

**ARE CRIMINAL RECORDS AN INFRINGEMENT ON THE RIGHT  
ENSHRINED IN ARTICLE 21(1)(g) OF THE CONSTITUTION: A  
CRITICAL ANALYSIS**

A DISSERTATION IN PARTIAL FULFILMENT  
OF THE REQUIREMENTS FOR THE DEGREE OF  
LLB

OF

THE UNIVERSITY OF NAMIBIA

BY

**ELINA LATUNGALA HAIPINGE**

(200613898)

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Supervisor: Mr. F. Mundia

## Declaration

This study is an original piece of work, which is made available for photocopying and inter – library loan.

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Elina Latungala Haipinge

31 October 2011

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Mr. F.K. Mundia

Supervisor

31 October 2011

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## CONTENT

	PAGE
ABSTRACT.....	v

### CHAPTER 1

#### General Introduction

Background to the study	1
Statement of the problem	4
Objectives to the study	5
Significance of the study	5
Research questions	5
Hypothesis	5
Methodology	6
Delimitations and scope of the study	6
Arrangement of the study	6
Definition of terms	7

### CHAPTER 2

#### Research Overview

Interpretation of Article 21(1)(g) of the Constitution	9
Economic discrimination and the use of criminal records in employment	10

### CHAPTER 3

#### Research Findings

Interpretation of Article 21(1)(g) of the Constitution	
Introduction	16
Economic, Social and Cultural Rights	16
Established Human Rights Principles on Employment	18
Regional Human Rights Principles Protecting Employment rights	19
Economic discrimination and the use of criminal records in employment	

General Overview	19
Employers' Rights	22
Ex-Offender's Right	23
Criminal records and Article 21(1)(g)	25
Are the Rights in Article 21(1)(g) subject to the limitation clause?	27

#### **CHAPTER 4**

##### **Lessons and Recommendations**

Introduction	29
Incorporation of legislation protecting ex-convicts employment rights	29
Setting aside of criminal records	30
Expungement	31

#### **CHAPTER 5**

<b>Conclusion</b>	<b>35</b>
<b>Annexure</b>	<b>37</b>
<b>REFERENCES</b>	<b>39</b>

## Abstract

The society to which ex-offenders return is drastically different from the one they left regarding availability of jobs, family support, community resources, and willingness to assist ex-offenders. "Finding a job is often the most serious concern [for ex-offenders], who [on average] have few job skills and little work history."<sup>1</sup> Without access to subsistence benefits, safe housing, and employment, ex-offenders are less likely to gain a foothold in society and to live as drug-free and crime-free members of their community.

This study critically analyses the various consequences faced by criminal record holders and argues that there are a number of obstacles faced by persons with previous convictions and that such obstacles result in the violation of the right to employment as well as to carry out any the profession of their choice and in some cases to conduct business as provided for by Article 21(1)(g) of the Namibian Constitution. The conclusion drawn by this study is that, although there exists a growing need to protect the rights of ex-offenders, especially that provided for by virtue of Article 21(1)(g) of the Constitution, it should be kept in mind that every individual is expected to face the consequences of their own actions and those persons who break the law are subsequently faced with the option of limitations to some of their rights.

The Article identifies and suggests several possible solutions such as the incorporation of legislation prohibiting the discrimination of ex-convicts/offenders by employers for example that could be implemented in order to protect the right to employment of ex-

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<sup>1</sup>Kadela K.R, & Seiter R.P. 2003. *Prisoner Re entry: What Works, What Does Not, and What Is Promising*, CRIME & DELINQUENCY, July 2003, p. 367.

convicts and thereby grant them equal opportunities to find jobs and provide for themselves and their families.

## Chapter 1

### General Introduction

#### 1.1 Background to the Study

Upon release from prison, ex-convicts face a vast and increasing maze of mandatory exclusions from valuable social programs and employment opportunities that threatens their hopes of success in the free economic world. The consequences and sufferings of people with previous convictions in society are a major issue as these infringe upon the person's life, either directly or indirectly. In the Namibian context, Article 21(1)(g) of the Constitution<sup>1</sup> provides that "all persons shall have the right to practice any profession, or carry on any occupation, trade or business". According to the latest existing annual report of the Ministry of Safety and Security, 3577 individuals have been released from prison on various counts<sup>2</sup> this is a relatively small number of ex-convicts released into society compared to the estimated around 600 000 American ex-convicts released annually. Nonetheless, the society to which ex-offenders return is drastically different from that which they left regarding availability of jobs, family support, community resources, and willingness to assist ex-offenders. Without access to subsistence benefits, safe housing, and employment, ex-offenders are less likely to gain a foothold in modern society and to live as drug-free and crime-free members of their community.

On the other hand, the distinguishing characteristic of criminal conduct is that it creates an increased risk of harm to society which then necessitates a corresponding need for protection.<sup>3</sup> In the attempt to protect the society at large from criminals, various measures and rules have been implemented. Such measures do not only symbolise a social division between law abiding citizens of a given society, however it also kills the human relations between the society and those that have already paid

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<sup>1</sup>The Namibian Constitution, Act No. 1 of 1990.

<sup>2</sup>Ministry of Safety and Security, Namibian Prison Service. Annual Report 2008.

<sup>3</sup>Rabie, M.A. & Marè, M.C. 1994. *Punishment: An introduction to principles*. Cape Town: Butterworths Publishers (Pty) Ltd, p, 2.



for their criminal offences in the hands of the criminal justice system. A fascinating explanation to this can be drawn from the statement by Cragg who stated that:

“One fundamental feature of human relationships is that they are rule governed. Since the function of a rule is to prohibit what otherwise might be done , rule enforcement seems unavoidable, if those who broke the rules were treated no differently from those who followed them, we would normally conclude that the rule had ceased to apply.”<sup>4</sup>

In other words, this means that there would seem to be no expectation to follow the rule if there is no consequence following non-compliance and hence the difference in treatment for non-compliers compared to those individuals who comply with the rules put in place.

Individuals who were unfortunate to have been caught on the wrong side of the law have been faced with severe punishment in most cases. The aims and forms of punishment have been discussed for many years to the point where it has evolved to be understood to appear in various forms but all in all it has one major purpose and that is to ensure that those who fail to obey the law are called upon to pay for their crimes. Some Authors<sup>5</sup> have defined punishment to encompass the societies' reaction to ex convicts, that is, they define punishment as,

“A sanction entailing the community's condemnation and disapproval of the offender and the infliction of suffering as corporal punishment and the deprivation of property liberty and even of life. It consequently involves drastic consequences for the offender, it is, in fact, societies most drastic legal sanction.”<sup>6</sup>

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<sup>4</sup>Cragg, W. 1992. *The Practice of Punishment: Towards a Theory of Restorative Justice* Canada: Routledge, p. 11.

<sup>5</sup>Rabie M.A. & Mare M.C. 1994, p. 2.

<sup>6</sup>Rabie M.A. & Marè M.C. 1994, p. 2.

In *Mkize*, in setting aside a sentence of declaration as habitual criminal, Miller J. Commented on the protection of society as a form of punishment in the following terms: " While the public is entitled to protection against any individual, one cannot sacrifice the individual entirely in offering protection to it [society]. He further stated that, "I think the most the court can do consistently with justice is to protect the public for as long a period as seems commensurate with the accused person's deserts."<sup>7</sup>

As much as imprisonment offers some sort of protection from the offensive individual, one should question the extent of such protection. Does it mean that the sentencing period is the period equivalent to protection needed by society against this individual? The truth of the matter is that convicted persons are kept in isolation from the rest of society as a form of punishment; however, even after such prison terms they continue to suffer punishment from their societies. The 'society against you' attitude is theoretically believed to have been brought about by the labelling of a person as bad at the time of conviction. Although the person is arrested and punished accordingly, society seems not to believe that the person has been reformed or that the offender has understood and acknowledged both their action(s) and consequences thereto, including the punishment granted for the offence. Furthermore, the labelling of convicted persons through a criminal record has a long term effect on the life and well being of such a labelled individual.

