



OFFENDER REINTEGRATION IN SOUTH AFRICA

A Complementary Crime Prevention Measure

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1. BACKGROUND

In 1995, the Constitutional Court of South Africa declared the death penalty unconstitutional, because the death penalty *inter alia*, rejected the possibility that those convicted could be rehabilitated.¹ The Court held that such a rejection is inconsistent with *ubuntu*, a well-known South African concept characterised by respect for human dignity and the dominant theme that the life of another human being is as important as one's own.² From this it may be inferred that one of South Africa's founding values requires respect for the life and dignity of everyone including those who have committed crime. This paper contends that although the Constitution does not expressly require the state to assist prisoners to reintegrate into society, its language and overall framework supports the notion of a constitutional obligation to support their rehabilitation.³ It is also argued that by not fulfilling this duty adequately, the state is contributing to repeat offending. It is proposed that if the duty to assist prisoners in reintegrating⁴ into mainstream society is accepted and complied with, a significant reduction in levels of crime could be achieved.

2. OFFENDER REINTEGRATION AS A COMPLEMENTARY CRIME PREVENTION MODEL IN SOUTH AFRICA

The prevalent and violent nature of crime in South Africa undermines the society envisioned in our Constitution.⁵ Crime threatens the safety of our communities on a continuous basis. It also evokes, at times, responses from society which could erode our aspirations to live in a state founded on human dignity, freedom and equality. There is consequently pressure on the state to address crime with urgency and with approaches that will yield immediate results. To date such approaches have by and large included law enforcement and criminal

justice responses. A larger police service, tougher bail laws and longer prison sentences as a result of minimum sentencing legislation are just some of the measures that have been introduced to stem the tide of crime. These measures have also taken precedence over crime prevention initiatives. Unfortunately these efforts have had a negligible impact on levels of crime, which are still unacceptably high.

This paper proposes that in addition to the 'traditional' criminal justice approaches, it is opportune that other measures with a stronger crime prevention focus should be explored and, where feasible, implemented. At the end of the criminal justice process is the correctional system, populated by thousands of inmates whose sentences are served without a clear purpose. Upon release, many ex-prisoners re-offend. The failure to assist their reintegration into society as law-abiding, productive citizens contributes significantly to the already high crime rate. This paper thus argues that the effective reintegration of ex-inmates into mainstream society should form an integral part of a coherent crime prevention strategy.

The prisons environment fails to prepare inmates for a crime-free life after release. In mainstream society, significant barriers exist for those who have served time. Offender reintegration addresses these issues directly. Successful offender reintegration models take a holistic approach to addressing offenders' involvement in crime. They usually take into account the individual circumstances of inmates and provide support to them on a needs-basis over the course of their incarceration as well as after their release to ensure that they do not re-offend.⁶

While there is no single solution to crime, offender reintegration is one obvious crime prevention measure that can reduce crime substantially. South African prisons host the ninth highest number of prisoners in the world and our incarceration rate per capita ranks first in Africa.⁷ International research has shown that high incarceration rates do not have a significant positive effect on levels of crime in a country.⁸ South Africa is a case in point, as it has a significant crime rate despite its equally high incarceration rate.⁹ Further, it is estimated that approximately 6 000 prisoners are released monthly and that the vast majority (some estimate as many as 85 percent) re-offend.¹⁰ It may be inferred that repeat offending by ex-prisoners contributes significantly to the prevalence of crime in South Africa. It is also logical that if the high rate of repeat offending by ex-prisoners were to be reduced, this would help to bring down the crime rate measurably.

The state has a legal obligation to provide real opportunities for prisoners to reintegrate into mainstream society. This paper reviews the framework within which offender reintegration has come to exist in South Africa and will also argue that the state has a constitutional obligation to assist prisoners to reintegrate into society. Additionally, the relevance of prisoners' families and communities to reintegration processes will be discussed. Non-governmental organisations' role in the reintegration of ex-prisoners will also be dealt with. Recommendations will be made in conclusion.

3. THE STATE'S DUTY TO SUPPORT PRISONERS' REINTEGRATION INTO MAINSTREAM SOCIETY

South African courts have begun to accept that positive, constitutionally derived duties with regards to criminal sanctions may be placed on the state. It is arguable that a constitutional duty rests on the state to assist prisoners with their reintegration into society. Firstly, however, our courts' contribution in shaping that duty shall be briefly outlined.

3.1 Arguments based on offender reintegration (rehabilitation) as a sentencing objective

Constitutional values add new dimensions to theories of punishment. Offender reintegration or rehabilitation is a less superficial aspect of punishment and sentencing in contemporary times than it was prior to constitutionalism. The utilisation of restorative justice processes,¹² alternative sentencing options such as correctional supervision¹³ and diversion¹⁴ programmes attest to a more rehabilitative approach to the outcomes of criminal justice processes, and even to punishment. But, offender reintegration is not a novel concept in South Africa. Our courts have over decades gradually began to show that the idea of banishing prisoners to 'rot in jail or lock the gates and throw away the keys' does not resonate with the value system to which we aspire. Below, a brief look is taken at the courts' contribution to establishing offender reintegration as a purpose of imprisonment prior to 1994.

In 1945 in *R v Swanepoel*¹⁵ the Court held that the main purposes of punishment are deterrence, prevention, reformation (rehabilitation) and retribution. It would appear that over time there has always been tension between the purpose of retribution and the other purposes. In cases where an individual had been found guilty of serious and/or violent crimes, this was especially evident.¹⁶ Vengeance (on the one hand) and mercy (on the other) seemed to be competing objectives in such cases. Retribution, or an eye for an eye, is based on the retributive theory of punishment that finds the justification for punishment in a past act; a wrong which requires punishment.¹⁷ On the other, rehabilitation, prevention and deterrence are based on theories that find their justification in the future and in the good that will result from the punishment, for example, reformation of the individual and the consequent prevention of crime in the future.¹⁸

The reformatory theory on which rehabilitation is based stands in particular contradistinction with the retributive theory. Reformation dictates that punishment is a means to an end and not an end in itself – 'that end being the reformation of the criminal as a person so that he may at a certain stage become a normal law-abiding and useful member of the community once again. By treatment and training the offender is rehabilitated ... [and] ceases to be a danger to society'.¹⁹ Courts were enjoined to impose sentences that achieved both the retributive and the rehabilitative purposes of punishment. This was undoubtedly not an easy feat, and it was notoriously difficult to strike a balance between the two.

In the 1961 case of *R v Karg*²⁰ it was observed that while the deterrent effect of punishment has remained as important as ever, the retributive aspect has tended to give way to the aspects of prevention and correction, i.e. rehabilitation of the individual. While there had been some conflicting views²¹ on the purpose of punishment in the pre-democratic era, the Constitutional Court in 1995 in *S v Williams* reflected upon the approach to sentencing pre-1994, and noted that there had been a gradual shift of emphasis away from a predominantly retributive attitude to a more rehabilitative approach.²² In the opinion of the Court 'sentences have been passed with rehabilitation in mind' even prior to the advent of democracy.

More recently, in *S v Shilubane*²³ where the accused was sentenced to nine months imprisonment on a conviction of theft, the Court held that retributive justice had failed to stem the rise of crime and that more innovative solutions had to be sought by courts.

3.2 Arguments based on offender reintegration as a constitutional obligation

It is argued here that the Constitution confers a duty on the state to create opportunities for prisoners' reintegration. Although the Constitution does not expressly provide that the state should assist prisoners to 'rehabilitate' or 'reintegrate',²⁴ the overall framework and language of the Constitution supports this notion of a constitutional obligation to support their reintegration. The following aims to highlight some of the provisions that speak to the state's duty in this regard.

3.2.1 Argument based on the goals of constitutional democracy

The preamble of the Constitution states that '[w]e ... through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to – [i]mprove the quality of life for all citizens and free the potential of each person'. In this regard, the state's duty to its citizens does not exclude prisoners. Prisoners are perhaps more in need of assistance to improve their quality of life than are ordinary citizens. Due to their limited freedom and consequent reliance on the state to meet their daily needs, the state must introduce reintegration processes that can help prisoners to eventually reach their full potential as productive law-abiding citizens.²⁵ The state should actively work towards this so as not to undermine one of the principal goals of constitutional democracy stated in the preamble to the Constitution.

i. Constitutional equality arguments

Section 9(1) of the Constitution guarantees equality before the law and the right to equal protection and benefit of the law. It expressly states that equal protection applies to 'everyone'. Although their right to liberty is justifiably limited thus, prisoners are in no way exempt from the protection – and the benefit – afforded by this provision. They do not become less entitled to justice and to the protection of the law due to their status as

prisoners. The Correctional Services Act 111 of 1998 (CSA) (section 6[4][a]) reinforces the state's constitutional duty to ensure that prisoners have equal benefit of the law. Upholding section 9(1) when it comes to prisoners will thus assist in the realisation of the goal of reintegrating offenders, i.e. to allow ex-offenders to become positive and productive participants in mainstream society.

