006)

<sup>150</sup> Ibid, Masood Ali, *Islamic Thoughts and its Philosophy*, Pg 158

which safeguards the welfare of community and individuals themselves. Consequently any restrictions on the jobs of ex-offenders need to be analyzed on the aforementioned principle of Islam in order to ensure welfare of society as well as the individual. However, since the limitation of job imposed by the society on ex-offenders snatches their freedom without any indication that the same is beneficial to the society. Therefore, the sanctions on the job of ex-offenders need to be revisited on the theory relating to the Rule of Necessity and Need (*darurat wa hajat*) since the deprivation of this right would lead to snatching source of income from ex-offenders which is essential an mean to spend a life. This right under legal theories of Islam falls in the domain of *al –Maslah al Mursilah* (unrestricted interest) and it qualifies all the conditions prescribed by Malikites <sup>151</sup>i.e.

First- that the case under review should be one pertaining to the transaction in order to construct the interest on the basis of reason. The case should not be one related to religious observance or (*Ibbadat*).

Secondly- that the interest should be in harmony with the spirit of the Shariah and should not be in conflict with any of its sources

Thirdly- that the interest should be of the essential and necessary (*darrurat wa hajat*) and of case of luxury (*tahsinat wa tazyinat*). The essential and necessary type should include the preservation of life, religion, reason, offer spring and property.

Tufi of Hanbali and al- Ghazali of Shafi' school also allowed the conditions prescribed by Malikites since it is associated to theory of Necessity and Need and not luxury. <sup>152</sup> According to al Ghazali objects of Shariah regarding a man is fivefold: to

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<sup>151</sup> Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* ( Islamabad: Islamic Research Institute, 2016)

<sup>152</sup> Dr. Mohammad Muslehuddin, *Crime And The Islamic Doctrine of Preventive Measures* (Islamabad: Islamic Research Institute, 1985)

conserve his religion (*hifz ul deen*), conserve his life (*hifz ul nafs*), conserve faculties of reason (*hifz ul aqal*), conserve offspring (*hifz ul nasal*), conserve his property (*hifz ul maal*). He observed that protection of these five comes within the category of necessities.<sup>153</sup> Al- Ghazali in case of conflict gives priority to preservation of life over preservation of Din, for the reasons that without life there would be no existence of Din.

<sup>14</sup>Ex offenders' right to work has close link with right to life. Thus it falls within one objective of Shariah i.e. *hifz ul nafs*. Therefore, it is necessity which employers and society need to provide it otherwise it would lead to anarchy in the society.

Justice in society can be established by providing equality in opportunities and freedom of talents to ex-offenders within the parameters which do not controvert with the high standards of life in Islam. Islam does not conceive equality in narrow literal sense of the term rather it distinguishes that individuals are blessed with different talents. However, the case of ex-offenders does not rest on equality of talent with rest of the individuals, rather they plead their right on the principle of equality of opportunity.

Now coming, to the employer's freedom to select a person of his choice on his work place. Islam acknowledge individual freedom of a person, however it bound down employer to be guided by the Devine law at the time of job selection for the purpose of promotion of civilization and achievement of embellished life. Principle of Al-adl should be followed by employers. Allah Says, "Lo! Allah enjoineth al 'Adl". This principle is considered as unsurpassed rule to create balance in all fundamental social relations. Therefore, employers while exercising their discretion at the time of job selection are actually acting as judge therefore they have to act justly and with Al-Adl.

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<sup>153</sup> Al- Ghazali, al Mustasfa min Ilm al –Usul, vol1, 286.

The Holy Quran says “And when Ye judge between men and man, that Ye judge with justice.” Allah (S.W.T.) also says: “O David! We did indeed make thee a vicegerent on earth: so judge though between men in truth (and justice): nor follow thou the lusts (for thy heart), for they will mislead thee from the path of God.” Justice is a compressive terminology which includes all virtues. It clenches society into a relationship of brotherhood. It requires to meet all standards that are recognized in social life. Allah Says: “O ye who believe! Stand out firmly for God, as witnesses to fair dealing and let not the hatred of others to you make you swerve to wrong and departed from justice. Be Just: That is next to Piety and fear of God.”<sup>154</sup> Therefore, it is not permissible for employers to judge ex-offenders compatibility for jobs on the basis of his abhorrence since it contradicts the Devine law enshrined in the above verse. Hence personal dislikes to set of persons should not violates their fundamental rights.

Islam does not recognizes absolute ownership of employer over his wealth, albeit man hold his wealth as vicegerent of Allah, since all wealth belongs to him. Allah says “Allah’s is the heritage of the heavens and the earth.”<sup>155</sup> Therefore, it is the responsibility of employers being trustee of God to provide opportunity to work to the underprivileged class of society as for instance ex-offenders are neglected class of society therefore it is required to treat them justly in order to support them to enjoy their share in the national wealth. They cannot be deprived of this wealth since, they once infringed laws of society. Employers’ preferential behavior towards ex-offenders is in violation to the principle of Al-Adl. They are answerable for their choice if it is origin of injustice to ex-offenders and violates their right of employability without giving ex-offenders opportunity to be heard. Islam recognizes the legal maxim: no man shall be

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<sup>154</sup> Al Quran 5: 9,10

<sup>155</sup> Al-Quran 3: 18.

condemned unheard.<sup>156</sup> The last Prophet (S.A.W) while appointing Hazrat Ali as a Judge in Yaman, advised him “....when two men come to you for decision, do not give decree in favor of the first till you hear the arguments of the other because that is more necessary so that decision may become clear to you”. Resultantly, the discriminatory behavior of employer is against the principle of Islam to provide an opportunity of hearing before condemning any individual. Employers cannot absolve of their responsibility, and thus they are accountable for their action. Furthermore, according to principle of *Al' Adl* Man will be held responsible for his discretion only because Allah has first provided explicit guidance on what is best for him. Allah says “O mankind! Now hath the Truth from your Lord Come unto You. So whosoever is guided, is guided for (the good of) his soul and whosoever erreth only against it...”<sup>157</sup> The Holy Quran further states: “Thus have We made of you an Ummah justly balanced, that ye might be witnesses over the nations, and the Apostle a witness over yourself.”<sup>158</sup> It is evident from the verse that it hold a person responsible for his conduct and imposed a duty on him to follow all principles of Islam which were conveyed by the Holy Prophet to his Ummah. He is also bound to practice the same through his words and conducts the denotation of heavenliness and morality, of impartiality and just play.

The discriminatory behavior of employers is not only detrimental to ex-offenders, but also effect social welfare of society. Ex-offenders unemployment is the reason that they land again in the world of crime resultantly the society faces recidivism in society. This problem can be resolved on Islamic rule of ‘*Sadd al Dharai*’means “End Schema or preventive measures to eradicate the evils before they take root”.<sup>159</sup>

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<sup>156</sup> Engr. Akhtar Khalid Bhatti, *The Holy Quran on Human Rights*, Page 82, See foot note 12

<sup>157</sup> Al-Quran 10:108

<sup>158</sup> Al-Quran 2 : 143

<sup>159</sup> Dr. Riaz Ul Hassan Gilani, *The Reconstruction of Legal Thought In Islam*( Lahore: Idara Tarjuman Al- Quran,2017)

Consequently, the discriminatory practices of employers and society towards employability of ex-offenders should be removed. There should be a balance between employers' right to select a person of their choice, individual's right to be treated equally and society welfare. Therefore, it is religious duty of employers to show through their conduct that they follow principles of justice and equality while offering opportunity to work to ex-offenders on merit.

### **3.8 CONCEPT OF RIGHT TO WORK UNDER CONSTITUTION OF PAKISTAN**

Pakistan economically viewed as an under developed country. The social and economic status of its citizens classified the society into upper middle class, middle class, lower middle class and poor class. The last two classes of society constitute majority of population of the country. They impart education to their children at the cost of their comfort in order to enable them to secure employment. For them seeking work is absolute necessity, as it is source of assistance to family. Keeping in view the social status difference in the society. It is mandated such that steps to be initiated by state which guarantee provision of equal opportunities of work to all without any discrimination. The state has legislative support in order to fulfill its duty of provision of sources of sustenance to its citizens.

Article 2A of the Constitution guarantees equality of opportunity in order to ensure establishment of an egalitarian society through new order. This aim can only be achieved if every citizen equally placed or situated is treated alike and to compete *inter alia* for the jobs on equal basis. Likewise article 3 obligates state to remove all form of exploitation of its citizens. Whereas article 25<sup>160</sup> of the Constitution warrants that all

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<sup>160</sup> Article 5 of Constitution of Pakistan

citizens are equal before law and need to have equal protection without any discrimination on the basis of sex . Article 27 (1)<sup>161</sup>of the Constitution of Pakistan guarantees “that every citizen will have equal opportunity for employment in the service of Pakistan, if otherwise qualified”. Collective study of these articles indicates that they intended to bring about egalitarian society on the basis of Islamic concept of social justice, where it is available to every person to have an equal opportunity to strive for job without any discrimination. The Constitution of Pakistan has also guaranteed right to work for every person and enlisted it as fundamental right without any qualification or condition such as “inherent requirement of job” rather it only provided a rider that a person should be qualified for job. Then whether “previous conviction” of a person can take him out of category of “otherwise qualified” as stated in the article. Further an anomaly still exist with regard to right to work that whether it is absolute right or qualified right under Constitution of Pakistan. Hence right to work of ex-offenders need to be examined in the given provisions of the Constitution of Pakistan which is carried out in subsequent chapter 3.

The study before expounding on entitlement of ex-offenders to right to work has shed lights on the concept of crime and punishment in order to develop understanding of issue of discrimination against ex-offenders.

### **3.9 CONCEPT OF CRIME AND PUNISHMENT**

Broadly civil law and criminal law are the main stream of law which regulate the conduct of individuals in a society. Civil law deals with the rights of individuals which are enforceable against each other as well as the whole world. Therefore the judgments given in civil cases are either characterized as in persona (against a person) or in rem

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<sup>161</sup> Article 27(1) of the Constitution, 1973

(against a society). The remedy under the civil laws is provided in form of damages to the aggrieved party to redress his loss. While under the criminal law any violation of norms set by society is considered as violation of right of state and therefore is made punishable. State enters as party instead of victim in any criminal case registered against the aggressor or violator. The reason behind this is a social contract which has bound down the state to protect the human rights of its citizens. The punishment received by the violators is either imposition of fine or incarceration. For the present study the focus is on the actions which are punishable under criminal law.

### **3.9.1 Concept of Crime**

Law comprises of different types of rules and principles to control human conduct while administration of justice deals with the enforcement of rights and duties formed by such rules. Therefore, wrong is simply an act which is contrary to the rules of right and justice.

Wrong can either be moral and legal. A moral or natural wrong is an act which committed in violation of rules of natural justice. Whereas a legal wrong is an act which is in contravention to the rule of legal justice and law. In ordinary parlance, a legal recognition of a wrong act encompasses suppression or punishment of it by the physical force of the state, this being the main intention for which the judicial action of the state is required. In short, the essence of legal wrong requires that law recognize it as wrong by law , or in other words a legal wrong is a contravention of justice according to law.

Another synonym word for the legal wrong is crime. According to Salmond' definition of crime: "A legal wrong or crime is an act deemed by law to be harmful to the society even though committed against an individual."<sup>162</sup>

The term "crime" "offence" and criminal offence ordinary has same meaning and are used interchangeably. The test that the act is made punishable by law in order to fall in either of these terms. It is not necessary that the act is defined as offence in law unless and until the law made it punishable. Similarly any act which is reprehensive morally and ethically it will not be an offence and a crime unless it is made punishable under the law.<sup>163</sup>

Ronal J Rychlak<sup>164</sup> argues that the criminal law of every society defines that actions which are forbidden to its member to commit since it is violation of rules set on values which are cherished by the members themselves. These rules are established into laws which give them more preservation in society as values and not just laws. However the power of society to formulate these rules is not limited. It has to take into consideration that these rules do not violate natural rights of any person. Therefore, state is under contract with individuals that if they abide by rules of society then they can receive benefits in lieu of that from society. The state punishes anyone who violates this contract.<sup>165</sup>

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<sup>162</sup> P.J.F Fitzgerald, *Salmond on jurisprudence* (Lahore: Lahore Publishers 12 edition, 1966), p215

<sup>163</sup> AIR 1931 PC 94

<sup>164</sup> Ronald J. Rychlak, "Society's Moral Right to Punish: A further exploration of denunciation theory of punishment" *Tulane Law Review* Volume 65: Issue no.2 (1990), pages 301-307.

<sup>165</sup> Edgar Bodenheimer, *Jurisprudence the Philosophy and Method of The Law* (Massachusetts: Harvard University Press, Cambridge, 1962), p 10

The question arises that whether punishment has any effect on life of wrong doers and society and serve the purpose of elimination or decrease of crime. Different theories of punishment were categorized in this regard.

### **3.9.2 Concept and Purpose of Punishment**

Punishment in pre-modern societies was retributive. A right has been given to individual or his families to take revenge of wrong done to them. Gradually concept of proportionate punishment was developed which reflects in the injunction of Quran "an eye for an eye". Subsequently the imposition of punishment was shifted from individuals to community. Later on, with the development of law codes the state took over the punitive function in order to maintain law and order. Different theories of punishment were gradually developed for prevention of crimes. There are two general philosophies which explain theories of punishment: utilitarian and retributive. The Utilitarian theory purpose is to eliminate prospect of committing crime in future by terrifying offenders and public. Utilitarian theory stresses that law should be applied to maximize the happiness in society. The utilitarian believes that there is no concept of society which is absolutely free from crime therefore it tries to inflict that amount of punishment which is necessary to prevent future crime. It holds that punishment should not be unlimited. The utilitarian theory is "consequentialist" in nature. It recognizes the impact of punishment over the offender and society. Therefore deterrence can either be specific or general. Specific deterrence focuses on individuals who committed the crime. The theory argues that there is remote chances that such individual reoffend because he fears another similar or worse punishment. Deterrence is meant for society,

in order to create fear in people for not to commit the offence otherwise they will face the same punishment as consequence of their crime.<sup>166</sup>

Another utilitarian notion for punishment is Rehabilitation. The purpose of rehabilitation is to restrict future crimes by providing offenders the ability to succeed within the four corner of law. Retributive theory is counterpart to the utilitarian theory. The retributivist argues that all human beings exercise free will and are able to take rational decisions. Therefore punishment should only be inflicted on such offenders who opt to make choice to upset the balance of society. The theorists justified the punishment as it protects the rights of both society and offenders. The theory of punishment permits an offender to return his debt back to the society and be free from guilt and stigma.

Akin to the idea of retributive theory is expiation which states that the crime wiped off once a person served his penalty. Salmond states that “guilt plus punishment is equal to innocence”.<sup>167</sup> This concept changes the idea of revenge into criminal justice. Injured person has right to take revenge. However the penalty of wrong action is a debt, which the offender has to pay it to his victim and when the punishment culminates, it means the debt is paid. The object of true redressal is to restore the position demanded by the rule of law, to substitute justice for injustice, to compel the wrong doer to restore to the victim what is his own. Hence, according to this theory

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<sup>166</sup> P.J.F Fitzgerald, *Salmond on jurisprudence* (Lahore: Lahore Publishers 12 edition 1966), 95.

<sup>167</sup> P.J.F Fitzgerald in *Salmond on jurisprudence* referred to definition of wrong provided by Lilly in Rights and Wrong page128 as’ “whereby he has transgressed the law of right, he incurred a debt. Justice requires that the debt be paid that the wrong be expiated. This is the first object of punishment-to make satisfaction of out raged law.”

criminals should be punished in order to make them, “pay their due”, therefore once the punishment is over, their slate should be wiped clean.

The study argues that the theory protects one set of offenders who have received conviction and served their sentence. It does not flesh light on the status of offenders who have just faced arrest without being convicted by law and then subsequently released. Whether their slate is also got cleared. Further, the discriminatory behavior of society towards offenders indicate that the society has never taken the objective of punishment seriously and it is still in the process of punishing the violators of laws by restricting their re-entry in society. This is very much evident when we come across bans placed on employment of ex-offenders by the society.

Punishment has third major rationale i.e. denunciation. The denunciation theory holds that punishment should be manifestation of societal condemnation. It is amalgamation of utilitarianism and retribution. Utilitarian prospect demands that fulfill the purpose of deterrence. Likewise denunciation is retributive because it endorses the concept that offenders deserve to be reprimanded. The theory points out to the purpose of sentence that it is not just inflicting punishment over violator but it also declares to law abiding citizens that a particular act which is being punished or denounced is not acceptable to society.<sup>168</sup>

Denunciation theory views criminal procedures and punishment as ‘an opportunity for communication with offenders, the victim and wider society with regard to nature of the wrong done’.<sup>169</sup> It is the only theory of punishment which justify the right of society to inflict punishment on wrong doer. It focuses on impact of punishment

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<sup>168</sup>, Ronald J Rychlak, “Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment”, *Tulane Law Review* Vol. 65: No. 2 (1990). Available at SSRN: <https://ssrn.com/abstract=2273557> last accessed on 12-09-2019

<sup>169</sup> Lucia Zadner, *Criminal Justice (Clarendon) Law Series (Oxford University Press, 2004)* page 109.

on potential law violators as well as law abiding citizens as compare to the rest theories of punishment which recognize impact of crime on society.<sup>170</sup>

In some countries the legal institution of punishment suggests certain assurances. It warrants certain shared values such as safety and security as they are important for upholding of law and order in society.<sup>171</sup> Therefore no one has freedom and liberty to violate these assurances. This guarantees that punishment will be inflicted only on those who violates the legal norms of society while law abiding citizens are save from any such punishment. The institution of punishment guarantees that offenders will not be exposed to extreme and arbitrary private vengeance rather their punishment should be reasonable, proportionate and consistent in its application under the rule of law. Essential purpose of Punishment is to provide information to offenders regarding type of punishment they have to serve for the purpose of paying debt back to society. The society cannot excess its limits and inflict more punishment then what the law prescribed for the offence. The study contends that this philosophy of punishment is not observed in letter and spirit practically since offenders once release from jail find themselves as still serving punishment because the society continuously considers them law violator and thus does not allow them to reintegrate as a punishment. This attitude of the society leads to preferential discrimination against ex-offenders particularly at workplace and thus violates their right of equality.

### **3.10 LEGAL STATUS OF EX-OFFENDER AND DIGNITY**

The expression legal status and legal character are used interchangeably for each other. The legal status as the expression denotes is a character or status conferred by

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<sup>170</sup> See Ronald J. “Theory of Punishment” note 58

<sup>171</sup> P Tomlin, “Extending the Golden Thread? Criminalisation and the Presumption of Innocence”, *Journal of Political Philosophy*, issue 21(2013), pp 44–66.

law on an individual. According to Holland legal character refers to such legal condition as" (1) minority (2) sex (3) patria potetas and manus (4) co-overture (c) celibacy(6) mental defect(8) rank, caste and official status (9) slavery (10) profession(11) civil death(12) illegitimacy (13) heresy( 14)foreign nationality and (15)hostile national". While according to Salmond<sup>172</sup> the term "status" is usually confined to personal legal condition or personal capacities and incapacities or compulsory as opposed to conventional personal conditions. In this sense the expression includes the rights and obligations of a person which he acquired himself by agreement as opposed to the conditions imposed upon him by law without his consent.

Courts in Pakistan have defined the status of man or legal character that it consists of such attributes which the law linked them with his individual and personal capacity.<sup>173</sup> It is interest which is affirmed and safeguarded by rule of laws. It is legal duty to respect an interest, since disregard of it constitute a wrong as it is protected by the law of the state. Every such right involves duty and obligations. Therefore, in case of ex-offenders, once they have served their punishment, they acquired the status of (free men) who had paid their debt back to society. They are entitled to restore their rights. But, unfortunately using the terminology ex-offenders to them violates their status as "freemen" who have equal protection of law for enforcement of their right as any other individual of society. Thus this terminology denied to convicted persons their legal status and snatch from them their dignity

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<sup>172</sup> P.J.F Fitzgerald, "Salmond on jurisprudence", 12 edit (1966)

<sup>173</sup> 1982 CLC 2369

The Superior courts in Pakistan has clubbed the concept of dignity with the status of a free man in Barrister Asfandyar Khan Case. Where, Justice Syed Mansoor Ali Shah, then Chief Justice of Honorable Lahore High Court <sup>174</sup>held as under:

*“Dignity unites the other human rights into a whole. The right to dignity reflects the recognition that a human being is a free agent, who develops his body and mind as he wishes, and the social framework to which he is connected and on which he depends. Human dignity is therefore the freedom of the individual to shape an individual identity. It is the autonomy of the individual will, it is the freedom of choice. Human dignity is infringed if a person’s life or physical or mental welfare is harmed”*

The study thus contends that ex-offenders should be given freedom to choose social frame work of their choice and this can only be possible if society allows them to reintegrate and get opportunity to participate in activities of society along with other members. Judicial pronouncement has articulated Ex-offenders' freedom of choice with their dignity. Therefore any action which is detrimental to their freedom can affect their individual identity and consequently infringe their dignity. Hence when such persons are called “ex-offenders” and treated differently it cause embarrassment for them and consequently provides ground for discrimination against them. Labelling persons with “ex-offenders” equalize them to disable persons in sense of their disability to get job opportunities. Here, their disability does not denotes their physical disability, rather it is situational disability where ex-offenders live in such environment in which social, environmental, medical, economical and human services are not available to them.

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<sup>174</sup> Barrister Asfandyar Khan Vs Government of Punjab PLD 2018 Lahore 300.

Lahore High Court differentiated between disabled persons and persons with different disabilities in Asfandyar case<sup>175</sup> as under:-

“Disability is a situation which is faced by an individual in the absence of social, environmental, medical, economic, and human services. Disability is always situational and its etiology is therefore both environmental and individual”

Legal status of ex-offenders once denied, it will lead to discriminatory behavior against them at the time of employment; but one may argue that it is justified on the ground that offenders had chosen their fate themselves and according to proponent of consequential theory a person who has violated the social contract himself, he in fact forfeited his own right to be benefitted from rule of law. The recent study repel this arguments while arguing that violation of social contract does not mean ex-offender is not able for forever to participate in the contract. For instance if an offender breaches terms of social contract and particularly of rule of law by offending , this does not constitute that he precluded the rule of law . It is unconceivable that by infringing a particular law an offender had rejected the rule of law completely. For instance, if a tax defaulter obeys all other laws and fulfills his other legal obligations, but he does not pay his taxes. Here he breaches a certain law which deals with taxes but for rest of rules of law, he is a law abiding citizen, therefore, he cannot be condemned for breach of social contract forever.

Denial of status of ex-offenders violates many of their fundamental rights such as right to life, right to equality, right to dignity, right to employment, right to non-discrimination. Therefore the state need to take such measures which ensure removal of disabilities of ex-offenders from participation in activities of society in order to make them effective member.

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<sup>175</sup> Asfandyar Khan Vs Government of Punjab PLD 2018 Lahore 305

### **3.11 WOMEN EX- OFFENDERS' STATUS AND ISSUES**

Women in Pakistan have low social status as compare to men therefore their issues are different from men generally and particularly when they are in prison. The women prisoners in Pakistan come from economic devastated segment of society. Sometime females landed in prisons due to their revenge from family and near one who have committed offence with them. In other cases, they bear the hardship of prisons due to crime committed by their males. Women prisoners have to face violence and inhuman attitude in prisons. A high ratio of women offenders have faced violence or sexual abuse. Added to it, women has to face greater stigma as compared to men. Prisoner women have to face more aversion from their families and society.<sup>176</sup>

Washington, DC: National Institute of Justice have highlighted issues of women in prison in US and reached on conclusion that “they have different issues as compare to their male counterparts in several significant ways: (1) they are less likely involved in violent offense; (2) they are more likely to have a dual diagnosis (substance abuse disorder and a psychiatric disorder); (3) they are more prone to multiple incidents of physical and sexual abuse; and (4) they are more likely to be responsible for their children's support”.<sup>177</sup> Similar issues are also faced by women Prisoners in Pakistan. Women in Pakistan have low social status as compare to men and they continuously face problem of discrimination from government and society. They do not have socio-

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<sup>176</sup> Dr. Aliyah Ali, Dr. Nasreen Aslam Shah, “Women Prisoners in Pakistan: Changing Practices to Enforce Laws & Rights,” *Kuwait Chapter of Arabian Journal of Business and Management Review* Vol. 1: No.4 (2011) p58.

<sup>177</sup> M. Morash, T.S Bynum and B.A Koons, Women offenders: Programming needs and promising approaches. Research in Brief. 1998; NCJ 171668. Washington, DC: National Institute of Justice.

economic security and chance to avail opportunities in almost every walk of life.<sup>178</sup> For many decades several laws were promulgated for the improvement of status of women, but they were not enforced. As per I.C.C (International Criminal Court) the rule of law must be uniformly implemented on all persons in order to ensure that all individuals enjoy equal rights regardless of colour, race, creed or sex. Justice means equality of all persons in their legal status and possession of human rights in this regard adjudicators play a pivotal role as the guardian of the constitutional equalities i.e. (i) equal access to employment (ii) equal working conditions (iii) elimination of discriminatory treatment (iv) elimination of discriminatory laws.<sup>179</sup> But economic self- subsistence is a challenge for ex-offenders when they lack employment skills and the situation get worsen specifically for women since they have to support themselves and their children in many circumstances. Women drug dealers had low-ranking roles. Many women have to engage in sexual activities in order to meet their ends. In addition job training and educational courses are not similar for women and men. Rehabilitation facilities provided to women in prisons are not tailored according to the work requirements. Therefore, female ex-offenders cannot compete on equal basis with men for employment. Women offenders therefore are extremely vulnerable to recidivism and relapse. Women offenders can claim their right to work more vigorously since they fall in category of protected class for purpose of prohibition of discrimination. But, they failed to enforce their right since they lack state support to formulate laws for protection of their right of employment.

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<sup>178</sup> Dr. Aliyah Ali, Dr. Nasreen Aslam Shah, "Women Prisoners in Pakistan: Changing Practices to Enforce Laws & Rights," *Kuwait Chapter of Arabian Journal of Business and Management Review* Vol. 1: issue No.4 (2011) p58.

<sup>179</sup> Justice (R) Fakhrunisa Khokhar, Judiciary and Gender Bias, [www.supremecourt.gov.pk/ijc/Articles/11/4.pdf](http://www.supremecourt.gov.pk/ijc/Articles/11/4.pdf) last visited on 11-10-2018

### **3.12 CONCLUSION**

The International instruments contain nondiscriminatory clauses in order to ensure provision of human rights to all persons equally. Some of these international instruments also provide grounds for discrimination which were not restricted but kept open ended in order to apply to any other grounds for discrimination. But these instrument also allow discrimination in some instances. As for example ILO convention 111 Concerning Discrimination in Respect of Employment and Occupation (1958) provides right to work without any discrimination, and on the same place it also provides exception to the principle of non –discrimination by inserting ‘job inherent requirement’ as justification for discrimination. Pakistan is signatory of many international instruments on human rights and in compliance to its international obligation it has inserted these human rights in chapter of fundamental rights to ensure equality in provision of these rights and prohibition of discrimination practices against them. But the grounds provided for discrimination are not exhaustive to include further grounds in it. Further the personal characteristic of ex-offenders and preferential behavior of employers coupled with statutory ban on employment of ex-offenders aggravated the issue of employment of ex-offenders in Pakistan.

# CHAPTER.04

## CRIMINAL RECORD, COLLATERAL CONSEQUENCES AND COST OF DISCRIMINATION

### 4.1 INTRODUCTION

Criminal record refers to a person interaction with criminal justice system in form of arrest, or conviction. Criminal records has legal and non-legal effects. Legal effects of criminal record is known as collateral consequences.<sup>180</sup> Collateral consequences have a drastic effect on many areas of ex-offenders life. Ex-offenders as citizens may lose many of their rights while as non -citizens may be deported or become ineligible to naturalize. The non- legal effects of criminal record entail stigma of “ex-offender” or shame which is faced by offenders. The emphasis of this chapter is on collateral consequences of criminal record on employment opportunities of ex-offenders. The chapter fleshes light on the business cost which is to be borne by employers and its impact on social and economic aspect of society. However before expounding about collateral consequences of criminal record. It is first necessary to determine what constitutes criminal record.

### 4.2 WHAT DOES CRIMINAL RECORD INCLUDES?

Criminal record disclosure varies from country to country, but generally criminal record includes:

- Attending court’s hearings
- Findings of guilt with no conviction
- Court convictions, including any penalty or sentence
- Charges
- Good behavior bonds or other court orders

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<sup>180</sup> Gabriel J. Chin, “Collateral Consequences of Criminal Conviction”, *Criminology, Criminal Justice, Law & Society* Vol 18: issue 3 (2017) page 2

- Matters awaiting court hearing
- Matters currently under investigation
- Police intelligence (records of investigations)
- Traffic infringements<sup>181</sup>

The disclosure of criminal record depends on the requirement of employer that what kind of information he needs from the applicant. The question regarding disclosure of criminal record sometimes turned to be misleading, particularly when it is not clear that whether disclosure is related to heinous offences or all type of offences including traffic rules infringement. This lead to confusion of applicant and he may provide any irrelevant disclosure about breach of law which may deprive him from his opportunity to work.

#### **4.3 WHETHER CRIMINAL RECORD CHECK HAS A COST**

Employers get chance to know about criminal history of applicant when they verify records from law enforcement agencies. They had to spend huge amount of money in order to obtain criminal record of applicants. Employers justify checking of criminal record of all potential new employees on the basis of “due diligence” in order to save themselves from risk to employ any criminal at work place. Whether background checks absolutely necessary? It depends on the nature of job. Many jobs do not require a person with clean record, as for instance hiring micro workers such as gardeners, sanitary workers etcetera. Therefore, those organizations which conduct criminal record check in routine has to bear huge cost of it which ultimately affect their budget.

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<sup>181</sup> <https://www.humanrights.gov.au/our-work/rights-and-freedoms/human-rights-discrimination-employment-basis-criminal-record>, last visited 12-12-2019

#### **4.4 CRIMINAL RECORD AND ITS COLLATERAL CONSEQUENCES ON AN APPLICANT.**

Collateral consequences affect different aspect of life of ex-offenders. Some criminal convictions affect the civil status of ex-offender as for instance a noncitizen may be deported and citizen loses his job; Criminal convictions affect employability. There are laws which ban inducting for employment persons with convictions in different government offices, particularly related to law enforcement agencies or jobs entail financial transactions. A convicted person is also ineligible to hold a license or permit to carry out any business. There are policies which ban employed of ex-offenders in private sector or regulated industries<sup>182</sup> or to be employed with government contractors or in sectors demanding security clearance from law enforcement agencies. This resulted in undermining the public interest in rehabilitating criminals and helping them become productive members of society.

Collateral consequences sometimes inflicted by committing specific offenses; others are implemented on just being felony or on vague term like crimes of moral turpitude. Some collateral consequences triggered inevitably, while others allows an employer to act on a case-to-case basis. Some apply for a particular period, while others for rest of life.<sup>183</sup>

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<sup>182</sup> For example, the court in *DiCola v. FDA* upheld lifetime debarment from the pharmaceutical industry based on a criminal conviction: The permanence of the debarment can be understood, without reference to punitive intent, as reflecting a congressional judgment that the integrity of the drug industry, and with it public confidence in that industry, will suffer if those who manufacture drugs use the services of someone who has committed a felony subversive of FDA regulation. That judgment may proceed from a skeptical view of the malleability of individual men and women; or from a greater concern with the cost of an error visited upon the public than with the cost of an error felt only by the excluded felon; or more likely from the cumulative force of both sentiments.

Criminal records can easily be accessed from all branches of the government. Usually criminal record is checked through local police stations, thus facilitating infliction of collateral consequences.<sup>184</sup>

A sentence is a direct consequence of the conviction which is mandated by the law. Offenders once received their conviction and spent it, they enter into another phase of sentence which was not awarded by court of law but by a society which closes its door on ex-offenders. This additional sentence is actually collateral consequence of a sentence passed by any court of law. These collateral consequences are relevant at the time of re-entry of ex-offenders in society. Many collateral consequences manifest themselves and affect ex-offenders' opportunity of employment, while others affect their access to government benefits, education and licensing.<sup>185</sup> The consequences of conviction sometimes become devastating.<sup>186</sup>

Employers often have good excuse for imposing these restrictions that they fear any liability for any wrong to be committed by ex-offenders at the work place and their attitude towards colleagues and other customers. Therefore, they connect the ban on employment with the public safety and thus it is appreciated by the society. Ex-offenders lag behind in education and skills therefore employers are reluctant to take risk to employ such persons particularly when they also doubt their credibility. There

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<sup>183</sup> Chin. Gabriel "collateral Consequences: Chapter in academy for justice, a report on scholarship and criminal justice reform". Erik Luna ed., 2017, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2948025](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2948025)

<sup>184</sup> James B. Jacobs, and Tamara Crepet, "The Expanding Scope, Use, and Availability of Criminal Records", *New York University Journal Legislation and Public Policy* Vol 11: issue no 177 (2007), 179

<sup>185</sup> Berson.B.Sarah. "Beyond the Sentence-understanding of collateral Consequences," *National Institute of Justice Journal*, issue No 272, (2013) available at <https://www.ncjrs.gov/pdffiles1/nij/241927.pdf> last visited 20-06-2018.

<sup>186</sup> R Lahny Silva. "In Search of a Second Chance: channeling BMW V. Gore and reconsidering occupational licensing restriction" *Kansas Law Review* Vol 61: issue no495 (2012), p 500.

is also apprehension that there is a risk that ex-offenders can repeat the same offence on the workplace in future. These apprehensions leave the level of unemployment of ex-offenders high which lead to recidivism. Though there is studies which shows that persons with criminal record have committed same offence in future, but then a fact also exist that most crimes do not commit at workplace.<sup>187</sup>

Unemployment of individuals with criminal record play active role in recidivism such discrimination has devastated consequences on ex-offender as well as society.<sup>188</sup> Offenders unable to find jobs are more likely to involve in criminal activities.<sup>189</sup> The collateral consequences of criminal record are gradually increases, particularly when it comes to opportunity to work, since it is invisible. The government some time clearly imposes restriction but often in the form of policies which are neutral apparently but has discriminatory effect over ex-offenders

In some countries like Pakistan courts while accepting plea of guilt warn offenders of direct consequences, but not of collateral consequences.<sup>190</sup> The criminal Justice system of these countries does not recognize collateral consequence of criminal record. Therefore neither the courts nor counsels of offenders warn offenders of collateral consequences if they plead guilty of an offence. Accused persons in Pakistan

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<sup>187</sup> A Stacy, Hickox, Mark.v Roehling. "Negative credentials: Fair and effective consideration of Criminal Record" *American Business Law Journal* Vol. 50 (2013), page 99.

<sup>188</sup> Deborah N. Archer and Kele Stewart," Making America the Land of Second Chances: Restoring Socioeconomic Rights for Ex-Offenders", *N.Y.U Review Law and Social Change* Vol 30 (2006), p 536.

<sup>189</sup> Jocelyn Simonson, "Rethinking Rational Discrimination against Ex-Offenders". *Georgetown Journal on Poverty Law & Policy* Vol. 13: issue No. 2, (2006), p 28.

<sup>190</sup> State v. Fisher, 877 N.W.2d 676, 682–83 (Iowa 2016) ("To adhere to the requirements of the Fourteenth Amendment a sentencing court must insure the defendant understands the direct consequences of the plea including the possible maximum sentence, as well as any mandatory minimum punishment. However, the court is not required to inform the defendant of all indirect and collateral consequences of a guilty plea.")

in order to avoid prolonged trial prefer to plead guilty. But due to their unawareness of collateral consequences of conviction they have to face devastated effect of it, for the rest of their life. Therefore it is necessary that legal system should consider plead of guilt as mitigating circumstance to save offenders from collateral consequences of their punishment.