Some authors<sup>8</sup> are of the opinion that Imprisonment is at any rate not in principle, aimed at rehabilitating the offender and the performance of useful tasks during prison sentences is in most cases never related to the offender's reformation. As Parker states:

"We can use our prisons to educate the illiterate, to teach men a useful trade, and to accomplish similar benevolent purposes. The plain disheartening fact is

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<sup>7</sup>Mkize 1973 (3) SA 284 (N)

<sup>8</sup> Cragg, W. 1992, p. 11-12; Rabie M.A. *et al*, 1994, p. 30;

that we have very little reason to suppose that there is a general connection between these measures and the prevention of future criminal behaviour.”<sup>9</sup>

The consequence of imprisonment and rehabilitation on the other hand, is to influence the offender’s personality so that he can become a law-abiding citizen. However, because rehabilitation usually takes a long time, it can be meaningfully implemented only in relation to offenders who serve long term prison sentences.<sup>10</sup> Nonetheless, the biggest impact of having a conviction is likely to be when you are looking for new employment. If the job you are applying for involves working with children or vulnerable people then you will be required, by law to have a Criminal Records check when you apply. The criminal record check discloses all convictions.<sup>11</sup>

## **1. 2 Statement of the problem**

The consequences and sufferings of people with previous convictions in society are a major issue as they manifest an infringement on the person’s life. The lack of acknowledgement for the effect of a criminal record on its holders’ rights has deprived a great number of people with previous convictions from personal growth, which includes, among others, economic growth, and also from possible exclusion from employment opportunities. Recently the American Bar Association concluded that the dramatic increase in the number of persons convicted and imprisoned means that this half-hidden network of legal barriers affects a growing proportion of the population. More people convicted inevitably means more people who will ultimately be released from prison or supervision, and who must either successfully re-enter society or be at risk of reoffending. If not administered in a sufficiently deliberate

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<sup>9</sup>As quoted in Rabie M.A. & Marè M.C. 1994. *Punishment: an introduction to principle*, p.30.

<sup>10</sup>Rabie M.A. & Marè M.C. 1994. *Punishment: an introduction to principle*, p. 31.

<sup>11</sup> Activist Legal Project UK, 2011, The Impact of arrest and Criminal convictions available at [www.activistslegalproject.org.uk](http://www.activistslegalproject.org.uk), last accessed 04 August 2011; p. 1.

manner, a regime of collateral consequences may frustrate the re-entry and rehabilitation of this population, and encourage recidivism.<sup>12</sup>

### **1.3 Objectives of the study**

The objectives of this study were:

1.3.1 To investigate whether the effect that the records of previous convictions have on peoples livelihoods

1.3.2 To examine the record of previous convictions in light of Article 21(1)(g) of the Namibian Constitution;

### **1.4 Significance of the study**

The study envisages that the likely outcome will be a guideline to stake holders and affected persons to clarify the respective rights and responsibilities in this area of law. The study may also be useful in the future for students interested in obtaining information by further studying/ covering the subject matter of this study or related aspects.

### **1.5 Research questions**

1.5.1 What effect does criminal records, have on the lives of people with previous convictions?

1.5.2 Is a criminal record a violation of Article 21(1)(g) of the Constitution?

1.5.3 What measures are in place, if any to reintegrate ex-convicts into society?

### **1.6 Hypothesis**

From the above research questions, I had formulated the following hypothesis:

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<sup>12</sup> Archer D, N. & Williams K, S. 2011. "Work in Progress: Making America "The Land of Second Chances": Restoring Economic rights for first offenders." to be published in *NYU Review of Law and Social Change*, p. 3.

Persons with criminal records are deprived of the full exercise of their right to practice any profession, or carry on any occupation as provided for by Article 21(1)(g) of the Constitution.

### **1.7 Methodology**

A qualitative desktop approach was undertaken as the primary research method for the research. Furthermore, a descriptive design was used for this study to describe phenomena as they exist and an empirical research was carried out to acquire the views and opinions of potential employers on the employability of persons with previous criminal convictions and why<sup>13</sup>. This study also included the analytical and predictive approach as an understanding was to be formulated and thereby generalized from the analysis by predicting and opining on certain phenomena on the basis of assumed, general circumstances.

### **1.8 Delimitations and scope of the field of study**

This study was mainly based on written experiences as well as social observation. No one-on-one interviews could be conducted with the affected persons (i.e. persons with criminal convictions) due to the nature of the subject and also a few potential employers expressed a willingness to give their opinion on the employability of persons with previous convictions. The views expressed in this paper are therefore based on theoretical reasoning and social observations as well as on statistics that are available on the Namibian prison system.

### **1.9 Overview of Chapters**

This study discusses the consequences of criminal records on the lives of the persons who possess them and in doing so focuses on the Namibia perspective in terms of the effectiveness of Article 21(1)(g) of the Constitution. In Chapter 2 of this study the chapters are arranged as follows:

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<sup>13</sup> See interview questionnaire, Annexure, on page 30

Chapter 1: is the reworked version of the research proposal.

Chapter 2: provides a literature review on the existing views and opinions on the topic or related topics.

Chapter 3: discusses and explains the findings of the research.

Chapter 4: provides a summary of the lessons learned during the research and recommendations.

### **1.10 Definition of Terms**

"Convicted": of an offence means that a court has found you guilty or you have pleaded guilty;

"Conviction": is an entry on your criminal record which may be disclosed in certain circumstances to other people and organisations.

"Criminal history": includes everything on your criminal record, but also includes details of all court matters, whether you have been convicted or not.<sup>14</sup>

"Criminal record" is a record of convictions against you. This will be handed up by the prosecutor if you are being sentenced for an offence in court.

"crime-free period":<sup>15</sup> is a period of time when you have not been:

- convicted of an offence punishable by imprisonment (this includes if you are found guilty but no conviction has been recorded, but would not include a police caution or youth justice conference);
- Subject to a control order (i.e. a sentence in a juvenile detention centre) or in prison because of a conviction for an offence.

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<sup>14</sup>It will include matters where you have been found not guilty, details of any failures to appear in court, and matters which have not yet been finalised. A criminal history is often handed up by the prosecutor if you are making a bail application.

<sup>15</sup>Definition extracted from Shopfront Youth Legal Centre (2004) Convictions and Criminal Records, FreeHills Sydney, p. 7.

“Ex-convict”: is an individual who was convicted of an offence and has already served their prison term or carried out their sentence in any other form.

“Ex-offender”: is an individual with a criminal history.<sup>16</sup>

“Expungement”: is a process by which a record of criminal conviction is destroyed or sealed from the state repository.<sup>17</sup>

**Keywords:** criminal record, ex-convicts,

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<sup>16</sup>This definition does not reflect the3 criminal record status of the offender.

<sup>17</sup>*Black’s Law Dictionary*.

## Chapter 2

### Research Overview

The following materials will be reviewed to provide related information to the topic.