It is important that prisoners are not reduced to second-class citizenship through imprisonment. The Constitution holds the guarantee of full citizenship to all South Africans. This guarantee coincides with the purpose of reintegration which is to ensure that prisoners become rightful and productive citizens. Denying them any of their fundamental rights (unless it is constitutionally justifiable) can only inhibit their progress in reintegrating into society, and consign them to second class citizenship, which would be an antithesis to the ideals of democracy.

Even before the advent of constitutional democracy, the courts upheld the principle that, but for the right to freedom, prisoners are generally entitled to all their other rights. As early as 1912 Innes JA held in *Whittaker and Morant v Roos and Bateman* that '[inmates] were entitled to all the personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed'.²⁶ Nearly seventy years later Corbett JA confirmed this dictum in *Goldberg and Others v Minister of Prisons and Others*.²⁷ The dictum became known as the residuum principle and was confirmed again by Hoexter JA in *Minister of Justice v Hofmeyr*,²⁸ where it was held that:

The Innes dictum serves to negate the parsimonious and misconceived notion that upon admission to gaol a prisoner is stripped, as it were, of all his personal rights ... The Innes dictum is a salutary reminder that in truth the prisoner retains all his personal rights save those abridged or proscribed by law. The root meaning of the Innes dictum is that the extent and the content of prisoner's rights are to be determined by reference not only to the relevant legislation but also to his inviolable common-law rights.²⁹

In 2008 in *Ehrlich v the Minister of Correctional Services*³⁰ Plasket J held that 'now in the era of democratic constitutionalism ... the residuum principle has stronger protection than before. There can be no doubt that it is in harmony with the Constitution's values'.³¹ By affording prisoners equal protection and benefit of the law, the Constitution implies an intention to treat them like ordinary citizens (with the exception that their freedom of movement is curtailed). This, too, is one of the objectives of reintegration; that prisoners are enabled to become like other responsible and productive citizens. The state has a duty to aspire towards that goal, in this reading of the constitutional obligation.

ii. Arguments based on the prohibition of unfair discrimination

Section 9(3) prohibits the state from unfairly discriminating directly or indirectly against anyone on the ground of *inter alia* social origin. Despite this, ex-prisoners find that they are often discriminated against because they have been to prison. In some social circles ex-prisoners are assumed to be of lesser moral standing than others who have not been to prison. They are deemed undeserving of the equal treatment and opportunities afforded to those who have no criminal record. This attitude towards ex-inmates is in reality not limited to social settings only. It also seeps into other aspects of life and has tangible negative effects on ex-inmates (as shall be more evident from the discussion below). There is thus a need for the state to take positive action to prevent unfair discrimination against people who have criminal records where such discrimination results in the marginalisation of ex-inmates and impedes their reintegration back into society on expiry of their sentence.

Discrimination on the basis of having been to prison extends to the field of employment. Having a criminal record is commonly an obstacle to finding a job. 'As a prisoner you don't get punished. The real punishment begins when you get out and try to find a job'.³² This sentiment (expressed by a former Krugersdorp Prison inmate who served ten years) echoes the plight of many other people who have served time in correctional facilities. Some ex-inmates claim that they would prefer to return to prison rather than to try to adjust to the difficulties of life outside the correctional environment.

Conceivably there are instances where it may be legally justifiable to differentiate between someone who has been to prison and someone who has not. For example, it would be justifiable to preclude someone who had been convicted for child abuse from working in a school. The Children's Act 38 of 2005 in fact provides for a National Child Protection Register which contains a record of names of people who are unsuitable to work with children for the purpose of protecting children in general against abuse and neglect.³³ It is also justifiable to prohibit someone who had been convicted for theft or fraud to enter the legal profession or to hold a position of trust.

It would however not be generally justifiable to prohibit someone as a candidate for employment 'just because' he had been to prison. People who have criminal records often state that they are discriminated against when they disclose this fact and frequently this happens even before they state what they had been convicted for. Job applicants who have criminal records also claim that even if they are qualified and their conviction would have no bearing on the work they apply for, they are still excluded.³⁴ It is this type of discrimination that the state should guard against and work actively towards eliminating. If ex-inmates are unfairly denied access to employment opportunities they will find it difficult to sustain themselves and their families. This is likely to have a negative impact on their reintegration into society; many practitioners in the field report that ex-inmates tend to think of turning to crime when they find it impossible to get a job.³⁵

Existing measures to protect all job applicants and employees against unfair discrimination include, *inter alia* the Employment Equity Act 55 of 1998 and the Promotion of Equality and

the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The Employment Equity Act (EEA), in section 6, contains the exact wording of section 9(3) of the Constitution, thus reinforcing the constitutional protection against unfair discrimination.³⁶ Section 6(2)(b) of the EEA also provides that it is not unfair discrimination to exclude any person on the basis of an inherent requirement³⁷ of the job. In practice this means that a person who has a conviction of a nature that is unrelated to the job he or she is applying for should thus not be automatically ineligible to be considered for the position.³⁸

PEPUDA has been in force since February 2000 and refers to an illustrative list of unfair practices which are widespread and that need to be addressed.³⁹ Included in that list at 1(a) is the 'creating of artificial barriers to equal access to employment opportunities by using certain recruitment and selection procedures' and at 1(b) 'applying human resource utilisation, development, promotion and retention practices which unfairly discriminate against persons from groups identified by the prohibited grounds'. It can be asserted on the basis of these provisions that the state should be proactive in identifying barriers like the blanket and arbitrary exclusion of job applicants who have criminal records. Courts in other jurisdictions have begun to emphasise that such exclusions cannot ordinarily be justified.

Based on reports by ex-inmates and findings by some researchers which indicate that having a criminal record limits access to employment, the protections in terms of both PEPUDA and the EEA are not resulting in substantial improvements. Protection afforded by legislation does therefore not suffice on its own. It may as a result be reasonable to infer that the enforcement of these protections may be realised through litigation in circumstances where employers do not abide by the law.⁴⁰ This may also help to enforce the right to be treated on the basis of personal merits and not to be subjected to blanket discrimination and stereotypes.⁴¹

iii. Arguments derived from the constitutional right to dignity

The Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.⁴² This is also a non-derogable right according to the Constitution and may thus not be departed from even during a state of emergency.⁴³ Moreover, our state is founded on the value of dignity.⁴⁴ It therefore applies to all realms of life in South Africa. The prison environment should be no exception to this. Van Zyl Smit explains that theoretically 'imprisonment properly organised should offer the offender the possibility of retaining his dignity, of reflecting on his conduct, and of returning to society as a full participant'. He acknowledges, however, that in reality, imprisonment, even for a short period, is a harsh form of punishment.⁴⁵

The prison environment is perhaps one of the most challenging spheres in which to uphold the right to dignity, but the state nevertheless has a duty to do so. As was confirmed in the famous *Makwanyane* case, respect should be shown for the life and dignity of even the most hardened criminals. These founding values must never be compromised in a

constitutional democracy. The Constitutional Court's pronouncement in this regard was unambiguous when it stated that '[i]t is true that they might have shown no mercy at all to their victims, but we do not and should not take our standards and values from the murderer. We must on the other hand impose our standards and values on the murderer'.⁴⁶ This speaks to the state's duty. We must apply our values to offenders so that they can also become supporters of all the values that make South Africa a constitutional state.

The Constitutional Court has held that the constitutional guarantee of dignity 'requires us to acknowledge the value and worth of all individuals as members of society'.⁴⁷ The marginalisation and stigmatisation due to being an inmate is well documented and the experience of being publicly convicted and sentenced to imprisonment can in itself be a degrading experience. Being branded an ex-convict is likely to diminish an individual's sense of self-worth, and dignity is thus impaired. A prisoner may come to believe that he or she is not deserving of an opportunity to participate in mainstream society.

