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Ibrahim Kingori Njoki v DCI Revisited - Rights of Ex-Convicts to Gainful Employment

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Abstract- A government has the monopoly of power to punish offenders who are deemed to disrupt the good order in society. This it does through a judicial process that culminates in a lawful punishment. Such punishment is meant to be proportional to the wrong done. Ordinarily, once a person has served the punishment, such a person would be deemed to have paid the debt to society. However, this is not the case with respect to ex-convicts and employment. Many countries keep criminal records which are used to exclude ex-convicts from employment. The Directorate of Criminal Investigations in Kenya has the mandate of collecting, storing and disclosing criminal convictions.² Modern developments in the protection of human rights has seen a paradigm shift towards accommodating ex-convicts in employment. Different countries have adopted varied measures towards this end. It is not in doubt that the age old practice of excluding ex-convicts from employment violates their right to dignity, privacy and labour relations. Such violation in turn endangers society through recidivism. Governments the world over endeavour to ensure that a criminal is properly prepared for re-integration into society.

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Ibrahim Kingori Njoki v DCI¹ Revisited - Rights of Ex-Convicts to Gainful Employment

Prof. Dr. Moni Wekesa ^α, Ms. Asha Mikinyango ^ο & Mr. Emmanuel Ekiru Tioko ^ρ

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Keywords: *ex-convicts, freedom from degrading treatment, recidivism, rehabilitation, right to dignity.*

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¹ [2023] KEHC 17924 (KLR).

² Established as part of the police service in Kenya by the National Police Act of 2011 and has duty to provide police clearance certificates that are based on a person's criminal records. Directorate of Criminal Investigations, Police <Clearance Certificate <https://www.cid.go.ke/index.php/services/police-clearance-certificate.html> > 9 July 2024.

I. INTRODUCTION

From time immemorial, society has attempted to deal harshly with members who go against established norms. With the passage of time, such dealings were formalized into laws that prescribe crimes and the corresponding punishment. Concurrently, a system of prisons developed as a way of 'keeping convicts' away from society for a prescribed period commensurate with the nature of crime committed. This was and is seen as a way of 'protecting' society from harmful elements. Such prisons were to serve the trio purposes of punishment, retribution and rehabilitation. At the end of the punishment, an ex-convict is free to mingle. However, whereas such people are released into the society, many nations have put laws in place that prevent them from (re-)joining gainful employment.

Up to mid-20th Century, convicts in the USA could regain their rights through executive pardon.³ However, this approach was found inadequate and in its place came two approaches. The first one is for a Judge to seal or expunge the criminal record thereby limiting public access. The second approach is for the Judges to either set-aside or defer dispositions. This way, a Judge 'pardons' an accused person. However, no evaluation has so far been made to find out the better approach. Through a pardon, the state expresses forgiveness and reconciliation after having imposed the jail term. The idea of 'expunging' or 'sealing of a criminal record' started in 1940 in the US. This was largely applied to juvenile offenders, who through this mechanism were given a 'clean slate' so that the effects of their incarceration would not affect them the rest of their lives. Now there are serious discussions on opening up this aspect to incarcerated persons of all ages. All but nine US States have made laws to reflect this approach with a varying scope of application. Even where conviction records are 'expunged' or 'sealed', an applicant for employment is required to disclose their criminal record. Such 'expungement' or 'sealing' is not a guarantee against exclusion from certain job opportunities that require background checks. In effect,

³ Collateral Consequences Resource Centre (CCRC) 'Forgiving and Forgetting - in American Justice: A 50-State Guide to Expungement and Restoration of Rights' (April 2018) 5 <<http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Apr-2018.pdf>> accessed 25 July 2023.

these mechanisms of restoring the rights of ex-convicts in USA have not yet risen to a level where an ex-convict, either through 'expungement' or 'sealing' of criminal records, can be considered 'clean enough' for employment opportunities.

In other words, 'punishment' continues even after a person has served the imposed punishment.

In Kenya, disclosure of criminal records in relation to employment is done through a 'Certificate of Good Conduct'. Section 55 allows for collection of personal data including fingerprints for the purposes of record and identification of all convicts.⁴ The Directorate of Criminal Investigations is mandated to collect, store and disclose criminal records.⁵ Police Standing Orders provide for the manner of taking of fingerprints.⁶ The major purpose of such records is to check - in case of an accused person - whether the person has a previous conviction. This report is used to determine the nature of the sentence to be meted out. However, appendix 15(a) also deals with police clearance certificates.⁷ Such certificates are for those who require a certificate of good conduct. For instance - under the Police Service Act - persons with a previous criminal record are not eligible to join the Police Service.⁸ This requirement applies to many state and public jobs in Kenya. The law does not differentiate whether the offence was minor, or the ex-convict was a minor when the offence was committed, even the period of imprisonment, or even age of the criminal record.

Any remark of a criminal record on that certificate spells doom to the dreams of an ex-convict of accessing employment.⁹ Such is the case also with certain professions that exclude ex-convicts. In recent times, there appears to be progressive developments aimed at integrating an ex-convict into the work place. This has been achieved through relaxation of certain laws and the expansion of the human rights sphere. Data protection laws have added an impetus to the protection of privacy rights. It is hypothesized in this paper that exclusion of ex-convicts from employment not only violates the individual's rights but also endangers the larger society by encouraging recidivism.

The public interest in disclosure of criminal records is best exemplified by the matter of Ian Huntley.¹⁰ Ian was convicted of the murders in 2003 of two girls at a place where he had been employed. Between 1995 and 1999, Ian had committed eight

sexual offences. However, the police station at which these crimes were reported had very poor record keeping practices which included omissions and deletions of information as the officers did not know which information to keep on the police records and which one to delete. There was no system of reviewing the records before deletion. There was also a disconnect between the police and social services with respect to information sharing. Although social services had reports that Ian had had sexual contacts with several girls below the age of consent, there records did not mention Ian's name. The intelligence system was disjointed, nay, non-existent. When Ian was appointed to Sohan Village College, there were no records to refer to regarding his criminal past. He was allowed to bring his own references. It was all agreed that had the previous records of sexual offences been available, Ian would not have been hired as a caretaker to deal with young girls. This case illustrates the need to disclose criminal records as a way of protecting the public.

II. CASE SUMMARY

In the matter of *Njoki*,¹¹ he was convicted in the year 2003 of the offence of creating disturbance and sentenced to six (6) months imprisonment. In his search for a job he is required to have a clean police clearance certificate. Sixteen years later with no repeat offence, the police issued him with a certificate of good conduct on 19th March 2019 and another one on 9th December 2019, both of which indicated that he had a criminal conviction. He wrote to respondent asking that the criminal record be erased to no avail. The petitioner claimed that the said indication of the conviction made it difficult for him to get a job. He was therefore unable to cater for his family. He argued that this violated his rights given that the criminal record was 20 years old. Respondent argued that they were the custodians of fingerprints and conviction records and that the record was accurate. They further stated that a criminal record could only be erased if the conviction was either quashed or on application of the discretionary 20-year rule. The court observed thus- '23. [...]. I have perused the key criminal statutes in Kenya namely; The Penal Code Cap 63, the Criminal Procedure Code Cap 75 and the National Police Service Act of 2011 and note that there is no legal provision or basis for expungement of criminal records in Kenya.' In Kenya, therefore, a criminal record locks out a person from gainful employment, more or less permanently. Ex-convicts are thus released into society but prevented from gainful employment.

It is apparent here that the petitioner in this case had not committed another offence for 16 years. And that he had been imprisoned for six (6) months,

⁴ National Police Service Act of 2011

⁵ *ibid*, s35(f).