#### **Interpretation of Article 21(1)(g)**

Property rights are commonly seen as fundamental human rights, sacred and inviolable, and the foundations for a free and democratic society. It therefore follows that employers, as the owners of capital, should have the basic right to use their property as they please.<sup>18</sup>

According to Nakuta, economic social and cultural rights are a *sine qua non* for improving people's lives and standard of living.<sup>19</sup> He further stipulates that many people cannot freely exercise economic, social and cultural rights as they exercise and enjoy fundamental rights and freedoms recognised and protected in the Bill of rights entrenched in the Constitution. This is said to be so because the non-entrenchment of economic, social and cultural rights in the Constitution, the way these rights have been formulated in the Constitution, and the dominant perception that these rights are not enforceable under the current constitutional dispensation.<sup>20</sup>

A violation of economic, social and cultural rights occurs when a state pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant on economic, social and cultural rights, or fails to achieve the required standard of conduct or result.<sup>21</sup> The Maastricht Guidelines add to this contention in that:

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<sup>18</sup>Lam, H. & Harcourt, M. 2003. "The use of Criminal Records in Employment Decision Making: Rights of ex-offenders, employers and the public." *Journal of Business Ethics* 47: 237–252, Netherlands: Kluwer Academic Publishers, p. 238.

<sup>19</sup>Nakuta, J. 2009. "The Justiciability of Social, Economic and Cultural Rights in Namibia and the Role of the Non-Governmental Organisations" Horn, N. & Bösl, A. 2009. *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Namibia Publisher, p. 89.

<sup>20</sup>Horn & Bösl, (Eds) 2009. *Human Rights and the Rule of Law in Namibia*, p. 89.

<sup>21</sup>Maastricht Guidelines on violations of economic, social and cultural rights, 1997, p. 3.



“Any discrimination on grounds of race, colour, sex language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.”

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The Maastricht guidelines<sup>23</sup> further states that “like civil and political rights, economic social and cultural rights impose three different types of obligations on the States: the obligation to respect, protect and fulfil. Failure to perform any of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.”<sup>24</sup>

### **Economic Discrimination and the use of criminal records in employment**

The right to be treated equally and not be subjected to discrimination is often seen as a ‘negative’ right.<sup>25</sup> The more accessible criminal records are, the more likely the stigma of a criminal conviction, or even an arrest, will endure. This stigma will likely have negative repercussions for an individual’s future interactions with the criminal justice system as well as with future employers, landlords as well as voluntary

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<sup>22</sup>Maastricht Guidelines on violations of economic, social and cultural rights, January 22-26, 1997, p. 3.

<sup>23</sup>Maastricht Guidelines, 1997, p. 3.

<sup>24</sup>Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22-26, 1997, p. 2.

<sup>25</sup>Lam, H. & Harcourt, M. 2003. “The use of Criminal Records in Employment Decision Making: Rights of Ex-offenders, employers and the public”. *Journal of Business Ethics* 47: 237–252, Netherlands: Kluwer Academic Publishers, p. 238.

associations.<sup>26</sup> After being released from prison, ex-offenders face a vast and increasing maze of mandatory exclusions from valuable social programs and employment opportunities that impede their hopes of success in the free world.<sup>27</sup> According to Jacobs *et al*, persons stigmatised with criminal labels face *de jure* and *de facto* discrimination in employment because of the labels attached to them.<sup>28</sup>

Chartier maintains that, discrimination on the basis of characteristics unrelated to a person's actual capacity to perform in a particular position is clearly inconsistent with the Golden Rule of natural law which rules out arbitrary preferences between persons, and, at least for most purposes, making choices about hiring, promotion, and retention or dismissal based on ethnicity, gender, age, or sexual orientation is arbitrary.<sup>29</sup> Arbitrary employment decisions may also be those decisions based on a person's perceived label as opposed to their work capability.<sup>30</sup> In some states, research has shown that a conviction for certain types of offences (generally those involving fraud or dishonesty) may stop the individual possessing such record from getting a licence as an auctioneer, travel agent, tow truck operator, TAB operator, builder, motor dealer, security guard or a private inquiry agent. It may also stop you from being a director of a company.<sup>31</sup>

Medical practitioners, nurses, dentists, opticians and optometrists have to be registered and the appropriate registration board may refuse to register a person who has been convicted of an offence. Twenty percent of the potential employers interviewed, indicated that employers can deny employment to persons who were

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<sup>26</sup>Jacobs, J. & Crepet, t. 2008. "The Expansion, Scope, and Use of Criminal Records" *Legislation and Public Policy* vol. 11:177. Criminal Records, p. 211.

<sup>27</sup>Archer D, N. & Williams K, S. 2011. *Work in Progress: Making America "The Land of Second Chances": Restoring Economic rights for first offenders.* To be published in *NYU Review of Law and Social Change*, p. 1.

<sup>28</sup>Jacobs, J. & Crepet, T. 2008. "The Expansion, Scope, and Use of Criminal Records" *Legislation and Public Policy*, Vol.11:177. Criminal Records, p. 178.

<sup>29</sup>Chartier, G. 2009. *Economic Justice and Natural Law.* Cambridge: University Press, p. 83.

<sup>30</sup>According to a Michigan study conducted in 1999 by the Michigan State University, two out of every three employers say that they will not employ ex-convicts.

<sup>31</sup>Shopfront Youth Legal Centre. 2004. *Convictions and Criminal Records*, Sydney: Freehills, p. 5.

arrested even if they were never convicted of any offence. The common reason for this is that an arrest indicates a potential commission of a crime. Employers can also fire an employee with a criminal record regardless of individual history, circumstances, or business necessity.<sup>32</sup> On the other hand, Lam & Harcourt maintains that, some employers may argue that selection based on criminal record is justified by the possibility that those who have committed wrongs in the past are likely to do so again.<sup>33</sup> Furthermore, the report by the Homeless Persons Legal Clinic provides that, in some circumstances, a criminal record will be relevant to a job a person is seeking or the service they are trying to access.<sup>34</sup> However, only where the nature of the offence indicates a real likelihood of re-offending, or where there is a genuine need for someone not to have a criminal record, should a criminal record be relevant to a person's employment or their ability to access a service.<sup>35</sup> The Maastricht Guidelines provide that, the active denial of economic rights to particular individuals or groups, whether through legislated or enforced discrimination, amounts to violations of economic rights.<sup>36</sup>

My view in terms of economic discrimination would be in favour with Chartier, in that, discrimination unrelated to the person's capacity and or ability to perform is unfair. Nonetheless, Lam and Harcourt's contentions are of great importance to the study, however, their views on the possibility of repeating an offense fail to take into consideration the various factors that may have led to the commission of the offense that has resulted into the said conviction or factors that may result in change of

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<sup>32</sup>Legal Assistance Center. 2004. After Prison roadblock to re-entry: A report on legal barriers facing people with criminal records. Legal Assistance Center, p. 10.

<sup>33</sup>Lam, H. & Harcourt, M. 2003. "The use of Criminal Records in Employment Decision Making: Rights of ex-offenders, Employers and the Public." *Journal of Business Ethics* 47: 237–252, Netherlands: Kluwer Academic Publishers, p. 243.

<sup>34</sup>Homeless Persons' Legal Clinic 1800 606 313 [hplc@pilch.org.au](mailto:hplc@pilch.org.au) [www.pilch.org.au/hplc](http://www.pilch.org.au/hplc) last accessed 31 August 2011, p. 1.

<sup>35</sup>Homeless Persons' Legal Clinic 1800 606 313 [hplc@pilch.org.au](mailto:hplc@pilch.org.au) [www.pilch.org.au/hplc](http://www.pilch.org.au/hplc) last accessed 31 August 2011, p. 1.

<sup>36</sup>Maastricht Guidelines on Violations of economic, social and cultural rights, p. 4.

character such as the maturity of the said individual and or his rehabilitation if he was sentenced to a rehabilitation centre.