In this regard the state has an obligation to ensure that ex-inmates are recognised as equal actors in community life, i.e. to actively promote and fulfill rights based on the constitutional value of dignity. The restoration and upholding of ex-inmates' right to dignity is the most important goal of offender reintegration. A person cannot fully participate in mainstream society unless other members of society recognise and respect his value as a human being (in essence the right to dignity). The constitutional guarantee of dignity thus necessitates that the state removes obstacles that threaten the dignity of ex-offenders and that the state simultaneously promotes the adoption of essential measures (such as reintegration programmes) to help restore and uphold this right.

In short, the constitutional obligation to promote dignity rights cannot be ignored or swept away where prisoners are concerned and, in giving effect to repairing prisoners' rights to dignity, the state must be the major duty bearer.

To summarise, most inmates return to society where their rights to dignity, equality, and not to be subjected to unfair discrimination are not respected and given effect. The state has a constitutional duty to respect, promote, fulfill and protect these rights in respect of everyone including prisoners. In respect of prisoners, offender reintegration is arguably the measure through which effect can be given to all these rights. This is asserted as it is widely accepted that when prisoners' fundamental rights are limited, their ability to join mainstream society as productive, law-abiding citizens is substantially diminished. The process of reintegration can then be relied upon in practice to help promote the rights of prisoners. It is thus argued here that the state has a constitutional duty to promote and support offender reintegration in order to give effect to prisoners' constitutionally guaranteed rights.

3.3 The current implementing framework for offender reintegration in South Africa

The state's duty to support offender reintegration as argued for above, and the view that reintegration is a right that prisoners can draw upon, can be further supported by the existence of the implementing framework for offender reintegration in South Africa. The Correctional Services Act (CSA) and the White Paper on Corrections 2005 create a framework for the state to fulfill its duty to create opportunities for prisoners to reintegrate into society. The CSA and the White Paper both set out that one of the primary purposes of imprisonment is to rehabilitate.

3.3.1 *The Correctional Services Act (CSA)*

The CSA re-affirms the goal of rehabilitation (reintegration) in section 2 by stating that the correctional system is intended to contribute to maintaining and protecting a just, peaceful and safe society by promoting the social responsibility and human development of all prisoners and persons subject to community corrections. Therefore, one of the main objectives of the Department of Correctional Services (DCS) is to promote the social responsibility and human development of all inmates.⁴⁸

A number of other provisions in the CSA speak to the creation of an environment in correctional centres that would increase inmates' prospects of effective reintegration into society. Provisions which stand out in this regard include those under Chapter three entitled 'Custody of all Prisoners under Conditions of Human Dignity'. These provisions, especially section 4(2)(c), which provides that the minimum rights of inmates conferred in terms of the CSA must not be violated or restricted for disciplinary or any other purposes, reinforces the residuum principle discussed earlier. Giving effect to the rights of prisoners is thus not simply an ideal, but a legal requirement. These rights include rights relevant to reintegration as an important element of restoring human dignity.

The CSA also deals with what may be seen as 'housekeeping' issues in order to prevent undue suffering and to promote a humane existence. Specific requirements regarding accommodation, nutrition, hygiene, clothing and bedding, exercise and healthcare⁴⁹ are accordingly stipulated. In section 13 the CSA obligates the DCS to encourage inmates to maintain contact with their community and to enable inmates to stay abreast of current affairs. It is apparent that this requirement is aimed at assisting inmates to build or rebuild relations with the communities to which they will return and to minimise the stigma of imprisonment which ultimately contributes to ex-inmates being unable to form part of mainstream society. These provisions indirectly promote offender reintegration; section 13, which encourages prisoners to maintain contact with the outside world, is a particularly important component.

More directly applicable to the reintegration process, the CSA provides that upon admission every sentenced offender must be subjected to an assessment.⁵⁰ The assessment is aimed at determining inmates': (a) security classification for purposes of safe custody;

(b) health needs; (c) educational needs; (d) social and psychological needs; (e) religious needs; (f) specific development programme needs; (g) work allocation; (h) allocation to a specific correctional centre; and (i) needs regarding reintegration into the community. The assessment is then followed with a correctional sentence plan⁵¹ for each inmate sentenced to longer than 24 months.⁵² The manner in which the sentence must be served is set out in light of the assessment and the correctional sentence plan. Logically this means that the DCS must invest resources into programmes for those who are eligible for sentence plans and services in respect of those plans.⁵³ Any other reading would deprive the requirement of sentence plans of any value at all.

The sentence plan is ideally used as a tool to strategise how a prisoner can best prepare for a crime-free life after release, i.e. to plan the reintegration process of the individual prisoner. Goals and targets can be set to ensure that when the prisoner is released he is able to reintegrate effectively. The DCS should ensure that the objectives set in the sentence plan align with the prisoner's needs identified during the assessment. This could occasionally require amendments to the plan as the needs of a prisoner may change over the course of a prison term. It is suggested here that the DCS should be open to accommodating such changes if they are essential to successful reintegration. Efforts should also be made to identify specific available programmes and services that may assist prisoners' in the reintegration process. Including these in the sentence plan will help to create a much clearer path for the particular offender's reintegration. It may arguably also give prisoners a greater sense of purpose and hope while they are incarcerated.

The sentence plan, regardless of how well it is structured, will be rendered futile if the DCS and prisoner do not take collective responsibility for its implementation, however. The DCS should make programmes, space and time available for the implementation of the plan, while the prisoner must take every opportunity to attend, learn and apply the lessons and skills offered to him.

In addition to the provisions discussed above there are also other provisions in the CSA that clearly support offender reintegration. An example is section 44(1)(d) which allows an inmate to be granted temporary leave from the correctional centre for any reason related to the successful reintegration of the inmate into the community. Section 45 further provides that an inmate must be prepared for placement, release and reintegration into society by participating in a pre-release programme.⁵⁴ The reintegration process should start from the moment the prison term commences.⁵⁵ It should be premised on a sentence plan, and with opportunities for furthering the reintegrative ideal built into the legal regime.

3.3.2 2005 White Paper on Corrections

The primary legal framework in the CSA is taken a step further in the White Paper on Corrections. This visionary document states that the DCS' mission is to '[P]lace rehabilitation at the centre of all Departmental activities in partnership with external stakeholders, through: The integrated application and direction of all Departmental resources to focus

on the correction of offending behaviour, the promotion of social responsibility and the overall development of the person under correction; the cost-effective provision of correctional facilities that will promote security, correction, care and development services within an enabling human rights environment; progressive and ethical management and staff practices within which every correctional official performs an effective correcting and encouraging role.⁵⁶ Additionally seven of the DCS's ten objectives, set out in the White Paper, relate to 'offender reintegration'.⁵⁷

The White Paper gives impetus to the conception of offender reintegration as a crime reduction strategy when it sets out that the main objective of the reintegration process is to nurture the relationships between the offender and his/her victim, the community, family and society in general.⁵⁸ Thus, at the policy level, the links between crime reduction, crime prevention and reintegration of prisoners are explicitly drawn.

Offender reintegration appears to present an immense challenge to both the family and community, who must accept ex-offenders back into society upon their release from correctional centres, as well as to offenders, who have to take responsibility for their actions and become productive members of society. Offender reintegration is therefore a difficult process but one that must be undertaken, not only in the interests of the offender, but also in the best interests of the community: ex-inmates who do not successfully reintegrate into mainstream society might re-offend.⁵⁹

Equally, though, in the correctional environment itself, the DCS in practice appears not to provide adequate resources to give effect to the legal obligation to reintegrate inmates. The total budget proposed by the DCS for the 2009/2010 financial year amounts to R13 238 600 000, of which 33.4 percent is earmarked for security, 26.2 percent for administration costs, 13.4 percent for facilities, 12.0 percent for care, 8.4 percent for corrections and 3.4 percent and 3.2 percent respectively for development and social reintegration.⁶⁰ Based on these figures, the DCS does not envisage any major spending on offender reintegration. The state's budgetary allocation is probably insufficiently aligned to its unambiguous legal and policy commitments on offender reintegration.

3.3.3 *Judicial approaches to offender reintegration*

It is also relevant to consider the judiciary's approach to the implementing framework for offender reintegration. In *Kruger*, the Court held that 'while the prison authorities must be accorded latitude in the administration of prison affairs and prisoners may be subjected to appropriate rules; it remains the continuing duty of the courts to enforce the constitutional rights of all persons, including prisoners'.⁶¹ The courts help to shape the context in which offender reintegration should occur: when a court imposes a sentence of imprisonment, its intention is not only to punish the convicted person, but also that time spent in prison may be utilised to rehabilitate.