⁶ National Police Service Standing Orders Kenya Gazette No 89 Legal Notice No. 100 (9 June 2017) Chapter 15 rule 26.

⁷ *Ibid* Appendix 15(a) S12

⁸ s 12(3)(c).

⁹ *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)*, *R (B) v Secretary of State for the Home Department (Liberty intervening)* [2015] AC 49 [45].

¹⁰ *The Bichard Inquiry Report* (2004) HC 653).

¹¹ n1.

indicating that the offence committed was not very serious. Further, the reference to a discretionary rule of 20 years means there is room for unchecked arbitrariness, contrary to the rule of law.

Under Kenyan law, all manner of criminal convictions are to be disclosed. It does not matter how long ago the applicable offence was committed, its nature, and its relation to the job applied for. In other words, it seems that the Government and society generally, do not believe that convicts can reform!

III. SITUATION ANALYSIS

This same Government has the responsibility to ensure convicted persons serve the punishment for their crime while at the same time, reform to be integrated back into the society. The Kenya Prisons Service is charged with rehabilitation and transformation of prisoners through learning, counseling education and career programmes. It is to ensure reformation of prisoners for social re-integration.¹² The Probation Service in Kenya offers aftercare services for reintegration and resettlement of ex-convicts.¹³ Imprisonment is supposed to serve the purposes of punishment and rehabilitation. Punishment, in turn, serves three main purposes, firstly, to show the offender that the impugned action is frowned upon by society. Secondly, to serve as a deterrence against both a repeat by the individual and by others who may be tempted into similar action. And thirdly, retribution. By retribution is meant that the wronged person gets a sense of justice, knowing that the person who wronged them has been punished. Rehabilitation prepares a convict for re-integration back into society. What has proved elusive is the aspect of rehabilitation, the main focus of this paper. For incarcerated persons, their stay in prison is also meant to 'rehabilitate' them, prepare them for 'reintegration' back into society. Unfortunately, society worldwide does not appear to believe that rehabilitation does take place.

Ex-convicts worldwide have challenges getting back into gainful employment. Many countries reportedly use a conviction to exclude former prisoners from employment.¹⁴ Global statistics bear this out. Pager studied the effects of a criminal record on beginners jobs that did not require more than a high school certificate involving 350 employers in Milwaukee, USA. He found that about 75% of employers asked about an applicant's criminal record while 27% of employers indicated that they would seek the information. Many employers in USA would not hire

an ex-convict. Sixty percent of ex-convicts were unemployed at the end of the first year and 67% after five years following their release.¹⁵ Looney & Turner found that ex-convicts struggle to get employment. And those who get jobs are underpaid.¹⁶ In other words, such employees with previous conviction records either earn less or are hired in lower level jobs. Other researchers found that applications that show criminal records are hardly considered.¹⁷ Lord Wilson said in *T* at para 45: "In these days of keen competition and defensive decision-making will the candidate with the clean record not be placed ahead of the other, however apparently irrelevant his offence and even if otherwise evenly matched?"¹⁸

It is thus apparently clear that a criminal record closes doors to employment.¹⁹ Omission on the part of authorities to avail records of previous offences is blamed for the hiring of a person who later murdered two young girls.²⁰

Additionally, it has been found that many professions require practitioners to be licensed²¹ and when applying for such a licence, one is required to indicate whether one has ever been convicted of a criminal offence, especially for offences whose prescribed punishment is six months in jail. Persons with such criminal records are normally denied a license or registration in many jurisdictions. Ex-convicts don't easily integrate back into mainstream society and more particularly into employment.²² This situation is

¹⁵ Ella Baker Center for Human Rights, Forward Together & Research Action Design *Who Pays - The True Cost of Incarceration on Families* at <<https://www.whopaysreport.org/about-the-project/>> accessed 2 February 2024.

¹⁶ A Looney & N Turner, *Work and opportunity before and after incarceration* (The Brookings Institution March 2018) < <https://www.brookings.edu/articles/work-and-opportunity-before-and-after-incarceration/>> accessed 9 February 2024.

¹⁷ D Pager, 'The Mark of a Criminal Record' 108(2003)3 *AJS* 937-975 <<https://www.journals.uchicago.edu/doi/abs/10.1086/374403>> accessed 9 February 2024; D Pager, B Western & N Sugie 'Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records' 623 (May 2009) *AAPSS* 195-213 <<https://journals.sagepub.com/doi/abs/10.1177/0002716208330793>> accessed 6 February 2024; D Pager, B Western & B Bonikowski 'Discrimination in a Low-Wage Labor Market: A Field Experiment' 74 (Oct 2009)5 *ASR* 777-799 < <https://scholar.harvard.edu/files/bonikowski/files/pager-western-bonikowski-discrimination-in-a-low-wage-labor-market.pdf>> accessed 7 February 2024.

¹⁸ n9.

¹⁹ Pager (n17).

²⁰ n10.

²¹ A Richmond, Preliminary review of country studies on occupational licensing Benefits and Shortcomings in Limiting Entry on the Labour Market (ILO, 2019) <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_818228.pdf> accessed 31 January 2024.

²² RB Freeman, "The Relation of Criminal Activity to Black Youth Employment." 16 (1987)1-2 *RBPE* < <https://journals.sagepub.com/doi/10.1007/BF02900926>> accessed 15 January 2024 99-107; D Nagin and J Waldfogel, 'The Effect of Conviction on Income through the Life Cycle' NBER Working Paper no. 4551. Cambridge, Mass.: National Bureau of Economic Research 1993 <<https://papers.ssrn.com>>

¹² Prisons Act Chapter 90 Laws of Kenya.

¹³ Probation of Offenders Act 11 of 2017.

¹⁴ LD Clark 'A Civil Rights Task: Removing Barriers to Employment of Ex-convicts' 38(2004) *University of San Francisco Law Review* 193 < <https://repository.usfca.edu/cgi/viewcontent.cgi?article=1258&context=usflawreview>> accessed 9 February 2024.

exacerbated by numerous laws and regulations that prohibit ex-convicts from employment.

A classic example is that of Ms Blake.²³ The applicant had operated a day-care for children for about a decade when authorities caught up with her for a misdemeanor conviction that was 30 years old and canceled her licence permanently. For 30 years, Ms Blake had not committed another offence!

The matter of denying a person employment on account of criminal records was also considered in Missouri in September 1970, where Buck Green, the plaintiff and a black man aged 29 years applied for a clerical job at defendant's Personnel Office St. Louis, Missouri.²⁴ He was required to and he filled out an application form. He indicated on the form that he had served a jail term of twenty-one months for refusing to do service in the military. He was informed that his application could not be considered because of the conviction and prison record. The company had a policy of not hiring persons with arrest and conviction records, except for minor traffic offenses. The 8th circuit stated that 'we cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed'.

Also in Pennsylvania the matter of criminal records affecting employment came up in matter of *E/* where the appellant/plaintiff was hired on a conditional basis as a driver for para-transit buses to drive persons with disabilities.²⁵ The agent was given firm instructions not to hire ex-convicts. Shortly after being hired, the respondent found out that the appellant had a 40-year old conviction. The appellant had been involved in a gang fight in which some people were shot. The appellant had argued at the time of the criminal proceedings that he did not pull the trigger. He had no subsequent convictions 40 years on. He was terminated after a background check. The appellant argued that respondent's use of a criminal record was discriminatory. Respondents adduced expert evidence to the effect that ex-convicts of violent crimes had a high rate of recidivism and were a great risk in the transport sector and more so to vulnerable persons like those with disabilities. The Third Circuit scoffed at the respondent's general policy of keeping ex-convicts out of her employment but found for the respondents based on overwhelming evidence on recidivism. The unfairness of

the decision of the District Court lies in two facts. Firstly, the crime for which the appellant had been convicted had nothing to do with the job he held, and secondly, 40 years had lapsed without the appellant committing another crime.