Ex-convicts face the obstacle of potential employer perceptions. According to Rosen “employers have become increasingly concerned about knowing if an applicant has a criminal record. More employers are conducting pre-employment background checks for criminal records.”<sup>37</sup> The reason for this, he maintains, is that employers have been the subject of large jury verdicts for negligent hiring in cases where they hire a person with a criminal record that harms others, and it could have been avoided by a criminal record check.<sup>38</sup> Everything is being re-examined, from traffic tickets to capital punishment, it will take those efforts and more to bring justice to the criminal justice system.<sup>39</sup> Strezewski of the D.C. jobs Council in stating that “employers are seeking an individual’s offender status as a way of sorting among candidates, she said “ex-offenders have paid their debt to society. The question remains however, how long should they be expected to pay?”<sup>40</sup> The availability, use, and scope of criminal records pose a serious challenge to reformers seeking to smooth the re-entry of ex-convicts in the community.<sup>41</sup>

According to Wasserman, in order to respect an ex-convict as an autonomous individual, the law has to assume that he is free to determine and alter his conduct at each moment.<sup>42</sup> Therefore, there is a need to evaluate the cause; necessity and extent of discrimination against ex-convicts. The homeless Person’s Legal Clinic maintains that discrimination stems from stereotypes in that:

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<sup>37</sup>Rosen L. 2003. “Criminal Records and getting back into the workforce: six critical steps for ex-offenders trying to get back into the workforce.” *Privacy Rights Clearinghouse*, September 1, 2003. Available at <http://www.privacyrights.org/ar/rosencrim.htm>. Last accessed 04/13/2011, p. 1.

<sup>38</sup>Rosen L. 2003. “Criminal Records and Getting Back into the Workforce: Six Critical Steps for Ex-offenders Trying to Get Back into the Workforce” p. 1.

<sup>39</sup>Leadership Conference on Civil and Human Rights. 2004. *Ex-offenders Battle economic Obstacles*. Leadership Conference Education Fund available at [www.civilrights.org](http://www.civilrights.org). Last accessed on the 13<sup>th</sup> April 2011.

<sup>40</sup>Quoted in Essley, L. 2009. Ex-offenders can’t find jobs. Available at [www.lizessley.blogspot.com](http://www.lizessley.blogspot.com). Last accessed 13 April 2011, p. 2.

<sup>41</sup>Jacobs, J. & Crepet, T. 2008. “The Expanding Scope, Use, and Availability of Criminal Records” *Legislation and Public Policy* Vol. 11:177, p. 179.

<sup>42</sup>Wasserman, D. 1992. *The Morality of Statistical Proof and the Risk of Mistaken Liability*, p. 943.

“Direct discrimination against individuals with a criminal record is based on stereotypes about what a criminal record means for a person’s financial capacity or ‘trustworthiness’. People with previous convictions should be considered on their merits, assessed on their strengths and weaknesses in terms of skills, knowledge, experience, reliability and any other relevant factor.”<sup>43</sup>

As regards economic discrimination my opinion dares to differ from that of the authors such as Rosen who seem to focus on justifying discrimination of ex-convicts by employers. It must be noted, however, that this study does not necessarily refuse to take into consideration the rights and fears of both employers and society at large, the study is however, directed against the unfair discrimination of ex-convicts and therefore focuses on overlooking the justifications provided for the discrimination of such individuals and emphasising on the protection and uplifting of ex-convicts’ rights. The views stated above are all relevant to the study even though some are conflicting because of the direction they provide by means of indicating the consequences faced by ex-convicts as well as the obstacles preventing the full protection of ex-convicts’ rights.

Some authors<sup>44</sup> believe that incorporating legislation that prevents discrimination based on irrelevant criminal records is the best solution to the underlying problem. My view is in great support of these authors as this paper leans to making recommendations to incorporate legislation that protects ex-convicts rights among other possible solutions. According to the Defending Justice Resource kit,<sup>45</sup> a number of laws prohibit ex-prisoners from obtaining licenses for several occupations. In some states in America, for example, former prisoners are barred from the auto

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<sup>43</sup> Homeless Persons’ Legal Clinic 1800 606 313 [hplc@pilch.org.au](mailto:hplc@pilch.org.au) [www.pilch.org.au/hplc](http://www.pilch.org.au/hplc) last accessed 31 August 2011.

<sup>44</sup> Archer *et al*, 2011; Jacobs *et al*, 2008.

<sup>45</sup> Defending Justice: An Activist Resource Kit, Available at <http://www.defendingjustice.org/factsheet/> last accessed 04 August 2011.

body repair, nursing, and real estate fields even though blocking access to these occupations is unrelated to the nature or severity of the prior conviction.<sup>46</sup>

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<sup>46</sup>Defending Justice: An Activist Resource Kit, Available at <http://www.defendingjustice.org/factsheet/> last accessed 04 August 2011.

## Chapter 3

### Interpretation of Article 21(1)(g) of the Constitution

#### Introduction

Article 21(1)(g) of the Constitution<sup>47</sup> provides that “*All persons shall have the right to practice any profession, or carry on any occupation, trade or business*”. Although ex offenders as individual citizens would under normal circumstances be entitled to this fundamental freedom, employers who choose not to employ ex offenders are also entitled to the fundamental right to own property as provided for under Article 16 of the Constitution which provides that all persons shall have the right to acquire and own property. As Lam and Harcourt state it,

“Property rights are commonly seen as fundamental human rights, sacred and inviolable, and the foundations for a free and democratic society. It therefore follows that employers, as the owners of capital, should have the basic right to use their property as they please.”<sup>48</sup>

#### Economic, Social and Cultural Rights

It has historically been argued and traditionally accepted that socio-economic rights are not justiciable.<sup>49</sup> Nonetheless an increasing number of countries have decided to include socio-economic rights in their constitutions.

The economic, social and cultural rights, comprises the second generation human rights. The civil, political, and economic disadvantages that result from criminal convictions have been termed “invisible punishments” due to their insignificance from the view of crime policymakers and the public. These rights tend to require the state to take action, usually in the form of legislation, policies etc, in order for these rights

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<sup>47</sup>The Constitution of The Republic of Namibia, Act No. 1 of 1990.

<sup>48</sup>Lam, H. & Harcourt, M. 2003. “The use of Criminal Records in Employment Decision Making: Rights of ex-offenders, employers and the public”. *Journal of Business Ethics* 47: 237–252, Netherlands: Kluwer Academic Publishers, p. 238.

<sup>49</sup>Christiansen E, C. 2007. “Adjudicating Non- Justiciable Rights: Socio Economic rights And The South African Constitution” *Columbia Human Rights Law Review* [38:263-] p, 322.

to be realised and thus be applicable. "The realisation of these rights is said to be periodical: full economic, social, and cultural rights can be achieved only gradually."<sup>50</sup> In many cases there is no clear distinction as to what constitutes economic rights, however, economic rights are said to include among others, the right to work, the right to free choice of employment and to just and favourable conditions of work; the right to form and join a trade union(s): the right to strike; the right to social security; and the right to own property.<sup>51</sup> According to Nakuta, "Economic, social and cultural rights are sine qua non for improving people's lives and standard of living."<sup>52</sup> The human right laws of other countries shows that these economic, social and cultural rights are plays a great role in shaping peoples opportunities in life. In any event moreover, these rights are interdependent on each other, the right to employment for example will eventually lead to the opportunity to exercise the right to property, so as the right to education will lead to the materialising or fulfilment of the right to employment of choice.<sup>53</sup>

Article 10(1) of the Constitution<sup>54</sup> provides that, all persons shall be equal before the law. Subsection (2) further provides that, no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. This is re stated in the Section 5(2)(d) of the Labour Act<sup>55</sup> provides that, "a person must not discriminate in any employment decision directly or indirectly, or adopt any requirement or engage in any practice which has the effect of discrimination against any individual on the grounds of social or economic status."

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<sup>50</sup>McChansey, A., *Promoting and Defending Economic, Social and Cultural Rights*, Washington DC: AAAS/HURIDOCs, p. 18.

