

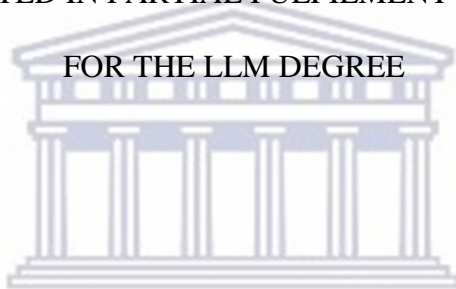
**UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**AN ANALYSIS OF THE SOUTH AFRICAN LEGISLATIVE FRAMEWORK FOR  
THE REINTEGRATION OF SENTENCED ADULT MALE OFFENDERS**

A MINI-THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS

FOR THE LLM DEGREE



UNIVERSITY *of the*  
**BY**  
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**SEPTEMBER 2019**

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## DECLARATION

I, Moses Norman Mills, hereby declare that **‘an analysis of the South African legislative framework for the reintegration of sentenced adult male offenders’** is my own work and that it has not been submitted before for any degree or assessment in any other university or similar institutions. All the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

**Signed:**

**Moses Norman Mills**

**September 2019**

**Signed**

**Dr Chesné Joy Albertus**

**September 2019**



## DEDICATION

I dedicate this work to my loving mother, Miriam Mills, your love and care for me is endless.

I also dedicate this to my late father, Colin Keith Mills, may your soul rest in peace.



## ACKNOWLEDGMENTS

First and foremost I would like thank God, for without Him, I am nothing.

I would like to acknowledge my supervisor and friend, Dr Chesne Albertus, for her dedication and support.

I would also like to acknowledge the GLA programme which enabled me to pursue my LLM degree.

I want to acknowledge my family and friends for their support and love during this journey.

To Aamina Petersen, I am grateful for your love and guidance.

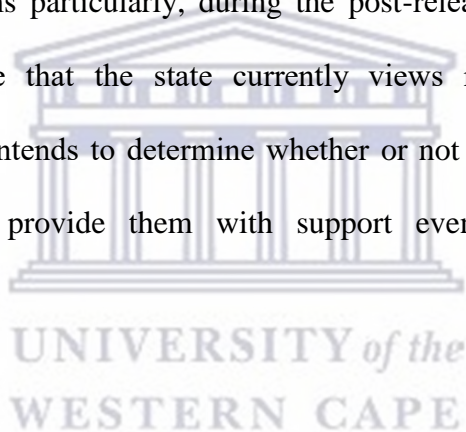
And lastly, thank you to my mother for feeding me.



## ABSTRACT

### **An analysis of the South African legislative framework for the reintegration of sentenced adult male offenders**

South Africa has one of the highest crime rates in the world. The state aims to reduce the prevalence of crime mainly by sentencing offenders to imprisonment. In turn the goal of imprisonment is to rehabilitate offenders so that they can refrain from reoffending and be reintegrated into society. Unfortunately, due to various factors which exist inside and outside of prisons, rehabilitation and reintegration is difficult to achieve. The study unpacks the perennial question of whether or not the state has a legal duty to reintegrate offenders into society. This question looms particularly, during the post-release phase of offenders' life. Preliminary indications are that the state currently views reintegration as a 'societal responsibility.' This study intends to determine whether or not the state has a legal duty to reintegrate offenders and provide them with support even after their release from imprisonment.



## KEY WORDS

Reintegration

Rehabilitation

Recidivism

Offenders

Department of Correctional Services

Correctional facilities

Sentencing

Overcrowding

Correctional Services Act

Criminal justice



## LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
DBE	Department of Basic Education
DCS	Department of Correctional Services
DHET	Department of Higher Education and Training
HIV	Human Immunodeficiency Virus
JICS	Judicial Inspectorate for Correctional Services
NGO	Non-Governmental Organisation
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
NRR	Network on Reducing Re-offending
OR	Offender Reintegration
SASSETA	Safety and Security Sector Education and Training Authority
SPCA	Society for the Prevention of Cruelty to Animals
TB	Tuberculosis
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNISA	University of South Africa

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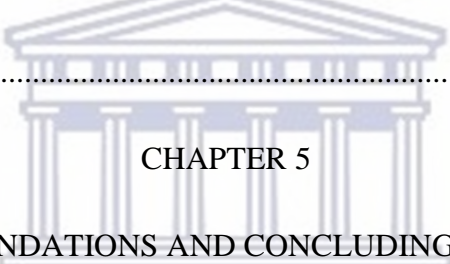
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## CHAPTER 1

### INTRODUCTION

#### 1.1. DEFINING KEY CONCEPTS

The following concepts will be used throughout this study and they have been defined to avoid any confusion or misinterpretation:

‘*Offender*’ – An offender is a person who commits an offence,<sup>1</sup> and who has been convicted by a court of law.<sup>2</sup> For the purposes of this proposed study an offender refers to a person that has been convicted and sentenced to imprisonment.<sup>3</sup>

‘*Recidivism*’ – Recidivism is a concept that has not yet been conclusively defined in South Africa.<sup>4</sup> Schoeman defines recidivism as re-offending behavioural patterns.<sup>5</sup> Recidivism is a measurement by which a state can monitor the effectiveness of its criminal justice system to rehabilitate and to reintegrate offenders.<sup>6</sup> For the purposes of this study recidivism refers to reoffending of any kind, by an offender who has served his sentence of imprisonment.

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<sup>1</sup> Section 1 of the Criminal Procedure Act 51 of 1977 defines ‘offence’ as ‘an act or omission punishable by law.’

<sup>2</sup> Section 1 of the Correctional Services Act 111 of 1998 defines ‘unsentenced offender’ as: ‘any person who is lawfully detained in a correctional centre and who has been convicted of an offence, but who has not yet been sentenced to incarceration or correctional supervision.’

<sup>3</sup> Section 1 of the Correctional Services Act 111 of 1998 defines ‘sentenced offender’ as: ‘a convicted person sentenced to incarceration or correctional supervision.’

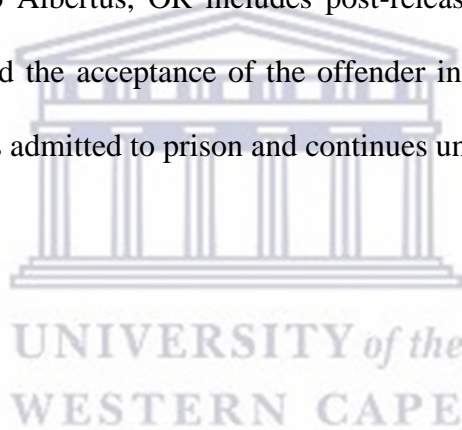
<sup>4</sup> Schoeman M ‘Recidivism: A conceptual and operational conundrum’ 2010 *Acta Criminologica* 80.

<sup>5</sup> Schoeman M ‘Recidivism: A conceptual and operational conundrum’ 2010 *Acta Criminologica* 80.

<sup>6</sup> Martinson R ‘What works? – questions and answers about prison reform’ 1974 *The Public Interest* 24 available at [https://www.nationalaffairs.com/public\\_interest/detail/what-works-questions-and-answers-about-prison-reform](https://www.nationalaffairs.com/public_interest/detail/what-works-questions-and-answers-about-prison-reform) (accessed 7 July 2018). See also Schoeman M ‘Recidivism: A conceptual and operational conundrum’ 2010 *Acta Criminologica* 81.

‘*Rehabilitation*’ – The medical definition for rehabilitation is: ‘[T]he process of helping a person who has suffered an illness or injury restore lost skills and so regain maximum self-sufficiency.’<sup>7</sup> Mujuzi defines rehabilitation as a process that transforms an offender from a criminal into a law-abiding citizen.<sup>8</sup> Rehabilitation involves treatment and training with the objective of changing the offender into a productive member of society.<sup>9</sup>

‘*Reintegration*’ – The White Paper on Corrections states that: ‘rehabilitation is completed only with the successful reintegration of offenders into the community in a manner that prevents recidivism.’<sup>10</sup> In essence this denotes that offender reintegration (herein after OR) is the final step in the rehabilitation process, and without successful OR, rehabilitation cannot be successful. According to Albertus, OR includes post-release interventions aimed at the prevention of recidivism and the acceptance of the offender into society.<sup>11</sup> OR should start from the moment a person is admitted to prison and continues until after release.<sup>12</sup>



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<sup>7</sup> MedicineNet.com ‘Medical Definition of Rehabilitation’ 13 May 2016 available at <https://www.medicinenet.com/script/main/art.asp?articlekey=5288> (accessed 20 July 2018).

<sup>8</sup> Mujuzi J ‘Don’t Send Them to Prison Because They Can’t Rehabilitate Them! The South African Judiciary Doubts the Executive’s Ability to Rehabilitate Offenders: A Note on *S v Shilubane* 2008 (1) SACR 295 (T)’ (2008) 24 *SAJHR* 337.

<sup>9</sup> *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) para 242.

<sup>10</sup> DCS *White Paper on Corrections in South Africa* (2004) para 6.2.6.

<sup>11</sup> Albertus C ‘Offender Reintegration in South Africa: A complementary crime prevention measure’ *Criminal Justice Initiative Occasional Paper 7 Open Society Foundation for South Africa* (2010) 22.

<sup>12</sup> Singh S ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 4.

## 1.2. BACKGROUND TO THE STUDY

During the 2016/2017 financial year a total of 2 129 001 crimes were reported and detected in South Africa.<sup>13</sup> This averages to more than 5 800 crimes a day for this period. Unfortunately this is not a new phenomenon in South Africa. The crime rate has been consistently high and the total number of crimes detected and reported has been over two million every year for the past decade.<sup>14</sup> Seemingly the state introduced what may be regarded as ‘tough on crime’ approaches to deal with the high levels of crime.<sup>15</sup> Such an approach is evident from; *inter alia*; the Criminal Law Amendment Act which prescribes minimum sentences for ‘certain serious offences’<sup>16</sup> and section 49 of the Criminal Procedure Act.<sup>17</sup> As a result, the average inmate population of sentenced male offenders for the previous eight years has been in excess of 110 000 per year.<sup>18</sup> South Africa currently has a total of 243 correctional centres under the

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<sup>13</sup> SAPS ‘Crime Statistics 2016/2017’ available at <https://www.saps.gov.za/services/crimestats.php> (accessed 7 July 2018).

<sup>14</sup> SAPS ‘Crime Statistics 2016/2017’ available at <https://www.saps.gov.za/services/crimestats.php> (accessed 7 July 2018). For example, the total amount of crimes reported and detected for 2015/2016 = 2 126 552; 2014/2015 = 2 152 866; and 2013/2014 = 2 154 394.

<sup>15</sup> eNCA ‘WATCH: We must put fear in the hearts of criminals: Cele’ 9 March 2018 available at <https://www.enca.com/south-africa/cele-to-be-formerly-welcomed-to-police> (accessed 7 July 2018).

This article contains a video interview with Minister of Police, Bheki Cele, which illustrates the ‘tough on crime’ approach. See also News24 “Zuma supports ‘shoot to kill’” 12 April 2008 available at <https://www.news24.com/SouthAfrica/Politics/Zuma-supports-shoot-to-kill-20080412> (accessed 7 July 2018).

<sup>16</sup> Section 51 of the Criminal Law Amendment Act 105 of 1997 as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007. For criticism of Act 105 of 1997 see Cameron E ‘Imprisoning the Nation: Minimum Sentences in South Africa’ UWC Dean’s Distinguished Lecture 19 October 2017.

<sup>17</sup> Section 49 of the Criminal Procedure Act 51 of 1977.

<sup>18</sup> DCS *Annual Report 2016/2017* (2017) 26 & DCS *Annual Report 2013/2014* (2014) 27.

control of the DCS<sup>19</sup> and in 2018 reportedly had an inmate population rate of 280 per 100 000 of the population.<sup>20</sup> As noted by Sarkin, ‘a country’s rate of imprisonment is an effective measure of its punitiveness’.<sup>21</sup> If one applies this to the South African context it may not be easily refuted that South Africa relies heavily on a punitive approach to addressing crime.

One of the preliminary questions which arise is whether incarceration effectively achieves its goal of correcting offenders’ criminal behaviour and reducing crime. Taking into consideration the above mentioned statistics the answer seems to generally be a negative one.<sup>22</sup> Whilst the stated goal of imprisonment in the White Paper on Corrections is to reintegrate the offender into society as a law abiding citizen,<sup>23</sup> most correctional facilities in South Africa do not rehabilitate offenders.<sup>24</sup>

The directives of rehabilitation and OR given to the DCS are clearly in conflict with other departments of the Executive. This is evident from current Minister of Police, Bheki Cele’s,

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<sup>19</sup> DCS *Annual Report 2017/2018* (2018) 27. See also Judicial Inspectorate of Prisons *Annual Report for the period 1 April 2007 to 31 March 2008* (2008) 9, which shows that there were only 237 correctional facilities operational in 2008. Thus, the number of correctional facilities grew by 6 in the past decade.

<sup>20</sup> World Prison Brief available at <http://www.prisonstudies.org/country/south-africa> (accessed 19 July 2018).

<sup>21</sup> Sarkin J ‘An overview of human rights in prisons worldwide’ in Sarkin J (ed) *Human Rights in African Prisons* (2008) 10.

<sup>22</sup> Singh S ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 9.

<sup>23</sup> DCS *White Paper on Corrections in South Africa* (2004) para 6.2.6, which states that: ‘rehabilitation is completed only with the successful reintegration of offenders into the community in a manner that prevents recidivism.’

<sup>24</sup> Cameron E (2017) *Imprisoning the Nation: Minimum Sentences in South Africa* Dean’s Distinguished Lecture, 19 October 2017: University of the Western Cape para 99 & *S v Shilubane* 2008 (1) SACR 295 (T) para 5.



approach, when he instructed police to shoot to kill.<sup>25</sup> This ‘shoot to kill’ approach is even allowed by the legislature.<sup>26</sup> This arguably threatens to violate constitutionally protected rights such as the right to life and dignity, which are non-derogable rights.<sup>27</sup> This approach has been followed by his predecessors, yet this has not resulted in a decrease in the crime rate.<sup>28</sup> This clearly shows that the current ‘tough on crime’ approach has not reduced crime. Perhaps it is time for the state to explore additional approaches to dealing with crime in South Africa.

Prisons and incarceration is not an African concept, and pre-colonial African states focused more on victim compensation.<sup>29</sup> This made the reintegration of such offenders into society

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<sup>25</sup> eNCA ‘Ignore the human rights of criminals, Cele tells police’ 4 March 2018 available at <https://www.enca.com/south-africa/ignore-the-human-rights-of-criminals-cele-tells-his-charges> (accessed 7 July 2018). See also Sky News “SA Police Chief: ‘Cops Must Use Deadly Force’” 9 November 2009 available at <https://www.youtube.com/watch?v=pRbxM3ocl6w> (accessed 7 July 2018) which shows a video where Bheki Cele encourages police to shoot those who shoot at police; and where police shot and mistakenly killed an innocent person because of the ‘tough on crime’ approach.

<sup>26</sup> Section 49 of the Criminal Procedure Act 51 of 1977, See Albertus C *The constitutionality of using deadly force against a fleeing suspect for purposes of arrest* (unpublished LLM thesis, University of the Western Cape, 2008) for a critique on the constitutionality of section 49 of Act 51 of 1977.

<sup>27</sup> Sections 10 & 11 of the Constitution of the Republic of South Africa, 1996.

<sup>28</sup> News24 “Kill the bastards under fire” 10 April 2008 available at <https://www.news24.com/MyNews24/YourStory/Kill-the-bastards-under-fire-20080410> (accessed 7 July 2018). Tandwa L “Shoot to kill, says ‘new sheriff in town’ Mbalula” *News24* 25 April 2017 available at <https://www.news24.com/SouthAfrica/News/shoot-to-kill-says-new-sheriff-in-town-mbalula-20170425> (accessed 7 July 2018). It must be noted that it is not the provision of s 49 of the Criminal Procedure Act 51 of 1977 which is being criticised here, but rather the application thereof.

<sup>29</sup> Sarkin J ‘An overview of human rights in prisons worldwide’ in Sarkin J (ed) *Human Rights in African Prisons* (2008) 12 and Van Zyl Smit D *South African Prison Law and Practice* (1992) 1.



easier as the victim would have received some closure and the offender would not have been exposed to any conditions of incarceration.<sup>30</sup> Around the mid nineteenth century, imprisonment became a primary source of punishment in Europe and North America.<sup>31</sup> When colonisation of African countries occurred, the colonists used incarceration as a means of subjugating Africans.<sup>32</sup> In prisons White inmates were treated far better than African inmates, and efforts were also made to reintegrate these White inmates back into society.<sup>33</sup> This is an indication that during the era of colonialism the importance of OR after imprisonment was recognised, but unfortunately only applied to White inmates even though the concept of reintegration was originally an African practice.

In South Africa, the post-colonial apartheid government embraced the prison model developed by the colonial powers.<sup>34</sup> Racial segregation was prevalent in all parts the country, including in prisons.<sup>35</sup> In accordance with the Prisons Act of 1959

[A]s far as possible, white and non-white prisoners shall be detained in separate parts thereof and in such manner as to prevent white and non-white prisoners from being within

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<sup>30</sup> Sekhonyane M 'First Things First: Rehabilitation starts with alternatives to prison' (2004) 7 *SA Crime Quarterly* 34.

<sup>31</sup> Van Zyl Smit D *South African Prison Law and Practice* (1992) 3.

<sup>32</sup> Sarkin J 'An overview of human rights in prisons worldwide' in Sarkin J (ed) *Human Rights in African Prisons* (2008) 12.

<sup>33</sup> Sarkin J 'An overview of human rights in prisons worldwide' in Sarkin J (ed) *Human Rights in African Prisons* (2008) 13.

<sup>34</sup> Prisons Act 8 of 1959. See also Sarkin J 'An overview of human rights in prisons worldwide' in Sarkin J (ed) *Human Rights in African Prisons* (2008) 13.

<sup>35</sup> Section 23 of the Prisons Act 8 of 1959 & Group Areas Act 41 of 1950 & Dissel A 'Tracking Transformation in South African Prisons' (2002) 11 *Track Two* 9.

view of each other; and wherever practicable, non-white prisoners of different races shall be separated.<sup>36</sup>

Prison regulations also provided for a better 'diet scale' for White prisoners, and only Black prisoners who were on death row received a similar diet scale.<sup>37</sup> Discipline in prisons was kept through an iron fist approach as the use of corporal punishment was allowed in prisons, with the exception of female prisoners.<sup>38</sup> The unauthorised reporting of prison conditions was illegal.<sup>39</sup> This was evident when the State placed Laurence Gander, an editor of a newspaper, on trial for the unauthorised publishing on the conditions in prisons.<sup>40</sup> The racial divide and better treatment of White prisoners suggests that the government recognised that these conditions were required to reintegrate White prisoners.

In the late 1980s racial segregation in South African prisons was removed from law.<sup>41</sup> In 1993, the punishments of corporal punishment, solitary confinement and spare diet were abolished.<sup>42</sup> A significant change in emphasis happened when the Interim Constitution was adopted in 1993.<sup>43</sup> The Interim Constitution granted 'every person' the right to life.<sup>44</sup> This was one of the main sections on which the *S v Makwanyane* case was decided when the

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<sup>36</sup> Section 23(1)(b)-(c) of the Prisons Act 8 of 1959. The use of the words 'Whites and non-Whites' are not my own, but that of the Act.

<sup>37</sup> Van Zyl Smit D *South African Prison Law and Practice* (1992) 288.

<sup>38</sup> Sections 36 – 37 of the Prisons Act 8 of 1959.

<sup>39</sup> Section 44 of the Prisons Act 8 of 1959 & Davenport TRH *South Africa: a modern history* 4 ed (1991) 366.

<sup>40</sup> Davenport TRH *South Africa: a modern history* 4 ed (1991) 385.

<sup>41</sup> Dissel A 'Tracking Transformation in South African Prisons' (2002) 11*Track Two* 9.

<sup>42</sup> Dissel A 'Tracking Transformation in South African Prisons' (2002) 11*Track Two* 9.

<sup>43</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>44</sup> Section 9 of the Constitution of the Republic of South Africa, Act 200 of 1993.

Constitutional Court abolished the death penalty.<sup>45</sup> Madala J held that the death penalty rejected the possibility of rehabilitation and OR which is not consistent with the concept of *Ubuntu*.<sup>46</sup> This is consistent with the principle of *Ubuntu*, one of the founding values of the Constitution.<sup>47</sup> Justice Chaskalson also held that

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected.<sup>48</sup>

This judgment was a ground-breaking one which arguably set the tone for the criminal justice system envisaged for a constitutional democracy based on human dignity, freedom and equality. There can be no question that offender reintegration is an approach to crime which resonates with this judgment.

### 1.3. PROBLEM STATEMENT

An analysis of the laws and policies which regulate OR is necessary. Without successful or effective OR, recidivism rates will remain high (estimated to be between 50% and 70% in 2015).<sup>49</sup> It is also contended here that recidivism will continue to contribute to the already high crime rate. There is no accurate data regarding recidivism in South Africa because the

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<sup>45</sup> *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) para 80 – 86.

<sup>46</sup> *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) para 241 – 242.

<sup>47</sup> Constitution of the Republic of South Africa, 1996.

<sup>48</sup> *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) para 88.

<sup>49</sup> Khwela MN 'Effects of Incarceration on Recidivism in South Africa' (2015) 50 *Journal of Public Administration* 409.

DCS and the JICS do not include this in their annual reports.<sup>50</sup> Though it is not possible to draw conclusive inferences on why such information is not readily available or easily accessible for the public, it may signal reason for concern. It also gives rise to questions regarding the extent to which the DCS is successful at achieving its policy and legislative mandate.

The Constitution clearly states that ‘any obligations imposed by it must be fulfilled’.<sup>51</sup> The Constitution does not expressly obligate the state to actively participate in OR. However, when looking at the overall framework of the Constitution, can it be argued that such an obligation can be inferred?<sup>52</sup> The Constitution grants everyone the right to life, dignity and security of the person.<sup>53</sup> Thus, the state has the constitutional obligation to keep persons in the Republic safe.<sup>54</sup> It could be contended that in order to keep its citizens safe, the state ought to introduce crime prevention measures such as OR if singular law enforcement approaches do not significantly reduce the very high crime rate.

Sentencing in South Africa became more about rehabilitating the offender than punishing him when the Constitutional Court declared that corporal punishment is unconstitutional.<sup>55</sup> While the Correctional Services Act and the White Paper on Corrections state that offender

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<sup>50</sup> Ngabonziza O & Singh S ‘Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme’ (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 88.

<sup>51</sup> Section 2 of the Constitution of the Republic of South Africa, 1996.

<sup>52</sup> Albertus C ‘Offender Reintegration in South Africa: A complementary crime prevention measure’ Criminal Justice Initiative Occasional Paper 7 *Open Society Foundation for South Africa* (2010) 4 – 8.

<sup>53</sup> Sections 10, 11 & 12 of the Constitution of the Republic of South Africa, 1996.

<sup>54</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 57.

<sup>55</sup> *S v Williams and Others* 1995 (2) SACR 251 (CC), paras 94 – 96.

rehabilitation is the primary objective of corrections,<sup>56</sup> a broader legislative framework is required to assist OR. The goals set for the DCS by the Correctional Services Act and the White Paper on Corrections are admirable, but achieving these goals becomes a challenging task when there are no guidelines given to the DCS on how to achieve these goals. This is why a broader legislative framework which deals specifically with how to rehabilitate offenders and how to go about supporting their reintegration into society becomes of utmost importance.

The proposed thesis shall endeavour to show that it is problematic that the Correctional Services Act states that OR is a societal responsibility.<sup>57</sup> Arguably this is a conferral of an important constitutional duty to no one in particular. It is not clear who is obligated in terms of a 'societal responsibility'. An important starting point in locating the actor(s) responsible for supporting OR is to ask, does the state have a constitutional duty to support OR?

#### **1.4. SIGNIFICANCE AND LIMITATION OF THE STUDY**

##### **1.4.1. Significance of the study**

All studies on prisons are of utmost importance as they involve a state's 'most intrusive and extensive powers to curb individual human rights'.<sup>58</sup> Imprisonment is one of the most severe punishments that can be imposed on an offender.<sup>59</sup> Steps taken by the state to counter the severe effects that an offender experiences by being exposed to the conditions in prison is of

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<sup>56</sup> Section 1 of the Correctional Services Act 111 of 1998 and DCS *White Paper on Corrections in South Africa* (2004) para 4.1.2 & 4.2.1.

<sup>57</sup> Section 13(7)(a) of the Correctional Services Act 111 of 1998.

<sup>58</sup> Sarkin J 'An overview of human rights in prisons worldwide' in Sarkin J (ed) *Human Rights in African Prisons* (2008) 1.

<sup>59</sup> Sarkin J 'An overview of human rights in prisons worldwide' in Sarkin J (ed) *Human Rights in African Prisons* (2008) 2.

vital importance. Nelson Mandela said: ‘...no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.’<sup>60</sup> This study endeavors to show that the state does have a legal obligation to support OR and to unpack to some extent what such an obligation entails.

Prisoners are completely dependent on the state for their well-being and they are also seen and treated as outcasts by society. Thus, the way the state treats prisoners is a true reflection on the state itself.<sup>61</sup> Therefore, it can be argued that money should be invested in offender reintegration. Opponents to investment in OR may argue that this money could be used to fight poverty and other pressing issues, however addressing poverty and its related issues arguably forms part of supporting OR. In terms of the notion of substantive equality, the state is obligated to treat all people as equal before the law.<sup>62</sup>

This study is of significant importance because without effective OR, the recidivism rate will only continue to grow. Without any effective rehabilitation and OR programmes in correctional facilities, these facilities simply become a breeding ground for turning offenders into worse offenders.<sup>63</sup> Moreover, this study is significant as without locating the actors which are constitutionally and legally obligated for ensuring that real opportunities for

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<sup>60</sup> Amnesty International ‘Mandela Rules on Prisoner Treatment Adopted in Landmark Revision of UN Standards’ 22 May 2015 available at <https://www.amnesty.org/en/press-releases/2015/05/mandela-rules-on-prisoner-treatment-adopted-in-landmark-revision-of-un-standards-1/> (accessed 8 July 2018).

<sup>61</sup> Sarkin J ‘An overview of human rights in prisons worldwide’ in Sarkin J (ed) *Human Rights in African Prisons* (2008) 2-4.

<sup>62</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>63</sup> Paragraph 100 of Cameron E (2017) *Imprisoning the Nation: Minimum Sentences in South Africa* Dean’s Distinguished Lecture, 19 October 2017: University of the Western Cape.



reintegration do exist, repeat offending will continue to contribute to the crime rate and the violation of everyone's right to be safe will persist.

