



**UNIVERSITY OF
KWAZULU-NATAL**

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DIGNITY OF AN EX-CONVICT IN SOUTH AFRICA: A CRITICAL DISCUSSION

BY

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Submitted in partial fulfilment of the requirements for the degree of Master of Laws in
Constitutional Litigation (LLM) in the School of Law at the University of KwaZulu-Natal

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2018

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ACKNOWLEDGEMENTS

I would like to thank God for giving me faith and for his showers of blessings throughout my research study.

First and foremost, I thank my supervisor Ms Munirah Osman-Hyder for giving of her time to guide and encouragement throughout this project.

I thank the University of KwaZulu-Natal (Howard College) for the opportunity to study and to undertake this research under its umbrella and for the use of its facilities.

Last but not least, I thank my brother Khayaletu Nondabula who supported me financially, and the rest of my family. I also acknowledge and thank all my friends and colleagues who assisted me throughout the process and for the exchange of ideas.

ABSTRACT

The constitutions of many countries do not provide a clear definition of the concept of dignity. This study scrutinises the meaning of dignity and the violation of ex-convicts' right to dignity in South Africa. Government policies place ex-convicts at a disadvantage, which may result in discrimination. The study examines section 271(4) of the Criminal Procedure Act that pertains to criminal records. It highlights inconsistencies between public policies in South Africa and international treaties as well as some provisions of the country's constitution and offers recommendations to protect ex-convicts' dignity and their reintegration into society.

Key Words: Dignity, stigma effects, direct and indirect punishment, crime rate, recidivism, discrimination, reintegration.

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1. CHAPTER ONE: INTRODUCTION AND BACKGROUND

The concept of dignity is a very broad one, which needs to be defined in relation to certain contexts. Role players in the legal field define this concept in various ways. This study adopts the working definition of the term dignity in South Africa and the United States (US) which is discussed in section 1.4 below.

The Oxford Dictionary defines dignity as the quality of being worthy or honourable.¹ However, in some societies, people with criminal records, who are known as ex-convicts, are not accorded equal respect, which impinges on their dignity. In the South African legal context, an ex-convict is defined as a person who has previously been convicted of a crime as provided under Section 271(4) of the Criminal Procedure Act.² Lack of respect could also be due to one's background or current position in society. Wallace argued that it has become the norm to devalue or limit ex-convicts' dignity in democratic countries that are recognised for protecting constitutional rights.³

Ex-convicts thus endure the pain of double punishment for the rest of their lives because they have a criminal record.⁴ Despite the fact that South Africa is renowned as having the strongest constitutional framework in the world and that the country has emerged from a historical context that was marked by a lack of respect for human dignity, ex-convicts continue to suffer marginalisation due to their criminal record. This results in recidivism and, in turn, high crime rates. For example, Chikadzi found that ex-offenders in Gauteng Province confront myriad challenges in reintegrating into society, including financial difficulties because they are unable to find jobs.⁵ Dignity is a crucial human right and ex-offenders should to be protected against violation of their dignity by embracing humanity or Ubuntu and treating everyone the same.

¹ Dictionary, Oxford English "Oxford English dictionary online" (2007).

² Section (4) of the Criminal Procedure Act of 1977 provides that, if the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.

³ V Chikadzi 'Challenges facing ex-offenders when reintegrating into mainstream society in Gauteng, South Africa' (2017) *Social work* Vol 53 (2), pg. 295-296.

⁴ S E Wallace, *Community corrections and human dignity*. Jones & Bartlett Learning (2006), pg.25.

⁵ V Chikadzi 'Challenges facing ex-offenders when reintegrating into mainstream society in Gauteng, South Africa' (2017) *Social work* Vol 53 (2), pg. 295-296.

It is against this background that this study critically examines the concept of human dignity with regard to ex-convicts. It investigates the consequences of a criminal record and the reason why ex-convicts become recidivist. The study also scrutinizes government's efforts to protect ex-offenders from degradation and violation of their dignity within society and in the labour market. Finally, recommendations are made to enable ex-convicts to retain their dignity and not suffer social and economic disadvantages.

1.3 BACKGROUND TO THE STUDY

"All people have values, so being incapable of doing good should not be the reason to be denied respect or worth"⁶

Williams-Queens examined the challenges confronting ex-offenders in the US and the difficulty of reintegrating them into society because of the lost connection between the community and the ex-offender.⁷ Studies on recidivism in South Africa highlight the high rate of this phenomenon, which brings into question the efficiency of the country's prison rehabilitation system.⁸ Goudine and Hoffman observe that the fact that society tends to view offenders as people who enjoy crime⁹ affects them psychologically and leads to anti-social tendencies. They tend to isolate themselves or confine their social interaction to those in a similar situation, creating the potential for further offences.¹⁰ Jerome's study in the Western Cape noted that the failure of the Department of Correctional Services' rehabilitation process perpetuates crime.¹¹ Research conducted in Brazil highlights that ex-convicts are denied their dignity, suffer discrimination in the labour market and earn

⁶ S E Wallace, *Community corrections and human dignity* Jones & Bartlett Learning 2006, pg. 24.

⁷ A Williams-Queen 'Life Challenges Among Ex-Offenders: A Needs Assessment' 2014 *California State University, San Bernardino*, pg.8-9.

⁸ L Ntsokolo 'Using interactive ICT to support the rehabilitation of juvenile ex-convicts in South Africa' 2010 *Proceedings of the 4th IDIA Conference*, pg. 8.

⁹ G Goudine, S Hoffman, J H Venter 'Factors that influence adult recidivism: An exploratory study in Pollsmoor prison' (2006) *South African Journal of Psychology* Vol 36.2. 407-424, pg. 39-45.

¹⁰ G Goudine, S Hoffman, J H Venter 'Factors that influence adult recidivism: An exploratory study in Pollsmoor prison' (2006) *South African Journal of Psychology* 36.2. 407-424, pg. 30-37.

¹¹ S A Jerome 'Challenges that offenders face upon release that contribute to recidivism in the Department of Correctional Services: A case study of the West Coast Medium 'A' Correctional Centre in the Western Cape' 2012 *University of the Western Cape*, pg. 20-22.

less due to the stigma of having a criminal record.¹²Cnaan examined the psychological problems experienced by ex-convicts in the US, which result in difficulties in re-entering society as well as financial problems because they are unable to find work.¹³

There is a paucity of research on the violation and degradation of ex-offenders' dignity in South Africa and government policies on this issue. Johnson noted that ex-convicts are excluded from the concepts of humanity (Ubuntu), forgiveness and love.¹⁴ He recommended that the government and employers should equip ex-offenders with skills and offer them employment regardless of their criminal record.¹⁵

Government policies in South Africa undermine ex-prisoners' constitutional rights. They are unable to support themselves and their families because they cannot obtain permanent employment or earn decent wages.¹⁶The right to dignity is a fundamental right that is the cornerstone to all the other rights in the South African Constitution and it can only be limited by section 36 of the Constitution.¹⁷Given that the Constitution is the supreme law of the land, any legislation or conduct that is inconsistent with it is invalid and the obligations imposed by it must be fulfilled.¹⁸Government policies should therefore not supersede the Constitution.

¹² S Aldolfo, C Mario Jorge. de Mendonca and S Fabio 'Ex-convicts face multiple labor market punishments: Estimates of peer-group and stigma effects using equations of returns to schooling.' *Economia*, 2007, vol. 8, issue, 503-520. *Tulane University*, pg.3.

¹³ R A Cnaan, J Draine, & B Frazier 'Ex-Prisoners' Re-Entry: An Emerging Frontier and a Social Work Challenge' (2008) *Journal of Policy Practice* 7(2): 178-198, pg.192. Para 1.

¹⁴ L R Johnson & Q Baffour 'The African Philosophy of "Ubuntu" and Correctional Education in South Africa: A case study' (AFSAAP) Proceedings of the 38th AFSAAP Conference: 21st Century Tension and Transformation in Africa, *Deakin University*, 28th -30th October, 2015 (2016),pg.7. Para 4.

¹⁵ L R Johnson & Q Baffour 'The African Philosophy of "Ubuntu" and Correctional Education in South Africa: A case study' (AFSAAP) Proceedings of the 38th AFSAAP Conference: 21st Century Tension and Transformation in Africa, *Deakin University*, 28th -30th October, 2015 (2016), pg.8. Para2.

¹⁶ R A Cnaan, J Draine, & B Frazier 'Ex-Prisoners' Re-Entry: An Emerging Frontier and a Social Work Challenge' (2008) *Journal of Policy Practice* 7(2): 178-198 pg. 189.

¹⁷ Section 1 of the Constitution of the Republic of South Africa 1996.

¹⁸ Section 2 of the Constitution of the Republic of South Africa 1996.

1.4 LITERATURE REVIEW

1.4.1 THE DEFINITION OF THE CONCEPT OF DIGNITY IN THE US AND SOUTH AFRICA

This section examines the interpretation of the concept of dignity by two scholars from countries with sound, and well-recognized constitutions. Rao from the US and Woolman from South Africa set out the interpretation of the concept of dignity provided by their countries Constitutional Court or supreme Court.