In the *Ngcobo* case,⁶² however, in discussing rehabilitation as provided for in the CSA and White Paper, the Court remarked that it is a 'notorious fact' that prisons are overcrowded

and that prisoners are often subjected to undignified conditions of detention. Further, it was stated that it is 'optimistic in the extreme' to assume that there are always effective rehabilitation programmes in place.⁶³ It is the contention here that conditions in prisons are indeed appalling and are not always conducive to rehabilitation, but this does not warrant an unnecessarily negative attitude, such as that seemingly adopted by the Court. There are many, albeit largely undocumented, successes that emerge from reintegration processes.⁶⁴ More importantly, if the state abandons offender reintegration as a crime prevention strategy because it (the state) is failing to comply with its duty to create humane conditions of detention in prisons, it may not only be a violation of the Constitution, but it constitutes an approach which effectively rejects a substantial proportion of our citizenry as worthy of *ubuntu*, a core constitutional value. Courts should therefore be mindful of offender reintegration's potential success when imposing sentences and making decisions related to release or to parole.

In summary, the state's duty to support the reintegration of offenders may be inferred firstly, from the fact that rehabilitation is one of the accepted objectives of sentencing and even imprisonment. Secondly, the state's duty to support offender reintegration may also be seen as a constitutional obligation. This may be derived from arguments that rights like the right to dignity, equality and not to be discriminated against, which the state has a duty to protect and give effect to, are in respect of prisoners, in practice given effect to through reintegration. Lastly, the CSA, White Paper on Corrections and the judiciary create an implementing framework for offender reintegration. This supports the contention that there is a duty on the state to support offender reintegration as well as a corresponding right to reintegration which prisoners can draw upon.

4. OTHER IMPORTANT STAKEHOLDERS IN THE REINTEGRATION OF PRISONERS

In practice effective reintegration also requires the input of other (non-government) stakeholders.⁶⁵ These include the prisoner himself, his family and community as well as non-governmental organisations. Below, the role of these stakeholders in the reintegration process will be briefly discussed.

4.1 Prisoners as stakeholders in the reintegration process

Offender reintegration cannot occur without the commitment of prisoners. They have to *inter alia* avail themselves to attend programmes when possible, participate actively in programmes and utilise opportunities afforded to them if it will assist them in refraining from re-offending. However, in reality there are many challenges which affect their reintegration into society. These challenges must be considered, not to relieve or reduce prisoners' individual responsibility, but to understand how they may be assisted effectively

and the extent to which they can be held responsible for their own reintegration. The following is aimed at highlighting some of the challenges experienced by prisoners which are likely to impact on their reintegration.

4.1.1 Common characteristics and experiences of prisoners which affect their prospects of reintegration

This section seeks to discuss briefly some of the common characteristics and experiences of prisoners which can affect their prospects of effective reintegration. It will become clear below that a greater part of the inmate population is in any event vulnerable due to circumstances outside of the correctional centres in the first place and that this vulnerability is deepened by their loss of adult agency in prison. This therefore heightens the need for assistance to reintegrate when they are released. Thus crime prevention, as will be argued here, starts within the walls of the prison itself.

It must be cautioned that the literature highlights shortcomings in South African research with regard to the profile of inmates, such as biographical and demographic data, as well as lifestyle characteristics.⁶⁶ This notwithstanding, sufficient research exists to illustrate that inmates present a range of common characteristics, and that these are sufficiently prevalent to be of note.⁶⁷ It is also noteworthy that the profile of the inmate population differs considerably from that of the general population and that those differences alone can contribute to predisposed involvement in crime.⁶⁸ Research consistently shows that most inmates have a history of risk behaviour, limited opportunities, poor parenting, exclusion from certain resources, and a lack of abilities and skills to rise above these shortcomings.⁶⁹

It has been reported that inmates, as opposed to the general population, are 13 times as likely to have been in care as children, to be unemployed, ten times as likely to have been a regular truant, two-and-a-half times as likely to have had a family member convicted of a criminal offence, six times as likely to have been a young parent and fifteen times as likely to be HIV positive.⁷⁰ Further, 50 percent of inmates have less than a grade 12 education and 60 percent read below the grade 12 level at the time of their arrest.⁷¹ Sixty percent of inmates were not working fulltime at the time of their arrest⁷² and more than half of the inmate population has been to prison before.⁷³

Available research shows that certain families, and indeed certain communities, suffer from high incarceration rates.⁷⁴ Imprisonment thus becomes normalised from one generation to the next in specific communities.⁷⁵ The South African Institute for Race Relations (SAIRR) has found that the coloured population was incarcerated at a rate of almost 651 per 100 000 people. The imprisonment rate for this population group was twice that of the black population group, which was 342 per 100 000 people in 2007. According to the SAIRR the analysis does not seek to suggest that some population groups are more criminally inclined than others. It seeks to 'identify peculiar environmental influences that might drive members of some communities towards criminal activity'. The study, for example, found that criminal gang activity and drug and alcohol abuse were more

prevalent amongst communities populated by coloured people than others.

It may be assumed that many prisoners are already vulnerable due to their backgrounds. It is possible that they lack self-esteem, skill and support to reintegrate into society because of their personal background and that this is exacerbated by the prison environment. The inhumane conditions in prison degrade inmates further and minimise their chances of rehabilitating. These considerations must be borne in mind when contemplating how prisoners may be assisted and to what extent they are personally responsible for their reintegration (or not).

4.1.2 The effect of the limitation of freedom

Imprisonment limits a person's freedom. This has a profoundly negative effect on prisoners and their preparation for reintegration. In *Goldberg v Minister of Prisons* it was thus held that '[t]he inroads which incarceration necessarily make upon a prisoner's personal rights and liberties ... are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and to the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison.'⁷⁶

It is also useful to take into account what 'prison' as an institution objectively entails. According to Steinberg, an inmate's experience is essentially one of infantilisation.⁷⁷ He explains that if adult life is made meaningful by the exercise of one's agency, then this is exactly what the inmate is denied in the correctional environment. 'Agency' in this context, he continues, not only refers to the overarching projects of adult life such as raising children and forging a career, but includes even the simplest things we do by ourselves like washing, using a telephone, deciding when to eat and when to rest. Inmates are deprived of the very basics of being an adult.⁷⁸ This is likely to affect an inmate's sense of self-worth. To demonstrate their dissatisfaction with such treatment inmates may resort to conduct that may be seen as anti-social, 'rebellious' and even criminal. Reintegration programmes must seek to overcome and limit the dehumanising effects of imprisonment that are occasioned by loss of adult agency. They should focus on future agency and give prisoners ways to exercise this upon release.

4.1.3 Lack of constructive activities for prisoners

Being idle for the greater part of their incarceration adds to inmates' dilemma.⁷⁹ One inmate succinctly articulated the frustration of not being able to engage in constructive activities: 'There is a man who is serving a sentence of twenty-five years. He has been doing nothing in prison all these years. What does he know about the world, or about the changes outside?'⁸⁰ Another inmate expressed similar dissatisfaction: 'When I get out of prison I won't be able to do anything. I just sit or walk around all day. I get sick because I don't do anything.'⁸¹

In light of the reported lack of rehabilitation services and constructive activities for inmates, it is unsurprising that most ex-inmates do not reintegrate effectively and risk re-offending as a result. Prisoners should be required to participate in activities that will give them a sense of purpose and may contribute to skills development which may be utilised to sustain themselves after release. Allowing them to assist in the upkeep of the prison and other labour activities can serve this purpose. Intensive and individualised therapeutic interventions are also important to ensure that personal, internal psychological and emotional issues, which may underlie offending behaviour, are dealt with effectively.⁸² With such assistance, most prisoners would be in a better position to plan their reintegration and to refrain from re-offending.

4.2 Families' and communities' role in the reintegration process

It is important to consider that imprisonment affects not only the inmate concerned, but also his family and community.⁸³ They have to deal with the separation and the consequences of the inmate's absence from the home as well as the stigma attached to having a relative in prison. Families and communities have to accept the inmate back into the community when he is released and provide assistance to him to ensure that he adapts to life outside prison. If they are unable to do so, or are insufficiently prepared to assist, it is likely that the inmate may find the challenge of pursuing a crime-free life overwhelming and may re-offend. It is consequently important to consider how the imprisonment of an individual affects his family and community, and to examine how they in turn may influence the inmate's reintegration into society. This could provide clues to the contribution of reintegration to preventing crime.