#### **1.4.2. Limitation of the study**

The study acknowledges that it is not only sentenced adult male offenders that may require reintegration services and support. There are various other groups of offenders and in some instances accused persons who may require such support. For example, remand detainees who have not been convicted and who are released into society may require support to successfully reintegrate due to being imprisoned. The scope of this study will, however, be limited to sentenced adult male offenders who have served time in a correctional centre as adult males make up the largest part of the prison population. The study will exclude offenders that are serving life sentences and will also not deal extensively with alternatives to imprisonment as a punishment.

#### **1.5. FOCUS AND OBJECTIVES**

The primary question that this study answers is whether or not there is a legal obligation on the state to support the OR? Thus the objectives of the proposed study are:

- To determine if the Constitution confers a duty upon the state to support OR.
- To analyse the law and policy to determine if a legal obligation on the state to support OR does exist.

#### **1.6. METHODOLOGY**

This study will mainly involve desktop research. Various types of sources will be considered. These include domestic legislation, international and regional instruments. Both domestic and international policies and case law will also be considered. Secondary sources such as law

journals, government reports will be assessed. Annual reports by the DCS and the JICS will be discussed.

## **1.7. CHAPTER OUTLINE**

In Chapter 2 international instruments, domestic legislation and policies pertaining to imprisonment, rehabilitation and reintegration will be analysed. There will be an analysis to determine whether the domestic laws are consistent with the international instruments. The overall objective of this chapter is to argue that the state has a direct or indirect legal obligation to support OR.

Chapter 3 will address some of the challenges that offenders face in prison that impedes their rehabilitation and ultimately their reintegration into society. It will assess whether the state's current method of rehabilitating offenders is succeeding and what some of the most successful rehabilitation programmes are. This chapter aims to argue that the state's legal duty to reintegrate offenders (if any), starts from the moment the offender starts serving his sentence.

Chapter 4 will look at the legal framework for OR of adult male offenders after they have served their sentences and been released from correctional facilities. It looks at whether or not the state is doing enough with regards to reintegrating offenders into society. This chapter further assesses current efforts being made to support OR.

Chapter 5 is the concluding chapter. It will make some recommendations which may serve to improve current efforts (if any) at supporting OR.



## CHAPTER 2

### INTERNATIONAL AND DOMESTIC LEGAL INSTRUMENTS: DO THEY OBLIGATE STATES TO PROVIDE OFFENDER REINTEGRATION SERVICES?

#### 2.1. INTRODUCTION

The number of persons imprisoned cannot be said to be a reflection of the State's success in dealing with crime. The crime rate has remained consistently high, even with the increase in the number of sentenced prisoners.<sup>64</sup> It is in this context that it has become evident that the State's fight against crime is failing. Evidently South Africa's fight against crime is in dire need of new techniques and approaches. One of these new techniques could potentially be putting more focus on OR. This is something which the State has been lacking, which is evident from the fact that it does not record the recidivism rate.<sup>65</sup> The reason for the lack of OR efforts by the State could be the fact that there is no clear legal duty on the State to do this. Thus, the purpose of this chapter is to analyse various international instruments, regional instruments and domestic laws to determine whether such a legal duty exists.

#### 2.2. DO INTERNATIONAL INSTRUMENTS RECOGNISE A STATE DUTY TO SUPPORT OFFENDER REINTEGRATION?

This section will analyse various international legal instruments to determine whether they create, implicitly or explicitly, a duty on a state to support OR.

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<sup>64</sup> SAPS 'Crime Statistics 2016/2017' available at <https://www.saps.gov.za/services/crimestats.php> (accessed 7 July 2018) which shows that over 2 million crimes are detected and reported in South Africa for the past five years. DCS *Annual Report 2016/2017* (2017) 26 shows that the average inmate population for sentenced adult male offenders for the past 8 years has been in excess of one hundred thousand each year.

<sup>65</sup> The annual reports published the DCS and the JICS contain no statistics on the recidivism rates in South Africa.

### 2.2.1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (herein after the UDHR) was the first international document which entrenched the rights and freedoms of all human beings, and made these rights inalienable.<sup>66</sup>

The UDHR states that all human beings are born free and equal.<sup>67</sup> This was significant at the time as countless human rights violations occurred during World War II.<sup>68</sup> These violations included the inhumane treatment and torture of prisoners of war.<sup>69</sup> The Declaration includes provisions such as the right to life,<sup>70</sup> and the prohibition on torture and “cruel, inhuman or degrading treatment or punishment.”<sup>71</sup>

Article 7 of the UDHR provides that all persons are equal before the law, and are entitled to equal protection of the law.<sup>72</sup> The use of the word “all” in Article 7 implies that it is inclusive of offenders and means that offenders as entitled to protection of the law as compared to ordinary citizens. This UDHR was one of the first international instruments which aimed to give equal rights to all people. The UDHR is also arguably the pioneer in international prison law. It gave birth to numerous international instruments which will be discussed below, starting with the International Covenant on Civil and Political Rights.

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<sup>66</sup> Universal Declaration of Human Rights, General Assembly Resolution 217 A (1948).

<sup>67</sup> Article 1 of the Universal Declaration of Human Rights, General Assembly Resolution 217 A (1948).

<sup>68</sup> Weller J ‘How World War II led to Human Rights Laws’ available at <https://rightsinfo.org/remember-world-war-ii-led-human-rights-laws/> (accessed 20 February 2019).

<sup>69</sup> Weller J ‘How World War II led to Human Rights Laws’ available at <https://rightsinfo.org/remember-world-war-ii-led-human-rights-laws/> (accessed 20 February 2019).

<sup>70</sup> Article 3 of the Universal Declaration of Human Rights, General Assembly Resolution 217 A (1948).

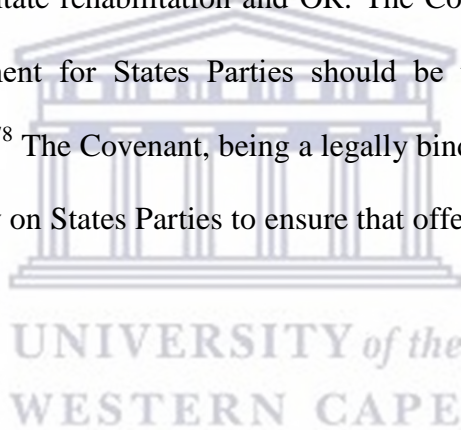
<sup>71</sup> Article 5 of the Universal Declaration of Human Rights, General Assembly Resolution 217 A (1948).

<sup>72</sup> Article 7 of the Universal Declaration of Human Rights, General Assembly Resolution 217 A (1948).

### 2.2.2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights was signed and ratified by South Africa making it a State Party to the Covenant.<sup>73</sup>

All States Parties must ensure an effective remedy if any right protected by this Covenant has been violated, regardless if the violation was committed by a person acting in an official capacity.<sup>74</sup> The Covenant prohibits torture, as well as “cruel, inhuman or degrading treatment or punishment.”<sup>75</sup> This reaffirmed the position in the Universal Declaration of Human Rights.<sup>76</sup> The Covenant also provides that offenders who are imprisoned must be treated in a humane manner and have their dignity respected.<sup>77</sup> This is arguably to create conditions of imprisonment that can facilitate rehabilitation and OR. The Covenant unambiguously states that the aim of imprisonment for States Parties should be the “reformation and social rehabilitation” of offenders.<sup>78</sup> The Covenant, being a legally binding international instrument, arguably creates a legal duty on States Parties to ensure that offender rehabilitation and OR is achieved.



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<sup>73</sup> United Nations Human Rights Office of the High Commissioner ‘Status of Ratification Interactive Dashboard’ available at <http://indicators.ohchr.org/> (accessed 23 February 2019).

<sup>74</sup> Article 2 of the International Covenant on Civil and Political Rights United Nations General Assembly Resolution 2200A (XXI) (1966).

<sup>75</sup> Article 7 of the International Covenant on Civil and Political Rights United Nations General Assembly Resolution 2200A (XXI) (1966).

<sup>76</sup> Article 7 of the Universal Declaration of Human Rights, General Assembly Resolution 217 A (1948).

<sup>77</sup> Article 10(1) of the International Covenant on Civil and Political Rights United Nations General Assembly Resolution 2200A (XXI) (1966).

<sup>78</sup> Article 10(3) of the International Covenant on Civil and Political Rights United Nations General Assembly Resolution 2200A (XXI) (1966).

Article 26 of the Covenant provides that all persons are equal and entitled to equal protection of the law.<sup>79</sup> The Covenant thus protects the rights of offenders and places a duty on States Parties not to undermine offenders' rights nor treat them as inferior to the rights of ordinary citizens. This means that States Parties to the Covenant cannot neglect or fail to promote the rights of offenders by arguing that the rights of ordinary citizens deserve greater protection. Article 26 of the Covenant refutes any and all arguments in favour of a hierarchy of human rights.<sup>80</sup>

### **2.2.3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (herein after the Convention against Torture) was signed and ratified by South Africa, making it a State Party to the Convention.<sup>81</sup>

The Convention against Torture defines 'torture' as any act which causes pain or suffering, intentionally inflicted on a person, for the purposes of punishing him for an act, by a person acting in an official capacity.<sup>82</sup> This definition is wide enough to include abuses suffered by

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<sup>79</sup> Article 26 of the International Covenant on Civil and Political Rights United Nations General Assembly Resolution 2200A (XXI) (1966).

<sup>80</sup> Article 26 of the International Covenant on Civil and Political Rights United Nations General Assembly Resolution 2200A (XXI) (1966).

<sup>81</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment United Nations General Assembly Resolution 39/46 (1984) & United Nations Human Rights Office of the High Commissioner 'Status of Ratification Interactive Dashboard' available at <http://indicators.ohchr.org/> (accessed 23 February 2019).

<sup>82</sup> Summarized/modified definition based on Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment United Nations General Assembly Resolution 39/46 (1984).

offenders which are inflicted by prison staff. Therefore if a prison official is working in a professional capacity and intentionally inflicts any pain or suffering on an offender for the purposes of punishment then it may be interpreted as an act of torture. It is arguable that violence in prison and warder on offender violence could impede OR.

The Convention against Torture is a clear statement from the international community that torture is unacceptable. The Convention could arguably also be an attempt from the international community to create safer correctional facilities, free from violence and human right violations which would be ideal to facilitate rehabilitation. This contention is supported by an earlier UN resolution known as the Standard Minimum Rules for the Treatment of Prisoners (hereinafter the Standard Minimum Rules).<sup>83</sup>

#### **2.2.4. Standard Minimum Rules for the Treatment of Prisoners**

In 1957 the UN Economic and Social Council endorsed the Standard Minimum Rules,<sup>84</sup> and encouraged states to incorporate the rules into their domestic laws and practice.<sup>85</sup> The Standard Minimum Rules was adopted during an era where the international community began to give more importance to human rights.<sup>86</sup> This resolution contains rules that were internationally accepted as the minimum standard for how prisoners should be treated.<sup>87</sup> This

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<sup>83</sup> Standard Minimum Rules for the Treatment of Prisoners, 1955 (1955) ECOSOC Res. 663 C (XXIV).

<sup>84</sup> Wright KN & Cingranelli DL 'Inhumane, Cruel, and Degrading Treatment of Criminal Prisoners throughout the World' (1985) 2 *Justice Quarterly* 347.

<sup>85</sup> 'Standard Minimum Rules for the Treatment of Prisoners' (1969) 2 *New York University Journal of International Law and Politics* 314.

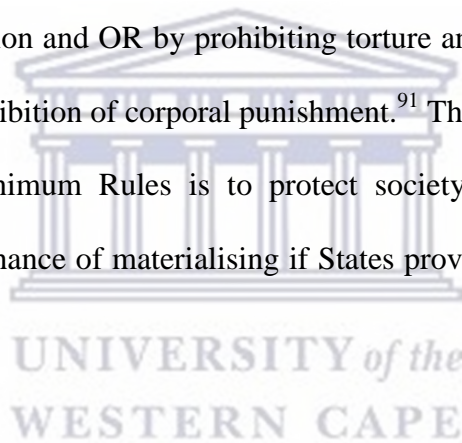
<sup>86</sup> Universal Declaration of Human Rights, General Assembly Resolution 217 A (1948).

<sup>87</sup> Wright KN and Cingranelli DL 'Inhumane, Cruel, and Degrading Treatment of Criminal Prisoners throughout the World' (1985) 2 *Justice Quarterly* 347.

was a significant development in the rights of prisoners which was necessary in the post war era during which prisoners had been detained in inhumane conditions.<sup>88</sup>

The Standard Minimum Rules consists of two parts: Part I – Rules of General Application and Part II – Rules Applicable to Special Categories. Part I aims to embody the Universal Declaration of Human Rights into the correctional system.<sup>89</sup> Part II contains rules aimed at the rehabilitation of the offender in such a way that he is able to successfully reintegrate into society and become self-supporting.<sup>90</sup> This suggests States should incarcerate offenders with the aim of achieving rehabilitation and successful OR.

It is evident that the Standard Minimum Rules shifts the purpose of punishment from retribution to the rehabilitation and OR by prohibiting torture and the inhumane treatment of prisoners as well as the prohibition of corporal punishment.<sup>91</sup> The purpose of imprisonment in terms of the Standard Minimum Rules is to protect society against crime.<sup>92</sup> This goal potentially stands a better chance of materialising if States provide OR services and support.



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<sup>88</sup> Peirce J ‘Making the Mandela Rules: Evidence, Expertise, and Politics in the Development of Soft Law International Prison Standards’ 2018 *Queen’s Law Journal* 270.

<sup>89</sup> ‘Standard Minimum Rules for the Treatment of Prisoners’ (1969) 2 *New York University Journal of International Law and Politics* 320.

<sup>90</sup> ‘Standard Minimum Rules for the Treatment of Prisoners’ (1969) 2 *New York University Journal of International Law and Politics* 320.

<sup>91</sup> Rule 31 of the Standard Minimum Rules for the Treatment of Prisoners, 1955 (1955) ECOSOC Res. 663 C (XXIV).

<sup>92</sup> Rule 58 of the Standard Minimum Rules for the Treatment of Prisoners, 1955 (1955) ECOSOC Res. 663 C (XXIV).



Rehabilitation serves the greater needs of society as it reduces recidivism, thus reducing the crime rate and creating a safer society.<sup>93</sup>

Rule 37 provides offenders with the right to regular communication with family and friends while imprisoned, which ultimately increases the potential for successful OR after release from prison.<sup>94</sup> This is an attempt to minimise the difference between incarceration and everyday life as provided for by the Standard Minimum Rules.<sup>95</sup> Rule 81 takes rehabilitation beyond the duration of the prison sentence and provides for post-release aid programmes to support OR.<sup>96</sup> This potentially creates a duty on States to support the reintegration of offenders during imprisonment and after the release of the offender.

In 2010 the UN General Assembly started reviewing the Standard Minimum Rules.<sup>97</sup> This was much needed as human rights and penology has developed a great deal since 1955 when the Standard Minimum Rules were adopted.<sup>98</sup> Thus the Standard Minimum Rules had to be brought in line with current international human rights standards. In December 2015 the UN General Assembly unanimously adopted the new updated Standard Minimum Rules for the

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<sup>93</sup> 'Standard Minimum Rules for the Treatment of Prisoners' (1969) 2 *New York University Journal of International Law and Politics* 315.

<sup>94</sup> Rule 37 of the Standard Minimum Rules for the Treatment of Prisoners, 1955 (1955) ECOSOC Res. 663 C (XXIV).

<sup>95</sup> Rule 60(1) of the Standard Minimum Rules for the Treatment of Prisoners, 1955 (1955) ECOSOC Resolution 663 C (XXIV).

<sup>96</sup> Rules 64 & 81 of the Standard Minimum Rules for the Treatment of Prisoners, 1955 (1955) ECOSOC Resolution 663 C (XXIV).

<sup>97</sup> McCall-Smith K 'Introductory Note to United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)' (2016) 55 *International Legal Materials* 1180.

<sup>98</sup> Peirce J 'Making the Mandela Rules: Evidence, Expertise, and Politics in the Development of Soft Law International Prison Standards' 2018 *Queen's Law Journal* 264.

Treatment of Prisoners, now known as the Nelson Mandela Rules (hereinafter the Mandela Rules).<sup>99</sup>

The Mandela Rules is not a legally binding document.<sup>100</sup> This is known as soft law which only creates soft obligations.<sup>101</sup> The UN justifies this by stating that not all the rules are capable of application internationally due to the different ‘legal, social, economic and geographical conditions’ throughout the world.<sup>102</sup> In essence, this means that States have the discretion of whether or not to implement the Mandela Rules. States who do implement the rules have discretion to implement the rules in part or in totality. Clifford notes that the lack of implementation does not in any way invalidate or devalue the rules.<sup>103</sup>

The Mandela Rules recognise that incarceration is a significant limitation of rights and therefore provides that the prison must not ‘aggravate the suffering inherent in such a situation’.<sup>104</sup> This implies that offenders must not be treated in a way that may aggravate the

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<sup>99</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015) & McCall-Smith K ‘Introductory Note to United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)’ (2016) 55 *International Legal Materials* 1180.

<sup>100</sup> McCall-Smith K ‘Introductory Note to United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)’ (2016) 55 *International Legal Materials* 1180.

<sup>101</sup> Peirce J ‘Making the Mandela Rules: Evidence, Expertise, and Politics in the Development of Soft Law International Prison Standards’ 2018 *Queen’s Law Journal* 263.

<sup>102</sup> Preliminary observation 2 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>103</sup> Clifford W ‘The Standard Minimum Rules for the Treatment of Prisoners’ (1972) 66 *American Society of International Law Proceedings* 234.

<sup>104</sup> Rule 3 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).



sentence of imprisonment with which they are already faced. The Mandela Rules further provide that life inside of prison should reflect life outside of prison as much as possible, to establish some degree of normality which could arguably ease the OR process after release.<sup>105</sup>

The Mandela Rules provide that all prisoners must be treated with respect and that all prisoners must be protected from *inter alia*, torture and inhuman or degrading treatment.<sup>106</sup>

The Mandela rules also prohibit indefinite and prolonged solitary confinement.<sup>107</sup> This could suggest that the Mandela Rules attempt to create an environment of imprisonment that is suitable for rehabilitation. This is supported in that the Mandela rules emphasises human dignity throughout the entire document.<sup>108</sup> The rules further provide for the treatment of both physical and mental health of offenders.<sup>109</sup> The Mandela Rules also provides for education programmes for prisoners.<sup>110</sup> If offenders receive proper education their potential for reintegration would arguably be improved.<sup>111</sup> The provision of education to offenders is also

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<sup>105</sup> Rule 5 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015) and Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 276.

<sup>106</sup> Rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>107</sup> Rule 43 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>108</sup> McCall-Smith K 'Introductory Note to United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)' (2016) 55 *International Legal Materials* 1180.

<sup>109</sup> Rule 25 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>110</sup> Rule 104 – 105 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>111</sup> *Pretorius and Others v Minister of Justice and Correctional Services and Others* 2018 (2) SACR 501 (GP) at para 27.

justified by the fact that it displaces idleness, provides the offender with useful skills that will help his reintegration.<sup>112</sup>

The Mandela Rules provide that prison personnel must be carefully selected as the proper administration of prisons significantly depends upon them.<sup>113</sup> The Mandela Rules also recognise that prison personnel should conduct their duties in such a manner that they become positive influences on offenders.<sup>114</sup> Therefore the role played by correctional staff is directly linked to the proper administration of prisons. The Mandela Rules expressly state that the purposes for imprisonment are ‘to protect society against crime and reduce recidivism’ and also expressly state that the only way to achieve these goals is if offenders are imprisoned in a way that will achieve OR.<sup>115</sup> This imposes a duty on States to pursue OR and consequently places a duty on prison staff to perform their duties in a way that will facilitate rehabilitation.

The wording of Rules 106 – 108 suggests that the drafters of the updated rules, view the post-release support of offenders as an integral part of the rehabilitation process and ultimately the achievement of OR.<sup>116</sup> Rule 108 expressly refers to governmental services or agencies which provide OR services and also recognises the need for this support in the period immediately

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<sup>112</sup> ‘Standard Minimum Rules for the Treatment of Prisoners’ (1969) 2 *New York University Journal of International Law and Politics* 322.

<sup>113</sup> Rule 74 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>114</sup> Rule 77 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>115</sup> Rule 4 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>116</sup> Rules 106 – 108 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

after the offenders release from prison.<sup>117</sup> All these rules point to the existence of a legal duty on the State to provide post-release support to offenders. Though this is soft law, States which decide to implement it ought to abide by it.

Although not binding, the Nelson Mandela rules offer guidance to courts as to how to interpret and if necessary develop the law. Jeremy Waldron argues that international norms should be given more importance in domestic courts as they represent the collective views of the international community on fair and feasible punishment policy.<sup>118</sup> With this being said, South Africa is one such State that has decided to implement the Nelson Mandela Rules, which is fitting as it is named after the country's first democratically elected president. South Africa also actively participated in the review process of the 1955 Standard Minimum Rules. The fact that South Africa elected to implement the Nelson Mandela Rules, could be an indication that there is a legal duty on the State to support OR.

### **2.2.5. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (herein after the Body of Principles) provides that all persons under any form of detention or imprisonment have the right to human treatment with respect to the dignity of such a person.<sup>119</sup>

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<sup>117</sup> Rule 108 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>118</sup> Peirce J 'Making the Mandela Rules: Evidence, Expertise, and Politics in the Development of Soft Law International Prison Standards' 2018 *Queen's Law Journal* 266.

<sup>119</sup> Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (1988).

The Body of Principles prohibit torture, as well as inhuman or degrading punishments.<sup>120</sup> It also recognises the importance of providing offenders with educational and cultural materials.<sup>121</sup> This Principle could suggest that the Body of Principles places a great significance on the development of the offender while imprisoned. This arguably shows the importance placed on the rehabilitation of offenders, as well as OR as the final stage of the rehabilitation process.

The Body of Principles further recognises the potential for the mistreatment of offenders and provides for reporting mechanisms to be put in place if such violations do occur.<sup>122</sup> Complaints of mistreatment of offenders can be made by the offender himself or his council, as well as his family or any person who has knowledge of the violation, in a confidential manner.<sup>123</sup> This Principle recognises that there are numerous circumstances in the prison environment that may potentially prevent or impede their rehabilitation and therefore provides a mechanism for these mistreatments to be reported. The Body of Principles further envisage that these complaints be investigated without undue delay and that the offender must not suffer prejudice because of the complaint.<sup>124</sup>

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<sup>120</sup> Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (1988).

<sup>121</sup> Principle 28 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (1988).

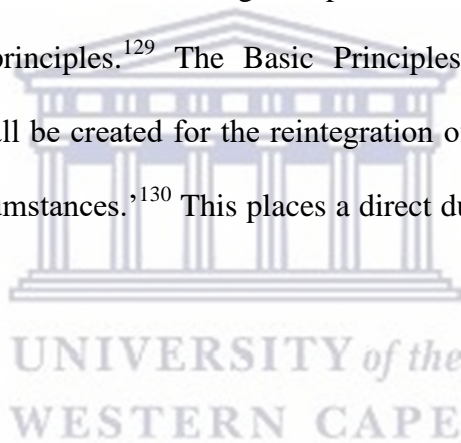
<sup>122</sup> Principle 33 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (1988).

<sup>123</sup> Principle 33 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (1988).

<sup>124</sup> Principle 33 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (1988).

### 2.2.6. Basic Principles for the Treatment of Prisoners

The Basic Principles for the Treatment of Prisoners (herein after the Basic Principles) provide that all offenders should be treated in a way that respects their dignity and that all offenders must be treated equally.<sup>125</sup> Importantly the Basic Principles provide that prisons must discharge their duty ‘in keeping with the State’s other social objectives’.<sup>126</sup> As it is the State’s social objective to create a safer society,<sup>127</sup> it is therefore the responsibility of the prison to reduce offending behaviour, so that upon their release from prison, offenders do not reoffend. The Basic Principles recognises that offenders do not lose their human rights upon imprisonment, but that some rights are limited due to incarceration.<sup>128</sup> The Basic Principles also acknowledges the importance of OR through the provision of education and employment training provided in the principles.<sup>129</sup> The Basic Principles also expressly states that: ‘...favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible circumstances.’<sup>130</sup> This places a direct duty upon states to support the OR of offenders.



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<sup>125</sup> Principles 1 – 2 of the Basic Principles for the Treatment of Prisoners General Assembly Resolution 45/111 (1990).

<sup>126</sup> Principle 3 of the Basic Principles for the Treatment of Prisoners General Assembly Resolution 45/111 (1990).

<sup>127</sup> Section 12 of the Constitution of the Republic of South Africa, 1996.

<sup>128</sup> Principle 5 of the Basic Principles for the Treatment of Prisoners General Assembly Resolution 45/111 (1990).

<sup>129</sup> Principles 6 & 8 of the Basic Principles for the Treatment of Prisoners General Assembly Resolution 45/111 (1990).

<sup>130</sup> Principle 10 of the Basic Principles for the Treatment of Prisoners General Assembly Resolution 45/111 (1990).

After analysing the international instruments, it is important to also consider regional instruments which may impose a State duty to support OR.

### **2.3. REGIONAL INSTRUMENTS WHICH MAY INFER A STATE DUTY TO SUPPORT OFFENDER REINTEGRATION**

African instruments and their approach to OR must be fully understood in the pursuit of determining whether or not a legal duty exists on South Africa to support OR. The following section will analyse the relevant regional instruments in Africa to determine whether or not they provide any legal duty to support OR.

#### **2.3.1. African Charter on Human and Peoples' Rights**

The Africa Charter on Human and Peoples' Rights (herein after the ACHPR) was adopted in 1981 by the Organisation for African Unity, the predecessor to the African Union.<sup>131</sup> The ACHPR has been signed and ratified by 54 States on the African continent, including South Africa.<sup>132</sup> Article one of the ACHPR obligates states parties to “adopt legislative and other measures to give effect to” the rights and duties contained in the Charter.<sup>133</sup> The ACHPR

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<sup>131</sup> African Charter on Human and Peoples' Rights, 1981 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982) & Viljoen F 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities' (2005) 27 *Human Rights Quarterly* 127.

<sup>132</sup> African Commission on Human and Peoples' Rights 'State Parties to the African Charter' available at <https://www.achpr.org/statepartiestotheafricancharter> (accessed 1 March 2019).

<sup>133</sup> Article 1 of the African Charter on Human and Peoples' Rights, 1981 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982).



recognises that all people have rights which should be protected.<sup>134</sup> The language of the ACHPR in Articles three to five suggests that it is inclusive of offenders.

Some of these rights are the right that all people are equal before the law and deserve equal protection of the law.<sup>135</sup> It holds that all persons have the right to life and that everyone has the right to be free from “torture, cruel, inhumane or degrading punishment.”<sup>136</sup> One of the purposes of the ACHPR is to protect and promote human rights in Africa and by inference the rights of offenders in Africa.<sup>137</sup>

### **2.3.2. Kampala Declaration on Prison Conditions in Africa**

The Kampala Declaration on Prison Conditions in Africa (hereinafter the Kampala Declaration) was adopted in 1996 when delegates from 47 States including 40 African States made recommendations to improve prison conditions in Africa.<sup>138</sup> The Kampala Declaration expressly recognises that offenders have the right to human dignity and prohibits the torture of offenders. It also expressly states that prisons in Africa are overcrowded, and the conditions are inhuman.<sup>139</sup> The Kampala Declaration also places emphasis on providing

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<sup>134</sup> Articles 3 – 6 of the African Charter on Human and Peoples’ Rights, 1981 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982).