In the first place, Rao notes that dignity focuses on the inherent worth of each individual. He adds that it exists by virtue of a person's humanity and does not depend on their intelligence, morality or social status. Human dignity cannot be lost or gained because it is an intrinsic worth and is based on the assumption of human equality. Thus, all human beings are born with the same quota of dignity.¹⁹

Rao argues that human dignity is not based on a measure of what counts as a dignified person or someone worthy of respect. Inherent dignity does not relate to a person's reasoning, but focuses on human potential. Freedom is intrinsically tied to human dignity because without dignity, the individual is not free to exercise his or her autonomy as he or she likes consistent with the freedom of others. This kind of dignity does not depend on the good opinion of others, the community or government policies.²⁰

Secondly, Rao observes that constitutional courts associate dignity with recognition and respect. It is conceptualized as a person's identity and worth depending on his/her relationship to society. Respecting a person's dignity requires recognition of individuals in their particularity. Thus, dignity requires interpersonal respect, the respect of fellow citizens. For example, individuals need to be protected from hate speech and insults in

¹⁹ N Rao 'The three concepts of dignity in constitutional law' (2011) *Notre Dame Law Review* 86(1).pg. 196. Para 1. See also (*State v Makwanyane* 1995 (3) SA 391 CC. Para 328)

²⁰ N Rao 'The three concepts of dignity in constitutional law' (2011) *Notre Dame Law Review* 86(1).pg. 201. Para 2.

order to maintain their standing in the community as well as their self-image.²¹ Therefore, the state should adopt policies that express the equality and worth of all individuals.²²

Thirdly, Rao notes that, in order to ensure one's dignity, one might be required to behave in certain ways. Thus, dignity constitutes a particular view of how human beings should live their lives.²³ Government policies may thus impose a particular conception of dignity on the individual or community. Rao adds that in this sense, dignity depends on specific ideas that deem a person worthy or dignified, to the extent that she or he conforms to such ideas.²⁴ Some constitutional courts have upheld policies that prevent individuals from choosing an undignified way of life. For example, France banned the practice of dwarf throwing as detrimental to public morality and dignity although some dwarfs were willing to engage in this spectacle. In conclusion, Rao notes that, in order to uphold human dignity, the government should define the basic condition of well-being; people should live according to rational standards with morals that are shaped by the community.²⁵

South African constitutional law scholar, Woolman, added two strands to the characteristics of dignity listed above, thus identifying five strands in South African jurisprudence. He notes that South Africa also recognizes collective agency; thus, this strand does not focus on the individual alone. Human dignity extends to unfair discrimination and socio-economic rights. Woolman further submits that dignity brings people together in the community and provides for mutual recognition.²⁶ Finally, he identifies self-governance as a strand of dignity that recognizes human beings' ability to reason and legislate for themselves. This enables them to self-govern and enjoy

²¹ N Rao 'The three concepts of dignity in constitutional law' (2011) *Notre Dame Law Review* 86(1).pg. 212. Para 2. See also (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (cc). Para 29).

²² N Rao 'The three concepts of dignity in constitutional law' (2011) *Notre Dame Law Review* 86(1).pg. 214-215.

²³ N Rao 'The three concepts of dignity in constitutional law' (2011) *Notre Dame Law Review* 86(1).pg. 245. Para 1.

²⁴ N Rao 'The three concepts of dignity in constitutional law' (2011) *Notre Dame Law Review* 86(1),pg. 246. Para 2.

²⁵ N Rao 'The three concepts of dignity in constitutional law' (2011) *Notre Dame Law Review* 86(1).pg. 230. See Also (*S v Williams* 1995 (3) SA 632 (CC). Para 58)

²⁶ Stu Woolman & Michael Bishop, *Constitutional law of South Africa* 2nd ed. January: Juta, (2013), chapter 36 pg. 14-15. See also (*Carmichele v minister of safety and security* 2001 (4) SA 938 CC. Para 56.)

democracy with dignity.²⁷In Germany, Barroso's interpretation of the concept of dignity influenced recognition of human dignity by the constitutional system.²⁸Norms as well as laws are built on the concept of dignity.²⁹

1.4.2 UNIVERSAL RECOGNITION OF HUMAN DIGNITY

Human dignity is incorporated in the Universal Declaration of Human Rights Africa.³⁰ The concept of human dignity plays the same role in human rights law as the human soul in religion, meaning that dignity cannot be separated from other rights and that the law is built on dignity.

Dignity is thus the basis for the recognition of all human rights. The purpose of these other rights is to preserve the inherent worth of the individual; thus, all the other rights are subjected to dignity. In other words, human dignity is the cornerstone for other rights.³¹

Human dignity has diverse meanings and it is conceptualized and determined by a country's historical context. On the African continent, the Organisation of African Unity (OAU) recognised the concept of human dignity in an afro-centric manner. The 1963 treaty that established the OAU provided that the dignity should be recognised and respected equally among all human beings. The preamble to the treaty states that:

²⁷ Stu Woolman & Michael Bishop, *Constitutional law of South Africa* 2nd ed. January: Juta, (2013), chapter 36 pg.12-13. See also (*Dawood v Minister of home affairs* 2000 (3) SA 936 (CC). Para 35)

²⁸ L R Barroso 'Here, there, and everywhere: Human dignity in contemporary law and in the transnational discourse' 2012 *Boston College International and Comparative Law Review*, pg.337-338.

²⁹ C McCrudden 'In pursuit of human dignity: An introduction to current debates' (2013) *University of Michigan Law School Vol* 309, pg. 1. Para 1.

³⁰ Section 10 of the South African Constitution provides that everyone has inherent dignity and the right to have his or her dignity respected and protected. Section 1 states that the Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. Section 7(1) of the South African Bill of Rights enshrines the rights of all people and affirms the democratic founding values of human dignity, equality and freedom.

³¹ C McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) *European Journal of International Law*, Vol 19, 656, pg. 2. Para 2.

“All members of the organization were conscious of the fact that dignity is one of the most vital objectives for the achievement of the legitimate aspiration of the African people”.³²

The African Charter on Human and People’s Rights of 1986 also protects individual rights and the dignity of a person, regardless of whether or not they are an ex-convict:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status”.³³

1.4.3 THE IMPACT OF A CRIMINAL RECORD ON EX-CONVICTS’ RIGHT TO DIGNITY

The Oxford Dictionary defines a criminal record as the history or list of a person’s previous criminal convictions. The maintenance of such a record varies from country to country.³⁴ Aldofo, Mario Jorge and Fabio observes that it has become the global norm to keep criminal records, resulting in stigmatisation of those that commit crime³⁵ and disadvantaging ex-convicts in the labour market. Many find it difficult to obtain work and those that do are often paid less than those that have not served time in prison.³⁶ The authors add that ex-convicts endure double punishment because after they have served their sentence and are deemed to be rehabilitated, they are punished in the job market.³⁷

The stigma attached to a criminal record implies that society discriminates against ex-convicts. This results in negative peer pressure and some ex-convicts that struggle to find

³² Organisation of African Unity, 1963. The preamble states that the OAU was established to enable African countries to assert their autonomy and sovereignty in order to achieve the aspirations of the African people through the recognition of their dignity and freedom from colonization and exploitation of the continent’s resources by other powerful continents.

³³ Preamble of African Charter on Human and People’s Rights of 1986. Article 1 of the charter commits OAU members to protect human rights, dignity, equality and liberty. It also notes the need for Africa to break free from colonization and assert its autonomy.

³⁴ Dictionary, Oxford English ‘Oxford English dictionary online’ 2015.

³⁵ S Aldofo, C Mario Jorge. de Mendonca and S Fabio ‘Ex-convicts face multiple labor market punishments: Estimates of peer-group and stigma effects using equations of returns to schooling.’ *Economia*, 2007, vol. 8, issue, 503-520. *Tulane University*, pg.12.

³⁶ S Aldofo, C Mario Jorge. de Mendonca and S Fabio ‘Ex-convicts face multiple labor market punishments: Estimates of peer-group and stigma effects using equations of returns to schooling.’ *Economia*, 2007, vol. 8, issue, 503-520. *Tulane University*, pg.9. Para 2.

³⁷ S Aldofo, C Mario Jorge. de Mendonca and S Fabio ‘Ex-convicts face multiple labor market punishments: Estimates of peer-group and stigma effects using equations of returns to schooling.’ *Economia*, 2007, vol. 8, issue, 503-520. *Tulane University*, pg.9. Para 2.

a job turn to more crime in order to survive.³⁸A criminal record can also exclude a person from certain occupations. For example, an ex-convict cannot obtain a license to operate as a real estate agent or in the building industry. He/she may also be excluded from management positions and cannot serve as a Member of Parliament. Muntingh submitted that a criminal record has an extremely detrimental effect on a person's life and lasts longer than the sentence imposed by the court.³⁹ He adds that, while such records might be regarded as protecting society, they signify to the community that a specific individual is dangerous and cannot be trusted.⁴⁰This violates the right to equality because that person is being treated in a discriminatory manner.⁴¹

The researcher agrees with Aldofo, Mario and Fabio that ex-convicts endure double punishment. In Africa, one of the things that perceive the dignity of a person is that they can provide for their family. Therefore, having a criminal record in South Africa is a disadvantage because the government and society treat people unequally. As noted previously, ex-convicts struggle to find work and when they do, they often earn lower wages than those without a criminal record.⁴² This undermines a person's dignity and violates the UN Charter which commits member countries to protect dignity and human worth regardless of whether or not one has a criminal record.⁴³

The UDHR, which was adopted in 1948, protects fundamental human rights even if a person is an ex-offender.⁴⁴Its preamble states:

³⁸ S Aldofo, C Mario Jorge. de Mendonca and S Fabio 'Ex-convicts face multiple labor market punishments: Estimates of peer-group and stigma effects using equations of returns to schooling.' *Economia*, 2007, vol. 8, issue, 503-520. *Tulane* pg. 8. Para 3-4.

³⁹ L Muntingh 'The law and the business of criminal record expungement in South Africa' 2011 *Civil society Prison Reform Initiative (CSPRI) Research Report No, 18*.pg. 5. Para 2.

⁴⁰ L Muntingh 'The law and the business of criminal record expungement in South Africa' 2011 *Civil society Prison Reform Initiative (CSPRI) Research Report No, 18*.pg. Para 3.

⁴¹ Section 9(4) of the Constitution of South Africa provides that no one may be unfairly discriminated directly or indirectly.

⁴² Organisation of African Unity of 1963.The preamble provides that the AOU was formed in African countries to enjoy their autonomy and sovereignty in order to achieve the aspiration of the African people through the recognition of their dignity and be free from colonization and exploitation of the African continent's resources by other powerful continents.

⁴³ United Nations, 1945. It was formulated in the aftermath of the Second World War to highlight the importance of human rights, dignity and the worth of all human beings.

⁴⁴ M Goodman 'Human Dignity in Supreme Court Constitutional Jurisprudence' (2006) *Nebraska Law Review Vol 84*, 750, pg. 175. Para 1.

“It recognised the inherent worth of human dignity and; of the equal and alienable rights that all members of human family is the foundation of freedom and justice and peace in the world”.⁴⁵

Steinmann notes that:

“The Universal Declaration of Human Rights and the International Charter of Human Rights conceive dignity as the basis for human rights and they also view it as the fundamental nature that represents the human beings”.⁴⁶

In the US, cases have been brought before the courts to compel employers not to discriminate against people because of their criminal record, especially if previous convictions are not substantially related to the job an ex-convict is applying for. An example, is *County of Milwaukee v. LIRC* in the Supreme Court of Wisconsin.⁴⁷ Hassan notes that, the more than 3000 convicts released each year in Malaysia confront stigma that stays with them for the rest of their lives.⁴⁸ The mistrust, suspicion and discrimination they experience can be likened to a second prison sentence.⁴⁹ Such rejection by society results in depression and mental health issues.⁵⁰

Hassan adds that ex-convicts are discriminated against to the extent that they feel that they are a burden to society and the only place they belong is in jail. They are robbed of their autonomy and find it difficult to survive due to financial stress.⁵¹ Sieh notes that ex-convicts are denied the vote in some countries and cannot hold political office. They are also denied the right to live in certain places.⁵²

⁴⁵ Universal Declaration of Human Rights, (Dec. 10, 1948). See Preamble and articles 1, 22.

