

**ANALYSIS OF THE DEMAND FOR A CERTIFICATE OF GOOD CONDUCT BY  
EMPLOYERS IN KENYA AND ITS EFFECTS ON THE RIGHT TO PRIVACY OF EX-  
OFFENDERS**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore

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## DECLARATION

I, NDERITU RACHEAL WAMBUI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ..... R.W.N .....

Date: .....10<sup>th</sup> April 2024.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Dr Peter Kwenjera



## ABSTRACT

A certificate of good conduct is a document extracted from the judicial records of a particular country which documents convictions made against the applicant to confirm good conduct. This study sought to evaluate whether the demand for a certificate of good conduct by employers in Kenya impedes the right to privacy of ex-offenders. There is need to balance the legitimate concerns of employers with the fundamental rights of ex-offenders, particularly the right to privacy. The requirement for a police clearance certificate, while ostensibly aimed at safeguarding business interests and public safety, prompts critical questions regarding the proportionality and necessity of such intrusive measures. Moreover, it raises issues of fairness and social justice, as ex-offenders, having served their sentences, face continued barriers to reintegration into society. To provide empirical data regarding the employment history of ex-offenders in Kenya, this paper critically evaluated the existing legal framework and international standards to provide valuable insights that inform potential policy reforms and contribute to the creation of a more equitable and inclusive employment process in Kenya. The qualitative research was conducted through desktop research of both primary and secondary sources.

Following this, the study explored existing legal provisions surrounding employment, which are pertinent to the utilization of certificates of good conduct by employers. Privacy rights also emerged as a central theme, with an emphasis on how the demand for certificates of good conduct intersects with the privacy concerns of ex-offenders. This paper argued that the operative phrase of Article 31 (c) is the necessity of the information being sought by an employer. While there cannot be a blanket mechanism to deal with what qualifies as necessary information to an employer, specific jobs should inherently provide what amounts to necessary information. The various reasons why traditional employment avenues often fail to accommodate individuals with a criminal history, touching upon employer biases, and systemic barriers that contribute to their marginalized status in the job market were also explored. It was established that stigma significantly diminishes the prospects of ex-offenders securing employment due to employers' reluctance to hire them, even if they possess the necessary qualifications. The study concluded by providing recommendations related to re-evaluation of hiring criteria, education and awareness programs, ban the box legislation, alternative screening methods, incentives for employers, enhanced rehabilitation programs, and data protection measures.

## LIST OF ABBREVIATIONS

<b>APFIS</b>	Automated Fingerprint Identification System
<b>DCI</b>	Directorate of Criminal Investigations
<b>DUI</b>	Driving Under the Influence
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ILO</b>	International Labour Organization
<b>OWI</b>	Operating While Intoxicated
<b>UDHR</b>	Universal Declaration of Human Rights



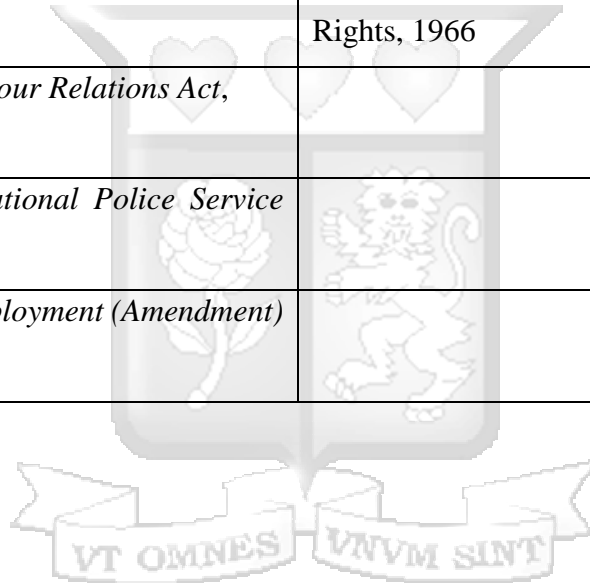
## TABLE OF CASES

Domestic	International
<i>PMK v Inspector General of Police &amp; 2 others (2019) eKLR.</i>	<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)



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Domestic	International
Republic of Kenya, Constitution of Kenya, 2010	Discrimination (Employment and Occupation) Convention, 1958
Republic of Kenya, <i>Data Protection Act</i> , 2019	International Covenant on Civil and Political Rights, 1966.
Republic of Kenya, <i>Employment Act</i> , 2007	The African Charter on Human and Peoples' Rights, 1981
Republic of Kenya, <i>Judicial Act</i> , 2011	Universal Declaration of Human Rights, 1948
Republic of Kenya, <i>Labour Institution Act</i> , 2007	International Covenant on Civil and Political Rights, 1966
Republic of Kenya, <i>Labour Relations Act</i> , 2007	
Republic of Kenya, <i>National Police Service Act</i> , 2011	
Republic of Kenya, <i>Employment (Amendment) Act</i> , 2022	