<sup>135</sup> Article 3 of the African Charter on Human and Peoples’ Rights, 1981 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982).

<sup>136</sup> Article 4 & 5 of the African Charter on Human and Peoples’ Rights, 1981 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982).

<sup>137</sup> Viljoen F ‘The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities’ (2005) 27 *Human Rights Quarterly* 127.

<sup>138</sup> Kampala Declaration on Prison Conditions in Africa (1996) & Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 288.

<sup>139</sup> Recommendation 1 of the Plan of Action for the Kampala Declaration on Prison Conditions in Africa (1996).

rehabilitation, vocational and skills programmes to enable the offender to become self-sufficient.<sup>140</sup> The Kampala Declaration provides ten recommendations on prison conditions and only the recommendations which are relevant to OR will be discussed.

These recommendations provide that the human rights of prisoners should be protected and that their living conditions should not infringe upon their human dignity.<sup>141</sup> The recommendations also provide that offenders should be allowed to develop and maintain their relationship with their families and society.<sup>142</sup> The recommendations further recognise the importance of OR and the importance of education in OR.<sup>143</sup> An important recommendation provided by the Kampala Declaration is that all inmates retain their rights, and some rights are limited as is necessary to secure their detention.<sup>144</sup> It could be argued that these recommendations were made to ensure that the conditions of imprisonment are suitable for rehabilitation.

The Kampala Declaration also provides for recommendations on prison staff. According to these recommendations prison staff should be properly trained.<sup>145</sup> It could be argued that the Kampala Declaration falls short in that it does not specify the type of training programmes that should be provided to prison staff. It could be argued that these recommendations could have gone further in providing that prison staff should be trained on rehabilitation programmes.

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<sup>140</sup> Recommendation 2 of the Plan of Action for the Kampala Declaration on Prison Conditions in Africa (1996).

<sup>141</sup> Recommendations 1 & 3 on Prison Conditions of the Kampala Declaration on Prison Conditions in Africa (1996).

<sup>142</sup> Recommendation 6 on Prison Conditions of the Kampala Declaration on Prison Conditions in Africa (1996).

<sup>143</sup> Recommendation 7 on Prison Conditions of the Kampala Declaration on Prison Conditions in Africa (1996).

<sup>144</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 288.

<sup>145</sup> Recommendations 4 – 6 on Prison Staff of the Kampala Declaration on Prison Conditions in Africa (1996).



### 2.3.3. Arusha Declaration on Good Prison Practice

The Arusha Declaration on Good Prison Practice (herein after the Arusha Declaration) was adopted in 1999 in Arusha, Tanzania.<sup>146</sup> In the Preamble of the Arusha Declaration it is noted *inter alia*, that there is a need to promote transparency and accountability in the prison administration and that conditions in African prisons do not adhere to the Standard Minimum Rules.<sup>147</sup> The Arusha Declaration calls for African states to incorporate international norms into their domestic legislation and to improve transparency and accountability in prisons.<sup>148</sup> It further provides that the dignity and rights of offenders must be protected and that prison conditions must be improved.<sup>149</sup> The Arusha Declaration emphasises the need for professionalism from prison staff and the need for them to receive human rights training to properly and effectively conduct their duties.<sup>150</sup>

### 2.3.4. Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa

The Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa (herein after the Ouagadougou Declaration) was adopted in 2002.<sup>151</sup> The Ouagadougou Declaration recommends a reduction in the prison population, which could arguably be due to the fact that prisons do not provide the ideal environment to achieve OR.<sup>152</sup> The Ouagadougou

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<sup>146</sup> Arusha Declaration on Good Prison Practice (1999).

<sup>147</sup> Preamble of the Arusha Declaration on Good Prison Practice (1999).

<sup>148</sup> Principles 1 & 2 of the Arusha Declaration on Good Prison Practice (1999).

<sup>149</sup> Principles 3, 4 & 7 of the Arusha Declaration on Good Prison Practice (1999).

<sup>150</sup> Principle 3 & 5 of the Arusha Declaration on Good Prison Practice (1999).

<sup>151</sup> Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa (2002).

<sup>152</sup> Recommendation 1 of the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa (2002).

Declaration explicitly refers to OR as being the end goal of imprisonment.<sup>153</sup> The Ouagadougou Declaration clearly indicates that the period of imprisonment should be used to rehabilitate offenders in order for them to be successfully reintegrated.<sup>154</sup> Importantly the Ouagadougou Declaration recognises that a needs-based approach is required when providing offenders with rehabilitation programmes.<sup>155</sup> In order for this needs-based approach to be as efficient as possible, it is crucial that proper assessments are done to ascertain what the needs of each offender are. The Ouagadougou Declaration is associated with a Plan of Action which provides States with various strategies which they may employ to assist in the implementation of the Ouagadougou Declaration.<sup>156</sup>

International and regional instruments have now been considered. This leads us to analyse South Africa's domestic law to determine whether or not the State has a duty to support OR.

#### **2.4. DOES SOUTH AFRICA'S DOMESTIC LAW IMPOSE A LEGAL DUTY ON THE STATE TO SUPPORT OFFENDER REINTEGRATION?**

In the following section the relevant domestic laws and policy which may suggest a legal duty to support OR is discussed.

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<sup>153</sup> Recommendation 3 of the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa (2002).

<sup>154</sup> Recommendation 3 of the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa (2002).

<sup>155</sup> Recommendation 3 of the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa (2002).

<sup>156</sup> Ouagadougou Plan of Action (2002).

#### 2.4.1. Constitution of the Republic of South Africa, 1996

The Constitution was adopted to establish a society where the divisions of the past would be addressed and a society based on *inter alia*, social justice and fundamental human rights.<sup>157</sup> It was also adopted based on the principles of equality and freeing the potential of each person.<sup>158</sup> The reference to words such as ‘each person’ means that it follows an approach which is inclusive of offenders.<sup>159</sup> It could be argued that the state must give more assistance to offenders than to ordinary citizens as they are entirely reliant on the state for their daily needs.<sup>160</sup> Offenders can only reach their full potential if the State positively participates in their reintegration, so that they can once again become productive law abiding citizens.<sup>161</sup>

The founding values of South Africa are *inter alia* ‘the achievement of equality and the advancement of human rights’.<sup>162</sup> The Constitution places a positive obligation on the state to ‘respect, protect, promote and fulfil the rights in the Bills of Rights’.<sup>163</sup> The equality clause in the Constitution is also inclusive of offenders in the use of the word ‘everyone’.<sup>164</sup> Therefore offenders deserve to have their rights to equal protection of the law protected, just as an ordinary law abiding citizen, subject to reasonable limitations.<sup>165</sup> The equality clause defeats

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<sup>157</sup> Preamble of the Constitution of the Republic of South Africa, 1996.

<sup>158</sup> Preamble of the Constitution of the Republic of South Africa, 1996.

<sup>159</sup> Preamble of the Constitution of the Republic of South Africa, 1996.

<sup>160</sup> Albertus C ‘Offender Reintegration in South Africa: A complementary crime prevention measure’ Criminal Justice Initiative Occasional Paper 7 *Open Society Foundation for South Africa* (2010) 6.

<sup>161</sup> Albertus C ‘Offender Reintegration in South Africa: A complementary crime prevention measure’ Criminal Justice Initiative Occasional Paper 7 *Open Society Foundation for South Africa* (2010) 6.

<sup>162</sup> Section 1 of the Constitution of the Republic of South Africa, 1996.

<sup>163</sup> Section 7(2) of the Constitution of the Republic of South Africa, 1996.

<sup>164</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>165</sup> Section 36 of the Constitution of the Republic of South Africa, 1996.

the argument that the rights of ordinary citizens should be satisfied before taking measures to promote the advancement of offenders' rights.

The Constitution grants 'everyone' the right to both basic and further education.<sup>166</sup> Therefore the DCS has a constitutional duty to ensure that education is available and accessible to offenders. Research suggests that education reduces recidivism and therefore educating offenders arguably encourages OR.<sup>167</sup>

The Constitution also provides 'everyone' with the right to human dignity and to have this right respected and protected, as well as providing 'everyone' with the right to life.<sup>168</sup> The Constitution further gives 'everyone' the right to freedom and security of the person.<sup>169</sup> The Constitution goes further to say that the right to freedom and security is inclusive of *inter alia*, freedom from violence from both public and private sources; prohibition of torture; and 'not to be treated or punished in a cruel, inhuman or degrading way'.<sup>170</sup> This means that there is a duty on the State to ensure that offenders are housed in a manner that will protect their well-being, lives and bodily integrity. By inference this arguably also means that there is a duty on the State to protect offenders and prevent assaults as far as reasonably possible in correctional facilities.<sup>171</sup>

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<sup>166</sup> Section 29(1) of the Constitution of the Republic of South Africa, 1996.

<sup>167</sup> *Pretorius and Others v Minister of Justice and Correctional Services and Others* 2018 (2) SACR 501 (GP) para 27.

<sup>168</sup> Section 10 – 11 of the Constitution of the Republic of South Africa, 1996.

<sup>169</sup> Section 12(1) of the Constitution of the Republic of South Africa, 1996.

<sup>170</sup> Section 12(1) of the Constitution of the Republic of South Africa, 1996.

<sup>171</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 202 – 204.

‘Everyone’ has the constitutional right to ‘an environment that is not harmful to their health or well-being.’<sup>172</sup> The DCS is responsible for providing imprisoned offenders with accommodation and they have a positive duty to ensure that such accommodation is not harmful to the health of offenders. The Constitution makes explicit reference to sentenced offenders, and provides them with the right to

[C]onditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.<sup>173</sup>

It could be inferred creating an environment that is not harmful to offenders in prison is important for facilitating their rehabilitation.

#### **2.4.2. Correctional Services Act**

The long title of the Correctional Services Act provides for safe conditions of imprisonment which is consistent with the human dignity of offenders.<sup>174</sup> The Preamble of the Correctional Services Act states that one of the Act’s purposes is to give effect to the Bill of Rights,<sup>175</sup> and expressly recognises international instruments relating to corrections.<sup>176</sup>

The Correctional Services Act defines ‘correction’ as the ‘provision of services and programmes aimed at correcting the offending behaviour of sentenced offenders in order to rehabilitate them’.<sup>177</sup> It is noteworthy to mention that this definition is not restricted to the provision of services to the duration of the offender’s sentence. In other words, the legislation

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<sup>172</sup> Section 24 of the Constitution of the Republic of South Africa, 1996.

<sup>173</sup> Section 35(2)(e) of the Constitution of the Republic of South Africa, 1996.

<sup>174</sup> Long title of the Correctional Services Act 111 of 1998.

<sup>175</sup> Chapter 2 of the Constitution of the Republic of South Africa, 1996.

<sup>176</sup> Preamble of the Correctional Services Act 111 of 1998.

<sup>177</sup> Section 1 of the Correctional Services Act 111 of 1998.

does not prevent the DCS from providing rehabilitation programmes and support to offenders after they have served their sentences. In fact, section 16 of the Correctional Services Act states that the DCS may provide rehabilitation programmes and services ‘even when not required to do so by the Act.’<sup>178</sup> This could be viewed as the legislature expecting the executive to be more proactive in their quest to rehabilitate offenders and to achieve successful OR. Section 16 thus implies the possibility of post-release services.

The Correctional Services Act defines the purpose of the correctional system as

...to contribute to maintaining and protecting a just, peaceful and safe society by-

- (a) enforcing sentences of the courts in the manner prescribed by this Act;
- (b) detaining all inmates in safe custody whilst ensuring their human dignity; and
- (c) promoting the social responsibility and human development of all sentenced offenders.<sup>179</sup>

It can be argued that in order for correctional centres to contribute to maintaining a safe and peaceful society, it must aim to curb recidivism which consequently curbs future crimes.

The stated objective for imprisonment in terms of the Correctional Services Act is to enable the offender to lead a crime-free life after his release.<sup>180</sup> Therefore it could be inferred that the object of imprisonment in South Africa is the achievement of OR. Omar argues that due to the language of the Correctional Services Act and the purpose of imprisonment, offenders have a right to rehabilitation.<sup>181</sup>

The Act does not provide a definition for the word rehabilitation (or rehabilitate), and the words ‘rehabilitation’, ‘rehabilitated’ and ‘rehabilitate’ only appear for a combined number of

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<sup>178</sup> Section 16(1) of the Correctional Services Act 111 of 1998.

<sup>179</sup> Section 2 of the Correctional Services Act 111 of 1998.

<sup>180</sup> Section 36 of the Correctional Services Act 111 of 1998.

<sup>181</sup> Omar J ‘A Prisoner’s Right?: The legal case for rehabilitation’ (2011) 37 *SA Crime Quarterly* 19.

four times in the entire Act.<sup>182</sup> The Correctional Services Act also fails to provide a definition for the word ‘reintegration’, and only mentions the words ‘reintegration’ and ‘re-integrate’ four times throughout the entire Act.<sup>183</sup> This is also astonishing given that rehabilitation and OR appear are the purpose of imprisonment.

The Correctional Services Act allows for civil society organisations,<sup>184</sup> and NGOs to interact with sentenced offenders to promote rehabilitation and OR.<sup>185</sup> Post-release support and reintegration of offenders into society is seen by the Legislature and Executive as a societal responsibility.<sup>186</sup> This leads us to question whether the role society should play is overemphasised and whether the State should take more responsibility for promoting OR. This does not mean that society does not play an important role in OR, but they cannot carry this responsibility alone. It is therefore imperative to investigate the policy document relating to the rehabilitation of offenders to see if the State has a duty to support OR.

### 2.4.3. White Paper on Corrections

The White Paper on Corrections makes the goals of rehabilitation and OR more explicit that the Correctional Services Act and the words ‘rehabilitation’, ‘rehabilitative’, ‘rehabilitate’ and ‘rehabilitated’ appear 250 times in the White paper.<sup>187</sup> The White Paper makes it clear

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<sup>182</sup> Sections 1, 13(7)(a), 18 & 50(1)(a)(iii) of the Correctional Services Act 111 of 1998.

<sup>183</sup> Sections 1, 38(1)(i), 44 (1)(d) & 45(1) of the Correctional Services Act 111 of 1998.

<sup>184</sup> These civil society organisations include community organisations and religious denominations or organisations.

<sup>185</sup> Section 13(7)(a) of the Correctional Services Act 111 of 1998.

<sup>186</sup> Section 13(7)(a) of the Correctional Services Act 111 of 1998 & DCS *White Paper on Corrections in South Africa* (2004) paras 1.1.6, 13.9, 14.5 & Chapter 3.

<sup>187</sup> Cilliers C & Smit J ‘Offender rehabilitation in the South African Correctional System: Myth or reality?’ (2007) *Acta Criminologica* 86.



that rehabilitation is the core of all DCS activities.<sup>188</sup> The White Paper recognises that rehabilitation has the potential to break the cycle of crime, and that punishment cannot do this.<sup>189</sup>

The White Paper acknowledges that ‘after-care’ is an integral part of the rehabilitation process and that international experiences have shown that OR is the most crucial element of rehabilitation.<sup>190</sup> The White Paper further states that the DCS alone cannot facilitate social reintegration and that the community play a role in achieving OR.<sup>191</sup> The White Paper further calls for an ‘Integrated Justice System’ which involves partnerships between all relevant governmental departments as well as civil society in the pursuit of OR.<sup>192</sup> This suggests that there is a State duty to facilitate OR. This is further supported by the fact that the White Paper states that rehabilitation the primary goal of the DCS and that rehabilitation cannot be complete without successful OR.<sup>193</sup>

## 2.5. CONCLUSION

This chapter shows that there is a strong suggestion from international instruments that the State should make rehabilitation the primary focus of the correctional system. Regional instruments similarly support this view and even go as far as providing plans on how States can achieve the goal of rehabilitation. The wording of South Africa’s domestic law points to a

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<sup>188</sup> DCS *White Paper on Corrections in South Africa* (2004) para 4.3.2 & Sloth-Nielsen J ‘The state of South Africa’s prisons’ in Buhlungu S et al (ed) *State of the Nation: South Africa 2007* (2007) 394.

<sup>189</sup> Omar J ‘A Prisoner’s Right?: The legal case for rehabilitation’ (2011) 37 *SA Crime Quarterly* 19 & DCS *White Paper on Corrections in South Africa* (2004) para 4.4.2.

<sup>190</sup> DCS *White Paper on Corrections in South Africa* (2004) para 9.13.8.

<sup>191</sup> DCS *White Paper on Corrections in South Africa* (2004) para 9.13.8.

<sup>192</sup> DCS *White Paper on Corrections in South Africa* (2004) para 6.2.6.

<sup>193</sup> DCS *White Paper on Corrections in South Africa* (2004) paras 6.2.6 & 9.15.1.

strong indication that rehabilitation is the goal of corrections. However, the DCS has made it explicitly clear that their core business is rehabilitation.<sup>194</sup> However, rehabilitation cannot be complete without successful OR. Therefore it can be concluded that various international and regional instruments as well as the domestic laws and legislation of South Africa, strongly suggests that there is a legal duty on the State to support rehabilitation and OR.



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<sup>194</sup> DCS *White Paper on Corrections in South Africa* (2004) para 4.3.2.

## CHAPTER 3

### THE GOAL OF REHABILITATION: A CLOSER LOOK AT SOUTH AFRICA'S CORRECTIONAL CENTRES

#### 3.1. INTRODUCTION

As discussed in Chapter 2, there are strong indications from the international, regional and domestic laws that the State has a legal duty to support OR. To ascertain whether South Africa is complying with this duty, we must evaluate how offenders are punished and what the goals of punishment are. The most severe sentence currently used in South Africa is imprisonment.<sup>195</sup> Consequently, it is crucial to discuss and analyse the nature of imprisonment in South Africa and whether or not it is achieving its stated goals. It must be noted that although other sentences exist, the discussion will be limited to imprisonment as it is the most frequently imposed sentence.<sup>196</sup>

Reintegration is only the final stage of rehabilitation,<sup>197</sup> but it is impacted by the sentence which has been imposed. A person cannot be expected to achieve successful OR if the sentence imposed does not aid both rehabilitation and OR. Thus, the rehabilitation process should ideally start from the offender's admission into the correctional centre. This chapter intends to look at the attitude of society towards rehabilitation. It further seeks to analyse life in prison for a sentenced offender. It aims to ascertain whether or not imprisonment is conducive to rehabilitation and OR and whether the state is fulfilling its duty to facilitate OR.

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<sup>195</sup> Muntingh L 'The Prison System' in Gould C (ed) *Criminal (in)justice in South Africa: a civil society perspective* (2009) 210.

<sup>196</sup> Muntingh L 'The Prison System' in Gould C (ed) *Criminal (in)justice in South Africa: a civil society perspective* (2009) 201.

<sup>197</sup> DCS *White Paper on Corrections in South Africa* (2004) para 6.2.6.

### 3.2. THE PUBLIC'S ATTITUDE TOWARD REHABILITATION

Public opinion influences policy makers and politicians who depend on the public's support.<sup>198</sup> Winston Churchill said that: '[t]he mood and temper of the public with regard to the treatment of crime and criminals, is one of the most unfailing tests of the civilization of any country...'<sup>199</sup> It is thus important to consider at least the public's opinion regarding rehabilitation and OR.

The concept of rehabilitation is often viewed with suspicion from members of society, and as a result it has always been met with some resistance.<sup>200</sup> Society often views rehabilitation and OR programmes as being soft on crime.<sup>201</sup> Some members of society also view offenders as outcasts and believe that they are not entitled to the same protection of their rights as ordinary citizens.<sup>202</sup> In the 2015/2016 year, JICS noted that the public believe that offenders have 'too many rights' and that this view is an obstacle in the pursuit of rehabilitation.<sup>203</sup> Society's views are often influenced by their personal experiences with crime and the experiences of

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<sup>198</sup> Ouellette HM, Applegate BK & Vuk M 'The Public's Stance on Prisoner Reentry: Policy Support and Personal Acceptance' (2017) 42 *Am J Crim Just* 770.

<sup>199</sup> Gross FA *Who Hangs the Hangman? A modern approach to punishment* (1966) 59.

<sup>200</sup> McNeill F "Four forms of 'offender' rehabilitation: Towards an interdisciplinary perspective" (2012) 17 *Legal and Criminological Psychology* 4.

<sup>201</sup> Ngabonziza O & Singh S 'Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme' (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 91 & Muntingh L *After Prison: A Case for Offender Reintegration* (2001) 6.

<sup>202</sup> Chikadzi V 'Challenges Facing Ex-Offenders When Reintegrating into Mainstream Society in Guateng, South Africa' (2017) 53 *Social Work/Maatskaplike Werk* 288.

<sup>203</sup> JICS *Annual Report for the period 01 April 2015 to 31 March 2016* (2016) 14.

friends and loved ones who have been victims to crime.<sup>204</sup> The public seems to support the view of ‘lock them up and throw away the key’ which clearly supports the continued use of imprisonment.<sup>205</sup>

### 3.3. IMPRISONMENT

The prison as it is known today is not an African concept, yet it has become a seemingly necessary institution in society that many cannot picture a society without prisons.<sup>206</sup> In South Africa, imprisonment has become one of the most common sentences implemented.<sup>207</sup> It is therefore imperative that we investigate whether or not prisons are achieving their purpose and whether they facilitate rehabilitation.

The Correctional Services Act defines the purpose of the correctional system as

...to contribute to maintaining and protecting a just, peaceful and safe society by-

- (d) enforcing sentences of the courts in the manner prescribed by this Act;
- (e) detaining all inmates in safe custody whilst ensuring their human dignity; and

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<sup>204</sup> Padayachee V ‘Offender Reintegration – A restorative approach to crime in South Africa’ in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 15.

<sup>205</sup> Padayachee V ‘Offender Reintegration – A restorative approach to crime in South Africa’ in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 15.

<sup>206</sup> Khwela MN ‘A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa’ (2014) 1 *Athens Journal of Social Sciences* 147.

<sup>207</sup> Muntingh L ‘The Prison System’ in Gould C (ed) *Criminal (in)justice in South Africa: a civil society perspective* (2009) 201.

(f) promoting the social responsibility and human development of all sentenced offenders.<sup>208</sup>

This implies that prisons must house sentenced offenders in conditions which respect their dignity while developing them in order to achieve rehabilitation. It can also be argued that in order for prisons to contribute to maintaining a safe and peaceful society, it must aim to curb recidivism which in turn reduces potential future crimes. The Correctional Services Act also defines ‘correction’ as providing programmes and services to rehabilitate sentenced offenders.<sup>209</sup> This means that prisons must operate as facilities which house offenders in conditions which respect their dignity and provide them with services and programmes which will promote their rehabilitation. Rehabilitation is thus a core function of the DCS.

The stated objective for imprisonment in terms of the Correctional Services Act is to enable the offender to lead a crime-free life after his release.<sup>210</sup> Therefore it could be inferred that the objective of imprisonment in South Africa is the achievement of OR. This may mean that the success of imprisonment in South Africa may *inter alia* be measured by the recidivism rate. In 2002 the recidivism rate was estimated to be between 85% - 94%.<sup>211</sup> In 2015 it was estimated that between 50% - 70% offenders re-offend within 3 years after release from imprisonment.<sup>212</sup> The rate of recidivism is estimated because South Africa does not publish

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<sup>208</sup> Section 2 of the Correctional Services Act 111 of 1998.

<sup>209</sup> Section 1 of the Correctional Services Act 111 of 1998.

<sup>210</sup> Section 36 of the Correctional Services Act 111 of 1998.

<sup>211</sup> Dissel A ‘Tracking Transformation in South African Prisons’ (2002) 11 *Track Two* 13.

<sup>212</sup> Khwela MN ‘Effects of Incarceration on Recidivism in South Africa’ (2015) 50 *Journal of Public Administration* 409.

information regarding recidivism,<sup>213</sup> which is arguably a grave omission by the State.<sup>214</sup> In 2016 it was established that approximately 30 000 offenders are released from correctional facilities every month.<sup>215</sup> Based on the aforementioned figures it is possible that approximately more than 18 000 of these released offenders will reoffend. This may contribute significantly to the crime rate. It is arguable that prisons are failing to meet their stated objectives and offenders are not properly prepared for OR.<sup>216</sup> The truism that ‘imprisonment creates more imprisonment,’<sup>217</sup> becomes even more convincing.

Despite the apparent failure of imprisonment in reducing crime,<sup>218</sup> it is still the most used sentence in South Africa.<sup>219</sup> Reports written in France between 1823 and 1842 indicated the failure of imprisonment and the adverse effects they have on offenders.<sup>220</sup> These reports showed that prisons do not decrease crime, but they cause recidivism and allow offenders to

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<sup>213</sup> Ngabonziza O & Singh S ‘Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme’ (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 88.

<sup>214</sup> Schoeman M ‘Recidivism: A conceptual and operational conundrum’ 2010 *Acta Criminologica* 80 – 81.

<sup>215</sup> Singh SB ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 4.

<sup>216</sup> Khwela MN ‘A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa’ (2014) 1 *Athens Journal of Social Sciences* 153.

<sup>217</sup> Harding DJ et al ‘Short and long-term effects of imprisonment on future felony convictions and prison admissions’ (2017) 114 *PNAS* 11106.

<sup>218</sup> Muntingh L ‘Punishment and deterrence: Don’t expect prisons to reduce crime’ (2008) 26 *SA Crime Quarterly* 3 – 4 & Muntingh L et al ‘Second Chance – Preventing Re-offending’ in Pennington S (ed) *Action for a Safe South Africa* (2008) 102 – 103.

<sup>219</sup> Tomasic R & Dobinson I *The Failure of Imprisonment: An Australian Perspective* (1979) 1 & Muntingh L ‘The Prison System’ in Gould C (ed) *Criminal (in)justice in South Africa: a civil society perspective* (2009) 201.

<sup>220</sup> Muntingh L *After Prison: A Case for Offender Reintegration* (2001) 5.



expand their criminal network.<sup>221</sup> These findings resonate with contemporary prisons in South Africa which are said to be universities of crime.<sup>222</sup> Correctional facilities breed more astute offenders, as knowledge of how to commit crimes and avoid detection is shared among offenders in prison.<sup>223</sup>

The protection offered by the conventional prison system is sometimes overstated because while imprisoned, the offender is incapacitated from committing offences in society.<sup>224</sup> When the offender is released from prison, there is a reasonable chance that he will commit crimes again due to his experiences in prison.<sup>225</sup> The potential for recidivism is higher in offenders who were sentenced to imprisonment compared to offenders who served their sentence in the community.<sup>226</sup> Therefore, when one looks at the problem holistically, we see that

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<sup>221</sup> Muntingh L *After Prison: A Case for Offender Reintegration* (2001) 5 – 6.