<sup>51</sup>Metagora Pariszi. *Economic Rights*. Available at [www.metagora.org/./economic.html](http://www.metagora.org/./economic.html). Last accessed 07 June 2011, p. 1.

<sup>52</sup>Nakuta, J. 2009. "The Justiciability of Social, Economic and Cultural Rights in Namibia and the Role of the Non-governmental Organisations". Horn, N. & Bösl, A. (Eds) 2009. *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Namibia Publisher, p. 89.

<sup>53</sup>In 1993, the Vienna World Conference on Human Rights reiterated that "all human rights are universal, indivisible, interdependent and interrelated." *World Conference on Human Rights: Vienna Declaration and Programme of Action*, Part 1, para. 5. UN Doc. A/CONF.157/23.

<sup>54</sup>The Namibian Constitution, Act, No. 1 of 1990.

<sup>55</sup>The Labour Act, No. 5 of 2007.



These social factors include the labelling of a person as a criminal or ex criminal by society. This section however limits the employer's property rights which are commonly seen as fundamental human rights which are sacred and inviolable. Such rights of employers are infringed upon due to the fact that such limitations prohibit the employer to use his or her property at will. This will be further elaborated on in the next chapter.

The prohibition on discrimination applies to any deprivation of a human right or fundamental freedom, acknowledged by the international community or stated in the Constitution or domestic law. In some cases, the request and use of criminal records can be considered to be racial discrimination due to the racial disparities in arrests and convictions that is prohibited by Article 10 of the Namibian Constitution.

### **Established Human Rights Principles on employment**

Although international legislation clearly indicates that full rights should be reached overtime, and that states have a legal obligation to take immediate and continued action to do so, resources and time may be required.<sup>56</sup>

- Universal Declaration of Human Rights<sup>57</sup>: Article 23: “Everyone has the right to work; to free choice of employment, to just and favourable conditions of work, and to protection against unemployment”
- International Covenant on Economic, Social, and Cultural Rights<sup>58</sup>

This is the primary international legal source of economic, social and cultural rights.<sup>59</sup>

Art. 6:

*“(1) The state parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by*

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<sup>56</sup>Metagora P. *Economic Rights*. Available at [www.metagora.org/./economic.html](http://www.metagora.org/./economic.html). Last accessed 07 June 2011.

<sup>57</sup>Universal Declaration on Human Rights of 1948. Adopted by the UN General Assembly in 1948.

<sup>58</sup>Adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200 A (XXI) of December 1966.

<sup>59</sup>Leckie, S. & Gollanger, A. 2006. *Economic, Social and Cultural Rights: A Legal Resource Guide*. Pennsylvania: University of Pennsylvania Press, p. xiv.

*work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

*(2) The steps to be taken by a state party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”*

Unlike South Africa which has economic rights enshrined in its Constitution, Namibia unfortunately does not provide for economic rights. These provisions are sufficient proof that there is a need to incorporate economic rights in the Namibian system. Incorporating economic rights will aid in the protection of ex-convicts' rights to earn a living. Other laws that relate to economic rights are discussed below.

### **Regional Human Rights Instruments protecting employment rights**

- African Charter on Human and Peoples Rights<sup>60</sup>

The Charter also recognises the right to employment and emphasises the conditions and pay, i.e. Labour rights. Article 15 of the Charter provides: “every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”

### **Economic discrimination and the use of criminal records in employment**

#### **General Overview**

Because of the easy availability of criminal records, employers have become increasingly concerned whether an applicant has a criminal record.<sup>61</sup> Ex-prisoners are usually discriminated against and denied access to work.<sup>62</sup> The lack of

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<sup>60</sup> Adopted June 27, 1981.

<sup>61</sup> Australian Human Rights Commission. 2004. *Human Rights Discrimination in Employment on Basis of Criminal Record*. Available at [www.hreoc.gov.au/./discussion.html](http://www.hreoc.gov.au/./discussion.html). Last accessed 14 August 2011, p. 2.

<sup>62</sup> National Legal Aid Defender Association. No Date. Available at <http://www.nlada.org/D<MS/Documents/1030397966.97/CIVIL%20REENTRY%20BARRIER.doc>

acknowledgment for the effect of a criminal record on its holder's economic right has deprived a great number of such record holders from economic growth and also from the employment opportunities for the alleviation of poverty. According to Kadela, "finding a job is often the most serious concern [for ex-offenders], who [on average] have few job skills and little work history"<sup>63</sup>. Overcoming the challenges and disadvantages of a criminal record is not just a challenge for those individuals that are released from prison; however, it is a challenge for anyone who has been officially labelled as a criminal.<sup>64</sup> The world to which convicts return to upon their release from prison differs entirely from the one they left behind in terms of availability of jobs, support, community & assistance and the availability of resources that can be used for self help. One of the primary employment restrictions facing ex-offenders is the prohibition against public employment.<sup>65</sup> As ex-offenders are likely to experience a decrease in their earned wages following release,<sup>66</sup> and unemployment remains a persistent problem for the majority of ex-offenders, many of our most vulnerable communities are being stripped of opportunities to develop their human and financial capital and to engage in community development efforts.<sup>67</sup> Also, if ex-convicts are rejected and treated as criminals, they may by force of both limited opportunities and self-fulfilling prophesy; behave consistently with their criminal label.<sup>68</sup>

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<sup>63</sup>Kadela, K.R & R.P Seiter, *Prisoner Re-entry: What Works, What Does Not, and What Is Promising*, CRIME & DELINQUENCY, July 2003, p. 367.

<sup>64</sup>Jacobs, J. & Crepet, T. 2008. "The Expanding Scope, Use, And Availability Of Criminal Records." *Legislation and Public Policy* Vol. 11:177. *Criminal Records*, p. 178.

<sup>65</sup>Kathlene M. Olivares, as cited by Archer D.N, & Williams K. S. 2011. *Work in progress: Making America the land of second chances*, p. 9.

<sup>66</sup>Western B. *Et al. The Labour Market Consequences of Incarceration* 21 *Indus. Relations Section, Princeton University, Working Paper No. 450*, Jan. 2001. p. 11-15. Available at <http://www.irs.princeton.edu/pubs/pdfs/450>.

<sup>67</sup>Henderson, T. Y. 2005. "New Frontiers in Fair Lending, Confronting Lending Discrimination Against Ex-offenders." *New York University Law Review*, Vol, 80, 1237. New York: New York University, p. 1250.

<sup>68</sup>Jacobs, J. & Crepet, T. "Expansion, Scope, and Use of Criminal Records" *Legislation and Public Policy*, Vol.11:177. *Criminal Records*, p. 211.

Employers are increasingly interested in finding out whether potential employees have previous convictions. This has caused great concern, especially among urban societies in that it has become difficult for an ex-offender to become a law abiding citizen without a job. This study reveals that numerous reasons are often advanced for the use of criminal records in employment as well as for the denial of employment opportunities for a conviction holder. There seems, however, to be no clear or perfect answer to the question of why employers choose to avoid employing people with criminal records. Seventy percent of the employers interviewed expressed the fear of responsibility for others action as a reason for being reluctant to employ previously convicted persons. Among other possible justifiers for this discriminatory decision is the fact that employers fear facing negligent hiring in cases where employers hire an individual with a criminal record who then either commits the same offence again or commits another offence that perhaps hurts someone.<sup>69</sup>

Another fear expressed by employers is that of vicarious liability. Employers can be held vicariously liable for the wrongful illegal acts of their employees which have been conducted in the scope or course of duty. The notion that convicted offenders are most likely to reoffend has clothed employers with a great fear of loss of their property as well as the risk of eventually being held vicariously liable for the offenses of their employee(s) with a criminal record. Some employment restrictions are based directly on concerns for public safety, and are arguably appropriate; however, there are a number of restrictions that are merely retributive as opposed to being adopted with the aim of incapacitation or prevention of future crime. Nonetheless, it is the lack of any sound policy, directed at the protection of ex-offenders rights that feeds this unfair discrimination's growth. Discrimination unrelated to the job being offered is

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<sup>69</sup>Rosen L. 2003. "Criminal Records and Getting Back into the Workforce: Six Critical Steps for Ex-offenders Trying to Get Back Into the Workforce", p. 1.

unfair in that it prejudices the person with a criminal record because it is not based on the necessary requirements for the job such as skill or qualification.