The imprisonment of a relative may be traumatic for many families. 'It is like someone had died'⁸⁴ is how the wife of an inmate described her husband's incarceration. The imprisonment of an individual may be experienced by some families as a profound loss. Families are also concerned about the inmates' well-being and particularly their safety during imprisonment. The need for intensive support to deal with the trauma and the needs which arise as a result of an offender's incarceration has been poorly documented, and services to families of prisoners are not easily accessible or widely available. It would appear that the plight of families of incarcerated persons has historically not enjoyed much attention.

Presently the majority of the South African prison population are young men. As the male prison population increases, so, too, do the number of children with fathers in prison.⁸⁵ The impact of the absence of fathers from homes is generally believed to have negative consequences. Bushfield argues that when a father's absence is due to imprisonment there are additional risks.⁸⁶ One such risk is that opportunities for both the prisoner and his family are reduced. 'There is a cyclical nature to crime and low educational attainment', and with the large number of fathers in prison, 'fatherlessness has become more than a private agony, it is now a very public issue with educational, social, cultural and economic consequences.'⁸⁷

In the United States of America a 1999 Princeton University study entitled *Father Absence and Youth Incarceration* observed that as the rate of ‘father absence’ grows, community disintegration and crime (particularly youth crime) will continue to grow.⁸⁸ The study also found that ‘father absence’ can be linked to 63 percent of youth suicides, 90 percent of homeless and runaway youths, 85 percent of children who exhibit behavioural disorders, 71 percent of high school dropouts, 75 percent of adolescents in centres for substance abuse patients and 80 percent of rapists motivated by displaced anger.⁸⁹ In South Africa, boys are growing up without positive male role models as many fathers, older brothers and uncles are in prison. The prison thus becomes ‘an institution with a secret allure where boys become men.’⁹⁰

While the full extent of the impact of the absence of fathers due to imprisonment is not widely known in South Africa, it is highly possible that it may have similar consequences for children here as it has for those in the US. This contention is affirmed to some extent by a study conducted by the Centre for Justice and Crime Prevention which explored the extent and nature of violence in schools. It was found that approximately 22.3 percent of children included in the study had either a parent or caregiver who had been imprisoned.⁹¹ Further 38.2 percent had siblings who have been to prison or who were in prison at the time of the study. The study included 12 794 learners from 125 primary and 140 secondary schools across South Africa. Although the focus of the study was not on the topic at hand, the findings in relation to parent imprisonment provides a glimpse into the issue: 25 percent more learners whose parents or caregivers had been in prison had been victims of violence at schools, than those whose caregivers had not been in jail. A tentative interpretation suggests that there is a reasonable probability that children of inmates are more vulnerable to victimisation than children whose parents have never been incarcerated. If this is indeed the case then the well-known concept in the field of psychology that victims of abuse often become perpetrators themselves⁹² should be explored, especially when it comes to children of prisoners.

The children of prisoners should be protected as far as possible against conditions which threaten to violate their rights and which may place them at risk of committing crime. Protection of the children of prisoners is thus a complementary, future-oriented, crime prevention strategy. In *S v M*, the Constitutional Court affirmed that courts and administrative authorities are constitutionally bound to consider the effect that their decisions will have on children’s lives,⁹³ and that section 28 of the Constitution (which deals specifically with the rights of children) presupposes that ‘the sins and traumas of fathers and mothers should not be visited on their children.’⁹⁴

Furthermore the Court held that the state cannot itself restore disrupted family life, but that it can create conditions for repair to take place⁹⁵ and ‘diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril.’⁹⁶ Where the imprisonment of a parent is inevitable and the rupture of family life is therefore unavoidable, the state is obliged to minimise the consequent negative effect on

children as far as it can.⁹⁷ The judgment expresses a constitutional duty on the state to give effect to the rights of prisoners' children. Indirectly the judgment recognises a duty to protect the prisoners' rights as parents and their right to family life;⁹⁸ both are key features of reintegration. Thus it can be seen that the jurisprudence at hand supports the legal ramifications of reintegration as an obligation of the state. The state should thus endeavor to involve families in the activities of their imprisoned relatives as much as possible.⁹⁹

In summation, although the state has a legal obligation to support the reintegration of offenders, prisoners, their families and communities also play a vital role in reintegration processes. However, there is a need to be cognisant of the challenges (to effective reintegration) which exist both in and outside the correctional environment for all these stakeholders. Many prisoners enter prison as vulnerable individuals and their vulnerability is deepened by the manner in which they are treated and the conditions in prisons, thus heightening the need for guidance and support. Families have to contend with the trauma caused by the separation of a relative as well as the stigma of having a relative in prison. In spite of these and other challenges which are currently largely unaddressed, families and communities ultimately have to accept prisoners back when they are released from prison.¹⁰⁰ As they are often the only sources of immediate support, families and communities are therefore also primary stakeholders in the reintegration of offenders.

4.3 The role of non-governmental organisations in the reintegration of prisoners

In the absence of sufficient programmes offered by the DCS, prisoners who are able to, tend to participate in programmes offered by non-governmental organisations (NGOs). There is a substantial (but unconfirmed) number of NGOs working both inside and outside of prison with prisoners, ex-prisoners and their families to promote offender reintegration and to reduce the chances of re-offending.¹⁰¹ Some ex-prisoners have indicated that most prisoners prefer the programmes and services offered by NGOs to those offered by the DCS.¹⁰² This is not to imply that the programmes offered by the Department are inferior or inappropriate to the ones offered by NGOs. Prisoners' preference is motivated by the view that NGOs 'are from the communities'.¹⁰³ By participating in NGO programmes, prisoners have an opportunity to work towards gaining the trust of the community. Participation in such programmes furthermore gives prisoners hope that they will be accepted back into the community when they are released.¹⁰⁴

The NGO sector comprises mostly of non-profit, community or faith-based organisations. Such organisations fill a particular niche within communities. Those who lead organisations that are community or faith-based are often respected community members who are familiar with the specific culture and challenges faced by the community. They are thus well-placed to work within the community and to deal with issues faced by ex-offenders.

NGOs offer diverse services and programmes to offenders. Some NGOs also offer support services to the family of offenders. The most common services offered include therapeutic

support in the form of individual and group counselling, family and victim conferences, drug and alcohol addiction counselling, anger management and conflict resolution education. Most NGOs also offer vocational and life-skills training that is generally aimed at assisting ex-prisoners to find ways of becoming financially independent. This may stem from the widely held view that if ex-offenders are not able to sustain themselves financially, they resort to crime as a means to support themselves and their families. While this may be debatable, it can hardly be denied that the majority of prisoners lack the skills required to find meaningful employment and that having a criminal record further limits their chances of finding employment in the formal labour market. The training programmes offered by NGOs are thus necessary to improve ex-prisoners' chances of becoming financially independent.

Accessing the services offered by NGOs is not always easy. Prisoners and their families are often not aware of all the services offered by NGOs. This is mainly due to the lack of coordination of initiatives in the field of offender reintegration. There is thus a need to streamline and coordinate the activities of all the role players in the field.¹⁰⁵ This will ensure a more consolidated approach to addressing the needs of offenders.

Ex-prisoners and their families generally commend the efforts of NGOs. Many ex-offenders in fact become employees or volunteers of the organisations that offered them assistance. This is indicative of the significant contribution that NGOs are making to the broader field of offender reintegration. What constrains the NGO sector is a lack of support from government. With the exception of a few that receive partial funding from the Department of Social Development, the vast majority of NGOs do not receive support either in the form of funding or capacity-building from the government. The majority of NGOs operate almost exclusively with financial support from local and international donors.

Community-based organisations (CBOs) in particular are at a disadvantage. They tend to struggle with a host of organisational development problems of which fundraising is often a major obstacle. While these challenges can impact negatively on the implementation of their programmes, CBOs as alluded to before, are well-placed to support offenders. Without the assurance of consistent financial support and capacity-building assistance, however, CBOs are in a precarious position and cannot always guarantee continued support or offer support to everyone who seeks assistance. As a result, NGOs require support that will ensure that they do not have to focus the bulk of their efforts on sustaining themselves. The DCS, whose duty it is to provide programmes to prisoners, ought to consider offering some assistance to NGOs.

The DCS should form strategic partnerships with NGOs who are rendering quality programmes. They should offer them funding as well as assure them that conditions in prisons are conducive to rehabilitation. This will contribute to the overall duty to create opportunities for effective reintegration. As noted before, NGOs and CBOs play an important role in the reintegration process. It is through them that prisoners and their families can begin to regain a community's trust and respect. While the DCS can never abdicate or

delegate its constitutional duty to the NGO sector, it can rely on that sector to help support offender reintegration by working in partnership.