⁴⁶ R Steinmann ‘The core meaning of human dignity’ (2016) PER: Potchefstroomse Elektroniese Regsblad vol 19(1), pg. 2.

⁴⁷ *County of Milwaukee v. LIRC*, 407 N.W.2d 908, 139 Wis. 2d 805 (1987). The judgement compels the employers not to discriminate people because of their criminal records.

⁴⁸ K A Hassan ‘Adjust to life outside prison: Do ex-offenders have a chance?’ 2015 *Malaysian Digest*. Para 5-6.

⁴⁹ K A Hassan ‘Adjust to life outside prison: Do ex-offenders have a chance?’ 2015 *Malaysian Digest*. Para 6.

⁵⁰ K A Hassan ‘Adjust to life outside prison: Do ex-offenders have a chance?’ 2015 *Malaysian Digest*. Para 8-9.

⁵¹ K A Hassan ‘Adjust to life outside prison: Do ex-offenders have a chance?’ 2015 *Malaysian Digest*. Para 9.

⁵² E W Sieh, *Community corrections and human dignity* Jones & Bartlett Learning (2006), pg. 7. Para 2.

In conclusion, while the right to dignity is constitutionally protected in many countries, including South Africa,⁵³ ex-offenders' right to dignity is violated by society and governments due to their criminal record, resulting in social and economic deprivation.

This state of affairs calls for a change in mindset on the part of citizens and governments to protect offenders' dignity once they are released from jail⁵⁴ and ensure that they are accorded their constitutional rights.⁵⁵

1.5 STATEMENT OF PURPOSE

The main purpose of this study is to critically analyse whether ex-convicts in South Africa are able to exercise their right to dignity and to be treated in the same manner as other members of society. This is achieved by investigating the nature of the discrimination suffered by ex-convicts and the limitations they confront due to stigma. The study also seeks to determine why criminal records create differentiation and inequality among people and why they result in ex-offenders committing further crimes. The researcher investigated why the criminal justice system maintains criminal records as provided for in section 271 of the Criminal Procedure Act 51 of 1977⁵⁶ and the impact of such records, including recidivism. South African constitutional jurisprudence of dignity interpreted in the Constitutional Court is examined.⁵⁷ Finally, the study offers recommendations to address the problems identified.

As noted previously, there is a paucity of research on the violation and degradation of ex-convicts' dignity in South Africa. This study adds to the body of knowledge on this issue and also addresses how the government can assist in preventing such violation of rights.

⁵³ Section 10. Everyone has inherent dignity and the right to have their dignity respected and protected.

⁵⁴ K A Hassan 'Adjust to life outside prison: Do ex-offenders have a chance?' 2015 *Malaysian Digest*. Para 16.

⁵⁵ K A Hassan 'Adjust to life outside prison: Do ex-offenders have a chance?' 2015 *Malaysian Digest*. Para 16.

⁵⁶ Criminal procedure Act 51 of 1977.

⁵⁷ *Ferreira v Levin* 1996 (1) SA 984 (4) BCLR 1 (CC). See para 49.⁵⁸ R Davis 'Analysis: South Africa a country of fear, say latest crime perception stats' 2017 *Daily Maverick*. Para 20.

1.6 RATIONALE

South Africa has a high rate of crime; the most recent statistics for three quarters of 2016/17 show in overall that the crime rate increased by 66%.⁵⁸ Geldenhuys noted that 90% of ex-convicts return to jail within a short period of time after their release.⁵⁹ Recidivism often results from the fact that ex-convicts are prevented from engaging in many activities and find it difficult to obtain a job, leading to financial problems.⁶⁰

While numerous studies have been conducted on crime in South Africa, few have focused on ex-offenders' right to dignity. It is submitted that society's rejection of ex-offenders, results in discrimination that violates their human dignity. Ex-convicts face myriad challenges that can be overcome if, in keeping with the spirit of Ubuntu, the government and the people of South Africa extend the right to dignity to all regardless of their criminal history.

This study examines the value of the dignity of ex-convicts and also raises the question of whether having a criminal record is equitable with an ex-convict's right to dignity. Scrutinising the way ex-convicts are treated in South Africa in relation to the application of section 10 of the Constitution, will help to assess whether they are treated the same as non-offenders. Moreover, the study aims to determine whether maintaining criminal records helps to protect society or creates further problems by resulting in high rates of crime and recidivism.

In addition, the study critically evaluates the problems confronted by ex-offenders who endure double punishment as they serve their sentence in prison but endure further punishment by being denied equal life opportunities because they have a criminal record.

⁵⁸ R Davis 'Analysis: South Africa a country of fear, say latest crime perception stats' 2017 *Daily Maverick*. Para 20.

⁵⁹ K Geldenhuys 'Reoffending: where does the problem lies' 2017 *Servamus*, pg. 6.

⁶⁰ A Williams-Queen 'Life Challenges Among Ex-Offenders: A Needs Assessment' 2014 *California State University, San Bernardino* pg.9-10.

It also explores measures that could be adopted by the government to prevent such challenges further affecting the dignity of ex-convicts.

1.7 OBJECTIVES OF THE STUDY

This research study aimed to evaluate the effectiveness of rehabilitation centres in reintegrating ex-convicts into society after they have been punished for their crimes and released. It is acknowledged that people who are convicted of crimes are bound to have their dignity limited in terms of section 36 of the Constitution.⁶¹The study's objectives were to:

- Examine unfair sanctions or indirect punishment of ex-convicts in South Africa.
- Critically examine the effectiveness of prison rehabilitation for ex-convicts.
- Identify the challenges faced by ex-convicts in reintegrating into society.
- Offer recommendations on how the South African government could assist in protecting the dignity of ex-convicts and preventing discrimination by society.

1.8 RESEARCH QUESTIONS

This study sought to answer the following questions:

- How does a criminal record affect the dignity of an ex-convict in South Africa and what impact does this have?
- How effective is prison rehabilitation for ex-offenders? Will crime decrease if people carry the stigma of a criminal record or does this result in increased crime in society?
- How effective is prison rehabilitation for ex-convicts and how can ex-convicts be effectively reintegrated into society?

1.9 RESEARCH METHODOLOGY

A qualitative research methodology was employed using desktop research. International and national data were gathered in order to fulfil the aforementioned research objectives.

⁶¹ Section 36 of the Constitution of the Republic of South Africa 1996 provides that the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Primary and secondary sources of law such as the South African Constitution, relevant case law, legislation, books and journal articles were consulted.

Qualitative research, also known as exploratory research was appropriate for this study since it focuses on social group behaviour. This approach offers in-depth insight on a phenomenon and enables ideas to emerge to suggest solutions to the identified problems.⁶²

Desktop research assisted the researcher to acquire theoretical knowledge on the concept under study. This method was also used to test the reliability of the data gathered from various scholars and identify the causes of the problem in issue.⁶³

Data were gathered to provide background information on the degradation of the dignity of ex-convicts in South Africa. Relevant legislation, including section 271 of the Criminal Procedure Act⁶⁴ was examined, and a literature review was conducted to construct a working definition of the concept of dignity in South Africa. International treaties were also analysed in order to understand global interpretation of the concept of human dignity.

1.10 STRUCTURE OF THE STUDY

1.10.1 CHAPTER ONE

Chapter one compares and contrasts definitions of dignity and presents the background to the study, a literature review, the purpose of the study and its aims and objectives. It also sets out the research questions and briefly discusses the research methodology.

1.10.2 CHAPTER TWO

Chapter two outlines the inconsistencies between international treaties and South African government policies that violate third-generation rights. It scrutinises the unfair treatment,

⁶² T P Yohannan. 'Towards developing a web-based blended learning environment' 2010 *University of Botswana*, pg. 293 and 201.

⁶³ T P Yohannan. 'Towards developing a web-based blended learning environment' 2010 *University of Botswana*, pg. 293 and 201.

⁶⁴ Criminal Procedure Act 51 of 1977

sanctions and double punishment imposed on ex-offenders and examines the effectiveness of prison rehabilitation for ex-offenders in South Africa.

1.10.3 CHAPTER THREE

Reintegration of ex-offenders into society cannot be achieved without taking into consideration their crucial rights, including the right to freedom and equality. This chapter discusses the Bill of Rights, protection of ex-offenders under the PEPUDA Act, and the Criminal Procedure Act. It critically analyses the challenges faced by ex-offenders in reintegrating into society and possible ways to overcome these, taken from Zimbabwe and Angola scholars.

1.10.4 CHAPTER FOUR

This final chapter presents and discusses the study's findings against the backdrop of the discussion in the previous three chapters. It also offers recommendations to address the problem of the degradation of the dignity of ex-offenders.

The following chapter presents an overview of the violation of generation rights and the unfair or indirect sanctions suffered by ex-offenders in South Africa, as well as the effectiveness of prison rehabilitation.

2 CHAPTER TWO: THE INCOMPATIBILITY OF PUBLIC POLICIES WITH THE CONSTITUTION OF SOUTH AFRICA

2.8 INTRODUCTION

South Africa is a constitutional democratic state that is founded on the values of human dignity and equality; all its people are protected by the Bill of Rights.⁶⁵The South African Constitutional Court has identified five strands that make up human dignity and protect the autonomy of the individual: equal concern, equal respect, self-actualisation, self-

⁶⁵ Constitution of the Republic of South Africa 1996.

governance and collective responsibility for material condition for agency.⁶⁶ Regardless of whether or not one is an ex-offender or a foreigner, all those that fall under the state sovereignty of South Africa are entitled to respect and to protection of their dignity.⁶⁷

The Oxford Dictionary defines an ex-convict as a former inmate or person found guilty of a criminal offence by a judge.⁶⁸ Ex-convicts in South Africa face various collateral sanctions that make it difficult for them to live a dignified life. A 'collateral sanction' is an American phrase that is defined by the criminal justice section standard as the disadvantage imposed automatically on ex-convicts because they have a criminal record.⁶⁹ For the purpose of this study, collateral sanctions are referred to as unfair sanctions or indirect punishment.