Similarly, in South Africa, the issue regarding criminal records in relation to employment was raised in the matter of *Maswanganyi*²⁶ where the appellant, - a soldier - was convicted on a charge of rape and imprisoned for life on 18 July 2014. When he appealed he was denied bail. His appeal succeeded on 13 Feb 2015. A month later, he submitted a letter for 're-employment'. He was informed of his termination while in prison where one of his superiors visited him and asked him to sign papers related to his pension. He filed an application in the High Court for reinstatement and payment of his salary from 18 July 2014 to 13 Feb 2015. He argued that he was not suspended from duty upon being charged and that between hearings he attended to work related activities. It was urged for him that the quashing of his conviction on appeal made his termination unlawful and respondent's refusal to reinstate him was unconstitutional. Respondent argued that the appellant concealed the fact of his trial and that respondent only knew about it after his conviction and sentence. They further argued that once he was convicted and jailed, his services with the defence forces stood terminated. And further that the law was silent on powers of respondent to reinstate appellant. Accordingly, respondents argued that appellant could only apply for re-employment. The High Court ordered for reinstatement and payment of all back salaries. Respondent appealed. The Supreme Court of Appeal reversed this decision saying that the termination follows the operation of law on account of the conviction and sentence handed down. At the Constitutional Court the appellant argued amongst others that his right to fair trial was impaired in that he continues to suffer even after the original conviction and sentence were set aside. The issue was whether his services stood terminated upon conviction by the trial court or at the end of an appeal process. So held the court:

[41] The words "conviction" and "sentence" in section 59(1)(d) of the Defence Act must thus be interpreted to refer to valid and final convictions and sentences, where there is an appeal. Once the decision of the trial court was set aside, there was no longer any lawful conviction nor sentence [...]. The member would no longer have a criminal record and no purpose would be served by continuing to subject such a member to the penal provisions of the section.

The same concern regarding ex-convicts' chances in employment applies in the United Kingdom. This is illustrated in a case where the plaintiff had a

com/sol3/papers.cfm?abstract_id=226769> accessed 5 January 2024; Pager (n17); B Western & K Beckett 'How Unregulated is the U.S. Labor Market? The Penal System as a Labor Market Institution.' 104 (1999) AJS 1030-60 <<https://www.journals.uchicago.edu/doi/abs/10.1086/210135>> accessed 5 February 2024.

²³ *Blake v Jossart* 868 N.W. 2d 198 (Wis. Ct. App. 2015) (No. 2012AP2578), review granted, 872 N.W. 2d 668 (Nov. 4, 2015).

²⁴ *Green v Missouri Pacific Railroad* 523 F.2d (8th Cir 1975).

²⁵ *El v Southeastern Pennsylvania Transportation Authority* 479 F.3d 232 (3d Cir. 2007).

²⁶ *Mozamane Teapson Maswanganyi v Minister of Defence and Military Veterans and Others* [2020] ZACC 4

degree in education and was qualified as a teacher. She worked in Spain until she fell ill when she decided to go back to United Kingdom in March 1999. In July and August 1999, P was cautioned for stealing a sandwich and for lifting a book worth 99p respectively. She thought the book 'spoke' to her. She was 28 years, homeless and suffering from undiagnosed schizophrenia when she committed the offences. In 2000 she was diagnosed with schizophrenia. She used to have hallucinations. By 2003 she had improved. She has been unable to get a job as she believes it is because of her having to disclose her previous offences²⁷. She is thus condemned to a life of hopelessness. This case illustrates the disclosure of records without context, where say for example, a person's past acts were not based on criminal intent but poor mental health which has since been medicated and controlled.

In another case, while aged 13, G was arrested and charged with two counts of sexual offences involving 'sexual curiosity' with two younger boys in August 2006.²⁸ In September 2006, the Police issued G with two reprimands. He committed no further crimes. He was later hired as a Library assistant. In 2011 he was asked to disclose his criminal record. He lost his job. He has been struggling - rather unsuccessfully - for another job because of disclosure requirements. He lost a job because of some earlier juvenile curiosity, which can be related to being a child at the time but as an adult who has refrained from such acts and has been a law abiding citizen, surely, the reformed behavior and years of being a law abiding citizen should count for something!

As a result of such occurrences, there is a push by both supporters and opponents to the practice of licensing to reduce barriers to professional occupations by ex-convicts.²⁹ Although many states use a conviction to exclude persons from certain employment. This is not necessary where the requirements of the job are unrelated to the nature of the conviction.³⁰ The court considered three factors - popularly known as the Green factors - that could guide an employer in dealing with ex-convicts. These are firstly, the weight of the offense; secondly, the time lapse since the offense was committed and/or the sentence completed. and thirdly, the nature of the job held or sought. These factors have

been adopted by the US Equal Employment Opportunity Commission (EEOC).³¹

a) *Recidivism*

There appears to be a fear that ex-convicts will recidivise, which means go back to their 'criminal ways' so that they land back in jail³². Recidivism is blamed on lacking support systems both inside the prison and outside. 'Recidivism' considered to be the chance that an ex-convict will offend the justice system again and go back to prison.³³ Some authors have observed that in Kakamega County, about 75% of ex-prisoners are likely to commit a crime within three years and 50% are likely to go back to prison. The global rate is estimated at 80% recidivism within 10 years. In Kenya, recidivism is said to account for about 35% of all inmates. These studies point to the fact that not all ex-convicts want to continue with the life of crime.

Some researchers followed a group of 500 delinquent men in the Boston area in a longitudinal study from age 7-70 to determine the pattern of recidivism and desistance from crime.³⁴ Information was collected from both state and national criminal records history. They found that the overall pattern of crime declined with age after ages 16/17. All crimes declined significantly in the middle thirties. The study found that there was no specific group that was prone to criminal activities. In addition, there appeared to be general desistance at work over time discouraging the participants from continuing in a life of crime. This study speaks to the fact that employment can contribute to 'reversing' a 'bad' to a 'good' moral character.

Taking these studies into consideration and considering the cases cited and reviewed in the foregoing sections, the ex-convicts in question served punishment and seemed to have reformed because they did not have another conviction on record and they clearly wanted to earn an honest living. For sixteen years, Njoki had not committed another crime.³⁵ Ms Blake was sacked for a crime that was 30 years old.³⁶ El was dismissed although he had not had a recurrent

³¹ US EEOC *Enforcement Guidance (No. 915.002 of 4/25/2012 on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, (as amended)* at <<https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions#1>> 24 January 2024.

³² R Weisberg, 'Meanings and Measures of Recidivism' (2018) SCLR <https://southernjournaloflawreview.com/wp-content/uploads/2018/01/87_785.pdf> accessed 9 February 2024.

³³ EM Oruta & WFM Luyt, 'Correlates Of Recidivism Among Released Prisoners: A Study of Kakamega County, Kenya' (2021) 109 *Journal of Law, Policy and Globalization* <<https://www.iiste.org/Journals/index.php/JLPG/article/viewFile/56392/58233>> accessed 5 January 2024.

³⁴ RJ Sampson & JH Laub 'Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70' 41(2003) 3 *Criminology* <https://scholar.harvard.edu/files/sampson/files/2003_crim_laub_1.pdf> accessed 4 February 2024.

³⁵ n1.

³⁶ *Blake v Jossart* (n23).