5. CONCLUSION

Crime in South Africa is exacerbated by the reality that the correctional system generally fails to prepare prisoners for a crime-free life when they are released. Repeat offending by ex-inmates thus contributes substantially to the high crime rate in South Africa. Offender reintegration is thus a necessary component of crime prevention. It seeks to support inmates while they are incarcerated and after release in becoming productive, law abiding citizens. There is also arguably a constitutional obligation on the state to support reintegration. Many inmates' right to dignity, equality and not to be unfairly discriminated against are violated in prison and in society after they are released, and offender reintegration is a process that gives effect to these rights. Offender reintegration should consequently commence from the moment an offender is sentenced to imprisonment. Importantly, imprisonment should be understood by the state and society as serving not only to punish an offender by limiting his freedom, but also to provide him with opportunities to reintegrate into society. Failure to accept these as the purposes of imprisonment may have profound negative implications for community safety. Furthermore, the DCS should ensure that appropriate resources and conditions are available to facilitate the reintegration of offenders. As most prisoners return to their families and community of origin, the impact of imprisonment on these role-players should be addressed. Additionally, efforts should be made by the state to involve families in the reintegration processes from the moment a prisoner's sentence commences. Finally, the state should invest in partnerships with non-governmental organisations that are rendering quality programmes to offenders and their families so as to address the vast need for reintegration services which exists in South Africa.

6. RECOMMENDATIONS

- The starting point in giving adequate effect to offender reintegration is to accept this objective as one of the true purposes of imprisonment and, at the same time, to recognise the real dangers in not doing so, i.e. the risk of ex-inmates re-offending in the future.
- The public should be made aware that communities play a vital role in reintegration processes. The negative effects of stigmatisation of prisoners and the necessary rehabilitative approach to imprisonment can be well addressed at community level. It must be understood by every community that imprisonment serves only two purposes, namely, to punish the prisoner by limiting his freedom and to provide

him with opportunities to rehabilitate. If prisoners do not reintegrate into their communities, such failure may have negative implications for community safety.

- Our courts can be instrumental in breaking the stigma, inertia and retributive value systems that prevent effective reintegration. Judgments that uphold the principles of *ubuntu* and emphasise rehabilitation as a sentencing purpose are vital in this regard.
- It seems obvious that the DCS should increase its budget allocation for offender reintegration. An increased budget for offender reintegration should thus be seen as bringing the DCS a step closer to meeting its constitutional and statutory obligations. Complementary and innovative strategic plans for reintegration and security should thus also be developed in tandem for prisons. Offender reintegration cannot occur without appropriate resources or in unsafe conditions.
- Prisoners are ultimately responsible for their reintegration. They should be required to give input in the development of their sentence plans. They should also be afforded opportunities to participate in the upkeep of the prison, on the basis that being involved in constructive activities can provide them with a sense of purpose and may help to ease the feeling of being 'infantilised' by the prisons system. If the activities in this regard are properly managed, the result could be the development of various skills which could be useful upon release.
- Participation in offender reintegration programmes should be obligatory for prisoners and reintegration efforts should commence from the moment a prisoner is sentenced to imprisonment. This is in the interest of both the prisoner and his immediate family and community. Reintegration can be seen as a decisive intervention in the cycle of crime and the prevention of the normalisation of imprisonment in many communities.
- By making participation in reintegration programmes compulsory, the duty on the state will be eased in the long run and the effects of crime on communities will begin to decrease. Repeat offending places great pressure on the state and the public. Simply housing prisoners is costly and, in the absence of offender reintegration, it is an investment of state funds which will yield no positive returns.
- The state should actively seek and support programmes that will help to build the skills of prisoners to enable them to sustain themselves without resorting to crime after release. Equally important are quality therapeutic programmes that will help prisoners to identify and deal with the personal issues which inhibit their reintegration. The classroom setting in which such programmes are typically offered is not always conducive for prisoners to reveal the issues they are struggling with. There should thus be a balance of group and private therapeutic sessions made available to prisoners.
- The DCS should explore possibilities of funding some of the programmes offered by NGOs and to working in partnership with them. NGOs are often based in communities and by interacting with them, prisoners can regain their own trust in the community and, in turn, they can win back their community's respect.

- The NGO sector does a considerable amount of work to support the reintegration of offenders. Yet the sector requires coordination to bolster its impact. Concerted efforts are needed to consolidate and document research, share knowledge and practices in the field. Importantly closer cooperation between stakeholders is required to identify and address the gaps in knowledge and practice in the field of offender reintegration.
- Ex-prisoners will only become part of mainstream society once they are afforded equal rights and opportunities as ordinary citizens. The state should therefore make efforts to ensure that imprisonment per se is not used arbitrarily to differentiate between ex-prisoners and other citizens. Discrimination on the basis that a person has a criminal record must be justifiable for constitutionally valid reasons. In addition, non-discriminatory employment practices in relation to ex-offenders should apply to all state institutions. Every state department should have an internal policy to this effect.
- Families can play a vital role in reintegration processes. The CSA recognises this clearly, hence it provides for the right to have contact with family, friends, religious leaders, and other persons with links to the outside. Concerted efforts should accordingly be made by the state to involve families in reintegration processes from the moment a prisoner's sentence commences. The impact of imprisonment on the families of offenders should not be underestimated and they should thus be afforded appropriate support to deal with the effects of their relatives' imprisonment. Assistance to prepare them to support their relative upon release should also be readily available to families. This should form part of the social reintegration budget and strategic plans of the DCS.
- Over and above the practical assistance afforded to families, there is an urgent need for in-depth research on the actual impact of imprisonment on families. The experience of children of prisoners should be studied so as to assist the development of measures to ensure that the effects of a parents' imprisonment on children are minimised. In particular the impact of fatherlessness due to imprisonment on children should be explored.
- Finally, we should inculcate into our nation's consciousness that 'an enlightened society will punish offenders, but will do so without sacrificing decency and human dignity'.¹⁰⁶ Choices of crime prevention models should always be based on rationality and efficacy. More importantly, offender reintegration resonates with the values of dignity and respect for human life. Society at large will benefit significantly from a crime prevention model which includes as one facet the reintegration of sentenced offenders.

Endnotes

- 1 *S v Makwanyane and Others* 1995(3) SA 391(CC) at paragraph 241.
- 2 *Makwanyane supra* at paragraph 225.
- 3 The White Paper on Corrections 2005 at paragraph 4.2.1 page 71 provides that 'rehabilitation' is the result of a process that combines the correction of offending behaviour, human development and the promotion of social responsibility and values. It is a desired outcome of processes that involve both the departmental responsibilities of government and the social responsibilities of the nation.
- 4 'Offender reintegration' is not defined in the Correctional Services Act 111 of 1998, or in the White Paper on Corrections 2005. In practice the concept is broadly understood to include support to offenders during their incarceration as well as after their release. Support may inter alia include therapeutic and vocational programmes in prison and aftercare interventions upon release which are aimed at assisting ex-offenders to refrain from re-offending and to be accepted as members of mainstream society.
- 5 See section 1 of the Final Constitution of the Republic of South Africa 108 of 1996.
- 6 See C. Frank, *The Role of Education, Health and Social Development in Preventing Crime* ISS Monograph No. 126, October 2006, at page 13 <http://www.iss.co.za/index.php?link_id=3&tslink_id=4310&link_type=12&tslink_type=12&tmpl_id=3> (accessed on 3 October 2009).
- 7 T. Clear, 'Mindful punishment: What to do about the South African penal system and why', *SA Crime Quarterly*, 23 March 2008, page 6 in endnote 2.
- 8 See the discussion by Tony, in which the incarceration rates in a number of countries are discussed in relation to the crime rates of those countries and how the conclusion can be drawn that higher incarceration rates do not necessarily result in reduced crime levels, in *Sentencing in South Africa: Conference Report 1, 25–26 October 2006*, Cape Town <http://www.osf.org.za/File_Uploads/docs/SENTENCINGREPORT1ConferenceReport.pdf> (accessed on 28 May 2009).
- 9 *Clear supra* at page 2.
- 10 The Good News and the Bad on the Crime Front <<http://www.sairr.org.za/publications/pub/ff/199905/crime.htm>> (accessed on 22 November 2008).
- 11 Van Zyl Smit, Dirk 'Sentencing and punishment' (chapter 49) in Woolman, Stuart et al. (eds) *Constitutional law of South Africa* 2ed. (2006) Juta, Cape Town, 49–1.
- 12 In *S v Maluleke* 2008(1) SACR 49(T) Bertelmann J stated that 'restorative justice ... may make a significant contribution in combating recidivism by encouraging offenders to take responsibility for their actions and assist the process of their ultimate reintegration into society thereby'.
- 13 In *S v R* 1993(1) SA 476 at 488 I, it was held that the introduction of correctional supervision assisted in shifting the emphasis from retribution to rehabilitation.
- 14 In *Review of South African Innovations in Diversion and Reintegration of Youth at Risk*, Open Society Foundation for South Africa, Newlands, 2005 at page 1, 'diversion' is described as a process of referring children under the age of 18 who have committed offences, and where there is enough evidence to prosecute, away from formal criminal justice proceedings. Additionally, it is stated that some diversion programmes also accommodate young people over the age of 18 years where it is deemed appropriate. Section 1 of the Child Justice Act 75 of 2008 provides that 'diversion' means 'diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of procedures established by Chapter 6 and Chapter 8 [of the Act]'. See also section 51 in Chapter 8 for the objectives of diversion.
- 15 1945 AD 444.
- 16 Pre-Constitution cases where the prospects of rehabilitation were considered as a mitigating factor in deciding upon an appropriate sentence for serious crimes include: *S v Cotton* (Case No: 462/91); *S v Dlamini* 1992(1) SA 18(A); *S v Bosman* 1992(1) SACR 115(A); *S v Ramba* 1990(2) SACR 334(A); *S v Ngcobo* 1992(2) SACR 515(A). Post-1994 cases where the prospects of rehabilitation contributed to lighter prison sentences on appeal include *inter alia Nkomo v S* 2006 SCA 167 RSA and *S v Sikhapha* 2006(2) SACR 439(SCA) and *S v Shilubane* 2008(1) SACR 295(T).
- 17 *S v Khumalo and Others* 1984(3) SA 327(A).
- 18 *Ibid.*