2.2 UNFAIR SANCTIONS OR INDIRECT PUNISHMENT OF EX-CONVICTS IN SOUTH AFRICA

The lives of ex-offenders are jeopardised by having a criminal record that creates barriers in their lives. They are discriminated against and are no longer trusted by society. People do not want to associate with ex-convicts and they are characterised as bad people in their community.⁷⁰

Ex-offenders suffer dehumanisation all over the world due to ignorance of their right to dignity. As a result, they suffer indirect punishment after they have served their sentence. Aldofo, and Fabio referred to this as double punishment.⁷¹ South Africa is no exception and the dignity of ex-convicts is violated by denying them access to government support and not fully recognising them under the democratic constitutional dispensation.⁷²

⁶⁶ Stu Woolman & Michael Bishop, *Constitutional law of South Africa*. 2nd ed. January: Juta 2013. Chapter 36, page. 6. Para 2.

⁶⁷ Section 1 of the Constitution of the Republic of South Africa.

⁶⁸ English Oxford living dictionary <http://oxforddictionaries.com>, 2014.

⁶⁹ American Bar Association Criminal Justice section.

⁷⁰ S J. Mullings 'Employment of Ex-Offenders: The Time has Come for a True Anti-discrimination Statute' (2014) 64 *Syracuse L. Rev.* Vol 261, 296, pg.264. Para 3.

⁷¹ S Aldofo, C Mario Jorge. de Mendonca and S Fabio 'Ex-convicts face multiple labor market punishments: Estimates of peer-group and stigma effects using equations of returns to schooling.' *Economia*, 2007, vol. 8, issue, 503-520. *Tulane University*, pg.9.

⁷² Section 10 of the Constitution of the Republic of South Africa.

Robertson argues that constitutional democracies across the world should revisit their policies and regulations on ex-convicts so that their history should not make them automatically ineligible for state benefits and support.⁷³ This also affects the descendants of ex-convicts and their families. He adds that a stable family relationship reduces the chance of re-offending, helps children to build relationships with parents that have been incarcerated and enables ex-convicts to live dignified lives⁷⁴. Hernandez argues that upholding the dignity of the ex-offender will enhance his/her self-esteem and develop a sense of pride, creating a positive life purpose.⁷⁵

The South Africa government is required to comply with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and protect the third-generation rights of all citizens regardless of whether or not they have a criminal record in order to uphold the dignity of the person as implied in the UN Charter.⁷⁶

2.3 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The ICCPR is a multilateral treaty that was adopted by the United Nations General Assembly⁷⁷. South Africa signed this treaty on 3 October 1994. It was ratified on 10 December 1998 and came into force on 10 March 1999. It binds South Africa to fulfil the needs of citizens and protect the dignity and rights of humankind. The preamble to the ICCPR provides that:

“The States parties to the present covenant, considering that, in accordance with the principles proclaimed in the charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable

O Robertson 'Collateral Convicts: Children of Incarcerated Parents' Recommendations and good practice from UN committee on the Rights of the Child Day of General Discussion 2011' (2012) *Quaker United Nation Office Human Rights and Refugees Publication*. pg. 54. Para 6.

⁷⁴ O Robertson 'Collateral Convicts: Children of Incarcerated Parents' Recommendations and good practice from UN committee on the Rights of the Child Day of General Discussion 2011' (2012) *Quaker United Nation Office Human Rights and Refugees Publication*.pg. 41.

⁷⁵ J G Hernandez 'Human Value, Dignity and the Presences of Others' 2015 HEC Forum 27 (3): 249-63.pg. 241.

⁷⁶ United Nation Charter of 1947. See article 1 (2).

⁷⁷ United Nation Charter of 1947.

rights of all members of the human family is the foundation of freedom, justice and peace in the world, recognizing that these rights derive from the inherent dignity of the human person, recognizing that, in accordance with the Universal Declaration of Human Rights.”⁷⁸

2.4 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

South Africa signed this treaty on 3 October 1994. It emphasises the importance of the dignity of human beings and equal treatment of humankind. The preamble states that:

“The States parties to the present covenant, considering that, in accordance with the principles proclaimed in the charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, recognizing that these rights derive from the inherent dignity of the human person, recognizing that, in accordance with the Universal Declaration of human rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights, considering the obligation of States under the Charter of the United”⁷⁹

Dignity and equality are inalienable rights that cannot be denied even if a person is convicted of a crime. They can then be limited under section 36 of the Constitution.⁸⁰ However, as the case of *S v Makwanyane* shows, they cannot be completely denied:

“In this case, the judgment of death sentence was conflicting with section eleven of the Bill of Rights (right to life) as amended and that violated the human dignity of Mr. Makwanyane, according to the constitution, any actions that are inconsistent with constitution are declared invalid.”⁸¹

The case of the *Minister of Justice v Hofmeyr* offers more clarity on the rights of the incarcerated:

⁷⁸ The International Covenant on Civil and Political Rights 1976. See preamble.

⁷⁹ The International Covenant on Economic, Social and Cultural Rights 1966. See preamble.

⁸⁰ Constitution of the Republic of South Africa 1996. Section 36(1) provides that the Bill of Rights may be limited only in terms of the law of general application to extent that the limitation is reasonable and justified in an open and democratic society based on dignity, equality and freedom, taking into account all relevant factors.

⁸¹ *S v Makwanyane and Another* 1995 (3) SA 391. See para. 1 and 2.

“People who are in prison awaiting trial and sentenced prisoners lose some of their fundamental rights, or have their rights limited, such as the right to freedom of association, freedom of movement and residence, and freedom of trade and occupation. But a person does not lose all of their rights as soon as they are sent to prison; they still have many legal and human rights, as set out in the Constitution and the laws on prisons and prison policy”⁸²

The ICCPR and ICESCR compel the South African government to ensure that all citizens enjoy all the civil and political rights they cover, notwithstanding the fact that a person is an ex-convict.⁸³ Civil rights are prerogative rights that are granted by the state to protect all citizens but still in the 21st century ex-convicts are still marginalised.⁸⁴ The right to freedom of movement and equality before the law need to be taken into account when considering ex-offenders’ right to equality in South Africa since various studies mentioned above depict that they are not treated equally. Chapter 2 of the Constitution protects civil rights and political rights and also prohibits unfair discrimination.⁸⁵

Alston emphasises that the state must protect civil and political rights. He adds that fulfilment of economic, social and cultural rights requires state intervention in order for citizens to live prosperous and dignified lives.⁸⁶ In the case of *Government of the Republic of South Africa v Grootboom*, the Constitutional Court held that, in order to uphold socio-economic rights, the state is obliged to provide all members of society with basic social goods such as education, health care, food, shelter, water and access to housing.⁸⁷

Self-determination refers to the right to freely pursue legal ways of developing the economy through obtaining employment in the public or private sector.⁸⁸ Ex-convicts should not be denied this right because they have a criminal record. After their sentence, they should be deemed to be rehabilitated and should not be unfairly or indirectly

⁸² *Minister of Justice v Hofmeyr* 1993 (3) SA 40. See para. 6 and 7.

⁸³ The International Covenant on Civil and Political Rights 1976. See Article 1.

⁸⁴ SAHA ‘archive for Justice: South African History Archive’ 1988. See access to information.

⁸⁵ The Constitution of the Republic of South Africa 1996. See chapter 2.

⁸⁶ P Alston ‘The nature and the scope of state parties’ obligations under the international covenant on economic, social and cultural rights’ (1987) *Human Rights Quarterly* Vol 156, 229.

⁸⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (46) (CC). See Para 23.

⁸⁸ The International Covenant on Economic, Social and Cultural Rights 1966. See Article 3.

punished by the state.⁸⁹ Their dignity must be restored following rehabilitation and they should enjoy the rights set out in international treaties and the Constitution. Therefore, state policies should not limit people through collateral sanctions that violate their dignity.⁹⁰

2.5. VIOLATION OF GENERATION RIGHTS

Generation rights are concerned with human rights such as dignity, equality, the right to life, belief and opinion, freedom of expression, freedom of association, freedom of movement and residence, and property, to name but a few.⁹¹ All these rights emanate from international treaties like the UDHR⁹² and bodies such as the UN.⁹³ The first-generation rights of ex-convicts are infringed by government policies since they cannot obtain a job in government or get promoted at work⁹⁴ because they are not trusted. However, section 22 of the Constitution sets out the right to freedom of trade or occupation and thus implies that all have the right to access work.⁹⁵ Violation of this right affects the right to equality and the dignity of ex-offenders that are discriminated against in the workplace because of their criminal records.⁹⁶

In the case of *Home Affairs and another v Fourie*, Judge Cameron held that people must be accepted for what they are and that society must embrace everyone. He added that segregating and penalising people for being who they are is profoundly disrespectful and undermines their intrinsic worth and dignity.⁹⁷ In terms of this judgment, ex-convicts should be protected from discrimination based on their past or reputation because this

⁸⁹ M Pinard 'Collateral consequences of criminal convictions: Confronting issues of race and dignity' (2010) 85 NYU_LRev.Vol85.pg. 523.

⁹⁰ M Pinard 'Collateral consequences of criminal convictions: Confronting issues of race and dignity' (2010) 85 NYU_LRev.Vol85. Para. 2.

⁹¹ B Meter 'Realisation of first generation rights in South Africa' 2014 *Solidarity Research Institution*, pg. 3-16.

⁹² Universal Declaration of Human Rights 1948.

⁹³ The Charter of the United Nations 1945.

⁹⁴ F D Flake 'When any sentence is a life sentence: Employment discrimination against ex-offenders' (2015) *Wash UL Rev Vol*: 45, pg. 59. Para.5.

⁹⁵ The Constitution of the Republic of South Africa 1996. See section 22.

⁹⁶ Constitution of the Republic of South Africa 1996. See sections 9 and 10.