²⁷ *R (P) v Secretary of State for Justice* [2017] EWCA, *R (G) v Chief Constable of Surrey Police and R (W) v Comr of Police of the Metropolis* [2018] 1 WLR 3281

²⁸ *R (G) v The Chief Constable of Surrey Police and Others*[2016] EWHC 295.

²⁹ MM Kleiner *Reforming Occupational Licensing Policies*, The Hamilton Project (Jan. 2015) at 13; MN Rodriguez & B Avery 'Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records' *National Employment Law Project* April 2016 at <www.nelp.org> 23 May 2023

³⁰ n14

crime for 40 years since the last one he had committed.³⁷ P was kept out of employment although she had no repeat criminal record for four years.³⁸ G lost a job in 2011 because of a crime committed under childish 'curiosity' in 2006. There was no other record of a crime.³⁹ These examples, though far and wide, illustrate the point that not all ex-convicts are prone to 'recidivism'. And further that the laws that keep ex-convicts out of employment can be outright 'unfair'. Lord Kerr had this to say about such laws:⁴⁰

113. [...] If previous convictions or cautions were irrelevant or only marginally relevant to an assessment of the suitability of an applicant for a particular post, the requirement that there be disclosure of all recordable convictions or cautions went against the interests of re-integrating ex-offenders into society to enable them to lead positive and law-abiding lives.

Onyango studied the factors that affect rehabilitation of prisoners in Kenya.⁴¹ These include inadequate infrastructure, human resource, lack of integrity and low morale of the staff. Failures of the state to have an effective rehabilitation programme is attributed to infrastructural and human resource factors.⁴² On infrastructure, all prison facilities host larger numbers than originally planned for. This makes the living conditions of the prisoners not only very uncomfortable but some develop aggressive tendencies or have such tendencies reinforced. On the human resource factor, the author identifies lack of capacity (proper training) of prison officers, lack of integrity of some prison officers, low morale amongst prison officers and poor housing for prison staff. It is submitted that these factors reflect a failure on the part of the state. Having so failed to provide for a conducive environment to effectively rehabilitate prisoners, the state should not be allowed to create a situation where the rights of those who have served their terms continue to be violated.

In any case, where an ex-convict is barred from employment by operation of 'law' - how is such a person expected to feed themselves outside of the prison? How can such persons pay for healthcare? How can they pay school fees for their children? How can they clothe themselves? We argue that barring ex-convicts from employment is an incentive for them to continue with a life of crime.

b) Effect of length of incarceration on chances of employment

One of the factors considered to affect recidivism is the period of incarceration. Some employers also use this factor to 'lock' ex-convicts from jobs. Ramakers *et al* studied the effect of length of incarceration on chances of getting employment. They studied 702 subjects whose prison terms were short with a mean of 3.6 months. They found that those imprisoned for terms less than six months had higher chances of employment as opposed to those who spent six or more months in jail.⁴³

Empirical research in Kenya revealed disparities in sentencing. For example for one and the same offence of manslaughter, different courts meted out sentences ranging from one year to 20 years in prison, possession of narcotics attracted jail terms varying from two months to two years, and theft was penalized by jail terms ranging from one month to three years.⁴⁴ There is therefore no clear relationship between the severity of crime and the punishment.

Some authors identified the following characteristics of offenders such as age, gender, number of convictions, type of offence, period between incarcerations, type of prison sentence, and any evidence of Drug use prior to imprisonment. They found a significant relationship between these personal/offender characteristics and recidivism. Nevertheless, those thought capable of recidivism are those who committed offences beneficial to them such as theft and those who were jailed for a very short period such as one week to six months as they would not have had sufficient time for rehabilitation.⁴⁵

From the foregoing, it is doubtful whether a policy of re-employing ex-convicts based on either length of incarceration or type of offence would be a fair practice. The new UK Scheme of disclosure of criminal records that includes differentiation based on periods of incarceration⁴⁶ and or as suggested by the 'Green Facts'⁴⁷ is already under attack.⁴⁸

c) Labeling and Its Effect on Ex-convicts

The labeling theory postulates that a person is likely to act in a manner that validates a tag society has

³⁷ n25.

³⁸ n27.

³⁹ *ibid*

⁴⁰ n27 (Lord Kerr dissenting).

⁴¹ JO Onyango 'The Challenges Facing Rehabilitation of Prisoners in Kenya and the Mitigation Strategies' 2(2013)2 *IJRS* < <https://docplayer.net/1757616-The-challenges-facing-rehabilitation-of-prisoners-in-kenya-and-the-mitigation-strategies.html> > accessed 6 February.

⁴² *ibid*.

⁴³ A Ramakers, R Apel, P Nieuwbeerta, A Dirkzwager & J van Wilsem 'Imprisonment Length and Post-Prison Employment Prospects' <<http://onlinelibrary.wiley.com/doi/10.1111/crim.2014.52.issue-3/issue-toc>> accessed 22 July 2023.

⁴⁴ SM Kinyanjui & M Akech 'Towards Structured Sentencing in Kenya: A Case for Reform' 9(2016) 1 *AJCJS* 266 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3624169 > accessed 15 January 2024.

⁴⁵ EM Oruta & WFM Luyt 'Correlates of Recidivism Among Released Prisoners: A Study of Kakamega County, Kenya' 109(2021) *Journal of Law, Policy and Globalization* <<https://www.iiste.org/Journals/index.php/JLPG/article/viewFile/56392/58233> > accessed 5 January 2024.

⁴⁶ *R(P) v Secretary of Justice* (Lady Hale) [75] (n27).

⁴⁷ *Green v Missouri Pacific Railroad* 523 F. 2d (8th Circ 1975).

⁴⁸ n27.

placed upon them.⁴⁹ A person who is labeled and branded as an ex-convict is likely to face shame and humiliation, factors that could explain an ex-convicts return to deviant behaviour. This should be more so when society rejects ex-convicts in employment. Such persons have been labeled as 'criminals' whom many members of society, including employers want to keep at a safe distance. This creates a situation of lack of acceptability in society, and more critically, an ex-convict may not have an opportunity to earn a decent income to enable them keep off deviant behavior.

Pager and Quillian set out to investigate whether employers do what they say. They carried out an experimental study in which they compared what employers self-report and what they actually do in real employment situations. They found that on a self-report survey about 60% expressed willingness to hire ex-convicts while in actual situation the result was below 20%. under actual situation, the study subjects presented themselves to the person responsible for hiring.⁵⁰

Whereas society feels aggrieved by a person's criminal conduct, the same society should be made aware of the 'rehabilitative' aspect of imprisonment. In addition to the label, society needs to appreciate that people change and that part of the prison's mandate is to rehabilitate a convict. This 'labeling' can be seen as a continuation of a punishment fully served in accordance with the law, and therefore, totally unnecessary. This 'labeling' does not therefore sit well with the rights under art 27.⁵¹ This 'labeling' is further reinforced by the exclusion of ex-convicts from employment. Lord Kerr opined that 'some employers will consider a criminal record as an automatic disqualification to employment'.⁵² The German Constitutional Court got it right when it said that once a criminal punishment has been served, an ex-convict would have paid his debt to society.⁵³ There is therefore no need to keep bringing up the criminal record. It is disclosure of criminal records that has caused many ex-convicts, Njoki included⁵⁴ tremendous suffering even in cases where there has been no repeat offence.

d) Importance of hiring ex-convicts

Studies suggest that employment tends to reduce the subjects' chances of committing crime.⁵⁵

Also, it was established that good jobs lowered the risk of recidivism, steady jobs make ex-convicts feel appreciated and welcome back into society, and that employment reduces the desire for criminal behaviour. Besides, earnings from employment enables persons to pay their bills and afford some luxuries of life. It is also said that employment reduces chances of engaging in 'income-generating' crimes. It is important to offer employment to ex-convicts because a strong relationships appears to exist between unemployment and recidivism.⁵⁶

e) Rights of ex-convicts

The whole debate on whether to disclose previous criminal offences in a certificate of good conduct revolves between on the one hand respecting the rights of an ex-convict to privacy, dignity and 'not to be subjected to degrading treatment', and on the other hand - protecting the public from possible harm (through recidivism).