USA Supreme Court has recognized the right of offenders to have prior advice regarding collateral consequences if they plead guilty. This principle was upheld in case titled “Padilla v. Commonwealth of Kentucky”<sup>191</sup>. It has great impact at U.S Criminal Administration of justice, where it is expected that after the decision of U.S Supreme Court, defense attorneys require to explain the consequences of plea bargain to the offender (their client). The case evolve on the fact that Padilla had pleaded guilty and received drug conviction on wrong advice of her counsel that there would be no deportation consequences. The lower courts denied Padilla’s claim of wrong advice, but Supreme Court held that the offenders should have a right of simple advices regarding collateral consequences. The courts in Pakistan need to elaborate in their decisions the collateral consequences of plead of guilt and conviction in their decisions, this enable offenders to know the limits of restriction they had to face by law. Similarly, defense attorneys need to inform the courts that they have advised their client regarding collateral consequences of plead guilty. These measures can be considered as stepping stone to protect offenders from collateral consequences.

US has enacted the Second Chance Act, a federal law which provided 250 million dollars to states and organizations to conduct research for re-entry of prisoners.

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<sup>191</sup> Padilla v. Commonwealth of Kentucky, 559 U.S. 356 (2010)

A few states have started to change their policies on collateral consequences. State of Ohio passed a bill in 2012 that uplifted ban on issuing professional licenses to ex-offenders and provided employers immunity from negligence hiring law suit. The U.S department of Veteran Affairs changed its policies to make it easier for ex-offenders to claim Veteran's benefits. The Equal Employment Opportunity Commission issued guidelines to employers and emphasized to take into account relevancy of criminal record with the job. ABA Criminal Justice System has launched national inventory of the collateral consequences of conviction websites where users can have knowledge about collateral consequence by offence type and jurisdiction.

There is a proposed legislation 'collateral consequences of conviction Act' in 2009 which requires all states need to document all collateral consequences and informed offenders regarding it. The states need to mitigate these consequences under particular circumstances and create forums for grant of relief to ex-offenders. Model Penal Code is updated to address collateral consequences. It has initiated sentencing provision which include these collateral consequences as part of sentence which ends routinely with the sentence of a convicted person and he gets certificate of good conduct after five years.<sup>192</sup> Collateral consequences in Pakistan have developed in piecemeal since there was limited judicial reviews, and legislatures have not dig out any reason to enact a law which could address issue of collateral consequences of criminal record. Therefore it appears that collateral consequences are inflicted slowly without any pre planning as how they are adjusted in concept of punishment, reentry in society and employment. Consequently these consequences are still creating hurdle in way of entry of ex-offenders at workplace. Therefore, it is required that Pakistan legislates a law

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<sup>192</sup> Lorelei Laird, "Ex-Offenders face tens of thousands of legal restrictions, bias and limits on their Rights" *ABA Journal*, June 1, 2013. available at <https://www.abajournal.com/magazine/article/ex-offenders-face-tens-of-thousands-of-legal-restrictions> last visited 12-11-2018

which inform offenders the type of collateral consequence they face depending on nature of offence and age of offenders. It is also required to provide time frame to offenders after which they will not face any collateral consequence.

#### **4.5 ELIMINATION OF UNNECESSARY COLLATERAL CONSEQUENCES**

It appears that the legislature has imposed collateral consequences to promote public safety. Although, these consequences were not imposed for the purpose of punishment. There is no evidence that consequences have impact on reduction of risk of recidivism. Therefore imposition of consequences was just based on assumption that it will promote public safety and reduce risk of commission of any offence. Many researches indicate that with passage of time risk of reoffending diminishes. Therefore elimination of collateral consequence has a positive impact on live of ex-offenders, as it help them to participate in activities of society.<sup>193</sup>

Added to it, a recent research proposes that the disqualifications enacted by law are not essentially matching the decisions renders on the basis of utilization criminal records and tendency of reoffending.<sup>194</sup> Thus a logical decision can be made by using practical factors such as the time elapsed since commission of crime and evidence of law-abiding behavior, rather than banning entry on the basis of conviction of particular crimes. Therefore, it is argued that a line should be drawn between the offenders who

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<sup>193</sup> Megan Denver, Siwach Garima, Shawn D. Bushway, “A New Look at the Employment and Recidivism Relationship through the Lens of a Criminal Background Check”, *Criminology Journal* Vol 55 (2017), p 174; Megan Denver, “Evaluating the Impact of “Old” Criminal Conviction Decision Guidelines on Subsequent Employment and Arrest Outcomes”, *Journal of Research in Crime & Delinquency* Vol 54 (2016), p379.

<sup>194</sup> Garima Siwach, Shawn D. Bushway, Megan. C Kurlychek, “Legal Mandates in Criminal Background Checks: An Evaluation of Disparate Impact in New York State” (June 14, 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2986384](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2986384) (last visited July 17, 2017).

can and cannot pose risk owing to their behavior and back history, rather than applying generally collateral consequences to all criminals. It is further argued that collateral consequences should be implemented for definite period and not permanently, but one may say that no specific time frame can be fixed as a deciding factor for purpose of imposing collateral consequences, since nature of offenders and type of offence they have committed differ from each other. The recent study argues that with passage of time there are chances that offenders change their behavior, therefore each case need to be analyzed separately for purpose of imposing collateral consequences. In most of the cases it would be reasonable to assess risk factor in each case separately while taking into consideration the pertinent factors and conditions. Again, it is advisable to determine cases of unreasonable high risks to affect social security and without compromising public safety to include individuals with minimum risk in lawful employment. Throwing all ex-offenders from employment will affect the cost which employers have to bear for not employing skilled labor from ex-offenders.<sup>195</sup>

#### **4.6 BUSINESS COSTS OF DISCRIMINATION AGAINST EX-OFFENDERS**

Unstable employment increases risk of reoffending; Studies have concluded that unemployment is a one of essential reason for recidivism.<sup>196</sup> Economists argues that hiring ex-offenders “simply smart business”. They contend that since ex- offenders are loyal employees and their retention rate is higher therefore businesses have lower

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<sup>195</sup> Chin. J. Gabriel “Collateral Consequences”, Chapter in academy for justice, a report on scholarship and criminal justice reform (Erik Luna ed., 2017, Forthcoming) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2948025](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2948025)

<sup>196</sup> Justice Center, National Reentry Resource Center, “What Works in Reentry Clearinghouse: Employment,” The Council of State Governments, available at <https://whatworks.csgjusticecenter.org/>. last visited on 12-10-2016

turnover.<sup>197</sup> Keeping in view the costs related with turnover and recruitment, researchers have established that “employees with a criminal background are in fact a better pool for employers.”<sup>198</sup> Business leaders can positively contribute for betterment of ex-offenders by allowing them to participate in employment opportunities. Companies can improve their bottom line, reduce recidivism and incarceration costs, avoid discriminatory practices, and increase public safety.

However, the recent research found that in Pakistan no such practice was ever reported, where employers have taken initiatives to provide conducive environment to ex-offenders which encourage them to apply for jobs, while maintaining their dignity by not disclosing their previous criminal history. Probably, employers in Pakistan conscious of fact that job opening are few and applicants are in large numbers, hence employers prefer to hire best among them who have no personality flaw, or stigma, besides they possess good work skill and education. Employers do not realize that their preferential discrimination is harmful to ex-offenders, their families and society. They even do not take into account the business cost they have to bear for such discrimination.

Some business leaders in USA have taken into account damage cause due to preferential discrimination against ex-offenders and they strived to find methods to decrease hurdles in their employment. Companies like Starbucks, Home Depot, Total Wine & More, American Airlines, Koch Industries and Under Armour have initiated

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<sup>197</sup> Atkinson, Daryl , “The Benefits of Ban the Box,” The Southern Coalition for Social Justice, 2014, [http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox\\_WhitePaper-2.pdf](http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf) last visited on 24-05-2017

<sup>198</sup> Dylan Minor, Nicola Persico, and Deborah M. Weiss, “Criminal Background and Job Performance,” Working Paper, October 30, 2016: [file:///Users/test/Downloads/SSRN-id2851951%20\(1\).pdf](file:///Users/test/Downloads/SSRN-id2851951%20(1).pdf). Last visited on 23-02-2017

hiring policies to allow entry of ex-offenders.<sup>199</sup> Similarly small companies like Butterball Farms, Dave's Killer Bread, and Haley House Bakery have also employed qualified talented ex-offenders.

#### **4.6.1 Case Study**

Wal-Mart is one of largest company in the United States. Wal-Mart has introduced a policy that past criminal record of applicant is not relevant for selecting persons for job. The company has removed a question related to criminal record from their employment forms. It has formed a vetting team to assess an applicant's total profile and qualifications and demonstrated efforts at rehabilitation. The company carry out a background check only if a candidate gives his consent and then he is required to self-disclose his criminal record. Company centralized information with regard to background check and consent form collected from applicant including his self-disclosure on online. Hiring manager and HR teams in the facility are not aware of convictions disclosed and they form their independent view about eligibility of candidate. However, the decision is finalized after final report is received regarding criminal history of candidate and decision that whether applicant is eligible for hire or deferred for hire is only based on final results of the report. The company provides to applicant right to explain anything potentially adverse on their record in order to provide him opportunity to provide additional information that only they possess (i.e. rehabilitation efforts, continuing education, work experience, etc.) before Wal-Mart makes a final decision to employ ex-offenders. These uniform hiring policies provide

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<sup>199</sup> White House Launches the Fair Chance Business Pledge April 11, 2016, available at <https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.last visited on 13-02-2019chapter

safeguard to ex-offenders applicants at work place and provide a fair opportunities to get employment.

The recent study contends that Pakistan has not conducted any research over cost benefit to hire ex-offenders in business, therefore, the study has focused on outcome of researches conducted on experience of commercial organizations of other countries who hired services of ex-offenders and what benefit they yield. This research argued that commercial organizations whether small or large in size by allowing entry to all applicants including ex-offenders can strengthen their workforce. It is further stressed that it yield positive impact on business cost. A recent research carried out at USA reached on conclusion that retention rate of ex-offenders at jobs is higher than those with clean record. This long retention on job reduces an employer's recruitment cost and training expenses for lower-skilled white-collar worker which analysts estimate are close to \$4,000 per employee.<sup>200</sup> In fact, with higher retention rates and greater loyalty, job seekers with criminal histories, researchers say, are "a better pool for employers." Companies are recognizing this advantage. Resource Manager at Total Wine & More, human resources found that annual turnover was on average 12.2 percent lower for employees with criminal records.<sup>201</sup> Electronic Recyclers International (ERI) observed same result when they adopted a program to recruit ex-offenders. This step reduced their turnover from 25 percent to just 11 percent.<sup>202</sup>

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<sup>200</sup> Dylan Minor, Nicola Persico, and Deborah M. Weiss, "Criminal Background and Job Performance," Working Paper, October 30, 2016, [file:///Users/test/Downloads/SSRN-id2851951%20\(1\).pdf](file:///Users/test/Downloads/SSRN-id2851951%20(1).pdf); see also Heather Boushey and Sarah Jane Glynn, "There are Significant Business Costs to Replacing Employees," Center for American Progress, November 16, 2012, <https://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf>.

<sup>201</sup> Data collected by Total Wine & More. Processed March 22, 2017 by Trone Private Sector And Education Advisory Council to the American Civil Liberties Union (ACLU).

<sup>202</sup> Matt Krumrie, "Why You Should Give Candidates with a Criminal Background a Second Chance," October 4, 2016, <https://www.ziprecruiter.com/blog/why-you-should-give-candidates-with-a-criminal-background-a-second-chance/>.

#### 4.6.2 Illustration

At some times employers have tendency to discriminate against specific categories of employees. For example, an employer who refuses to employ individuals with criminal record has a preference to non-offenders. Gary S. Becker an economist<sup>203</sup> has concluded that employers by their discrimination are affecting adversely their own cost, since they agreed to pay more for same quantity and quality of labor. To explain Becker's theory, presume that whole class of workers is divided into two groups: ex-offenders non-offenders, who can substitute each other meaning thereby that employer on the basis of merit cannot prefer one group over the other. In an impartial market place these workers get equal wages. However, if some employers have inclination towards non- offender then they have to pay increase wages to non – offenders. This increase in wages represents amount which these employers are intending to pay to avoid interaction with their disfavored group.<sup>204</sup> Similarly, if a market is dominated by such employers who have similar preference, then it could further increase prevailing wages which is need to be paid to non-offenders. Since, employers have to pay higher wages to balance out increase production cost, they reduce quantity of their products. This ultimately has negative impact over revenue of

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<sup>203</sup> See, Stephen P. Shepard, "Negligent Hiring Liability: A look at How It Affects Employers and the Rehabilitation and Reintegration of Ex-offenders," *APPALACHIAN Journal of Law* Vol 10, (2011), P 145, 148-49 (describing how a convicted sex offender raped other employees after being hired).

<sup>204</sup> This analysis is parallel to Becker's analysis on effects of racial discrimination. Becker points out, his analytical framework can be applied to any discriminatory practice, including race, gender, bloodline, or even to people with "unpleasant" personalities also see Kevin M. Murphy, " How Gray Becker saw the scourge of discrimination", *Economics Social policy*, 2015 available at <https://review.chicagobooth.edu/magazine/winter-2014/how-gary-becker-saw-the-scourge-of-discrimination> last visited 01-10-2019

employers and it also affect equilibrium of society as it receives fewer products on high price.

Gary argues that such discriminatory practices harm persons who were discriminated against, since they are either not employed or are hired at low wages as compared to others. Even the preferential group may be affected because there are chances that employers may not afford to hire them on higher cost. Employers can only afford to hire workers if their marginal cost equals to their marginal product. Discrimination ultimately burdened employers to pay increased marginal costs for labor. Thus this affects the quantity, quality and price of products affecting everyone involved in the process as compare to market place where no discrimination had occurred. Nondiscriminatory markets face lower marginal costs and they expand more quickly as compare to their discriminatory counterparts.

Hiring of ex-offenders is beneficial to improve company's bottom line. These companies with standardized hiring policies are playing an important role in reducing state expense associated with cycles of re-incarceration.<sup>205</sup> Stable employment helps to reduce re-arrests and re-incarceration. It keeps prison costs low thus contributes in reduction of huge burden on state exchequers. Further employers get chance to meet experienced individuals with criminal record, because ex-offenders with better qualification and experience have participated in process of hiring.

#### **4.7 SOCIAL AND ECONOMIC COSTS OF DISCRIMINATION**

Imprisonment leads to isolation from societal contacts, therefore, prisoners after release from prison face great challenges to enter into new environment which is separate from prison environment. They find it difficult to re-establish their social

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<sup>205</sup> Mark T Berg, and Beth M. Huebne, "Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism," *Justice Quarterly* Vol 28, (2011), P 382-410.

contacts in society. That is why policy analysts have called it “prisoner reentry” to indicate the exit of prisoners from incarceration.<sup>206</sup> Ex- offenders’ reintegration encapsulate the process of transition from prison into mainstream society. In this process, offenders start to adapt themselves in accordance with moral standard of society with the expectation to lead a life free from illegal activity.<sup>207</sup>.

Maruna, Immarigeon and Lebel<sup>208</sup> define offender reintegration as:

*"A systematic and evidence-based process by which actions are taken to work with the offender in custody and on release, so that communities are better protected from harm and reoffending is significantly reduced. It encompasses the totality of work with prisoners, their families, significant others and victims in partnership with statutory and voluntary organisations."*

Reintegration theory is based on a belief that criminal activity indicates absence of community role.<sup>209</sup> Therefore, proponents of reintegration theory instead to blame offenders for their criminal acts shifted the responsibility towards society and argued that society creates such conditions which breed criminals, therefore, it is essential that

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<sup>206</sup> Bruce Western, Anthony A Braga, Jaclyn Davis, Catherine Sirosis “Stress and Hardship after Prison” Department of Sociology, 33 Kirkland Street, Cambridge MA 02138, October, 2014 available at <https://scholar.harvard.edu/files/brucewestern/files/trans08.pdf> last visited on 16-07-2016.

<sup>207</sup> Victor chikadzi, “challenges facing ex-offenders when reintegrating into mainstream society in Gauteng South Africa” Social Worker (Stellenbosch. online), volume 53 n.2 Stellenbosch, 2017.

<sup>208</sup> Shadd Maruna, Suss Immarigeon, Thomas P. Label, “Ex-offender reintegration: theory and practice. After crime and punishment: pathways to offender reintegration”, 2004 [Online] Available: <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=205081>. [Accessed: 17/09/2016].

<sup>209</sup> Victor chikadzi, “challenges facing ex-offenders when reintegrating into mainstream society in Gauteng South Africa” Social Worker (Stellenbosch. online), volume 53, no.2 (Stellenbosch: 2017). Available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0037-80542017000200008](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0037-80542017000200008) last accessed on 13-08-2016

society should create such conducive environment for reintegrating ex-offenders.<sup>210</sup> According to Muntingh<sup>211</sup>, there are two moral premises for reintegration of offenders. “Firstly, people to live in harmony with one another, and secondly, wherever harmony and community are absent, they should be actively tracked.” Muntingh also argues that a penal approach stigmatizes offenders. Therefore, incarceration should be aimed for reforms and reintegration of offenders.<sup>212</sup>

The recent study explains that ex-offenders process of social reintegration can be divided into three parts: (i) the development of family relationships (ii) finding a place to stay (iii) obtaining a means of subsistence. All these parts ensures full participation in community life and fulfillment of the social standards. Ex-offenders feel distressed due to family estrangement, housing insecurity, income poverty and little access to mainstream social roles and opportunities that characterize full community participation.<sup>213</sup>

Families have prominent role in bringing ex-offenders to normal lives. The control theory of sociology argues that persons abstain from deviant behavior owing to different factors which control their nature to break social norms.<sup>214</sup> Control their

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<sup>210</sup> L. Glanz, *Managing Crime in the New South Africa: Selected readings* (Pretoria: HSRC Publishers, 1993).

<sup>211</sup> Lukas Muntingh, prepared a Monograph titled “After prison: the case for offender reintegration” published by Pretoria Institute for Security Studies, P 2001. Where in Lukas question that questions whether the current system of imprisonment can achieve the desired goals of punishment and ensure that instead of reoffending, a former prisoner can become a member of the community once again

<sup>212</sup> Victor chikadzi, “challenges facing ex-offenders when reintegrating into mainstream society in Gauteng South Africa” Social Worker (Stellenbosch. online), volume 53: issue no.2, (2017). Last accessed on 12-10-2019

<sup>213</sup> Jeffrey R. Kling, “Incarceration Length, Employment, and Earnings” *American Economic Review* Vol. 96: Issue No. 3, June (2006), pp. 863-876 and John H. Tyler & Jeffrey R. Kling, 2006. “Prison-Based Education and Re-Entry into the Mainstream Labor Market,” NBER Working Papers 12114, National Bureau of Economic Research, Inc.

<sup>214</sup> This theory was developed by thinkers such as Travis Hirschi and Walter Reckless in the late 1960s and early 1970s, control theory explains why people often do not act on deviant impulses

instinct to breach social values. Controls can be internal such as a conscience and motivation to succeed; others are external, such as one's parents, friends, and legal codes. Control theory annex socialization and social bonds to non-deviant behavior.<sup>215</sup>.

A person's stigma of "offender or 'ex-felony'" give him a setback as he faces condemnation by society which create a sense of fear in him to interact with others. The study argues that the society while affixing stigma 'of law violators' on ex-offenders did not take into consideration those situations and circumstances in which offence was committed. Further, the society has failed to take into account that all offenders in jail are not violators of law, rather there are prisoners who were arrested on mere apprehension that they are likely to commit offence. Society needs to mend its perspective about reintegration of ex-offenders in order to have positive impact over social ties of ex-offenders with other members of society.

## 4.8 CONCLUSION

Collateral consequences of conviction is a growing problem. Therefore state should take steps to reform collateral consequences since they have great impact on lives of many ex-offenders. These collateral consequences are not declared in documents. They invisibly exist in state policies. Therefore, individuals do not know what collateral consequences they will face once they come out of prison. The situation get worst when they are misguided by their counsel and they plead guilty and subsequently they had to face collateral consequences of their conviction. Therefore, defense counsels need to inform their clients about collateral consequence of if they plead guilty. Similarly, the recent study has discussed that courts need to include

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<sup>215</sup> David J. Harding, Jessica J.B Wyse, Cheyney Dobson, Jeffery D. Morenoff, " Making Ends Meet after Prison" *Journal of Policy Analysis and Management* Vol 33: issue 2, (2014),P 440-470

collateral consequences in their sentencing decisions. This will be significant to convey to ex- offenders nature of collateral consequences and time limit of their applicability. There are some collateral consequences which are for specific span of time while others are imposed for rest of life. It is the responsibility of state to prepare itself to collect all collateral consequences. It should confirm that collateral consequences are structured in such a form to promote public safety. It must also ensure that they protect public from harmful individuals as well as provide a space for people with convictions to lead their lives in accordance with law. It is necessary that assessment of collateral consequences should be based on fundamental factor and not on intuition. Where it is necessary it should be restricted with regard to commission of certain crimes and each case to be analyzed separately. It is also essential that their application should be for specific period rather than to be applies generally on all type of offences for unlimited period. Collateral Consequences lead to discriminatory behavior against ex-offenders and its outcome become radical when it effect the source of subsistence of ex-offenders. The recent study has also analyzed that discriminatory market places need to pay more cost for the same work as compare to non -discriminatory markets. The study also highlights that discrimination against ex-offenders has social and economic cost which society need to bear in form of recidivism.

## **PART II**

### **EFFICACY OF CRIMINAL JUSTICE SYSTEM OF PAKISTAN FOR REHABILITATION OF EX-OFFENDERS AS COMPARE TO OTHER COUNTRIES AND REMEDIAL MEASURES ADOPTED BY FOREIGN COUNTRIES FOR REINTEGRATION OF EX- OFFENDERS**

## CHAPTER 05

### EFFICACY OF EXISTING LAWS OF PAKISTAN TO PROTECT EX-OFFENDERS' RIGHT TO WORK

#### 5.1 INTRODUCTION

This chapter highlights fundamental rights available to ex-offenders being citizens of Pakistan. The study further analyzes consistency of laws banning jobs of ex-offenders with articles of Constitution for the purpose of determining their validity. Provision of Constitution has enshrined concept of social justice which is based on plain concept that all humans are born free and are entitled to equal rights, therefore, everyone has equal opportunity to work. The study shed lights whether these legal rights are also available to Ex-offenders being citizens of Pakistan. The prevailing recruitment policies in Pakistan depends on criminal record check from concerned police station. The study argues that the criminal record is not updated therefore it is not reliable source to get current information about criminal record of a person, further it leads to violation of right to work of persons who was declared innocent by law. The study also shed lights on specific jobs which are banned on ex-offenders keeping in view job requirement. The philosophy behind such restrictions. How Islam view laws banning jobs of ex-offenders to determine compatibility of recruitment policies of Pakistan with Shariah laws.

#### 5.2 LEGAL RIGHTS AVAILABLE TO EX-OFFENDERS BEING CITIZENS OF PAKISTAN

Father of the Nation Mr. Muhammad Ali Jinnah's in his presidential address to the Constituent Assembly of Pakistan in 1947 said the following:

*"As you know, history shows that in England, conditions, some time ago, were much worse than those prevailing in India today. The Roman Catholics and the Protestants persecuted each other. Even now there are some States in existence where there are discriminations made and bars imposed against a particular class. Thank God, we are not starting in those days. We are starting in the days where there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one State. "*

Pakistan legal system revolves around Constitution of Pakistan which is a social contract of state with individuals. The Constitution of Pakistan has long list of articles which elaborate about link between good economic governance and fundamental rights. On a reading of the preamble. Part I Fundamental Rights and chapter 2 Principles of Policy of the Constitution together indicate that it is intended to establish an egalitarian society. It is apparent that the founding father intended to usher in an egalitarian Islamic society where every citizen is assured of social and economic justice, equality in terms of status and opportunity ensures dignity of a person. Justice and equality, the two "priceless jewels" occupying pride of place are thus embedded as stepping stones to restructure a modern state on the basis of principles of democracy, social justice etc. as pronounced by Islam. The idea behind preservation of fundamental rights is to safeguard them from state atrocities. The purpose behind declaration of fundamental rights is to assert that elementary human rights such as right to life, right to liberty and right to work should be considered as inviolable under all conditions by human authority. These are basic human rights without which human life becomes

meaningless. They preexist before inception of political society and hence cannot be snatched by it.

Chief Justice (R) Anwar Zaheer Jamali <sup>216</sup> in his address on fundamental Right said:-

*“Preamble reminding us of the “unremitting struggle of the people against oppression and tyranny”, the Preamble provides the normative conception of the State, as, in the words of the Constitution, “a new order” mandated to create “an egalitarian society”. At the heart of the idea or mission of Pakistan is also this hope and promise of an ethical conception of the State that connects with the Islamic worldview. As such, in our context, the creation of an egalitarian society is not a mere philosophical notion, it is, in fact, a Constitutional imperative that must be practically observed and implemented. This may appear daunting but we must continuously strive to ensure that this goal is a cornerstone of State efforts including legislation, public policy, jurisprudence and economics.”*

Fundamental rights are inviolable “interests” provided to the people of Pakistan in order to establish an egalitarian society and for development a human personality. All persons are entitled to enjoy fundamental rights without discrimination in Pakistan. Therefore, ex-offenders have right to enjoy all these fundamental rights. But, discriminatory behavior at time of employment of ex-offenders leads to violation of their various fundamental rights such as right of individual to be dealt in accordance with law (Article 4) right to life (Art. 9) right to dignity (Art.14) freedom of trade, business or profession (Art 18) equality of Citizens (Art. 25) and right to safeguard against

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<sup>216</sup> Chief Justice (r ) Anwar Zaheer Jamali ‘s address on “ Fundamental Rights-The Promise of Just Society” 10 December, 2015

discrimination in services (Art 27). Even, rest of fundamental rights can be claimed as part of right to life keeping in view the expanded definition of ‘right to life’ provided by Supreme Court of Pakistan in its famous case of *Shehla Zia*.<sup>217</sup> This case annunciates right to life which covers all fundamental rights upon which the existence of life depends.

Incorporation of fundamental rights in the provision of Constitution of Pakistan and their liberal interpretation by the courts of Pakistan indicate that individuals have protection of law to be dealt in accordance with law, however, ex-offenders being citizens of Pakistan whether enjoy same level of protection of law is yet to be analyzed.

Concept of social justice is enshrined in the preamble of the Constitution of Pakistan, 1973 in the following words:-

*“Therein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality.”*

It is evident that the Constitution of Pakistan recognizes principles of equality of status and opportunities, social, economic and political justice subject to law and public morality.

Article 4(1) of the Constitution has used the term “all individuals” and thus extended right to enjoy equal protection of law to all persons whether they are citizens or non-citizens and are for time being in Pakistan. The Constitution has placed an

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<sup>217</sup> *Shehla Zia V Wapda* PLD 1994 SC 693.

inevitable value to right of every individual to be dealt in accordance with law. Article 4(2) (a) to (c) of the Constitution provides protection from any arbitrary action affecting right to life, liberty, body, reputation and property. It ensures that no person is constrained to do anything or forbidden from any action until the law categorically prohibits the same.<sup>218</sup>

The Constitution of Pakistan provides protections against arbitrary laws which are incompatible with fundamental rights and declared them void.<sup>219</sup> This indicates that

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<sup>219</sup> Article 4: Right of individuals to be dealt with in accordance with law, etc.<sup>218</sup>.

(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular:-

- (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
- (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
- (c) no person shall be compelled to do that which the law does not require him to do.

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<sup>219</sup> Article 8. Laws inconsistent with or in derogation of fundamental rights to be void.

(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

(3) The provisions of this Article shall not apply to:-

(a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or

(b) Any of the-----

(i) Laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;

(ii) Other laws specified in Part I of the First Schedule;

Pakistan incompliance with its international obligation has incorporated relevant provision to respect and protect human rights. The study explains that all laws which place restriction on employment of ex-offenders, if scrutinized on touch stone of article 8 are void laws, since they infringe right to work of ex-offenders. It appears that Pakistan has not scrutinized its laws on the basis of parameter set out in this article to determine validity of such laws, and thus violated its international duty to ensure provision of fundamental rights to all. Therefore the employment laws need to be framed within the parameters of this article, so that undue infringement of right of employment of ex-offenders should be avoided. The recent research contends that the laws banning jobs of ex-offenders need to consider the factor of "job requirement" instead of placing generalized ban on ex-offenders. There should be a balance between criteria of job requirements and right of ex-offenders to be treated equally in accordance with the law without any discrimination. Similarly, the Constitution of Pakistan provides right to freedom of trade, business and profession but this right again is qualified. Article 18 of the Constitution of Pakistan is relevant in this regard.<sup>220</sup>

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and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.

(4) Notwithstanding anything contained in paragraph (b) of clause (3), within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in Part II of the First Schedule into conformity with the rights conferred by this Chapter:

Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months.

Explanation: - If in respect of any law Majlis-e-Shoora (Parliament) is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.

(5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution.

<sup>220</sup> Article 18. Freedom of trade, business or profession.

It is evident that article 18 of the Constitution provides qualified right to trade, business or profession. However it recognizes a right to do a lawful trade or business. It also recognizes licensing mechanism for purpose of entry into any trade or occupation. The licensing authority has discretion in this regard to define terms and conditions of a license, however the exercise of discretion should not be arbitrary as it infringe fundamental right of any individual, particularly ex-offenders who are vulnerable to discrimination.

The Indian court has explained limits of restriction that could be impose on person's enjoyment of right. It has held:-

*"The limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public."*<sup>221</sup>

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Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent:-

- (a) The regulation of any trade or profession by a licensing system; or
- (b) The regulation of trade, commerce or industry in the interest of free competition therein; or
- (c) The carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.

<sup>221</sup> M/s Dwarka Prasad v. State of U.P. (AIR 1954 SC 224), P.P. enterprises v. Union of India (AIR 1982 S.C 1016)

Similarly, Islamabad High Court in case titled “Pakistan Telecommunication Company Limited Vs Pakistan Telecommunication Authority” has also considered same criteria while interpreting scope of Article 18 of the Constitution of Pakistan in order to safeguard interest of individual Vis-a Vis of society. The court held:-

*“Under Art.18 of the Constitution, every citizen had a right to enter into any lawful business, however, the same could be regulated in the interest of fair competition, under Art 18(b) of the Constitution –object of free trade and business was also to maintain a healthy competition therein--object of freedom of business was also to avoid monopoly of any person”<sup>222</sup>*

The study argues that the state while regulating trade, business or profession can impose restriction but then these restriction should not be arbitrary to public interest i.e. to effect healthy competition in lawful business and to snatch from a person his right of fair competition in business on the basis of equal status and opportunity. Constitution of Pakistan under Article 25 confers on all individuals ‘right to equality’.<sup>223</sup> This Article provides elementary right to be treated equally before the law and to have an equal protection of law. It also provides protection against discrimination. However the language of statute does not clarify that whether direct discrimination or indirect

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<sup>222</sup> Pakistan Telecommunication Company Limited Vs Pakistan Telecommunication Authority, PLD 2014 Islamabad 79

<sup>223</sup> Article 25. Equality of citizens.

- (1) All citizens are equal before law and are entitled to equal protection of law.
- (2) There shall be no discrimination on the basis of sex.
- (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

discrimination is prohibited. Furthermore the provision does not disclose what constitute discrimination for purpose of defining elements of discrimination. Thus this vacuum can only be filled through intervention of court. Courts have to analyze each case separately to determine whether act of state or authority was discriminatory towards a person. Further, this Article has given generalized protection to extent of ‘equal protection of law’. But, it has not generalized the protection in terms of discrimination to include grounds based on inherent individual characteristics such as race, origin etcetera for prohibition. The Article only used words that ‘there shall be no discrimination on the basis of sex. Similarly, Article 27 of the Constitution prohibits discrimination in service of Pakistan and has enlisted proscribed grounds for discrimination i.e. race, religion, caste, sex, residence or place of birth. However the article embedded the words “on the ground only” which indicates that it has restricted scope of protection to the given grounds only.<sup>224</sup>

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<sup>224</sup> Article 27. Safeguard against discrimination in services.

- (1) No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth.

Provided that, for a period not exceeding [forty] years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan:

Provided further that, in the interest of the said service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex.

- (2) Nothing in clause (1) shall prevent any Provincial Government, or any local or other authority in a Province, from prescribing, in relation to any post or class of service under that Government or authority, conditions as to residence in the Province for a period not exceeding three years, prior to appointment under that Government or authority.

The study argues that article 27 is not flexible in application, since no such words “other status” envisaged to extend its applicability to all possible grounds for discrimination in service. Therefore, ex-offenders can claim protection under this Article once amendment is carried out and persons with criminal record are included in proscribed grounds for discrimination. In the present scenario ex-offenders can only approach courts to interpret the Constitution and extend the protection against discrimination to ex-offenders on other available fundamental rights, such as right to life and right to dignity.<sup>225</sup> The courts of country can be called upon to decide that restriction on entry of ex-offenders in employment is reasonable and consistent with provisions of Constitution. The Constitution being supreme law of country has to be prevailed in case there is any inconsistency between banning laws and constitutional provisions. The courts in such eventuality have no other options but to treat such laws as void to the extent of inconsistency in order to enforce fundamental rights of ex-offenders.<sup>226</sup>

Ex-offenders are politically powerless and unpopular, therefore no law so far is made to protect fundamental right of employment of ex-offenders. However government needs to provide policy guidelines for general applicability that employers should give merit preference over individual characteristic. This measure helps Pakistan to ensure observance of nondiscriminatory provisions in service.

One may argue that how government can implement the above referred policy in private sector, particularly when the relationship of employment is governed by the principles of master and servant. To address this line of argument it is suffice to say that the law provides protection against arbitrary action of employer. The employer

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<sup>225</sup> Article 8 of the Constitution of Pakistan, 1973

<sup>226</sup> PLD 1964 S.C 673 (P. 783)

needs to exercise his discretion reasonably, otherwise he has to be held answerable for his action. Further the government can formulate law to regulate recruitment policies in public and private sectors with regard to employment of ex-offenders.

The Constitution includes right to work in list of fundamental rights. It is source of subsistence in life. Hence, denying equal opportunity to work to ex-offenders amounts to infringement of their right to life. It also infringes norms of social justice. Social justice requires abolition of all sort of inequalities, such as inequalities of wealth, opportunity, race, caste, religion and title. Social Justice, in short is harmonization of rival claims of interest of different groups and sections in social structure to build up a “welfare state.”<sup>227</sup>

The Declaration of the Rights of Man and Citizen adopted by author of French Revolution included:

*“Men are born and remain free and equal in rights. Social distinctions can be based only upon public utility-----Law is the expression of the general will ----it must be the same for all, whether it protects or punishes. All citizens being equal in its eyes are equally eligible to the public dignities, places and employments, according to their capacities and without any other distinction than that of their virtues and talent.”<sup>228</sup>*

Justice J. C. Shah in his "Rule of Law and the Indian Constitution" described the concept of modern democratic states as follows:-

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<sup>227</sup> M. Mehmood, *The Constitution of Islamic Republic of Pakistan*, 1973 ( Lahore: Al Qanoon Publishers, 2012) page 12

<sup>228</sup> The Declaration of the Rights of Man and Citizen adopted and affirmed in the Constitution of the Fifth French Republic, 1958.

*“The concept of a modern democratic state is an instrument of social welfare striving to secure the greatest good to the greatest number was evolved from the principles of equality and liberty. Equality was in the course of time translated to a more ambitious plane of equality of status and opportunity in matters - social and economic and distinct from purely political equality and voting rights. The State assumed to itself to secure for its citizens social justice and the attribute of equality in a purely protective sense got translated into equality in the realisation of social justice as an index of a democratic society”.*<sup>229</sup>

Justice Jaganmohan Reddy in his "Social Justice and the Constitution" <sup>230</sup> states:

*“The concept of social justice has now gone beyond what the ancients could possibly have contemplated. It now take the form of... equalisation of employment opportunities many other things.”*

He also stated aspect of social justice in the following words<sup>231</sup> :

*“There are two aspects of social justice. The first one is that everyone has equal rights to basis equality compatible with similar liberty of others; and the second one is that social and economic inequalities are to be adjusted in such a way they are both reasonably expected to be to everyone's advantage and attached to positions and office open to all*

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<sup>229</sup> Justice J. C. Shah in his "Rule of Law and the Indian Constitution", 1972 Edition of Sir Dorab Tata Memorial Lectures, at page 13.