⁹⁷ *Minister of Home Affairs and another v Fourie* 2005 (1) S.A 524 Para 14, 15 and 16.

undermines their dignity. Discrimination⁹⁸ also damages a person's self-esteem and sense of self-worth.⁹⁹ Thus, state policies should be based on protection and respect for ex-convicts' dignity.¹⁰⁰

Inmates benefit from free medical treatment while in prison but once they are released, they find it difficult to access health care as they are unemployed. Violation of their rights under section 27¹⁰¹ of the Constitution leads to high rates of unemployment. Ex-convicts thus find it difficult to access quality health care and medication that is not available at no cost in government clinics. This is one of the reasons for the high rates of crime and recidivism in South Africa. In the case of *Minister of Health v Treatment Action Campaign*, it was held that the state is obliged to fulfil section 27(1) but it must take reasonable steps using available resources to achieve progressive realisation.¹⁰²

The government is failing ex-offenders, especially those that serve long sentences as when they are released, they have no adequate place¹⁰³ to live and some have no families. They thus go on to commit more crime. In the case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*, the Constitutional Court held that where the state takes steps to provide housing, it may not deliberately exclude certain people from its programmes.¹⁰⁴

Ex-offenders' right to safety and security which is set out in section 12 of the Constitution¹⁰⁵ is also violated because the community no longer trusts them and they see themselves as a burden and as vulnerable. Naude states that the right to dignity is absolute and cannot be measured against any value or rationally sacrificed or traded

⁹⁸ Section 9 of the South African Constitution of 1996.

⁹⁹ J E Scott 'The perception and management of criminal stigma: An examination of stigma's differential impact on parolees and probationers' 2016 (unpublished PhD *Indiana University*).pg. 4. Para 2.

¹⁰⁰ J E Scott 'The perception and management of criminal stigma: An examination of stigma's differential impact on parolees and probationers' 2016 (unpublished PhD *Indiana University*), 2016, pg.5.

¹⁰¹ Constitution of the Republic of South Africa 1996. See section 27.

¹⁰² *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC). See Para 39.

¹⁰³ Section 26 of the Constitution of the Republic of South Africa 1996.

¹⁰⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 (PTY) 2012 (2) SA 104 (cc). See Para 74.

¹⁰⁵ The Constitution of the Republic of South Africa 1996. See section 12.

away.¹⁰⁶From an analytical perspective, the fact that ex-convicts have a criminal record does not take away their dignity and their intrinsic worth that should be protected by the government.¹⁰⁷

The Constitution of South Africa thus protects ex-offenders' dignity and social and economic rights. The state is compelled to protect them and also provide them with job opportunities.¹⁰⁸

2.6 THE EFFECTIVENESS OF PRISON REHABILITATION FOR EX-CONVICTS

Matshaba's study concluded that the South African rehabilitation system has not been successful due to the many social challenges that confront ex-convicts after their release from a correctional centre.¹⁰⁹ The researcher concurs with this contention as the government has not scrutinised the violation of ex-convicts' dignity and how they should be protected in compliance with the Constitution.¹¹⁰ Ex-offenders endure unfair and indirect punishment on a daily basis as a result of government policies.¹¹¹

The majority of studies on ex-offenders concur that there are high rates of recidivism, resulting in increased crime.¹¹² They neglect to consider the fact that ex-offenders commit crime because their dignity is not upheld by the state and, while they have been released from prison, they suffer unfair treatment and sanctions because of the stigma of a criminal record. Matshaba adds that many community members have negative attitudes towards ex-inmates. Their social exclusion ignites conflict and ex-offenders end up banding

¹⁰⁶ B Naude *Dignity, freedom and post-apartheid legal order Cape Town* 2nd ed. Juta (2008), pg. 359.

¹⁰⁷ R Steinmann 'The core meaning of human dignity' (2016) PER: Potchefstroomse Elektroniese Regsblad vol 19(1), pg. 12. Para 5.

¹⁰⁸ Constitution of the Republic of South Africa 1996.see chapter 1 and 2.

¹⁰⁹ T D Matshaba 'Challenges faced by ex-inmates after their release from incarceration in the democratic South Africa' (2015) Acta Criminologica: *Southern African Journal of Criminology, Special Edition* 2 pg. 66. Para. 2.

¹¹⁰ Constitution of Republic of South Africa 1996.

¹¹¹ S Aldolfo, C Mario Jorge. de Mendonca and S Fabio 'Ex-convicts face multiple labor market punishments: Estimates of peer-group and stigma effects using equations of returns to schooling.' *Economia*, 2007, vol. 8, issue, 503-520. *Tulane University*, pg.9.

¹¹² K Geldenhuys 'Reoffending: Where does the problem lie?' *Servamus Community-based Safety and Security Magazine* (2017) Vol 22-27, pg. 22. Para 3.

together because they feel isolated from society and unable to live a normal life.¹¹³The South African Constitution upholds freedom of association.¹¹⁴In the case of *Roberts v United States Jaycees*, the court held that a person enjoys intimate personal relationships in the absence of unjustified state interference. An individual's emotional life is enriched when they have close ties with other people thus government policies should take that into consideration because a stigma of having criminal record impinges the ties of ex-convicts with their family and the society.¹¹⁵

In support of Matshaba and section 18 of the Constitution,¹¹⁶ this study submits that a person that feels excluded from living a normal life will deviate from the norm and act inappropriately in order to survive. Sections 27(b) and (c) of the Constitution uphold the right to access sufficient food, water, and social security and social assistance.¹¹⁷ When state policies violate this right, ex-convicts' dignity is negatively affected as they are deprived of employment opportunities and making a contribution to the economy therefore, they are unable to buy prescribed medication.¹¹⁸In the case of *Khosa v Minister of Social Development*, the Constitutional Court held that only providing social security for South African citizens and excluding foreign citizens is not reasonable and that it violates the right to equality of permanent residents that lack citizenship, resulting in stigma.¹¹⁹Therefore, it is difficult for ex-convicts to get a proper job in order to enjoy section 27 (1) (a) and (b) of the constitution.¹²⁰

The researcher agrees with Matshaba that disallowing ex-convicts from full participation in the economy and civil society violates their rights.¹²¹This also goes against the logic of

T D Matshaba 'Challenges faced by ex-inmates after their release from incarceration in the democratic South Africa' (2015) *Acta Criminologica: Southern African Journal of Criminology, Special Edition 2* pg. 74.

¹¹⁴ Constitution of Republic of South Africa 1996. See section 18.

¹¹⁵ *Roberts v United States Jaycees* 468 US 609 (1984) 615. See Para 83.

¹¹⁶ Constitution of Republic of South Africa 1996, section 18, freedom of association provides that everyone has a right to freedom of association.

¹¹⁷ Constitution of Republic of South Africa 1996. See section 27.

¹¹⁸ E S Nilsen 'Decency, dignity, and desert: Restoring ideals of humane punishment to constitutional discourse' (2007) 41 *UC Davis L. Rev Vol: 111*, pg.122-123.

¹¹⁹ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC). See Para 74.

¹²⁰ Section 27 of the constitution of the Republic of South Africa of 1996.

¹²¹ T D Matshaba 'Challenges faced by ex-inmates after their release from incarceration in the democratic South Africa' (2015) *Acta Criminologica: Southern African Journal of Criminology, Special Edition 2* pg. 79.

section 84(j) of the Constitution, which provides that the President has the power to grant pardons.¹²² If government policies prevent or limit ex-offenders from economic participation, what is the use of granting them a pardon?¹²³South Africa's Constitution provides that the government should protect the dignity of the citizens and enable them to enjoy civil and political liberties that promote access to economic opportunities.¹²⁴Dignity requires access to welfare services and a certain standard of living.¹²⁵

Smit explains that the epilogue or framework to the South African Constitution makes it clear that the country aims to promote national unity, reconciliation and amnesty. Thus, ex-offenders should be exonerated once they have served their sentence and the government should try by all means to reintegrate them back into their community as it was done in the Truth and Reconciliation Commission in 1994.¹²⁶

In 2017/18, the Department of Correctional Services received a budget allocation of R22.8 billion to meet prisoners' needs, including skills training.¹²⁷It costs R350 per day to sustain a prisoner, amounting to R10800 per month.¹²⁸Substantial investment is thus made in each prisoner in South Africa, but once released, they continue to be a burden to society. This defeats the purpose and suggests that the strategies adopted by Correctional Services should be reviewed, with a focus on enabling ex-convicts to transition and

¹²² Constitution of Republic of South Africa 1996. See section 84.

¹²³ The Constitution of South Africa of 1996, Section 84(2) (j) the president is responsible for pardoning or relieving offenders and remitting any fines, penalties or forfeitures.

¹²⁴ S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) *South African Journal on Human Rights* vol1 1-31, pg. 7. Para. 2.

¹²⁵ S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) *South African Journal on Human Rights* vol1 1-31, pg.11-12.

¹²⁶ D V-Z Smit 'Civil disabilities of former prisoners in a constitutional democracy: Building on the South African experience, sentencing' (2003) *Acta Juridica* (2003): 221, pg. 244. Para 2.

¹²⁷ Minister Michael Masutha; Correctional Service Dept. budget vote 2017/10' 2017 accessible at <http://www.gov.za/speeches/minister-micheal-masutha-correctional-services-dept-budget-vote-201718-17-may-2017-0000>.Para 10.

¹²⁸'How much each prisoner costs South African taxpayer to stay behind bars' 2015 *Business Tech* accessible at <https://businesstech.co.za/news/general/104579/how-much-each-prisoner-costs-sa-taxpayers=everyday>.Para 6.

become better people who are able to support their families and contribute to the country's economic growth.¹²⁹

In conclusion, this chapter showed that government policies in relation to ex-offenders are inconsistent with various sections of the Constitution.¹³⁰ The dignity of ex-offenders is degraded through violation of their generation rights and the international treaties that protect individual rights. Furthermore, the Department of Correctional Services has failed to successfully rehabilitate convicts. While substantial funds are invested in rehabilitation programmes, South Africa is ranked among the top three countries in terms of crime rates.¹³¹ A review of such programmes is thus required to identify alternative transition strategies that will enable ex-convicts to support their families and the country's economic growth.

The following chapter focuses on the individual's right to freedom and the equality clause in the Constitution. It also examines why it difficult for ex-convicts to reintegrate into society and possible solutions to these challenges.

¹²⁹ Minister Michael Masutha; Correctional Service Dept. budget vote 2017/10' 2017 *accessible at <http://www.gov.za/speeches/minister-micheal-masutha-correctional-services-dept-budget-vote-201718-17-may-2017-0000>*.Par a 27.

¹³⁰ The Constitution of the Republic of South Africa 1996.

¹³¹ C Carmichael 'Countries with high rate of crime 2017 list' 2016/2017 *Gazette Review*. Para 9.