Appeals to the European Court of Human Rights (ECtHR) dealing with disclosure of conviction records have been based on art 8 of the European Convention on Human Rights (ECHR) which prescribes the right to privacy.⁵⁷

The ECHR does not mention the phrase 'human dignity' although the Universal Declaration of Human Rights (UDHR) contains it. The UDHR uses 'human dignity' both in the preamble and at article 1. The right to privacy is contained at article 12 of UDHR.⁵⁸ Both UDHR and ECHR contain prohibition against 'torture, inhuman or degrading treatment or punishment' at articles 5 and 3 respectively. The African (Banjul) Charter on Human and Peoples Rights contains the phrase 'human dignity' both in the preamble and at article 5. In fact, article 5 uses 'dignity' in the same breath as the prohibition against 'slavery, servitude, degrading or inhuman treatment or punishment'.⁵⁹

The Constitution of Kenya contains provisions on human 'dignity',⁶⁰ 'freedom and security of the person', including a prohibition on 'inhuman or degrading treatment or punishment',⁶¹ 'slavery, servitude and forced labour',⁶² and 'privacy'.⁶³ The limitation of rights and fundamental freedoms provided

[%20employment%20and%20recidivism.pdf](#) accessed 9 February 2024.

⁵⁶ n14.

⁵⁷ 1950 European Convention on Human Rights at <https://www.echr.coe.int/documents/d/echr/Convention_ENG> 3 Feb 2024

⁵⁸ 1948 UN Universal Declaration of Human Rights at <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> 3 Feb 2024

⁵⁹ Adopted in 1981 and came into force in 1986 at <<https://www.african-court.org/wpafc/wp-content/uploads/2020/04/AFRICAN-BANJUL-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS.pdf>> 3 Feb 2024

⁶⁰ n51, art 28.

⁶¹ *ibid*, art 29.

⁶² *ibid*, art 30.

⁶³ *ibid*, art 31.

⁴⁹ H Becker, *Outsiders; Studies in the Sociology of Deviance* (London, Free Press of Glencoe 1963).

⁵⁰ D Pager & L Quillian 'Walking the Talk? What Employers Say Versus What They Do' 70(Jun 2005) 3 *American Sociological Review* ABI/INFORM Global pg. 355

⁵¹ Constitution of Kenya, 2010

⁵² n 27 (Lord Kerr dissenting)

⁵³ *The Case of Lebach* German Constitutional Court 5 June 1973 BVerfGE 35, 202.

⁵⁴ n 1

⁵⁵ MT Berg & BM Huebner 'Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism' 28(2011)2 *Justice Quarterly* 382-410 <<https://www.pacific-gateway.org/reentry>,

for under article 24 mirrors that in art 8(2) of the ECHR. Such limitation must have a basis in law, be 'reasonable and justifiable in an open and democratic society'. Restrictions based on law has been interpreted by the ECtHR to mean that there must be a law and that such a law must be 'accessible and foreseeable'. It must not authorize the exercise of power that is not constrained by law (arbitrariness). Such a law must not confer a broad discretion so that its exercise is made dependent on the will of those executing it. The law itself must 'contain safeguards against arbitrariness'.⁶⁴ The law must be 'specific on the scope of discretion allowed to officials'.⁶⁵

In the matter of MM in which the recording of criminal convictions in Northern Ireland was governed by statute but their retention and disclosure by common law, the court observed that the 'extent of discretion under the common law was not specific'. There was no mechanism for independent review as to whether to retain the criminal records or not, and there was no statutory provision on which records to disclose, their relevance to the job applied for, the time that has lapsed since the offence was committed, and to the nature of the offence. The court found that the officials had unfettered discretion and therefore, their actions were not anchored in law.⁶⁶

Decisions of the ECtHR on limitation of the right to privacy especially concerning disclosure of criminal records have been interpreted in the UK as requiring the law to be so precise as to reduce arbitrariness and accord the public protection against wide exercise of discretion by public officials.⁶⁷

The Constitution of Kenya provides for various rights and fundamental freedoms at chapter four. The preamble to the said Constitution provides so far as is relevant to this discourse that -⁶⁸

PREAMBLE

We, the people of Kenya —

[...]

COMMITTED to nurturing and protecting the well-being of the individual, the family, communities and the nation:

RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:

[...]

The preamble to the Constitution sets the tone for the entire document. Human dignity appear to be at the centre of the entire document. In the matter of *Makwanyane*⁶⁹, the Constitutional Court of South Africa analyzed the preamble to find that the death penalty - based on revenge - was not in tune with the tenor of the constitution. When an ex-convict is locked out of employment and thereby subjected to a life of difficulties, the convict, their family and their community suffer. This case has been cited with approval in Kenya.⁷⁰

In the matter of *Gregg*⁷¹, Brennan J stated that '[It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.' In Germany, the Federal Constitutional Court has held regarding punishment that.⁷²

Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.

At the beginning of 1969 in Germany, the Petitioner - together with others - planned a raid on a Bundeswehr/Federal Army ammunition depot.⁷³ The petitioner was involved in a robbery in which four sleeping soldiers were killed, seriously injured another and stole weapons and ammunition. The petitioner was sentenced to six years imprisonment for being an accessory. After serving two thirds of the sentence and while awaiting remission of the remaining sentence to be suspended on probation, a German television station named "Zweites Deutsches Fernsehen" (ZDF) commissioned a documentary with the title "The Soldiers' Murder of Lebach". The documentary showed how the armed robbery was planned and executed. It contained the name and images of the petitioner, giving his background, including his homosexual behaviour. The petitioner sought an injunction to prohibit ZDF from broadcasting the documentary on the ground that the documentary violated several of his rights such as his personality rights, ownership rights, and his right to his image. It was argued in his favour that this documentary would cause social isolation of petitioner and make his rehabilitation difficult. Respondents argued that the petitioner's private rights were not superior to the public interest to know and to the right of broadcasters to inform the public. Respondents averred that the public

⁶⁴ *Huvig v France* (1990) 12 EHRR 528, at para 26; *Kruslin v France* (1990) 12 EHRR 547; *Malone v United Kingdom* (1985) 7 EHRR 14; *Silver v United Kingdom* (1983) 5 EHRR 347; *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245.

⁶⁵ *Amann v Switzerland* (2000) 30 EHRR 843, para 56), *Rotaru v Romania* (2000) 8 BHRR 449, para 55.

⁶⁶ *MM v United Kingdom* (Application No 24029/07), 29 April 2013

⁶⁷ *R (Gillan) v Comr of Police for the Metropolis* [2006] 2 AC 307, para 34 (Lord Bingham); *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345, at para 41 (Lord Hope); *R (T) v Chief Constable of Greater Manchester Police* [2015] AC 49 (Lord Reed).

⁶⁸ n51.

⁶⁹ *S v Makwanyane & Anor* (CCT 3/94) [1995] ZACC 3; 1995(6) BCLR 665.

⁷⁰ *J O O (also known as J M) v Attorney General & 6 others* [2018] eKLR (HCT) par 63

⁷¹ *Gregg v Georgia*, 428 U.S. 153, 173 (1976) (Brennan J, dissenting).