<sup>230</sup> Justice Jaganmohan Reddy, (Andhra University Press, 1976), Page 8.

<sup>231</sup> Ibid, *Social justice and the Constitution*, page 2

*both these aspects depend greatly upon the kind of structure of society which we have and which we envisage."*

Justice K. K. Mathew in his "Democracy, Equality and Freedom" <sup>232</sup> states that:

*"Welfare State exists not only to enable the people to take out their livelihood but also to make it possible for them to lead a good life."*

J. W. Evans and L.R. Ward in "Social and Political Philosophy of Jacques Maritain" <sup>233</sup> state that:

*"The State exists and its only title to exist is claim to advance the public good and secure the public interest ..."*

Mac. Iver, in his "The Modern State" stated that "If we clearly grasp the character of State as a social agent understanding it rationally as a form of service and mystically as an ultimate power ... we shall differ only in respect of the limits of its ability to render service" <sup>234</sup>, which Bernard Schewartz emphasized as "Welfare State" in "A Commentary on the Constitution of the United State of America" <sup>235</sup> and stated that:

*"(State) is distinguished by its distribution of economic benefactions to persons and classes in community. Increasingly people are coming to*

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<sup>232</sup> Kuttyil Kurien Mathew, *Democracy, Equality and Freedom* (Eastern Book Company publisher, 1978), Page 47

<sup>233</sup> J. W. Evans and L.R. Ward in "Social and Political Philosophy of Jacques Maritain" 1956 Edition, at page 101

<sup>234</sup> Superintendent Of Post Offices, ... vs Kalluri Vasayya on 22 April, 1983 Equivalent citations: (1984) IILLJ 140 AP

Reference of Mac. Iver, book "The Modern State" page 8

<sup>235</sup> Bernard Schewartz "A Commentary on the Constitution of the United State of America" Volume 2, Chapter 18 Rights of persons, page 872 discussed in case (1984) IILLJ 140 AP

*live on largesse dispensed by Government. Government is coming to represent the primary the primary source of income and other economic benefits."*

The Supreme Court of the United States of American in Allgaver v. State of Louisiana<sup>236</sup> has held that:

*"A citizen has a right to earn his livelihood by any lawful calling to purpose any livelihood or avocation and for that purpose to enter into all contracts which may be proper necessary and essential in his carrying out to a successful conclusion of the purposes above mentioned. In the privilege of pursuits in an ordinary calling or trade and of acquisition, holding and selling property must be embraced the right to make all proper contracts in relation thereto."*

The Indian Court in Superintendent of Post Offices, vs Kalluri Vasayya held "It is therefore legitimate to conclude that the State is an organization to transcend all sections of the society to enable them to lead good life assuring dignity of person under a legal order. Thus, its true dignity comes not from its power and prestige but from doing justice to its subjects."<sup>237</sup>

Friedmann, in his "Law in a Changing Society"<sup>238</sup> viewed that "the right to earn a living according to one's capabilities and training, may be regarded either as an aspect of liberty (to develop one's personality) or as an aspect of property, if property, as it

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<sup>236</sup> The Supreme Court of the United States of American in Allgaver v. State of Louisiana (1897) 165 U.S. 578

<sup>237</sup> Superintendent Of Post Offices, ... vs Kalluri Vasayya on 22 April, 1983Equivalent citations: (1984) IILLJ 140 AP

<sup>238</sup> W. Friedmann Harmonds, *Law in Changing society* (Penguin Books Ltd, 1964), page 281

must, is no longer defined as a compound of tangible, real and personal assets, but the totality of all rights and interests capable of legal protection which have an economic value. Whatever its characterization the right to earn a living has barely been articulated as an essential value to be protected in the administrative process although its protection is for the ordinary citizen, the 'common man' perhaps a matter of greater practical importance than any of the traditionally articulated values. If this is a value worthy of protection in contemporary democracy the unchecked power of the ... Government department ... to deprive persons of their livelihood and employability in the field of their training and skill is truly arbitrary power."

This view was reiterated in case M/s. Kasturi Lal v. State Jammu and Kashmir (A.I.R. 1980. S.C. 1628) while holding: "Therefore, right to equal treatment is calculated to promote profound social interest. Right like equality is indispensable for a citizen to lead good life than property rights. In the words of Alexis De Tocquelle that "man's passion for equality is greater than his desire for liberty." The principle of "interest" to be reality, is to be articulated in full vigor so that the concept of "privilege" becomes meaningful. Justness and fairness should pervade spectrum of considering the claims by the authority concerned for an appointment to a post or office under the state. If the right to hearing in that process is penumbra of equality clause it would sub serve the privilege, interest or legitimate expectation of interest of an applicant for an equal opportunity while considering his claims for an appointment to a post or an office under the State. It would, thereby, bear material, practical and fruitful result yielding utility to equality clause or else tend to be sterile. Viewed from this perspective it is legitimate on the part of the citizen to expect fair consideration of his claims. The non-consideration thereof is itself violation of the basic values enshrined and implicit in the fundamental doctrine of equality. This process may help as aid like mortar, if not brick

in building an egalitarian society. "It is apposite to quote here Professor H. R. Towney in his "Equality" that it (concept of legal equality) was the levelling of legal privilege which provides the stimulus for the mobilization of economic power and social emancipation upon which the modern society is based. Bernard Schewartz says in "A Commentary on the Constitution of the United States of America", Volume II, Page 488 that "it would be impossible to overestimate the importance both in theory and practice of the concept of legal equality embodied in the equal protection clause." Therefore judicial solicitude is necessary to preserve the said right to the citizen so as to ensure conditions to the citizen to the pursuit of happiness and to develop the personality to the full extent."<sup>239</sup>

The Constitution of Pakistan provides for social and economic wellbeing of people of Pakistan under chapter of 'the principles of policy'. The state under Article 29 read with Article 2 A, 37 and 38 of the Constitution of Pakistan is bound to formulate such policies for the promotion of social, economic wellbeing of people. This include provision of work and adequate livelihood with reasonable rest and leisure to all citizens. These Articles are relevant to the governance of state but they are not binding. These principles cannot be enforceable by any court.<sup>240</sup> However, they help courts to interpret provisions of constitution in conformity with aims and objects of constitution. Thus any law promulgated or any action taken by any organ of state in pursuance of Articles 37 and 38 of the Constitution, cannot be considered as sufficient discharge of function by state, since the new laws need to be scrutinized on touch stone

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<sup>239</sup> Bernard Schewartz, "A Commentary, of the Constitution of United States of America," in Volume II, Part III, Chapter 20, under S. 584 to 586 at pages 871 to 884.

<sup>240</sup> PLD1996 Karachi. 1(a)

that they do not violate any fundamental right of a person or it is against the injunction of Islam or in violation of principle of natural justice.<sup>241</sup>

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<sup>241</sup> 37. Promotion of social justice and eradication of social evils.

The State shall:

- (a) Promote, with special care, the educational and economic interests of backward classes or areas;
- (b) Remove illiteracy and provide free and compulsory secondary education within minimum possible period;
- (c) Make technical and professional education generally available and higher education equally accessible to all on the basis of merit;
- (d) Ensure inexpensive and expeditious justice;
- (e) Make provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment;
- (f) Enable the people of different areas, through education, training, agricultural and industrial development and other methods, to participate fully in all forms of national activities, including employment in the service of Pakistan;
- (g) Prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements;
- (h) Prevent the consumption of alcoholic liquor otherwise than for medicinal and, in the case of non-Muslims, religious purposes; and
- (i) Decentralize the Government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public.

38. Promotion of social and economic well-being of the people.

The State shall:

- (a) Secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;
- (b) Provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure;
- (c) Provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means;
- (d) Provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are

Thus the protection provided under articles 37 and 38 of the Constitution of Pakistan alone is not sufficient to safeguard right of employment of ex-offenders. Unfortunately due to lack of policies at state level and non-provision of effective mechanism to safeguard rights of citizens. Ex-offenders face more difficulties to enforce their rights. In this regard, it is the responsibility of state to take concrete steps in order to secure and safeguard wellbeing of people of Pakistan generally and to protect right of employment of ex-offenders particularly.

### **5.3 PREVAILING EMPLOYMENT POLICIES IN PAKISTAN**

The Ministry of Labor and Manpower (MOL & MP) used Labor Force Survey (LFS) to carry out “periodic assessment of employment situation” in the country. In this connection “Pakistan Employment Trends” report<sup>242</sup> was prepared in order to provide empirical data which helped to draw trends in employments on the ground of ten key indicators, which are derived mainly from LFS data. These key indicators prescribes the formation of the labor market in Pakistan in order to help chalk out the range of desirable policy options. The recent study explains, this report is not comprehensive since it does not take into account a segment of society which is laying in prison, though they are doing work in prisons and running industry of carpets, blankets, beds which are sources to generate revenue for jails.

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permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment;

- (e) Reduce disparity in the income and earnings of individuals, including persons in the various classes of the service of Pakistan; and
- (f) Eliminate riba as early as possible.

<sup>242</sup> Pakistan employment trend report , 2013 prepared by Government of Pakistan, statistic Division , Pakistan Bauru of Statistic available at [http://www.pbs.gov.pk/sites/default/files/Labour%20Force/publications/Pakistan\\_Employment\\_2013.pdf](http://www.pbs.gov.pk/sites/default/files/Labour%20Force/publications/Pakistan_Employment_2013.pdf)

Secondly, the report also did not include reason of unemployment, those laws banning employment of a class of persons who fall in the category of “ex-prisoners”. Hence there is no statistic that how many of prisoners get employment after their release from jail. Consequently, no study found in Pakistan which could establish reasons behind ratio of recidivism in Pakistan and whether unemployment could be one of factors in this regard, as it was indicated in the studies conducted in foreign countries.

There are broadly two categories of jobs in Pakistan (i) public sector jobs (ii) private sector jobs. It is observed that in public sector jobs criminal record of applicants are checked from people of their vicinity as well as from concerned police stations of their area. Criminal record is considered relevant in government employment therefore any negative report from police station has adverse impact on prospective of employability of a person.<sup>243</sup>

The situation of employment in private sector in Pakistan is also worst, since, there is no government policy or law which regulate jobs of private sector. Private employers are at liberty to select any policy of their choice when they give advertisement for jobs. Here the criteria of selection is not defined, hence ex-offenders find it very difficult to enforce their right in private sectors. Particularly in such setup where employers were not bound to assign any reason for not selecting a person for any job. This practice in Private sectors is usually fall within the domain of “practice in vogue” which is detrimental to right to life of ex-offenders and in derogation of fundamental right of employment of ex-offenders and snatch from them the right to be treated in accordance with law. Private sectors employers cannot escape their responsibility that they cannot be hold accountable to uphold constitutional principles, since being citizens of Pakistan, they are under contractual obligation to abide by the

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<sup>243</sup> Section 6 of The Civil Servant Act of Pakistan, 1973

terms and conditions of the Constitution. Further the Constitution of Pakistan does not restrict the protection of any persons against arbitrary act of the state rather it provides protection generally against any arbitrary act which is even committed by private person. Lastly, private sectors employers are bound by law and they cannot be considered above the law.

In foreign countries, like America, an employee cannot be denied job on the basis of his previous conviction unless employer establishes substantial relationship between the previous conviction of applicant and the job offered.<sup>244</sup>

But, unfortunately no such policy is under consideration in Pakistan. This issue of ex-prisoners jobs perhaps not in the attention of political parties therefore it has not gained any attention. Further this issue is not of heightened importance for states, since there is no particular international instrument which deals with discrimination against ex-offenders. Consequently, many states like Pakistan have not paid serious attention to this emergent issue.

#### **5.4 CRIMINAL RECORD'S ENTRY IN PAKISTAN**

Pakistan is a country which is burdened by social issues. It has minimum resources to use technology in order to maintain criminal record. Therefore, criminal record data in Pakistan is maintained manually under police rules.<sup>245</sup> A register No 09 is maintained under these rules. The entries in this register is made on the basis of certificate of arrest “Parcha Giraftari”. If a person who is arrested by a police station in which jurisdiction offence is committed, the said police station prepares his

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<sup>244</sup> Stacy A. Hickox& Mark V. Roehling, “Negative credentials; Fair and Effective Consideration of Criminal Records”, *American Business Law Journal* Vol 50 (2013), 201-08

<sup>245</sup> Pakistan Police Rules, 1934

certificate of arrest and then send it to a police station where this person ordinary resides. This sharing of information between two stations is relevant for purpose of maintaining record of criminal activities of a person. Therefore, any inquiry about the conduct of an applicant is usually sent to police station where that person resides which provide information on the basis of register 09 about the criminal record of a person. The study points out that, this system of maintaining criminal record of a person is faulty and cannot be considered reliable to seek update information about a person record. There is no proper supervision of updating of those record. Therefore once a person's name is entered in the relevant register he finds it difficult to clarify his name from record. There is no proper mechanism for updating of criminal record on the basis of outcome of trial. Thus a person's name remains in the list of criminals, even if he is declared innocent by court, which affects his employability.

One may argue that the government cannot dispense with criminal record check due to faulty mechanism to update criminal record in police station, since there are jobs of sensitive nature and only persons with clean criminal record can be hired for it. To address this line of argument, the study argues that without devising a stable mechanism for up keeping of criminal record properly, carrying out criminal record check will serve no purpose, as it unduly affect right of employment of those offenders who are later on declared innocent by the courts of law.

The Study further argues that government practice to carry out record check is relevant for sensitive jobs. However, it should not be made a compulsory process for every government job, since, there are jobs which do not fall in category of classified job or involve financial obligations, as for instance jobs in railway or postal services etcetera. Therefore, government can relax rule of back ground check for such like jobs, this will save government exchequers.

## 5.5 CAUSES OF DISCRIMINATION AGAINST EX-OFFENDERS

Prisoners upon their release from prison try to reintegrate in the society. But they face a discriminatory treatment from the society. They are not allowed to exercise their basic fundamental right to work and hence they find themselves a separate class in the society. This discriminatory behavior towards ex-offenders is based largely on three factors (i) the personal characteristic of offender (ii) Preferential behavior of employers (iii) state sanctions in form of codified laws. The study has shed lights on all these three factors in order to get better understanding of causes of discrimination.

### (A) Personal Characteristics

Ex offenders' face major hurdle in getting employment due to lack of work skills, educational qualifications and a stable job history.<sup>246</sup> Few Scholars have argued that prisoners' skills further eroded during their period of incarceration which affect their chances to get jobs.<sup>247</sup> Moreover, Ex-offenders may show such criminal attitude and behavior which further restrict their prospects of employment. For instance, those who are unwilling to mend their criminal behavior are unlikely to spend a conventional lifestyle and to adopt legitimate employment. Similarly, ex-offenders who believe that legal system is unfair to them they may continue criminal behavior after release and hold a stable job.

Substance Abuse Prevention and Treatment Block Grant Technical Assistance program has published a Treatment Improvement Protocol (TIP)<sup>248</sup> which enlisted

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<sup>246</sup> James S. Vacca, "Educated Prisoners are less likely to Return to Prison", *Journal of Correctional Education* Vol 55 (2004),p 297-305

<sup>247</sup> Mark T. Berr & Beth M. Huebner, " Re-entry and the Ties that Bind: An examination of Social Ties, Employment and Recidivism," *Justice Quarterly* volume 28 (2011), p.382- 388

certain characteristic of ex-offenders that substantially decrease their opportunity to get job these include:

(i) **Ex-Offender Sense Of Failure And Hopelessness**

Ex-offenders have fear of failure since they might have failed in school or in their personal relations or in their professional achievement. Therefore they developed a sense that whatever they will do, they will not succeed to change their life consequently they prefer to remain in their criminal world and resist to change their criminal behavior. Such type of ex-offenders even if they are allowed by society to reintegrate and offer them jobs, they still will not be able to get employment due to their personal characteristic.

(ii) **Offenders Often Feel Alienated From The Mainstream Institution**

Offenders experience with the court, lawyer or at school or health facility center might be depressing. Generally, it is observed that institutions which deal with service facilities do not treat visitors with attention. But for rest of people this is normal behavior of such institutions and organizations, however, ex-offenders perceive such behavior as disrespect and considers that they are receiving such behavior due to their criminal record.

(iii) **Personal Conditions**

Mental and health related problems and disabilities <sup>249</sup> such as depression, anxiety, low self-esteem, low motivation<sup>250</sup> and behavioral problem such as

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<sup>248</sup> Center for Substance Abuse Treatment. Integrating Substance Abuse Treatment and Vocational Services. Treatment Improvement Protocol (TIP) Series, No. 38. HHS Publication No. (SMA) 12-4216. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2000.

<sup>249</sup> Graffam, Joseph, Shinkfield, Alison, Lavelle, Barbara and McPherson, Wenda, How to "make it work": creating a future for bailees and ex-offenders : a preliminary report on interviews conducted with key stakeholders Deakin University, Melbourne, 2002 available at <http://dro.deakin.edu.au/view/DU:30010134> last visited on 12-12-2019

<sup>250</sup> Jacqueline B Helfgott, Elain Gunnison, " The influence of social Distance on Community Correction Officer Perception of offender Reentry Needs", *Federal Probation Journal* Vol 72: No.1 available at [https://www.uscourts.gov/sites/default/files/72\\_1\\_1\\_0.pdf](https://www.uscourts.gov/sites/default/files/72_1_1_0.pdf) last visited on 13-06-2016

anger management and lack of basic skills of work are considered as major obstacles for jobs of ex-offenders.

(iv) **Limited Financial Conditions Of Ex-Offenders**

Ex-offenders limited finances have direct impact on their capability to obtain and maintain employment. They got meager amount at time of their release from prison or their earning from industrial participation. Hence ex-offenders find it difficult to make arrangement for their housing and to maintain family expense and to get medical treatment. Ex-offenders find it difficult to get proper cloths and meet expense of interviews in such situations.<sup>251</sup>

(v) **Lack Of Family Support**

Family support, another social factor which is important for re-integration of ex-offender in the society. There are evidences that ex-offender with greater family support perform better in terms of obtaining employment and having stable tenure of it as compared to those with less support.<sup>252</sup>

(vi) **Lack Of Healthy Accommodation Conditions**

Accommodation is a critical factor that may affect successful transition into community and has direct influence on employment. Accommodation crises landed ex-offenders in cheap accommodation in slump areas which are considered as breeding feed for substance abuse. It is limiting social

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<sup>251</sup> Maria Berghuis, “ Reentry programs for Adult Male Offender Recidivism and Reintegration: A system Review and Meta-Analysis”, *International Journal of Offender Therapy and Comparative Criminology* Volume 62: issue (2018), page 4657

<sup>252</sup> Mark T. Berg and Beth M. Huebner, “Reentry and the ties that bind: An examination of social Ties, employment and recidivism” *Quarterly Justice* Vol 28: issue No2 (2011), p 388.

networking of ex-offenders to other individuals with similar background which impact on their chances to get job.<sup>253</sup>

(vii) **Employment Experiences**

Employers can only afford to employ ex-offender if he has employment experience since his major concern is productivity ratio of any individual. Ex-offenders if they lack employment experience they are not preferred to be employed and this is one of the strong ground available to employers to refuse jobs to ex-offenders.

The study contends that prisoners, in Pakistan earn work skills and there are some NGOs which have established workshops and are parting vocational trainings to prisoners, as a step forward for rehabilitation of prisoners. But, then whether these trainings match skills required by employers. Furthermore, the jails in Pakistan are overcrowded therefore prisoners were engaged in unskilled works like cooking, cleaning and stone breaking. Therefore they are deprived from getting skillful education which is reproductive for them and they could become indispensable assets for the employer. An employer can compromise on their status of ex-offenders but that is only possible when ex-offenders have skills compatible to the market demand.<sup>254</sup>

**(B) Employers' Biases**

Former Justice Thurgood Marshall wrote in 1974 that

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<sup>253</sup> Ashley Renae Williams-Queen, "Life Challenges Among Ex-offenders: A needs Assessment" A Project Presented to the Faculty of California State University, San Bernardino for degree of Master of Social Work, June 2014 page 19 available at <https://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1037&context=etd> last visited on 12-12-2019

<sup>254</sup> The research writer is working as Additional District and Sessions Judge Islamabad and the observation given is from personal experience of jail inspection conducted on 16-09-2016

*“When the prison gates slam behind an inmate, he does no lose his human quality, his yearning for self-respect does not end; nor is his quest for self-realization conclude, if anything the needs for identity and self-respect are more compelling in the dehumanizing prison environment”<sup>255</sup>*

These comments of Justice Thurgood Marshall can very well define ex-offenders as a “class”. Ex-offenders are deprived of many basic rights which are available to rest human beings in order to survive in this world and one of such right is to earn livelihood. The recent study explores that mostly jobs offered in the market are tagged with the slogan that ex-offenders are not encouraged to apply, while some even place more restriction over entry of a person if he remained in prison over a petty offence. The job seeker stands in same category whether they are offenders of heinous or petty offence. The society views them with the same spectacles that they are violators of law. This preset mindset of the society aggravated when employers also adopt it and place restriction on the entry of the offenders in their workplace. Employers usually place a general restriction on ex-offenders without realizing the relevancy of the offence with the job and differentiating between offender involved in petty and heinous offences. The bar is same for all offenders since they are considered as criminal mind persons capable to take the law in their hand and thus there is a threat which prevails among employers, therefore, ex-offenders are considered a risk at the workplace. This attitude of employers is a barrier which is difficult to be managed or minimized by general anti discriminatory laws.

One may argue that employers have a right to ensure safety at workplace, but the recent study contends that they must differential among offenders who are real

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<sup>255</sup> Procunier Vs Martinez 416U.S 396,428(1974)

threat and the one who could be beneficial for their progress and prosperity. There are factors such as mental illness or surrounding circumstances which play vital role for entry of any individual in the world of crime i.e. person suffering from anxiety or depression or a person suffered violence at home since his childhood or sense of revenge from society for his deprivation etc. Hence changing the preoccupied presumptions about ex-offenders as untrustworthy or violent persons at workplace can be helpful for reintegration of ex-offenders in the society.

The foreign jurisdictions had drawn a line between the rights of employers and employees. In America, employer has to establish substantial relationship between previous conviction and post advertised to deny job to ex-offenders. This principle was duly protected through legislation and it was enforced through the courts of law. Contrary to that the Constitution of Pakistan provides conclusive grounds for discrimination in service. Therefore no new ground for discrimination can be added unless the constitution is amended, hence, in the absence of such legislation, it is not possible to extend protection of law to ex –offenders against discrimination on the basis of criminal record. Consequently, ex-offenders have to enforce their rights through constitutional courts in writ jurisdiction and the recent case in this regard is case of Muhammad Ammir, A well renowned Pakistani cricketer who was prisoned in U.K after his conviction by ICC for bawling no ball at preset times at a match played at Lord's in August 2010 similarly other Pakistani cricketers Salman Butt and Mohammad Asif were also sentenced for spot-fixing. However, he was subsequently allowed to play cricket by International Cricket Council (ICC). However, a writ petition was filed at Lahore High Court Lahore against inclusion of cricketer Aamir in the national team

which was dismissed by the High court while allowing him to play in Pakistani team.<sup>256</sup>

But, this is one of the cases where the individuals like the cricketer, who succeed to defend his rights in the court of law but such an expensive litigation to engage a counsel for writ jurisdiction of a High Court is not affordable by every ex-offender.

### **(C) Legislative Restrictions**

A third barrier is enactment of such laws which ban entry of ex-offenders in various employments. Some of these restrictions are reasonable owing to the nature of job and relevancy of crime with the position. However, generalized application of such statutes on all ex-offenders may likely to create chaos in society. Such statutes lead to formulation of a particular class of applicants with criminal record who were discriminated for employment as compare to other applicants without criminal record.

## **5.6 JOBS' CHARACTERIZATION**

### **(A) Jobs Which Do Not Require Criminal Record Check**

Ex-offenders can get jobs in such organizations which do not carry back ground check of individuals and are less concerned with the previous history of applicants as for instance organizations and companies carrying business of construction, or run real estate business. This can be observed in practices of many foreign companies as for instance according to websites of Applebee's, Denny's, Jack in the Box, Dunkin Donuts, Jimmy John's Sandwiches, Subway and Luby's Cafeteria's all hire felons,<sup>257</sup> Similarly companies in the telemarketing industry are often willing to hire individuals with a felony conviction. Blue chip companies such as AT&T, Dell, Fed Ex, Kraft, Sprint,

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<sup>256</sup> Malik Asad, "Petition calls for lifetime ban on Butt, Asif and Aamir" Daily Dawn, December 10, 2015

<sup>257</sup> Clayton Browne, "Jobs That Are Hiring Felons" August 22, 2017 available at <https://work.chron.com/jobs-hiring-felons-24698.htm> last accessed on 15-01-2020

Verizon, United Airlines and Greyhound all have major call center and telemarketing operations and are known to hire felons.<sup>258</sup>

Ex-offenders can also get jobs in manufacturing industry and agriculture sectors, since no such survey is carried out by such sectors for hiring individuals with clear record. It was never observed in job postings of these sectors any conditions which discourage the ex-offenders not to apply in such sectors.

## **(B) Jobs Require Criminal Record Check**

There are some jobs which place a clear ban on employment of ex-offenders among them these are the followings:

### **Government Jobs.**

The government carry background check of fresh appointee in all Federal Government Ministry/ Division/ Department including Federal Public Commission by making reference for security clearance of fresh employees to the following agencies:- “(a) Intelligence Bureau, Government of Pakistan. (b) District Police. (c) Special Branch of Provincial Police”<sup>259</sup>. Any negative report regarding applicant’s character is considered adverse to his appointment.

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<sup>258</sup> Ibid

<sup>259</sup> Cabinet Division letter No. 12(3)/76-MW(S), dated 31-5-1977 provide for Verification of Antecedents on First Appointment “Revised procedure for vetting of government employees. - In supersession of all previous instructions on the subject, it has now been decided, in consultation with the Intelligence Bureau, to introduce a simplified and less time-consuming procedure for the verification of antecedents of employees at the time of their first appointment in government service. 2. According to the revised procedure, all Federal Government Ministries/Divisions/ Departments, including Federal Public Service Commission, will make simultaneous references for security clearance of fresh employees to the following agencies:- (a) Intelligence Bureau, Government of Pakistan. (b) District Police. (c) Special Branch of Provincial Police concerned. 3. The Intelligence Bureau has undertaken to give a political record check of the candidates direct to the departments concerned within a maximum period of one month. In case a report from the Intelligence Bureau is not received within one month, the department concerned will allow the selected candidates to join

## **Law Enforcement Agencies**

It is clearly mentioned in job applications forms of law enforcement agencies a question related to previous conviction and the agencies then carry background check to verify such information from different sources.<sup>260</sup> This type of jobs are never preferred to be offered to such individuals since for enforcement of law, the state gives them an authority, therefore once an individual who passed through the system of criminal justice as an offender, may find it difficult to be part of it now as an enforcer. Secondly there is apprehension of misuse of power by ex-offender to avenge any of his misfortunes during his interaction with criminal justice system. Thirdly, there is no such mechanism in law enforcement agencies through which it can be checked out that ex-offenders after release from jail have any contact with world of crime. And lastly the society cannot expect to carry out functions of law enforcement by individual who remained offender of law and served a part of his life in jail.

## **Financial Institutions**

These institutions since deal with monetary matters, therefore for them the interpersonal skill of any individual is foremost important. They cannot afford to take risk to hire any individual who was convicted on embezzlement.<sup>261</sup> State Bank of Pakistan Services Corporation Ordinance, 2001 has clearly envisaged this restriction in its section 10 to "restrict employment of any person convicted on tax evasion under any

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their posts on production of character certificates from two government officers not below • Grade-17. It will, however, be understood that the appointees will remain on probation for a period of six months or till the receipt of their vetting report. During the probationary period, the new appointees will not be entrusted with sensitive duties/assignments. 4. The District Police and the Special Branch concerned will be required to give clearance in respect of the character and antecedents of fresh/entrants in government service within a maximum period of two months. These agencies will return the verification rolls, after conducting local enquiries, direct to the department concerned and not through the Intelligence Bureau except in cases where the conduct of the candidate has come to adverse notice and this aspect is considered relevant to his appointment in government service."

<sup>260</sup> Cabinet Division letter No. 12(3)/76-MW(S), dated 31-5-1977 foot note 216.

<sup>261</sup> Regulation 9(12)(iii) of The State Bank of Pakistan staff Regulations(2001)

law or convicted or proceedings pending against him under Section 412 of Companies ordinance, 1984 or convicted of offence of moral turpitude.”<sup>262</sup>

## **Legislative Bodies**

The Constitution of Pakistan has provided that any person is disqualified to be elected as member of legislative assembly if he is convicted by court of law of any offence of moral turpitude and sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release.<sup>263</sup> Similar provision is available for member of provincial legislative bodies.

## **Occupational Licenses**

Pakistan has created regulatory bodies to grant occupational license to any person. The delegation of authority to such bodies was made through formulation of statutes. There are some occupations which place restriction on ex-offenders’ eligibility to hold a license, such as Pakistan Legal Practitioners and Bar Council Act of 1973. This Act disqualifies a person to be a member of Pakistan Bar Council if he is previously convicted of moral turpitude.<sup>264</sup> Thus ex-offenders find it very difficult to get a license and carry on their profession and occupation on their own.

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<sup>262</sup> “Section 10 Disqualification’s of the Managing director: - No person shall be appointed or hold office of Managing Director:-----(a)-----

(d) who has been convicted of tax evasion under any law , or has been convicted or proceedings are pending against him under section 412 of the Companies Ordinance, 1984(XLVII of 1984) or section 83 of the Banking Companies Ordinance, 1962(LVII of 1962), or has been convicted by a court of law for an offence involving moral turpitude;”

<sup>263</sup> Article 63(h) of the Constitution of Islamic Republic of Pakistan, 1973.

<sup>264</sup> Section 11 which deals with the disqualification to be a member of Pakistan bar council under The Legal and Practitioners and Bar Councils Act, No xxxv of 1973

## 5.7 PHILOSOPHIES OF RESTRICTION ON JOBS OF EX-OFFENDERS

Offenders had committed different offences which range from minor to heinous offences and therefore they have to serve different terms of imprisonment. Consequently treating them alike for the purpose of placing same level of sanctions on them is unjustified.

Restriction on ex-offenders was justified by its proponents that it is the consequences of conduct of offenders. They violated the social contract and rejected rule of law of society. Therefore they do not deserve to claim any right which emerges out from those social contracts.<sup>265</sup>

Locke wrote, “if a man ‘disclaim the lawful government of the country he was born in, he must also quit the right that belonged to him by the laws of it.’”<sup>266</sup>

But, this view is legally unjustifiable, since an offender has paid penalty for breach of this social contract by spending term of his imprisonment in jail. There he surrendered all his rights in the form of freedom of movement, freedom of enjoyment of life, right of education of his choice, right to job, during his period of incarceration. Therefore, once the contract was repudiated by the offender, this does not mean that he lost his right to enter into new social contract once he comes out of his imprisonment. There is no concept of continuing punishment or penalty in the eyes of law, since the moment responsibility is fixed upon a person for his offence and he received punishment for that wrongful act, he paid back his debt. Hence once the sentence is

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<sup>265</sup> Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of Law* (Massachusetts: Harvard University Press Cambridge, 1962), p 10-

<sup>266</sup> John Locke, *second treatise of civil Government* (Jonathan Bennett,2017), page 39

completed and penalty is paid the act and its consequences were become past and closed transaction in the eyes of law. Otherwise continuing punishment is violation of very basic concept that a person is punished twice for the same offence as one punishment is inflicted through legal process and other through social process where the society restricted his right to many amenities and opportunities which are essential for his life and violated the ex-offenders right to be treated equally and with dignity.

Hoskins while repelling the arguments of proponent for restriction on ex-offenders wrote,

*“Thus violation of some particular law, by itself, appears insufficient to render one no longer a party to contract.”*<sup>267</sup>

Now coming to the situation of habitual offenders, the study argues the conduct of ex-offenders itself demonstrate that they had committed contempt of terms of social contract and thus rejected the rule of law, therefore, by their conduct they have given up their right to enjoy various benefits which are available due to obedience of rule of law. But to address this argument it is suffice to say that for every crime committed, ex-offenders have held accountable by sentencing to jail and therefore they repeatedly surrendered their rights for terms of their incarceration, it never happened that for every repeated offence their punishment is adjusted for the previous one served by the offenders for the earlier offence.

The criminal administration of Justice in Pakistan had prescribed severe punishment to the repeater of offence, hence the punishment become tougher if the offender repeats an offence. Therefore, for the repetition of offence, the offender paid more debt to the society and held more accountable as his term of incarceration is more

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<sup>267</sup> Zachary Hoskins, “Ex-offenders Restriction”, *Journal of applied Philosophy* Vol 31: issue No1, (2014), p 36

than the individual who committed the offence for the first time. Hence, habitual character of the offender cannot be justified for banning of rights which conferred upon him by rule of law. Even, otherwise by repeating an offence an offender has not demonstrated that he will never abide by the law permanently and he will never respect the law. Consequently, there is no justification to extend restriction on ex-offenders beyond their terms of punishment. Therefore the defender of the theory of forfeiture of rights pose with the challenge that how long the forfeiture of the rights of offenders will be lasted.

The proponents of theory of correlative of rights and duties argued that there is a relation between rights and duties. A person who infringes his constitutional duties is not entitled for the enforcement of his legal rights. They quote Salmond in this regard<sup>268</sup>:

*"The question has been debated whether rights and duties are necessarily correlative".*

According to this view, "there can be no right without a corresponding duty, or duty without a corresponding right, any more than there can be a husband without a wife or a father without a child. For, on this view, every duty must be a duty towards some person or persons; in whom therefore, a correlative right is vested."<sup>269</sup>

They have also taken inference from Article 29 of the Universal Declaration of Human Rights<sup>270</sup> which provides that "everyone has duties to the community in which alone free and full development of his personality is possible. Under Clause (2)

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<sup>268</sup> Salmond on Jurisprudence. Twelfth Edition, observes at page 220

<sup>269</sup> Ibid Salmond page 221

<sup>270</sup> Article 29 of the Universal Declaration of Human Rights adopted by the General Assembly on 19th December, 1948

"everyone shall be subject only to such limitations as are determined by law solely for the purposes of securing due recognition and respect of the rights and freedoms as of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Hence they state that a person who does not have respect to the requirements of morality, public order and the general welfare in a democratic society ought not to be entitled to enforce his rights. But, to address this argument, it is suffice to say that snatching the right to work of ex-offenders on this ground that they have violated their duties to society is misconceived as the society has already punished them for their violation. Therefore, this principle of correlativity of rights with duties does not provide sound basis to place ban on job on ex-offenders.

The consequentialists argue that restriction on ex-offender is valuable instrument of bringing about some social benefits end i.e. risk reduction. They contended that it is permissible to ban jobs on ex-offenders as it would reduce the risk of threat to colleagues, partners and others. This rational is based on the idea of incapacitation as it put restrictions on ex-offenders in such situation where they may likely act harmful to others. There is no reasonable logic behind the arguments of consequentialists since offenders are required to be treated according to what they have done and not according to what they may likely to do in future.

It is further argued that factor of risk is eminent in case of offenders having psychological disorder of committing offence out of pleasure and hence allowing such persons to enter the society may cause risk of danger. To address this argument it is suffice to say that without treatment of such offenders the reprobative purpose of

punishment is not fulfilled and consequently it repels the argument of disallowing reentry of such offenders in society.