3. CHAPTER THREE: REINTEGRATION OF EX-CONVICTS INTO SOCIETY

3.1 INTRODUCTION

Reintegration is defined as the action or process of restoring someone back into society or an element regarded as disparate for unity.¹³² Reintegration of ex-offenders is critical and different countries adopt different strategies to achieve this purpose. The South African Constitution of 1996 aims to redress the injustices of the past and endorse human rights¹³³ as it was developed on the grounds of equality.¹³⁴ This chapter discusses ex-offenders' right to freedom and equality in order to evaluate the extent of discrimination against them in South Africa. This is followed by a discussion on reintegration of ex-offenders back into society, since a criminal record creates strong barriers to such reintegration.¹³⁵

3.2 EVALUATION OF EX-CONVICTS' RIGHT TO FREEDOM AND EQUALITY

South Africa is a signatory to international and regional treaties that promote the protection of freedom and equality.¹³⁶ Article 1 of the UDHR protects the equality of human beings¹³⁷. Article 2 makes it clear that this right applies to all:

"Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, and sex, language, religion, political or other opinion, national or social origin, property birth or other status."¹³⁸

The right to equality is protected by article 26 of the ICCPR as follows:

"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 [must] prohibit any discrimination and guarantee to all persons equal and

¹³² 'English Oxford Living Dictionary' 2017 Oxford University Press.

O Fuo & A du Plessis 'In the face of judicial deference: taking the "minimum core" of Socio-Economic rights local government sphere' (2015) *Law, Democracy and Development* (2015), pg. 1. Para 1.

¹³⁴ See section 1 of the Constitution of the Republic of South Africa of 1996.

¹³⁵ R Greenberg 'Out from behind bars: Canadian ex-prisoners perspective on the transition from prison to the community' (2003) *Verstehen* vol IX. Para 7.

¹³⁶ See preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹³⁷ Assembly, UN General 'Universal Declaration of Human Rights' *UN General Assembly* 1948 provides that all human beings are born free and equal in dignity and rights. See Article 1.

¹³⁸ Assembly, UN General 'Universal Declaration of Human Rights' *UN General Assembly* 1948. See Article 2.

effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹³⁹

Articles 2 and 3 of the African Charter on Human and People’s Rights provide:

Article 2:“Every individual shall be entitled to the full enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.”¹⁴⁰

Article 3:“Every individual shall be equal before the law” and “entitled to equal protection of the law.”¹⁴¹

Section 271(4) of South Africa’s Criminal Procedure Act provides for criminal records in order to assist the courts in imposing a sentence that takes previous convictions into account.¹⁴²It is submitted that government policies violate the equality clause since they legally oblige ex-offenders to disclose their criminal records and this leads to discrimination.¹⁴³Government policies have changed the rationale for criminal records, with negative impacts on ex-offenders that are now subjected to legal discrimination that isolates them and denies them access to economic opportunities and freedom.¹⁴⁴This undermines section 9(4) of the Constitution.¹⁴⁵

In support of the above argument, in the case of *Harkson v Lane NO and others*¹⁴⁶ the court set out the steps that should be followed to determine whether the various subsections of section 9 of the Constitution have been violated:

- a) “Does the challenged law or conduct differentiate between people or categories of people? If yes does the differentiation bear a rational connection to legitimate government purpose? If it does not

¹³⁹ The International Covenant on Civil and Political Rights of 1976. See Article 2.1.

¹⁴⁰ The African Charter on Human and People’s Rights 1987. See Article 2.

¹⁴¹ The African Charter on Human and People’s Rights 1987. See Article 3.

¹⁴² Criminal Procedure Act 51 of 1977. See section 174.

¹⁴³ R Greenberg‘Out from behind bars: Canadian ex-prisoners perspective on the transition from prison to the community’ (2003) *Verstehen* vol IX Para 7.

¹⁴⁴ R Greenberg‘Out from behind bars: Canadian ex-prisoners perspective on the transition from prison to the community’ (2003) *Verstehen* vol IX. Para 7-8.

¹⁴⁵ Constitution of the Republic of South Africa 1996. See section 9.

¹⁴⁶ *Harkson v Lane NO and Others* ZACC 12; 1997 (11) BCLR. Para 50.

then there is no violation of section 9(1). Even if it does bear rational connection it will still amount to discrimination.

- b) Does the differentiation amount to discrimination?
 - 1) If is on the listed grounds then discrimination is established. But if it is not then the discrimination will depend on the impairment of the dignity of the person.
 - 2) If the differentiation amount to discrimination does it amount to unfair discrimination? Yes if it has been found on the listed ground of section 9(3), then unfairness will be presumed. If not on the listed grounds then the complainant had to establish unfairness on the balance of probabilities.
- c) If the discrimination is found to be unfair then determination will have to be made under limitation clause section 36”

Government policies are impairing the dignity of ex-offenders and denying them economic and social opportunities.¹⁴⁷ The freedom of a person was discussed by the full bench of the Constitutional Court in the case of *Lawyers for Human Rights v Minister of Home Affairs and others*.¹⁴⁸ The ground of the judgment was the contextual theory on the violation of the right to freedom of the individual during the apartheid era.¹⁴⁹ The judgment stated that the framers of the Constitution outlawed abuse of power and deprivation of personal freedom by including section 12 (1) that guarantees the freedom and security of the person from arbitrary deprivation of freedom. Non-compliance with this section would thus mean that the democratic South Africa is no different from the apartheid government.¹⁵⁰ Thus, the criminal record turned to deprive ex-convicts freedom since the stigma block them from many opportunities in private and public sectors¹⁵¹ or treated unfairly at work.

¹⁴⁷ The Constitution of Republic of South Africa of 1996.

¹⁴⁸ *Lawyers for Human Rights v Minister of Home Affairs and others* (CCT38/16) [2017] ZACC 22.

¹⁴⁹ In the case of *Lawyers for Human Rights v Minister of Home Affairs and others* (CCT38/16) [2017] ZACC 22, it was held that the right to freedom was one of the rights violated during the apartheid era. Arrest and detention without trial were commonly used to suppress opposition to the laws and policies of the government of the day. Many detainees were arrested for indefinite periods. See Para 1.

¹⁵⁰ *Lawyers for Human Rights v Minister of Home Affairs and others* (CCT38/16) [2017] ZACC 22. See Para 3.

¹⁵¹ Section 12 (1) (c) of the Constitution of the Republic of South Africa of 1996.

The UDHR provides that a person is entitled to equal protection against discrimination¹⁵² but government policies in South Africa create discrimination on the basis of a criminal record. PEPUDA gives effect to section 9 of the Constitution by outlawing unfair discrimination and harassment and also promotes equality in South Africa.¹⁵³ Section 12 of PEPUDA protects ex-offenders from disclosing their criminal records since it prohibits any dissemination and publication of information that would unfairly discriminate and could be construed to discriminate or is reasonably understood to demonstrate a clear intention to unfairly discriminate against any person. Since government policies make it legal to disclose such information, ex-offenders are unable to obtain employment.¹⁵⁴ In the case of *G4S Security Solutions (SA) (PTY) LTD v commissioner Anthony Ruggiero and others*, the applicant was dismissed after being found guilty of misrepresenting his criminal record when he applied for employment. He was also found guilty of being in breach of the Private Security Industry Regulatory Authority Act 56. However, the Labour Court ordered as follows¹⁵⁵:

2. “The first respondent’s finding that the third respondent was not guilty of misrepresenting his criminal record when applying for employment in 1996 and when applying for promotion in 2010 is reviewed and set aside and substituted with a finding that he was guilty of such misconduct;

3. The relief awarded by the first respondent in paragraph 35 of his award is substituted with the following (using the citation of the parties as they appear in the award);

4. The respondent, G4S Secure Solutions SA (Pty) Ltd is ordered to reinstate the applicant, Thandabantu Ntloko with retrospective effect to 1 August 2011 on the same terms and conditions applicable prior to his dismissal and to pay the applicant his arrear remuneration calculated at the rate of remuneration he received at the time of his dismissal, for the period 1 August 2011 to the date of his return to work within 14 days of his return to work in terms of this order;

4.1 The applicant must report for work within 14 days of this judgment;

¹⁵² Assembly, UN General 'Universal Declaration of Human Rights' *UN General Assembly* 1948. See Article 1.

¹⁵³ The Constitution of the Republic of South Africa. See section 9.

¹⁵⁴ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See section 12.

¹⁵⁵ *G4S Security Solutions (SA) (PTY) LTD v commissioner Anthony Ruggiero and others* C 389/2011. See Para 1 and 18.

5. No order is made as to costs.”

In terms of protection of ex-offenders from unfair discrimination on the basis of having a criminal record, Section 25(4) (a) of PEPUDA provides that government ministers must, taking into account available resources, achieve equality by eliminating any form of unfair discrimination or perpetuation of inequality in any law or government policies, for which they are responsible.¹⁵⁶Section 1 (a) of PEPUDA prohibits the creation of artificial barriers to equal access to employment opportunities by using certain recruitment and selection procedures and section 1 (c) reinforces the principle of equal payment for equal work.¹⁵⁷Many ex-offenders do not receive the same payment as employees without a criminal record. Employers undermine their dignity because they know they have nowhere else to go, and they are sanctioned by government policies.¹⁵⁸

In the case of *Pioneer Foods (PTY) LTD v Workers Against Regression and others*, the Labour Court of South Africa held that the principle of equal pay for work of equal value is considered to be essential in eliminating discrimination in the work place. Therefore, differentiating remuneration is unfair and discriminatory if the grounds listed in section 6(1) of PEPUDA are not complied with.¹⁵⁹

South Africa still confronts the legacy of past discrimination and inequality.¹⁶⁰One of the main aims of the equality clause is to tackle poverty. Government policy makers should understand that inequality leads to high rates of poverty and crime.¹⁶¹ The treatment of ex-offenders in South Africa creates substantial inequality in the workplace and community, and perpetuates crime.

¹⁵⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See section 25.

¹⁵⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See Section 1.

¹⁵⁸ S Aldolfo, C Mario Jorge. de Mendonca and S Fabio ‘Ex-convicts face multiple labor market punishments: Estimates of peer-group and stigma effects using equations of returns to schooling.’ *Economia*, 2007, vol. 8, issue, 503-520. *Tulane University*, pg. 2.