⁷² [1977] 45 BVerfGE 187, 228 (*Life Imprisonment* case) (as translated in Kommers, KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 315 (1989) at 316).

⁷³ n53

had a legitimate right to know and that the documentary sought to serve as a deterrent to would be offenders, improve the morals of society and to promote social justice. In agreeing with the petitioner, the Constitutional Court unanimously held that where a crime had been prosecuted and a sentence issued in accordance to the law, that was sufficient retribution for the public.

The 'right to dignity' and 'freedom from torture and cruel, inhuman or degrading treatment or punishment' are non-derogable rights. In the matter of *Muriithi* in which the prosecution sought to use samples in court obtained from accused persons without their consent, the court stated that this violated their right to dignity.⁷⁴ Kenyan courts have also dealt with the question of the right to dignity in matters involving forceful evictions of persons considered to be inhabiting public land.⁷⁵

Another decision from the South African Constitutional Court in *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14 has been cited with approval by the High Court thus-⁷⁶

53 [...] the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity.

We submit without any fear of contradiction that an income (read employment) enables an individual to realize and enjoy all other rights. A government based on 'essential values of human rights' must take care of the rights of ex-convicts as well. In any case, article 27 outlaws any form of discrimination. Whereas the phrase 'rule of law' has been recited numerous times with reference to obedience of the law - with respect to ex-convicts- rule of law should mean that upon serving their lawful sentence - then a conviction that led to the said sentence should not be used against them forever. The purpose of a lawful sentence is to mete out punishment commensurate with the offence for which a person was convicted. Once the sentence is served, then the 'debt' to society and the wronged person should be considered 'paid' and the ex-convict allowed to move on with their lives or have a fresh start in life.⁷⁷

Chapter four of the constitution is dedicated to rights that may be enjoyed by persons living in Kenya, complete with mechanisms for redress. Whereas some rights are deemed not absolute or can be limited, the manner of their limiting is clearly spelt out. There is no express limitation of rights based on a conviction record.

Besides, the right to dignity is non-derogable. We forcefully submit that the practice of humiliating ex-convicts or of subjecting them to ridicule long after they have fully served their lawful sentence is a gross violation of their right to dignity.

Under Kenyan law, a state agency is required to ask for compliance certificate which invariably includes a report from the Directorate of Criminal Investigations (DCI) regarding a record of convictions, if any. The DCI is the custodian of all criminal records in the country. Non-state employers may ask for such clearance as well.⁷⁸ A criminal record on such a certificate spells doom on any hope of being hired. Nothing in the indicates how long such records are to be kept. Nothing in the law speaks to whether certain criminal records 'expire'. Nothing in the law differentiates a serious crime from a minor one - all have to be indicated. Nothing in the prescribes whether it is necessary to relate the conviction to the potential employment for which a certificate of good conduct is sought.

The constitution further provides for the right to dignity,⁷⁹ freedom of association,⁸⁰ and economic and social rights.⁸¹ The constitution is geared towards promoting the well-being of an individual. The rights referred to attach to an individual. It is common knowledge that an income facilitates enjoyment of many other rights such as acquisition and ownership of property, ability to afford healthcare services, ability to afford food and shelter, ability to move around and associate with others, and ability to pay for other services such as telephone, internet, water and electricity. These basic needs and necessities are at the core of the right to dignity. Realization of other needs is easier to achieve when these basics are catered for.

The practice of 'hanging' onto criminal records whose effect is to deny ex-convicts a chance to employment should be construed as an action of 'turning the ex-offender 'into an object of crime prevention'. The studies by Berg & Huebner⁸² illustrate the importance of the right to dignity. A source of income enables a person to live in dignity. We submit that once a person has completed their prison sentence, their right to dignity should not be unnecessarily impaired either through societal labeling or regulatory policies such as those requiring a certificate of good conduct. The use of criminal records to deny ex-convicts a chance of employment appears to be a perpetuation of a punishment already served. To the extent that such an action denies them employment or acts as a

⁷⁴ *Muriithi v The OCS Meru Police Station* [2012] eKLR (HCt)

⁷⁵ *Kariuki v The Town Clerk of Nairobi City Council* [2011] eKLR (HCt); *Mitu-Bell Welfare Society v The Kenya Airports Authority* [2021] eKLR (SCt).

⁷⁶ *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* [2021] eKLR (HCt) par 53

⁷⁷ n 53.

⁷⁸ Employment Act 2007 (as amended by Act No. 4 of 2023) s9.

⁷⁹ n51, art 28.

⁸⁰ *ibid*, 36.

⁸¹ *Ibid*, art 43.

⁸² n56.

restriction in employment should be construed as a violation of their right to dignity.

The right to privacy is one of those contained in the Constitution of Kenya. This right has been extended to mean the right to demand a 'pull down' of materials from the internet deemed unfavourable to a person. In Europe, this right has been extended to include the 'right to be forgotten'. Of late, this right has gained more premium through 'data protection laws'. In Europe, management of personal data that includes offenses, criminal proceedings, convictions and prison terms is only allowed where there is an enabling legislation. Whatever the case, care is to be exercised not to expose the data subject to the risk of discrimination.⁸³

In the matter of *Gonzales*⁸⁴ - in which the applicant sought his name to be hidden by a Spanish Newspaper and by Google in an article published about him being auctioned - the CJUE held that a data subject had a right to erasure of certain information that is prejudicial to their interest. This is more so if the said information has the effect of interfering with the person's privacy. More tellingly, the court observed that search engines have a way of collecting and putting together information about a person, and that search engines therefore can be classified as 'data processing'. According to the court, the right to privacy overrides any economic or public interest in such information.

It is instructive that none of the applicants to the ECtHR has alleged violation of the right to dignity. This is probably because such a right is not provided for in the ECHR. However, the German Constitutional Court the right to dignity and decided in favour of the petitioner. In Kenya, the right to dignity is non-derogable. Although this right was mentioned in Njoki, it was not forcefully argued. The question whether the practice in Kenya does offend the 'right to dignity' and the 'prohibition against inhuman or degrading treatment' - an equally non-derogable right may have to await judicial interpretation. We, however, submit that the current practice of indiscriminate disclosure of criminal records severely offends the spirit of the constitution as envisioned in the preamble and with respect to the aforementioned rights. The practice has the effect of exposing the Kenyan public to the risk of increased criminal activity through recidivism by unemployed ex-convicts

IV. BEST PRACTICES

Some researchers hold the view that a prison sentence should not be perpetually used to deny ex-

convicts opportunities for employment. Further that there is need for states to have an automatic mechanism for expunging criminal records based on the seriousness of the offense and the period out of prison. They aver that such an approach would not only make ex-convicts succeed but that it would also promote public safety.⁸⁵ '[...] it has been held by some courts that reliance on a criminal record to refuse employment violates Title VII where the criteria have an adverse impact on blacks and are not shown to be job-related.'⁸⁶

At Johns Hopkins Hospital, USA, ex-convicts are required to apply the normal way. Interviews are done. If one is selected, then the Hospital endeavors to place the person in the most appropriate section based on skills and experience. The Hospital assigns an offer to help the ex-convict transition to 'normal' society. At least 5% of all employees at the Hospital have a positive criminal record. The Hospital carries out background checks on all applicants after an offer has been made. A 3-6 year prospective follow-up of 79 such employees with criminal convictions showed that 73 (>92%) were still employed at the end of the study period. Based on the support at the workplace, ex-convicts have successfully joined the workforce at Johns Hopkins Hospital.⁸⁷ The Johns Hopkins Hospital employs ex-convicts bases on guidelines from the Joint Commission in the US. The Joint Commission,⁸⁸ a non-profit organization established in 1951 sets standards and has authority of accreditation in health care in the US. In evaluating compliance of health institutions with respect to hiring of ex-convicts, the Commission expects an institution to comply with State law. Where State law is missing or ambiguous, then an institution is required to formulate her own policies and abide by them. Institutions are required to document all criminal background checks.