Incapacitation theory view restriction as part of punishment to incapacitate offenders from committing further offence. But this theory has been criticized as it is in contravention to the concept of individuals as “autonomous moral agents”. Opponents of incapacitation contends that ex-offenders should be treated according to what they have actually done and not as what they might have to do (or are believed likely to do). R. A. Duff puts it this way:

*“Respect for another as an autonomous agent does not preclude the attempt to persuade her to behave as we think she should behave. Nor does it preclude preventing her, if necessary by force, from carrying through a crime on which she has already embarked. But it does preclude an attempt to incapacitate her from future wrongdoing. Apart from the fact that incapacitation will also typically incapacitate the person from quite legitimate activities, it deprives her of the ability to determine her own conduct in the light of her own grasp of reasons for action — an ability that is crucial to autonomous agency”*<sup>271</sup>

Duff arguments that incapacitating offender is inconsistent to treat them with respect because it deprives them to determine their conduct according to their reasoning. Likewise, incapacitating ex-offenders is also unacceptable. Ban on jobs of ex-offenders is amounting to incapacitate them to exercise their choice.

The study therefore explains that a state while enacting upon any statute which has bearing on employment of ex-offenders, need to consider the severity of crime committed

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<sup>271</sup> R. A Duff, "In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara" Melbourne", *University Law Review* Vol 24: issue 2 (2000), P 411

by ex-offenders. There are offenders who are habitual. While others might have committed crimes under uncontrolled circumstances without any criminal intent. Hence, it is unjustified to place all offenders in one category and treat them alike. This could lead to drastic effects on employability of non-habitual offenders.

Further the proponent of incapacitation has not pointed out how long these restrictions are applicable or be imposed. It is unjustified to impose restriction on ex-offenders without specifying time limit for it. Particularly, when offenders were under same set of restrictions during their incarceration period. This notion of restriction on ex-offenders is also against punishment policy of society to ensure reasonableness of punishment.

Still some proponents of these incapacitation theory contended that, these restrictions are beneficial as some offenders still pose threat to the society even after completion of their punishment. It is suffice to say that in such case, the society instead to shut the door of entry on the offenders, it should laid down some policies which can cater for such threats, as for instance the child molester should be denied job in children school.

Further predicting danger of reoffending is illogical as not every offender poses threat to the society. Even otherwise, it is not justifiable to throw net of restrictions widely on offenders. These restrictions may save society from habitual offenders, but on the same hand it also deprive non habitual offenders to reintegrate into society. Therefore, it is essential to evaluate that whether the advantage to place restriction on ex-offenders can override the injustice done to non-dangerous offenders. It is observed that with the passage of time, offenders' tendency to commit crime diminishes.

Consequently, there is a need that these policies relating to restriction on ex-offenders should be tailored narrowly to avoid over inclusiveness.

## **5.8 CONCLUSION**

The study in this chapter indicates that provisions of Constitution which provide right to equality and prohibits discrimination in service are rigid as they cannot be applied on all other possible grounds for discrimination. Therefore protection provided under these provisions is only limited to proscribe grounds mentioned in those articles. The study further bifurcate jobs on the basis of their need for criminal record check and suggests that ex-offenders can be employed in jobs which have no nexus with personality trait of a person. The study has also encompasses different views of jurists about restriction on employment of ex-offenders.

## **CHAPTER 06**

### **REHABILITATION AND FUTURE JOB PROSPECT OF EX-OFFENDERS IN PAKISTAN**

#### **6.1 INTRODUCTION**

This chapter carries a study that how criminal justice system has made shift from policy “tough on crime” to policy of rehabilitation keeping in view stringent outcomes of laws and practices based earlier policy. The international law instruments have also acknowledge the importance of rehabilitation of offenders and consider it the main purpose of criminal justice system. These instruments also emphasis on provision of education and work skills in jails as measures of rehabilitation to make offenders commensurate with requirement of workplace. The study has highlighted that Pakistan has also introduced rehabilitation measure in jail in compliance to international obligations. However, jail population is overcrowded in Pakistan therefore these rehabilitation measures do not have positive outcome on the offenders, therefore the study indicate that there is a need that Pakistan should shift to correction measures like probation and parole since Pakistan has already enacted The Probation of Offenders Ordinance, 1960, Prisoners Probational Release Act, 1926, and Rules 1927 which can enable Pakistan to lessen the crowd of jail and make it a place of rehabilitation. Further release of offenders from jail and allow them opportunity to rehabilitate outside the prison have positive impact on their personal and professional life. These offenders get chance to enjoy their family life and an opportunity to work which build their confidence to enter work place. However, inspite of these benefits which can be drawn from these statutes the study shows that these laws are not implemented by courts in letter and spirit due to which the effectiveness of these laws is diminished. The study

also highlights that these statutes need to be revisited to include community service in its purview. It also highlights that parole and probation facilities are extended only to offenders of petty nature offences, which is contrary to international standards which demand rehabilitation of all offenders irrespective of what type of offence they have committed.

## **6.2 INTERNATIONAL PERSPECTIVE**

Sentencing system and imprisonment have series of goals such as deterrence, incapacitation, punishment, and rehabilitation. In recent years, the sentencing policy was enacted for enhancing the deterrence effect of the criminal justice system under the slogan of “tough on crime”. To create deterrence such policies were designed which could impose substantial term of imprisonment for the felony. It is not yet settled that enhanced sanctions or higher possibility of being apprehended provide any additional benefits for deterrence.

Laws which place restriction on employment of ex-offenders offer general deterrence to society where people get afraid not to commit crime and get punished in order to save themselves from condemnation of society which does not allow their social reintegration. The legislative restriction made ex-offenders entry in society difficult by imposing ban on their employment, hiring, licensing and housing etcetera. However, in spite of deterrence created by these laws, the society did not get fruitful result. Ex-offenders after facing ban on their social reintegration and difficultly to maintain their source of subsistence started to commit offences again which lead to increase in chances of recidivism in society

Many countries keeping in view the outcome of such stringent laws banning employment of ex-offenders made a shift from policy tough on crime to rehabilitation policy. The aim of this policy of rehabilitation is to furnish such facilities to the offenders within the jail which can bring positive impact on their personalities and skills which commensurate with the requirement of work outside prisons. Keeping in view the shift of policy from deterrence to rehabilitation many NGO's and government sponsored programs were started in jail.<sup>272</sup> Further it provides support to offenders to abstain from crime and successfully reenter into community. These initiatives are helpful to inculcate positive attitude in prisoners, particularly who landed in world of crime as they could not get enough resources to learn their livelihood.

International human rights instruments<sup>273</sup> as well as the United Nation's standards and norms in crime prevention and criminal justice explicitly recognized importance of rehabilitation of offenders and stressed to include rehabilitation in fundamental objectives of criminal justice systems for the purpose of successful social reintegration of offenders in society. It also signifies importance of interventions to support social reintegration of offenders for prevention of recidivism.

The International Instruments acknowledge the importance of rehabilitation of offenders as follows:

The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)<sup>274</sup> the most crucial international standards which describe good principles and practices in treatment of prisoners and prison management. It stressed

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<sup>272</sup> Cullen F.T, Gendreau P, "Assessing correctional rehabilitation: policy, practice and prospect." *Policies processes and decision of the Criminal Justice System*, (2000) p 109-175

<sup>273</sup> More specifically, the International Covenant on Civil and Political Rights (General Assembly resolution

2200 A (XXI), annex) states that "the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation" (art. 10, para. 3).

<sup>274</sup> United Nations Standard Minimum Rules For the Treatment of Prisoners (Nelson Mandela Rules) General Assembly resolution 70/175, annex, adopted on 17 December 2015.

upon provision of meaningful rehabilitation programs in prisons for achieving the eventual purposes of a sentence of imprisonment, namely to reduce recidivism and to improve public safety. The Nelson Mandela Rules also highlighted that the importance of education, vocational training, work, treatment and other forms of assistance set in accordance with the individual treatment needs of each offender by prison administrations and other competent authorities which would assist ex-offenders to reintegrate into society<sup>275</sup> For reference the relevant provision of Nelson Mandela Rules<sup>276</sup> is reproduced hereunder:

“Rule 4

1. The purposes of a sentence of imprisonment or similar measures deprivative of a person’s liberty are primarily to protect society against crime and to reduce recidivism. Those purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life.”

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) stressed upon that women offenders do not pose a risk to society. Further, imprisonment may render their social reintegration more difficult. Likewise, the Bangkok Rules stress upon “prison authorities to have liaison with probation and/or social welfare services, local community groups and NGOs, to design and implement comprehensive pre- and post-

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<sup>275</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (General Assembly resolution 70/175, annex), preliminary observation 1 and rule 4.

<sup>276</sup> ibid

release reintegration programs that take into account the gender-specific needs of women prisoners”.<sup>277</sup>

Convention on the Rights of the Child requires the states parties to ensure that “the arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time” and that any response to a child in conflict with the law should take into account the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.

According to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), “the objective of the training and treatment offered to children deprived of their liberty should be to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society”. While for non-institutional treatment it emphasized that efforts should be made “to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process”.<sup>278</sup>

The emphasis on “law-abiding behavior” and “socially constructive roles” as aim of treatment indicates that prevention of recidivism is main purpose of criminal justice interventions. The Guidelines for “the Prevention of Crime” recognizes wide range of approaches are required for prevention of crime which includes measures to “prevent recidivism by assisting in the social reintegration of offenders and other

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<sup>277</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (General Assembly resolution 65/229), thirteenth preambular paragraph and annex, rule 46

<sup>278</sup> Convention on the Rights of the Child (United Nations, Treaty Series, vol. 1577, No. 27531) (art. 37,

para. (b), and art. 40, para. 1); and United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (General Assembly resolution 40/33, annex) rules 24.1 and 26.1.

preventive mechanisms (reintegration programmes)”. The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) denote to the significance of measures for the socialization and integration of all children and young persons.<sup>279</sup>

The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) require from member states to establish non-custodial measures in order to have other options to imprisonment. It emphasized that punishment through imprisonment be reduced and criminal justices policies to be rationalized and human rights are provided to prisoners, further it is required that social justice and the rehabilitation of the offenders be given due consideration. The Tokyo Rules also encourage efforts to raise awareness among the general public to develop constructive attitudes towards the value of non-custodial measures, as well as of the importance of the social reintegration of offenders. It also call for public participation in the application of alternatives measures instead of imprisonment and to consider it as “an opportunity for members of the community to contribute to the protection of their society”<sup>280</sup>

Social reintegration leads to positive result when particularly all those factors which led the offenders to commit crimes are dealt and their physical and social requirements are fulfilled both during incarceration and after released.<sup>281</sup>

For this purpose international standards specify that imprisonment should not be limited to the deprivation of liberty. Rather, it should have opportunities for prisoners

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<sup>279</sup> Guidelines for the Prevention of Crime (Economic and Social Council resolution 2002/13, annex) para. 6 (d); and United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) (General Assembly resolution 45/112, annex), para. 10.

<sup>280</sup> United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (General Assembly resolution 45/110, annex), rules 1.5, 17.2, 18.3 and 18.4.

<sup>281</sup> Jeremy Travis, Amy. L. Solomon and Michelle Waul, “From Prison to Home: The Dimensions and Consequences of Prisoner Reentry,” Washington, D.C., Urban Institute, Justice Policy Center, 2001. available at [http://research.urban.org/UploadedPDF/from\\_prison\\_to\\_home.pdf](http://research.urban.org/UploadedPDF/from_prison_to_home.pdf) last accessed on 12-12-2019

to acquire education and learn skills which would support them to successfully reintegrate after release. The aim behind it to avoid recidivism. Rehabilitation programmes in prisons are considered as best method to protect society from future crime and to reduce recidivism. It is essential that prisoners to be prepared for their release and successfully reintegrate into society through prison-based programmes and post-release support. The Global Programmes suggest various constructive activities to be initiated in prisons that include education, vocational training and work programmes. UNODC's new manual "The Roadmap for the Development of Prison-based Rehabilitation Programmes" has provided reasons for investment in education, training and work programmes in prison.<sup>282</sup>

UNDO had carried out extensive study wherein US confirmed an explicit relationship between the provision of educational programmes and vocational training in prisons and reduction of recidivism and increase in prospective of getting employment by ex-offenders. It is found that Prisoners who had taken correctional educational

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<sup>282</sup> The manual enlisted main lists four main causes for prison systems to invest in education, training and work programmes for prisoners:

- First, giving prisoners opportunities to learn new skills and to build work experience will help them to stay away from crime when they leave prison, thus contributing to public safety;
- Second, the provision of constructive activities in prisons assists in rendering life in prison more similar to life outside - referred as the principle of "normalization", which is important to facilitate a prisoners' social reintegration into the community upon release;
- Third, education, vocational training and work programmes in prisons support order, safety and security in prison facilities, as prisoners involved in constructive activities are less likely to engage in disruptive behavior; and
- Lastly, remuneration schemes related to work programmes enable prisoners to support themselves and their families, while equally producing revenues for prison administrations to maintain such programmes and to support the improvement of prison conditions.

programmes had 43 per cent lower odds of returning to prison than those who did not; their chances to get employment after release was 13 per cent higher; and they were 28 per cent more likely to be employed after release from prison than those who did not receive such training.<sup>283</sup>

The recent study explores that in Pakistan there are many workshops setup in jails in order to provide male prison inmates technical skills and females' opportunity to learn sewing and beautician work. These types of skills are useful for them to earn their livelihood bread and butter, if they failed to get any job in any public or private sectors.<sup>284</sup> However, this situation get worst when educated prisoners are not allowed to enter into employment on the basis of their education due to implementation of policy of deterrence. Therefore there is a need that policy of deterrence to be revisited sine it has adverse effect on the purpose of rehabilitation policy.

### **6.3 PAKISTAN'S CORRECTION MEASURES FOR REHABILITATION OF OFFENDERS**

Pakistan's prisons are heavily overcrowded having old and dilapidated facilities, often dating from the 19th century<sup>285</sup> . According to the Federal Ombudsman, as of November, 2019 "the total nationwide prison population stood at 77,275 in 114 prisons across the country. The capacity of these prisons is 57,742, putting the occupancy rate at 130 percent over capacity."<sup>286</sup> The prison system in Pakistan is below the international standard. The jail environment usually has poor conditions of hygiene,

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<sup>283</sup> UNODC, "The Doha declaration promoting a culture of lawfulness" available at <https://www.unodc.org/dohadeclaration/en/news/2017/12/roadmap-to-a-new-chance-un-releases-new-guidance-for-prison-based-rehabilitation.html> last access on 13-12-2019

<sup>284</sup> These observation were gather during jail inspection conducted by the writer as additional district and sessions Judge, Islamabad.

<sup>285</sup> M. M Khan, "The Prison System in Pakistan", *Pakistan Journal of Criminology*. Volume 2: issue no 3),(2010) P 35-50

<sup>286</sup> Federal Ombudsman report referred in Country Reports on Human Rights Practices for 2019 United States Department of State, Bureau of Democracy, Human Rights and Labor

inadequate food and medical care, unsanitary conditions, violent behavior of prison staff towards prisoners<sup>287</sup>. The incarceration of offenders in such like conditions does not have positive impact over their personalities. The studies suggest that a person who entered a prison on minor offence, when he released from prison he turned up to be hardened criminal. Therefore, poor environment of prisons minimizes the chances of rehabilitation of prisoners.<sup>288</sup> Therefore the probation is an alternative mechanism of rehabilitation to keep offenders in the community. Probation system is beneficial as it aims to prevent offenders from becoming hardened criminals<sup>289</sup>. It also assist the offenders to become beneficial and productive members of society.<sup>290</sup> Thus, the probation system is a correctional mechanism<sup>291</sup> which not just tries to rehabilitate offenders but assist them to re-integrate back into society.<sup>292</sup> United Nations Institute for Crime Prevention has also recognized the aim of probation system that is to promote rehabilitation and reintegration of offenders into the community to make them conformist with the community settings.<sup>293</sup> Rehabilitation is the only way of punishment which obligates the state to look for the offender's family needs as it provides opportunity to offenders to work for their family's welfare and save them from

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<sup>287</sup> D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press,2001), p346.

<sup>288</sup> Dr. Basharat Hussain, “The History and Development of Probation Service in Pakistan and in Khyber Pakhtunkhwa”, *Pakistan Journal of Criminology* Vol 5: issue 2,(2013), p36.

<sup>289</sup> R Martinson and J.Wilks, “Save Parole Supervision”, *Federal Probation Journal* Volume 41: issue 3(1977),P 10-13

<sup>290</sup> P. McAnany, D Thomson and D .Fogel, *Probation and justice: Reconsideration of mission* ( Cambridge, MA: Oelgeschlager, Gunn, and Hain Publishers, 1984)

<sup>291</sup> S .Srivastava, “The Legal Framework of Probation in India”, *The Indian Journal of Social Work*, (1970),p. 263-269

<sup>292</sup>D. Garland, “Of Crimes and Criminals: The Development of Criminology in Britain.” In M. Maguire, R. Morgan and R. Reiner (Ed.), *the oxford handbook of criminology*, 2nd ed. Oxford: Clarendon Press (1997).

<sup>293</sup> UNAFEI Annual report for probation systems. Resource Material Series No.61,” Tokyo, Japan: (2003), p.97.

negative impact of imprisonment.<sup>294</sup> The effectiveness of probation through rehabilitation is a hundred times more effective than rehabilitation in prison.<sup>295</sup>

Pakistan correction measures for offenders consist upon imprisonment, probation and parole. Parole and probation are correction measures which are used to release first time offenders (convicted and under trial prisoners) conditionally that if they did not meet standards of releasing authority then they may be committed back to correctional institution. When the administrative agency exercise this power it is called parole and if it granted by the court it is called probation. The purpose of these legislations is to assist offenders to pursue crime free life in society. These laws were primarily promulgated for the benefit of “first time” offenders who are able to be reformed and capable of leading a useful and productive life so as to ensure that they do not turned to be hardened criminals once released from prison.

#### **6.4 PROBATION AS CORRECTION MECHANISM**

Pakistan had no legal mechanism to release offenders on probation till the promulgation of the Probation of Offenders Ordinance, 1960.<sup>296</sup> This statute provides legal procedure for release of offenders on probation.<sup>297</sup> The Probation of Offenders Ordinance 1960, provides that probation is granted by the court in way of suspension of the imposition of a sentence of imprisonment or the postponement of final judgment in a court case. The courts through probation provide an opportunity to an offender for non-serious offences to reform him/herself life and refrain to commit further offences.

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<sup>294</sup> A. M Aulakh, *Criminal justice: Crime, punishment and treatment in Pakistan* ( Lahore: Muslim Academy Urdu bazaar ,1986), p.124

<sup>295</sup> Ibid, *Criminal justice: Crime, punishment and treatment in Pakistan*, p.126

<sup>296</sup> M. H. Bhutta, “Community Based Rehabilitation of Offenders: An Overview of Probation and Parole System in Pakistan”, *Pakistan Journal of Criminology* Vol 2: issue 3, (2010),p 51-67

<sup>297</sup> Probation of Offenders Ordinance, 1960.

The Ordinance empowers the trial court while taking into consideration factors such as the age, character, health & background of the offender, and the nature & circumstances leading to the offence, discharge any offender after due admonishment, who has committed an offence punishable with imprisonment not more than two years.<sup>298</sup> However the courts sparingly exercise such powers and prefer to exercise their jurisdiction under section 5<sup>299</sup> of the Probation of Offenders Ordinance, 1960. Where the court has to provide reasons in writing that instead of sentencing the person at once, it is sending offender on probation under the supervision of a probation officer for such

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<sup>298</sup> section 4 of the Pakistan Probation of offenders Ordinance 1960:- (1) Where a court by which a person, not proved to have been previously convicted is convicted of an offence punishable with imprisonment for not more than two years is of opinion, having an regard to :- (a) The age, character, antecedents or physical or mental conditions of the offender, and (b) The nature of the offence or any extenuating circumstances attending the commission of the offence; that it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may , after recording its reason in writing, make an order discharging him after due admonition, or, if the court think fit, it may likewise make an order discharging him subject to the condition that he enters into a bond, with or without sureties, for committing no offence and being of good behavior during such period not exceeding one year from the date of order as may be specified therein. (2) Before making an order for conditional discharge, the court shall explain to the offender in ordinary language that if he commits any offence or does not remain of good behavior during the period of conditional discharge he will be liable to be sentenced for the original offence.

<sup>299</sup> (1) Where a court by which:- (a) any male person is convicted of an offence not being an offence under chapter VI or Chapter VII of the Pakistan Penal Code (Act XLV of 1860), or under section 216-A, 328, 386, 387, 388, 389, 392,393, 397, 398, 399, 8 401, 402, 455 or 458 of that code, or an offence punishable with death or transportation for life, or (b) any female person convicted of any offence other than an offence punishable with death is of opinion that, having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so , the court may, for reasons to be recorded in writing, instead of sentencing the person at once, make a probation order , that is to say an order requiring him or her to be under the supervision of a probation officer for such period not being less than one year or more than three years as may be specified in the order; Provided that the court shall not pass a probation order unless the offender enters into a bond, with or without sureties, to commit no offence and to keep the peace and be of good behavior during the period of the bond and to appear and receive sentence if called upon to do so during that period; Provided further that the court shall not pass a probation order under this section unless it is satisfied that the offender or one of his sureties, if any, has a fixed place of abode or a regular occupation within the local limits of his jurisdiction and is likely to continue in such place of abode or such occupation, during the period of the bond.

(2) While making a probation order, the court may also direct that the bond shall contain such conditions as in the opinion of the court may be necessary for securing supervision of the offender by the probation officer and also such additional conditions with respect to residence, environment, abstention from intoxicants and another 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 .

period not being less than one year or more than three years as the court deem appropriate. However, it is the duty of the court that while exercising this discretion to bound down offenders to enter into a bond, with or without sureties to keep the peace and be of good behavior during the period of the bond and to appear and receive sentence if called upon to do so during that period. The court may also impose additional condition in the bond as in the opinion of the court may be necessary for securing supervision of the offender by the probation officer and also such additional conditions with respect to residence, environment, abstention from intoxicants and another matter keeping in view 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

A Study was conducted by Javed Iqbal Khokhar, Qamar Abbas Jafri, Nadeem Abbas and Mazhar Hussain Bhutta<sup>300</sup> to explore the role of probation in criminal justice and reached on the conclusion that “the environment of jail that included quality of food, education for behavioral change, medical facilities, and violence by jail officials on inmates was not conducive for the rehabilitation of those offenders who were convicted for minor offenses and jailed for few months. Therefore, probation was found helpful for rehabilitation and reintegration of offenders into society. It is suggested that role of probation in the criminal justice system can be enhanced by granting the probation order to those offenders, who are incarcerated in prisons under trial in minor

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<sup>300</sup> Javed Iqbal Khokhar, Qamar Abbas Jafri, Nadeem Abbas, Mazhar Hussain Bhutta “Probation, Criminal Justice System And Rehabilitation Of Offenders: Case Of Punjab Province, Pakistan” Science International , 2019 available at [https://www.academia.edu/39265121/Probation\\_Criminal\\_Justice\\_System\\_and\\_Rehabilitation\\_of\\_Offenders\\_Case\\_of\\_Punjab\\_Province\\_Pakistan](https://www.academia.edu/39265121/Probation_Criminal_Justice_System_and_Rehabilitation_of_Offenders_Case_of_Punjab_Province_Pakistan) last accessed on 20-01-2020

offenses, to reduce prison overcrowding and for better rehabilitation of offenders in the community setting.”

But, practically the probation orders are not given by courts in spirit of law as the probation officer has been assigned an important role in the whole process to prepare and submit “social investigation report” (SIR) on the direction of the court. A probation officer prepares a SIR that includes information about an offender's character, background, commission and nature of offence, home surroundings and other circumstances to the court. This report helps the court to reach on conclusion that whether offender to be sent to jail or on probation. But in practice, the court in majority of the cases directly put offenders on probation without seeking a formal SIR.<sup>301</sup>

The statute does not extend Probation to all types of offences. The court while considering an offender for probation, it has to take into account his personal characteristic, the needs of the offender and the type of offence thus depriving the first time offenders in heinous crimes to benefit from probation. The law of probation in Pakistan extend the benefit of probation to offenders involved in petty offences without considering the risk factor which such offender can pose to society. It appears that the law has presumed that only offenders involve in heinous offences can cause risk to safety of society. Therefore there is a need that law should be amended and probation to be extended to offences of all types.

Different provisions are enacted in the probation law for male and female offenders. Male offenders are not eligible to probation if involved in offences punishable by death or life imprisonment or are convicted of offences of heinous nature

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<sup>301</sup> Penal Reform International report on “Probation And Parole System In Pakistan: Assessment And Recommendations For Reform” available at [https://cdn.penalreform.org/wp-content/uploads/2013/05/Probation-and-parole-system-in-Pakistan\\_English-1.pdf](https://cdn.penalreform.org/wp-content/uploads/2013/05/Probation-and-parole-system-in-Pakistan_English-1.pdf) last accessed on 12-12-2019

as described in the Pakistan Penal Code of 1860. Contrary to it, female offenders are entitled for a probation order in all offences except those punishable by the death penalty.

## **6.5 PAROLE AS CORRECTION MECHANISM**

The second correction measure adopted by Pakistan criminal justice system is parole. Parole permits qualified release of prisoners in particular cases before the completion of term of their imprisonment. The good conduct Prisoner's Probational Release Act, 1926 and Rules 1927 provides that prisoners on parole after completing a mandatory period of substantive sentence in prison, serve the last portion of their punishment in the community. When the provincial government is satisfied that a prisoner's track record or good conduct behind bars suggests that he or she would likely abstain from crime and would lead a "useful and industrious life" in the community. Then the Executive (Home Secretary) is empowered under these rules to release certain offenders on parole. The prisoners are released under "the supervision of a parole officer or a "secular institution or of a person or society professing the same religion as the prisoner".

The Parole rules provide mechanism for the employment of the parolees, under the supervision of a parole office on fixed wages with specific terms and conditions fixed with the approved employers of Reclamation and Probation (R&P) Directorates. Any person or institution can file an application to R&P Director to be a potential employer. The Directorate carries out proper scrutiny of record of employer and on the recommendations of the relevant district administration it decides that whether to select or reject him in case he does not fulfil the selection criteria. The employer need to meet standards such as: "to be resident of the same province, being of a good repute, not involved in any illegal trade/activities, being able to provide accommodation, clothes,

food and wages to the parolee". The employer need to pay monthly wages of minimum of Rs.1000 Pak Rupees to the parolees depending upon his skills. The employer has to deposit the wages in a Bank Account opened on the name of the concerned parole officer. The parolee receive the total deposit amount at the end of the total parole period. The parolee on prior approval of relevant parole officer can withdraw part of the monthly wages for his personal or family use. Prisoners can be send on parole either on their application or by their family members.

This correctional mechanism helps offenders to get job experience and skills. It has also positive effect on their psyche which helps them to overcome their fear to enter work place and interact with employers. Further employers can also be benefited through this process as they get a chance to explore capable and competent offenders who are suitable for their jobs among these parolees. Further it build the confidence of employers to hire them when such parolees show good conduct at the work place. But it is observed that the parole system has short coming which effect its efficiency to provide relief to offenders such as place of work of Parolees need to be at a distance of minimum of 45 miles away from their immediate families. They are authorized to visit their families by taking prior approval of casual leave from concerned parole officer. Casual leave is authorized to the parolee once he completed first six months of the parole period. This condition is explicitly in contradiction to right to family life of ex-offenders and frustrate the purpose of reintegrating ex-offenders in community after release from prison. The reasons given to such restriction that it is for Security and safety of the parolee and others. There is no second opinion to the security and safety of the parolee and community; however, the restriction should not be generalized rather such decision should be taken keeping in view the particular facts of each case and such

restrictions of distant working should be placed only on high risk cases in the best interest of parolees, family and community.

## **6.6 CONCLUSION**

Pakistan had adopted correction laws dated back to colonial era in order to meet the international obligation with regard to protection of right of prisoners and the rehabilitation as an alternative sentence. These laws need to be updated, since it become outdated as they are not sufficiently covering the present situation of jails in Pakistan. Further, the correctional laws do not cover the whole spectrum of rehabilitation of jail inmates, therefore, lacunas in legislations need to be filled while keeping in view the international standards and practices. These standards are effective for rehabilitation of offenders which help them to reintegrate in the society and minimize discriminatory practices adopted against them due to their criminal record. The correction systems of Pakistan is based on “good conduct” of prisoners and extend these benefits in order to ensure that they will not repeat offence and become law abiding citizens. However, there is a need to generalize applicability of these laws and include all offenders in sphere of rehabilitation since there is no international bar to restrict rehabilitation process only to offenders of petty offences. Further there is a need to include community service as part of community sentencing. At present, law is silent about any such provisions, particularly in the existing situation of Pakistan where there is no framework for formal rehabilitation of offenders outside the prison. Further there is need to take additional measures such as to encourage police stations to use caution as a mechanism to divert offender in minor cases from the formal criminal justice system. A caution is a formal warning about future conduct given by a senior police officer, usually in a police station, after a person has committed an offence and admitted guilt. It is used as an alternative to a charge and possible prosecution. Likewise the provision

of conditional discharge under section 4 of the Pakistan Probation of Offender Ordinance 1960 need to be exercised extensively by judiciary to increase release of offenders on conditional discharge.

## CHAPTER.07

### LEGAL FRAME WORKS OF OTHER COUNTRIES

#### 7.1 INTRODUCTION

Discrimination against ex-offenders in employment had come to limelight as a result of different studies conducted by various countries to find out causes of recidivism. Where the researchers had found that unemployment of ex-offenders is major cause of recidivism. The present study is focused on the measures taken by U.K, Canada, Singapore and America inside and outside of prisons to safeguard their right to work which is source of their subsistence. The rehabilitation programs of offenders were introduced inside prisons which were more focused on provision of education and work skill to enable them to meet job requirements. Further it provided opportunities to offenders to work during period of incarceration. This is a new concept where criminal justice system has robust its confidence on offenders and provided them opportunity to interact with employers. The rehabilitation programs initiated by Singapore has valued the right to family life of offenders and received positive impact of it on offenders. Similarly Canada, America, and England have legislated laws to streamline use of criminal record at the time of employment decision. These countries have enacted laws and constituted bodies to ensure save use of criminal record to protect interest of employers Vis a Vis of ex-offenders. The study in this chapter also analyzes that these measures can be used as guidelines for Pakistan to solve problem of misused of criminal record by employers.

## **7.2 LEGAL PROTECTION PROVIDED TO EX-OFFENDERS UNDER U.K LEGISLATION.**

Ex-offenders in England face almost the same apprehensions of employers about them when they were refused jobs. A survey was conducted in England and it was found that 50% of employers would not consider employees having criminal record. While 32% were concerned about ex-offenders skills and capabilities, 40% of employers worried about public image of their business and 45% were concerned that if ex-offenders employed they would be unreliable employees.<sup>302</sup>

The U.K government self-assessment of prison system found that it failed to rehabilitate and prevent chances of recidivism.<sup>303</sup> This failure has cost society to bear extra burden of £15 billion per year.<sup>304</sup> The problem added when ex-offenders who were ready to work did not get job. According to data provided by Ministry of Justice and Department of Works and Pensions 28% of ex-convicts applied for job seekers allowance in 2014.<sup>305</sup>

U.K, therefore felt a need to solve problem of employment of ex-offender and consequently the government worked at its policies inside as well as outside prisons. These policies are as follows:

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<sup>302</sup> yougov survey commissioned in 2016 by Department of Work and Pension available at [https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/42yrwvixdo/YG-Archive-160126-DWPwaves.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/42yrwvixdo/YG-Archive-160126-DWPwaves.pdf) last visited on 12-06-2019. (The Work and Pensions Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Office of the Department for Work and Pensions and its associated public bodies).

<sup>303</sup> Department of work and pensions and Ministry of Justice (SED0033)

<sup>304</sup> Q217( Sam Gylmah, Parliamentary under Secretary of State for Prison and Probation)

<sup>305</sup> Experimental Statistics from 2013 MOJ/DWP/HMRC data share: linking data on offenders with benefit. employment and income data

## 7.2.1 Prison Policies of U.K

### (1) Education and Training in Prisons

The government in order to solve the challenge of employment of ex-offenders had introduced in 2014, Transforming Rehabilitation Program (TRP), this program was designed to reform method of handling prisoners in England and Wales. The aim of this program was simple “to make progress in driving down reoffending rates.”<sup>306</sup> The probation was also structured under these reforms. Government created 21 Community Rehabilitation Companies (CRCs), owned by eight different service providers to render services to low-risk and medium-risk offenders.<sup>307</sup> A new National Probation Service (NPS) was established in June 2014 to handle high-risk offenders through Multi-Agency Public Protection Arrangements (MAPPA).<sup>308</sup> The Ministry of Justice distributed a white paper on Prison Safety and Reforms in November 2016.<sup>309</sup> It worked out a strategy for reforms of prison reform which is inclusive of greater freedoms for prison governors to utilize budgets and take decisions about provision of facilities in prisons. The Government adopted in 2017 a job plan for ex-offenders.<sup>310</sup>

However, these reforms in prison did not yield expected result as one third of prisoners were reported that they were suffering from disability and almost half had no school qualification and when they entered the prison they got minimum support for

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<sup>306</sup> Ministry of Justice, Transforming Rehabilitation: A Strategy for Reform, May 2013

<sup>307</sup> CRCs were in public ownership until 1 February 2015, when they transferred to eight, mainly private sector, providers. CRCs sub-contract some services to other providers

<sup>308</sup> Prisoners assessed as being a higher risk to public safety

<sup>309</sup> Ministry of Justice, Prison safety and reform, November 2016

<sup>310</sup> 9 Q155 (Sam Gyimah, Parliamentary Under-Secretary of State for Prisons and Probation) 10 NAO, Ministry of Justice: Transforming Rehabilitation, April 2016 The following written evidence was received and can be viewed on the inquiry publications page of the Committee’s website.

education and employment. The situation aggravated due to infrequent prison services and rising level of violence in jails.<sup>311</sup>

The Work and Pensions Committee pointed out to flaws in the government employment support program that it lacks co-ordination since there is no definite plan as how different agencies work in liaison with each other in different prisons to get ex-offenders jobs. It suggested for adoption of “gold standard” for employment support of prisoners, where the prison required to demonstrate strong link with employers and local business who offer work placement and get the prisoners release on temporary licenses. Further, it was pointed out that different organizations have different standard for basic qualification to attend workshops courses. Therefore if prisoners leave to any other prison due to lack of capacity they may face problem to continue with their course or workshop training, as each jail program has different standards. Dame Sally Coates found too much variation in the requirements of different awarding bodies for basic skills:

*“Education in prisons should be underpinned by a coherent set of basic skills qualifications (English, math and ICT) that enable a learner to progress to Level 3 and beyond, even if they move across the prison estate to a place where education is supplied by a different provider. At the moment, prison learners may have to start courses again if they move part-way through a course because their new prison’s education provider uses a different awarding body.”<sup>312</sup>*

Dame Sally suggested that all prisons should require to offer workshop courses, apprenticeships and job opportunities with real employers.<sup>313</sup> She further suggested that

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<sup>311</sup> Population bulletin , monthly October 2016

<sup>312</sup> Dame Sally Coates, “Unlocking Potential , A Review of education in Prison” prepared by Ministry of Justice available at [www.gov.uk/moj](http://www.gov.uk/moj)

<sup>313</sup> The House of Common Works and Pensions Committee Report titled “Support for Offenders” for the Sessions 2016-2017.

there should be Personal Learning Plan for every prisoner. She said that Learning Plans should include the educational activity need to be taken by prisoner during incarceration. The activity should be digital to facilitate the prisoner to follow it easily. This plan should be developed with active involvement of prisoners. However, she admits a fact that it is not necessary that all prisoner would be willing to work after their release. Yet where offenders are ready to do work then these plans are providing “employment pathway”.<sup>314</sup>

## **(2) Through the Gate (TTG) Policy**

England introduced a policy of ‘Through the Gate’ (TTG) in order to bring about a step change in rehabilitation for reduction of chances of reoffending. The purpose of this policy is to prepare prisoners for reentry in society and increase their prospect of leading a better life. This policy was initiated in spring 2015 and allowed supervision through post-release licence. Further rehabilitation facility was extended to all offender to enhance the impact of policy on recidivism.<sup>315</sup>

But these reforms in rehabilitation policy did not meet the expectation of government. The inspection report states that:-

*“Newly formed Community Rehabilitation Companies (CRCs) are responsible for Through the Gate provision, but are not sufficiently incentivised under their contract arrangements to give priority to*

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<sup>314</sup> Dame Sally Coates, *Unlocking Potential: A review of education in prison*, May 2016, In September 2015 the Lord Chancellor and Secretary of State for Justice, UK asked Dame Sally Coates to lead a review of education in prison and make recommendations as to how it could be improved.