Chartier on the other hand, maintains that, discrimination on the basis of characteristics unrelated to a person's actual capacity to perform in a particular position is clearly inconsistent with the Golden Rule of natural law which rules out arbitrary preferences between persons, and, at least for most purposes, making choices about hiring, promotion, and retention or dismissal based on ethnicity, gender, age, or sexual orientation is arbitrary.<sup>70</sup>

### **The Employers' Rights**

There is no doubt that ex-offenders face various infringements on their respective fundamental rights and freedoms, however, one cannot ignore the fact that there are various parties involved in employment relationships who also have rights and such rights also need protection. The question one needs to ask is whether ex-offenders rights are of less importance to the society at large or why is there a common practice that ex-offenders' rights are always the first option to be pushed aside for the protection of the greater society? Or perhaps it has to do with the percentage of population since there appears to generally be a smaller number of previously convicted persons in any given society.

As stated earlier, employers as owners of companies, corporations as various medium enterprises or holdings are clothed with property rights. Such rights are recognised around the world, especially in developed countries as well as developing countries.<sup>71</sup> The freedom to use one's own property (including capital) has been argued for ever since the seventeenth century. French philosopher John Locke argued that individuals should have perfect freedom to use their possessions as they

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<sup>70</sup>Chartier, G. 2009. *Economic Justice and Natural Law*. Cambridge University Press, p. 83.

<sup>71</sup>The United Nations Universal Declaration of Human Rights states that "No one should be arbitrarily deprived of their property. Similarly, Article 16 of the Namibian Constitution states that "All persons have the right to own and dispose of all movable and immovable property individually and in association with others....."

deem fit, as long as using such property harms no one else.<sup>72</sup> Lam, *et al* maintains that:

“It follows therefore that, employers as the owners of capital should have the right to use their property as they please. If they want to use their own money to buy labour from the market, they should have the autonomy to do so. If they prefer not to buy labour, they should be free to do so as well”.<sup>73</sup>

This statement would be of great significance to the employers within the private sector market but could the same be said for government as an employment provider? As an employer it would be unfair to say that the state has the prerogative to discriminate against a potential job seeker solely based on the basis of their criminal record. The state not only has an obligation to ensure the upholding of all persons rights and freedoms in general, but also an obligation to provide for the basic needs of every citizen. This burden on the state is generally reduced when the person is economically fit to provide for their own basic needs.

### **Ex-offenders Rights**

The constitution provides for equal rights for all individual citizens of Namibia and therefore the Constitution does not discriminate in terms of human rights. This therefore means that prisoners and ex-convicts who have already served their sentences have rights to. Upon release into society however, ex-convicts have historically been faced with major challenges threatening their rights as individuals. As stated by Kadela *et al*, “prisoners have historically returned to the communities from which they were sentenced, generally to live with family members, attempt to find a job, and successfully avoid future criminality. Restricted socio-economic

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<sup>72</sup>As extracted from Lam, H. & Harcourt, M. 2003. *The use of Criminal Records in Employment Decision Making: Rights of ex-offenders, employers and the public. Journal of Business Ethics* 47: 237–252, Netherlands: Kluwer Academic Publishers, p. 237.

<sup>73</sup>Lam, H. & Harcourt, M. 2003. *The use of Criminal Records in Employment Decision Making: Rights of ex-offenders, employers and the public. Journal of Business Ethics* 47: 237–252, p. 237.

opportunities make reoffending more likely.”<sup>74</sup> Once a person is released from prison, he or she is returned to the community, where he or she is expected to resume a normal life with the same status and rights as all other citizens.<sup>75</sup>

Although the principle against double jeopardy may in theory be applied to protect ex-offenders rights, in practice this is not a clear case. The greater society at large continues to punish individuals who have already paid for their crimes by serving their prison terms. “Applying the principle of double jeopardy widely, means that ex-offenders should not have to endure additional punishments that are later imposed on them by the larger society in the form of “life-long stigmatism or discrimination.”<sup>76</sup> In Uganda, Mission After Custody (MAC)<sup>77</sup> reminds societies at large that it is every prisoner’s prerogative to be released from prison and that it should also be understood that, as it is human to error and upon individual decision and judgement to return to the communities they belong, it is imprudent to keep victimising them, due to their past mistakes, because this leads them out of place which eventually contributes to a relationship between homelessness and crime.<sup>78</sup>

Furthermore, because every individual has the right not to disclose any personal information that is not relevant to the job such as marital status and health history, a criminal record that is greatly irrelevant or rather far distant from the job being applied for therefore does not need to be disclosed. On the other hand however, failure to disclose criminal records no matter how farfetched they are from the job is shown to

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<sup>74</sup>Kadela, K.R & R.P Seiter, “Prisoner Re-entry: What Works, What Does Not, and What Is Promising” *CRIME & DELINQUENCY*, July 2003, p. 360-361.

<sup>75</sup>See Lam & Harcourt. 2003. “The use of Criminal Records in Employment Decision Making: Rights of Ex-Offenders, Employers and the Public” *Journal of Business Ethics* 47: 237-252, p. 240.

<sup>76</sup>Lam & Harcourt. 2003. “The use of Criminal Records in Employment Decision Making: Rights of Ex-Offenders, Employers and the Public” *Journal of Business Ethics* 47: 237-252, p. 240.

<sup>77</sup>Mission after Custody, a charitable organisation in Uganda established in 2005 with the aim of helping particularly prisoners, ex-offenders and ex-convicts, by offering them a window of kindness and love, while enhancing advocacy and awareness of the inalienable rights.

<sup>78</sup>MAC. 2008. Mission After Custody, It’s Never Too Late to Reform. Available at [www.maccentreug.org/](http://www.maccentreug.org/), p. 1.

fuel the risk of termination or even result in termination of employment contracts once such a record is revealed.

A previous conviction need not be a ground for rejection but such previous conviction should rather be viewed in light of a matter of what weight one (as a prospective employer) is going to place on the fact that the individual has a previous conviction. In order to establish what weight to place on the individual previous conviction, all relevant factors; any other conditions such as skill and expertise as well as surrounding circumstances and weigh the relevance of his conviction to the circumstances in which he is to be found. If an individual is deemed to be a qualified person and trustworthy (even if slightly so), then you can act on his skill and expertise and employ him notwithstanding that he has a previous conviction.<sup>79</sup> It is not always about what the person did but about what he can do. The fact that someone has a previous conviction does not necessarily mean that he or she has been declared a criminal for life or that he will be a criminal for life. However, because of his criminal record or because of the type of offence that he has been previously convicted for, there may be dangers involved in employing him or granting him a specific licence. In view of the above mentioned, caution must be exercised in weighing the possible dangers involved, when dealing with people with previous convictions.