In Wisconsin, the Fair Employment Act (WFEA) acts against discrimination based on a criminal record, amongst other characteristics.⁸⁹ This law has been described by the Supreme Court of Wisconsin as a

⁸⁵ L Couloute & D Kopf 'Out of Prison & Out of Work: Unemployment among formerly incarcerated people' July 2018 at <<https://www.pri.sonpolicy.org/reports/outofwork.html>> accessed 25 July 2023.

⁸⁶ *Griggs v Duke Power Co.*, 401 U.S. 424, 432 (1971), the Court invalidated the company's practice of barring persons from hire who did not have a high school degree because this requirement eliminated a disproportionate number of black applicants with-out a job-related justification. A number of whites who did not have a high school degree occupied the jobs to which the new rule had been applied.

⁸⁷ PD Paulk 'The Johns Hopkins Hospital Success in Hiring Ex-Convicts' (Sept 2016) at <<https://www.diversityincbestpractices.com/medialib/uploads/2016/09/Paulk-Presentation-Hiring-Ex-Offenders-09-142016.pdf>> accessed 24 January 2024.

⁸⁸ At <<https://www.jointcommission.org/standards/standard-faqs/hospital-and-hospital-clinics/human-resources-hr/000001355/>> accessed 22 January 2024.

⁸⁹ WIS. STAT. §§ 111.321, 111.36 (1999-2000).

⁸³ European Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (as amended by the Council of Ministers of EU on 18 May 2018) art 6.

⁸⁴ *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (judgment of 13 May 2014, C-131/12, EU:C:2014:317).

good attempt at eliminating barriers to employment.⁹⁰ This prevent the use of a conviction record in the hiring process.⁹¹ It has also been held that such laws help in rehabilitating ex-convicts and thereby providing them with the much needed form of livelihood.⁹² However, WFEA has an exception - unless the offence for which one was convicted is related to the nature of the work applied for. This exception is considered to be in line with other discrimination laws in other states based on convictions⁹³. The Supreme Court of Wisconsin - while interpreting this exception-held that employers only need to evaluate the elements of the crime with those of the job to decide whether to discriminate or not. This came up in *County of Milwaukee*, in which Steven Serebin was sacked after he was found guilty of homicide by reckless conduct and other crimes from his previous employment. The court held-⁹⁴

[T]he 'circumstances' of the offense and the job are similar since in both contexts Serebin was in a position of exercising enormous responsibility for the safety, health, and life of a vulnerable, dependent segment of the population. The twelve misdemeanors indicate a pattern of neglect of duty for the welfare of people unable to protect themselves. The propensities and personal qualities exhibited are manifestly inconsistent with the expectations of responsibility associated with the job.

In many States, the mechanism of 'deferred adjudication' helps accused persons to avoid a conviction record. Deferred adjudication is controlled by the court. An accused person, upon pleading guilty - the court continues with the case while the accused will be either on probation or supervision. Upon completion of supervision, a court will dismiss the charges and 'seal' or 'expunge' the record. Certificates of Relief such as a 'certificate of good conduct' is a mechanism that started in New York in the 1940's. These are issued by the Court either at sentencing or after a short wait upon release from prison. These do not 'seal' or 'expunge' the criminal record, but are aimed at showing that the bearer has 'reformed'.

The concept of 'deferred adjudication' finds a resemblance in the procedure foreseen in the Plea Bargain Bill in Kenya. Under the said Bill, a person who agrees to and complies with the conditions for plea bargain will not have a conviction record. This will be an indirect way of 'expunging' the criminal convictions.

However, the matter of arrests and presentation in court should not be used against such a person.

The UK has come up with a progressive law in which rehabilitation periods have been reduced tremendously thereby allowing ex-convicts to seek (re-) employment without their previous convictions acting as a bar. It has been made particularly easy for those who serve sentences of four years or less.⁹⁵ In addition, community service is prescribed for offences that require less than 12 months in prison. There is an exemption to what is considered to be serious offences such as serious violent, sexual and terrorism offenses. This exemption is deemed necessary to keep the public safe. In cases of custodial sentences of four or less years or more than four years but for less serious offences, the criminal record becomes 'spent' after a rehabilitation period of seven years or less years. It can no longer act as a bar to employment.

In the UK, there are attempts to get ex-convicts into employment in the shortest time possible. It is reported that 30% had been employed within six months of leaving prison. The thinking here is that getting ex-convicts busy prevents recidivism and makes the streets safe. Some of the measures implemented is to equip prisoners with skills needed in the job market outside of prison, career advisory services conducted in prison, coaching on how to write a CV, conducting mock interviews to prepare them on how to take interviews. The UK Prison Service also runs nationwide recruitment drives into careers where there are shortages. The Department for Work and Pensions also conducts activities aimed at making prisoners ready for work upon their release. Joe Shalam is quoted as having said:

Employment is proven to cut reoffending, while also providing prison leavers with the keys to a better and more stable life. It's a rare win-win that we should be doing everything to achieve.⁹⁶

Most of the disputes in Europe involving ex-convicts and disclosure of their criminal record while applying for a job have been based on art 8 of the EU Convention,⁹⁷ which focuses on the right to privacy. Both the ECtHR and Courts in the UK have accepted a domestic law limiting that right - which law must fulfill the conditions set in art 8(2). These touch on legality, access to the rules and foreseeability. Proportionality has not enjoyed a lot of discussion. The courts of appeal in England⁹⁸ as well as in Northern Ireland⁹⁹

⁹⁰ *County of Milwaukee v Labor & Indus. Review Comm'n*, 407 N.W.2d 908, 914 (Wis.1987).

⁹¹ *Miller Brewing Co. v Dept of Indus. Labor & Human Relations*, 308 N.W.2d 922,927 (Wis. Ct. App. 1981)

⁹² *County of Milwaukee v Labor & Indus. Review Comm'n*, 407 N.W.2d 908, 915 (Wis. 1987);

⁹³ TM Hruz 'The Unwisdom of the Wisconsin Fair Employment Act's Ban of Discrimination on the Basis of Conviction Records' 85 (2002) MARQLR779 <<https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1332&context=mulr>>

⁹⁴ *County of Milwaukee v LIRC*. 407 N.W.2d 908 (Wis. 1987).

⁹⁵ Police, Crime, Sentencing and Courts Act 2022 s193 (UK).

⁹⁶ Ministry of Justice, HM Prison and Probation Service, The Rt Hon Alex Chalk KC MP, and Mims Davies MP :'Thousands more ex-prisoners in work following major drive to boost employment' *Press release* 24 May 2023 at <<https://www.gov.uk/government/news/thousands-more-ex-prisoners-in-work-following-major-drive-to-boost-employment>> accessed 20 Dec 2023.

⁹⁷ EU Convention on Human Rights.

⁹⁸ *R (P) v Secretary of State for Justice, R (G) v Chief Constable of Surrey Police and R (W) v Comr of Police of the Metropolis* [2018] 1 WLR 3281.

rejected an approach of disclosure of convicts based on the 1997 UK Police Act - a scheme that was too broad and one which was open to arbitrariness.

In the matter of MM, the applicant had received some cautions which she were supposed to be deleted from criminal records after five years. That did not happen. This affected her application for two jobs. Hence, this petition to the ECtHR in which she argued that the law applicable to her Police records did not meet the standard of 'in accordance to the law' of article 8.2 of the ECHR. The ECtHR held that

206. [...] no distinction is made [in the law and regulations] on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought.