<sup>222</sup> Ngabonziza O & Singh S ‘Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme’ (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 88.

<sup>223</sup> Consedine J ‘Restorative Justice – Healing the Effects of Crime’ *Restorative Justice and Probation Conference, Warsaw* 2 December 2003 available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjEtK\\_MzK3kAhVHZFAKHxIrC1MOFjAAegQIABAC&url=http%3A%2F%2Fwp.catholicworker.org.nz%2Fwp-content%2Fthemes%2Fvendor-child-theme%2F\\_assets%2Fpdf%2Frestorative-justice%2Fhealing-the-effects-of-crime.pdf&usg=AOvVaw0LcBJWOPunk3ZwgytgV1Dy](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjEtK_MzK3kAhVHZFAKHxIrC1MOFjAAegQIABAC&url=http%3A%2F%2Fwp.catholicworker.org.nz%2Fwp-content%2Fthemes%2Fvendor-child-theme%2F_assets%2Fpdf%2Frestorative-justice%2Fhealing-the-effects-of-crime.pdf&usg=AOvVaw0LcBJWOPunk3ZwgytgV1Dy) (accessed 5 May 2019).

<sup>224</sup> Muntingh L ‘Punishment and deterrence: Don’t expect prisons to reduce crime’ (2008) 26 *SA Crime Quarterly* 5.

<sup>225</sup> Bagaric M, Hunter D & Wolf G ‘Technological Incarceration and the End of the Prison Crisis’ (2018) 108 *Journal of Criminal Law & Criminology* 87 & Cullen FT, Jonson CL & Nagin DS ‘Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science’ (2011) 91 *The Prison Journal Supplement* 53S.

<sup>226</sup> Muntingh L ‘Punishment and deterrence: Don’t expect prisons to reduce crime’ (2008) 26 *SA Crime Quarterly* 6.

conventional imprisonment does in fact not protect or contribute to a safer society in any noticeable way.<sup>227</sup>

With regard to a sentence of imprisonment, it is accepted that the deprivation of liberty is the punishment,<sup>228</sup> and therefore offenders should not be subjected to any further undue punishments. This is a well-established principle in South African law which is known as the residuum principle and has been codified by the Correctional Services Act.<sup>229</sup>

In terms of the residuum principle offenders should not necessarily have any other rights diminished apart from those necessary to implement the sentence.<sup>230</sup> This principle was established in 1912 in the Appellate Division in *Whittaker v Roos and Bateman* where the court held that offenders retained their rights with the exception of those limited by the law by consequence of their imprisonment.<sup>231</sup> In 1993, the residuum principle was confirmed in *Minister of Justice v Hofmeyr*, where the court noted that offenders do not only retain the rights provided by legislation, but also those conferred by the common law.<sup>232</sup>

The residuum principle lays the foundation for rehabilitation and OR. If an offender has his fundamental rights respected while incarcerated, there is arguably greater potential for such

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<sup>227</sup> Bagaric M, Hunter D & Wolf G 'Technological Incarceration and the End of the Prison Crisis' (2018) 108 *Journal of Criminal Law & Criminology* 87.

<sup>228</sup> S 36 of the Correctional Services Act 111 of 1998.

<sup>229</sup> S 36 of the Correctional Services Act 111 of 1998.

<sup>230</sup> Muntingh L 'Guidelines and Principles on Imprisonment and the Prevention of Torture under the African Charter on Human and Peoples' Rights – How Relevant are They for South Africa?' (2013) 17 *Law, Democracy & Development* 365. This is consistent with section 36 of the Correctional Services Act 111 of 1998.

<sup>231</sup> *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 118 & 120 – 123.

<sup>232</sup> *Minister of Justice v Hofmeyr* [1993] 2 ALL SA 232 (A) 236 – 238. See also Hughes A *Human dignity and fundamental rights in South Africa and Ireland* (2014) 252.

an offender to be rehabilitated.<sup>233</sup> However, when offenders are subjected to conditions of imprisonment which violates their fundamental human rights their chances for rehabilitation and OR is arguably slimmer.<sup>234</sup> This requires us to investigate what offenders are currently experiencing in correctional facilities as this may give us some insight as to why the recidivism rate remains so high.

### 3.4. LIFE IN SOUTH AFRICAN PRISONS

The Correctional Services Act envisages that every sentenced offender should be assessed upon admission to the correctional centre.<sup>235</sup> This assessment is to determine *inter alia*, their educational needs, social and psychological needs, specific development programme needs and needs regarding OR.<sup>236</sup> This assessment must take place as soon as possible after the admission of the sentenced offender.<sup>237</sup> Considering the lack of capacity in the DCS,<sup>238</sup> and overcrowding of correctional facilities, it is arguable that offenders do not receive thorough assessments. Sentenced offenders are entitled to a correctional sentence plan which contains specific interventions to be implemented based on their needs.<sup>239</sup>

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<sup>233</sup> Bagaric M, Hunter D & Wolf G 'Technological Incarceration and the End of the Prison Crisis' (2018) 108 *Journal of Criminal Law & Criminology* 88.

<sup>234</sup> Bagaric M, Hunter D & Wolf G 'Technological Incarceration and the End of the Prison Crisis' (2018) 108 *Journal of Criminal Law & Criminology* 87 & Singh SB 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 8.

<sup>235</sup> Section 38 of the Correctional Services Act 111 of 1998.

<sup>236</sup> Section 38(1) of the Correctional Services Act 111 of 1998.

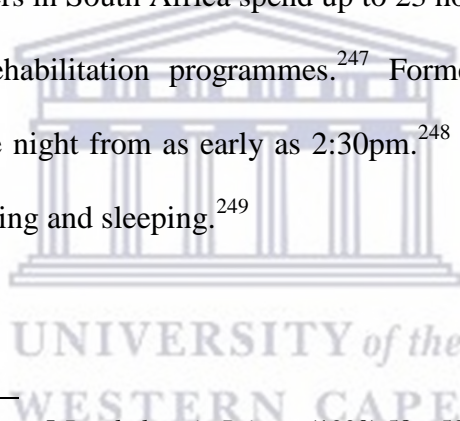
<sup>237</sup> S 38(1) of the Correctional Services Act 111 of 1998.

<sup>238</sup> DCS *Annual Report 2017/2018* (2018) 97.

<sup>239</sup> S 38(1A) of the Correctional Services Act 111 of 1998 read with DCS *White Paper on Corrections in South Africa* (2004) para 9.7.

The prison routine can quickly become monotonous and the lack of stimulation can affect the way that offenders think and negatively affect their problem solving skills.<sup>240</sup> Offenders have no say in what they eat,<sup>241</sup> with the exception of those on religious diets as provided by the Correctional Services Act.<sup>242</sup> They are limited in what they are allowed to wear,<sup>243</sup> how much contact they have with family and friends on the outside,<sup>244</sup> and how much time they spend outside the confines of their cell. Imprisonment virtually takes away an offenders ability to make their own choices. Research suggests that individuals who do not regularly make choices have difficulty making choices in future.<sup>245</sup>

One of the problems of life in prison is the idleness and lack of things to do.<sup>246</sup> It is claimed that many sentenced offenders in South Africa spend up to 23 hours a day in their cells due to limited recreational and rehabilitation programmes.<sup>247</sup> Former offenders reported being locked up in the cell for the night from as early as 2:30pm.<sup>248</sup> They also remark that life in prison consists mostly of eating and sleeping.<sup>249</sup>



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<sup>240</sup> Cooke DJ, Baldwin PJ & Howison J *Psychology in Prisons* (1990) 58 – 59.

<sup>241</sup> Scott NC *Look before you Leap* (2010) 280.

<sup>242</sup> S 8(3) of the Correctional Services Act 111 of 1998.

<sup>243</sup> Regulation 5 of the Promulgation of Correctional Services Regulations with amendments incorporated in GN R 323 GG 35277 of 25 April 2012.

<sup>244</sup> DCS 'Visitation Process' available at [http://www.dcs.gov.za/?page\\_id=1120](http://www.dcs.gov.za/?page_id=1120) (accessed 16 April 2019).

<sup>245</sup> Cooke DJ, Baldwin PJ & Howison J *Psychology in Prisons* (1990) 55 & 59.

<sup>246</sup> Du Preez N & Luyt W 'Curriculation and Methodology in relation to Development Programmes in Prisons' (2004) 17 *Acta Criminologica* 24.

<sup>247</sup> Benatar S 'The state of our prisons and what this reveals about our society' (2014) 104 *SAMJ* 613.

<sup>248</sup> Muntingh L *Ex-prisoner's views on imprisonment and re-entry* (2009) 8.

<sup>249</sup> Muntingh L *Ex-prisoner's views on imprisonment and re-entry* (2009) 8.

It is arguable that the regulated prison lifestyle negatively affects the self-sufficiency of offenders as they become used to the monotonous prison routine which does not give them any sense of responsibility. The regulated prison routine is also said to have long lasting negative effects on offenders.<sup>250</sup> Research indicates that serving a sentence of imprisonment causes psychological damage to offenders.<sup>251</sup> This could arguably be exacerbated by the regulated prison life.

During the 2017/2018 year, only 39 407 out of 164 129 all offenders (male, female, and juvenile sentenced and unsentenced offenders) were involved in psychological services.<sup>252</sup> This means that around 75% of all offenders did not receive psychological services for this period. There were only 79 ‘psychologists and vocational counsellors’ employed by the DCS during the same period.<sup>253</sup> The Correctional Services Act provides that psychological services must be made available to sentenced offenders.<sup>254</sup> Given that imprisonment causes psychological damage, it is arguable that all sentenced offenders need psychological services. However given the capacity constraints, offenders will continue to struggle with mental health issues with a lack of support from the State.

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<sup>250</sup> Singh S ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 8.

<sup>251</sup> Muntingh L *After Prison: A Case for Offender Reintegration* (2001) 6.

<sup>252</sup> DCS *Annual Report 2017/2018* (2018) 70. The Annual Report of the DCS does not provide any information on the extent of the ‘involvement’ in psychological services and it does not give further details on what such services entails.

<sup>253</sup> DCS *Annual Report 2017/2018* (2018) 97.

<sup>254</sup> Section 7(3) of the Correctional Services Act 111 of 1998.

Long periods of imprisonment also increase the likelihood for offenders to become so dependent on the prison system that they find it difficult to picture a life outside of prison.<sup>255</sup> The psychological damage caused by imprisonment exacerbates the difficulty offenders with prior mental health issues experience.<sup>256</sup> Offenders with mental disorders such as anxiety and depression have minimal or no support, which sometimes results in them violently acting out or becoming hopeless about the future.<sup>257</sup> These feelings may arguably even lead to thoughts of suicide.<sup>258</sup> Therefore mental health care is very important in the pursuit of OR. The structural design of the prison arguably also negatively affects the mental health of offenders.

Prisons were originally designed for the purpose of punishment,<sup>259</sup> and many of those structures are still used to house inmates today. Research indicates that the conditions in the environment can influence human behaviour and thus the architecture of a prison can inhibit the rehabilitation of offenders.<sup>260</sup> Correctional centres in South Africa are ageing, structurally outdated,<sup>261</sup> and poorly ventilated.<sup>262</sup> Poor prison design inhibits prison staff from easily observing offenders,<sup>263</sup> resulting in offenders being left on their own for the majority of the

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<sup>255</sup> Cooke DJ, Baldwin PJ & Howison J *Psychology in Prisons* (1990) 59 & Richards SC & Jones RS 'Beating the perpetual incarceration machine: overcoming structural impediments to re-entry' in Maruna S & Immerigeon R (eds) *After Crime and Punishment: Pathways to offender reintegration* (2004) 202.

<sup>256</sup> Mdakane M 'Mental Health Care in Prisons and Beyond' (2019) 6 *Mental Health Matters* 30.

<sup>257</sup> Cooke DJ, Baldwin PJ & Howison J *Psychology in Prisons* (1990) 60 – 62.

<sup>258</sup> Mdakane M 'Mental Health Care in Prisons and Beyond' (2019) 6 *Mental Health Matters* 29.

<sup>259</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 29.

<sup>260</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 27 & 41.

<sup>261</sup> DCS *Annual Report 2017/2018* (2018) 14. See also Muntingh L 'The Prison System' in Gould C (ed) *Criminal (in)justice in South Africa: a civil society perspective* (2009) 208.

<sup>262</sup> Benatar S 'The state of our prisons and what this reveals about our society' (2014) 104 *SAMJ* 613.

<sup>263</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 28.



day and most of the night.<sup>264</sup> Some features of the prison architecture, such as dormitory cells promote overcrowding in that it becomes easy to add another bed to include another offender.<sup>265</sup>

### 3.4.1. Overcrowding

This section will look at the occupancy rates of South Africa's correctional centres, which are infamous for their overcrowding.<sup>266</sup> Overcrowding in correctional centres is a global problem.<sup>267</sup> Research shows that the issue has plagued South Africa's correctional centres since 1965.<sup>268</sup> Correctional facilities in South Africa were at 121% capacity in 1995, which drastically increased to 161% in 2002.<sup>269</sup> The occupancy rate of correctional centres was 144% in 2008.<sup>270</sup> The decrease in occupancy between 2002 and 2008 was due to a special remission of sentences granted to certain sentenced offenders in 2005.<sup>271</sup> In 2013, South Africa was reported as having the highest rate of incarceration in Africa.<sup>272</sup> In 2015, South Africa was reported as having the 11<sup>th</sup> highest prison population in the world.<sup>273</sup>

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<sup>264</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 27.

<sup>265</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 28.

<sup>266</sup> Geldemhuys K 'Overcrowded Prisons – An unofficial death sentence?' (2017) 110 *Servamus* 14.

<sup>267</sup> Mdakane M 'Mental Health Care in Prisons and Beyond' (2019) 6 *Mental Health Matters* 29.

<sup>268</sup> Geldemhuys K 'Overcrowded Prisons – An unofficial death sentence?' (2017) 110 *Servamus* 14.

<sup>269</sup> Benatar S 'The state of our prisons and what this reveals about our society' (2014) 104 *SAMJ* 613.

<sup>270</sup> Benatar S 'The state of our prisons and what this reveals about our society' (2014) 104 *SAMJ* 613.

<sup>271</sup> Sloth-Nielsen J 'The state of South Africa's prisons' in Buhlungu S et al (ed) *State of the Nation: South Africa 2007* (2007) 379 & 384. See also Giffard C & Muntingh L *The Effect of Sentencing on the Size of the South African Prison Population* (2006) 9.

<sup>272</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 11.

<sup>273</sup> Geldemhuys K 'Overcrowded Prisons – An unofficial death sentence?' (2017) 110 *Servamus* 15.



In 2017/2018 the average inmate population was 160 583,<sup>274</sup> a minor increase from 2016/2017 average of 160 280.<sup>275</sup> The approved bed space for the 2017/2018 year was 118 723,<sup>276</sup> a decrease from the 2016/2017 year's 119 134,<sup>277</sup> meaning that the correctional facilities were at 135% capacity during 2017/2018. Some correctional centres had occupancy of over 150% during 2016/2017.<sup>278</sup> This means that first, the average inmate population has been on a steady increase from 1995, despite a minor drop after 2002. Secondly, it means that despite the attempts of the State to increase the capacity of its correctional facilities, it has not been successful in reducing overcrowding.

Judge Bertelsmann said: 'It is no exaggeration to say that, if the SPCA were to cram as many animals into a cage as our correctional services are forced to cram prisoners into a single cell, the SPCA would be prosecuted for cruelty to animals.'<sup>279</sup> This paints a horrible picture of overcrowding in South African correctional facilities. It also implies that offenders in correctional centres are treated inhumanely. This is further supported by Judge Cameron, who visited Pollsmoor correctional centre in 2015 and pointed out that a number of toilets are blocked because the plumbing is overburdened.<sup>280</sup>

To illustrate how grave the situation is, attention must be drawn to the Pollsmoor Remand Detention Facility (herein after 'Pollsmoor Remand'). In December 2016 Pollsmoor Remand

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<sup>274</sup> DCS *Annual Report 2017/2018* (2018) 9.

<sup>275</sup> DCS *Annual Report 2016/2017* (2017) 24.

<sup>276</sup> DCS *Annual Report 2017/2018* (2018) 9.

<sup>277</sup> DCS *Annual Report 2016/2017* (2017) 24.

<sup>278</sup> DCS *Annual Report 2016/2017* (2017) 34.

<sup>279</sup> Staff Reporter 'Judge lashes out at SA's prison crisis' *Mail & Guardian* 12 February 2005 available at <https://mg.co.za/article/2005-02-12-judge-lashes-out-at-sas-prison-crisis> (accessed 20 April 2019).

<sup>280</sup> Cameron E *Report: Pollsmoor Correctional Centre – Remand Centre and Women's Centre* (2015) see pages 14, 16, 18 and 21.

had occupancy levels of more than 250%.<sup>281</sup> The facility was built to house 1619 offenders, but was housing 4066 in December 2016.<sup>282</sup> The Cape High Court ordered the Government of South Africa as well as the DCS to reduce the occupancy by at least 150% following legal action taken by Sonke Gender Justice and Lawyers for Human Rights.<sup>283</sup> The DCS acted swiftly and had reduced the occupancy by 161% as of 8 May 2017, resulting in the facility being at 92% capacity.<sup>284</sup> At first glance, the reduction in occupancy at Pollsmoor Remand appears to be positive. However, the way in which DCS addressed the overcrowding in Pollsmoor Remand was through a mass relocation of offenders to Free State and Northern Cape correctional centres.<sup>285</sup> This has resulted in offenders having to serve sentences far from home. As noted by Lewis, this would result in little to no family contact and that visits are an incentive for good behaviour.<sup>286</sup> It is also possible that the relocation to other correctional centres may cause or further contribute to overcrowding in those centres.

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<sup>281</sup> Sonke Gender Justice ‘How many remand detainees are there in South Africa and how many in Pollsmoor Remand specifically?’ available at <https://genderjustice.org.za/card/pollsmoor-remand-case-explained/how-many-remand-detainees-are-there-in-south-africa-and-how-many-in-pollsmoor-remand-specifically/> (accessed 5 May 2019).

<sup>282</sup> DCS ‘Correctional Services on reduced overcrowding in Pollsmoor prison – Overcrowding in Pollsmoor reduced by 90%’ available at <https://www.gov.za/speeches/overcrowding-pollsmoor-reduced-90-10-may-2017-0000> (accessed 16 May 2019).

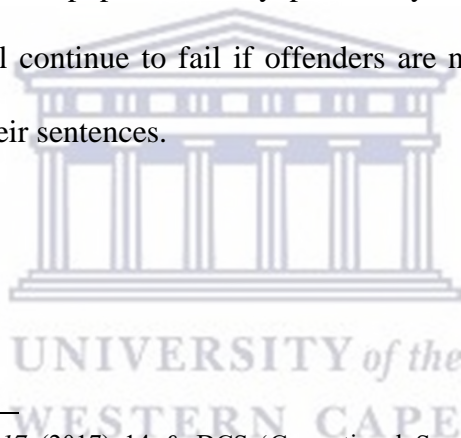
<sup>283</sup> *Sonke Gender Justice v Government of South Africa* unreported case no 24087/15 (23 February 2017).

<sup>284</sup> DCS ‘Correctional Services on reduced overcrowding in Pollsmoor prison – Overcrowding in Pollsmoor reduced by 90%’ available at <https://www.gov.za/speeches/overcrowding-pollsmoor-reduced-90-10-may-2017-0000> (accessed 16 May 2019).

<sup>285</sup> Lewis HP *The Prison Speaks: Men’s Voices/South African Jails* 2 ed (2017) 13.

<sup>286</sup> Lewis HP *The Prison Speaks: Men’s Voices/South African Jails* 2 ed (2017) 13.

The DCS have also attempted to address overcrowding nationally by increasing the bed space in correctional centres.<sup>287</sup> However, this approach in dealing with overcrowding can only be described as an ‘ineffective short-term solution.’<sup>288</sup> The creation of more bed space and even building more correctional centres would not only come at great costs to tax payers, but would also not solve the issue of overcrowding.<sup>289</sup> International experiences also shows that building more prisons will not solve the problem of overcrowding.<sup>290</sup> This is attributed to the fact that if the underlying issues causing overcrowding are not addressed then these new correctional centres would suffer the same fate as existing ones and overcrowding will continue to be an issue.<sup>291</sup> Thus, it is contended here that if the State were to effectively focus on and support OR, the prison population may potentially decrease as recidivism would decrease. However, OR will continue to fail if offenders are not properly prepared for life after prison while serving their sentences.



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<sup>287</sup> DCS *Annual Report 2016/2017* (2017) 14 & DCS ‘Correctional Services on reduced overcrowding in Pollsmoor prison – Overcrowding in Pollsmoor reduced by 90%’ available at <https://www.gov.za/speeches/overcrowding-pollsmoor-reduced-90-10-may-2017-0000> (accessed 16 May 2019).

<sup>288</sup> Geldemhuys K ‘Overcrowded Prisons – An unofficial death sentence?’ (2017) 110 *Servamus* 20.

<sup>289</sup> Geldemhuys K ‘Overcrowded Prisons – An unofficial death sentence?’ (2017) 110 *Servamus* 20 & JICS *Annual Report for the period 01 April 2015 to 31 March 2016* (2016) 50 & Muntingh L ‘The Prison System’ in Gould C (ed) *Criminal (in)justice in South Africa: a civil society perspective* (2009) 209.

<sup>290</sup> Tapscott C ‘Challenges to good prison governance in Africa’ in Sarkin J (ed) *Human Rights in African Prisons* (2008) 74.

<sup>291</sup> Some of the underlying issues causing overcrowding are the minimum sentencing legislation in South Africa, namely, the Criminal Law Amendment Act 105 of 1997, conditions of imprisonment which inhibit rehabilitation and the lack of support given to offenders upon their re-entry into society.

### 3.4.2. Ways in which overcrowding inhibits rehabilitation

It appears that offenders find it difficult to prepare for life on the outside while they are serving sentences of imprisonment. They are affected by overcrowding which is a major obstacle in the pursuit of successful rehabilitation and OR.<sup>292</sup> The DCS itself has acknowledged that overcrowding inhibits the effective implementation of its mandate and goal of rehabilitating offenders and achieving successful OR.<sup>293</sup> The JICS states that overcrowding coupled with staff shortages is one of the main issues in South African prisons.<sup>294</sup> This section will look at the impact overcrowding and its associated factors have on the rehabilitation process.

Prison gangs are more prevalent in prisons that are overcrowded and overcrowding makes it difficult to control or prevent gang activities.<sup>295</sup> Overcrowded prisons are also proven to experience more violence.<sup>296</sup> The notorious number gangs are said to control correctional facilities throughout South Africa and although other gangs exist, the number gangs are by far the largest.<sup>297</sup> It has been alleged that some members of the DCS are also members of the number gangs.<sup>298</sup>

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<sup>292</sup> Singh SB 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 4.

<sup>293</sup> DCS *Annual Report 2016/2017* (2017) 9.

<sup>294</sup> JICS *Annual Report for the period 01 April 2015 to 31 March 2016* (2016) 48.

<sup>295</sup> Bambeni L 'The role of government in combating recidivism of ex-offenders in South Africa' (2018) 111 *Servimus* 35.

<sup>296</sup> Geldemhuys K 'Overcrowded Prisons – An unofficial death sentence?' (2017) 110 *Servimus* 18.

<sup>297</sup> Dissel A 'Tracking Transformation in South African Prisons' (2002) 11 *Track Two* 10 & Gear S & Ngubeni K *Daai Ding: Sex, Sexual Violence and Coercion in Men's Prisons* (2002) 4 – 5 & Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 72.

<sup>298</sup> Mapasa M 'Art of Survival' 2006 available at <https://www.youtube.com/watch?v=63O0H2g8x00> (accessed 15 January 2019).

DCS members who are associated with gangs have the effect of leaving non-gang members (referred to as '*franse*' in prison) in the position where they have to choose between being preyed upon by gangs or joining a number gang for protection.<sup>299</sup> Regardless of the choice that is made, it ultimately makes rehabilitation an almost unattainable goal. To a large extent the number gangs control prison culture and assert their dominance by instilling fear in non-gang members through threats, exploitation, physical and sexual abuse.<sup>300</sup> The number gangs use coercion to recruit new members.<sup>301</sup> Prison gangs rely heavily on the use of rape to assert power over other inmates in prison.<sup>302</sup>

Hassine argues that rape has become a common practice in prison and the prevalence is exacerbated by overcrowding.<sup>303</sup> Correctional centres are 'high-risk settings for the sexual victimisation and rape of prisoners'.<sup>304</sup> In 2016, the UN Human Rights Committee expressed its concerns regarding *inter alia*, the amount of sexual violence which occurs in prisons in South Africa.<sup>305</sup> The number gangs allegedly threaten offenders who try to resist rape with a 'slow puncture' which is when an offender who is HIV positive rapes the offender to transfer

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<sup>299</sup> Muntingh L *Ex-prisoner's views on imprisonment and re-entry* (2009) 8.

<sup>300</sup> Gear S & Ngubeni K *Daai Ding: Sex, Sexual Violence and Coercion in Men's Prisons* (2002) 4 – 5.

<sup>301</sup> Gear S & Ngubeni K *Daai Ding: Sex, Sexual Violence and Coercion in Men's Prisons* (2002) 5.

<sup>302</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 83.

<sup>303</sup> Hassine V *Life Without Parole: Living in Prison Today* edited by Bernard TJ, McCleary R & Wright RA 2 ed (1999) 133 – 134. See also Nare P 'Rape is not an inevitable part of prison life. It is preventable' available at <https://www.witsjusticeproject.co.za/news-and-insights-category/sentenced-twice-over> (accessed 18 September 2019).

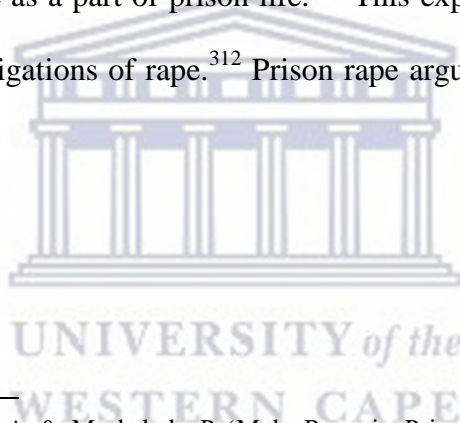
<sup>304</sup> Booyens K, Hesselink-Louw A & Mashabela P 'Male Rape in Prison: An Overview' (2004) 17 *Acta Criminologica* 1 & 7.

<sup>305</sup> Human Rights Committee *Concluding observations on the initial report of South Africa* (2016) concluding observation 28.

the virus.<sup>306</sup> In prison, rape is more about a display of power than for sexual pleasure.<sup>307</sup>

Victims of rape often experience post-traumatic stress disorders which lead to anxiety and depression and sometimes even results in suicide.<sup>308</sup> This clearly inhibits any rehabilitation efforts.