¹⁵⁹ *Pioneer Foods (PTY) LTD v Workers Against Regression and Others* C 687/15. See Para 9 and 15.

¹⁶⁰ S Fredman ‘The potential and limits of an equal rights paradigm in addressing poverty’ (2011) *Stellenbosch Law Review* vol566-59, pg. 568. Para 1.

¹⁶¹ S Fredman ‘The potential and limits of an equal rights paradigm in addressing poverty’ (2011) *Stellenbosch Law Review* vol566-59, 568. Para 2.

3.3 CHALLENGES FACED BY EX-CONVICTS IN REINTEGRATING INTO SOCIETY

Ferner notes that it is difficult for ex-offenders to re-enter society, especially those that have served long sentences. They suffer from anxiety after being released, but have few resources to access mental health care or even buy basic necessities.¹⁶² The stigma of having a criminal record means that their dignity is undermined by members of the community.¹⁶³ Muntingh notes that many people turn against those with a criminal record¹⁶⁴and they thus find it hard to obtain employment.¹⁶⁵

Statistics that show language barrier form the government assistance in prison in South Africa that lead to recidivism. In 2017, South Africa had 8623 qualified psychologists and 868 qualified psychiatrists.¹⁶⁶In 2016/2017 243 prisons accommodated around157013 inmates.¹⁶⁷The Department of Correctional Services 2016 Annual Report states that 79.6% of inmates are black, 18.2% coloured, 1.6% white and 0.6% Asian and Indian.¹⁶⁸ The shortage of mental health professionals will negatively affect ex-convicts' reintegration into society.¹⁶⁹ Furthermore, while South Africa has11 official languages; the psychology profession is dominated by whites (5526 qualified psychologists and 479 qualified psychiatrists). There are 575 qualified Indian psychologists and 134 psychiatrists, while 447qualified psychologists and 28 qualified psychiatrists are coloured.¹⁷⁰However, the majority of prisoners are black Africans.¹⁷¹There are thus major

¹⁶² M Ferner 'These programs are helping prisoners live again on the outside' 2015, *Huff Post* accessible <https://www.hoffpsot.com/entry/if-we-want-fewer-prisoner-we-need-more-compassion-when-they-re-enter-society> n 55ad61d5e4b0caf721b39cd1. Para 1-3.

¹⁶³ K A Hassan 'Adjust to life outside prison: Do ex-offenders have a chance' 2015 *Malaysian Digest*. Para 6-15.

¹⁶⁴ L Muntingh'Tackling recidivism: What is needed for successful offender reintegration' (2002) *track 2 Vol 11(2)*. Para 8.

¹⁶⁵ L Muntingh'Tackling recidivism: What is needed for successful offender reintegration' (2002) *track 2 Vol 11(2)*.Para 1-4.

¹⁶⁶ Y Daffue'The Registration Statistics' 2017 HPCSA.

¹⁶⁷ G Makou, I Skosana& R Hopkins 'Factsheet: The state of South Africa's prisons' 2017 *Africa check sorting facts from fiction*. See pg. 1 of the 2015/16 Judicial Inspection for Correctional Services Report.

¹⁶⁸ G Makou, I Skosana& R Hopkins 'Factsheet: The state of South Africa's prisons' 2017 *Africa check sorting facts from fiction*. See pg. 3 of 2015/16 judicial inspection for correctional services report.

¹⁶⁹ Y Daffue'The Registration Statistics'2017HPCSA.

¹⁷⁰ Y Daffue 'The Registration Statistics' 2017 HPCSA.

¹⁷¹ A. Bruce, A Stacey, &L Shipley, *Issues and controversies in crime and justice* 2nded Oxford Academic Press (2005), pg. 515.

language barriers between inmates who are on probation and the assessing psychologists. This makes it even more difficult for ex-offenders to adapt to society.¹⁷²

Inmates join gangs in prison and become part of the gang culture. They feel appreciated while in prison, but struggle to adapt once they are released.¹⁷³ Ferner also notes that, while most ex-offenders are willing to start over when they leave prison, they don't know where to start. Being confined to prison makes them dependent, and while they need a place to live and work as well as counselling, they have limited resources. Many ex-prisoners fail to adjust and end up back behind bars.¹⁷⁴

3.4 POSSIBLE WAYS FOR EX-CONVICTS TO REINTEGRATE INTO SOCIETY

In Angola, inmates that are sentenced to life can only be released if they are granted parole or pardon from the president. Those that offer their services to assist other short-term inmates to reintegrate into society are likely to be considered.¹⁷⁵ Angolan state prisons offer various programmes that assist the rehabilitation and reintegration of inmates back into society. Classes are offered in different subjects, including anger management, welding skills, carpentry, air condition repairs and veterinary technology, to name but a few. Older inmates can volunteer to mentor new short-term prisoners and encourage them to respect themselves and others. This will assist the inmate to provide for his/her family with dignity outside prison.¹⁷⁶

Chang notes that, given that jobs are scarce in modern times, especially for ex-convicts, prisoners should not be released from re-entry programmes until they have a job waiting

¹⁷² A Bruce, A Stacey, L Shipley, *Issues and controversies in crime and justice* 2nded Oxford Academic Press (2005), pg. 108. Para 1.

¹⁷³ A Dissel 'South Africa's Prison conditions: The inmates talk' 1996 *in imbizo Vol 2*. Para. 47 -49.

¹⁷⁴ M Ferner 'These programs are helping prisoners live again on the outside' 2015, *Huff Post accessible* https://www.huffpost.com/entry/if-we-want-fewer-prisoner-we-need-more-compassion-when-they-re-enter-society_n_55ad61d5e4b0caf721b39cd1. Para 3.

¹⁷⁵ C Chang 'Re-entry court offer opportunity for young convicts to learn from lifers' 2011 *The Times-Picayune*. Para 1-6.

¹⁷⁶ C Chang 'Re-entry court offer opportunity for young convicts to learn from lifers' 2011 *The Times-Picayune*. Para 5.

for them outside.¹⁷⁷ Samuels argues that re-entry programmes should be expanded in order to save taxpayers' money and reduce recidivism. Providing prisoners with job training and communication and other skills would give them a better start outside prison and could avoid recidivism.¹⁷⁸

Education is a major part of re-entry. Section 29 (1) (a) and (b) of the South African Constitution provides that everyone has the right to education.¹⁷⁹ In countries like Malaysia, prisoners are trained on how to re-integrate into society.¹⁸⁰ While South African prisoners are able to exercise their right to education, they struggle to obtain employment when released because they have a criminal record. The purpose of rehabilitation programmes is to turn criminals into law abiding citizens and they offer policy makers a constructive opportunity to improve the safety of communities.¹⁸¹

International instruments and the policies of the Correctional Services Department state that education must be provided in the correctional environment and must be in line with the education system in the broader society. This re-entry system makes it easier for ex-inmates to get a job.¹⁸² Mkhosi found that education can improve the cognitive thinking of an ex-offender.¹⁸³

Policy makers should also consider ways of stepping up education for confined offenders in order to promote economic growth and save taxpayers' money. While obtaining an education does not guarantee that a person will not commit crime, it reduces the chances

¹⁷⁷ C Chang 'Re-entry court offer opportunity for young convicts to learn from lifers' 2011 *The Times-Picayune*. Para 19.

¹⁷⁸ D Samuels 'New prison re-entry program: Can they help reduce Louisiana's sky-high incarceration vote' 2015 *The Times Picayune*. Para 8.

¹⁷⁹ See section 29 of the South African Constitution of 1996.

¹⁸⁰ K A Hassan 'Adjust to life outside prison: Do ex-offenders have a chance?' 2015 *Malaysian Digest*. Para 21.

¹⁸¹ N G Mkhosi 'Managing a full-time school within a correctional services environment' 2013 *University of Pretoria*. pg. 1.

¹⁸² N G Mkhosi 'managing a full-time school within a correctional services environment' 2013 *university of Pretoria*. pg. 1-2.

¹⁸³ N G Mkhosi 'managing a full-time school within a correctional services environment' 2013 *university of Pretoria*. pg. 3.

of continuously committing crime and also decreases the chances of not being reintegrated back into society after leaving a correctional centre.¹⁸⁴

Visits by representatives of various religions are also often part of the re-entry programme. In Zimbabwe, the Lutheran Church plays a significant role in rehabilitating female inmates and ex-prisoners.¹⁸⁵ Pastors preach in the local languages and create a positive mindset about life after prison. This helps to address feelings of anxiety about what will happen once they are released, especially among women inmates because of patriarchal expectations of women within African culture. Many people forget that women also make mistakes that result in imprisonment.¹⁸⁶ In Zimbabwe, the church works to restore female prisoners' dignity through repenting so that they will not be judged on their past when they are released.¹⁸⁷ Female ex-prisoners suffer double punishment since they are rejected by both the church and society. However, pastors preach the message of Ubuntu (humanness) in order to heal the spirit.¹⁸⁸

In Detroit, the church and volunteers are assisting ex-offenders to reintegrate into their community upon return from prison. They encourage them to think positively and maintain links with their families, to access work and education and to avoid criminal friends, and drugs and alcohol.¹⁸⁹

In any community, the church provides an opportunity for people to accept and affirm who they are. The dignity of a person who feels down due to a criminal record can be affirmed

¹⁸⁴ N G Mkhosi 'managing a full-time school within a correctional services environment' 2013 *university of Pretoria*. pg. 3-6.

¹⁸⁵ T Zhou 'The public vocation of Lutheran churches and the rehabilitation of Zimbabwean female ex-prisoners' 2011 *Wiley online library*, pg.188. Para 1.

¹⁸⁶ T Zhou 'The public vocation of Lutheran churches and the rehabilitation of Zimbabwean female ex-prisoners' 2011 *Wiley online library*, pg.188. Para 4.

¹⁸⁷ T Zhou 'The public vocation of Lutheran churches and the rehabilitation of Zimbabwean female ex-prisoners' 2011 *Wiley online library*, pg.188. Para 5.

¹⁸⁸ T Zhou 'The public vocation of Lutheran churches and the rehabilitation of Zimbabwean female ex-prisoners' 2011 *Wiley online library*, pg.188-189. Para 5 and 1.