- 19 *Makwanyane supra* at paragraph 242.
- 20 1961(1) SA 231(a) at 236A.
- 21 In *S v Khumalo and Others* (1984[3] SA 327 at 330D-E) for example, Nicholas JA held that deterrence has been described as the 'universally admitted' object of punishment and that the other purposes of punishment are 'accessory'. Interestingly, he also remarked that in 'modern times' (1984) retribution was considered to be of lesser importance.
- 22 *Shilubane supra* at paragraph 66.
- 23 2008(1) SACR 295(T)
- 24 See *S v Niemand* 2002(1) SA 21(CC) at paragraph 24 where Madala J, held that even a person declared a habitual criminal is removed from society for the purpose of rehabilitating. In *Kruger v Minister of Correctional Service* 2006(11) BCLR 1339(T) at paragraph 25 it was held the prison authorities have a duty to rehabilitate 'as far as humanly possible'.
- 25 Van Zyl Smit (D. Van Zyl Smit, 'Sentencing and punishment' [chapter 49] in Woolman, Stuart et al. [eds] *Constitutional law of South Africa* 2ed. [2006] Juta, Cape Town, 49–26) states that the recognition of the right of prisoners to constitutionally acceptable treatment means that they may claim positive performance from the prison authorities and, since prisoners are dependent on the authorities in ways that ordinary citizens are not, the authorities have to provide directly for the fulfillment of basic needs according to law. In this regard, he cites the case of Van Biljon in which the Court, upholding prisoners' constitutional right to medical treatment, explained that 'unlike persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment and must thus be provided with such treatment'. (*Van Biljon and Others v Minister of Correctional Services and Others* 1997(4) SA 441(C) at paragraph 53). This may evoke controversy given that there are people outside prison who are indigent and do not have access to such services. Against this, one may state that indigent people at least have the freedom of movement to seek assistance where it is not readily available. But for the prison authorities, most prisoners would have no other means to access services.
- 26 1912 AD, 122–123.
- 27 1979(1) SA 14(A) at 39 C–E.
- 28 1993(3) SA 131(A).
- 29 *Hofmeyr supra* at 141 C–E. This principle was also affirmed in *Kruger supra* at paragraph 25.
- 30 Case No. 6113/2007.
- 31 At paragraph 7.
- 32 Z. Nicholson, 'Former criminals benefit by R33m', *Argus*, 9 August 2008, page 6.
- 33 Section 118 of the Children's Act.
- 34 For those with criminal records the prospects of finding employment in the formal labour market is challenging. In an exploratory study with released prisoners in Cape Town, the Civil Society Prison Reform Initiative (CSPRI) found that although at the time of arrest and imprisonment 47 percent of the sample had been in full time employment and 38 percent in casual jobs, several months after release less than half had managed to find employment. Of those who did find employment, most had either returned to their pre-imprisonment job or had found employment in a family business. See L. Muntingh (2008) *Prisoner Re-entry in Cape Town: An exploratory study*. CSPRI Research Paper No. 14. Cape Town: Civil Society Prison Reform Initiative.
- 35 This is obviously not the case in respect of all ex-inmates, but most people do cite unemployment as a challenge to reintegration.
- 36 Section 9(3) of the Constitution and section 6 of the EEA do not list a criminal record as a ground. Discrimination on the basis of having a criminal record is thus not automatically presumed unfair. However, it can be argued that discrimination due to a criminal record is analogous to a listed ground. Listed grounds relate to attributes or characteristics that impact on human dignity. Where discrimination on analogous grounds is alleged, a claimant must therefore show that law or conduct on grounds other than those listed in section 9(3) is based on attributes or characteristics 'which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner'. *Harksen v Lane* No. 1998(1) S 300(CC) at paragraph 46. Without providing an extensive argument in this regard it can be contended that when ex-inmates are treated differently from others simply because they have a criminal record it violates their dignity. In particular, discrimination which unfairly inhibits access to employment can frustrate the reintegration process and further marginalise ex-offenders.

- 37 An inherent requirement of the job depends on the nature of the job and the required qualifications. If someone with extremely poor eyesight is for example excluded from being considered for a position as an airline pilot, such an exclusion will constitute fair discrimination as he or she lacks a material quality that is essential to performing the duties which the job entails.
- 38 In *British Columbia (Public Relations Commission) v British Columbia Government Services Employee's Union (B.C.GSEU) (Meiorin Grievance)*. (1999) S.C.J. No. 46, (1999) 3 S.C.R. 3 at paragraph 45, the requirement of an employer's bona fide occupational requirement, an almost similar concept to that of 'inherent requirement of the job' was considered. It was held that an employer must justify on a balance of probabilities that '(1) the employer adopted the standard for a purpose rationally connected to the job; (2) the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work related purpose; and (3) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing characteristics of the claimant without imposing undue hardship upon the employer.' In South Africa, these considerations would perhaps go a long way to preventing the arbitrary exclusion of job applicants with criminal records. In *Hoffman v South African Airways* 2001(1) SA(CC) at paragraph 34 the Court held that legitimate commercial requirements are an important consideration in determining whether or not to employ an individual. However 'allowing stereotyping and prejudice to creep in under the guise of commercial interests had to be guarded against'. Prejudice whether direct or indirect cannot be tolerated (paragraph 37).
- 39 Section 29 of PEPUDA.
- 40 The Canadian Charter on Rights and Freedoms contains an anti-discriminatory clause (i.e. section 15) similar to section 9(3) of our Constitution. The Human Rights Code in the province of Manitoba in Canada is also premised in similar terms as section 15; the Manitoba Human Rights Commission Board of Adjudication in *Penner v Fort Garry Services Inc* <http://www.gove.mb.ca/hrc/english/publications/decision_penner.htm> has stated that employers should ensure that they treat employees or job applicants with criminal records on the basis of personal merits relating to the job in question rather than on assumptions or stereotyping.
- 41 In *Field v Orkin*, Civ. No. 00-5913, 2001 U.S. Dist. LEXIS 24068 at 8 (E.D. Pa. 2001) it was held that a complete bar to employment based on a criminal conviction record would create an automatic and impenetrable barrier to employment, and would leave a large group of citizens permanently unemployed.
- 42 Section 10.
- 43 Section 37(5)(c).
- 44 Section 1 of the Constitution.
- 45 D. Van Zyl Smit, 'Sentencing and punishment' (chapter 49) in Woolman, Stuart et al. (eds) *Constitutional law of South Africa* 2ed. (2006) Juta, Cape Town, page 26.
- 46 *Makwanyane* at paragraph 247.
- 47 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999(1) S 6(CC) at paragraph 29.
- 48 Section 2. See also sections 36, 38, 41 and 45.
- 49 Sections 7, 8, 9, 10, 11 and respectively.
- 50 Section 38 of Act 111 of 1998.
- 51 See section 38 1(A)(b) of the CSA where it stipulates what the correctional sentence plan must address.
- 52 Repeat offenders not sentenced to longer than 24 months will thus not be eligible for sentence plans. Those who are in the beginning stages of their criminal careers, an opportune time for preventive measures to be effective, are most likely to be deprived. This provision may inadvertently pave the way for young offenders to become more engaged in crime and, until they commit serious offences that warrant lengthy sentences, they will not be exposed to rehabilitation programmes.
- 53 It must be considered that it will effectively mean that vast numbers of inmates will not have the benefit of a sentence plan as many are sentenced to less than 24 months.
- 54 In practice it seems that many prisoners do not participate in reintegration programmes until shortly before they are released. This is predictably inadequate and ineffective in reintegrating prisoners.
- 55 According to the Judicial Inspectorate on Prisons Annual Report for the period 1 April 2008 to 31 March 2009 (at page 12) 67 percent of sentenced inmates are serving prison terms in excess of five years and the growth rate amongst those who are