<sup>315</sup> A joint inspection by HM Inspectorate of Probation and HM Inspectorate of Prisons, “An Inspection of through the Gate Resettlement Services for Short-Term Prisoners” dated October 2016 available at <https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2016/09/Through-the-Gate.pdf> last visited on July 2019.

*this work. Payment is triggered by task completion rather than anything more meaningful. Additional financial rewards are far off and dependent on reoffending rates that are not altogether within the CRC's gift. CRC total workloads (and therefore income) are less than anticipated when contracts were signed. As CRCs continue to develop and adjust their operating models accordingly, CRCs are hard-pressed and are generally giving priority to work that is rewarded with more immediate and more substantial payment. These detailed contractual arrangements must change and develop, for the government's rehabilitation policies to be delivered well.*<sup>316</sup>

HM Inspectorate of Probation and HM Inspectorate of Prisons did not encounter a single prisoner who was benefited to get employment by “Through the Gate” program, rather large number of ex-offenders had to rely on Job Centre Plus (JCP) Work Coaches for employment support.

The Works and Pensions Committee report stated that the support provided by the Job Centre plus (JCP) was not consistent therefore, ex-offenders who were keen to get job could not afford to be rejected by JCP as hard case. Therefore, it was suggested that all Job centers employ a specialized person to aid ex-offenders to get jobs. Willing ex-offenders to get work should be facilitated to have access to work and health Program. The policy to permit job seeker's to get allowance soon after their release from prison is hailed as a step to reduce the chance of recidivism.<sup>317</sup>

Pakistan on the same line can introduce infrastructure of Job Centers which will assist prisoners after release to find suitable job according to their compatibility. Pakistan has not given any incentive to private sectors for establishment of job centers,

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<sup>316</sup> ibid

<sup>317</sup> House of Common, Work and Pensions Committee report on “Support for offenders” for the session 2016-2017 available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/58/58.pdf> last visited on 5 July, 2019.

therefore, to expect that private sectors will take such initiative is not possible since it will derive no benefit to them. Furthermore, private sectors cannot be expected to step into the shoe of government and look after welfare of ex-offenders themselves. The government therefore need to take initiatives to establish such facilities which will convey a positive message to ex-offenders that the society is ready to allow them to re-integrate. Further prisoners after their release are reluctant to find jobs. Thus, establishment of job centers will provide plate forms to the offenders to find out jobs which will help them to overcome their fear and problems.

### **7.2.2 Policies after Release from Prisons**

The disclosure regime is designed to protect the public. However, U.K parliament has passed The Rehabilitation of Offenders Act 1974<sup>318</sup> allows convictions, cautions and reprimand in respect of certain offences to be considered “spent”. The prisoners after the rehabilitation period are considered as they have never committed those offences. The statute further explains that the rehabilitation period starts from the date the sentence is imposed by the court and not from the date of release from prison. The rehabilitation period includes the “buffer period” which is 18 months but in case of offenders less than 18 years, the puffer period reduced to six months.<sup>319</sup> A rehabilitated person under the statute is not required to disclose about his previous criminal record and he is not subjected to any liability or otherwise if he failed to disclose the “spent” conviction.<sup>320</sup>

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<sup>318</sup> Rehabilitation of Offenders Act, 1974.

<sup>319</sup> Section 4 of Rehabilitation of Offenders Act 1974

<sup>320</sup> Section 3 of Rehabilitation of Offenders Act, 1974

The Rehabilitation Offenders Act provides list of professions, offices, employment work and occupation as well as licenses, where conviction is not considered as spent. The Disclosure and Barring Services (DBS) issues certificate of criminal record to an offender where he needs to show his previous conviction therefore in the Act these profession are mentioned in “excepted list”.<sup>321</sup> The professions and work which fall in the list of excepted are mainly related to work with children or other people in vulnerable circumstances, or where sensitive information is handled and therefore to employ offender over there can cause risk of abuse of public trust.

It is unlawful for an employer to refuse a job to a person if position does not fall in the “excepted list” of professions or dismiss him from employment because the person has a ‘spent’ caution or conviction. It is also unlawful for an organization to carry or depute someone else to obtain a Disclosure and Barring Service (DBS) check on a person whose conviction fall under the category of “spent conviction” and the job offered by the organization fall within the domain of applicability of the Act. Employer can only carry out basic back ground check from DBS if a job falls in the exempted category of the Act. While DB in such a case can only disclose ‘unspent’ convictions of a person.<sup>322</sup>

The purpose of this Act is to allow ex-offenders to reintegrate into society as these persons need not to carry stigma of conviction throughout their life. However this Act was called for reforms in order to enable ex-offender to re-enter a society and maintain a public safety.<sup>323</sup> The Act has already restricted “period of sentence” to be for purpose of availing benefit of provision of “spent conviction”. This period was

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<sup>321</sup> Section 4(1) , Section 6(4) (5) of the Rehabilitation of Offenders Act, 1974

<sup>322</sup> Section 5 of Rehabilitation of Offenders Act, 1974.

<sup>323</sup> Nacro, a national social Justice Charity at U.K which campaigns for reforms.

initially consist of thirty months which was later on enhanced to 48 months<sup>324</sup> this indicate that the legislature is cautious about the interest of society. This process is yielding positive result therefore the sentence period was increased to consider the same for rehabilitation of other offenders.

Pakistan introduced programmes for rehabilitation of prisoners but no legislation is formulated to recognize positive impact of rehabilitation over prisoners. Pakistan need to formulate a pilot project to take such measure which help offenders who landed in prison on trivial offences and received minor sentence to declare their period of conviction as “spent” after rehabilitation.

## **(1) Filtering System**

The U.K government introduced filtering process on 29<sup>th</sup> May, 2013. The background behind adopting filtering process was that earlier employers had to consult Police National Computer (PNC) to carry out criminal record check.<sup>325</sup> Therefore, there was an increasing demand on the government to amend the Police Act, 1997. Subsequently, a court case was filed titled R (T) Vs Chief Constable of Greater Manchester and others (known as T).<sup>326</sup> Where the court of appeal in its landmark Judgment declared The Police Act, 1997 and the Exception Order were incompatible with Article 8 of the European Convention on Human Rights as they provide for the

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<sup>324</sup> In section 5(1) (b) and (d) (sentences excluded from rehabilitation) for “thirty months” substitute “forty eight months”. The provisions of the Rehabilitation of Offenders Act 1974 were amended by Section 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The changes were implemented on 10 March 2014.

<sup>325</sup> Constituency Case Work Criminal Record, House of Commons Library at <https://commonslibrary.parliament.uk/constituency-casework/criminal-records/> last accessed on 13-01-2020

<sup>326</sup> R(T) Vs Chief Constable of Greater Manchester and others(2013) EWCA civ 25

disclosure to the employers about all the spent convictions and caution on a blanket basis and hence the court held it as “disproportionate”.

The government in pursuance to the judgment of court of appeal amended The Police Act 1997 and Exception Order. It exempted from ‘standard and enhanced disclosure certificate’ certain old and minor convictions, cautions, reprimands and warning and considered them as filtered out from the certificate.<sup>327</sup>

This filtration system provides time scale where the spent conviction not to be disclosed to the employers:

- (a) Where a person is below 18 years at the time of conviction: conviction will be filtered after 5.5 years.
- (b) Person above 18 years at the time of conviction: conviction will be filtered after 11 years.

In case of caution:-

- (a) Person is below 18 years at the time of accepting a caution: the caution may be filtered after 2 years
- (b) Person above 18 years at the time of caution: caution is filtered after 6 years.

However, a caution cannot be filtered from a standard or enhanced certificate where:-

- (i) The person has been convicted of any other offence at any time
- (ii) The person was sentenced to custody in respect of the conviction.

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<sup>327</sup> The amendment are set out in the Rehabilitation of Offenders Act, 1974 (exception) order 1975(Amendment) (England and Wales) order 2013(S.I 2013/1198) and the Police Act 1997 (criminal record certificate: Relevant Matters) (Amendment) (England and Wales) order 2013 (S.I 2013/1200)

(iii) The offence of which the person was convicted was a listed offence, as set out in Article 2 A (5) of the exception order<sup>328</sup> (listed offences include for example sexual or serious violent offences and offences relating to safeguard vulnerable people).

The filtering system set out a mechanism to create balance between public interest and rehabilitation as it set out a time limits where the spent conviction not to be disclosed to employers. This filtration system is more effective in case of person below age of 18 years at the time of conviction. This provides a safeguard and protection to children from collateral consequences of disclosure of criminal record.

## **(2) Banning the Box**

A global policy “Ban the Box” encourages employers to remove question related to previous criminal record of applicant from initial employment forms. The campaign was started in the US and subsequently launched in the UK by Charity organization “Business in the Community” to promote responsible business, in 2013.<sup>329</sup>

But unlike America where the Banning Box policy have statutory backing for public sector employers and any corporations in their supply chains. U.K has not legislated any such law. Employers under this policy have to take into consideration several factors such as the nature and seriousness of crime committed by the ex-offenders. The duration of time between commission of offence and relevancy of crime with job. This boost confidence of ex-offenders to fairly inform about detail of crime

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<sup>328</sup> The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975

<sup>329</sup> Unlock is an independent award-winning national charity that provides a voice and support for people with convictions who are facing stigma and obstacles because of their criminal record, often long after they have served their sentence. available at <https://www.unlock.org.uk/projects/employment-discrimination/ban-the-box/> last accessed on 13-01-2020

and their convictions further it enable employers to carry out impartial evaluation of the risk likely to be posed to their business.

David Cameron in 2013 announced that civil service would eliminate question regarding criminal record from initial recruitment form, however this direction would not apply for jobs entail specific security requirements. There were a recommendations by the Work and Pensions Committee that the government ought to apply “Ban the Box policy” in all recruitment process of public bodies except jobs that entail security risk. The Government should also formulate a law on ban the box which then become statutory obligation of employers to comply with it.

“Ban the Box” initiative is considered as step forward toward ex-offenders re-entry in society. Many countries like USA and UK this campaign has led to positive results. This policy can help to repeal many de-jure restrictions on ex-offenders in public as well as private sectors.

Henry and Jacobs<sup>330</sup> argued that although “Ban the Box” campaign is considered a strong step to regularize the status of ex-offender and to eliminate discrimination against ex-offenders. However this campaign is not helpful for all categories of ex-offenders. Only those ex-offenders can be benefitted from this policy who are educated, skilled workers. While rest of ex-offenders who are less educated, not skilled, habitual criminals and convicts of heinous offences have no chance to get any advantage from policy “Ban the Box”. It is further argued that in absence of implementation and administration mechanism no fruitful result can be achieved of this policy.

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<sup>330</sup> Jessica S.Henry and James B Jacob, “Ban the Box to Promote Ex-offender Employment” Volume 6, Number 4, 2007 available at <http://ssrn.com> last visited on 15 July, 2019

Further, the campaign has not restricted background check of criminal record at all, rather it had deferred it at subsequent stage when ex-offenders qualify to be selected for the post. They argued that there is a possibility that at subsequent stage when employers get to know about criminal record of applicant he may change his mind. Hence they argued that ‘ban the box policy’ is not effective for purpose of redressal of issue of employment discrimination of ex-offenders. The territories which are implementing the policy of “Ban the Box” are silent with regard to guidelines employers need to follow at time of hiring ex-offenders.

Henry and Jacob<sup>331</sup> argued that these guidelines are not easily formulated. They have to be considered in the light of relevancy of conviction with job requirement, length and quality of criminal act. Since criminal history of ex-offenders vary from one person to another

Further, this policy was criticized by employers on the grounds that hiring ex-offenders lead to compromise safety at work place and they can face law suit for negligent hiring.<sup>332</sup> While small business and organizations consider that this policy will waste their time and money. They argued that they have to indulge in the process of recruitment of such persons whom they subsequently drop due to their criminal record. They further argued that in this process they may lose chance to hire persons with clean record and relevant job experience, since those persons in this process had found jobs in other organizations.<sup>333</sup>

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<sup>331</sup> Jessica S.Henry and James B Jacob, “Ban the Box to Promote Ex-offender Employment” Volume 6, Number 4, 2007 available at <http://ssrn.com> last visited on 15 July, 2019

<sup>332</sup> Ibid note 222

<sup>333</sup> Gorce La, Tammy “ As ‘ Ban the Box’ spreads private employers still have questions” New York times No 22, 2017 available at <https://www.nytimes.com/2017/11/22/business/small-business-criminal-record.html> last visited on 12-05-2019.

## **7.3 LEGAL PROTECTION PROVIDED TO EX-OFFENDERS UNDER CANADIAN LEGISLATIONS.**

Canadians have a recognized right to be treated equally at work place and for that purpose the government has enacted laws and programs to protect the right of employment. In this regard the Canadian Human Rights Act is a broad piece of legislation that place ban on discrimination on the basis of gender, race, ethnicity, conviction and other grounds.<sup>334</sup> Further, there are programs such as Canada's Employment Equity Act<sup>335</sup> and the Federal Contractors Program which require employers to take active measures for improvement of employment opportunities for specific groups in the country.<sup>336</sup> While Canada Labour Code<sup>337</sup> protect rights and responsibility of employers and employees within the federally regulated sectors. The study below analysis these legislation and programs in order to understand how these legislation and measures guarded right to work of ex-offenders and provided a shield against discriminatory practices of employers.

### **7.3.1 Canadian Human Rights Act**

The Human Right Act<sup>338</sup> was promulgated in order to give effect to the principle that all individuals should have equal opportunity to spend their lives according to their own whims and wishes to the exclusion of interference of others by discriminatory practices. The Act enlists prohibited grounds for discrimination which are: - (i) Race (ii) National or ethnic origin (iii) color (iv) Religion (v) Age (vi) Sex (vii) Sexual orientation (viii)

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<sup>334</sup> Canadian Human Rights Act R.S.C 1985 Chapter 6.

<sup>335</sup> Employment Equity Act (S.C. 1995, c. 44).

<sup>336</sup> Employment Equity Act (S.C. 1995, c. 44).

<sup>337</sup> Canada Labour Code (R.S.C., 1985, c. L-2).

<sup>338</sup> The Canadian Labour Code, 1985

Gender identity or expression (ix) Marital Status(x) Genetic characteristic (xi) Disability  
(xii) Conviction for an offence for which pardon has been granted or in respect of which a record suspension has been ordered.

Sections 7, 8, 9, 10 of the statute deal with the discriminatory practices and policies that deprive individuals of opportunity of employment.<sup>339</sup> Section 7 deals with employment.<sup>340</sup> While section 8 deals with employment applications, advertisements,<sup>341</sup> section 9 (1) deals with employer organizations<sup>342</sup> and section 10 deals with discriminatory policy or practice.<sup>343</sup> Section 25 of the Act explains the category of convicted person whose criminal record has been suspended.<sup>344</sup>

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<sup>339</sup> Canadian Human Rights Act R.S.C 1985 Chapter-6

<sup>340</sup> Section 7 “It is a discriminatory practice, directly or indirectly,(a) to refuse to employ or continue to employ any individual, or (b) In the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

<sup>341</sup> : Section 8- It is a discriminatory practice:-(a) to use or circulate any form of application for employment, or(b) in connection with employment or prospective employment, to publish any advertisement or to make any written or oral inquiry that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.

<sup>342</sup> Section 9 : It is a discriminatory practice for an employer organization on a prohibited ground of discrimination(a) to exclude an individual from full membership in the organization;(b) to expel or suspend a member of the organization; or(c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual.

<sup>343</sup>Section 10: It is a discriminatory practice for an employer, employee organization or employer organization (a) to establish or pursue a policy or practice, or(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

<sup>344</sup> “*conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered*” means a conviction of an individual for an offence in respect of which a pardon has been granted under Her Majesty’s royal prerogative of mercy or under section 748 of the Criminal Code or a record suspension has been ordered under the Criminal Records Act, that has not been revoked or ceased to have effect; (*état de personne graciée*)”

The law caters for the possible grounds for discrimination and explicitly prohibits direct and indirect form of discrimination on the basis of criminal record. This legislation fulfill two international obligations of country i.e. to respect and protect human right to work but the legislation is silent with regard to provision of right to work to ex-offenders. However, the law has restricted the protection to the extent of individuals whose conviction is pardoned by Majesty's Royal prerogative of mercy or in respect of which record suspension has been ordered under Criminal Record Act. This limitation in statute run contrary to concept of theory "offenders paid their debt after completion of sentence". Therefore those convicts who have completed their sentence with the hope that they need not to pay more for their offence as they already paid their debt to the society and completed their sentence would find no protection under such enactment to consider their record as 'spent' for purpose of employment.

The individuals with suspended conviction or pardoned also feel discrimination since the moment their name enter in the court case, it can easily be found on internet and hence accessible to employers which then contribute towards their refusal of job. It is not necessarily that the data on internet regarding court case is updated to include information that their conviction is suspended or pardoned.<sup>345</sup> Similarly, the applicants do not find chance to explain to employers that their conviction was suspended or they have been pardoned.<sup>346</sup> Individuals with pardoned conviction do not get police clearance certificate, if they apply for vulnerable jobs. Hence they are discriminated in spite of protection provided under the Act.

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<sup>345</sup> Section 25 of the Canadian Human Rights Act (R.S.C1985 c H-6)

<sup>346</sup> Ibid Section 25 of Canadian Human Right Act

### 7.3.2 Employment Equity Act

This Act was promulgated in order to achieve equality in the workplace and employment opportunities or benefits should not be denied to any person for reasons unrelated to ability. The purpose of the Act is to correct the disadvantage experienced in employment by women, Aboriginal peoples, persons with disabilities and members of visible minorities. The Act emphasized that employment equity does not only mean that persons to be treated in the same way but it also requires adoption of special measures to eliminate distinctions among the persons.<sup>347</sup>

This Act provides protection to limited segment of society and does not extend its scope for general applicability to other class of persons. The Act can be useful to ex-convicts if they fall in the category of persons protected under this Act by virtue of their sex i.e. women, or disability or belongs to aboriginal peoples or member of visible minorities. However this protection cannot be availed separately by such persons on the basis of their mere criminal record.

Canada had passed Crime Bill, 2012 wherein, the period for grant of pardoned was extended. The changes brought in the policy was due to the reason that less than 4% of individuals who were earlier pardoned they again committed offence. This new change in pardon policy means that now 96% of offenders have to wait longer in jail because of the risk created by 4% of offenders who re-offended.<sup>348</sup>

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<sup>347</sup> Employment Equity Act(S.C 1995 c.44)

<sup>348</sup> Canadian Legal Resource Centre Inc. article “Criminal Record Discrimination costs Tax payers and put the public at great risk” available at <https://www.canadianlegal.org/criminal-record-discrimination/> last visited 12-07-2019

### 7.3.3 Reintegration Policies of Canada for Ex- Offenders

Canada in spite of not having defined laws for protection of ex-offenders. However it has set up Correctional Service of Canada (CSC). This service is run by the government. Its mission is to “contribute to public safety by actively encouraging and assisting offenders to become law-abiding citizens, while exercising reasonable, safe, secure and humane control.”

Parole offices are run and supervised in Canadian community under supervision of Ministry of Communication Safety and Correction Services (MCSC) in corroboration with Correction Service Centers. Parole Offices creates a bond between released offenders and the criminal justice system. They track information regarding addresses, employment, community services and vacations of released inmates in their community.<sup>349</sup>

The Ministry of Community Safety and Correction Services (MCSCS) provides a vast variety of programs to the offenders which range from aggression control, job-readiness training, anti-criminal thinking programs, and literacy training and parenting skills lessons, sex offender programs etcetera.<sup>350</sup>. MCSCS also offer a program called TRICOR Industries , this facilitate offenders to work in industries during their incarceration in prison, in this way they serve in industries and gain skills which help them for re-entry in society. Government of Ontario run this program and its products are distributed among government institutions, schools, charities, and correctional

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<sup>349</sup>The Correctional Service of Canada (CSC) is responsible for managing institutions of various security levels and supervising offenders under conditional release in the community.

<sup>350</sup>The Ministry of Community Safety and Correction Services

facilities. The Ontario Ministry of Transportation also get prepared all licenses plates by the offenders who are languishing in jail.<sup>351</sup>

Canada has set up a support programs for offenders who released from jail. These programs are more beneficial for offenders if they resides in a “half way house”. A ‘half way house’ provides residential facility to released offenders who are suffering from mental disorder, drug addiction, or criminal activity. These houses are designed in such a way that they facilitate their readjustment to private life.<sup>352</sup> Government of Ontario has also issue licenses to ‘half way houses’ to carry on ‘Clean Program’ and authorizes them to offer employment to ex-offenders particularly to those who are suffering from mental illness and could not find job due to disability discrimination. The program place services of ex-offenders at disposal of community employers who carry out local cleaning in this way offenders gain work experience and get familiarized to a more normal life style.

To conclude the laws in Canada with regard to employment of ex-offenders are not well defined and need to be broadly interpreted. Further The Canadian Human Rights Act need to be revisited in order to include offenders involved in all type of offences irrespective that they were pardoned or not and assessment should be made on the basis of risk evaluation. The government has introduced Correctional Service Centers in prison and support programs out of prison such as “ Half way home” to equip offenders for re-integration in society but these programs will not accomplish the purpose in absence of laws that protect right of employment of ex-offenders.

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<sup>351</sup> [www.mcses.jus.gov.on.ca](http://www.mcses.jus.gov.on.ca)

<sup>352</sup> Merriam-Webster ([www.merriam-webster.com/](http://www.merriam-webster.com/)).

The study argues that Pakistan can also introduce programs inside prison on line of Canadian programs which could enable offenders to do work in employers' factories and organizations during the period of their incarceration. This would help offenders to build their confidence to develop interaction with community which ultimately overcome their barrier of reentry in the society and to get employment.

#### **7.4 LEGAL PROTECTION PROVIDED TO EX-OFFENDERS UNDER THE SINGAPORE LEGAL SYSTEM**

Singapore like other countries also faces the problem of re-integration of offenders after their release from prisons. Therefore, in Singapore employment of ex-offenders is considered as a key factor to bring the ex-offenders back to life. Singapore has taken measures for the rehabilitation and re-integration of ex-offenders at state level in order to save the society from curse of recidivism. Many programs were run by the Ministry of Home Affairs (MHA) in the prison and outside of it. These programs are designed with the help of Yellow Ribbon Project to provide ex-offenders better economic and social assistance which could help them to re-integrate in the society.

The Programs and initiatives so far introduced by the Ministry of Singapore are as follows:

##### **7.4.1 Rehabilitation Programs in Prisons**

Ministry of Home Affair has established a uniform organization Singapore Prison Service (SPS) which strives for security of society through rehabilitation of offenders. Singapore Prison Service also has liaison with its partners in after care and prevention programs. SPS recognizes programs which focus on family support to inmates and considered it as best medium to boost their ability to face challenges

outside prison, particularly at the work place and transform them into responsible citizens.<sup>353</sup>

### **(i) Programs Introduced By SPS At Prisons**

Singapore Prison Service (SPS) and Singapore Corporation of Rehabilitative of Enterprises (SCORE) have introduced in January, 2019 the Social Skill Training Programs (SSTP) and Family Re-integration Programs (FRP). The purpose of these programs is to strengthen the bond of prisoners with their family in order to enhance communication skills of inmates. SPS considers that the family support and motivation are best result oriented for better rehabilitation and re-integration in society.<sup>354</sup>

### **(ii) Employability Of Offenders**

Singapore Prison Service has introduced employability programs to enhance the skills of inmates and to provide them vocational training. These programs are initiated since SPS considers employment is essential factor for successful re-integration of offenders in the society.

Singapore Corporation of Rehabilitation Enterprises (SCORE) in collaboration of Work Force Singapore (WSG) has taken up six month pilot projects since 01 November, 2018. The aim of such programs is to improve job matching and train the ex-offenders to go through challenges of entering into job, after long period of displacement. As of data available on the official website of SPS 34 ex-offenders were placed on career training till end of March, 2019 and 7 ex-offenders were offered

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<sup>353</sup> Singapore Prison Service, a uniformed organization institutionalized in 1946, is one of the nine Departments under the Ministry of Home Affairs (MHA).

<sup>354</sup> The strived to achieve better rehabilitation and reintegration of offenders and ex-offenders therefore they initiated family programmes and community support to prevent re-offending.

permanent jobs.<sup>355</sup> The prisons in Pakistan can adopt such policy which is more realistic in nature since it solve the problem of compatibility of offenders with job requirement. This also helps prisons to keep track of offenders benefited from this process to determine its effectiveness in provisions of jobs to prisoners after release.

#### **7.4.2 Re-Integration Programs outside Prisons**

Singapore in order to help ex-offenders in their career has established Industrial and Service Co-operative Society Limited (ISCOS) in 1989.<sup>356</sup> The vision of ISCOS is to enable the ex-offenders to achieve sustainable career, built cohesive family and lead a positive lives. ISCOS in order to achieve its goal of sustainable career of ex-offenders has initiated job placement programs. ISCOS through such programs provides guidelines to ex-offenders and keep liaison with the employers for various sectors to arrange for jobs interviews of ex-offenders.<sup>357</sup>

Singapore on one hand, had initiated wide range of programs inside and outside of the prison, but these measures become ineffective when offenders face a question regarding their criminal record in employment form which could lead employers to draw negative inference against ex-offenders, if the applicants replied honestly to such question. Therefore, this fear of ex-offenders may tend them to be dishonest to furnish information about their criminal record which ultimately become more dangerous when employers at subsequent stage got to know about their criminal record which would result in their termination from jobs.

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<sup>355</sup> Ibid Singapore Prison Service SPS available at <https://www.sps.gov.sg/news-about-us/in-the-news/strengthening-rehabilitation-and-reintegration-with-family-interventions-and-employability-initiatives>

<sup>356</sup> The Ministry of Home Affairs, Singapore, established the Industrial and Services Co-operative Society Limited (ISCOS) which is extending friendship and support to its members (ex-offenders) and their families so that they can lead meaningful and productive lives.

<sup>357</sup> ISCOS has over 14,000 ex-offender members, who have benefited from various programs and initiatives from employment and skills training, support and guidance in community.

### 7.4.3 Legislation

Singapore in order to give relief to ex-offenders, who are sentenced to less than three month involved in petty offences enacted a legislation The Registration of Criminals (Amendment) Act, 2005.<sup>358</sup> This Act deals with the registration of criminals and considers conviction “spent” if punishment of three month imprisonment is given to a person and he spends five years consecutively without being convicted in any other offence. The benefit of the “spent conviction” is that an offender get his record wiped off which means that he is not required to disclose about his criminal record.

This legislation *prima facie* beneficial to ex-offenders involved in petty offences, but it has indirect discriminatory effect on rest of offenders who do not fall in the category of offenders protected under the statute. Hence, Singapore by enacting such legislation has violated the international obligation to legislate law which has nondiscriminatory effect. Further, Singapore still has not provided complete framework for effective application of the statute and what remedy is available in case of denial of right accrued to ex-offenders in the statute. The Registration of Criminal (Amendment) Act, 2005 is a good step but still it needs to be revisited to expand its applicability to offenders who spent five years free of crime irrespective of the fact in which offence they received punishment, however the government can increase the period of ‘crime free’ to them from five to ten years.

Pakistan like Singapore can get guidelines from the programs introduced by Singapore inside and outside prisons for rehabilitation of prisoners in order to make them effective member of society after their release from prison. The most important

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<sup>358</sup> The Registration of Criminals (Amendment) Act , 2005 is available at [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=70858&p\\_count=96462](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=70858&p_count=96462) lasted visited on 12-01-2020

step which Singapore has taken that it recognizes the importance of right to family life by introducing Family Re-integration Programs (FRP) which would assist prisoners to interact with their families and lessen their fear of aversion from family due to their criminal background. Pakistan can also work on these lines and arrange programs and events where prisoners can freely meet their families in happy environment. This would help prisoners to develop positive thinking and attitude towards their families and rest of the society. Secondly they feel more confident to interact with the rest members of society. Thirdly conducting such programs is not costly and can easily run by the government with collaboration of organizations which are striving to solve issues of prisoners.

## **7.5 LEGAL PROTECTION PROVIDED TO EX-OFFENDERS UNDER THE AMERICAN LEGISLATIONS**

Studies argues that that in America ex-offenders lack requisite qualifications for job such as relevant education and job experience as compared to general population.<sup>359</sup> The criminal record itself restrict employment of ex-offenders, firstly: due to statutes that formally ban persons with certain types of convictions<sup>360</sup> and secondly: due to preferential behavior of employers.<sup>361</sup> The rationale behind an employer's preferences is that individuals with criminal record are more likely to pose risk to other colleagues

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<sup>359</sup> Michael A. Stoll, "Ex-offenders, criminal Background Check, and Racial Consequences in the Labor Market", *University of Chicago Legal Forum* Volume 2009: issue 1(2009), Page 382.

<sup>360</sup> Bruce E. May, "Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felons Employment Opportunities", *North Dakota Law Review* Vol 71: issue1 (1995) 187, 195

<sup>361</sup> Devah Pager, "Double Jeopardy: Race, Crime and Getting a Job", 2005 *Wisconsin Law Review*. Issue 2(2005), p 617, 622-27, 640-44.

and customers at work place. The African American and Latinos ex-offenders are more affected due to this discriminatory behavior for being minority group.<sup>362</sup>

The United States Civil Rights Act of 1964<sup>363</sup> provides protection to persons with criminal records from employment discrimination if they fall in the category of protected group. The court struck down practices and policies of employers which exclude persons with criminal record and are not justified on the basis of legitimate business necessity.

Title VII of the Act describes two types of discrimination on the basis of which affected person can bring his claim for redressal before the court i.e. Disparate treatment and Disparate Impact.

- (i) Disparate Treatment:-Disparate treatment is a way in which the employers have differential treatment towards a person as compared to others in similarly placed circumstances, and this difference in treatment is based on proscribed grounds i.e. gender age race, , or other protected characteristics.<sup>364</sup>
- (ii) Disparate Impact:-The term "disparate impact" indicates consequences of discriminatory action of employers. The practices of employers are *prima facie* neutral in their effect on employees with different traits, but actually have a more adverse effect or impact on a particular group of employees.

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<sup>362</sup>Jocelyn Simonson, "Rational Discrimination against Ex-Offenders", *Georgetown Journal on Poverty Law & Policy* Vol 13: issue no 2, (2006), p.284.

<sup>363</sup>An Act to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States of America to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

<sup>364</sup>Lisa Gauerin, " Disparate Treatment Discrimination" on <https://www.nolo.com/legal-encyclopedia/disparate-treatment-discrimination.html> last visited on 12-07-2019

However, employer can escape liability if he succeeds to prove that his action was based on business necessity.

The discussion on this legislation is further elaborated in next chapter, here the purpose is only to give insight about the legislative measures which provide protection to right of employment of ex-offenders

### **7.5.1 Anti Discriminatory Legislations by States**

Many states have laws addressing employment discrimination against ex-offenders. Many of these statutes apply to public employers. On the same place Hawaii, Wisconsin, Pennsylvania, and New York are among the states which have legislated laws to provide protection to ex-offenders against discriminatory behavior of employers in public and private sectors.<sup>365</sup> Even, the limit of protection provided in these legislations of states vary radically from each other: Wisconsin enactment provides protection to ex-offenders against discrimination. It provides exception to this principle of law if criminal record substantially relates to job need.<sup>366</sup> It sets a high standard for employers to meet; while anti discriminatory statute of Pennsylvania authorizes discrimination against ex-convicts if it is based on ground of “relates to” the position.

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<sup>367</sup> While legislations of New York and Hawaii falls somewhere in between.<sup>368</sup>

<sup>365</sup> Hawaii Revised Statute, 1993 and Supp. 2006, section 378-1 to -6; Wisconsin Statute 2003, Section 111.325–111.335; 18 PA. CONS. STAT. ANN, West 2000. Section 9125; New York Correction Law, 2003 amended in 2007 Section 750–55.

<sup>366</sup> 11. Wisconsin Statute, 2003 Section 111.335(1) (c) (1).

<sup>367</sup> 12. 18 PA. CONS. STAT. ANN, West 2000 Section 9125(b).

<sup>368</sup> Christine Neylon O’ Brien & Jonathan J. Darrow, “adverse employment consequences triggered by criminal conviction: recent cases interpret states statutes prohibiting discrimination”, *Wake Forest Law Review*, Vol 42 (2007), 1005

## **(I) Hawaii Anti Discriminatory Statute**

Hawaii statutes provide protection to the ex-offenders by increasing their right of privacy and jobs opportunities. Employers can only use criminal record as basis of denying a job to ex-offenders if there is a rational relationship between conviction and job requirement. The Hawaii Criminal Justice Data Centre and Attorney General's office interpreted the "rational relationship" in the following terms:-

"The Hawaii Civil Rights Commission (HCRC) investigates complaints of employment discrimination arising from an employer's hiring decision based on the rational relationship of an applicant's conviction to the job. In investigations of such complaints, an employer is required to show a rational relationship between the conviction and the duties and responsibilities of the position. Although no administrative rules or guidelines have been adopted by the HCRC to set forth when a conviction is "rationally related" to the job, the rational relationship standard is not a difficult one to satisfy, requiring only a showing of an understandable or rational connection between the offense and how it may affect an individual's ability to perform the job duties and functions. Almost any conceivable relationship between the offense and the job will likely satisfy the rational relationship standard. The HCRC enforcement section has determined that records of conviction for crimes of violence or dishonesty meet the rational relationship standard for a broad range of jobs.

The legislative history surrounding the enactment of HRS section 378-2.5 enunciates vast grounds for application of these standards in order

to enable employers to safeguard his business and customers. One defender of the law described the “rational relationship” between the conviction and job is lower standard than “substantial relation” and a lot lower than “reasonable rational” while as compared to “fair relationship” it is considered as most lower than it.”<sup>369</sup>

The Hawaii legislation limits the ability of employer to use criminal record for allowing or denying job to ex-offender. However the test of “rational relationship” is not difficult for employer to pass as compared to test of “substantial relationship” provided under Wisconsin’s statute or the “direct relationship exclusion” or “unreasonable risk” mentioned in New York statute.

## **(II) Wisconsin Anti Discriminatory Statute**

Wisconsin enacted comprehensive legislation which bars employers from public sectors, private employers, labor organizations, licensing bodies and other persons from employment discrimination on the basis of criminal record<sup>370</sup> as well as on the basis of other twelve grounds including age, race and disability.

## **(III) Pennsylvania Legislation**

Pennsylvania has enacted Criminal History Record Information Act. Employers under the Act consider criminal history record information only to the extent that it

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<sup>369</sup> Hawaii Criminal Justice Data Center, Department Of The Attorney General, Criminal History Record Checks Report To The 2003 Legislature 4–5 (2002)

<sup>370</sup> Christine Neylon O’ Brien & Jonathan J. Darrow, “adverse employment consequences triggered by criminal conviction: recent cases interpret states statutes prohibiting discrimination”, *Wake Forest Law Review*, Vol 42 (2007),1002

relates to ex-offenders suitability for the particular position, however previous arrest cannot be considered while allowing or denying job to ex-offenders,<sup>371</sup> who voluntarily provide information in employment application since it is not included in the definition of criminal history record information. The protection under the statute is only provided at the time of hiring, therefore if the applicant at the time of hiring did not disclose his previous conviction and subsequently the employer got to know about the conviction he has choice to take adverse decision. His action is not questionable under the statute since it was not basis of his decision at the time of employment.