207. The cumulative effect of these shortcomings is that the court is not satisfied that there were, and are, sufficient safeguards in the system for retention and disclosure of criminal record data to ensure that data relating to the applicant's private life have not been, and will not be, disclosed in violation of her right to respect for her private life.

In the matter of T¹⁰⁰ which attacked the prevailing legislation before the 2013 amendment, the UK Supreme Court, in a leading Judgement by Lord Reid stated-

113. [...] Put shortly, legislation which requires the indiscriminate disclosure by the state of personal data which it has collected and stored does not contain adequate safeguards against arbitrary interferences with article 8 rights.

114. [...] In other words, in order for the interference to be 'in accordance with the law', there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. [...].

These attacks on the UK system of disclosure of convictions by both domestic courts and ECtHR precipitated changes to the 1997 Police Act. The amendments were done in 2013. This new set of laws were the subject of litigation in which the UK Supreme Court, in a majority decision rendered itself as follows (Lady Hale)-¹⁰¹

75. The scheme as it now stands [*the current laws relating to ex-convicts*] does not have that indiscriminate nature. It has been carefully devised with a view to balancing the important public interests involved. In my view there are at least three of these. There is, of course, the importance of enabling people who have committed offences, and suffered the consequences of doing so, to put their past behind them and lead happy, productive and law-abiding lives. The full account of the facts of the four cases before us, given by Lord Kerr, is ample illustration of

the importance of this aim, and of the devastating effect that disclosure of past offending can have upon it. There is, on the other hand, the importance of safeguarding children and vulnerable adults from people who might cause them harm, as well as ensuring the integrity of the practice of certain occupations and activities. [...]. There is also, in my view, a public interest in devising a scheme which is practicable and works well for the great majority of people seeking positions for which a criminal record certificate is required.

Looney & Turner speak of incentives that have been built in the tax system in the US to encourage employers to hire ex-convicts. Subsidies are provided for in the tax code such as the Work Opportunity Tax Credit (WOTC) and the Earned Income Tax Credit (EITC). These subsidies are supposed to fast track the (re-)entry of ex-convicts into employment.¹⁰² These incentives have been found to reduce recidivism among women where households with children get more than those without (maximum of over \$6,000 versus \$500).¹⁰³ It has also been observed that there is a relatively low uptake of WOTC by employers largely due to complex administrative processes involved. Even with such a good policy, the uptake lies at around 30% of those released from prison annually.¹⁰⁴

The South African Criminal laws allow for expungement of criminal records under certain conditions such as after expiry of 10 years and others.¹⁰⁵ The laws set out the procedure to be followed.

The Constitution of Kenya provides for the grounds of removal of a judicial officer to include 'gross misconduct or misbehavior'.¹⁰⁶ Such a ground must be proven on a standard above a balance of probability but below that required of criminal offences.¹⁰⁷ Ms Baraza was removed from the Judiciary for gross misconduct and misbehavior, which included threatening to shoot a security guard.¹⁰⁸ In the matter of *Mutava*,¹⁰⁹ the Tribunal found that he had caused certain cases to be allocated to him, he made a ruling in a matter that was not properly before his court and he attempted to influence decisions in matters before another Judge. These allegations were affirmed by the Supreme Court. The Judge was eventually removed from office. However, such a removal does not go with a prohibition against further and future employment. Neither does such a removal lead to 'exclusion' from the professional body. The removed Judges can be gainfully engaged in other

¹⁰² n 16.

¹⁰³ A Agan & M Makowsky . 'The Minimum Wage, EITC, and Criminal Recidivism'. Working Paper 2018 at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097203> accessed 12 January 2024.

¹⁰⁴ n16.

¹⁰⁵ South African Criminal Procedure Act 51 of 1977 at ss 271A - E

¹⁰⁶ n51, art 168(1)

¹⁰⁷ *Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya* [2019] eKLR (SCT)

¹⁰⁸ Report and Recommendation Into The Conduct of The Hon. Lady Justice Nancy Makokha Baraza [2012] Eklr.

¹⁰⁹ n107.

⁹⁹ *In re Gallagher's Application* [2016] NICA 42.

¹⁰⁰ n9.

¹⁰¹ n 27.

sectors of the economy - both public and private. Of course removal of a person from the Judiciary is not a comfortable thing for the individual and for the family and friends. However, the fact that it does not completely bar the concerned individual from gainful employment is an approach - we submit - that is worth extending to ex-convicts.

All in all, we resonate with the following words - ¹¹⁰

169. It is, thus, incumbent on those responsible for devising a scheme of disclosure to be aware that at least some employers will regard the existence of a criminal record as an automatic bar to choosing the candidate with the record. Where, therefore, it is abundantly obvious, as in many cases it will be, that the criminal record of an individual could have no conceivable relevance to the position for which he or she applies, a system in which disclosure is not made is not only feasible but essential.

V. CONCLUSION

For many decades and in many countries, employers have been reluctant to hire ex-convicts. Many governments keep records of ex-convicts for a very long time. Many states have laws in place that require employers to conduct 'background checks' on potential employees. Many convicts lose out on employment due to such records. In some countries, these records last forever. In other countries, a person can apply to have such information regarding their criminal record expunged after a statutory period. On the one hand, this action of using criminal records to bar ex-convicts from employment denies such persons an opportunity to earn a living, live a life free of crime, and to realize their human rights to the full. In a way, they are prevented from fully re-integrating into society. On the other hand, keeping ex-convicts out of employment is a recipe for recidivism and therefore aggravating the danger to the public. The exercise of 'locking' out ex-convicts from employment encourages such persons to commit 'economic' crimes as a way of survival. Many are apprehended and taken back to jail in what is termed 'recidivism'.

One of the purposes of punishment after conviction is to rehabilitate (enable such persons to fit back into society. Completion of a jail term, and therefore, release from prison must signify that the state has done everything possible to facilitate re-integration of the ex-convict back into society. In countries like Kenya, factors that negatively impact on rehabilitation of prisoners are well known. Such factors are ones the government can mitigate. It is the responsibility of the State to rehabilitate convicts. Once a sentence has been served - the debt to the public would have been paid.

Ex-convicts should not continue to endure punishment because of a state's failure to do what it should have done. Developments in Europe around 'the

right to be forgotten' coupled with data protection laws are worthy using to put a limit on how long a state agency can hold onto criminal records of ex-convicts and to what use such data should be put. Furthermore, employers need to be incentivised - probably through tax rebates - to hire ex-convicts and therefore keep them away from recidivating.

Kenya's constitution shows a determination to improve the welfare of all (preamble). Keeping ex-convicts out of employment violates their right to dignity and therefore all other rights. In the spirit of the preamble to the constitution, the government must walk the talk of 'nurturing and protecting the well-being of the individual, the family, communities and the nation' as well as 'recognizing the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law'. The preamble to Kenya's constitution, the non-derogable rights of 'dignity' and 'prohibition against inhuman and degrading treatment', together with recent developments on the right to privacy which call for a 'right to be forgotten' would appear to point to the need for a newer approach to disclosure of criminal records with clear cut guidelines on their expungement. To this end, there is need for amendment of several laws touching on the penal system and for striking down - through judicial fiat - all laws that prevent ex-convicts from accessing employment. All in all, Kenya has an obligation to promote constitutionalism-and in this respect - by abolishing the use of criminal records to bar ex-convicts from employment.

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Conflict of Interest Declaration

None of the authors has any conflict of interest.

¹¹⁰ n27 (Lord Kerr dissenting).