¹⁸⁹ T Oconnor, P Ryan & C Parikh 'A model program for church and Ex-offenders' reintegration' (1998) 28 (1-2) *Journal of Offender Rehabilitation*, pg. 108. Para 2.

through joining a church or rehabilitation group in the community or accessing free counselling services offered by the government.¹⁹⁰

This chapter highlighted protection of the equality of individuals set out in international treaties¹⁹¹, and the right to individual freedom and autonomy provided by the South African Constitution of 1996.¹⁹² It also highlighted the PEPUDA Act and its importance in protecting the equality of individuals.¹⁹³ Finally, the chapter examined why ex-offenders find it difficult to successfully reintegrate into society and discussed possible solutions to these challenges.

Chapter 4 discusses the study's findings and draws on the literature from other countries, international treaties and the South African Constitution to offer recommendations on how the South African government could assist in protecting the dignity of ex-convicts and preventing discrimination by society.

¹⁹⁰ T Oconnor, P Ryan & C Parikh 'A model program for church and Ex-offenders' reintegration' (1998) 28 (1-2) *Journal of Offender Rehabilitation*. pg. 109. Para 3.

¹⁹¹ Un General Assembly, 'Universal Declaration of Human Rights' *UN General Assembly* 1948.

¹⁹² The Constitution of the Republic of South Africa of 1996.

¹⁹³ Promotion of Equality and Prevention of Unfair Discrimination Act 4 2000. See section 9.

4. CHAPTER FOUR: ANALYSIS, DISCUSSION AND RECOMMENDATIONS

4.1 INTRODUCTION

The framers of South Africa's Constitution developed a progressive constitution that is respected throughout the world. The constitutional dispensation was designed to restore South Africans' dignity, integrity and sense of self-worth.¹⁹⁴

4.2 ANALYSIS

The legal definition of the strands of dignity by the Constitutional Court of South Africa emanate from case law on socio-economic rights and academic studies. Human dignity applies to all individuals regardless of their demographic characteristics. The history and development of the concept of dignity was examined as well as debates among scholars on its definition. It was established that ex-convicts suffer ill-treatment at the hands of the state, the private sector and community members.

It was noted that the treatment of ex-prisoners undermines various constitutional provisions and leads to degradation of the concept of human dignity. The challenges confronting ex-convicts in reintegrating into society and the reasons for this state of affairs were also explored as well as possible solutions.

4.3 FINDINGS

4.3.1 TO WHAT EXTENT SHOULD GOVERNMENT POLICIES BE LIMITED?

Government policies are based on the political ideology of the state in a manner consistent with law and customs.¹⁹⁵ The South African Constitution is the supreme law of the land and, in the event of conflict between the three organs of state, the judiciary has the power to resolve the problem through its interpretation of the Constitution.

¹⁹⁴ 'Department of Cooperative Governance and Traditional Affairs on its' 2015/16 Annual Report, with Minister and Deputy Minister in attendance accessible at <https://pmg.org.za/committee-meeting/23388/> Para 1-8.

¹⁹⁵ 'South African government policies' 2015 *Ineng* accessible at <https://ineng.co.za/south-african-government-policies-since-1994/>.page 3-6.

This study found that government policies are a primary reason why criminal records affect the dignity of ex-convicts. These policies undermine the dignity of ex-convicts and influence society at large to follow suit. Despite having served their sentences, upon release, prisoners' dignity is not valued and they are no longer trustworthy in the eyes of society. This robs ex-convicts of significant life opportunities like obtaining a license to operate in a particular business sector or obtaining a job in the private or public sector. It results in social isolation and high rates of recidivism.

The case of *President of Republic of South Africa and others v Hugo*¹⁹⁶ revolved around section 84 of the Constitution¹⁹⁷ that sets out the powers entrusted to the president. S84 (2) (j) provides that the president has discretionary powers to grant a pardon to offenders, remit any fines and forfeit their penalties.¹⁹⁸ However, empirical studies have shown that many people with a criminal record find it difficult to find a job. This raises the question: what is the use of a presidential pardon if an ex-offender can't find a job to feed his/her family? The study also found that government policies that result in a criminal record affecting the dignity of ex-convicts contradict section 84(2) (j) which adjuncts with section 10 of the Constitution.¹⁹⁹

The South African Constitution is framed in line with international treaties that protect human rights. The study scrutinised the application of the first and second-generation rights granted by the Constitution and whether or not the rights of those with a criminal record are protected. South Africans are entitled to enjoy all civil and political rights but are limited under section 36 of the Constitution.²⁰⁰ However, these rights are not enjoyed by all, but only apply to those that have never been imprisoned. People with criminal records are judged by their past and are discriminated against. They do not fully enjoy freedom, justice and peace because these rights are derived from the inherent dignity of human beings.

¹⁹⁶ *President of Republic of South Africa and others v Hugo* [1997] ZACC 4; 1997 (6)

¹⁹⁷ The Constitution of the Republic of South Africa 1996.

¹⁹⁸ The Constitution of the Republic of South Africa 1996.

¹⁹⁹ The Constitution of the Republic of South Africa 1996. See sections 84 and 10.

²⁰⁰ The Constitution of the Republic of South Africa 1996. See section 36.

People with a criminal record lose some of their fundamental rights because their right to dignity is infringed by government policies. They cannot obtain a government job and their chances of promotion at the workplace are slim²⁰¹ even though section 22 of the Constitution provides the right to freedom of trade or occupation.²⁰² Due to the lack of trust from the community, ex-convicts are also no longer protected by section 12 of the Constitution²⁰³ since they are seen as a burden and their lives are often in danger.

The clauses on the right to freedom and equality in PEPUDA²⁰⁴ are crucial rights given South Africa's history. The evaluation revealed that these rights are undermined by government policies since ex-convicts have to disclose their criminal records, leading to discrimination. Section 271 (4) of the Criminal Procedure Act²⁰⁵ provides for criminal records to be maintained. The study also established the link between equality and poverty and noted that government policy makers should understand that inequality results in poverty and crime.²⁰⁶ The treatment of ex-offenders in South Africa creates significant inequality between people in the workplace and community, and perpetuates crime.

It was noted that the Department of Correctional Services' efforts to reintegrate ex-convicts into society are not successful due to the problems cited above.²⁰⁷ Both ex-

²⁰¹ F D Flake 'When any sentence is a life sentence: Employment discrimination against ex-offenders' (2015) *93 Wash UL Rev Vol 45*, pg. 45. Para 1.

²⁰² The Constitution of the Republic of South Africa 1996. See section 22.

²⁰³ Section 12(1) of the Constitution of the Republic of South Africa provides that everyone has the right to freedom and security of the person.

²⁰⁴ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁰⁵ S 271 of the Criminal Procedure Act 51 of 1977 provides that: (1) The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused. (2) The court shall ask the accused whether he admits or denies any previous conviction referred to in subsection (1). (3) If the accused denies such previous conviction, the prosecution may tender evidence that the accused was so previously convicted. (4) If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall consider such conviction when imposing any sentence in respect of the offence of which the accused has been convicted. This section makes it clear that previous convictions are provided on the basis that criminal records will assist the court in imposing a sentence that takes previous convictions into account.

²⁰⁶ S Fredman 'The potential and limits of an equal rights paradigm in addressing poverty' (2011) *Stellenbosch Law Review Vol 566-59*, pg. 556. Para 1.

²⁰⁷ M Mhanga 'Minister Michael Masutha; Correctional Services Dept. budget vote 2017/10' 2017 *Department of Correctional Services*. Para 6-7.

inmates and inmates confront significant challenges, including a shortage of black psychologists and psychiatrists, with resultant language barriers.

4.4 RECOMMENDATIONS

4.4.1 WHICH APPROACH IS BEST FOR SOUTH AFRICA IN ENACTING GOVERNMENT POLICIES?

Government, parliamentary structures and the different branches of government play a major role in formulating public policies. The ruling party convenes national conferences where policies are drafted and particular issues are debated and discussed. The party also decides on its overall vision and goals. Public policy is based on the Constitution.

In South Africa, public policies have failed to accommodate the dignity of certain individuals. Based on this study's findings, it is recommended that the education offered to confined offenders should aim to restore their dignity upon release. All prisoners should be obliged to study and be provided with free stationery. They should register for courses that correspond with the length of their sentence. Such education should not be limited to technical skills, but should also promote cognitive thinking. It would increase the chances of ex-offenders obtaining a job on release from prison, thereby restoring their dignity and enabling them to provide for their families. It would also reduce the crime rate in the country.

This could act as one of the re-entry programmes for rehabilitation of inmates by the Department of Correctional Services. The degradation of inmates' dignity occurs because it is limited under section 36 of the Constitution.²⁰⁸ While obtaining high quality education does not necessarily mean that a person will stop committing crime, it will reduce the chances of doing so and assist ex-convicts to use their skills to earn a living.²⁰⁹

In South Africa, the majority of prisoners are black. Many inmates and ex-convicts are illiterate and cannot speak or understand English. High rates of poverty result in high

²⁰⁸ The Constitution of the Republic of South Africa 1996. See section 36.

²⁰⁹ N G Mkosi 'Managing a full-time school within a correctional services environment' 2013 *University of Pretoria*, pg. 2. Para 2.

levels of crime and in turn, cause ex-convicts' dignity to be degraded by government policies. It is thus recommended that there-entry programmes run by the Department of Correctional Services employ the services of black psychologists, psychiatrists and social workers and those of other races that speak and understand South African indigenous languages.

Finally, based on the Lutheran Church's rehabilitation of female inmates and ex-prisoners in Zimbabwe,²¹⁰ and the right to freedom of association in the South African Constitution,²¹¹ it is recommended that re-entry programmes promote reconciliation among prisoners and prepare and motivate them for life after prison. For example, ex-inmates could be invited to events where motivational speakers assist them to regain their dignity.

In closing, based on the South African Constitutional Court's interpretation of the concept of dignity that consist of five strands, this study identified the reasons why a criminal record undermines the dignity of ex-inmates. South Africa's constitutional framework is built on the right to human dignity, equality and freedom.²¹² However, due to government policies, having a criminal record negatively affects an individual's freedom.²¹³ It is hoped that the recommendations offered here will assist policy makers in protecting the dignity of people with criminal records in South Africa.

²¹⁰ T Zhou 'The public vocation of Lutheran churches and the rehabilitation of Zimbabwean female ex-prisoners' 2011 *Wiley online library*, pg. 188 –190.

²¹¹ See section 18 of the Constitution of the Republic of South Africa 1996.

²¹² See section 1 The Constitution of the Republic of South Africa of 1996.

²¹³ See sections 9 and 12 of The Constitution of the Republic of South Africa of 1996.

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