It has been claimed by Booyens *et al* that there is possible official involvement in prison rape through active participation or through tolerance by DCS officials.<sup>309</sup> The Jali Commission investigated cases where a warder raped a juvenile more than 11 times in Grootvlei Prison and another warder who took a juvenile to an older prisoner for sex.<sup>310</sup> There also appears to be a lack of concern with regard to preventing rapes from occurring in prison, and some officials appear to treat rape as a part of prison life.<sup>311</sup> This explains the lack of support and delay in dealing with investigations of rape.<sup>312</sup> Prison rape arguably increases the likelihood of the spread HIV.



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<sup>306</sup> Booyens K, Hesselink-Louw A & Mashabela P 'Male Rape in Prison: An Overview' (2004) 17 *Acta Criminologica* 7.

<sup>307</sup> Hassine V *Life Without Parole: Living in Prison Today* edited by Bernard TJ, McCleary R & Wright RA 2 ed (1999) 138 – 139.

<sup>308</sup> Booyens K, Hesselink-Louw A & Mashabela P 'Male Rape in Prison: An Overview' (2004) 17 *Acta Criminologica* 8.

<sup>309</sup> Booyens K, Hesselink-Louw A & Mashabela P 'Male Rape in Prison: An Overview' (2004) 17 *Acta Criminologica* 7.

<sup>310</sup> Booyens K, Hesselink-Louw A & Mashabela P 'Male Rape in Prison: An Overview' (2004) 17 *Acta Criminologica* 7.

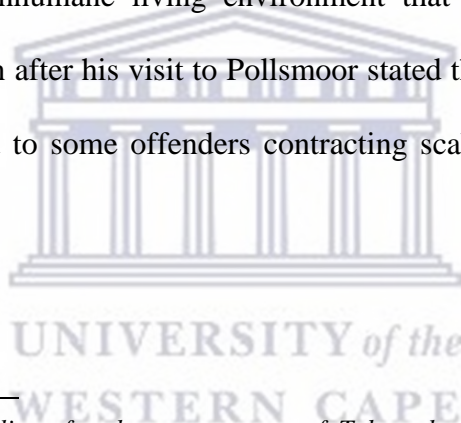
<sup>311</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 91.

<sup>312</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 85 – 86.



The spread of TB and HIV are common in South African correctional facilities,<sup>313</sup> and can be as a result of overcrowded prisons.<sup>314</sup> This was proven in *Lee v Minister of Correctional Services* where Dudley Lee, was detained from 1999 – 2004 during which he contracted TB due to the failure of the DCS to take reasonable preventative measures.<sup>315</sup> The Constitutional Court held that a prisoner's right to humane conditions of detention imposes a legal duty on the State to provide adequate healthcare services to all prisoners.<sup>316</sup> It was further held that the offender's right to dignity and to be treated humanely had been infringed.<sup>317</sup> As a result, the State was held delictually liable for its failure to take reasonable steps to protect Lee from the spread of TB.<sup>318</sup>

Overcrowding creates an inhumane living environment that infringes on the dignity of offenders.<sup>319</sup> Judge Cameron after his visit to Pollsmoor stated that insufficient hot water and a lack of clean bedding led to some offenders contracting scabies.<sup>320</sup> Bambeni argues that



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<sup>313</sup> Department of Health *Guidelines for the management of Tuberculosis, Human Immunodeficiency and Sexually-Transmitted Infections in Correctional facilities 2013* (2013) 12.

<sup>314</sup> Singh S 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 4.

<sup>315</sup> Blom O & Maodi W 'Only a matter of time before overcrowding in prisons flood the courts: constitutional law' (2013) 13 *Without Prejudice* 60.

<sup>316</sup> Blom O & Maodi W 'Only a matter of time before overcrowding in prisons flood the courts: constitutional law' (2013) 13 *Without Prejudice* 61.

<sup>317</sup> *Lee v Minister of Correctional Services* [2012] ZACC 30 para 62, 65 & 70.

<sup>318</sup> *Lee v Minister of Correctional Services* [2012] ZACC 30 para 77.

<sup>319</sup> JICS *Annual Report for the period 01 April 2015 to 31 March 2016* (2016) 48 – 49 & Bambeni L 'The role of government in combating recidivism of ex-offenders in South Africa' (2018) 111 *Servimus* 35.

<sup>320</sup> Cameron E *Report: Pollsmoor Correctional Centre – Remand Centre and Women's Centre* (2015) para 41.



inhumane prison conditions have the potential to create emotional trauma and recidivism among offenders.<sup>321</sup>

This is exacerbated by the lack of doctors in the employ of the DCS.<sup>322</sup> In March 2018 the DCS reported having only 10 medical practitioners and 886 professional nurses employed to care for all offenders (sentenced and unsentenced).<sup>323</sup> These employees are expected to provide medical treatment to all offenders (sentenced and unsentenced) in the care of the DCS. It is therefore not an understatement to say that the DCS lack the capacity to effectively treat all the offenders in its care. The number of human rights violations in South African correctional centres has resulted in a number of deaths of prisoners.<sup>324</sup> The UN Human Rights Committee said that the conditions in South African correctional facilities are not meeting the standards set by the Correctional Services Act.<sup>325</sup> Poor health conditions in prison arguably lead to an increased potential of premature death.

There have been a high number of both natural and unnatural deaths documented in South Africa's correctional facilities. The Heads of Correctional Centres are required to report all deaths to the Inspecting Judge.<sup>326</sup> Since 1999 – 2016 there have been over 500 reported natural deaths annually in correctional centres.<sup>327</sup> During 2017/2018, 61 unnatural deaths

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<sup>321</sup> Bambeni L 'The role of government in combating recidivism of ex-offenders in South Africa' (2018) 111 *Servimus* 34.

<sup>322</sup> DCS *Annual Report 2017/2018* (2018) 97.

<sup>323</sup> DCS *Annual Report 2017/2018* (2018) 97.

<sup>324</sup> Bambeni L 'The role of government in combating recidivism of ex-offenders in South Africa' (2018) 111 *Servimus* 35.

<sup>325</sup> Human Rights Committee *Concluding observations on the initial report of South Africa* (2016) concluding observations 28 - 31.

<sup>326</sup> Section 15 of the Correctional Services Act 111 of 1998.

<sup>327</sup> JICS *Annual Report for the period 01 April 2015 to 31 March 2016* (2016) 72.

were reported, 27 due to unknown causes, 25 as a result of suicide, eight due to inmate-on-inmate assault and one died because of burn wounds.<sup>328</sup> In 2006 the UN Committee against Torture critiqued South Africa due to the high number of deaths in its correctional facilities and by the apparent lack of investigations into alleged abuse of power by DCS officials.<sup>329</sup>

### 3.5. PRISON GOVERNANCE

In 2000 the State had lost control of the DCS, and in 2001 then President, Thabo Mbeki, established the Jali Commission of inquiry into corruption and maladministration in the DCS.<sup>330</sup> This report exposed human rights violations of offenders and corruption in the DCS.<sup>331</sup> Nearly 15 years after the Jali Commission report and still the human rights of offenders are violated and conditions of imprisonment remain appalling.<sup>332</sup> The DCS acknowledges that DCS officials are at the core of its functions.<sup>333</sup> Therefore it could be argued that a correctional facility cannot achieve its goal of rehabilitation if it is governed in a manner that does not promote the rehabilitation of offenders.

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<sup>328</sup> DCS *Annual Report 2017/2018* (2018) 55.

<sup>329</sup> Muntingh L 'The Prison System' in Gould C (ed) *Criminal (in)justice in South Africa: a civil society perspective* (2009) 208.

<sup>330</sup> Parliamentary Monitoring Group 'Audit of Department of Correctional Services' available at <http://www.pmg.org.za/minutes/20000413-audit-department-correctional-services> (accessed 26 May 2019).

<sup>331</sup> Commission of inquiry into alleged incidents of corruption, maladministration, violence or intimidation into the department of correctional services appointed by order of the president of the republic of South Africa in terms of proclamation no. 135 of 2001, as amended, final report, 2005 available at [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/061016jalireport\\_0.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/061016jalireport_0.pdf) (accessed 6 July 2018). See also Muntingh L 'The Prison System' in Gould C (ed) *Criminal (in)justice in South Africa: a civil society perspective* (2009) 207.

<sup>332</sup> Hopkins R 'Judge's damning report on Pollsmoor' *IOL* 4 September 2015 available at <https://www.iol.co.za/news/judges-damning-report-on-pollsmoor-1910556> (accessed 20 April 2019).

<sup>333</sup> DCS *Annual Report 2017/2018* (2018) 13.

The DCS has a great lack of and finds difficulty in retaining professional staff, which significantly reduces its capacity.<sup>334</sup> In March 2018 the DCS reported having 521 ‘educationists’, 79 ‘psychologists and vocational counsellors’ and 595 ‘social work and related professionals’ in its employ.<sup>335</sup> Without the capacity to achieve the set goals of imprisonment, these goals may arguably not be accomplished. The DCS employed 34 397 ‘custodial and security personnel’ which results in a large amount of custodial staff who may not be equipped to develop offenders in a manner that will promote their rehabilitation.

Correctional officials, as representatives of the State, must conduct their duties in a manner that respects the dignity and human rights of offenders.<sup>336</sup> In terms of administrative law, correctional officials are only allowed to act in a manner that is consistent with the Correctional Services Act, the regulations thereof and the Constitution.<sup>337</sup> If they go beyond the scope of their duty or act in a manner that violates the rights of offenders, then the State could be held accountable for the actions of such warders.<sup>338</sup>

Prison warders have the most contact with offenders in correctional facilities. They can therefore not be overlooked in any discussion regarding the rehabilitation of offenders. It has been noted that the warder-prisoner relationship is important in the pursuit for rehabilitation.<sup>339</sup> This could arguably mean that where there is no warder-offender relationship, or where such a relationship is strained, then it may impede the rehabilitation of

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<sup>334</sup> Muntingh L ‘The Prison System’ in Gould C (ed) *Criminal (in)justice in South Africa: a civil society perspective* (2009) 204 – 205 & 207.

<sup>335</sup> DCS *Annual Report 2017/2018* (2018) 97.

<sup>336</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 194.

<sup>337</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 243.

<sup>338</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 194.

<sup>339</sup> Lewis HP *The Prison Speaks: Men’s Voices/South African Jails* 2 ed (2017) 24.

the offender. The most frequent complaint from prisoners involves the mistreatment and lack of respect from warders.<sup>340</sup> It is possible that when offenders are treated with disrespect is negatively affects their attempts at rehabilitation and it could potentially produce hostility in the offender. Offenders aver that DCS officials could be more positive in the execution of their duties and should treat offenders fairly.<sup>341</sup>

The DCS are attempting to professionalise the role of custodial staff and are in the process of developing two new occupational qualifications which have been registered with the South African Qualifications Authority.<sup>342</sup> This is a step in the right direction for the DCS, however it could currently be suggested that some warders may be impeding the rehabilitation of offenders. It is reported that the average starting wage for a warder is around R9 000.<sup>343</sup> It is arguable that such low wages not only dissuades prospective warders, but could be a contributing factor to corruption by warders.<sup>344</sup>

In 2002 a video that was recorded by offenders with the head of prison at Grootvlei prison exposed how easy it was for them to purchase drugs and alcohol from a warder.<sup>345</sup> They also

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<sup>340</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 24 & Scott NC *Look before you Leap* (2010) 211 & Muntingh L *Ex-prisoner's views on imprisonment and re-entry* (2009) 10.

<sup>341</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 57.

<sup>342</sup> DCS *Annual Report 2017/2018* (2018) 13. These two occupational qualifications are: 'Offender Release and Placement Practitioner' and 'Correctional Officer'.

<sup>343</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 24.

<sup>344</sup> Pelizzo R et al 'Determinants of Bribery: Theory and Evidence from Sub-Saharan Africa' (2016) 28 *African Development Review* 229.

<sup>345</sup> McGreal C 'Secret film exposes South African jails: Warders trade in sex, drugs and weapons, inquiry told' *The Guardian* 27 July 2002 available at <https://www.theguardian.com/world/2002/jul/27/christmcmcgreal> (accessed on 22 July 2019).

purchased a firearm from a warder, which he willingly sold even after being informed that they intend to use the firearm in an escape attempt.<sup>346</sup> It further showed how a warder was paid to bring a juvenile to the cell for sex with an offender. The situation was so bad that the State had effectively lost control of the DCS.<sup>347</sup> Some of the alleged acts of corruption that were exposed under the Jali Commission included, *inter alia*, smuggling drugs and weapons by warders, humiliation of prisoners and wide scale nepotism.<sup>348</sup> There were even reports where offenders' food was sold by warders to other offenders.<sup>349</sup>

Although there has been some exposure of corruption in the DCS, it still appears to plague correctional centres. It is alleged that offenders and warders are still smuggling drugs and other contraband into correctional facilities.<sup>350</sup> In July 2014 five DCS officials were arrested on suspicion of facilitating gang culture in prison and smuggling drugs into Worcester Prison.<sup>351</sup> DCS national spokesperson Singabakho Nxumalo said that there have been instances where DCS officials have been caught attempting to smuggle contraband into

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<sup>346</sup> McGreal C 'Secret film exposes South African jails: Warders trade in sex, drugs and weapons, inquiry told' *The Guardian* 27 July 2002 available at <https://www.theguardian.com/world/2002/jul/27/chrimcmgreal> (accessed on 22 July 2019).

<sup>347</sup> McGreal C 'Secret film exposes South African jails: Warders trade in sex, drugs and weapons, inquiry told' *The Guardian* 27 July 2002 available at <https://www.theguardian.com/world/2002/jul/27/chrimcmgreal> (accessed on 22 July 2019). See video at SABC Digital News: Special Assignment available at <https://www.youtube.com/watch?v=tbberUWq-Pk> (accessed 15 March 2019).

<sup>348</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 25.

<sup>349</sup> Hesselink-Louw A, Joubert S & Maree A 'Criminological assessment of offenders: An analysis with the aim of promoting rehabilitation' (2003) 16 *Acta Criminologica* 93.

<sup>350</sup> Erasmus J 'Prison corruption taking us backwards' *Corruption Watch* 5 August 2014 available at <https://www.corruptionwatch.org.za/prison-corruption-taking-us-backwards/> (accessed 22 July 2019).

<sup>351</sup> Erasmus J 'Prison corruption taking us backwards' *Corruption Watch* 5 August 2014 available at <https://www.corruptionwatch.org.za/prison-corruption-taking-us-backwards/> (accessed 22 July 2019).

cells.<sup>352</sup> Petty corruption appears to still be happening in correctional facilities and warders who are not corrupt are said to be under pressure from those who are.<sup>353</sup>

According to Muntingh South Africa has a ‘culture of *de facto* impunity’ as it is rare that DCS officials are prosecuted or convicted.<sup>354</sup> In 2015/16, 34 correctional officials and 37 officials in 2016/17 were charged and found guilty of corrupt activities.<sup>355</sup> Considering that corruption is generally difficult to detect due to its secretive nature,<sup>356</sup> it could be speculated that the number of officials prosecuted for corruption is only a fraction of the total amount of officials involved in corruption. This leads us to question how well rehabilitation programmes run in conditions of imprisonment which appear to be plagued by corruption and gang activities.



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<sup>352</sup> Ngema T ‘KZN prisons: Corrupt warders accused of smuggling contraband’ *IOL* 10 January 2019 available at <https://www.iol.co.za/dailynews/news/kzn-prisons-corrupt-warders-accused-of-smuggling-contraband-18750302> (accessed 22 July 2019).

<sup>353</sup> Singh SB ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 12.

<sup>354</sup> Muntingh L ‘The Mandela Rules: A diplomatic success but will they lead to better care of SA prisoners?’ *thought leader: Mail & Guardian* 13 January 2016 available at <https://thoughtleader.co.za/lukasmuntingh/2016/01/13/mandela-rules-a-diplomatic-success-but-will-they-lead-to-better-care-of-sa-prisoners/> (accessed 7 September 2018).

<sup>355</sup> Etheridge J ‘2 officials arrested for allegedly helping 16 inmates escape from Sun City’ *news24* 19 April 2018 available at <https://www.news24.com/SouthAfrica/News/just-in-2-officials-arrested-for-allegedly-helping-16-inmates-escape-from-sun-city-20180419> (accessed 22 November 2018).

<sup>356</sup> Tshepo M ‘The Nexus between Corruption and Governance since the Dispensation of Democracy in South Africa: A Time Series Analysis’ available at [http://2015.essa.org.za/fullpaper/essa\\_2854.pdf](http://2015.essa.org.za/fullpaper/essa_2854.pdf) (accessed on 20 July 2019).



### 3.6. REHABILITATION IN SOUTH AFRICAN CORRECTIONAL CENTRES

Rehabilitation cannot be achieved in a single event.<sup>357</sup> For OR to be successful, rehabilitation programmes must be provided to offenders throughout his sentence and must continue when the offender re-enters the community.<sup>358</sup> However, in 2016 Singh argued that approximately ‘10 – 15% of sentenced offenders have regular access to rehabilitation programmes.’<sup>359</sup> The importance of physical exercise and training should not be overlooked in the development of offenders as it has shown to reduce stress and control aggression.<sup>360</sup> The rehabilitation programmes offered in correctional centres will now be discussed.

There is a great need for civil society to interact with offenders while they are imprisoned as this could potentially counter institutionalisation as offenders will have constant contact with law abiding citizens.<sup>361</sup> This need is also great due to the lack of capacity from the DCS as well as its lack of professional staff.<sup>362</sup> The DCS works in partnerships with NGOs to deliver rehabilitation and reintegration services to offenders.<sup>363</sup> The number of organisations working with offenders inside and outside of correctional centres in South Africa is unknown. Some of these NGOs and their rehabilitation programmes will now be discussed.

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<sup>357</sup> Cilliers C & Smit J ‘Offender rehabilitation in the South African Correctional System: Myth or reality?’ (2007) *Acta Criminologica* 85.

<sup>358</sup> Singh SB ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 4.

<sup>359</sup> Singh SB ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 7.

<sup>360</sup> Du Preez N & Luyt W ‘Curriculum and Methodology in relation to Development Programmes in Prisons’ (2004) 17 *Acta Criminologica* 31.

<sup>361</sup> Luyt W, Jonker J & Bruyns H *Unit management & legal principles in prisons* 3 ed (2010) 292.

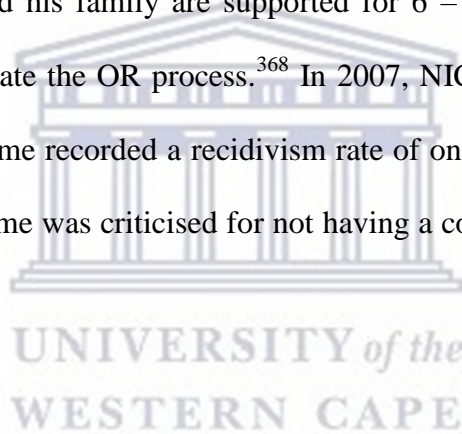
<sup>362</sup> Herbig FJW & Hesselink AE ‘Seeing the Person, Not Just the Number: Needs-based rehabilitation of offenders in South African prisons’ (2012) 41 *SA Crime Quarterly* 30.

<sup>363</sup> Singh SB ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 4.



One of these NGOs is NICRO and one of its OR programmes is the ‘NICRO, Help I am free!’ programme which supports offenders in their final year of imprisonment and in their year of release.<sup>364</sup> This programme uses theatre as a tool of empowerment for offenders and provides life skills to help offenders become law abiding citizens.<sup>365</sup> A positive tenet of this programme is that it continues to provide offenders with support after their release from imprisonment which arguably increases their potential for OR.

Another OR programme run by NICRO is the ‘Tough Enough Programme’ which is aimed at offenders with less than six months left of their sentence.<sup>366</sup> This programme not only involves offenders, but also the families of offenders in an attempt to facilitate a smooth OR process.<sup>367</sup> The offender and his family are supported for 6 – 9 months after release from imprisonment to help facilitate the OR process.<sup>368</sup> In 2007, NICRO held that participants in the Tough Enough Programme recorded a recidivism rate of only 20%.<sup>369</sup> However, in 2012 the Tough Enough Programme was criticised for not having a comprehensive plan to address



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<sup>364</sup> NICRO *Annual Report 2016/2017* (2017) 4.

<sup>365</sup> NICRO *Annual Report 2016/2017* (2017) 4.

<sup>366</sup> Singh SB ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 5.

<sup>367</sup> Singh SB ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 5.

<sup>368</sup> Ngabonziza O & Singh S ‘Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme’ (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 88.

<sup>369</sup> Ngabonziza O & Singh S ‘Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme’ (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 88.

the needs of offenders such as ‘employment, accommodation, drug abuse and alcohol and mental health.’<sup>370</sup>

The ‘My Path Programme’ is run by an NGO named Khulisa, and is aimed at correcting offending behaviour and personal development.<sup>371</sup> The programme is targeted at offenders who have two or less years remaining on their sentences in hopes of preparing them for life after prison.<sup>372</sup> Khulisa, unlike the NICRO Tough Enough Programme, engages potential employers in an attempt to create employment opportunities available to offenders upon their release.<sup>373</sup> This could potentially be crucial as ex-offenders report finding difficulty in securing employment after their release from imprisonment.<sup>374</sup>

The DCS itself also offers rehabilitation programmes to offenders in accordance with their correctional sentence plans. The Correctional Services Act only makes provision for offenders sentenced to more than 24 months imprisonment to be afforded correctional sentence plans.<sup>375</sup> Legislation therefore does not prohibit cases where correctional sentence plans are not provided to offenders who are sentenced for less than 24 months. The sentence plan is designed to provide offenders with treatment based on their specific needs.<sup>376</sup> Therefore, offenders without a sentence plan arguably receive programmes which may not cater to their individual needs which may render these programmes useless to the offender.

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<sup>370</sup> Ngabonziza O & Singh S ‘Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme’ (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 93.

<sup>371</sup> Singh SB ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 5.

<sup>372</sup> Singh SB ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 5.

<sup>373</sup> Singh SB ‘Offender Rehabilitation and Reintegration: A South African Perspective’ (2016) 46 *J Soc Sci* 5.

<sup>374</sup> Scott NC *Look before you Leap* (2010) 280.

<sup>375</sup> S 38 of the Correctional Services Act 111 of 1998.

<sup>376</sup> S 38(1A) Correctional Services Act 111 of 1998.

However, the DCS attempts to go beyond their legislative requirements by committing itself to providing correctional sentence plans to all offenders.<sup>377</sup> Notwithstanding, the legislation is arguably lacking by not making the provision of sentence plans to all sentenced offenders, a hard obligation as individualised treatment is essential for effective rehabilitation.

The DCS claims to have placed 86 518 (82%) sentenced offenders in various rehabilitation programmes during 2017/2018.<sup>378</sup> However, further information is not provided on the extent or duration of the offenders' participation in these programmes nor the content or scope of the programmes. As noted above if programmes are once-off, they are unlikely to achieve rehabilitation. Dissel opines that many prisons do not have the facilities to run these programmes due to space constraints which are as a result of overcrowding.<sup>379</sup> Although the White Paper envisages individual correctional sentence plans and needs-based rehabilitation for offenders, individualised treatment of offenders does not appear to be the norm.<sup>380</sup> This is due to the lack of capacity and lack of professional staff in the employ of the DCS. In 2012 it was argued that a single social worker may have a case load in excess of 3000 offenders.<sup>381</sup> There is no recent information which indicates whether or not the individual social worker caseloads have improved.

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<sup>377</sup> DCS *White Paper on Corrections in South Africa* (2004) para 9.7. See also DCS *White Paper on Corrections in South Africa* (2004) para 9.7.1 which expressly uses the words 'addressing the unique needs of every single offender.'

<sup>378</sup> DCS *Annual Report 2017/2018* (2018) 8.

<sup>379</sup> Dissel A 'Tracking Transformation in South African Prisons' (2002) 11 *Track Two* 13.

<sup>380</sup> Herbig FJW & Hesselink AE 'Seeing the Person, Not Just the Number: Needs-based rehabilitation of offenders in South African prisons' (2012) 41 *SA Crime Quarterly* 30.

<sup>381</sup> Herbig FJW & Hesselink AE 'Seeing the Person, Not Just the Number: Needs-based rehabilitation of offenders in South African prisons' (2012) 41 *SA Crime Quarterly* 30.

It is essential that rehabilitation programmes are accompanied with educational training programmes which could in and of itself be viewed as a rehabilitation programme.

### 3.6.1. The education of offenders

Education is crucial to rehabilitation as it lays the foundation upon which other developmental programmes can build.<sup>382</sup> The White Paper recognises that the right to education is not curtailed by imprisonment.<sup>383</sup> Khwela argues that educating offenders results in the decrease of recidivism.<sup>384</sup> Research conducted in the United States of America also proves that education can be a determining factor in the reduction of recidivism.<sup>385</sup> The reality is that there are a lack of facilities in which educational programmes can operate as well as a lack of staff capacity by the DCS as discussed earlier.

The DCS makes Adult Basic Education Training programmes from level 1 – 4 as well as mainstream education from grade 1 – 9 freely available to sentenced adult offenders.<sup>386</sup> Offenders also have access to tertiary education, but have to pay for it themselves.<sup>387</sup> The JICS noted that only 46% of the correctional centres visited during the 2015/2016 year had

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<sup>382</sup> Du Preez N & Luyt W ‘Curriculation and Methodology in relation to Development Programmes in Prisons’ (2004) 17 *Acta Criminologica* 25.

<sup>383</sup> DCS *White Paper on Corrections in South Africa* (2004) para 9.9.1.

<sup>384</sup> Khwela MN ‘Effects of Incarceration on Recidivism in South Africa’ (2015) 50 *Journal of Public Administration* 409.

<sup>385</sup> *Pretorius and Others v Minister of Justice and Correctional Services and Others* 2018 (2) SACR 501 (GP) at para 27.

<sup>386</sup> Du Preez N & Luyt W ‘Curriculation and Methodology in relation to Development Programmes in Prisons’ (2004) 17 *Acta Criminologica* 26.

<sup>387</sup> Du Preez N & Luyt W ‘Curriculation and Methodology in relation to Development Programmes in Prisons’ (2004) 17 *Acta Criminologica* 26.

permanently employed educators.<sup>388</sup> In 2014, the ratio of offenders to educators was 227:1.<sup>389</sup> This is clearly insufficient to provide quality educational services to all offenders. Consequently, though the Correctional Services Act is promoting rehabilitation through education, it may not be achieving the best results due to an enormous enforcement deficit. Assistance could potentially be sought from the Department of Basic Education and the Department of Higher Education and Training if the State intends to fully comply with its legislative mandate.<sup>390</sup>

During 2017/2018 the DCS reported that approximately 10 996 offenders participated in the 'Adult Education Training and Further Education Training programmes.'<sup>391</sup> During the same period 142 out of 185 learners passed Grade 12.<sup>392</sup> SASSETA also provided training to 500 offenders on accredited skills such as tiling and agriculture and UNISA provided education programmes to 43 offenders during 2017/2018.<sup>393</sup> These statistics suggests that offenders are involved in educational and vocational training programmes. It could only be assumed that if there were more facilities available and the DCS had a greater capacity, especially in professional skills, then more offenders would be accessing the programmes.