### **Criminal Records And Article 21(1)(g) of The Constitution**

The information gathered from the empirical research does not deviate from the information gathered from the desktop research. There are however a few differences in the findings although not significant. Both the empirical and desktop research carried out by this study reflected that criminal records are rapidly becoming negative *curriculum vitae* (a stigma that brands the individual as unreliable and perhaps dangerous) used to determine the eligibility for occupational licenses, and

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<sup>79</sup>Benchbook - Bad Character / Previous Convictions of Witnesses. No. 42, p. 1.



employment.<sup>80</sup> What is of great concern here is that there is no direct answer to the question whether the possession of a criminal record can be viewed as a direct infringement on the right enshrined in Article 21(1)(g) of the Constitution.

Although a great number of ex-convicts are denied equal opportunities to explore and benefit from the fruits of Article 21(1)(g) and therefore resulting in numerous challenges which might lead to reoffending. The possession of a criminal record is not necessarily the sole cause of discrimination of ex-convicts by employers. Ex-convicts have a variety of factors that affect their employability and earning capacity which include limited education and cognitive skills as well as limited work experience.<sup>81</sup> These results challenge the hypothesis upon which this study is based. Firstly these results indicate that the mere possession of a previous criminal conviction does not render the person unemployable. Secondly other factors related to the conviction affect the employability of that individual. The major issue therefore becomes, how can ex-convicts be reintegrated into a society that is strong on rejecting criminals for whatever reason? The answer to this question is to be found in the measures put in place to assist with the reintegration of previously convicted offenders.

The Namibian Prison Services' annual report stated that fifteen percent of the 3577 persons released from prison in 2008 have been reintegrated with the community.<sup>82</sup> The report provides that fifteen percent of the released prisoners could be traced on what they are doing after release from prison and indicates that they have embarked upon a journey of self employment through business. These statistics also challenge the hypothesis to the study in terms of the practice of any profession. If those

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<sup>80</sup>Jacobs, J. & Crepet, T. 'The Expanding Scope, Use, and Availability of Criminal Records' Legislation and Public Policy [Vol. 11:177]. 2008. Criminal records, p. 177.

<sup>81</sup>Holzer, H. *et al.* 2003. "Employment Barriers Facing Ex-offenders". *The Urban Institute Roundtable Discussion Paper*. New York: University Law School, p. 4.

<sup>82</sup>The Republic of Namibia, Ministry of Safety and Security: Namibian Police Services. *Annual Report 2007-2008*, p. 16.

convicts who have served prison sentences and have the opportunity to acquire skills that they can employ after prison, this grants them an opportunity to exercise this skill after their prison sentences and therefore follow a certain profession even though it is not of an exclusive standard. Therefore, to argue that the Namibian ex-convicts are not fairly re-integrated into society as the hypothesis of this study stipulates could be a tarnishing of the rehabilitation services offered by the Namibian Prison services.

A number of activities are carried out in the Namibian Prisons to nurture and strengthen the service's role in community whilst imparting inmates with living skills that they can employ after being released to earn a living. At Walvis Bay prison, there are leather art and sewing projects as well as a coffin manufacturing project. At Oluno Prison there are also several projects such as needle work and basket weaving.

### **Is the Right in Article 21(1)(g) subject to the Limitation clause?**

None of the rights enshrined in the Constitution are absolute. All such rights are subject to limitation provided that there is compliance with the limitations clause. Article 22 of the Constitution provides:

*“whether or whenever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:*

- (a) be of a general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;*
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles here on which authority to enact such limitation is claimed to rest.”*

The provision of the Namibian Constitution is not as clear as the South African provision on the limitation of rights. Section 36(1) of the South African Constitution provides:

36(1) *“all rights in the Bill of Rights may be limited in terms of law of a general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equity and freedom, taking into account all relevant factors including-*

*(a) the nature of the right;*

*(b) the importance of the purpose of the limitation;*

*(c) the nature and extent of the limitation;*

*(d) the relation between the limitation and its purpose.*

36(2) *except as provided in sub – section (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*

In terms of the rules of statutory interpretation, all limitations shall be interpreted strictly and in favour of the rights at issue. With reference to Article 22 of the Constitution, therefore, a right enshrined in the Constitution shall only be limited in terms of a law of general application and such limitation shall be interpreted in favour of the right. This means in terms of a law that does not target a specific individual. The application of the limitation clause nonetheless involves a process which calls for the balancing of different interests.

## Chapter 4

### Lessons and Recommendations

#### Introduction

Namibia is a relatively small country with a high unemployment rate and high degree of dependency on foreign input, regardless of whether it is in the form of skills or funds. This recommended solution has the potential to reduce the unemployment rate in terms of the unemployment percentage representing ex-convicts by enacting new employment legislation that protects ex-convicts' right to earn a living and thus grant them a fair chance for employment and an opportunity to provide for themselves. Although society continues to discriminate against ex-offenders and stigmatise them, some of these ex-convicts possess much needed skills that could be utilized to benefit themselves, their community and the country at large.

The incorporation of legislation protecting ex-convicts right to employment is needed to protect individuals from discrimination on the basis of irrelevant previous convictions. For example, the whole of Australia, except for Southern Australia have proscribed discrimination based on criminal record, either through human rights legislation or spent convictions legislation.<sup>83</sup>

#### **Incorporation of Legislation Protecting Ex-Convicts' Right to Employment**

As stated earlier in chapter 1, Dietrich maintains that it is a common assumption that the function of the criminal justice system is to punish wrong doers and dissuade them from repeating their actions. He further states that with regard to the influence or role played by prisons and/or rehabilitation centres is that prisons lead to an absence of a sense of responsibility on the part of the offender and thus normal later integration of the offender into society becomes difficult to achieve.<sup>84</sup> Without access employment or opportunities to exercise income generating skills, ex-offenders are

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<sup>83</sup> Lam & Harcourt. 2003. "The use of Criminal Records in Employment Decision Making: Rights of Ex-Offenders, Employers and the Public" *Journal of Business Ethics* 47: 237-252, p. 245.

<sup>84</sup> Rabie MA. & Marè MC. 1994. *Punishment: an introduction to principle*, p. 30.

less likely to gain a foothold in modern society and to live as drug-free and crime-free members of their community. According to Von Hirsch, *et al*, “The more that convicted persons are restricted by law from pursuing legitimate occupations, the fewer opportunities they will have for remaining law abiding.”<sup>85</sup> Moreover, the labelling of convicted persons through criminal records has a long term effect on the lives and well being of such labelled individuals.<sup>86</sup>

Every decision made carries with it benefits for one party, and usually also carries with it disadvantages for the other parties. Although enacting new legislation regulating the imposition of ex-offenders rights would limit the challenges faced by ex-convicts, it will have a negative consequence on the employers in that, employers would feel that they are compelled to employ criminals. Some authors<sup>87</sup> propose the continuance of criminal records, but making them available only on a need-to-know basis. This seems to be a fair proposal in terms of fighting discrimination against ex-convicts; however, controlling the access to criminal records is not easy and could lead to other challenges. Nevertheless, if criminal records cannot be controlled, other policy interventions will be necessary to minimise the consequences of a criminal record.<sup>88</sup> For example a policy that limits the accessibility to criminal records.

### **Setting aside criminal convictions**

The setting aside of criminal convictions is an old practice although not easily practically observed in our criminal justice system. The Criminal Procedure Act<sup>89</sup>

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<sup>85</sup>Von Hirsch A. & Wasik, M. 1997. “Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework” 56 *Cambridge L.J.* 599, p. 605.

<sup>86</sup>The labelling theory has been introduced in the 1960’s and argues that criminals are not evil people who engage in wrong acts; rather they are individuals who have a criminal status placed upon them by both the criminal justice system and the society as a whole. See Munice, J. 1999. *Youth and Crime, a Critical Introduction*. London: Sage Publications, p.119. See also, Braithwaith, J. 1989. *Crime, Shame and Reintegration*. Cambridge: University Press.

<sup>87</sup> Von Hirsch *et al*, 1997; Jacobs *et al*, 2008.