#### **(IV) New York Legislation**

Currently, eight states enacted laws the most significant legal shield for provision of employment to ex-offenders in the market. These laws provide limitation for use of criminal record by employers at the time of decision.<sup>372</sup> New York State's Article 23A, is more comprehensive law under which an employer can refuse job on the basis of criminal record either on the basis of "direct relationship" between the conviction and the nature of job or "unreasonable risk" to public safety if ex-offender is employed. An employer has to scrutinize the criminal record while taking into

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<sup>371</sup> Pokalsky v. Se. Pa. Transp. Auth., No. Civ. 02-323, 2002 WL 1998175, at 5 (E.D. Pa. Aug. 28, 2002) ("it is well established that employers may consider only a prior conviction and not a prior arrest."); in case titled Tilson v. Sch. Dist. of Phila., Civ. A. No. 89-1923, 1990 WL 98932 it is held that "Pennsylvania law now permits consideration of job-related convictions only. Employers were formerly allowed to consider arrest records of prospective employees, but the word 'arrest' was removed by statutory amendment in 1979 . . ." cf. 18 PA. CONS. STAT. ANN. § 9121(b)(2) (West 2000) ("Before a . . . police department disseminates criminal history record information to an individual or noncriminal justice agency, it shall extract from the record all notations of arrests . . . where: (i) three years have elapsed from the date of arrest; (ii) no conviction has occurred; and (iii) no proceedings are pending seeking a conviction.").

<sup>372</sup> The eight states are Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New York, Pennsylvania, and Wisconsin. See Connecticut Code 2005 Sections 46a-80; Hawaii Revised Statutes, 2003 Sections 378-2.5; 775 Illinois Compiled Statutes 5/2-103 (2005); Massachusetts General Laws Chapter 151B, sections 4(9), 2005; Minnesota Statute Sections 364.03 (2005); New York Correction. Law Sections 750-755 (Mc Kinney 2005); Title 18 Pennsylvania Consolidated Statute Sections 9125 (2005); Wisconsin Statute Sections 111.335 (2005)

account many factors such as the circumstances under which individual committed the offence and any evidence of rehabilitation, before applying either of the exceptions above.<sup>373</sup>

#### **(V) California, Connecticut, The District Of Columbia, Louisiana, Minnesota, Maine, And Massachusetts**

The states which enacted limited legislation are (a) California where it restricted employers to request job applicants to disclose about arrest which was not resulted in conviction.<sup>374</sup>(b) Connecticut state law prohibits state employers from discrimination but exempting law enforcement agencies <sup>375</sup>(c ) Washington, D.C. law restricts employers to pass cost of background checks to applicants<sup>376</sup>, (d) Illinois state law restricts employers to use criminal record that was sealed or expunged<sup>377</sup> ( e)Louisiana

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<sup>373</sup>New York Correctional Law Sections 750-755 (McKinney 2005) available at <https://www.labor.ny.gov/formsdocs/wp/correction-law-article-23a.pdf>

<sup>374</sup> California Labor Code 2006, section 432.7(a) (“No employer, whether . . . public . . . or private . . . shall ask an applicant . . . to disclose . . . information concerning an arrest or detention that did not result in conviction, . . . nor shall any employer . . . utilize, as a factor in determining any condition of employment including hiring, promotion, [or] termination . . . any record of arrest or detention that did not result in conviction . . .”).

<sup>375</sup> Connecticut General Statute 2007, Sections 46a-80 (“(a) Except as provided in subsection (b) of this section and subsection (b) of section 46a-81, . . . a person shall not be disqualified from employment by the state of Connecticut . . . solely because of a prior conviction of a crime. (b) A person may be denied employment by the state . . . by reason of the prior conviction . . . if after considering (1) the nature of the crime and its relationship to the job . . . ; (2) . . . the degree of rehabilitation . . . ; and (3) the time elapsed since the conviction . . . , the state . . . determines that the applicant is not suitable for the position of employment sought . . .”).

<sup>376</sup> District of Columbia Office Code, 2001, Section 2-1402.66 (“It shall be an unlawful practice . . . for any person to require the production of any arrest record . . . at the monetary expense of any individual to whom such record may relate. Such ‘arrest records’ shall contain only listings of convictions and forfeitures of collateral that have occurred within 10 years of the time at which such record is requested.”).

<sup>377</sup> Illinois Human Rights Act.2006 Section 103 arrest record (“(A) Unless otherwise authorized by law, it is a civil rights violation for any employer . . . to inquire into or to use the fact of an arrest or criminal history record information ordered expunged, sealed or impounded . . . as a basis to refuse to hire . . . [or as a basis to] discharge . . . . This Section does not prohibit a State agency, unit of local government or school district, or private organization from requesting or utilizing sealed felony conviction information obtained from the Department of State Police . . . or under other State or federal laws or regulations that require criminal background checks in evaluating the qualifications and character of an employee or a prospective employee. (B) The prohibition against the use of the fact of an arrest contained in this Section shall not be construed to prohibit an

provides protection to ex-offenders with regard to employment discrimination in occupations requiring a state license <sup>378</sup>, and Minnesota provides protection to the applicant if he has evidence of rehabilitation from employment discrimination where the employer cannot use previous criminal record to disqualify him.<sup>379</sup> Maine statutes authorize the employer to take adverse employment action on the basis of drug convictions, however he has to prove that there are rules which prohibit employment for drug convicted person.<sup>380</sup> Massachusetts statute restrict employers on use of record of arrest without convictions, convictions for misdemeanors which are minor or served convictions for any misdemeanor years ago, while making decision for employment.<sup>381</sup>

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employer . . . from obtaining or using other information which indicates that a person actually engaged in the conduct for which he or she was arrested.”).

<sup>378</sup> Louisiana Revised Law Statutes, 2017 Section 37:2950 (“A person shall not be . . . held ineligible to . . . engage in any . . . occupation . . . for which a license . . . is required to be issued by the state of Louisiana . . . solely because of a prior criminal record, except in cases in which the applicant has been convicted of a felony, and such conviction directly relates to the position of employment sought . . . D. (1) (a) This Section shall not be applicable to: (i) any law enforcement agency. . . . (ix) The Louisiana State Bar Association. . . . (xiv) The Louisiana State Board of Elementary and Secondary Education. (b) Nothing herein shall be construed to preclude the agency, in its discretion, from adopting the policy set forth in this Section. (2) This Section shall not be applicable to the office of alcohol and tobacco control of the Department of Revenue.”).

<sup>379</sup> Minnesota Statutes, 2019, Section 364.03 (“A person who has been convicted of a crime . . . which directly relates to the public employment sought . . . shall not be disqualified from the employment . . . if the person can show competent evidence of sufficient rehabilitation . . .”).

<sup>380</sup> Maine Revised Statutes, 2007, Title. 26 Labor and Industry Chapter 7 Employment Practices, Section 681(7) (“This subchapter does not prevent an employer from establishing rules related to the possession or use of substances of abuse by employees, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules, except when a substance abuse test is required, requested or suggested by the employer or used as the basis for any disciplinary action.”).

<sup>381</sup> Massachusetts General Law, Chapter 151B, Section 4(9) (2006); see also Lau, *supra* note 42, at 725–26 (comparing the Massachusetts statute to that in Hawaii and noting that both prohibit inquiries into arrests and place a time frame upon relevance of prior convictions).

## **7.6 CONCLUSION**

Countries have started to realize the dilemma of employment of ex-offenders and its effect on their society. Therefore, different countries have enacted legislations to provide protection to some extent to the ex-offenders, though the protection is not broadly applied to all ex-offenders the moment they release from prison, but still there is remedy available to them if a considerable time spent between conviction and employment or the conviction is not related to job requirement. However Pakistan still need to enact such legislation by taking into consideration the factors addressed in other countries legislation while extending protection of employment discrimination against ex-offenders. The statutes are not only required to be legislated for provision of protection to ex-offenders at time of employment from discrimination, but these statutes need to be implemented in letter and spirit.

## **PART III**

### **ROLE OF COURTS FOR ENFORCEMENT OF RIGHT TO WORK OF EX-OFFENDERS IN PAKISTAN AND FOREIGN COUNTRIES**

## **CHAPTER-08**

### **COMPARISON OF ROLE OF COURTS IN FOREIGN JURISDICTIONS WITH PAKISTAN ON THE ISSUE OF DISCRIMINATION AGAINST EX-OFFENDERS.**

#### **8.1 INTRODUCTION**

The study in this chapter has focused on the international perspectives of providing adjudicatory body to ensure, secure and guarantee the effective enjoyment of human rights within jurisdiction of states. The main emphasis of this study is on the obligation of Pakistan as state member of International Convention on Economic, Social and Cultural Rights to provide protection to right to work of a person. The study highlights the main clauses of the convention which deal with the establishment of independent unbiased forum for redressal of grievance of human rights due to violation committed by state and the guiding principles to court for elimination of discriminatory practices effecting right of employment of a person. The study discusses the role of courts in Pakistan in the international perspective and the cases decided by the courts which have long lasting effect over jurisprudence of Pakistan while dealing with right of ex-convict to contest an election .Moreover, the study discusses the role of courts with respect to protecting statutes banning employment of ex-offenders, without striking down their incompatibility with the fundamental rights guaranteed under the Constitution of Pakistan. The study also highlights the decisions of courts in foreign jurisdictions like USA and U.K and the approach adopted for interpretation of statutes favourable to employers and ex-offenders at the same time.

## 8.2 INTERNATIONAL PERSPECTIVE

Life is meaningless if individuals cannot enjoy their human rights. These rights lost their value if no legal system is there to play an active role for their protection.

Human rights are essential component of international law. At international level, plethora of human rights treaties, declarations and conventions have been framed to provide guidance to member state parties to bring their domestic laws in conformity with international law in order to ensure, secure and guarantee the effective enjoyment of human rights within their jurisdiction. The state obligations are incorporated in international instruments and recognized in international jurisprudence have now attained the status of an obligation under customary international law.

Right to work falls within the ambit of International Covenant on Economic, Social and Cultural Rights, therefore, the present study focuses on the steps need to be taken by the states for fulfillment of international obligation for protection of rights mentioned in the convention.

International Covenant on Economic, Social and Cultural Rights (ICESCR) have divided the state duties into (i) duties of immediate effect (ii) duties require progressive realization or gradual implementation. Article 2(1) of the ICESCR refers to the progressive realization of the rights enshrined in the treaty.<sup>382</sup> The treaty acknowledges, in this sense, that the full realization of the rights recognized within it in many circumstances requires gradual implementation. However it made it clear that not every right enshrined in the covenant requires progressive realization. There are

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<sup>382</sup> ICESCR, Article 2(1): “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present”

some rights which need immediate application. The CESCR has identified some duties as having immediate effect. These include: (i) the duty to take steps or adopt measures directed towards the full realization of the rights contained in the ICESCR; (ii) the prohibition of discrimination.

The state once ratified these ICESCR is under obligation to perform duties of immediate effect. ICESCR article 2(1) incorporates the duty to take steps “by all appropriate means” which certainly include legislative action to incorporate ICESC rights in domestic constitution and provision of judicial remedies.<sup>383</sup> The noncompliance of duties of immediate effect can be assessed by adjudicatory bodies. For example, state legislation which discriminates against people on prohibited grounds such as gender, race, national origin, disability or sexual orientation, constitute violations of immediate effective duties. Similarly, a state inaction to amend such discriminatory legislation within a reasonable time also constitute violations of duties of immediate effect.

The CESCR has classified the different levels of state obligations by stating that every ESC right, as with every human right, includes “(i) duties to respect (ii) duties to protect and (iii) duties to fulfil.” This explanation of state obligations evident in the Maastricht Guidelines on violations of economic, social and cultural Rights.<sup>384</sup> These three duties of states are elaborated hereunder for further understanding the obligation of state with respect to protection of these rights:-

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<sup>383</sup> CESCR General Comment N° 3, The nature of States parties’ obligations (Fifth session, 1990), U.N. Doc. E/1991/23, paras. 3, 4, 5 and 7.

<sup>384</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Guideline 6.

### **(i) Duties To Respect**

Duties to respect demands that state be abstained from interfering in the enjoyment of human rights. The state in order to prevent intervention, it need to take proactive measures as for instance to stop state agent to take certain action which violate of human rights or to provide remedy to victim if the duty of state is breached. Here the court intervention is significant as it ensure compliance with duties to respect ESC rights, both by way of preventive or restorative or compensatory measure. The role of courts can be illustrated from a case titled SERAC and CESR v. Nigeria in the Social and Economic Rights Action/Center for Economic and Social Rights v. Nigeria (SERAC and CESR) case, the African Commission on Human and Peoples' Rights endorsed the notion of duties to respect the enjoyment of ESC rights. The Commission stated: "The obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action".<sup>385</sup>

### **(ii) Duties To Protect**

The state under this duty is required to abstain third party from unduly interfering in the right-holder's enjoyment of a particular freedom or entitlement. Stress is laid down on the state action that is required to prevent intervention of third party. The state can achieve this objective by following ways:-

- (i) State regulation of private party conduct;
- (ii) inspection and monitoring of compliance; and

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<sup>385</sup> See African Commission on Human and Peoples' Rights, SERAC and CESR v. Nigeria, Communication N° 155/96, October 13-27, 2001

(iii) Administrative and judicial sanctions enforced against non-compliant third parties, such as employers, landlords, providers of health care or educational services, potentially pollutant industries or private food and water suppliers.<sup>386</sup>

Judicial intervention in the form of preventive, restorative or compensatory is necessary required to ensure compliance with duties to protect ESC rights. A person who challenged action of a third party which violated his fundamental rights essentials to spend a decent life. Her the court intervention is required to protect rights involved in it. However for effective enforcement of ESC, the judicial intervention is essential along with other state measures such as enactment of laws and regulations. Usually availability of basic ESC rights like right to work depend upon market forces dominating the process of decision making. This creates hurdle for state in fulfillment of its duty to protect these rights. States who have not legislated any law for protection of right to work of ex-offenders are under international obligation to formulate laws which provide guidelines to employers for employment of ex-offenders. This legislation helps to protect multiple rights of employers and employees. Similarly there is a need that state should take affective measures to analyze employment laws which have discriminatory impact on employment of ex-offenders otherwise existence of such laws amounts to infringement of duty to protect ESC rights under the Covenant.

### **(iii) Duties To Fulfill**

State has an obligation under the ‘duties to fulfil’ to facilitate and provide access to right. This is particularly important when a person has limited access to a right such as the case of ex-offenders they have limited access to right to work. In this situation

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<sup>386</sup> Maastricht Guidelines, Guideline 15(d).

state has to act as a proactive agent and strive to bring about access to a range of ESC rights. Therefore, stress is laid down on state action directed at:

- (i) highlighting problematic situations;
- (ii) providing relief; and
- (iii) forming such conditions which would enable right-holders to have access to the provisions protected by rights.

It is the state obligation to ensure enjoyment of ESC rights by removing hurdles in its way. It also entails enforcement of such actions which could change discriminatory social and cultural patterns which adversely affect vulnerable groups.

### **8.2.1 Right to Remedy**

The availability of justiciability (access to adjudicatory body) right is considered an important instrument in enforcement of human rights. Justiciability refers to right of a person to approach independent and impartial adjudicating body when violation of his rights occurred or likely to be occurred. Legal remedy is available in two forms firstly by providing a procedural remedy i.e. establishment of courts or tribunal for redressal of grievance and provision of adequate compensation to the victim.<sup>387</sup>

When violation of human rights is challenged then availability of legal remedies is particularly of significance. This is the reason that many human rights treaties expressly provide for a right to an access to justice in case of violations of human rights.<sup>388</sup> The effective enforcement of all human rights is ensured through provision of

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<sup>387</sup> International Commission of Jurists, “ Courts and Legal Enforcement of Economic, Social and Cultural Rights” Comparative experience of Justiciability, Geneva 2008

<sup>388</sup> See, for example, International Covenant on Civil and Political Rights, Article 2(3); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 13;

right to remedy.<sup>389</sup> The UN Committee on Economic, Social and Cultural Rights (CESCR) reflects this notion in its General Comment (GC) No 9: “But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place”.<sup>390</sup>

UN Treaty Bodies ‘the Human Rights Committee’ has held that in Case of Gross Human Rights Violations remedy could be assured by the judiciary. Further administrative mechanisms should be there specifically for investigation of allegations of violations. The Committee normally insist on provision of judicial remedies in

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International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; International Convention for the Protection of All Persons from Enforced Disappearance, Articles 12, 20 and 24; Universal Declaration of Human Rights, Article 8; United Nations Principles Relating to the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions, Principles 4 and 16; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principles 4-7; Vienna Declaration and Program of Action, Article 27; Program of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Articles 13, 160-162 and 165; Declaration on Human Rights Defenders, Article 9; European Convention on Human Rights and Fundamental Freedoms (ECHR), Article 13; Charter of Fundamental Rights of the European Union, Article 47; American Convention on Human Rights, Article 25; American Declaration of the Rights and Duties of Man, Article XVIII; Inter-American Convention on Forced Disappearance of Persons, Article III(1); Inter-American Convention to Prevent and Punish Torture, Article 8(1); African Charter on Human and Peoples’ Rights, Article 7(1)(a); and Arab Charter on Human Rights, Article 9.

<sup>389</sup> See, for example, the Report of the UN Special Representative of the Secretary-General on Human Rights Defenders, A/56/341, September 10, 2001, para. 9; Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2002/83, January 31, 2002, para. 116. The Human Rights Committee has underlined in its General Comment (GC) N° 29 on derogations during a state of emergency that the right to a remedy constitutes “a treaty obligation inherent in the Covenant as a whole” and that even in times of emergency, “the State party must comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective”. See HRC, General Comment N° 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 14.

<sup>390</sup> CESCR, General Comment N° 9, The domestic application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para. 2.

individual cases, where serious violation of covenant is observed. In the case of F. Birindwa ci Bithashwiwa and E. Tshisekedi wa Mulumba the committee observed that it is the state obligation to provide the applicants with an effective remedy as envisaged under article 2 (3) of the Covenant, and to ensure that particularly they can effectively challenge these violations before a court of law.<sup>391</sup>

### **8.2.2 Non-Discrimination and Equal Protection Of Law**

The courts are often approached by individuals on the basis of claim of discrimination or unlawful or unreasonable restriction placed by law which create interference in the enjoyment of their economic, social and cultural rights. ICESCR had made prohibition of discrimination of immediate effect.<sup>392</sup> Other international human rights instruments also stress upon this feature, as for instance article 26 of the ICCPR ensures that equal protection principle should be envisaged in any piece of legislation enacted by the state irrespective of its substantive content, including laws regulating ESC rights. Every Constitution in the world incorporates provisions of non-discrimination and equal treatment.

#### **‘Suspect Categories’**

An essential part of the present development of anti-discriminatory law is the intensified scrutiny made of such legislations and administrative practices which have disparate impact on certain group of people which resulted in denial of restriction of rights. It is not allowed that specific criteria be used to make distinction which adversely affect a particular set of persons who remained disadvantageous in the past

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<sup>391</sup> Case F. Birindwa ci Bithashwiwa and E. Tshisekedi WA Mulumba v Zaire, Views of 29 November 1989, CCPR/C/37/D/241/1987, para 14.

<sup>392</sup> Limburg Principles, Principles 13, 22 and 35-41; Maastricht Guidelines, Guidelines 11, 12 and 14(a).

or continue to be so. Therefore this behavior is considered “highly suspect”, therefore it is not easily authorized to be justified. It is thus a presumption that state can only allow justification for legal differentiation based on ‘suspect categories’ if there is pressing need to do so. There is a dire need to point out towards other social groups who face differential treatment and requires intensified scrutiny by law as for instance ex-offenders are easily discriminated on the basis of their criminal record at the time of employment and thus they fall in ‘suspect category’ whose rights are easily interfered with by employers.

### **8.3 RIGHT TO REMEDY UNDER LEGAL REGIME OF PAKISTAN**

Pakistan in compliance with international obligation under ICESCR has tailored its Constitution, 1973 and provided to its citizens right of justiciability (right to access to courts) both in term of access to adjudicating bodies as well as grant of remedies. The Constitution has also incorporated provisions in Chapter II principles known as ‘Principles of Policy’ which is compatible with requirement of ICESCR. They recognize duty of state to take steps of immediate effect for protection of human rights. Article 29 of the Constitution of Pakistan placed a responsibility on each organ and authority of the state or any person performing functions on behalf of organ or authority of the state, to act in accordance with the Principles of Policy. Article 30 of the Constitution of Pakistan made it responsibility of the organ or authority or state or any person acting on behalf of organ or authority of the state to decide whether the action is in accordance with the Principles of Policy or not. The judiciary is assigned very important role namely to warrant that none of the organs and functionaries of state are working in contravention of any provision of the Constitution or of any other law. Because, of this nature of responsibility the Constitution guarantee independence of

judiciary. The independence of judiciary can be manifested within the Constitution by providing judicial framework to ensure the same. In this regard article 175 of the Constitution of Pakistan is relevant which provides that “there shall be a Supreme Court of Pakistan, a High Court for each province and such other courts as may be established by law”, Whereas clause (2) lays down that “No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.”

The ‘right to access to Justice’ is a fundamental right. Independence which is not possible to be enforced in the absence of independence of judiciary. Thus the same can only be achieved by providing impartial, fair and just adjudicator framework.

Supreme Court of Pakistan in *Baz Muhammad Kakar vs. Federation of Pakistan* case held that “The Courts are obliged to exercise their powers and jurisdiction to secure the rights of the citizens against arbitrary violations”. <sup>393</sup>

High Court has ample jurisdiction to enforce fundamental rights not against both public authorities as well as private parties. High court enforces rights provided inter alia by articles 11 & 22 of the Constitution against private parties which might in most cases require enforcement against such parties. <sup>394</sup>

Article 199<sup>395</sup> of the Constitution of Pakistan provides jurisdiction of the High Courts of the country to issue five different writs in order to protect fundamental rights of any person.

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<sup>393</sup> *Baz Muhammad Kakar Vs. Federation of Pakistan* PLD 2012 SC 923

<sup>394</sup> PLD 2009 S.C 507

<sup>395</sup> Article 199: Jurisdiction of High Court

1. Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law-

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- a. on the application of any aggrieved party, make an order-
  - i. directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or
  - ii. declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or
- b. on the application of any person, make an order-
  - i. directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or
  - ii. requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or
- c. on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II.

- 2. Subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged.
- 3. An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.

- 4. Where-
  - a. an application is made to a High Court for an order under paragraph (a) or paragraph (c) of clause (1), and
  - b. the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to public interest or State property or of impeding the assessment or collection of public revenues, the Court shall not make an interim order unless the prescribed law officer has been given notice of the application and he or any person authorized by him in that behalf has had an opportunity of being heard and the Court, for reasons to be recorded in writing, is satisfied that the interim order-
    - i. would not have such effect as aforesaid; or
    - ii. would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction.
- 4A. An interim order made by a High Court on an application made to it to question the validity or legal effect of any order made, proceeding taken or act done by any authority or person, which has been made, taken or done or purports to have been made, taken or done under any law which is specified

Similarly Supreme Court of Pakistan has analogues jurisdiction under article 184(3) of the Constitution which reads:-

*“On the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of trial court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part-II”.*<sup>396</sup>

Similarly, there are district courts in each district of a province including Islamabad which are under supervision and control of their respective high courts. These courts are trial courts for purpose of civil and criminal cases. They have preliminary jurisdiction to entertain any suit or criminal case. Any aggrieved person can approach these forums under substantive laws.

The study contends that the international obligation of Pakistan does not completely fulfilled by just creating adjudicatory forums rather these forums need to be affordable and in access of individuals. Moreover the courts should be means of redressal of grievance. Moreover, it is international obligation of Pakistan to take steps of immediate nature which can ensure that courts are there, for enforcement of rights of urgent nature, such as right to work under ICESCR. The prohibition of discrimination, the prohibition of forced Labour, the right to fair remuneration, and the

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in Part I of the First Schedule or relates to, or is connected with, State property or assessment or collection of public revenues shall cease to have effect on the expiration of a period of six months following the day on which it is made:

Provided that the matter shall be finally decided by the High Court within six months from the date on which the interim order is made.

<sup>396</sup> PLD 2009 S.C 507

right to enjoy conditions of work compatible with human dignity and duties of immediate effect.

Employment discrimination against ex-offenders is visible in employment policies of government and its other organ similarly it is freely practiced by private employers. However the government has not framed any law to prohibit such discrimination therefore ex-offenders have to take assistance of the courts for enforcement of their right to work. Therefore they have to approach high courts in writ jurisdiction, which is complex remedy to avail, for the reasons that the jurisdiction of high court is based on violation of a legal right. A right should be recognized by law, but since so far no legal right of ex-offenders available in statutes or recognized by law in Pakistan, therefore, it is difficult to ex-offenders to challenge the state policies that it is in violation of their fundamental rights before High Courts.

Similarly, ex-offenders can approach to the Supreme Court of Pakistan under Article 184, however to invoke this jurisdiction they have to establish their claims that it falls within the ambit of “question of public importance.” A requirement imposed by Article 184<sup>397</sup> of Constitution of Pakistan to invoke its jurisdiction. Here the language of legal provision of Constitution itself create hindrance in the process of access to highest forum of court thus violates fundamental right “access to justice”

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<sup>397</sup> 184. Original Jurisdiction of Supreme Court.

- (1) The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments.  
Explanation.—In this clause, "Governments" means the Federal Government and the Provincial Governments.
- (2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only.
- (3) Without prejudice to the provisions of Article 199, the Supreme Court shall consider that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved have the power to make an order of the nature mentioned in the said Article.

Ex-offender besides approaching constitutional courts of country has remedy to approach district court to enforce his right of work which is less expensive than to approach constitutional courts in term of litigation cost. However, regardless of availability of all tier of courts to the ex-offenders to enforce their fundamental right to be treated equally in term of status and opportunity, there are following difficulties in way of ex-offenders for availing their remedy through courts of law.

1. Ex- offenders can enforce their right of employment through district courts, but in absence of clear law which prohibits discrimination against ex-offenders, they have to face many legal issues which they find it difficult to answer, as for instance, if an ex-offender files any suit for declaration<sup>398</sup> of his right to get employment. He has to establish his right through assistance of some laws which declare his right and in absence of such laws, ex-offender finds it difficult to enforce his right particularly when the Constitution of Pakistan has not provided any protection against discrimination to ex-offenders in clear words.
2. The cost of litigation is too high that ex-offenders who are already facing financial problems for being unemployed find it difficult to approach the courts for enforcement of their rights and bear expenses of litigation.
3. The courts are overburdened with the pendency of large number of cases, therefore, ex-offenders find it difficult to put their cases on priority for early decision of their cases.
4. Employer has an edge over the ex-offenders as he is financially capable to hire services of competent and renowned lawyers therefore the ex-offender find it

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<sup>398</sup> Section 42 of Specific Relief Act, 1877

difficult to engage a lawyer of same stature in order to fight for his rights in the court against employer therefore he is afraid to loss his case in court of law. Hence, despite of availability of right to remedy in the legal system of Pakistan, it deprives ex-offenders from their right of “access to justice”. It added to their frustration when they found that courts are not favorable place to approach for redressal of their grievances.

#### **8.4 ROLE OF COURTS FOR EFFECTIVE ENFORCEMENT OF NON-DISCRIMINATORY PROVISIONS IN PAKISTAN**

The courts in Pakistan recently were not proactive to protect the provisions of non-discrimination in their recent judgments. The courts while invoking jurisdiction of article 62 and 63 of the Constitution of Pakistan had disqualified members of legislative assemblies on the basis of their conviction for contempt of court. Thus it validated the consequence of provision of article 63 of the Constitution which create disparity among candidates to contest for seats of legislative assembly. This provision has impact of indirect discrimination which is otherwise contrary to nondiscriminatory provisions of Constitution of Pakistan. This can be illustrated by a case decided by the Lahore High Court, Pakistan where it had set aside order of returning officer of Election Tribunal who declared a candidates convicted and sentences to 14 years rigorous imprisonment and fine, to be qualified to contest election.<sup>399</sup>

In recent era the courts have used these articles for disqualifying members of parliament while including the previous conviction in the definition of righteous. Though, no clear definition had emerged in Pakistan jurisprudence to provide real

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<sup>399</sup> PLD 2008 Lahore 421

authoritative definition of “righteous”. The fresh attempt to interpret “righteous was made in case of Muhammad Yousaf<sup>400</sup> where the election appellate tribunal instead to have recourse to jurisprudential approach had quoted the definition of righteous from concise oxford dictionary as:-

*“Someone who is morally right, just, upright virtuous, law abiding”*

By using this generic definition the court declared convicts in criminal case are not law abiding and thus do not fulfill the standard of article 62(i)(f) of the Constitution of Pakistan.<sup>401</sup> For reference article 62(i) (f) is reproduced hereunder:-

“62. (1) a person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless—  
(f) he is sagacious, righteous, non-profligate, honest and amen, there being no declaration to the contrary by a court of law; and”

Similarly, the superior courts have disqualified the members of legislative assembly under article 63(i) (g) when they received sentence on the proceeding of contempt of court. Notable example is disqualification of Mr. Yousaf Raza Gillani, then Prime Minister of Pakistan for not adhering to the order of the August Supreme Court of Pakistan passed in its decision in case of Dr. Mubashar Hasan<sup>402</sup>. Where he was sentenced till rising of court and consequently being convicted of law he had to face the consequences of Article 63(g) of the Constitution and was removed from his office and banned to contest the election for five years.

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<sup>400</sup> Muhammad Yousaf vs. Irshad Sipra1988 CLC 2475, 2489

<sup>401</sup> Ibid Muhammad Yousaf case

<sup>402</sup> PLD 2010 Supreme Court page 265

Similarly Mr. Nawaz Sharif had also faced disqualification for failing to declare his assets<sup>403</sup> and then Danyal Aziz a former federal minister was convicted of contempt of court till rising of the court that rendered the minister to be disqualified from holding public office for five years.<sup>404</sup> Further on similar ground Talal<sup>405</sup> Chaudhry was sentenced for contempt of court under section 3 & 5 of contempt of court ordinance 2003 till the rising of the court and fined of Rs. 100,000/- and thus was also disqualified from contesting election for five years under Article 63(1)(g) of Constitution.<sup>406</sup>

Article 63(1) (g) of the Constitution of Pakistan prescribes period of disentitlement to contest election as a consequence of the punishment, while disqualification under Article 62 (1) (f) was declared by Supreme Court of Pakistan to be for life time <sup>407</sup>which is contrary to the concept that “a person had paid his debt to the society after serving of punishment.”

The question arises that whether imposition of ban from contesting election for period of five years on the ground mentioned in article 63(1) (g) will wash out the stigma of criminal act committed by him and whether after the passage of said period he becomes “righteous”, sagacious and law abiding “citizen”. In fact, the ban contained in Article 63(i) (g) is tantamount again to punish them for their offence, as he received extended punishment than the court handed over to him and thus contradict the principle of double jeopardy enshrined in Article 13 of the Constitution of Pakistan which provides protection against double punishment.

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<sup>403</sup> Supreme Court verdict dated 28-07-2017 in Const. Ps. No. 29-30/2016 & 03/2017 available at [http://www.supremecourt.gov.pk/web/user\\_files/File/Const.P. 29\\_2016\\_28072016.pdf](http://www.supremecourt.gov.pk/web/user_files/File/Const.P. 29_2016_28072016.pdf) last visited on 03-08-2019

<sup>404</sup> PLD 2018 Supreme Court 738

<sup>405</sup> PLD 2018 Supreme Court 773.

<sup>406</sup> PLD 2018 Supreme Court 773

<sup>407</sup> Sami Ullah Baloch and others Vs Abdul Karim Nousherwani and others PLD 2018 Supreme Court page 405.

Similarly, Article 63(i) (h) of the Constitution deals with the breach of right and duty due to commission of offence and it had given limitation that a person is disqualified for five years to contest election if he receives punishment of two years imprisonment for an offence involving moral turpitude.

The Supreme Court of Pakistan has interpreted conviction of a person as disqualification in different aspect. On one hand it acknowledged the challenges which ex-convict faces while entering in the society since he has to handle many daunting challenges for his rehabilitation and therefore, it looked at the disqualification provided under Article 63(1) (h) of the Constitution for a limited period of five years after his release from jail, as a relief by the Constitution rather than disqualify him for longer period. The Supreme Court has given the following reason for short of limited period for disqualification.

*“Even so, with limited period of his disqualification as an ex-convict for offence involving moral turpitude, he still carries the odium of his past conviction before the voters in his constituency, whose hearts and mind find dignity and acceptance for himself in society. The notable efforts by the constitution to allow him an opportunity to reform himself and to strive for such a position in society cannot be deprecated for providing him relief rather than longer disenfranchisement.”<sup>408</sup>*

While on the other hand Supreme Court recent pronouncement on disqualification of members of parliament on the basis of conviction had endorsed theory of deterrence in punishment. The court in Dadullah case<sup>409</sup> had expressed its

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<sup>408</sup> PLD 2018 Supreme Court 405

<sup>409</sup> Dadullah Vs State 2015 SCMR 856

view on concept of punishment awarded to an accused in a criminal case in the following terms:-

*“Conceptually punishment to an accused is awarded on the concept of retribution deterrence or reformation. The purpose behind infliction of sentence is twofold, firstly, it would create such atmosphere which could become a deterrence for the people who have inclination towards crime and secondly to work as a medium in reforming the offence. Deterrent punishment is not only to maintain balance with gravity of wrong done by a person but also to make an example for others as a preventive measures for reformation of the society.”*

On the same hand the Supreme Court has also acknowledge that a person who undergone a sentence has paid his debt to society. It is held in Sami Ullah Baloch case as under:<sup>410</sup>

*“Retributive justice entail several serious consequences apart from deprivation of personal liberty of the convict, such a convict in fact suffer a loss of life by bearing immobilized, endures, loss of his livelihood, watches disruption and hurt to his family and lives with the lasting stigma of conviction in his reputation. It is therefore, said that a convict, who has undergone a sentence of corporal punishment has paid his debt to society.”*

Subsequently, the Supreme Court of Pakistan in its latest judgment has shifted it approach to consider a convict person has paid his debt to society to a new approach where it extended the effect of conviction of a person and had held it a reason behind his disqualification from legislative assembly. The Supreme Court instead to interpret article 63(1) h of Constitution of Pakistan on touch stone of standards of

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<sup>410</sup> Sami Ullah Baloch and others Vs Abdul Karim Nousherwani and others PLD 2018 SC 405

‘reasonableness’, ‘proportionality’, ‘adequacy’, ‘appropriateness’ or ‘progression’ and define the offences which fall within the ambit of “ offences of moral turpitude” and to consider the time elapsed since the sentence is served to be a mitigating factors for imposition of ban of article 63 (1)(h) rather re-enforced the impact of this provision which is in contradiction to human rights of non -discrimination and equality.

There is another anomaly that exist in the restrictive provisions of Constitution of Pakistan to contest election i.e. that it disqualifies a person on the basis of conviction on offence of moral turpitude, but it neither define the term moral turpitude nor enlist offences which constitute offence of moral turpitude.

Thus, disqualification on basis of moral turpitude is a difficult value to be defined. Since morality perception differs from person to person and society to society. In our society Islam is seen as code to set morality in society. The qualification relating to Islamic way of life and Islamic teaching and practice are not applicable to Non-Muslim candidates, though they are required to have good moral reputation<sup>411</sup>. The phrase’ Moral Turpitude’ has different expressions therefore the court of different countries have diversely interpreted it. The general definition of the phrase and judicial interpretation of same is given hereunder to have better understanding of issue:-

“*Moral turpitude*” can be defined as an act of barenness, vileness as the depravity in private and social duties which owes to his fellow man or to society in general, contrary to accepted and customary role of right and duty between man and man<sup>412</sup>.