- 56 serving a sentence of life imprisonment for the period 1998 until 2009 stands at 1023 percent.
- 57 See DCS (2005) White Paper on Corrections in South Africa at paragraph 4.3.2.
- 58 L. Muntingh, 'Offender Rehabilitation and Reintegration: Taking the White Paper on Corrections forward' <http://www.communitylawcentre.org.za/Projects/Civil-Society-Prison-Reform/publications/cspri-publications/offender-reintegration-no_10.pdf> at page 4 (accessed on 27 November 2007).
- 59 White Paper at 9.13.3 at page 141.
- 60 L. Muntingh, 'After Prison: The Case for Offender Reintegration' <<http://www.iss.co.za/Pubs?Monographs/No52/Execsam.html>> (accessed on 26 November 2007).
- 61 JIOP Annual Report 2008/09 at pages 52–54.
- 62 *Kruger supra* at paragraph 25.
- 63 *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo and two others* (165/08) [2009] ZASCA 72 (1 June 2009).
- 64 *Ngcobo supra* at paragraph 21.
- 65 *Creating Paths for Offender Reintegration*, Conference Report, Open Society Foundation For South Africa and the Department of Correctional Services, 14–15 October 2008, Pretoria pages 75–97 <http://www.osf.org.za/File_Uploads/docs/Offender-Reintegration-Conference-Report4.pdf>.
- 66 This is also evident from some of the provisions in the CSA and the White Paper as discussed earlier. See for example the discussion regarding section 13 of the CSA and the White Paper in which it is stipulated that the main objective of the reintegration process is to nurture the relationships between the offender and his/her victim, the community, family and society in general.
- 67 L. Muntingh, 'Offender Rehabilitation and Reintegration: Taking the White Paper on Corrections forward', *supra* at page 14.
- 68 *Ibid.*
- 69 L. Muntingh, 'Offender Rehabilitation and Reintegration: Taking the White Paper on Corrections forward', *supra* at page 20.
- 70 *Ibid.*
- 71 K. Mpuang, 'The Case for Effective Offender Reintegration' <<http://www.csvr.org.za/confpaps/mpuang.htm>> (accessed 7 November 2007).
- 72 <<http://www.dcs.gov.za/>> (accessed on 12 November 2007).
- 73 *Ibid.*
- 74 The Good News and the Bad on the Crime Front, *supra* (accessed on 22 November 2007).
- 75 L. Muntingh, *Youth crime and violence – Some perspectives from the prison reform sector*, HSRC Roundtable discussion on youth crime and violence, 13 May 2008 <<http://www.hsrc.ac.za/Document-2791.phtml>>.
- 76 *Ibid.*
- 77 1979(1) SA 14(A) at 39 C–E.
- 78 J. Steinberg (2004) page 18.
- 79 *Ibid.*
- 80 According to the Judicial Inspectorate for Prisons Annual Report for the period 1 April 2008 to 31 March 2009 (at page 8) most prisoners spend up to 23 hours per day in communal cells due to overcrowding.
- 81 A. Dissel, *South Africa's Prison Conditions: The inmates talk* <<http://www.csvr.org.za/wits/papers/pspinmat.htm>> (accessed on 11 May 2009).
- 82 *Ibid.*
- 83 The classroom-setting in which most therapeutic programmes are presented serves a purpose, but it cannot substitute the individualised assistance required by many prisoners. One-on-one counselling and therapeutic sessions should be prioritised when necessary.
- 84 See *Creating Paths for Offender Reintegration Conference Report, supra* at page 84–85.
- 85 J. Murray (2005) 'The effects of imprisonment on families and children of prisoners' in A. Lieblich and S. Maruna, *The effects of imprisonment* Cullpton, Devon: Willan, page 444.
- 86 S. Bushfield, 'Fathers in Prison: Impact of Parenting Education' <<http://findarticles.com/p/articles/miqa4111/is200406/ain9453867/>>.
- 87 *Ibid.* See also *Creating Paths for Offender Reintegration, supra* at pages 14, 15.

87 Bushfield, *supra*.

88 R. Turner and J. Peck, 'Long-distance dads: Restoring incarcerated fathers to their children' <<http://www.highbeam.com/doc/1G1-85176399.html>> (accessed 25 August 2009).

89 *Ibid*.

90 L. Muntingh, *Youth crime and violence – Some perspectives from the prison reform sector*, HSRC Roundtable discussion on youth crime and violence, 13 May 2008 <<http://www.hsrb.ac.za/Document-2791.phtml/>>.

91 *National Schools Violence Study 2007*: Centre For Justice and Crime Prevention Johannesburg, April 2008. Presentation available at <<http://www.cjcp.org.za/>>.

92 S. Hammons, Psychology and the human heart are keys in winning the war, the peace <<http://www.americanchronicle.com/articles/view/3350/>>.

93 *M v S* (Centre for Child Law: Amicus Curiae) 2007(2) SACR 539(CC) 2008(3) SA 232(CC) at paragraph 15.

94 *M v S* at paragraph 18.

95 Practically this could mean that prisoners should be detained in centres that are accessible to their family members.

Conditions in prisons should be of a nature that they reassure children and other relatives of the prisoners' well-being and safety. Visiting areas in prisons should be more child-friendly and regular communication between children and their parents should be permitted in cases where such communication will give effect to any of the child's rights.

96 *M v S* at paragraph 20.

97 *Ibid*.

98 In a US four-state longitudinal study entitled *Returning Home: Understanding the Challenges of Prisoner Reentry* (N. La Vigne, C. Visher, J. Castro, *Chicago Prisoners' Experiences Returning Home Urban Institute*, December 2004) one of the key findings was that inmates who had the benefit of family support before imprisonment is less likely to re-offend after release and that those with negative relationships were more likely to re-offend. Sound family relations are thus integral to ex-inmates' success at reintegrating into society. In a study conducted by the Civil Society Prison Reform Initiative (CSPRI) in Cape Town, South Africa (L. Muntingh, *Prisoner re-entry in Cape Town – An exploratory study*, *supra* at page 11) to establish the immediate experiences of prisoners after they are released from prison, many of the respondents reported that while they were imprisoned they lost touch with friends on the outside and that they were visited by family only. It was also found that good family relations were often instrumental in ex-prisoners' finding employment and access to services.

99 Therapeutic programmes such as family conferencing should be a regular occurrence in prisons, events that include children should be an integral feature of reintegration plans, regular communication with family members should be encouraged and as early as at the commencement of imprisonment, special efforts should be made to ensure that the sentence plan of each offender makes provision for interaction with family. Families should also be introduced to DCS officials and communication between them should be encouraged, as this will give families assurance that their relatives will find the support they require whilst they are detained.

100 South Africa does not have a 'life without the possibility of parole' sentencing option so almost all prisoners will eventually be released.

101 L. Muntingh (2008) *A Societal Responsibility: The role of civil society organisations in prisoner support, rehabilitation and reintegration*, Civil Society Prison Reform Initiative, Research Report at page 1.

102 *Creating Paths for Offender Reintegration Conference Report*, *supra* at page 81.

103 *Ibid*.

104 *Ibid*.

105 *Creating Paths for Offender reintegration, Conference report*, *supra* at page 81.

106 Williams, *supra* at paragraph 68.