In *Pretorius and Others v Minister of Justice and Correctional Services and Others*, Swanepoel J found prison policy that prohibited the use of personal laptops in the prison cell

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<sup>388</sup> JICS *Annual Report for the period 01 April 2015 to 31 March 2016* (2016) 53.

<sup>389</sup> Singh SB 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 8.

<sup>390</sup> Section 41 of the Correctional Services Act 111 of 1998.

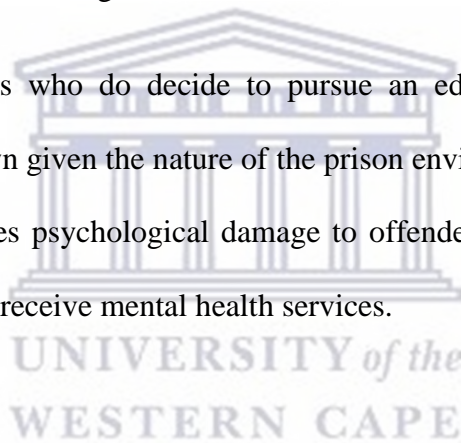
<sup>391</sup> DCS *Annual Report 2017/2018* (2018) 10.

<sup>392</sup> DCS *Annual Report 2017/2018* (2018) 10.

<sup>393</sup> DCS *Annual Report 2017/2018* (2018) 13.

for study purposes to be unfairly discriminatory.<sup>394</sup> These offenders were registered for further education programmes.<sup>395</sup> Swanepoel J further remarked: ‘Had I been asked to declare the policy inconsistent with the Constitution, I may well have done so.’<sup>396</sup> This clearly indicates that the judiciary recognises the right to education of offenders. It also suggests that the courts view education as an important factor in the rehabilitation of offenders and believe that their education should be supported and facilitated when reasonable to do so. Swanepoel J concurred with the remark made in *Hennie and Others v Minister of Correctional Services and Others*,<sup>397</sup> that: ‘Research shows that there is an inverse relation between knowledge, culture and crime. The greater the knowledge, culture and access to education, the less the crime.’<sup>398</sup> This implies that educating the nation is in itself a crime prevention technique.

It is possible that offenders who do decide to pursue an education qualification find it difficult to study on their own given the nature of the prison environment. This is exacerbated because imprisonment causes psychological damage to offenders.<sup>399</sup> As a result it is of the utmost importance that they receive mental health services.



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<sup>394</sup> *Pretorius and Others v Minister of Justice and Correctional Services and Others* 2018 (2) SACR 501 (GP) at para 32-44.

<sup>395</sup> *Pretorius and Others v Minister of Justice and Correctional Services and Others* 2018 (2) SACR 501 (GP) at para 32-44.

<sup>396</sup> *Pretorius and Others v Minister of Justice and Correctional Services and Others* 2018 (2) SACR 501 (GP) at para 42.

<sup>397</sup> *Hennie and Others v Minister of Correctional Services and Others* unreported case no 729/2015 (7 May 2015).

<sup>398</sup> *Hennie and Others v Minister of Correctional Services and Others* unreported case no 729/2015 (7 May 2015) para 40.

<sup>399</sup> Muntingh L *After Prison: A Case for Offender Reintegration* (2001) 6.



### 3.6.2. The provision of psychotherapy to offenders

The DCS employed 60 psychologists in 2016 and 79 psychologists in 2018.<sup>400</sup> The main purpose of the psychologist is to assess, diagnose and treat sentenced offenders.<sup>401</sup> The DCS acknowledges that it is highly unlikely that psychologists would be able to provide adequate mental healthcare to all offenders.<sup>402</sup> The lack of such services results in the psychologists having to prioritise certain categories of offenders for treatment. These categories include *inter alia*, suicide risks, court referrals, aggressive and sexual offenders.<sup>403</sup> If an offender falls outside all these prioritised categories, it is unlikely that he will ever receive psychological treatment while imprisoned. The absence of psychological treatment to all offenders is arguably a significant absence in the pursuit for rehabilitation as the prison environment causes various types of stresses.<sup>404</sup> Additionally, many prisoners are affected by social problems and come from dysfunctional families as well as indigent communities.

In the case of *Minister of Justice v Hofmeyr* it was held that the right to bodily integrity was inclusive of a mental element which arguably includes the psychological well-being of the offender.<sup>405</sup> Long-term idleness and isolation has been argued to cause negative

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<sup>400</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 24 & DCS *Annual Report 2017/2018* (2018) 97.

<sup>401</sup> DCS 'Psychological Services' available at [http://www.dcs.gov.za/?page\\_id=319](http://www.dcs.gov.za/?page_id=319) (accessed 18 May 2019).

<sup>402</sup> DCS 'Psychological Services' available at [http://www.dcs.gov.za/?page\\_id=319](http://www.dcs.gov.za/?page_id=319) (accessed 18 May 2019).

<sup>403</sup> DCS 'Psychological Services' available at [http://www.dcs.gov.za/?page\\_id=319](http://www.dcs.gov.za/?page_id=319) (accessed 18 May 2019).

<sup>404</sup> Alpert GP 'Collective Violence Behind Bars' in Riedel M & Vales PA (eds) *Treating the Offender: Problems and issues* (1977) 22.

<sup>405</sup> *Minister of Justice v Hofmeyr* [1993] 2 ALL SA 232 (A) 243 & 248.



psychological effects on offenders.<sup>406</sup> South African correctional facilities are infamous for the idleness experienced by offenders.<sup>407</sup> This idleness not only causes psychological damage,<sup>408</sup> but may also decrease the self-sufficiency of offenders as their lifestyles are largely regulated by the prison. Some offenders become institutionalised and become so dependent on the prison that they cannot envisage a life without it.<sup>409</sup> Some offenders may have undiagnosed and untreated mental disorders prior to being incarcerated.<sup>410</sup> These mental disorders consequently become more severe as mental health treatment is extremely limited in prison.<sup>411</sup> Negative psychological effects caused by imprisonment clearly inhibit rehabilitation.

In 2008, Dissel noted that over 70% of offenders suffer from mental health issues.<sup>412</sup> Mdakane opines that the most common health issues in prison include ‘depression, anxiety and post-traumatic stress disorder.’<sup>413</sup> Overcrowded prisons create environments related to psychological distress.<sup>414</sup> It has also been stated that mental disorders could cause premature

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<sup>406</sup> Ngabonziza O & Singh S ‘Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme’ (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 92.

<sup>407</sup> Muntingh L *Ex-prisoner’s views on imprisonment and re-entry* (2009) 8.

<sup>408</sup> Mdakane M ‘Mental Health Care in Prisons and Beyond’ (2019) 6 *Mental Health Matters* 29.

<sup>409</sup> Ngabonziza O & Singh S ‘Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme’ (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 92.

<sup>410</sup> Mdakane M ‘Mental Health Care in Prisons and Beyond’ (2019) 6 *Mental Health Matters* 30.

<sup>411</sup> Mdakane M ‘Mental Health Care in Prisons and Beyond’ (2019) 6 *Mental Health Matters* 30.

<sup>412</sup> Dissel A ‘Rehabilitation and reintegration in African prisons’ in Sarkin J (ed) *Human Rights in African Prisons* (2008) 158.

<sup>413</sup> Mdakane M ‘Mental Health Care in Prisons and Beyond’ (2019) 6 *Mental Health Matters* 29.

<sup>414</sup> Mdakane M ‘Mental Health Care in Prisons and Beyond’ (2019) 6 *Mental Health Matters* 29.

death in individuals.<sup>415</sup> A link between suicide and the absence of mental healthcare in prisons has been alleged.<sup>416</sup> This would explain the high number of deaths (natural and unnatural) experienced annually in correctional facilities.<sup>417</sup>

Attempts at rehabilitation in correctional centres are therefore filled with obstacles and difficulties. The State should perhaps consider other jurisdictions where rehabilitation appears to work in the correctional centre to draw knowledge which it can use to improve its current prison system.

### 3.7. NORWAY AND THE PRINCIPLE OF NORMALITY

Norwegian penology is referred to as it has OR at its core,<sup>418</sup> and recorded a recidivism rate of only 20% in 2018.<sup>419</sup> Though the context is very different to South Africa, there may be some value in noting what works regarding OR.

In 2010, Norway completed the construction of Halden Prison.<sup>420</sup> Halden prison is often referred to as the ‘world’s most humane’ correctional facility.<sup>421</sup> This is largely thanks to the

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<sup>415</sup> Roberts LW et al ‘Premature Mortality Among People with Mental Illness: Advocacy in Academic Psychiatry’ (2017) 41 *Acad Psychiatry* 441 – 443.

<sup>416</sup> Benatar S ‘The state of our prisons and what this reveals about our society’ (2014) 104 *SAMJ* 614.

<sup>417</sup> See above fn 327 & fn 328.

<sup>418</sup> Labutta E ‘The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice’ (2017) 31 *Emory International Law Review* 345.

<sup>419</sup> Bagaric M, Hunter D & Wolf G ‘Technological Incarceration and the End of the Prison Crisis’ (2018) 108 *Journal of Criminal Law & Criminology* 128.

<sup>420</sup> Samson L ‘Can the architecture of a prison contribute to the rehabilitation of its inmates?’ *Design Indaba* 29 April 2019 available at <https://www.designindaba.com/articles/creative-work/can-architecture-prison-contribute-rehabilitation-its-inmates> (accessed 5 July 2019).

principle of normality (or normalisation) applied in the correctional facility,<sup>422</sup> which has been incorporated in Nordic countries since the 1970s.<sup>423</sup> The principle of normality requires that the sentence of imprisonment should be aimed at reintegration.<sup>424</sup> The principle further envisages that imprisonment should as far as possible resemble life in the community to prevent physical and mental deterioration.<sup>425</sup> This is supported by the Nelson Mandela rules as discussed in chapter 2.<sup>426</sup> Therefore, once the offender is sentenced to imprisonment the only focus is on rehabilitation and equipping the offender with skills to promote reintegration. Offenders are seen as members of society during their sentence of imprisonment, and are treated as such.<sup>427</sup> A sentence of imprisonment is viewed only as the limitation of freedom and offenders should not suffer any further undue harm.<sup>428</sup> This approach is also consistent

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<sup>421</sup> The Story Institute ‘Inside Norway’s Halden Prison’ available at <http://www.thestoryinstitute.com/halden> (accessed 20 July 2019).

<sup>422</sup> Labutta E ‘The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice’ (2017) 31 *Emory International Law Review* 345.

<sup>423</sup> Engbo HJ ‘Normalisation in Nordic Prisons – From a Prison Governor’s Perspective’ in Smith PS & Ugelvik T (eds) *Scandinavian Penal History, Culture and Prison Practice: Embraced by the Welfare State?* (2017) 327.

<sup>424</sup> Labutta E ‘The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice’ (2017) 31 *Emory International Law Review* 345.

<sup>425</sup> Fransen P ‘The Rise of the Open Prisons and the Breakthrough of the Principle of Normalisation from the 1930s Until Today’ in Smith PS & Ugelvik T (eds) *Scandinavian Penal History, Culture and Prison Practice: Embraced by the Welfare State?* (2017) 85 – 86.

<sup>426</sup> Rule 5 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>427</sup> Labutta E ‘The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice’ (2017) 31 *Emory International Law Review* 347 – 348.

<sup>428</sup> Bagaric M, Hunter D & Wolf G ‘Technological Incarceration and the End of the Prison Crisis’ (2018) 108 *Journal of Criminal Law & Criminology* 128 – 129.

with the residuum principle in South Africa. Halden prison in Norway is one of the best examples of these principles in practice.<sup>429</sup>

Halden was designed with the rehabilitation in mind,<sup>430</sup> which is evident from the unbarred windows,<sup>431</sup> and cells which are fitted with televisions and a fridge.<sup>432</sup> Halden even has a grocery store where offenders purchase goods with money earned from prison jobs.<sup>433</sup> Guards often socialise with offenders and create an environment which arguably makes the offender feel as an equal as opposed to less of a person because of the crime he has committed.<sup>434</sup> Opponents to rehabilitation and reintegration would potentially argue that these conditions are too luxurious and expensive for people who have transgressed the law. However, with Norway recording a recidivism rate of 20% in 2018, the results speak for themselves.

South African prisons are overcrowded and house offenders in conditions that infringe on their dignity. This has not yielded any positive results with regards to reducing recidivism. There is a vast difference in the way that offenders are imprisoned in South Africa and in

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<sup>429</sup> Labutta E 'The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice' (2017) 31 *Emory International Law Review* 345.

<sup>430</sup> Samson L 'Can the architecture of a prison contribute to the rehabilitation of its inmates?' *Design Indaba* 29 April 2019 available at <https://www.designindaba.com/articles/creative-work/can-architecture-prison-contribute-rehabilitation-its-inmates> (accessed 5 July 2019).

<sup>431</sup> Bagaric M, Hunter D & Wolf G 'Technological Incarceration and the End of the Prison Crisis' (2018) 108 *Journal of Criminal Law & Criminology* 129.

<sup>432</sup> The Story Institute 'Inside Norway's Halden Prison' available at <http://www.thestoryinstitute.com/halden> (accessed 20 July 2019).

<sup>433</sup> The Story Institute 'Inside Norway's Halden Prison' available at <http://www.thestoryinstitute.com/halden> (accessed 20 July 2019).

<sup>434</sup> The Story Institute 'Inside Norway's Halden Prison' available at <http://www.thestoryinstitute.com/halden> (accessed 20 July 2019).

Norway. Perhaps it is time for South Africa to learn from Norway and have a paradigm shift in the way that correctional facilities are run. It is by no means implied that South Africa should provide offenders with the amenities that are available in Halden prison. It is also acknowledged that simply importing the Norwegian philosophy in South Africa may not work given the different socio-economic standards. However, there are valuable lessons to be learned from Norwegian penology. The ethos of human dignity and equality, which is also the bases of our Constitution, is perhaps the primary values to be adopted with earnesty in the South African correctional System.

### 3.8. CONCLUSION

This chapter has shown that the general attitude displayed by society is not one which supports rehabilitation. It was also shown that the assessments conducted upon the offender's admission to the correctional centre may not be adequate. It was further established that prisons are dehumanising and increases an individual's potential for recidivism.<sup>435</sup> Further, it was illustrated that prisons in South Africa do not rehabilitate, and that they contribute to more criminality. Although the DCS finds it difficult in providing rehabilitation and OR services to offenders due to overcrowding, this cannot be said to be an absolute excuse for its failure to rehabilitate offenders. Important ideas from Norwegian Penology was discussed which the State could draw knowledge from to improve its pursuit of rehabilitation. Some aspects of the principle of normality may very well be incorporated into South Africa's correctional system. As such it must be concluded that correctional facilities in South Africa

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<sup>435</sup> Padayachee V 'Offender Reintegration – A restorative approach to crime in South Africa' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 15.

do not properly prepare offenders for life after prison,<sup>436</sup> despite the aspirations of the Correctional Services Act and the White Paper on Corrections.



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<sup>436</sup> Ngabonziza O & Singh S 'Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme' (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 90.

## CHAPTER 4

### OFFENDER REINTEGRATION: LIFE AFTER IMPRISONMENT

#### 4.1. INTRODUCTION

The DCS admit that facilitating OR is part of its mandate,<sup>437</sup> yet the only post-release services provided by the State are probation and parole. Many offenders express a need for quality post-release support services.<sup>438</sup> The previous chapter shows that any attempt made to rehabilitate the offender while in prison may largely be impeded by the prison conditions in South Africa. Given the current system of imprisonment in South Africa, there is a dire need to assist offenders to reintegrate into society. Thus post-release support is crucial so that offenders may be equipped with skills to promote their self-sufficiency, their personal development and reduce recidivism. One of the goals of the DCS and the purpose of the correctional system is to protect and create a safer society.<sup>439</sup> The State must thus commit itself to the reduction of recidivism.

This chapter aims to discuss some of the issues that offenders are faced with upon their release. It is acknowledged that offenders experience a range a difficulties after their release, however, this discussion will be limited to some of the issues that are most commonly experienced by offenders. This chapter will further endeavour to look at what support is provided to help offenders adjust to life after prison. It will further analyse issues in the community which may increase the likelihood of recidivism. This chapter will also consider some NGOs who work with offenders after prison and how they attempt to prevent the offender from reoffending. It further aims to investigate whether investing in OR may be more economical than our current approach to rehabilitation.

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<sup>437</sup> DCS *Annual Report 2016/2017* (2017) 9.

<sup>438</sup> Muntingh L *Ex-prisoner's views on imprisonment and re-entry* (2009) 23.

<sup>439</sup> DCS *Annual Report 2017/2018* (2018) 12 & Section 2 of the Correctional Services Act 111 of 1998.



## 4.2. RELEASE FROM IMPRISONMENT: THE TRANSITION PHASE

Statistics show that for the period 1994/95 to 2010/11, the average annual amount of sentenced offenders released were 16 000 in the Western Cape and 14 000 in Gauteng respectively.<sup>440</sup> It was shown that 65% of these releases were offenders who were sentenced to imprisonment for 24 months or less.<sup>441</sup> This means that offenders are being sentenced for short periods, when non-custodial sentences could arguably have been pursued. This then results in large amounts of persons being exposed to harsh conditions of imprisonment which may make them more prone to violence and criminal conduct.<sup>442</sup> Research indicates that offenders who serve custodial sentences are more likely to reoffend than offenders who served non-custodial sentences.<sup>443</sup>

More than 90% of offenders who are sentenced to imprisonment will be released back into the community.<sup>444</sup> In 2008 it was found that nationally, approximately 5000 sentenced offenders are released monthly.<sup>445</sup> In 2016 approximately 30 000 offenders (sentenced and unsentenced) are released every month.<sup>446</sup> Given the high rate of recidivism most offenders

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<sup>440</sup> Muntingh L & Naude J *Community safety, offender re-entry and local government* (2013) 13.

<sup>441</sup> Muntingh L & Naude J *Community safety, offender re-entry and local government* (2013) 14 & 17.

<sup>442</sup> Hassine V *Life Without Parole: Living in Prison Today* edited by Bernard TJ, McCleary R & Wright RA 2<sup>ed</sup> (1999) 10. See also Ngabonziza O & Singh S 'Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme' (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 90.

<sup>443</sup> Harding DJ et al 'Short and long-term effects of imprisonment on future felony convictions and prison admissions' (2017) 114 *PNAS* 11106.

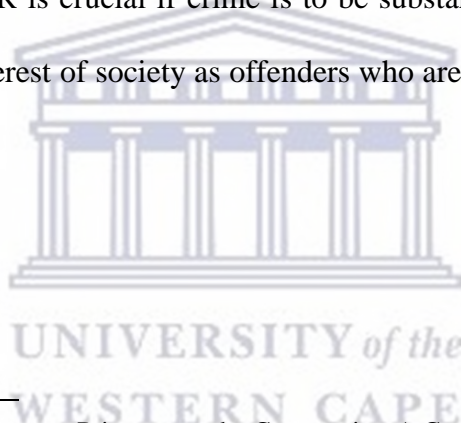
<sup>444</sup> Singh S 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 8.

<sup>445</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 46.

<sup>446</sup> Singh SB 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 4.

who are released from prison are not rehabilitated and are likely to reoffend.<sup>447</sup> With such large amounts of individuals circulating through the prison system, it is essential that they receive post-release support to undo the harmful effects of imprisonment as discussed in the previous chapter.<sup>448</sup>

During the period of April 2017 to March 2018, 20 336 people were murdered in South Africa.<sup>449</sup> In 2018 it was also reported that certain areas in South Africa have a murder rate of more than 100 per 100 000 of the population, which is higher than some war zones.<sup>450</sup> The failure of OR often results in recidivism.<sup>451</sup> By implication this means that if OR were to be more successful; the rate of recidivism and the amount of crimes committed could possibly also decrease. Successful OR is crucial if crime is to be substantially reduced.<sup>452</sup> Therefore, investing in OR is in the interest of society as offenders who are not successfully reintegrated



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<sup>447</sup> Khwela MN 'A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa' (2014) 1 *Athens Journal of Social Sciences* 148.

<sup>448</sup> See above para 3.4 of chapter 3.

<sup>449</sup> Businessstech 'South Africa is deploying the army to fight crime – here's how the murder rate compares to an actual war zone' available at <https://businesstech.co.za/news/government/328767/south-africa-is-deploying-the-army-to-fight-crime-heres-how-the-murder-rate-compares-to-an-actual-war-zone/> (accessed 14 July 2019).

<sup>450</sup> Businessstech 'South Africa is deploying the army to fight crime – here's how the murder rate compares to an actual war zone' available at <https://businesstech.co.za/news/government/328767/south-africa-is-deploying-the-army-to-fight-crime-heres-how-the-murder-rate-compares-to-an-actual-war-zone/> (accessed 14 July 2019).

<sup>451</sup> NRR 'Welcome to the Network on Reducing Re-offending' available at <http://www.nrr.org.za/index> (accessed 20 March 2019).

<sup>452</sup> Muntingh L *After Prison: A Case for Offender Reintegration* (2001) 3.

will likely return to crime.<sup>453</sup> As such, OR must be viewed as a legitimate way of reducing crime.<sup>454</sup>

Offenders have to adjust to a new lifestyle while incarcerated,<sup>455</sup> and the freedoms that they are faced with upon release can sometimes be terrifying.<sup>456</sup> Upon release offenders are expected to adjust to society which may be very different from the society which they once knew because of how fast modern society develops.<sup>457</sup> It has also been noted that offenders, depending on the length of their sentence, may experience difficulty in recalling societal rules.<sup>458</sup> These offenders are then expected to be equipped with the necessary skills to live a productive and crime-free life.<sup>459</sup> However, the reality is that upon release many offenders do not possess these skills, and those who do need support in putting these skills into practice. It

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<sup>453</sup> Muntingh L *After Prison: A Case for Offender Reintegration* (2001) 6 – 7.

<sup>454</sup> Muntingh L *After Prison: A Case for Offender Reintegration* (2001) 4.

<sup>455</sup> Ngabonziza O & Singh S 'Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme' (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 92.

<sup>456</sup> Hlavka H, Wheelock D & Jones R 'Exoffender Accounts of Successful Reentry from Prison' (2015) 54 *Journal of Offender Rehabilitation* 407 & Tomasic R & Dobinson I *The Failure of Imprisonment: An Australian Perspective* (1979) 3.

<sup>457</sup> Richards SC & Jones RS 'Beating the perpetual incarceration machine: overcoming structural impediments to re-entry' in Maruna S & Immarigeon R (eds) *After Crime and Punishment: Pathways to offender reintegration* (2004) 203.

<sup>458</sup> Richards SC & Jones RS 'Beating the perpetual incarceration machine: overcoming structural impediments to re-entry' in Maruna S & Immarigeon R (eds) *After Crime and Punishment: Pathways to offender reintegration* (2004) 203.

<sup>459</sup> Examples of these skills include anger management skills, educational and vocational skills and employment skills.

is arguable that the State should assist offenders in unlearning bad habits which they may have acquired while imprisoned to contribute to a safe society.<sup>460</sup>

Some ex-offenders argue that the DCS rehabilitation programmes which they received in prison did not adequately prepare them for OR.<sup>461</sup> Ex-offenders also indicate that they do not know where to find assistance to help their reintegration.<sup>462</sup> The lack of knowledge with regard to available post-release support services appears to be prevalent among offenders.<sup>463</sup>

It must be noted that the DCS itself does not focus on post-release support for ex-offenders.<sup>464</sup> In fact, Singh states that the DCS has no strategy in place to deal with released offenders, and that rehabilitation services that the DCS provide to offenders terminate upon their release.<sup>465</sup> There is a lack of resources available to ex-offenders to assist them in repairing the harm caused by imprisonment.<sup>466</sup> The only post-release programme provided by the DCS to offenders is parole and Muntingh argues that parole only serves a policing function which has not shown to reduce recidivism.<sup>467</sup> This is perhaps an indication that reintegration is not the main aim of the DCS.

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<sup>460</sup> Khwela MN 'Effects of Incarceration on Recidivism in South Africa' (2015) 50 *Journal of Public Administration* 409.

<sup>461</sup> Singh SB 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 7.

<sup>462</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 54.

<sup>463</sup> Muntingh L *Ex-prisoner's views on imprisonment and re-entry* (2009) 23.

<sup>464</sup> Singh SB 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 5.

<sup>465</sup> Singh SB 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 4.

<sup>466</sup> Lushaba N 'Rising from the Ashes: Practical explorations in rehabilitation and social re-integration in the prisons of Zululand' Criminal Justice Initiative Occasional Paper 12 *Open Society Foundation for South Africa* (2010) 2.

<sup>467</sup> Muntingh L & Naude J *Community safety, offender re-entry and local government* (2013) 8.

If OR is not the focus then how can rehabilitation be achieved? Rehabilitation is only achieved upon successful reintegration,<sup>468</sup> and if rehabilitation is the goal of the DCS then more attention must be paid to post-release services. Post-release services are essential given that the current system of imprisonment has not had any substantial impact on reducing recidivism.<sup>469</sup> If the State does not provide post-release services to the offender it could arguably make him despondent and potentially make him vulnerable to criminal activities.<sup>470</sup> The State's failure to provide conditions of detention that respects the dignity of offenders is another reason that the State should provide post-release services to achieve OR. The Correctional Services Act provides that the DCS 'may provide correction, development and care programmes and services even when not required to so by this Act'.<sup>471</sup> This potentially lays the foundation upon which post-release support services can be based.

Rehabilitation has a greater likelihood of success if offenders continue to receive support after their release from imprisonment.<sup>472</sup> It is submitted here that there is a legislative need for an express provision imposing a duty on the State to give offenders post-release support to promote OR. Many offenders return to the same communities in which they first developed their offending behaviour.<sup>473</sup> According to Khwela factors such as the family of

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<sup>468</sup> DCS *White Paper on Corrections in South Africa* (2004) para 6.2.6.

<sup>469</sup> Harding DJ et al 'Short and long-term effects of imprisonment on future felony convictions and prison admissions' (2017) 114 *PNAS* 11106 & Muntingh L 'Punishment and deterrence: Don't expect prisons to reduce crime' (2008) 26 *SA Crime Quarterly* 6.

<sup>470</sup> Singh SB 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 7.

<sup>471</sup> Section 16 of the Correctional Services Act 111 of 1998.

<sup>472</sup> Chikadzi V 'Challenges Facing Ex-Offenders When Reintegrating Into Mainstream Society in Gauteng, South Africa' (2017) 53(2) *Social Work* 288.

<sup>473</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 53.

the offender, the community and conditions in society all conspire in trapping the offender in a life of crime.<sup>474</sup> The community is a significant factor when looking at why offenders commit crime and why offenders re-offend. The risk factors which may promote criminality in the community will now be discussed.