According to Webster dictionary meaning

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<sup>411</sup> Yasmen Aftab Ali “Morality and society” Pakistan Times issue September, 22. 2014

<sup>412</sup> Black’s law dictionary 1891-1991, P1008

*“It is an act or behavior that gravely violates moral sentiment or accepted moral standards of community”<sup>413</sup>*

Words and phrases legally define moral turpitude as

*“Fined every little meriting applicant’s claim that admitted offences of issuing false cheques and being operator of worthless cheques are not crime of moral turpitude”<sup>414</sup>*

The word “*moral turpitude*” has been defined in Remnatha Aiyer’s Law Lexicon phrase:-

*“Anything done contrary to justice, honest principle or good morals: an act of baseness, vileness of depravity in private and social duties which man owes to his fellow or to society in general, contrary to accepted and customary rule of right and duty between man and man”<sup>415</sup>.*

Moral Turpitude further defined in Law Lexicon of British India that:-

*“It is not clear what constitute moral turpitude or what will be held such. It can be or contract to promote public wrong, short of crime may or may not involve in it. However, if a person conspires and involved to breach public interest and thus violates law and public policy, then this act could fall in moral turpitude.”<sup>416</sup>*

An elaborated concept of moral turpitude was found in decision by District Court for District of Nebraska of USA as

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<sup>413</sup> Merriam-Webster Law Dictionary available at <https://www.merriam-webster.com/legal/moral%20turpitude> last visited on 22-01-2020

<sup>414</sup> Saunders “words and phrases legally defined” Vol-III, 2<sup>nd</sup> Edn, page 294 It has been observed under heading “Moral turpitude” by court in Canada”

<sup>415</sup> State V Adkin-40 ohio App 2d 473, 320 NE 2d 308, 3211, 690. O 2d 416- Mian Muhibullah Kakakhel, “ Excellent legal words and phrase” Vol II, (1996) P3366, 3367

<sup>416</sup> P. Ramanth Lyer, Law Lexicon of British India ( Madras Law Journal Office, 1940)Page 832 referred in Thiru C.V. Jayaraman Vs unknown W.P.Nos.8599 and 8600 of 2007

*“A term of frequent occurrence in statutes, especially those providing that a witness convicted of a crime involved moral turpitude can be shown to impeach his credibility. In general it means neither more nor less than a turpitude i.e. anything done against justice, honesty, modesty or good moral. It is also defined as an act of bareness vileness or depravity in private and social duties which man owes to his fellowman or society in general contrary to accepted and customary rule of rights on duty between man and man.”*<sup>417</sup>

Moral Turpitude is a vague term which implies that something immoral in itself regardless whether it is punishable by law or not. Thus excluding unintentional wrong or an improper act done without unlawful or improper intent. For if the term ‘moral turpitude’ includes unintentional wrong then it comes out of the scope of criminal administration of justice which criminalizes an act if element of actus rues (an action a person takes to perform a criminal act) and mens rea (The intention or knowledge of wrong doing) coincide. Hence, if an act is lacking requisite mens rea then it can only be considered a morally wrongful act. The Supreme Court of Pakistan has explained the difference between acts which can be wrongful but it is not an offence in famous case titled Mansur-ul-Haque v. Government of Pakistan<sup>418</sup> a case of a Chief of the Naval Staff allegedly misusing his authority in the matter of purchase of some naval ships. While acquitting the accused person this court held as under: “The mere procedural irregularities in the transaction, would not be sufficient to constitute an offence under section 9(a) (VI) of the ibid Ordinance. This is essential to draw distinction between procedural irregularities and violation of substantial provisions of law to determine the question of criminal liability in the transaction. The procedural irregularities may bring

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<sup>417</sup> Bartos Vs United States District court, District Nebraska C.C.A Neb 19 F, 2d 722, 724

<sup>418</sup> Mansur-ul-Haque v. Government of Pakistan (PLD 2008 SC 166)

an act done in the official capacity within the ambit of misconduct which is distinguishable from criminal misconduct or an act which may not constitute an offence. Therefore unless it is established through the evidence that an act or series of acts done in the transaction constituted an offence, the criminal charge would be groundless”

Similarly, The Supreme Court of Pakistan has termed a misuse of authority is no offence under National Accountability Ordinance, 1999 if is committed without criminal intent for reference the relevant para of judgment can be referred herein “The offence of corruption and corrupt practices within the meanings of section 9(a)(vi) of the Ordinance, is not an offence of strict liability, therefore, the use of authority without the object of illegal gain or pecuniary benefit or undue favour to any other person with some ulterior motive, may not be a deliberate act to constitute an offence. The mens rea for an offence under section 9(a) (vi) of the Ordinance, is found in two elements i.e. conscious misuse of authority and illegal gain or undue benefit and in absence of anyone of these basic components of crime, the misuse of authority is not culpable, therefore, the prosecution must establish mens rea and actus reus of the crime to establish the charge, as without proof of these elements of crime, mere misuse of authority, has no penal consequence.”<sup>419</sup>

The Lahore High Court has further elaborated in case of Anwar Saifullah<sup>420</sup> that a person who misused his authority without any mens rea or actus reus can be accused of mistake of civil law. i.e. ignorance of rules. But a mistake of civil law negates mens rea of civil wrong.

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<sup>419</sup> The State and others v. M. Idrees Ghauri and others (2008 SCMR 1118)

<sup>420</sup> M. Anwar Saifullah Khan v. State (PLD 2002 Lahore 458)

The study contends that in light of these court judgments it can easily be concluded that acts sometimes appear to be in violation of law and committed with intent to disregard the law, but deep analysis of facts revealed that they are civil wrongs which have no penal consequences. Therefore what constitute an act of moral turpitude whether it is a civil wrong or a criminal offence is not clear yet?

#### **8.4.1 Pakistan's Courts Interpretation of Term (Moral Turpitude)**

Supreme Court of Pakistan in its renowned judgment about an authoritative pronouncement about effect of provision of article 62(1)(f) of the Constitution of Islamic Republic of Pakistan, has declared it of perpetual effect and further declared that the expression “moral turpitude” is not a defined expression in our codified law. The expression “moral turpitude” has been examined in authoritative legal commentaries and precedents and made reliance on the definition provided in words and phrases, permanent Edition 27-A, which provides the following meaning to the said expression.

*“Moral turpitude” is a vague term and its meaning depends to some extent on the state of public morals it is anything that is done contrary to justice, honesty, principle or good morals an act of bareness, vileness or depravity in the private and social duties which a man owes to his fellows man, or to society in general contrary to the accepted and contrary rule of right and duty between man and man it implies something immoral in itself, regardless of fact whether it is punishable by law”<sup>421</sup>.*

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<sup>421</sup> This definition was considered by Supreme Court of Pakistan in Ghulam Hussain vs Chairman POF Board (2002 SCMR 1691)

The Supreme Court of Pakistan had relied on the above definition and elaborated the concept further as under:-

*“Perusal of the meaning of above expression clearly indicates that anything which is done contrary to the good principles of morality is within the circuit of above expression. In fact any act which runs contrary to justice, honesty, good moral values, and established judicial norms of a society falls within the scope of above expression”<sup>422</sup>*

The Court then made the conclusion in following terms:-

*“It is clear that offences of moral turpitude would include delinquent conduct involving inter alia misrepresentation, fraud, breach of trust or fiduciary duty, dishonesty, misappropriation, forgery, cheating, conflict of interest etc.”*

But this conclusion is vague in nature since in criminal law facts of case differ from case to case, therefore, law of precedents cannot be applied in strict sense. Secondly the criminal code<sup>423</sup> has not provided exhausted list of offences and only provided the expression of offences which entail the effect of breach of trust, fraud, fiduciary, relationship, misrepresentation.

The articles of Constitution<sup>424</sup> banning a person from contesting an election or holding any public office requires a court pronouncement to declare a person convicted of an offence which falls within the category of “moral turpitude”, however, it is observed that the courts while pronouncing judgment of conviction do not describe the offence nature and whether the same falls within the definition of moral turpitude. It is worthwhile to mention here that the general law i.e. Pakistan Penal Code does not

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<sup>422</sup> Ibid Ghulam Hussain case 2002 SCMR 1691

<sup>423</sup> Code of Criminal Procedure, 1898

<sup>424</sup> Article 62 and 63 of Constitution of Pakistan, 1973

provide any definition of offence of moral turpitude and even does not enlist any offence as of moral turpitude. The code<sup>425</sup> under chapter XIV has provided offences affecting morals such as sale of obscene books<sup>426</sup> and sale of obscene objects to young personal<sup>427</sup> and obscene acts and songs<sup>428</sup>. These offences could remotely be attributed as the one of moral turpitude as referred in article 63(1) (h) of the Constitution. Hence, depriving a convicted person to contest election merely for committing offence which was not even adjudicated upon by the court as of moral turpitude amount to punishing him twice on vague term and hence affecting his right to life and reputation in the society and tantamount of snatching of his political right to contest election.

#### **8.4.2 Scrutiny of Statutes by Courts For Enforcement Of Right To Work**

Statutes, case laws and jurisprudential concepts play vital role in interpretation and clarification of the content and scope of rights. There is no concept of unqualified and unrestricted rights and absolute and uncontrolled liberty. It is imperative for any organized society that it uphold collective interests of the society and to maintain public order of the state therefore it place reasonable restrictions on exercise of such rights and liberties. The Constitution of Pakistan provides fundamental rights but they are subject to overriding effect of necessity or interest of community. A balance has to be maintained between these rights of individuals and the interest of community. To carry out these obligations, judges have developed tests to scrutinize neutrality of law to keep balance between individual and community interest. Courts usually assess the course of action undertaken by the legislature on touchstone of legal standard such as ‘reasonableness’, ‘proportionality’, ‘adequacy’, ‘appropriateness’ or ‘progression’.

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<sup>425</sup> Pakistan Penal Code(PPC), 1860, chapter XIV

<sup>426</sup> Section 292 PPC

<sup>427</sup> offence u/s 293 PPC

<sup>428</sup> Section 294 PPC

Courts job is to determine that an individual person's right has been satisfied. They need not to supplant legislature in designing the most appropriate public policies to satisfy a right. Albeit courts examine effectiveness of measures chosen to fulfil that right.<sup>429</sup> A reasonable restriction on right of an individual can be imposed in public interest. A reasonable restriction can be adjudged if it is imposed with due regard to the public requirement. However anything which is arbitrary or excessive will be outside the bound of reasonableness. For that purpose, courts need to consider in parallel disadvantage of restriction on right of individual and what society can derive advantage of it. If a statute place a restriction upon particular individuals then courts should clearly determine the public need and whether it is reasonable to place restriction on individual, in sense that it has no excessive bearing on individuals.<sup>430</sup>

The Constitution of Pakistan <sup>431</sup> imposed limitation upon the action of government both federal and provincial which is essential for preservation of private and public rights. The Supreme Court of Pakistan has enunciated a principle of law that enforcement of limitation on actions of state functionaries by process of judicial scrutiny is the devise of self -governing communities. Judicial scrutiny is a mechanism by which rights of individuals and communities are protected from arbitrary acts of public agents, who transcending the limits of their lawful authority even when they are acting on the name of government.

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<sup>429</sup> International Commission of Jurists, " Courts and Legal Enforcement of Economic, Social and Cultural Rights" Comparative experience of Justiciability, Geneva 2008

<sup>430</sup> PLD 2007 Supreme Court 642

<sup>431</sup> Article 8 of the constitution of Pakistan , 1973

However, in spite of availability of tool of scrutiny to the judiciary, Pakistan has legislated laws such as <sup>432</sup> National Tariff Commission Act, <sup>433</sup>The Competition Commission Act, 2010 which place ban on the convicted person to enter in their employment. Similarly Pakistan Legal Practitioners and Bar Council Act of 1973, does not grant a license to practice law if he is previously convicted.<sup>434</sup>These statutes do not explain what public interest they will serve by placing ban on the jobs of convicted persons. These statutes are creating discrimination and depriving ex-offenders of equal opportunities to work and thus they are in clear contradiction to fundamental rights guaranteed in Constitution of Pakistan, 1973.

The provisions in these statutes have placed a blanket restriction on all offenders to apply for the posts without limiting the scope of restriction to nature of offence and its relevance with duties to be performed in jobs. These organizations may have some posts which deals in finance matters of these organization or any other post which have substantially bearing on working and performance of these organization, here the restriction to employ ex-offender on such posts can be justified. But where the posts involve petty nature of jobs such as tea boy or sanitary worker or security guard, then placing restriction on employment of ex-offenders on such posts is unjustified and create discrimination against ex-offenders. The organizations have completely eliminated their opportunities to get work there.

These organizations cannot be allowed to have flavor of discrimination against ex-offenders in violation of fundamental rights of ex-offenders. These Organizations at the time of job postings need to identify the fields, where ex-offenders cannot be

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<sup>432</sup> The National Accountability Bureau Ordinance, 1999.

<sup>433</sup> National Tariff Commission Act, 2015

<sup>434</sup> Section 11 which deals with the disqualification to be a member of Pakistan bar council under The Legal and Practitioners and Bar Councils Act, No xxxv of 1973

employed and to clarify that these restrictions is specific and cannot be considered as generalized for other posts of organizations. For that purpose the statutes of these organizations need to be revisited and harmonized with the provisions of non-discriminatory articles of Constitution of Pakistan.

One may argue that applicants can find work in any other organization or company and thus it cannot be construed that their right to work was violated. But the study contends that it is not the case, blocking of jobs in such like organizations is equivalent to interfere in opportunities to work of applicants. This can be explained simply in sense that these jobs can be very relevant and essential for them. It may be the case that the position offered by the company could provide the applicant a unique experience which cannot be availed in any other corporation.

The statute further does not define the term moral turpitude and it also does not refer to any other statute for definition of moral turpitude. Therefore, it does not furnish clear and explicit basis of exclusion of ex-offenders from jobs of these organizations. Thus these statutes do not explain the reason or purpose of these restriction on ex-offenders and what interest they intend to safeguard. Therefore substantial responsibility is on the courts to enforce human right to work of ex-offenders in order to enable them to enjoy equality of opportunities with rest of applicants.

There is another legislation in Pakistan i.e. National Accountability Ordinance which is a special law meant to eradicate corruption and corrupt practices and to hold accountable all persons involved in such practices and matters ancillary thereto. The ordinance provides instances of corrupt practices<sup>435</sup>. Further it provides the punishment

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<sup>435</sup> Section 9 of NAB Ordinance 1999

for corruption and corrupt practices<sup>436</sup>. The study argues that this Ordinance is eminent example of statute having direct discriminatory effect on convicted persons as it contemplates consequences of conviction which disqualify a convicted person to hold public office if held by him and stand further disqualify for a period of ten years to be reckoned from the date of his serving sentence to be elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or any province. <sup>437</sup>

The study further explains that NAB Ordinance within itself create discrimination among the set of accused persons as it does not disqualify accused to hold public office or to contest an election if he has availed benefit of plea bar gain before any investigation or inquired is initiated against him. while on the other hand if the accused availed the benefit of plea bargain after commencement of trial then under section 15 of ibid Ordinance he cease to hold the public office and contest election. <sup>438</sup>

This Ordinance by providing consequential effects to convictions as such negated the theories of punishment i.e. deterrence prevention and reformative, retributive and expiation. Though these theories have different purpose to serve but they agreed on one ultimate result that convicted persons have paid their debt to society. But collateral consequences of conviction mentioned in NAB Ordinance entail conviction follows a person after he had completed his conviction under the NAB Ordinance. This Ordinance had introduced two types of sentences one which a person received from a court of law and served in jail and the other outside the jail in the form of consequences of conviction.

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<sup>436</sup> Section 10 of NAB Ordinance 1999

<sup>437</sup> Section 15 of NAB Ordinance 1999

<sup>438</sup> Section 25 of National Accountability Bureau Ordinance, 1999

The study explores that the law itself ensures that the stigma of conviction should follow a person after completion of his sentence and creates hurdle in the reentry of a convicted person in the society by placing ban on his employment or to hold any public office or contest election. Resultantly a convicted person under this law lag behind the rest segment of society for the period of ban as he cannot acquire any job related experience. Further when the ban period is completed there are chances that the convict person has spent considerable part of his age in the ban period and reach in advance age which disqualify him otherwise to apply for any job. Thus it allowed society to completely shut its door on the convicted person.

Further, whether the spent period of ban provided under the Ordinance can transform a person into a righteous and sagacious. Law has only prescribed period of ban on convicted person to hold public office or employ but it has not given him relieve that after the period of incarceration his criminal record will be sealed or expunged and he is no more required to disclose it after specified period of disqualification provided in the statute. The National Accountability Ordinance does not specify the period when the stigma of ex-offender is completely washed out.

The NAB Ordinance provisions banning ex-offenders from entering or holding any public office is not only in contradiction to the fundamental rights provided under articles 25 and 27 of the Constitution, but also contrary to the legal maxim “where there is legal wrong, there is a remedy”. A person committed an offence which is a legal wrong and the legal remedy was achieved by inflicting punishment in accordance with law. Furthermore, extending the consequence of punishment under the NAB Ordinance negates the theory of proportionality of sentence and lead to expanding the remedy i.e. reformation of a convict more than a period which is warranted by the law.

Pakistan labour law such as Industrial Relation Act is also discriminatory towards ex-offenders as it prohibits a person convicted of offence under Section 78 or heinous offence under PPC to be elected as an officer of a trade Union<sup>439</sup>.

Pakistan has also restricted entry of ex-offenders in some occupations as for instance Pakistan Legal practitioners and Bar Council Act of 1973 disqualify a person to be a member of Pakistan Bar council if he is previously convicted of moral turpitude<sup>440</sup>. This statute like other banning statutes does not clarify a public purpose it would serve by placing ban on grant of license to ex-offenders to become legal practitioner. This ban is contrary to interest of ex-offenders as it discourage them to pursue their legal education which is even otherwise helpful for them to understand their right and enforce it in courts of law. Further, by adopting profession of law, they can develop positive thinking and understands rights of society and how they can lead their lives within sphere of law.

Thus, these banning statutes are in contradiction to doctrine of limitation which place legal limitation on all organs of state whether executive or legislative to act in violation of fundamental rights. It is clear that these statutes have waived off fundamental right to work of ex-offenders. Thus they have violated the aim and purpose of the Constitution of Pakistan and principles of policy of state. Government under article 29 of the Constitution of Pakistan is bound to formulate a policy for promotion of social and economic wellbeing of the people, which includes provision of opportunity to work. Thus these legislations to the extent of their contradiction with right to work of ex-offenders are liable to be declared void by the courts.

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<sup>439</sup> Section 7 of Industrial Relation Act, 2008.

<sup>440</sup> Section 11 which deals with the disqualification to be a member of Pakistan bar council under The Legal and Practitioners and Bar Councils Act, No xxxv of 1973

The courts while dealing with the cases of refusal of employment to ex-offenders have given liberal interpretation while extending the application of fundamental right to life to provide protection to right to work of ex-offenders. Peshawar High Court while exercising its Writ Jurisdiction in case titled “Inamullah Vs Government of KPK through Chief Secretary and 3 others” has protected right of employment of convicted person while distinguishing his case from the case of citizens disqualified for appointment on superior posts, who are convicted in cases that fall into one of moral turpitude, of scandalizing the judiciary and the Armed Forces, of undermining the ideology and security of Pakistan and other offence of like nature. While conviction of the petitioner under Section 13 of Pakistan Arms Ordinance, 1965 for possessing 12 bore live cartridges ten in number as not of one which fall into category of case of moral turpitude and hence directed to appoint plaintiff to the post of constable forthwith as he was otherwise eligible for appointment . The court has further elaborated the refusal of employment to the petitioner and placing ban for life time on him to enter the government service as offending his most fundamental right to life which was cherished by the Constitution. <sup>441</sup>

This judgment opened up a scope to ex-offenders to challenge the statutes banning employment of ex-offenders as the court has already established the link of their right to work with their right to life and thus it strengthened their legal standing when they claim their right to work from state and seek amendment of such statutes.

Further Pakistan is under international obligation to use appropriate means to achieve legal goal set out internationally for enforcement of human rights. The ICESCR

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<sup>441</sup> Peshawar High Court decided Writ Petition No.480- M/2014 Inamullah Vs Government of KPK and others on 25.06.2015

recognizes different rights in its general clauses such as articles 2(1) and 4 and particular one. It set goal to be achieved by the states and bound them to take appropriate steps consistent with these goals. It further elaborates that any restriction imposed on these rights should be compatible with the purpose of promoting the general welfare in a democratic society. Lack of action on part of state in enforcement of right and modification of discriminatory laws and practices to enforce rights, or to eradicate discriminatory legislation or practices within a reasonable time, also constitute violations of duties of immediate effect. Pakistan in compliance with international obligation need to remove such legislations which are discriminatory in nature to ex-offenders to the extent of their inconsistency with human right to work, which is protected under human right instruments and to save itself from stigma of non-compliance with international duties.

The courts in other countries have played an active role for enforcement of nondiscriminatory and equality rights and they strived to create balance between right of employers and persons with criminal records. To achieve this target they have applied different approaches with the passage of time in order to reach at optimal result.

## **8.5 ROLE OF COURTS IN FOREIGN COUNTRIES ON THE ISSUE OF DISCRIMINATION AGAINST EX-OFFENDERS**

The courts in other countries are handling cases of employment discrimination against ex-offenders which are resulted by promulgation of statutes barring employment of ex-offenders in public sector and employers policies in private sectors. The study has focused on the role of courts in USA and U.K in this regard which will help to develop understanding of criteria they have adopted over passage of time to protect rights of employers and ex-offenders while interpreting statute barring

employment of ex-offenders and statute redressing discrimination against employment of ex-offenders.

### **8.5.1 USA Courts In Defining Limits Of Statutory Ban On Employment Of Ex-Offenders.**

USA has formulated no federal law which prohibits discrimination against ex-offenders.<sup>442</sup> The ex-offenders can only get shelter of Title VII to a limited extent as it prohibits discrimination on two basis i.e. disparate treatment and disparate impact if it is established on proscribed grounds such as race, color, sex, national, origin and religion.<sup>443</sup>

Ex-offenders in many states face discrimination which is mandated by law. Most of these laws were influences with the wave of policy ‘tough on crime’ which resulted in legislation of such laws which restrict the ability of ex-offenders to seek public employment.<sup>444</sup> However with the passage of time now all fifty states have relaxed these restriction in public employment. Some states narrowly apply these restriction to felony of certain types of crime or it allows restoration of right to get public employment after passage of certain time. There are six states which require existence of relationship between the character of criminal conduct and the job sought. While seven states have blanket ban on employment of ex-offenders.<sup>445</sup>

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<sup>442</sup> Dallan F. Flake, “When Any Sentence is a Life Sentence: Employment Discrimination against Ex-Offenders”, *Washington University Law Review* Vol 93: issue 1 (2015), page 48.

<sup>443</sup> U. S. Code, Title 42, Section 2000e- Unlawful employment practices; also see U.S Equal Employment Opportunity Commission (EEOC) Guidance.

<sup>444</sup> David C. Thompson, “ Navigating the hidden obstacles to Ex-offender Reentry”, *Boston College Law Review* Vol 45 : issue No2, (2004), p255, 280

<sup>445</sup> The seven states are Alabama, Arkansas, Indiana, Iowa, Nevada, Ohio, and South Carolina.

In the private sector, occupational licensing restrictions place de facto bars over ex-offenders in many instances. Occupation such as attorneys, accountants, general contractors, barbers, and gas station operators are subject to licensing requirements which ensure uniformity of service and regulatory control over qualifications and occupational entry in the modern workforce bar entry of ex-offenders in these occupations.<sup>446</sup> Federal, state and municipal laws routinely exclude ex-offenders from these regulated occupations either directly or by requirement of “good moral character”. The condition of “good moral character” is creating more serious problems for ex-offenders as it is vague in nature and hence it gives employers latitude to define it in the way they want.

These statutory barriers were challenged before the courts on equal protection grounds and developed a jurisprudence which dated back to 1898 when Supreme Court has decided case titled Hawker V New York.<sup>447</sup> The case brought before the court by Hawker who was a physician and ex-convict. He had challenged validity of New York legislation on the Ex-post Facto clause of the Constitution. This clause prevents the state of New York from imposing additional punishment on him by revoking his medical license after he already had served his sentence. The court did not agree with the contention submitted by Hawk and held that the state police power has sufficient authority to impose a character requirement for a physician. The court further held that New York’s licensing rules were based on good public policy because, “it is not, as a rule, the good people who commit crime.”<sup>448</sup>

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<sup>446</sup> Bruce E. May, “The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon’s Employment Opportunities”, *North Dakota Law Review* Vol 71: issue No1, (1995),P 187, 193

<sup>447</sup> 170 U.S 189(1898)

<sup>448</sup> Ibid page 197

However, in another case titled “Schware Vs Board of Bar Examination of New Mexico” the Supreme Court has taken a different stance. It had held that although the state can require standard such as good moral character before it admits an application to the bar “any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.” But then it scrutinized the past history of applicant and held that there was no evidence to rationally justify a finding that applicant was unfit to practice law.<sup>449</sup>

Subsequently, the Supreme Court after three years in De Veau v Braisted upheld the New York statute that prohibits ex-offenders from collecting dues on behalf of waterfront union.<sup>450</sup> This time the court has focused on “the context of the structure and history of the legislation of which it was a part.”<sup>451</sup>

In the same way the Seventh Circuit upheld Illinois law denying ex-felon employment as private investigator or detective which was challenged in case titled Schanuel vs Anderson<sup>452</sup>. The Court noted that “legislature had broad latitude, particularly where matters of social and moral welfare are involved.” And added that “detective agency employees perform the potentially sensitive tasks of guarding persons and property.” The court therefore reached on conclusion that it is unreasonable to suppose that ‘the public trust might be undermined by assigning any such task to ex-offenders”<sup>453</sup>

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<sup>449</sup> Schware Vs Board of Bar Examination of New Mexico 353 U.S.232(1957)

<sup>450</sup> Deveau Vs Braisted 363 U.S 144 (1960)

<sup>451</sup> Ibid De Veau case.

<sup>452</sup> 708 F.2d 316 (7<sup>th</sup> Cir. 1983)

<sup>453</sup> Ibid at 319

It is evident from these decisions that cases which challenged employment restriction were mostly remain unsuccessful. Further the courts have evolved contradictory philosophies to scrutinize statutory restrictions on ex-offenders on same facts of cases. As for instance in Smith V Fussenich<sup>454</sup> which had similar facts as was in case of Schanuel but the court decided it opposite way it held that “ the position of private investigator and security guards.. require little skill and responsibility” and there was no evidence that “criminality was a serious problem” among security guard and private investigators.”

Jordan segall found that inconsistent jurisprudence developed in decision of cases of statutory bans on ex-offenders and left an option to the courts to generate individual conclusion with regard to laws banning employment of ex-offenders on a case to case basis.<sup>455</sup> The court in case of Kadrmas held that the state sanctions on employment of ex-offenders need to be scrutinized on the basis of legitimate government purpose to defeat plea of equal protection on reasonable grounds.<sup>456</sup> But inspite of this low bar, the court seldom strike down a law which ban employment of ex-offenders being irrational. The court have been especially skeptical of knocking down such statutes which exclude ex-offenders from an entire occupation as a class. In this instance Kindem Vs Alameda is relevant to be referred where the court held that a plaintiff's ten years old juvenile felony conviction had “ little bearing on his ability to perform a janitor for the city” and concluded that a generalized distinction between felons and non- felons “is not rationally related to any legitimate state interest.”<sup>457</sup>

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<sup>454</sup> Smith V Fussenich, 440 F.Supp. 1077 (D Conn.1977)

<sup>455</sup> Jordan Segall, “Mass Incarceration, Ex-Felon Discrimination, & Black Labor Market Disadvantage, ” *University of Pennsylvania of Law and Social Change* 14, no.1 (2011) page 158

<sup>456</sup> Kadrmas v. Dickinson Pub. Schs. 487 U.S. 450, 457–58 (1988).

A comprehensive review of state statutes indicate that in 1986 states generally placed less restrictions on civil rights of offenders however in 1980 and 90's when the criminal justice system become more punitive the collateral employment sanctions increased for ex-offenders, however the courts did not play any role for their protection from irrational statutory sanctions. Even today there is no expectation that courts can be effective vehicle for reforms.

The statutory sanctions against ex-offenders affect only public employment and those jobs which are subject to licensing requirement. However, in private sector employers have flavor of discrimination against ex-offenders therefore here the role of court is essential to maintain balance between the rights of ex-offenders as prospective employee and employers. Title VII does not categorically prohibits employers from using criminal record as a basis for hiring decision. For that purpose the courts applied test of "disparate treatment" and "disparate impact" provided in Titled VII.

### **8.5.2 Court Decisions in Cases Filed Under Title VII**

The cases which are brought by ex-offenders under Title VII are either based on disparate treatment or disparate impact where different standards of prove are required to establish these grounds before the courts.

The cases which are filed by ex- offenders under disparate treatment need to be proved that there is a *prima facie* case that : (a) the plaintiff is a member of a protected class (b) the offender is qualified to perform a job (c) he suffers an adverse employment action (d) Adverse action give rise of inference of discrimination.<sup>458</sup> The burden of prove

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<sup>457</sup> Kindem F. Supp 1108 ( N.D Cal.1980)

<sup>458</sup> Young v. Builders Steel Co., 754 F.3d 573, 577 (8th Cir. 2014). This burden-shifting framework does not apply to cases in which a plaintiff has direct evidence of discrimination. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121–22 (1985).

then shifted to employer who need to prove that the adverse action was based on legitimate non-discriminatory reason, after which the burden again shifted to the ex-offender applicant who need to prove that the employer action was based on discrimination. The best evidence available to the ex-offender to prove that the employer discriminated the applicants on the basis of criminal history, for instance the employer had given preference to white applicant with criminal record over black applicant with similar criminal record, while black applicant was more eligible for the job.

The Courts in disparate impact claims carefully scrutinize whether the policy itself is justifiable. The ex-offenders in such claims have to prove that the employer *prima facie* neutral criminal record policy is actually disproportionately has adverse impact on some individuals protected under Title VII.<sup>459</sup> While the employers need to prove that the exclusionary policy is related to business necessity and job need.<sup>460</sup>

The main case which was decided on the disparate impact involving ex offender is “Green v Missouri Pacific Railroad.”<sup>461</sup> In this case Green, a black man who was convicted of twenty one year sentence was refused job by Railroad on clerk position due to his conviction. The Railroad tried to justify its policy of banning job on ex-offenders that it fears theft of cargo, misappropriation of company funds, bonding qualifications, for possible impeachment of employee as witness, liability for negligent hiring, job disruption and an alleged want of moral character of ex-offenders. But the court refused to consider these factors as consideration for wide range policy applicable broadly on all felons.

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<sup>459</sup> Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 576 n.1 (D.C. Cir. 2013) (citing Gen. Bldg. Contractors Ass’n. v. Pennsylvania, 458 U.S. 375, 387–88 (1982)).

<sup>460</sup> Ricci v. DeStefano, 557 U.S. 557, 578–79 (2009).

<sup>461</sup> Green vs Missouri Pacific Railroad Company 523 F.2d 1290 (8th Cir. 1975)

In post remand appeal the Eighth Circuit affirmed the injunction permitted Railroad to use criminal record while taking decision for employment, however it has laid down three factors for Railroad while using the criminal record: The nature and gravity of offence, how much time elapse since the offence or the completion of sentence and the nature of job held or sought.<sup>462</sup>

The Green three factors were used by the courts for decade to analyze whether the criminal record exclusion was job related and consistent with business necessity.<sup>463</sup> in 2007 the Third Circuit court has imposed more strict criteria in case El v Southeastern Pennsylvania Transportation Authority (SEPT) where it refused to accept bald assertion of business necessity without any empirical proof.<sup>464</sup> This El decision has set new grounds for employers to establish their case of business necessity while analyzing the risk both quantitatively and qualitatively.

### **8.5.3 Courts' Decisions In Negligent Hiring Cases**

The negligent hiring case rather than promoting employment of ex-offenders, tend to create hindrance as the court in recent years have imposed heavy fine on companies for hiring employees without carrying background check. Consequently the chances of employment of ex-offenders reduced as compare to non -offender

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<sup>462</sup> Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977).

<sup>463</sup> Waldon v. Cincinnati Pub. Schs., 941 F. Supp. 2d 884, 889–90 (S.D. Ohio 2013) (denying school district's motion to dismiss based on determination that policy banning individuals with certain convictions from employment did not constitute a business necessity as a matter of law because the offenses at issue were remote in time, one of the offenses was "insubstantial," and both plaintiffs had demonstrated "decades of good performance"); Hill v. U.S. 1283, 1301 (S.D.N.Y. 1981) (finding that evidence showed the employer did not consider an applicant's conviction in isolation "but in the context of the [individual's] overall qualifications and employment record"). But see EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 752 (S.D. Fla. 1989) (observing that Green was "ill founded" because it could be "broadly read to bar all employment conviction policies"). Postal Serv., 522 F. Supp.

<sup>464</sup> 479 F.3d 232 (3d Cir. 2007).

applicants because the employer consider the past conduct of applicant is predictor of future misconduct.<sup>465</sup>

The Courts consider different factors for assessing the foreseeability of the tortious conduct of an employee. In most states, foreseeability depends on the extent and nature of an employee's criminal history and "the nexus . . . between the prior acts and the ultimate harm caused."<sup>466</sup> But the courts are not consistent in their view some time they held the employer liable where the employee had no previous criminal record and in other cases they hold that the criminal record does not indicate identical role played in negligent act. Therefore the court's decisions give little guidance to the employers how to avoid negligent hiring claims.<sup>467</sup>

## **8.6 COURTS' ROLE IN INTERPRETING ANTI DISCRIMINATORY STATUTES**

The courts have played an effective role where statutes addressing employment discrimination against ex-offender. These statutes have laid down test in order to determine that whether employers' decision to refuse employment to a person with criminal record is just. For instance Hawaii statute was enacted to protect persons with conviction records by increasing their right to privacy and opportunities for employment. The law only authorizes employers to inquire about criminal record if it has rational relationship to job. The courts has applied the same test of "rational

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<sup>465</sup> Dallan F. Flake, "When Any Sentence is a Life Sentence: Employment Discrimination against Ex-Offenders", *Washington University Law Review*, Vol 93, issue 1 (2015), 48.

<sup>466</sup> Stacy A. Hickox, "Employer Liability for Negligent Hiring of Ex-Offenders", *Saint Louis University Law Journal* Vol 55, (2011), P 1001, 1007–08 (2011) (quoting *Doe v. ATC, Inc.*, 624 S.E.2d 447, 450 (S.C. Ct. App. 2005).

<sup>467</sup> *Ibid*, Stacy, "Employer Liability for Negligent Hiring of Ex-Offenders" p 1008

relationship in case titled Wright Vs Home Depot U.S.A Inc.<sup>468</sup> Where Wright was previously convicted of using controlled substance methamphetamine. He received a suspended sentence and two years of probation. Wright was hired by the Home depot in Maui in April 2001. He passed drug test prior to employment. Wright did not disclose about his previous conviction in his employment form and Home Depot did not check his criminal history. After two years of Wright induction in employment he applied for promotion to the post of Supervisor. Home Depot had carried out a background investigation, where they found that he was convicted over used of control substance drug. Wright was terminated on two accounts (i) previous criminal conviction (ii) use of drug in violation of company policy. Wright challenged the action of company in his suit. He contended that his termination was wrongful and discriminatory. It was also in violation of state statute which declares all such action unlawful which are discriminatory against individuals with criminal record. He further argued that his conviction over use of control substance did not bear any rational relationship to the duties of his jobs he held. He further argued that to allow Home depot action will turn the protection granted by statute against discrimination “meaningless”. While Home Depot pleaded for dismissal of suit filed by Wright and defended their action that the conviction received by Wright bore a rational relationship to his employment, they also pleaded ground of safety of customers and other employees and that it was detrimental for their goodwill and repute. The state circuit court accepted defense of Home Depot and dismissed the suit filed by Wright. It had held that there was a rational relationship between conviction and job held by Wright.

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<sup>468</sup> Wright v. Home Depot U.S.A., Inc., 142 P.3d 265 (Haw. 2006)

The Supreme Court of Hawaii reviewed the appellate court view de novo in light of facts mentioned in the plaint filed by Wright and interpreted the statute and its legislative intent in accordance with the language of statute. Section 328 -2.5 contemplate the ability of employers to consider an individual' criminal conviction in the context of "hiring, termination, or the terms and conditions or privileges of employment.....provided the record bears a rational relationship to the duties and responsibilities of the position". The court held that employers can look at criminal conviction at times other than at hiring. The court remanded the case and granted opportunity to Wright to prove his claim that his conviction has no rational relationship with the duties of his job. The court further observed that although the statute does not define "rational relationship" however the ordinary meaning of the term would be used. The Court has held that statutory language allowed employers to take into consideration employees' criminal conviction record prior to employment if the conviction occurred within ten years. Thus the court has given an interpretation in favour of employer to use criminal conviction record of employee. Further Hawaii's rational relationship standard is not difficult to employers to meet and the standard to determine rationalist is very low therefore adverse action of employers can easily be upheld by courts unless clearly irrational.