<sup>88</sup> Jacobs, J. & Crepet, T. 2008. “Expansion, Scope and Use of Criminal Records” *Legislation and Public Policy*, vol.11:177. Criminal Records, p. 212.

<sup>89</sup>Criminal Procedure Act, No. 51 of 1977.

makes provision for convictions that can fall away as previous convictions after expiration of 10 years. Section 217A of the Act provides that, where a court has convicted a person of

*(a) An offence for which the punishment may be a period of imprisonment exceeding 6 months without the option of a fine, and*

*(i) Has postponed the passing of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before court in terms of section 297(3); or*

*(ii) Has discharged that person with a caution or reprimand in terms of section 297(1)(c).*

*(b) Any other offence than that for which the punishment may be paid of imprisonment exceeding 6 months without the option of a fine,*

That conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period such person has been convicted of an offence for which the punishment may be a period of imprisonment exceeding 6 months without the option of a fine.

## **Expungement**

Expungement of criminal records is not a new concept on the international level. A number of states have incorporated expungement of records into their legal systems. Many richer countries such as Canada, Britain, The US and Australia have passed legislation prohibiting discrimination on the basis of criminal records.<sup>90</sup> The need for expungement provisions in America was first formally recognised at the 1956 National Conference on Parole. It was actively embraced by most States in the ensuing two decades. Namibia's legal fraternity is still young and the need for protecting ex-offenders right to employment has not yet been acknowledged. In order to afford ex-offenders a second chance, the government must help facilitate a successful transition for ex-offenders back into their communities. "Some jurisdictions

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<sup>90</sup>Lam, H. & Harcourt, M. 2003. "The use of Criminal Records in Employment Decision Making: Rights of ex-offenders, employers and the public." *Journal of Business Ethics* 47: 237–252, Netherlands: Kluwer Academic Publishers, p. 237.

have civil and human rights provisions which include the criminal records as a prohibited ground for discrimination.”<sup>91</sup> In South Africa, for example, a person may apply for an expungement of his or her criminal record if:

- 10 years has lapsed after the date of the conviction for that offence;
- The person has not been convicted of any other offence and sentenced to a period of imprisonment without the option of a fine during those 10 years;
- The person has not been convicted of (a) a sexual offence against a child or a person who is mentally disabled; (b) is not found unsuitable to work with children by a criminal court.

Recently the American Bar Association concluded that the dramatic increase in the numbers of persons convicted and imprisoned means that this half-hidden network of legal barriers affects a growing proportion of the populace. More people convicted inevitably means more people who will ultimately be released from prison or supervision, and who must either successfully re-enter society or be at risk of reoffending. If not administered in a sufficiently deliberate manner, a regime of collateral consequences may frustrate the re-entry and rehabilitation of this population, and encourage recidivism.<sup>92</sup>

Expungement, when properly done, can remove obstacles faced by ex-offenders to gainful employment, or professional licenses, and bring closure and emotional relief, and privileges of which the person was deprived by reason of the conviction. A full criminal pardon, whether direct or through criminal rehabilitation proceedings, restores all of the rights. “The expungement order shall direct that criminal records be expunged from all official records, except the non-public records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal

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<sup>91</sup>Lam, H. & Harcourt, M. 2003. “The use of Criminal Records in Employment Decision Making: Rights of ex-offenders, employers and the public.” *Journal of Business Ethics* 47: 237–252, Netherlands: Kluwer Academic Publishers.p.237.

<sup>92</sup>Archer D, N. & Williams K, S. 2011. Work in Progress: Making America “The Land of Second Chances”: Restoring Economic rights for first offenders. To be published in *NYU Review of Law and Social Change*, p. 1.

proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in terms of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.”<sup>93</sup>

The rationale for expungement include among others, the administration of the criminal justice system is also far from perfect. Not everyone gets a fair trial or an appropriate punishment. Even though the criminal system relies on proof of guilt beyond a reasonable doubt, wrongful convictions still occur from time to time. Systematic bias in legislative enactment and enforcement further adds to the need to protect ex-offenders, many of whom may be victims of incompetence or prejudice.<sup>94</sup> The administration of the criminal justice system is also far from perfect. Not everyone gets a fair trial or an appropriate punishment. Even though the criminal system relies on proof of guilt beyond a reasonable doubt, wrongful convictions still occur from time to time.

Expungement of records is not necessarily a clear cut solution as it does not guarantee that an individual whose conviction has been expunged will not commit an offence again. However this applies to persons who have not yet committed offences as well, there is no guarantee that someone who has not yet committed an offence will never commit an offence and thus in my view individuals who committed misdemeanour offences once and proved to have lived a crime free life must be

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<sup>93</sup>American Bar Association Commission on Effective Criminal Sanctions and the Public Defender Service for the District of Columbia. 2009. *Internal Exile: Collateral Consequences of Conviction in Federal laws and regulations*. (Citation omitted), p. 46.

<sup>94</sup>Lam, H. & Harcourt, M. 2003. *The use of Criminal Records in Employment Decision Making: Rights of ex-offenders, employers and the public*. *Journal of Business Ethics* 47: 237–252, Netherlands: Kluwer Academic Publishers, p. 243.



awarded a second chance to be a law abiding citizen with full opportunities to improve their lives as every other individual.

## CHAPTER 5

### CONCLUSION

Research and statistics indicate that more and more employers are concerned with criminal history of potential employees, irrespective of its relevance to the job applied for or the time that has passed since the last conviction. This is a clear indication of the fact that the discrimination of ex-offenders results in fewer job opportunities and lower earnings. On the other hand society also has the interest to help ex-offenders with criminal records to obtain employment. A person with a criminal record face great challenges in getting employment, and will therefore face the risk of falling back to crime. Because of the negative stigma associated with imprisonment/ criminal convictions, a criminal record often makes it impossible for ex-convicts to obtain work. It is impossible to provide for oneself and his family without employment. If ex-offenders are not given a second chance to live a normal life by legitimate employment, how can they be expected to lead a normal life without turning back to crime or continuously rely on government aid through welfare funds? Overall, the exclusion of first time ex-offenders from the employment circle does not only ruins that specific individual's life but places an increased burden on government funds. Ex-offenders are most likely to return to their old habits and return to prison. The result of returning to prison does not only signify the protection of society from ex-convicts however it also signifies the continuous dependence of such individuals on the tax payers' money through prison maintenance, food supplies, etc.<sup>95</sup>

Finally the study proved the hypothesis to be correct and concludes that article 21(1)(g) of the Constitution is not an absolute right and may be subjected to limitations, to the extent that the limitation is justifiable which in my view a limitation of the right of an ex – convict is to a certain extent justifiable because individuals ought

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<sup>95</sup> Howard More, director of the prison ministry at Greater Mount Calvary Holy Church in Northeast, quoted by Lizz Essley. Essley, L. 2009. Ex-offenders can't find jobs. Available at [www.lizessley.blogspot.com](http://www.lizessley.blogspot.com). Last accessed 13 April 2011.

to take responsibility for their actions and there is a price to pay for every wrong committed.

**ANNEXURE**  
**Questionnaire**

1. As a potential employer, would you employ an individual with a previous criminal conviction?.....

2. If No, Why?

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3. If Yes, would you employ a person with any of the following previous convictions and which one?

- 1. Fraud;
- 2. Theft;
- 3. Child Molestation;
- 4. Robbery;
- 5. Assault;
- 6. Rape;
- 7. Culpable Homicide; or
- 8. Murder

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4. As a potential employer do you see the need to investigate or enquire on a potential employees criminal background and why?

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5. If you were to interview two potential employees, with the same qualifications and same rating of capability, would you choose to employ the individual with a criminal record?

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