### 4.3. COMMUNITY

According to Reitan, one of the key features of OR theory is that the punishment imposed on the offender is designed to promote a 'community of good citizens'.<sup>475</sup> Reitan defines a community of good citizens as having three main components which consists of: 'a unifying bond', 'mutual concern' and 'refrainment from exploitation'.<sup>476</sup> All three components of this definition could be equated to the South African concept of *Ubuntu*. In terms of *Ubuntu* everyone is interlinked and interconnected as human beings.<sup>477</sup> *Ubuntu* also places a duty on members of the community to show respect for one another.<sup>478</sup> By consequence of this interconnectedness, there should be a mutual concern for one another. Where this mutual concern is present, there will be an absence of exploitation as the likelihood of exploiting someone decreases where there is a concern for that person.

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<sup>474</sup> Khwela MN 'A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa' (2014) 1 *Athens Journal of Social Sciences* 149.

<sup>475</sup> Reitan E 'Punishment and Community: The Reintegrative Theory of Punishment' (1996) 26 *Canadian Journal of Philosophy* 57 & 62.

<sup>476</sup> Reitan E 'Punishment and Community: The Reintegrative Theory of Punishment' (1996) 26 *Canadian Journal of Philosophy* 59.

<sup>477</sup> Mangena F 'Restorative justice's deep roots in Africa' (2015) 34 *South African Journal of Philosophy* 4 – 5.

<sup>478</sup> Hughes A *Human dignity and fundamental rights in South Africa and Ireland* (2014) 163.



Given the crime rate, it is reasonable to conclude that a community of good citizens does not factually exist in South Africa.<sup>479</sup> There must be a constant pursuit to create and preserve the community of good citizens. Reitan contends that it is an absence or breach in the community which gives rise to criminal behaviour.<sup>480</sup> Therefore the breaches and absences in the community must be effectively addressed to decrease the likelihood of crime.

It must be borne in mind that the offender remains part of the community even when he is temporarily removed through imprisonment. Nevertheless, post-release support and interventions which focus solely on offenders are not sufficient. Focus should also be placed on addressing risk factors in the community which are associated with offending behaviour. Davis argues that: '[p]risons relieve us from the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers.'<sup>481</sup> Crime-ridden communities could also affect individuals' behaviour negatively. It is well established that certain communities 'contribute disproportionately to the prison population' meaning that significant numbers of prisoners are coming from these communities.<sup>482</sup> Therefore focus must be placed on these communities when addressing the abovementioned risk factors.

The majority of offenders who are imprisoned will return to their community. Effectively addressing the socio-economic needs of members of the community would arguably result in less individuals turning to crime. OR services must be made available to ex-offenders in the

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<sup>479</sup> See above fn 14 of chapter 1.

<sup>480</sup> Reitan E 'Punishment and Community: The Reintegrative Theory of Punishment' (1996) 26 *Canadian Journal of Philosophy* 58.

<sup>481</sup> Davis AY *Are Prisons Obsolete* (2003) 16.

<sup>482</sup> Muntingh L & Naude J *Community safety, offender re-entry and local government* (2013) 22.



community they return to, as the lack of such services contributes to recidivism.<sup>483</sup> If this is not done then many offenders will continue to be trapped in a cycle of crime and imprisonment.<sup>484</sup>

It is essential to analyse the risk factors associated with criminal activity to properly understand and counteract recidivism. The next section aims to discuss how addressing these risk factors in the community may not only reduce recidivism, but also reduce the prevalence of crime in communities.

#### **4.4. RISK FACTORS RELATED TO CRIMINAL BEHAVIOUR**

There is no conclusive evidence as to the exact factors which contribute to or cause crime. However, research shows that there are risk factors which increase the potential of criminal activity in certain individuals.<sup>485</sup> These risk factors affect every individual differently.<sup>486</sup> The factors discussed below do not constitute a closed list. This notwithstanding, poverty, unemployment, substance abuse and social exclusion have often been cited as factors which increased the potential for criminal activity in some offenders.

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<sup>483</sup> Khwela MN 'A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa' (2014) 1 *Athens Journal of Social Sciences* 147.

<sup>484</sup> Ngabonziza O & Singh S 'Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme' (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 89.

<sup>485</sup> Hesselink-Louw A, Joubert S & Maree A 'Criminological assessment of offenders: An analysis with the aim of promoting rehabilitation' (2003) 16 *Acta Criminologica* 91.

<sup>486</sup> Kemshall H *Understanding the Community Management of High Risk Offenders* (2008) 10.

Poverty does not cause crime, however its associating factors could arguably be risk factors related to criminal behaviour.<sup>487</sup> It is by no means suggested that all penurious persons are criminals. However, many offenders in South Africa come from indigent backgrounds and communities.<sup>488</sup> Some of the risk factors associated with poverty include a low level of education, unemployment, substance abuse, social exclusion and poor quality family relationships. Each one of these factors may increase the potential for criminal behaviour and they will now be discussed.

#### 4.4.1. Low levels of education

A lack low level of education is a risk factor related to criminal activity.<sup>489</sup> Swanepoel J noted that education lies in the centre of a successful society.<sup>490</sup> It is thus very telling that in South Africa, 40 out of 100 students who start grade one together go on to pass grade 12 in the stipulated time period (12 years).<sup>491</sup> The other 20 out of the 100 will reach matric within the 12 year period, but fail the final matric exam.<sup>492</sup> The remaining 40 of the 100 will drop out of

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<sup>487</sup> Loots S & Louw D 'Antisocial personalities: Measuring prevalence among offenders in South Africa' (2011) 36 *SA Crime Quarterly* 31.

<sup>488</sup> Scott NC *Look before you Leap* (2010) 232.

<sup>489</sup> Hesselink-Louw A, Joubert S & Maree A 'Criminological assessment of offenders: An analysis with the aim of promoting rehabilitation' (2003) 16 *Acta Criminologica* 92.

<sup>490</sup> *Pretorius and Others v Minister of Justice and Correctional Services and Others* 2018 (2) SACR 501 (GP) at para 26.

<sup>491</sup> Mansfield M 'Reform needed to tackle school dropout rate' IOL 28 March 2019 available at <https://www.iol.co.za/capetimes/opinion/reform-needed-to-tackle-school-dropout-rate-20153338> (accessed 21 April 2019).

<sup>492</sup> Mansfield M 'Reform needed to tackle school dropout rate' IOL 28 March 2019 available at <https://www.iol.co.za/capetimes/opinion/reform-needed-to-tackle-school-dropout-rate-20153338> (accessed 21 April 2019).

school before reaching grade 12.<sup>493</sup> Only 40-50% of South Africans hold a matric certificate or an equivalent qualification,<sup>494</sup> and 57% of all South Africans over the age of 20 have no basic education qualification.<sup>495</sup>

People without matric certificate are 8% less likely to find employment.<sup>496</sup> Those without a matric certificate, who do manage to find employment, will earn on average 39% less than someone with a matric certificate.<sup>497</sup> The fact that they are earning less because they do not have a matric certificate may lead to a sense of frustration. It also increases the possibility that they may pursue alternative routes of earning an income, even if these routes are illicit.<sup>498</sup>

Educating offenders may create in them an expectation of putting their acquired skills into practice once they are released from imprisonment. This is reflected in the confidence offenders have in securing post-release employment before they are released from prison.<sup>499</sup> Imaginably, it may be demotivating to an offender who is released from prison just to be

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<sup>493</sup> DGMT 'Zero Dropout Schools Initiative' available at <https://dgmt.co.za/zero-dropout-schools/> (accessed 20 July 2019).

<sup>494</sup> DGMT 'Zero Dropout Schools Initiative' available at <https://dgmt.co.za/zero-dropout-schools/> (accessed 20 July 2019).

<sup>495</sup> Mansfield M 'Reform needed to tackle school dropout rate' IOL 28 March 2019 available at <https://www.iol.co.za/capetimes/opinion/reform-needed-to-tackle-school-dropout-rate-20153338> (accessed 21 April 2019).

<sup>496</sup> DGMT 'Zero Dropout Schools Initiative' available at <https://dgmt.co.za/zero-dropout-schools/> (accessed 20 July 2019).

<sup>497</sup> DGMT 'Zero Dropout Schools Initiative' available at <https://dgmt.co.za/zero-dropout-schools/> (accessed 20 July 2019).

<sup>498</sup> Gross FA *Who Hangs the Hangman? A modern approach to punishment* (1966) 29.

<sup>499</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 51.

faced with the reality that the prospects of him using his acquired skills are very slim. Qualifications obtained in prison may be frowned upon by some members of society. There is thus hesitation when it comes to employing someone with a qualification that was obtained in prison. Qualifications earned in prison should not be labelled as such as this may devalue the qualification.<sup>500</sup> Some ex-offenders who do manage to secure employment at times fall victim to discriminatory practices in the workplace due to their criminal backgrounds.<sup>501</sup> This leads to another risk factor in criminal behaviour namely, unemployment.<sup>502</sup>

#### 4.4.2. Unemployment

In the fourth quarter of 2018, South Africa's unemployment rate was 27.1%.<sup>503</sup> The average unemployment rate for the period 2000 – 2018 was 25.63%.<sup>504</sup> Based on this information it is clear that the rate of unemployment is high and has consistently been high for nearly two decades. Imprisonment often also results in the loss of employment,<sup>505</sup> and as a result many offenders are placed in a position whereby they have to seek employment upon their release from prison.

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<sup>500</sup> Du Preez N & Luyt W 'Curriculum and Methodology in relation to Development Programmes in Prisons' (2004) 17 *Acta Criminologica* 27.

<sup>501</sup> Ducksworth J 'The prisoner reentry industry' (2010) 34 *Dialect Anthropol* 558.

<sup>502</sup> Hattery A & Smith E *Prisoner Reentry and Social Capital: The long road to reintegration* (2010) 17 & Gross FA *Who Hangs the Hangman? A modern approach to punishment* (1966) 29 & Cooke DJ, Baldwin PJ & Howison J *Psychology in Prisons* (1990) 10.

<sup>503</sup> Stats SA 'Work & Labour Force' available at [http://www.statssa.gov.za/?page\\_id=737&id=1](http://www.statssa.gov.za/?page_id=737&id=1) (accessed 6 August 2019).

<sup>504</sup> Trading Economics 'South Africa Unemployment Rate' available at <https://tradingeconomics.com/south-africa/unemployment-rate> (accessed 16 August 2019).

<sup>505</sup> Fallesen P & Andersen LH 'Explaining the Consequences of Imprisonment for Union Formation and Dissolution in Denmark' (2017) 36 *Journal of Policy Analysis and Management* 156.

One of the most common goals offenders have after release is finding employment,<sup>506</sup> but ex-offenders remark that they find it virtually impossible to find employment due to their criminal records.<sup>507</sup> Former offenders are put in a difficult position when applying for jobs which require them to declare their criminal record. If they ‘tick the box’ to declare that they do have a criminal record, then there is a strong likelihood that they are unfairly discriminated against due to their criminal past.<sup>508</sup> If they do not declare their criminal record and their record is uncovered, then they are disqualified from the position due to having lied on the job application.<sup>509</sup> Often the only reason that ex-offenders are refused employment is because they have a criminal record and are perceived as being untrustworthy by prospective employers.<sup>510</sup> The purpose of rehabilitation and OR is to make the offender a productive member of society but this is difficult when offenders are not afforded employment solely due to having a criminal record.<sup>511</sup>

The reluctance from the community to employ ex-offenders shows that they do not readily accept offenders back into society, even if the offender is making efforts to become part of the community. This leads to the offender feeling rejected and as if he is still being punished

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<sup>506</sup> Muntingh L ‘Experiences immediately after release’ in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 49.

<sup>507</sup> Scott NC *Look before you Leap* (2010) 280.

<sup>508</sup> Scott NC *Look before you Leap* (2010) 280 – 281.

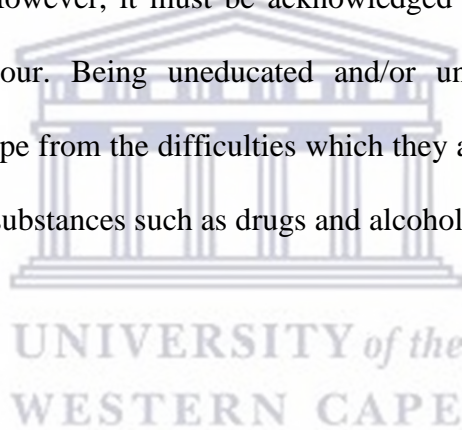
<sup>509</sup> Phoenix Zululand *Phoenix Rising: A programme to promote self-worth and preparation for re-integration into family, community and society* (2017) 22.

<sup>510</sup> Ngabonziza O & Singh S ‘Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme’ (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 92.

<sup>511</sup> Hattery A & Smith E *Prisoner Reentry and Social Capital: The long road to reintegration* (2010) 17.

even after having served his sentence.<sup>512</sup> The inability to find employment also results in a lack of financial means for the offender to support themselves and their family, especially where the offender is a parent.<sup>513</sup> Crime rates consequently increase when people are confronted with periods of economic stress.<sup>514</sup> Crimes such as housebreaking and robbery also increase where there is a lack of income.<sup>515</sup>

It is by no means suggested that former offenders must be given preference when it comes to employment opportunities, but they should at least be judged on the same level as all other citizens. Everyone, including offenders, have the constitutional right to fair labour practices.<sup>516</sup> It is also not suggested that offenders cannot be fairly discriminated against by prospective employers.<sup>517</sup> However, it must be acknowledged that unemployment is a risk factor for criminal behaviour. Being uneducated and/or unemployed potentially leads offenders to seeking an escape from the difficulties which they are faced with. Some of them find this escape by abusing substances such as drugs and alcohol.



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<sup>512</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 50 & Gross FA *Who Hangs the Hangman? A modern approach to punishment* (1966) 28.

<sup>513</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 50.

<sup>514</sup> Gross FA *Who Hangs the Hangman? A modern approach to punishment* (1966) 29.

<sup>515</sup> Gross FA *Who Hangs the Hangman? A modern approach to punishment* (1966) 28.

<sup>516</sup> Constitution of the Republic of South Africa, 1996 s 23(1).

<sup>517</sup> For example, when looking at the occupation of a primary school teacher, it would be fair to discriminate against persons who are convicted paedophiles. As the example illustrates, it is crucial that the nature of the offence is taken into account and not only the mere existence of a criminal record.



#### 4.4.3. Substance abuse

Drug abuse is a risk factor related to criminal behaviour.<sup>518</sup> However, Bowker contends that ‘only amphetamines and other strong stimulants’ could potentially increase the likelihood of violence, and further states that most drugs have the opposite effect.<sup>519</sup> Bowker further argues that drugs such as depressants and hallucinogens do not increase the potential of violence or crime in users.<sup>520</sup> There is a great debate on whether drug use causes crime or whether crime causes drug use, but it cannot be denied that they are related.<sup>521</sup> The ease in availability of drugs in the community exacerbates this risk factor.<sup>522</sup> Research further suggests that being intoxicated by alcohol increases the potential for violent crimes in individuals.<sup>523</sup> Substance abuse can also lead to the deterioration of family relationships.<sup>524</sup> This inhibits reintegration as family support after release is an important element in OR as will be discussed later.

Support services must be made available and accessible to ex-offenders who abuse substances and are addicted to these substances. However, making these services available is not enough, and a greater emphasis must be placed on informing offenders of the services available to them upon and even before release from prison. Some ex-offenders reported not being aware of the resources available to them to assist in coping with addiction and

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<sup>518</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 19 & Lab SP *Crime Prevention: Approaches, Practices, and Evaluations* 7 ed (2010) 238.

<sup>519</sup> Bowker LH *Prisoner Subcultures* (1977) 111.

<sup>520</sup> Bowker LH *Prisoner Subcultures* (1977) 111.

<sup>521</sup> Lab SP *Crime Prevention: Approaches, Practices, and Evaluations* 7 ed (2010) 235 – 238.

<sup>522</sup> Peltzer K et al ‘Illicit Drug Use and Treatment in South Africa: a review’ (2010) 45 *Subst Use Misuse* 2223 – 2224.

<sup>523</sup> Cooke DJ, Baldwin PJ & Howison J *Psychology in Prisons* (1990) 35.

<sup>524</sup> Muntingh L ‘Experiences immediately after release’ in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 50.



substance abuse.<sup>525</sup> Substance abuse, unemployment, being uneducated are all factors which increase the likelihood of being shunned by the community.

#### 4.4.4. Social exclusion

Public opinion also has an impact on how likely offenders are to be accepted by the community after they are released from imprisonment.<sup>526</sup> Society does not view offenders as future responsible citizens.<sup>527</sup> The community fears that the offenders will reoffend once released from imprisonment which causes members of the community to become apprehensive towards ex-offenders.<sup>528</sup> Ex-offenders respond to the apprehension which they are treated with in a hostile attitude towards members of the community.<sup>529</sup>

The hostility between the community and ex-offenders leads to many individuals being socially excluded, and this social exclusion is a risk factor related to criminality. Quite a number of offenders come from a socially excluded background.<sup>530</sup> They then continue to be confronted by this exclusion when they return to the community after serving sentences of

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<sup>525</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 51.

<sup>526</sup> Ouellette HM, Applegate BK & Vuk M 'The Public's Stance on Prisoner Reentry: Policy Support and Personal Acceptance' (2017) 42 *Am J Crim Just* 770.

<sup>527</sup> 'Standard Minimum Rules for the Treatment of Prisoners' (1969) 2 *New York University Journal of International Law and Politics* 330.

<sup>528</sup> Reitan E 'Punishment and Community: The Reintegrative Theory of Punishment' (1996) 26 *Canadian Journal of Philosophy* 69.

<sup>529</sup> Reitan E 'Punishment and Community: The Reintegrative Theory of Punishment' (1996) 26 *Canadian Journal of Philosophy* 63.

<sup>530</sup> Ngabonziza O & Singh S 'Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme' (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 90.

imprisonment. The social exclusion ex-offenders experience is arguably worse as they now have criminal records and are even more frowned upon by the community.<sup>531</sup> This is reflected in the common attitudes towards former offenders from the community such as ‘once a criminal, always a criminal’.<sup>532</sup> The secrecy of prison culture further increases the suspicion with which the community view ex-offenders.<sup>533</sup> There is a relation between the community’s perception of offenders and the social exclusion experienced by ex-offenders.<sup>534</sup> If the offender is not accepted by the community then he is likely to find a sense of belonging with other socially excluded groups such as gangs and criminal enterprises.<sup>535</sup>

When an offender returns to his community, he inevitably has interactions with former associates. These former associates at times are gang members as many ex-offenders belonged to street gangs prior to being imprisoned.<sup>536</sup> This increases the likelihood of recidivism as being involved in gang activity increases the likelihood of offending.<sup>537</sup> Some former offenders remarked that they were offered drugs and alcohol by their friends when they return home.<sup>538</sup>

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<sup>531</sup> Tomasic R & Dobinson I *The Failure of Imprisonment: An Australian Perspective* (1979) 3.

<sup>532</sup> Scott NC *Look before you Leap* (2010) 281.

<sup>533</sup> Meeks D ‘Doing Jail Time: The Socialization Process of a County Jail Environment’ (2005) 2 *Justice Policy Journal* 3.

<sup>534</sup> See above para 3.2 of chapter 3.

<sup>535</sup> Reitan E ‘Punishment and Community: The Reintegrative Theory of Punishment’ (1996) 26 *Canadian Journal of Philosophy* 63.

<sup>536</sup> Muntingh L ‘Experiences immediately after release’ in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 53.

<sup>537</sup> Lab SP *Crime Prevention: Approaches, Practices, and Evaluations* 7 ed (2010) 179.

<sup>538</sup> Muntingh L ‘Experiences immediately after release’ in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 53.

It is also noted that some ex-offenders are committed to change, but at times are overwhelmed by peer pressure into engaging in illegal activities.<sup>539</sup> Ex-offenders primarily deal with this in one of two ways. They avoid contact and interactions with former associates or they find alternative social networks such as family, support groups or religious groups.<sup>540</sup> Avoiding interactions with former associates often leads to anti-social behaviour which is not ideal for OR as it has been linked to the commission violent crimes.<sup>541</sup> Therefore the role that the family of the offender plays is crucial as they could provide him with a positive support structure to better facilitate his reintegration.

#### 4.5. OFFENDER FAMILY SUPPORT

Crime does not only affect the victim and the victim's family, but it also affects the family of the offender.<sup>542</sup> Offenders often come from dysfunctional families.<sup>543</sup> Upon release the offender is likely to return to this dysfunctional family which could counteract the rehabilitation efforts of the offender and potentially contribute to re-offending.<sup>544</sup> Providing some sort of support to the family to improve this could be crucial as most offenders return to

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<sup>539</sup> Khwela MN 'Effects of Incarceration on Recidivism in South Africa' (2015) 50 *Journal of Public Administration* 410.

<sup>540</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 53.

<sup>541</sup> Loots S & Louw D 'Antisocial personalities: Measuring prevalence among offenders in South Africa' (2011) 36 *SA Crime Quarterly* 31.

<sup>542</sup> Khwela MN 'A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa' (2014) 1 *Athens Journal of Social Sciences* 146.

<sup>543</sup> Scott NC *Look before you Leap* (2010) 232. & DCS *White Paper on Corrections in South Africa* (2004) para 3.2.1.

<sup>544</sup> Khwela MN 'Effects of Incarceration on Recidivism in South Africa' (2015) 50 *Journal of Public Administration* 411.

their families after release.<sup>545</sup> Therefore it is essential that the State support the improvement of the quality of the relationship between offenders and their families as this may decrease the potential for recidivism.

Imprisonment deteriorates the relationship between the offender and his family, which arguably results in a poor quality relationship.<sup>546</sup> This is exacerbated by the limited number of visits offenders are allowed as well as the short length of these visits.<sup>547</sup> Many prisons are far from communities from which offenders come and this increases the expenses related to visiting the offender while in prison. Ex-offenders express difficulty being accepted and trusted by their families after they return home.<sup>548</sup> It is therefore no surprise that, emotional and family support was highlighted as essential to successfully achieving OR.<sup>549</sup> It has also been noted that positive social networks play an important role in OR.<sup>550</sup> The family of the offender is perfectly positioned to act as a positive social network.

The family of the offender can significantly improve the offender's potential for successfully reintegrating back into society.<sup>551</sup> According to Khwela rehabilitation could be an incomplete

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<sup>545</sup> Khwela MN 'A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa' (2014) 1 *Athens Journal of Social Sciences* 146.

<sup>546</sup> Bagaric M, Hunter D & Wolf G 'Technological Incarceration and the End of the Prison Crisis' (2018) 108 *Journal of Criminal Law & Criminology* 86.

<sup>547</sup> Cooke DJ, Baldwin PJ & Howison J *Psychology in Prisons* (1990) 57.

<sup>548</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 50.

<sup>549</sup> Hlavka H, Wheelock D & Jones R 'Exoffender Accounts of Successful Reentry from Prison' (2015) 54 *Journal of Offender Rehabilitation* 412.

<sup>550</sup> Hattery A & Smith E *Prisoner Reentry and Social Capital: The long road to reintegration* (2010) 24.

<sup>551</sup> Khwela MN 'Effects of Incarceration on Recidivism in South Africa' (2015) 50 *Journal of Public Administration* 411.

process if the family of the offender is excluded.<sup>552</sup> It is very likely that during the period of imprisonment the offender's family relationships have been strained, or even irreparably damaged.<sup>553</sup> Therefore it is essential that the offender receives support from the State to restore and mend such relationships. This could potentially be done through a social worker who works for the State and acts as an intermediary or mediator between the offender and his family. It is important that an impartial third party is involved in such proceedings as emotions such as anger and frustration could result in an even greater disconnect if the offender attempts to restore the relationship on his own. This process should preferably start while the offender is still imprisoned. Thus, when he is released he would have less fears of being treated as an outcast by his family if the process achieves positive results.

It is arguable that ordinary members of society do not possess the necessary skills to effectively support offenders' reintegration. The families of offenders should receive training and support services from the State prior to the release of the offender to prepare them on how to positively contribute to OR. In this manner the State may thus fulfil its obligation to ensure OR and create a safer society.

Phoenix Zululand Restorative Justice Programme (herein after Phoenix Zululand) was established in 2003 and provides a number of restorative justice services in several prisons in the Zululand region.<sup>554</sup> The organisation consist not only of inter alia, academics, magistrates,

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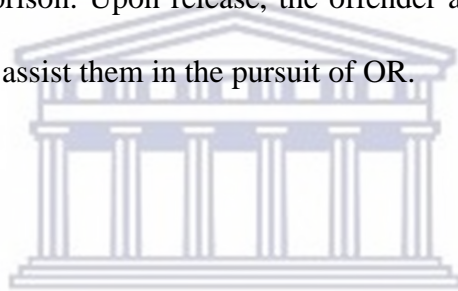
<sup>552</sup> Khwela MN 'A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa' (2014) 1 *Athens Journal of Social Sciences* 148 – 149.

<sup>553</sup> Bambeni L 'The role of government in combating recidivism of ex-offenders in South Africa' (2018) 111 *Servimus* 34.

<sup>554</sup> Lushaba N 'Rising from the Ashes: Practical explorations in rehabilitation and social re-integration in the prisons of Zululand' Criminal Justice Initiative Occasional Paper 12 *Open Society Foundation for South Africa* (2010) 2.

and prosecutors, but also sentenced offenders and ex-offenders.<sup>555</sup> Phoenix Zululand is described as a ‘social crime prevention initiative’ that aims to promote justice between the offender and his family.<sup>556</sup> Phoenix Zululand provides life skills and vocational training programmes to offenders over a two to three month period which culminates in a family conference.<sup>557</sup> Family group conferences find its origins in 1989 with the Maori in New Zealand, making it a relatively new practice.<sup>558</sup>

Phoenix Zululand hosts approximately 30 one day family conferences per year, where offenders and their families are brought together and partake in activities aimed at strengthening their relationships.<sup>559</sup> The restorative justice programme and family conferences takes place in prison. Upon release, the offender and his family will both have received training which will assist them in the pursuit of OR.



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<sup>555</sup> Given gain ‘Phoenix Zululand Restorative Justice Programme’ available at <https://www.givengain.com/c/phoenixzululand/about> (accessed 20 August 2019).

<sup>556</sup> Given gain ‘Phoenix Zululand Restorative Justice Programme’ available at <https://www.givengain.com/c/phoenixzululand/about> (accessed 20 August 2019).

<sup>557</sup> Quakers in the World ‘The Phoenix Restorative Justice Programme, South Africa’ available at <http://www.quakersintheworld.org/quakers-in-action/177/The-Phoenix-Restorative-Justice-Programme-South-Africa> (accessed 25 August 2019) & Lushaba N ‘Rising from the Ashes: Practical explorations in rehabilitation and social re-integration in the prisons of Zululand’ Criminal Justice Initiative Occasional Paper 12 *Open Society Foundation for South Africa* (2010) 2 & 6.

<sup>558</sup> Lab SP *Crime Prevention: Approaches, Practices, and Evaluations* 7 ed (2010) 303.

<sup>559</sup> Quakers in the World ‘The Phoenix Restorative Justice Programme, South Africa’ available at <http://www.quakersintheworld.org/quakers-in-action/177/The-Phoenix-Restorative-Justice-Programme-South-Africa> (accessed 25 August 2019).