Similarly, Wisconsin had legislated a comprehensive statute which is applicable to public employment, private employers, labour organization employment agencies and license granting bodies. It placed bar over use of arrest or conviction record as basis of discrimination against ex-offender.<sup>469</sup> However, this protection is not available to

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<sup>469</sup> WIS. STAT. § 111.321 (2003) ("Subject to ss. 111.33 to 111.36, no employer . . . may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of . . . arrest record, [or] conviction record . . .").

employees or prospective employees whose criminal conviction substantially related to the circumstances of a particular job.<sup>470</sup>

The court of appeal has relied on this test while adjudicating a case titled In Wal-Mart Stores, Inc. v. Labor & Industry Review Commission,<sup>471</sup> Facts of the case are that an employee was charged but not convicted for possessing one thousand gram of marijuana on her property at the time she was hired at Wal-Mart. When Wal-Mart heard of this charge it had suspended the employee and subsequently upon her conviction, she was terminated from the job retroactive to the date of her suspension. The only issue before the court to resolve was whether the arrest and conviction were “substantially related to the circumstances” of her job. The court upheld that there was no substantial relationship. The court agreed with the reasoning of the Labor and Industry Review Commission “LIRC” and stated that “To find a substantial relationship in this case would be to conclude that individuals with drug-related arrests or conviction records can be legally barred from employment in virtually any industry, warehouse, or agricultural setting . . . .” Wal-Mart argued that forcing the company to employ an a person who pled guilty and convicted for possession of drug run counter to its “zero-tolerance” drug policy. However, the court repelled the argument while holding that Wisconsin Act did not prohibit dismissal of an employee if he found in violation of an employer’s drug use policies during the period of employment. Further the argument is

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<sup>470</sup> WIS. STAT. § 111.335(1)(b)–(c) (2003) (“Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ . . . or to suspend from employment . . . , any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job . . . . Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ . . . .

<sup>471</sup> No. 97–2690, 1998 WL 286332 (Wis. Ct. App. June 4, 1998).

irrelevant since, there was no evidence of drug use by the employee during the period of employment.

In this case, the court has granted relief to ex-offenders while interpreting the statute in liberal way that it would not infringe right of employment of ex-offenders, where employers failed to establish substantial relationship between the conviction and nature of job. It is further to state that the employer company case was not rest on “business necessity” therefore no scope was left to court except to apply test of “substantial relationship” to decide the case.

In another case titled Milwaukee Board of School Directors v. Labor & Industry Review Commission<sup>472</sup> wherein, Mark Moore was involved in an argument with his girlfriend, during which he threw a pan of hot grease over her, it missed her but it hit her twenty-month-old daughter, causing injury that required extensive surgery and skin grafts. Mark Moore was convicted of “injury by conduct regardless of life.” Subsequently he got employment in Milwaukee Public Schools Moore as a Boiler Room Attendant Trainee. He did not disclose about his conviction in his application form. Later one, the school discovered during his term of employment that he was convicted. It had terminated his service for failure to disclose about his conviction. Moore after eight years of his conviction again applied for the position of Boiler Room Attendant. This time he disclosed about his conviction. But his application was rejected by the school while considering the violent nature of offence and the fact that the victim of the offense was a small child, the nature of the position for which he applied, and the nature of school business i.e. public education. The Wisconsin Court of Appeals upheld the determination of the LIRC that the school board unlawfully discriminated against

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<sup>472</sup> No. 00-1956, 2001 WL 641791 (Wis. Ct. App. June 12, 2001).

Moore. It further held that his conviction did not substantially relate to the position of Boiler Room Attendant. The court observed that the nature of job for which Moore applied would have intermittent contact with children, therefore in such circumstances, there would be no foster criminal conduct on his part.

The court had taken into consideration the period elapsed since the incident occurred. The court was also mindful of circumstances in which the offence is committed by Moore that it was unintentional reaction in that spur of moment without any element of intention or earlier preparation. The Wisconsin statute mandates a balancing of interests: rehabilitation on one side and protecting citizens (including children) on the other. Therefore, it is for the court to maintain the balance while analyzing the risk that the person with the criminal conviction poses in a particular job to the risk that he would be likely to pose without that job.

The state of Pennsylvania's has formulated a Criminal History Record Information Act, which authorizes employers to consider a person's "criminal history record information," to the extent to determine his suitability for a particular post in question.<sup>473</sup> However, employers may not consider a prior arrest in making the hiring decision.<sup>474</sup>

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<sup>473</sup> 18 PA. CONS. STAT. ANN. § 9125 (West 2000) ("(a) . . . Whenever an employer is in receipt of information which is part of an employment applicant's criminal history record information file, it may use that information for the purpose of deciding whether or not to hire the applicant, only in accordance with this section. (b) . . . Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied. (c) . . . The employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or in part on criminal history record information.").

<sup>474</sup> See *id.* § 9124(b) (1) (stating that "records of arrest if there is no conviction" may not be considered by state licensing agencies in determining eligibility for a license, certificate, registration, or permit); *Foxworth v. Pa. State Police*, 402 F. Supp. 2d 523, 545 n.21 (E.D. Pa. 2005) (under section 9125, employers may consider only a prior conviction and not a prior arrest."); *Pokalsky v. Se. Pa. Transp. Auth.*, No. Civ. 02-323, 2002 WL 1998175, at \*5 (E.D. Pa. Aug. 28, 2002) ("[I]t is well established that employers may consider only a prior conviction and not a prior arrest."); *Tilson v. Sch. Dist. of Phila.*, Civ. A. No. 89-1923, 1990 WL 98932, at \*4 (E.D. Pa. July 13, 1990) ("Pennsylvania law now permits consideration of job-related convictions only. Employers were formerly allowed to

The protection provided under this statute is not applicable if a person voluntarily provide information about his conviction in his application form. This principle was upheld by the court in case titled *Fox worth v. Pennsylvania State Police*. *Fox worth* had disclosed information about a theft he committed when he was eighteen years old, though his criminal record was expunged under program for first time offenders but still he was denied job by Pennsylvania state police. The court while upholding the action of Pennsylvania State police had held that *Fox worth* was not entitled to relief because the adverse employment action was based on the underlying criminal conduct, and not on his criminal record *per se*.<sup>475</sup> The court decision indicate that if *Fox worth* was not honest to disclose about his criminal record, he would have got the job. Such interpretation of statute by the court has sent a perverse message to those whom society seeks to rehabilitate.

The statute did not take the period lapse since conviction and application for job in order to extend protection to applicant with criminal record. The protection provided under this statute is only to the extent of hiring stage it is not applicable to ongoing adverse action taken during employment. Therefore limited number of cases decided under the Pennsylvania law.<sup>476</sup>

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consider arrest records of prospective employees, but the word ‘arrest’ was removed by statutory amendment in 1979 . . . .”) (Citations omitted); cf. 18 PA. CONS. STAT. ANN. § 9121(b)(2) (West 2000) (“Before a . . . police department disseminates criminal history record information to an individual or noncriminal justice agency, it shall extract from the record all notations of arrests . . . where: (i) three years have elapsed from the date of arrest; (ii) no conviction has occurred; and (iii) no proceedings are pending seeking a conviction.”).

<sup>475</sup> *Foxworth v. Pa. State Police*, No. Civ. A. 03CV6795, 2005 WL 3470601, at \*2 (E.D. Pa. Dec. 19, 2005)

<sup>476</sup> Christine Neylon O’ Brien & Jonathan J. Darrow, “adverse employment consequences triggered by criminal conviction: recent cases interpret states statutes prohibiting discrimination”, *Wake Forest Law Review*, Vol 42 (2007),p 33

New York enacted legislation which, like Pennsylvania's, protects applicants only at the time of hire.<sup>477</sup> The statute contemplate that no application for employment shall be denied on the basis of individual having criminal record, unless there is a direct relationship between the previous criminal offence and specific employment sought.

In *City of New York v. New York City Civil Service Commission*, the Appellate Division declined to reverse a reinstatement order of an employee as a watershed. The court held that by merely a person had been convicted of attempted robbery and sexual abuse, and two misdemeanor convictions for criminal possession of a weapon and theft of transportation services does not disentitle a person to hold a job unless there is a direct relationship between the offences committed by him and job he holds. The court while referring to the reference letters which were submitted on behalf of employee are attesting to his work ability and that he is a responsible and hardworking employee" and that a period of his employment had been "without disciplinary problems." The court further observed that the work was to be performed under supervision and did not involve dealing with the public, therefore multiple felony and misdemeanor convictions did not directly relate to the employment.

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<sup>477</sup> NEW YORK. CORRECT. LAW § 752 (McKinney 2003) (amended in 2007) ("No application for . . . employment . . . shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of 'good moral character' when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific . . . employment sought or held by the individual; or (2) . . . the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."). Note, however, that New York courts have discussed Section 752 in the context of other adverse employment decisions, such as failure to promote. E.g. *Alston v. City of New York*, 703 N.Y.S.2d 186, 187 (App. Div. 2000) (noting in dicta that the plaintiff's "mail fraud conviction, which involved [plaintiff's] submission of false car service vouchers in connection with his employment as a caseworker, raises legitimate issues about his fitness for the supervisory position [in human resources administration]").

## 8.7 LEGAL FRAMEWORK AND ROLE OF COURTS FOR PROVIDING PROTECTION TO EX-OFFENDERS IN U.K

UK has signed the European Convention on Human Rights (ECHR) in 1951. U.K Government in 1965 gave UK citizens a right to approach the European Court of Human Rights for enforcement of their rights under the ECHR.<sup>478</sup> Subsequently, Human Rights Act 1998 has made ECHR part of UK domestic law. The domestic courts therefore can adjudicate on matters brought by UK citizens on breaches of human rights. The domestic courts can make declaration of invalidity of any Act of Parliament if it infringes the ECHR.<sup>479</sup> This piece of legislation remained enforced until it is amended by the parliament. The U.K domestic courts have exercised this power consciously while protecting right to work of ex-offenders while analyzing compatibility of the Police Act, 1997<sup>480</sup> and the Rehabilitation of Offenders Act, 1974 (ROA)<sup>481</sup> with ECHR.

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<sup>478</sup> Professor Suzanne Rab, Serle Court “Legal systems in the UK (England and Wales): overview” available at [https://uk.practicallaw.thomsonreuters.com/5-6362498?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/5-6362498?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) last visited 12-01-2020

<sup>479</sup> Section 4 of U.K The Human Rights Act, 1998

<sup>480</sup> U.K parliament has enacted the Police Act 1997 which introduces a legislative frame work for the disclosure of criminal records to meet a rising demand for the release of such information for employment and other purposes. Part V of the 1997 Act provided for the issue of three types of certificates. Section 112 dealt with the issue of a criminal conviction certificate. This is a certificate which gives prescribed details of every conviction of the applicant which is recorded on central records, or states that there is no such conviction. Section 113 dealt with the issue of a criminal record certificate. This is a certificate which gives the prescribed details of every conviction within the meaning of the Rehabilitation of Offenders Act 1974 and a caution, or states that there is no such matter. A certificate of this kind may only be issued where the application is countersigned by a registered person and is accompanied by a statement of that person that the information is required for a question in relation to which section 4(2) (a) or (b) of the Rehabilitation of Offenders Act 1974 has been excluded by an order of the Secretary of State. Section 115 deals with the issuance of an enhanced criminal record certificate.<sup>480</sup>

<sup>481</sup> The other major legislation which deals with the offenders is the Rehabilitation of Offenders Act, 1974 (ROA). The ROA provides a scheme whereby criminal convictions, cautions, warnings and reprimands in respect of certain offences are deemed to be "spent" after specified periods of time. Thereafter, the person convicted or cautioned in respect of such offences should be treated as if he

The courts in England had decided law suits where the claimant challenged the provisions of the Police Act 1997 ("the 1997 Act"), the Rehabilitation of Offenders Act 1974 ("the ROA") and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 ("the ROA Order"), which was made pursuant to the ROA, that they are incompatible with Article 8 of the European Convention on Human Rights ("the ECHR"). Article 8 is therefore reproduced hereunder as reference:

Article 8(1) of the ECHR and interference with right to private life

- "1. Everyone has the right to respect for his private and family life, his home and correspondence.
- 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The courts while protection right of employment of ex-offenders have held that the disclosure about previous conviction of the applicant tantamount to interference in his private life. In R (L) Lord Hope in his judgment at paras 24 to 27 had given a useful summary of the jurisprudence. He stated that there are two separate basis on which the disclosure of information about past convictions or cautions can constitute an interference with the right to respect for private life under article 8(1). First, the disclosure of personal information that individuals wish to keep to themselves can constitute an interference. In one sense, criminal conviction information is public by virtue of the simple fact that convictions and sentences are announced in public. But as the conviction recedes into the past, it becomes part of the individual's private life. By

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had never committed the offence in question and need not make reference to the conviction or caution in answering any question which might otherwise require its disclosure.

contrast, a caution takes place in private, so that the administering of a caution is part of an individual's private life from the outset. Secondly, the disclosure of historic information about convictions or cautions can lead to a person's exclusion from employment, and can therefore adversely affect his or her ability to develop relations with others: this too involves an interference with the right to respect for private life. Excluding a person from employment in his chosen field is liable to affect his ability to develop relationships with others, and affect his possibility of earning a living can have serious repercussions on the enjoyment of his private life.<sup>482</sup>

The court in *X v Iceland*<sup>483</sup> and *Niemietz v Germany*<sup>484</sup> held that excluding a person from employment in her chosen field is liable to affect her ability to develop relationships with others, and the problems that this creates clog as regards the possibility of earning a living has serious repercussions on the enjoyment of her private life.

In *Sidabras v Lithuania*<sup>485</sup> the court held that she is entitled to have her good name and reputation protected. Similarly in *Turek v Slovakia*<sup>486</sup> the court held that the fact that a person has been excluded from employment is likely to get about and, if it does, the stigma will be considerable.

In *MM v United Kingdom*<sup>487</sup> (Application No 24029/07), 29 April 2013. The applicant had disclosed about a caution received by her for child abduction in 2000 in

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<sup>482</sup> *R (L) (Fc) V Commissioner of Police of the Metropolis*, 2009 UKSC 3.

<sup>483</sup> *X v Iceland* (1976) 5 DR 86

<sup>484</sup> *Niemietz v Germany* (1992) 16 EHRR 97, para 29

<sup>485</sup> *Sidabras v Lithuania* (2004) 42 EHRR 104, para 48

<sup>486</sup> *Turek v Slovakia* (2006) 44 EHRR 861, para 109

<sup>487</sup> *MM v United Kingdom* (Application No 24029/07), 29 April 2013

her two applications for jobs involving care work, which resulted for her failure to be selected for the said jobs. She had accepted the caution on an assurance that it would be deleted from police records after five years, which was the practice at the time. But the practice subsequently changed. She tried in the years 2006 and 2007 to have the caution deleted, but remained unsuccessful. She was not aggrieved about the past disclosures, but about the retention of the caution on police files, which exposed her to the risk of disclosure in future whenever she applied for a job requiring a criminal record certificate. The court held that “the collective effect of these shortcomings is that the court is not satisfied that there are enough safeguards in the system for retention and disclosure of criminal record data to ensure that data relating to the applicant’s private life have not been, and will not be, disclosed in violation of her right to respect for her private life. The retention and disclosure of the applicant’s caution data accordingly cannot be regarded as being in accordance with the law.”

Lord Neuberger suggested in *R (L) v Comr of Police of the Metropolis (Secretary of State for the Home Department intervening)*<sup>488</sup> that in the majority of cases the disclosure of any criminal record would be “something close to a killer blow”

In *R (AR) v Chief Constable of Greater Manchester Police* 489 the court held that registered bodies may lose their registration if they fail to carry out their function to enforce the code of practice on employers. The Code of Practice requires employers to have a written policy which can be available to candidates on request, concerning the suitability of ex-offenders, to notify candidates of the potential impact of a criminal

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<sup>488</sup> in *R (L) v Comr of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2010] 1 AC 410

<sup>489</sup> in *R (AR) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079

record and to discuss with candidates the content of any disclosure before withdrawing an offer of employment.

The courts in U.K have protected ex-offenders against criminal record discrimination by stating that it amounts to interference in his private life. The court further held that conviction after passage of sometime becomes a private part of an individual life. Therefore in many cases they protected ex-offenders from arbitrary record check by employers on pretext that it affects ex-offenders right to have good name and reputation. This is novel jurisprudence where the ex-offenders can get assistance to overcome menace of “good conduct” requirement stipulated in many statutes and recruitment policies of employers.

## **8.8 CONCLUSION**

To conclude many jurisdictions have enacted various legislations to provide maximum solution to issue of employment discrimination against ex-offender's keeping in view their socio -economic conditions. However, employers while exercising their right to employ persons of their choice sometimes infringe anti discriminatory statutes therefore, in many statutes standard of proof is provided to enable courts to determine that whether the action of employers are justified and does not have discriminatory impact on ex-offenders. The study further argues that the role of courts is important in order to bring coherent application of laws which can protect the rights of ex-offenders as well as employers.

## CHAPTER 09

### CONCLUSION

#### 9.1 FINDINGS OF THESIS

The thesis argues that all human rights instruments lay stress that every person is entitled to all rights and freedom without any distinction. However, with the passage of time the availability of human rights to all persons become difficult if existing laws are not amended or new laws are not legislated to cater new situations. Therefore, this thesis reached on conclusion that problem of employment of ex-offenders in Pakistan has emerged due to inefficacy of existing laws to protect their right to work. Chapter 01 is introductory which encompasses aim and objective of study alongside research questions and methods used to conduct research. While keeping in view the above requirements the thesis has reached on following findings: Chapter 2 has woven the right to work with threads of discrimination and equality. As these two parallel concepts are essential to analyze availability of right to work to any person. Equality is a positive duty which means all persons to be treated equally and law cannot treat them differently. While discrimination relates to specific group of persons in society who need protection of their rights, therefore, it is a negative duty. The international instruments have recognized both these concepts for protection of human rights and emphasized on non-discriminatory principles which means prevention of any action which denies to individuals or groups of people the equality of treatment. However, the chapter has highlighted lacuna in implementation of these non-discriminatory clauses, since there is no international convention which provides conclusive definition of discrimination to cover all grounds of discrimination. It also stressed that these international instruments provide justification for discrimination, on the ground of

“inherent requirement” mentioned in ILO Convention 111. Further the courts have justified discrimination while holding that the non-discrimination principle was only violated if the distinction had no “reasonable and objective justification”. Therefore the study argues that in this way a discretion is given to states to formulate policy and defend its rationality in order to justify their discriminatory actions. The study has also explained that there are legislations, which provide exclusive grounds for prohibition of discrimination, while other legislations, do not enlist grounds and only prohibit discrimination. The study argues that the later type of legislation is effective as new grounds for discrimination can be added in it. However the study suggests that ex-offenders can also seek protection of their rights under principles of natural justice. Employers under this principle are required to provide them opportunity of hearing before refusing their application forms. The next chapter 3 is interrelated to first chapter as it shows the importance of right to work; as one of the economic and social rights in international law, enlisted in Articles of UDHR, ICESCR and ILO. This right as social economic right is also incorporated as a fundamental right in Constitution of Pakistan. The chapter details different theories which explain nature of right to work i.e. theory of will and theory of interest. The study explains that interest theory states that the right to work is designed to benefit not a specific person but all people who are involved with work. Mainly subsistence and self- realization are the principal interests which need to be protected in relation to right to work, therefore, this theory is more relevant to explain right to work for the present study. The study explains that courts have recognized the nexus of right to work with right to life, therefore, it lays stress on its protection. The study further shed some lights on The Holy Quranic terminology of *al-adl* and *al- qist* for Justice which means giving every person his due right and argues that discriminatory act of employers is against injunction of Islam, as it denied to ex-

offenders their due right to work. Thus it creates hindrance in exercise of right to life by ex-offenders and to establish a social justice in a society. The chapter also explains that ex-offenders had already received their punishments from court of law, therefore, as per assurance of institution of punishment, the offenders should not be subjected to excessive and arbitrary private vengeance rather their punishment under the rule of law should be reasonable, proportionate and consistent in its application. But society continuously inflicting upon them excessive punishment and considers them law violator and thus does not allow them to re-enter in the society. The banning of jobs on ex-offenders is one of such punishment which still exist in statute books and practiced by employers. The study argues that ex-offenders after serving their sentences have acquired a status of a “free men” who had paid his debt back to society, therefore, the society is bound to respect their status, since it has close link with their right to dignity. The courts in Pakistan interpret it as a freedom to shape an individual identity, therefore, a person dignity is infringed if his life, physical or mental welfare is harmed. Thus the study has based its arguments that by snatching right to work of ex-offenders means interference in their right to dignity and to lead a prosperous life according to their own desires. Then the thesis in next chapter 4 further highlighted the consequences of criminal record on life of ex-offenders and argues that offenders are only informed about the direct consequences of their conviction, however, they are neither advised by their counsels nor by courts, that if they plead guilty, what other collateral consequences they have to face. The study concluded that collateral consequences affect the life of ex-offenders and their dependents when they do not find source of subsistence, consequently they started to commit crimes which ultimately adversely affect interest of society and employers. The society has to face recidivism while employers have to bear additional cost of selective labor with clean record and thus affect their

productivity. The study has also argued that Pakistan need to legislate a law to enlist all collateral consequences in a document, notify them to offenders. The government needs to mitigate these consequences under particular circumstances and create forums for grant of relief to ex-offenders. Connected to the finding of previous chapter the study has argued in Chapter 5 that Constitution of Pakistan does not provide absolute right to work, further nondiscriminatory provisions of Constitution enlisted all grounds of discrimination and did not leave any space for inclusion of other grounds for discrimination, which created problems for ex-offenders to claim their rights on grounds of discrimination. They also incapacitated the courts as they cannot go beyond the grounds provided in law. The study has also explained the causes of discrimination and considered the personal characteristics of offenders as one of factors of discrimination besides employers' preferential behavior and state sanctioning laws. This concludes that the sole responsibility cannot be shifted to the employers and state for discriminatory practices, since in some instances the personal characteristic of ex-offenders create obstacles in their entry in employment. Therefore to address this cause of discrimination the study suggested for improvement of correctional measures in Chapter 06 and argued that Pakistan has beneficial laws such as Probation of Offenders Ordinance, 1960 and Probational Parole rules, 1927 which give opportunity to offenders to rehabilitate outside of prison and get chance to enjoy family life right and interact with community. Parole process is particularly of significance as it allows offenders to be employed with approved employers on salary. This process is beneficial for both offenders as they get chance to interact with employers and overcome their fear of rejection and get work skills from work place, while employers get an opportunity to judge a person honesty for purpose of his employment after release. The study explored that there is a need for some improvement in existing law of probation

and parole and stressed on frequent use of these powers by court in order to make these law effective and lessen the population of overcrowded jails. The study further linked the process of analyzing importance of correction measures in Pakistan with parallel best practices adopted by U.K Canada, Singapore and US inside and outside of prisons in chapter 07. It highlighted effectiveness of job centers to find jobs for ex-offenders and thus suggested that Pakistan can work out for establishment of such center which will assist prisoners after release to find suitable job according to their compatibility. Similarly the study argues that The Rehabilitation of Offenders Act 1974 of U.K is an effective legislation since it considers certain offences to be “spent”. The prisoners after the rehabilitation period are considered as they have never committed those offences. This type of legislation convey a positive message to ex-offenders regarding their acceptability in society. The study further explained that Pakistan can legislate new law and in this regard it can take guidance from Human Right Act of Canada, which prohibits both types of discrimination i.e. direct and indirect against persons with criminal record. The Act defined what constitute discriminatory practices and policies that deprive individuals of opportunity of employment. It also restrict such employment application and advertisement which expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination. It also regulates the conduct of employers and organizations with regard to recruitment policies which tend to be discriminatory in effect. The Act has also catered for rights of convicted person's right whose conviction was pardoned by Her Majesty Royal prerogative of mercy as well as court order. Canada has also enacted Employment Equity Act which emphasized that employment equity does not only mean that persons to be treated in the same way, but it also requires adoption of special measures to eliminate distinctions among the persons. Though the law has limited scope but it can be considered as a

stepping stone for providing equity in employment. The study has also encompasses the steps taken by Canada The Ministry of Community Safety and Correction Services which helped offenders after their release to overcome their anger and aggression and run programmes to control their criminal thinking and provide them training to get jobs. Singapore had also taken effective steps and study has highlighted that the programmes are based on provision of family life to offenders in order to inculcate in them positive habits. Similarly US has legislated laws to regulate the recruitment process of employers and set standards for employers to meet in order to defend their actions of refusal of jobs to ex-offenders. The measures of these countries were studies and discussed in order to answer to research question of the present study with regard to effectiveness of role of correction measure to build positive personal characteristic in offenders which could enable them to enter society with positive thinking and increase prospective of their employment. The study argues that ex-offenders once gained confidence through correction measures at prisons can easily utilize their skills in informal sectors. They can also engage in any labour skilled or unskilled. Similarly, they can take jobs which do not require human interaction such as gardening etc. This, enable them to earn for their living and do not left themselves at the mercy of state to legislate laws for their recruitments. Ex-offenders engagement in such like activities would reduce the chances of recidivism and enable ex-offenders to spend a respectable life. Lastly, the study has explained that how Pakistan has recognized the right to remedy and has established a complete tier of court system to safeguard rights of individuals, however ex-offenders who are already financially weak due to unemployment cannot consider court as an appropriate forum to approach for enforcement of their right to work. Further, the courts in Pakistan have stringently interpreted provisions of Article 62 and 63 of the Constitution of Pakistan, 1973 and

deprived ex-offenders to exercise their political right to contest election on vague term of 'Moral Turpitude' which was not defined in laws of Pakistan. However in one case Pakistan has interpreted refusal of job to ex-offenders means to snatch their right to life. This interpretation can be consider a ray of hope for implementation of right of employment of ex-offenders on ground of infringement of right to life before courts in Pakistan. The study has also compared the role of courts in other countries and in this respect decisions of U. S and U.K courts were considered for purpose of analyzing standard sets by them. These decisions of courts indicate that courts have realized the issue of discrimination of ex-offenders and therefore it turned down actions of employers which did not satisfy criteria of business need. The courts have also analyzed actions of employers in light of anti-discriminatory statutes and meticulously examined actions of employers on the standard set within the statute. The courts in U.K has interpreted refusal of right of employment to ex-offenders as violation of their right to life. Thus study has argued that courts in Pakistan can lend ratio of foreign courts judgment while deciding discriminatory cases filed by ex-offenders against employers.

In the light of all these finding it can safely be concluded that all research questions are answered in the foregoing result of chapters. Further, the hypothesis of this thesis is answered in affirmative that the current legal regime of Pakistan is not comprehensive enough to provide equal treatment to all individuals without discrimination and therefore failed to protect right of equal opportunity of employment of ex-offenders. Therefore, the same required to be revisited in order to bring it in conformity with the international standards.

## **9.2 SUGGESTIONS AND RECOMMENDATIONS**

The solution for problem of employability of ex-offenders can be addressed if employers and government take necessary steps, therefore these recommendations suggests steps which are required to be taken by them in order to curb menace of discrimination against ex-offenders. It also recommends for improved role of judiciary.

### **(A) THE STEPS NEED TO BE TAKEN BY EMPLOYERS ARE:-**

1. Employers should develop sensible and fair recruitment policies which do not unreasonably discriminate against ex-offenders. Employers should make qualifications, skill and experience the basis for the recruitment. For that purpose employers should set up an enterprise policy which provide clear procedures on non-discrimination and equal opportunities; and communicate it both internally and externally. They also need to provide training to recruitment managers in order to raise their awareness about nondiscriminatory recruitment practices.
2. It is recommended that employers should adopt logical internal policies with regard to treatment of evidence of record of conviction and arrest before employment and during employment. In this regard, assistance can be sought from the revised policy given by San Francisco Civil Service<sup>490</sup> which requires that due consideration to be given to seven factors when reviewing an applicant's criminal history (i) the nature and gravity of the offense, (2) the degree to which the conviction is related to the position, (3) the time elapsed

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490 City & County of San Francisco, Department Of Human Resources, available at <https://sfdhr.org/information-about-hiring-process>

since conviction, (4) the age of the applicant at the time of the conviction, (5) the frequency of convictions, (6) evidence of rehabilitation and (7) any other mitigating circumstances.

3. Ex-offenders after release from prison feel low esteemed and rejected therefore in order to restore their confidence it would be appropriate to encourage companies to provide these ex-offenders transitional job as probationers so they can acquire relevant job skill instead of mere training obtained at vocational centers of jail. The government in order to encourage employers to offer job to individuals with criminal record, should provide them incentive and rebate in taxes. This step would open many avenues for the ex-offenders' employment.
4. The discrimination against ex-offenders starts from the question regarding previous conviction at the application form. The answer to such question draw a line between convicts and non-convicts individuals and lead to preferential attitude of employers, therefore, it is proposed that question with regard to previous criminal record to be deferred to later stage. Furthermore question regarding past conviction should be modified in such a way that it covers the nature of offence and the period lag between conviction and time for application for that post. This would enable employers to decide whether ex-convicts employment is harmful or beneficial to the interests of the stakeholders.
5. Pakistan like many countries need to device a policy guideline for public and private employment on the format of policy of banning a box which disallow employers to ask questions at the initiate stage regarding previous conviction, however, employers at subsequent stage can lodge an inquiry for back ground

checking after selection. This will enable individuals with criminal records to participate in selection process and place their credential before employers which can help them to cross the initiate screening stage and attend interviews and they will also be able to show their competence and eligibility for the position.

**(B) RECOMMENDATIONS FOR STEPS TO BE TAKEN BY GOVERNMENT**  
**INSIDE PRISONS**

- 1 Effectiveness of prison system in Pakistan for reform of criminals has long been questioned. The prisoners face degrading living conditions and expose to violence and abuse of prison inmates which ultimately affect their Psyche and they develop anger and aversion against society and state.<sup>491</sup> Therefore there is a need that laws and criminal justice system to be reformed and such policies to be adopted which encourage inclination towards infliction of conviction in the form of fines and community services and correction measures such as parole, probation to be extensively used by courts.
- 2 The scope of probation need to be extended to all offenders and risk assessment should be the only conditions to determine suitability of prisoner for probation. Further community service should be made part of probation system. In this way offender get chance to interact with community and enhance his communication skills. This also provide a chance to offenders to be acceptable to community which would ultimately help them to reintegrate in society.

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<sup>491</sup> Rukhsana Shah, “Prison Reforms” *The Daily Dawn* dated August 21, 2018

- 3 Pakistan can be benefited from programs and policies adopted by U.K and Singapore to bring reforms inside and outside of jails. The government need to introduce such rehabilitation programs which can positively affect life and thinking of offenders during their rehabilitation period. Prisons should work out to start social skill training programs and family re-integration programs. These programs will help prisoners to strengthen their bond with their families which enable them to enhance their communication skills and help them to re-integrate in society.
- 4 The government can also grant incentives to rehabilitated offenders involved in petty offences by considering their conviction as 'spent'. In such case they are not required to disclose their conviction in their job application form. Guidance in this regard can be taken from U.K Rehabilitation of Offenders Act, 1974. The government of Pakistan can share experience of U.K on the affectivity of Rehabilitation of Offenders Act, 1974 on the life of ex-offenders and what are the pros and cons of this law, which can be taken into consideration when Pakistan intend to legislate such type of law.
- 5 Further, different organizations have different standard for basic qualification to attend workshops courses in jails. Therefore, in case prisoners have to be shifted to other prison due to lack of capacity, they may face problem to continue with their courses or workshop trainings. Therefore the government is required to devise uniform workshop courses in all prisons. This will assist offenders to continue their courses without any interruption. Ideally, the government should strive to offer workshop courses, apprenticeships and job opportunities with real employers this would enable offenders to get practical experience of workplace.

- 6 The government should also introduce such skill programs at the rehabilitation centers which are beneficial for women. Women in Pakistan's society is heavily burden to look after their children and home chores. Therefore there is a need to introduce such programs and courses at prison which could enable them to earn their livelihood easily from their homes. This would aid them to be self-sufficient and can easily bear the financial burden of their family without compromising their family life.
- 7 The government should also provide such employment opportunities where ex-offenders can easily be employed. This will be beneficial for their transformation from prisoners to ordinary citizens. It will boost their self-esteem and will encourage them to participate positively in the society. For instance government should run computer based programs in prisons in order to teach ex-offenders how to operate computer and internet. This is the easiest way to get source of income for ex-offenders since they can hire themselves in such projects which are conducted on line and where disclosing previous history is not required for employment in most of cases. The employer also feels secure to hire ex-offenders since there is no question of public interaction which he fears loss of reputation for hiring ex-offenders or claim of damages on the basis of negligent hiring in case of any violation committed by ex-offenders.

## **OUTSIDE PRISON**

- 1 The Government in order to pay attention on the employability of ex-offenders it need to establish a statutory body as Singapore did by creating Industrial and Service Co-operative Society Limited (ISCOS). This body should be given mandate to work on vocational skills development and other skills contributing to

'job-readiness' of ex-offenders in order to enable them to meet job standards. The function of this statutory body should include job placement programs which could provide guidelines to ex-offenders to get job offers and to keep liaison with employers of various sectors to arrange for jobs interviews of ex-offenders. The establishment of an independent body for this purpose is advantageous as it has to specifically look after issue of employability of offenders. Further, interaction of this body with employers for job interviews of ex-offenders give employers' confidence that the body will take responsibility of ex-offenders conduct at work place.

#### **(C) RECOMMENDATIONS FOR AMENDMENT AND LEGISLATION OF NEW LAWS**

1. It is recommended that necessary amendment to be carried out in article 27 of the Constitution of Pakistan to include all possible grounds of discrimination. This step is necessary since discrimination is hidden everywhere in society and it is difficult to manage it, such as the discriminatory behavior of employers towards ex-offenders which can easily be justified on the basis of business necessity. Further to broaden scope of the article by including word "other status" in order to enable the courts to apply the law on new scenarios and situations which are discriminatory on grounds not mentioned in the article. This ensures compliance of international obligation of Pakistan to provide human rights to all without any discrimination.
2. Article 63 of the Constitution of Pakistan needs to be amended and anomaly of disqualifying a member of legislative assemble on basis of conviction of moral turpitude need to be removed. Similarly, those laws which place sanction on the

employment of ex-offenders need to be reviewed and criteria of exclusion of individuals convicted of offences of moral turpitude is to be redefined.

3. The Government must ensure the availability of right to enter into any lawful profession or occupation, and to conduct any lawful trade or business to ex-offenders as guaranteed under Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973. For that purpose it needs to legislate a new law on line of the Pakistan Transgender Persons (Protection of Rights) Act of 2018 where it enlists possible prohibited grounds for discrimination which could include: unfair treatment in employment, trade or occupation; the denial or termination from, employment or occupation; the denial of opportunity to stand for or hold public or private office. The law should also declare that no establishment, institution, department, organization shall discriminate against any person holding criminal record in any matter relating to employment such as recruitment, promotion, appointment, transfer and declare all actions based on preferential discrimination against ex-offenders null and void unless employer through reason in writing explain that his decision to refuse job to ex-offender was based on inherent requirement of job.

#### **(C) RECOMMENDATION FOR IMPROVED ROLE OF JUDICIARY**

It is recommended that the courts to liberally interpret the statutes banning the employment of ex-offenders since it infringe fundamental right to work of ex-offenders on a vague term of “conviction on moral turpitude”. This is necessary for advancement of justice and equality in society. The courts can play a pivotal role to bring the

attention of the government toward the issue of employment of ex-offenders since there are number of instances where through court intervention the government legislated many laws which are beneficial to deprived class of society and the most recent one is The Transgender Persons (Protection of Rights) Act, 2018. The courts in Pakistan needs to consider the importance of issue of employment of ex-offenders and how it could ultimately affect our society by providing chances to ex-offenders to reoffend, which the criminal justice system is striving to control in order to keep peace and tranquility in society.

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