#### 4.6. RESTORATIVE JUSTICE AND OFFENDER REINTEGRATION

Restorative justice theory states that ‘the harm of one is the harm of all’ and therefore crime hurts not only the affected individuals, but entire communities.<sup>560</sup> Consequently it is also important that ties between the offender and the community are restored.

Restorative justice is an important component of rehabilitation.<sup>561</sup> Restorative justice programmes seek to create a non-confrontational environment in which the offender and interested parties can express themselves in an attempt to find ways of moving forward together.<sup>562</sup> Restorative justice aims to repair the harm that the crime caused to the victim and the community.<sup>563</sup> However, in order to repair the harm caused by the crime it is essential that the root causes of the crime is identified and understood in order for it to be treated.<sup>564</sup>

Restorative justice also aims to bring a sense of personal responsibility in the offender for the harm which his crime has caused.<sup>565</sup> Therefore it requires that the offender acknowledges responsibility for his actions, and that he understands the harm which he has caused.<sup>566</sup> The ultimate goal of restorative justice is to create ‘...a sense of belonging to the community...’

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<sup>560</sup> Phoenix Zululand *Phoenix Rising: A programme to promote self-worth and preparation for re-integration into family, community and society* (2017) 20.

<sup>561</sup> Herbig FJW & Hesselink AE ‘Seeing the Person, Not Just the Number: Needs-based rehabilitation of offenders in South African prisons’ (2012) 41 *SA Crime Quarterly* 32.

<sup>562</sup> Lab SP *Crime Prevention: Approaches, Practices, and Evaluations* 7 ed (2010) 302.

<sup>563</sup> Lab SP *Crime Prevention: Approaches, Practices, and Evaluations* 7 ed (2010) 301 – 302.

<sup>564</sup> Herbig FJW & Hesselink AE ‘Seeing the Person, Not Just the Number: Needs-based rehabilitation of offenders in South African prisons’ (2012) 41 *SA Crime Quarterly* 32.

<sup>565</sup> Herbig FJW & Hesselink AE ‘Seeing the Person, Not Just the Number: Needs-based rehabilitation of offenders in South African prisons’ (2012) 41 *SA Crime Quarterly* 32.

<sup>566</sup> Phoenix Zululand *Phoenix Rising: A programme to promote self-worth and preparation for re-integration into family, community and society* (2017) 20.



within the offender.<sup>567</sup> It is arguable that this sense of belonging would increase the potential for successful OR. This also resonates with *Ubuntu* and the traditional African system of restorative justice which had been eroded due to colonialism and modern prison theory.

Restorative justice is used around the world and has also been adopted by the DCS.<sup>568</sup> In the 2017/2018 period the DCS procured the services of 50 additional ‘Social Auxiliary Workers’ on five year contracts to implement restorative justice programmes.<sup>569</sup> Although this is a positive step taken by the DCS, they can be criticised for not employing these social workers on a permanent basis. These restorative justice programmes consist of victim-offender dialogue which is aimed at promoting closure to the victim and the OR of the offender.<sup>570</sup> Although some NGOs provide restorative justice programmes to offenders, there is arguably still a need for the State to facilitate such programmes after the release of offenders.

#### 4.7. A WAY FORWARD – THE STATE’S RESPONSIBILITY

In terms of the White Paper on Corrections, rehabilitation is achieved through *inter alia*, interventions to change social circumstances.<sup>571</sup> This means that the DCS recognises the role that changing social circumstances plays in rehabilitation. However, the DCS has a lack of

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<sup>567</sup> Herbig FJW & Hesselink AE ‘Seeing the Person, Not Just the Number: Needs-based rehabilitation of offenders in South African prisons’ (2012) 41 *SA Crime Quarterly* 33.

<sup>568</sup> Phoenix Zululand *Phoenix Rising: A programme to promote self-worth and preparation for re-integration into family, community and society* (2017) 20.

<sup>569</sup> DCS *Annual Report 2017/2018* (2018) 9.

<sup>570</sup> DCS *Annual Report 2017/2018* (2018) 9.

<sup>571</sup> DCS *White Paper on Corrections in South Africa* (2004) para 4.2.3 & Omar J ‘A Prisoner’s Right?: The legal case for rehabilitation’ (2011) 37 *SA Crime Quarterly* 20.

professional staff and the retention rate for professional staff is poor.<sup>572</sup> It could therefore be argued that other government departments should also contribute in addressing the conditions in the community as this does not fall solely in the mandate of the DCS. The Department of Social Development, the DBE, the DHET, the Department of Public Works, and the Department of Justice in conjunction with the DCS could all be involved in an inter-departmental approach to addressing the risk factors in the community associated with crime. This is consistent with the principles of co-operative government and intergovernmental which is obligatory in terms of the Constitution.<sup>573</sup> It is essential that these governmental departments work together in not only addressing crime in the community but by consequence, creating a community that is ideal for OR.

During 2017/2018 the DCS partnered with the DHET to provide 726 adult male offenders with career development services and exposed them to career and economic opportunities available.<sup>574</sup> Despite this it must be noted that this number is only a fraction of the total number of adult male sentenced offenders. Thus, the majority of the sentenced offenders did not receive these services and the DCS must improve such efforts as all offenders should be provided with such information. Knowing which career and economic opportunities are available will not only help the offender in his rehabilitation, but it could be crucial for OR.

One of the ways in which the inter-departmental approach may operate is in the establishment of more halfway houses.

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<sup>572</sup> Herbig FJW & Hesselink AE 'Seeing the Person, Not Just the Number: Needs-based rehabilitation of offenders in South African prisons' (2012) 41 *SA Crime Quarterly* 30.

<sup>573</sup> Section 41 of the Constitution of the Republic of South Africa, 1996.

<sup>574</sup> DCS *Annual Report 2017/2018* (2018) 13.

#### 4.7.1. The halfway house

A halfway house aims to breach the gap between the correctional facility and the free world.<sup>575</sup> Many offenders leave prison without any money and poor prospects for accommodation and social support.<sup>576</sup> The halfway house thus provides temporary accommodation and acts as a transitional space in which offenders can build independence after living in an environment where unilateral decision making is almost non-existent.<sup>577</sup> It also fulfils the State's constitutional duty to provide shelter to the most desperate as per the Grootboom case.<sup>578</sup> It is also consistent with rule 108 of the Mandela Rules.<sup>579</sup>

Van Wyk argues that it is in this transitional space created by the halfway house where offenders have the ability to become self-sufficient to the extent that they no longer require the halfway house.<sup>580</sup> Promoting self-sufficiency and responsibility should be prioritised in halfway houses. Van Wyk further argues that in order to do this, ex-offenders in halfway

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<sup>575</sup> Keller OJ & Alper BS *Halfway Houses: Community-Centered Correction and Treatment* (1970) 14.

<sup>576</sup> Ngabonziza O & Singh S 'Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme' (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 92.

<sup>577</sup> Van Wyk SA *From Incarceration to Successful Reintegration: An Ethnographic Study of the Impact of a Halfway House on Recidivism Amongst Female Ex-Offenders* (unpublished MA thesis, Stellenbosch University, 2014) 72.

<sup>578</sup> *Government of RSA and Others v Grootboom and Others* 2001(1) SA 46 (CC) para 44, 56, 65 & 96.

<sup>579</sup> Rule 108 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>580</sup> Van Wyk SA *From Incarceration to Successful Reintegration: An Ethnographic Study of the Impact of a Halfway House on Recidivism Amongst Female Ex-Offenders* (unpublished MA thesis, Stellenbosch University, 2014) 72.

houses should be given chores such as cooking and cleaning which will also counteract institutionalisation.<sup>581</sup>

The halfway house could arguably be used as a pre-release mechanism, where offenders are either mandated to go to prior to release if they need more help preparing them for life on the outside. It can also be used as a condition of parole, whereby offenders are obligated to live at a halfway house prior to returning home. This creates the ideal space for treating offenders, especially in terms of psychological treatment. Due to the low population at a halfway house, there is greater likelihood for a psychologist to have individual sessions with offenders which they may not receive while in a correctional facility. This also allows the psychologist to provide a more individualised treatment for each offender, as opposed to using a blanket treatment that won't have the same effect on every offender.

Some offenders are eligible for parole but are not released from prison as they have no residential address, which is a prerequisite for parole.<sup>582</sup> Halfway houses provide a solution to this issue by acting as a 'residential address' for offenders.<sup>583</sup> The 2017/2018 Annual Report of the DCS stated that eight halfway houses have been established by the DCS which are run by NGOs on behalf of the DCS.<sup>584</sup> This is in keeping with the White Paper on Corrections which recognises the need for partnerships between government department and civil

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<sup>581</sup> Van Wyk SA *From Incarceration to Successful Reintegration: An Ethnographic Study of the Impact of a Halfway House on Recidivism Amongst Female Ex-Offenders* (unpublished MA thesis, Stellenbosch University, 2014) 72.

<sup>582</sup> Parliamentary Monitoring Group 'Halfway houses; rehabilitation & reintegration of parolees/ex-offenders: Correctional Services status report' available at <https://pmg.org.za/committee-meeting/23900/> (accessed 28 August 2019).

<sup>583</sup> DCS *Annual Report 2017/2018* (2018) 14.

<sup>584</sup> DCS *Annual Report 2017/2018* (2018) 14.

society.<sup>585</sup> The DCS further stated in 2017/2018 that a total of 342 parolees and probationers have been reintegrated after living in a halfway house since the inception of halfway houses in South Africa.<sup>586</sup> This indicates that halfway houses have had success in achieving OR and is therefore a plausible approach that the State can adopt in reducing recidivism.

The State can also learn from NGOs who have valuable knowledge regarding what works in the pursuit for successful OR.

#### **4.7.2. Lessons to be learned from NGOs**

It is acknowledged that in order for the State to fulfil its duty of rehabilitation it must work in conjunction with civil society. Prior to 2008, organisations that worked in prison and those who worked with ex-offenders in communities were all working independently.<sup>587</sup> At a conference in August 2008, organisations identified the need to work together in an attempt to share knowledge with regards to what works and what does not work with regard to rehabilitation and OR.<sup>588</sup> As a result, the Network on Reducing Reoffending (herein after the NRR) was established and created a platform where its members can share their knowledge and continue improving their approaches to achieving OR. This is in itself a lesson which the State can learn and further strengthens the argument for an inter-departmental approach in the pursuit of OR. It is essential that knowledge about crime and socio-economic conditions of offenders is shared between different State departments.

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<sup>585</sup> DCS *White Paper on Corrections in South Africa* (2004) para 6.2.6.

<sup>586</sup> DCS *Annual Report 2017/2018* (2018) 14.

<sup>587</sup> NRR 'Welcome to the Network on Reducing Re-offending' available at <http://www.nrr.org.za/index> (accessed 20 March 2019).

<sup>588</sup> NRR 'Welcome to the Network on Reducing Re-offending' available at <http://www.nrr.org.za/index> (accessed 20 March 2019).

Realistic is a member of the NRR and was founded in 2004 by a former DCS official who personally witnessed the same offenders passing in and out of the prison system and recognised the need for OR.<sup>589</sup> Realistic provides OR services to probationers and parolees.<sup>590</sup> The NGO places a great focus on offender family support and attempts to restore broken family relationships through restorative justice programmes.<sup>591</sup> It also adopts a needs-based approach and designs an individual plan for each offender.<sup>592</sup> This is essential as it allows for each offender to receive the services which he needs, as opposed to being presented with irrelevant content and services.

In the period 2004-2014, 751 ex-offenders have completed programmes from Realistic out of whom only 10% have reoffended as at 2014.<sup>593</sup> Realistic also helps place ex-offenders in positions of employment and provides them with therapeutic support service, which includes one-on-one counselling sessions.<sup>594</sup> The organisation's success shows that where programmes are individualised to the needs of offenders and well-structured then they can significantly

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<sup>589</sup> Madikane S 'Rebuilding and Life Skills Training Centre (REALISTIC)' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 63.

<sup>590</sup> Madikane S 'Rebuilding and Life Skills Training Centre (REALISTIC)' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 63.

<sup>591</sup> Muntingh L A *Societal Responsibility: The role of civil society organisations in prisoner support, rehabilitation and reintegration* (2008) 7.

<sup>592</sup> Madikane S 'Rebuilding and Life Skills Training Centre (REALISTIC)' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 63.

<sup>593</sup> Realistic CBO 'Our Goals' available at <https://realisticcbo.org/goals/> (accessed 11 August 2019).

<sup>594</sup> Realistic CBO 'Programms' available at <https://realisticcbo.org/programms/> (accessed 11 August 2019).



reduce the recidivism rate. It also shows how crucial post-release support services are to achieving successful OR.

Another NGO and member of the NRR is the Former Convicted Offenders Development Initiative (herein after FOCODI) that was established by ex-offenders at Boksburg Correctional Centre in 2001.<sup>595</sup> FOCODI provides pre-release and post-release support to offenders and they have a unique advantage as many ex-offenders facilitate these programmes.<sup>596</sup> Ducksworth argues that some ex-offenders are more capable of assisting other ex-offender in the OR process as opposed to someone who only holds intellectual knowledge.<sup>597</sup> FOCODI's post-release programme consists of many topics including equipping ex-offenders with skills to assist them in finding employment, technical skills and crime prevention.<sup>598</sup> This could suggest that the State could procure the services of ex-offenders who have successfully achieved OR and want to assist other offenders do the same. Rehabilitation and OR programmes that have shown success are those that target the individual needs of the offender,<sup>599</sup> which suggests that one-size-fits-all type programmes do

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<sup>595</sup> Radebe J 'Former Convicted Offenders Development Initiative (FOCODI)' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 72.

<sup>596</sup> Muntingh L A *Societal Responsibility: The role of civil society organisations in prisoner support, rehabilitation and reintegration* (2008) 5.

<sup>597</sup> Ducksworth J 'The prisoner reentry industry' (2010) 34 *Dialect Anthropol* 560.

<sup>598</sup> Radebe J 'Former Convicted Offenders Development Initiative (FOCODI)' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 73.

<sup>599</sup> Ngabonziza O & Singh S 'Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme' (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 88 & Muntingh L & Naude J *Community safety,*



not necessarily benefit offenders. This means that offenders should undergo thorough assessments to identify their specific needs. As argued in Chapter 3, the DCS has a severe lack of professional staff and that offenders may not be receiving thorough assessments.<sup>600</sup> Other programmes which have shown success are those which target the known risk factors associated with crime.<sup>601</sup> These factors include substance abuse, low levels of education and unemployment as discussed above.<sup>602</sup> Programmes selected for specific offenders should be aligned to their specific style of learning to achieve the best possible results.<sup>603</sup> OR services provided to ex-offenders after their release should ideally be linked to the rehabilitation programmes that they received while being incarcerated to promote cohesion in the rehabilitation process.<sup>604</sup> Other programmes that have shown success are those that are active and participatory and are delivered by professionally trained persons.<sup>605</sup>

It is acknowledged that the State does provide funding to a number of NGOs working with offenders. It must be mentioned though, that many of these organisations work with limited resources and limited or sometimes no State support.<sup>606</sup> Even with these limitations NGOs

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*offender re-entry and local government* (2013) 9 & Khwela MN 'Effects of Incarceration on Recidivism in South Africa' (2015) 50 *Journal of Public Administration* 410.

<sup>600</sup> See above para 3.4 of chapter 3.

<sup>601</sup> Muntingh L & Naude J *Community safety, offender re-entry and local government* (2013) 9.

<sup>602</sup> See above para 4.4.

<sup>603</sup> Muntingh L & Naude J *Community safety, offender re-entry and local government* (2013) 10.

<sup>604</sup> Muntingh L & Naude J *Community safety, offender re-entry and local government* (2013) 34.

<sup>605</sup> Ngabonziza O & Singh S 'Offender Reintegration Programme and its Role in Reducing Recidivism: Exploring Perceptions of the Effectiveness of Tough Enough Programme' (2012) Special Edition No 2 *Acta Criminologica: Southern African Journal of Criminology* 93.

<sup>606</sup> Muntingh L *A Societal Responsibility: The role of civil society organisations in prisoner support, rehabilitation and reintegration* (2008) 20.

still make considerable achievements in helping offenders achieve OR. Although these NGOs are doing commendable work with offenders, it leads to the suggestion that they are carrying the State's load. The State must work in conjunction with civil society in the pursuit of OR. There is arguably a need for the establishment of State-owned organisations who provide post-release services to assist and to promote OR. These State-owned organisations can draw valuable knowledge from NGOs and the NRR in formulating strategies, policies and practices based on what works.

Opponents to rehabilitation and OR often state that money used to invest in such programmes could be used to assist *inter alia*, indigent people. They should be reminded that imprisonment as it currently operates is not cost effective and the cost implications of imprisonment and OR will now be discussed.

#### **4.8. THE COSTS AND THE BENEFITS OF OFFENDER REINTEGRATION**

Although there are many arguments against financially investing in OR, we cannot deny the dire need for such programmes. We must look at the problem holistically. In 2003, it cost the State R94.16 cents per day to house a prisoner which increased to R124 per day in 2011.<sup>607</sup> In 2017, the maximum daily cost allowed for housing an offender per day was around R300.<sup>608</sup> With an average inmate population of over 160 000,<sup>609</sup> this means that it could potentially cost the State around R48 million per day to house offenders. Therefore it cannot be denied that prisons require a vast amount of State resources to operate.<sup>610</sup>

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<sup>607</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 31.

<sup>608</sup> Lewis HP *The Prison Speaks: Men's Voices/South African Jails* 2 ed (2017) 31.

<sup>609</sup> DCS *Annual Report 2017/2018* (2018) 9 & DCS *Annual Report 2016/2017* (2017) 24.

<sup>610</sup> Muntingh L 'Punishment and deterrence: Don't expect prisons to reduce crime' (2008) 26 *SA Crime Quarterly* 6.

The purpose of ‘incarceration’ as stated by the DCS includes the provision of well-maintained infrastructure in order to safely house offenders in a manner that will respect their human dignity.<sup>611</sup> The purpose of ‘care’ includes the provision of health care services to maintain the well-being of offenders.<sup>612</sup> During 2017/18 the DCS spent R13 949 901 000 on incarceration and R2 322 675 000 on Care.<sup>613</sup> This means that the DCS spent over R16 billion rand in one year to house and care for offenders. These amounts are procured from taxpayers, who in turn are not rewarded with a safer society, as the crime rate remains consistently high and recidivism continues to plague the country. This cost evaluation is not inclusive of the damages the State pays in civil claims as a result of poor prison conditions as was illustrated in the case of *Lee v Minister of Correctional Services*.<sup>614</sup>

The continued overuse of imprisonment is not only an ineffective punishment to reduce crime,<sup>615</sup> but it is also extremely costly as illustrated above. Prison does not rehabilitate offenders, and it is a breeding ground for more violent offenders,<sup>616</sup> as demonstrated by the occupancy levels of South African prisons over the past few years.<sup>617</sup> Thus, the costs to house offenders will at the very least remain the same, resulting in a continued constraint on the

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<sup>611</sup> DCS *Annual Report 2017/2018* (2018) 54.

<sup>612</sup> DCS *Annual Report 2017/2018* (2018) 71.

<sup>613</sup> DCS *Annual Report 2017/2018* (2018) 18.

<sup>614</sup> Geldemhuys K ‘Prison Overcrowding – Are there any viable solutions to this serious problem?’ (2018) 111 *Servamus* 18.

<sup>615</sup> Muntingh L et al ‘Second Chance – Preventing Re-offending’ in Pennington S (ed) *Action for a Safe South Africa* (2008) 102 – 103.

<sup>616</sup> Padayachee V ‘Offender Reintegration – A restorative approach to crime in South Africa’ in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 15.

<sup>617</sup> See above para 3.4.1 of chapter 3.

coffers of the State. OR provides a more sustainable and cost effective solution to crime and punishment. Although it will require much investment at first,<sup>618</sup> it will become less costly overtime as the recidivism rate, and subsequently the crime rate decreases. Thus, even though there is opposition to the suggestion that the State should invest in OR, when one looks at the problem holistically, OR seems to be the more cost effective solution in the long term.

#### 4.9. CONCLUSION

Post-release support appears to be one of the missing links in the pursuit for rehabilitation and OR. It is unreasonable and impractical to expect the DCS to bare the sole responsibility of OR and it must be accepted that an inter-departmental approach is required. This inter-departmental approach should target the risk factors associated with criminality. It can also clearly be shown that post-release support services are crucial in achieving successful OR and thereby completing the rehabilitation process. The effectiveness of halfway houses as a post-release support system has also been shown. The State must implement programmes which have been proven to work in achieving OR and can draw valuable lessons from NGOs to do this. It has conclusively been argued that the benefits of OR far outweigh the costs involved and therefore post-release support from the State is in the interest of society.<sup>619</sup> Therefore it must be concluded that OR is attainable if programmes based on best practices are created and where these programmes are effectively implemented.

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<sup>618</sup> Muntingh L A *Societal Responsibility: The role of civil society organisations in prisoner support, rehabilitation and reintegration* (2008) 2.

<sup>619</sup> Khwela MN 'A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa' (2014) 1 *Athens Journal of Social Sciences* 148.

## CHAPTER 5

### RECOMMENDATIONS AND CONCLUDING REMARKS

As established in the previous chapters, there are strong indications that a legal duty to rehabilitate offenders exists and by consequence a legal duty to reintegrate offenders also exists. This is because rehabilitation cannot be successful without successful OR.<sup>620</sup> This chapter aims to provide recommendations that can be implemented by the State to assist in the fulfilment of this legal duty, as well as some concluding remarks.

#### 5.1. RECOMMENDATIONS

The section aims to discuss proposed recommendations to make the rehabilitation and OR process as successful as possible.

##### 5.1.1. The Assessment of offenders

In order for offenders to receive needs-based programmes and development services as envisaged by the Correctional Services Act,<sup>621</sup> offenders must be properly and thoroughly assessed by professionally trained personnel. Services that offenders receive are based on their sentence plans which are formulated on the basis of their individual assessments. If these assessments are not properly conducted and updated then there is a great likelihood that offenders' sentence plans are not specifically tailored to their individual needs. Consequently this suggests that offenders are not receiving needs-based programmes and the programmes which they do receive may not yield the desired results. Assessments should also be inclusive of mental health assessments to satisfy the constitutional right to bodily integrity which is

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<sup>620</sup> DCS *White Paper on Corrections in South Africa* (2004) para 6.2.6.

<sup>621</sup> Section 41 of the Correctional Services Act 111 of 1998.

inclusive of a mental element.<sup>622</sup> This is consistent with their right to health care.<sup>623</sup> Offenders should also be assessed periodically throughout their sentence as their needs may alter.

### **5.1.2. The reduction of overcrowding and improvement of conditions of imprisonment**

The current prison conditions must be improved if the State wishes to fulfil its constitutional duty to create a humane environment that is conducive for rehabilitation in its correctional centres.<sup>624</sup> The DCS alone cannot improve conditions of imprisonment, but it may be able to improve the conditions if the prison population was reduced. Fewer offenders should be sentenced to imprisonment as this has not proven to decrease crime. Non-custodial sentences ought to be imposed more often.

The State must improve the socio-economic conditions in the community by adopting an inter-departmental strategy in order to counteract the risk factors associated with criminality as provided for in the White Paper on Corrections.<sup>625</sup> This acts as a preventative strategy which may reduce crime and recidivism, resulting in fewer offenders being sentenced to imprisonment. This may lead to a decrease of the prison population which would arguably enable the DCS to provide more humane conditions of detention to offenders. Humane conditions of detention and the safe custody of sentenced offenders will arguably increase the potential of rehabilitation and OR.

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<sup>622</sup> *Minister of Justice v Hofmeyr* [1993] 2 ALL SA 232 (A) 243 & 248.

<sup>623</sup> Section 27 of the Constitution of the Republic of South Africa, 1996.

<sup>624</sup> Section 35(e) of the Constitution of the Republic of South Africa, 1996.

<sup>625</sup> DCS *White Paper on Corrections in South Africa* (2004) ch 13.



### 5.1.3. Halfway houses and post-release support

Given the fact that imprisonment may increase the likelihood of recidivism and that offenders may become institutionalised and experience mental health deterioration while incarcerated, it is essential that the State establish more halfway houses. Halfway houses, as a mid-point between imprisonment and ‘free-society’ provide the ideal environment to undo the harmful effects of incarceration, restore/repair family relationships and prepare the offender for release. During the offender’s temporary stay at halfway house, his family could be prepared for his release. This would prepare the family for what to expect when the offender returns. It could also potentially equip the family with the necessary skills to support the reintegration of the offender.<sup>626</sup> It would also assist the State to comply with its duty to provide shelter to the desperate members of society,<sup>627</sup> as well as satisfy its duty in terms of the Mandela Rules.<sup>628</sup>

Halfway houses also provide the opportunity for post-release support services to be offered to offenders. It is crucial that the State adopt an inter-departmental approach and work in conjunction with NGOs in providing post-release OR services to offenders.<sup>629</sup> The Correctional Services Act allows for the DCS to provide development services to offenders even when not provided for by the Act.<sup>630</sup> These services could also extend beyond the offender’s stay at the halfway house. It is evident that not many offenders are aware of post-

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<sup>626</sup> Muntingh L ‘Experiences immediately after release’ in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 57.

<sup>627</sup> *Government of RSA and Others v Grootboom and Others* 2001(1) SA 46 (CC) para 44, 56, 65 & 96.

<sup>628</sup> Rule 108 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly Resolution 70/175 (2015).

<sup>629</sup> Padayachee V ‘Offender Reintegration – A restorative approach to crime in South Africa’ in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 16.

<sup>630</sup> Section 16(1) of the Correctional Services Act 111 of 1998.



release support services which are available to them.<sup>631</sup> Therefore post-release services should be better publicised and more easily accessible.

Government departments should build partnerships with prospective employers to help ex-offenders find employment as done by Khulisa.<sup>632</sup> They could even go one step further and encourage OR through the provision of incentives to employers for employing persons with criminal records. These incentives should be offered to employers in both the public and private spheres. This would encourage the employment of former offenders and help enable them to lead self-sustaining lives.

## 5.2. CONCLUSION

While there are cogent arguments for OR, it can be concluded that there is a strong suggestion of a legal existence imposing a duty upon the State to support OR. South Africa's criminal justice system is currently not effectively reducing crime or rehabilitating offenders. Therefore the State is failing to satisfy its legal duty. A paradigm shift is required in how criminals are punished and held accountable. The criminal justice system must work in tandem to pursue the successful OR of all sentenced offenders.

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<sup>631</sup> Muntingh L 'Experiences immediately after release' in DCS (ed) *Creating Paths for Offender Reintegration: Conference Report 14 – 15 October 2008, Kivietskroon Hotel, Kameeldrift-East, Pretoria* (2008) 54.

<sup>632</sup> Singh SB 'Offender Rehabilitation and Reintegration: A South African Perspective' (2016) 46 *J Soc Sci* 4.

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