# CHAPTER ONE

## INTRODUCTION

### 1.1 Background

A certificate of good conduct is a document extracted from the judicial records of a particular country which documents convictions made against the applicant to confirm good conduct.<sup>1</sup> It is further mentioned that it should be issued by a competent authority. In Kenya, the competent authority is the Directorate of Criminal Investigations, which is responsible for maintaining criminal records.<sup>2</sup> This maintenance is different for children. The judge in *PMK v Inspector of General Police & 2 others* ruled that children cannot be subject to the punishment of criminal records which are permanent. The reasoning behind this, is that children are different from adults in that, it is easier for a child to change since he or she is still in the stage of character formation.<sup>3</sup> Article 247 of the Kenyan constitution establishes the directorate.<sup>4</sup> The procedure for obtaining the certificate which is also referred to as a Police Clearance Certificate is well laid down in the directorate's website.<sup>5</sup>

A criminal history, together with the invasion of privacy, carries with it a level of stigma that makes it unlikely that an employer will employ an ex-offender.<sup>6</sup> Despite this, employers still seek criminal record checks, through the police clearance certificate in Kenya, as part of the process of recruitment.<sup>7</sup> Privacy is defined as the right an individual has to determine what information about herself or himself can be revealed to others.<sup>8</sup> Article 31(c) of the Kenyan Constitution provides that every person has the right not have information relating to private affairs unnecessarily revealed.<sup>9</sup> Further, Article 2(5) and 2(6) state that general rules of international law<sup>10</sup> and any treaty

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<sup>1</sup> Law Insider Dictionary

<sup>2</sup> Section 35(f), *National Police Service Act* (Act No. 11A of 2011).

<sup>3</sup> *PMK v Inspector General of Police & 2 others* (2019) eKLR.

<sup>4</sup> Article 247, *Constitution of Kenya* (2010).

<sup>5</sup> \_ < <https://www.cid.go.ke/index.php/services/police-clearance-certificate.html>> Directorate of Criminal Investigations.

<sup>6</sup> Georgina Heydon and Bronwyn Naylor, "Criminal Record Checking and Employment: The Importance of Policy and Proximity" (2017) 51 *Australian & New Zealand Journal of Criminology* 372.

<sup>7</sup> *Ibid.*

<sup>8</sup> Alsalehi M, 'Privacy, Criminal records and employment. Should punishment extend beyond what court has already imposed?' London School of Economics, 2008.

<sup>9</sup> Article 31(c), *Constitution of Kenya* (2010).

<sup>10</sup> Article 2(5), *Constitution of Kenya* (2010).

or convention shall form part of the Kenyan law.<sup>11</sup> Therefore, the provision of the United Nations Universal Declaration of Human Rights that no person should be subjected to arbitrary interference with his privacy or attacks on his reputation forms part of Kenyan law.<sup>12</sup> It adds that everybody has the right to be protected by the law from such. The Data Protection Act 2019 laws of Kenya provides for the protection of the privacy of individuals.<sup>13</sup> It defines personal data as information relating to a natural person who is identifiable.<sup>14</sup> While defining personal data breach, the act mentions unauthorized disclosure. Authorized according to the dictionary means something that is done with official approval.<sup>15</sup>

A certificate of good conduct contains personal data since it holds information of an identifiable individual as discussed in the Act. An individual seeking employment is also entitled to protection from interference of privacy by virtue of being an individual as per the Act.<sup>16</sup> This, however, does not seem to be the case with employers requiring job seekers to hand in their police clearance certificate in Kenya. There has been petitions before the National Assembly asking for the prevention of employers from demanding the certificates. The arguments add that some of the convictions are products of youthful misguidedness and should then not act as stumbling blocks to people's lives.<sup>17</sup> Ex-offenders<sup>18</sup> have reported that refusal to disclose criminal records leads employers to discontinue their employment claiming dishonesty as a ground.<sup>19</sup> They therefore do not have much of a choice on whether or not their private information should be disclosed to other persons.

Though the handing over of the certificate is authorized, it is not wilfully done. In other words, it becomes a case of 'I have to' not 'I want to.' According to the Kenya National Commission on

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<sup>11</sup> Article 2(6), Constitution of Kenya (2010).

<sup>12</sup> Article 12, *The Universal Declaration of Human Rights*, 10 December 1948.

<sup>13</sup> Section 3(c), *Data Protection Act* (Act No. 24 of 2019).

<sup>14</sup> Section 2, *Data Protection Act* (Act No. 24 of 2019).

<sup>15</sup> Merriam- Webster Dictionary, 1<sup>st</sup> ed.

<sup>16</sup> Section 3(c), *Data Protection Act* (Act No. 24 of 2019).

<sup>17</sup> Ghai Jill C, 'Ban on employers insisting on certificate of good conduct not adequate answer' *The Star*, 11 September 2021, 2-3.

<sup>18</sup> An ex-offender is a person who is seeking paid employment or already in employment who has criminal convictions\_ < <https://www.oxfordreference.com/>>

<sup>19</sup> Heydon G and Naylor B, 'Criminal record checking and employment: The importance of policy proximity' *Sage Journals*, 2017\_ < <https://journals.sagepub.com/doi/10.1177/0004865817723410>> on 8 August 2017.

Human Rights, there is need for decriminalization and reclassification of petty offences in Kenya that on the basis of, *interalia*, offenders face human rights violations as most of them are poor, marginalised and vulnerable and cannot afford the costs of justice.<sup>20</sup> Connectedly, whether there is a link between the job and the crime is an important question to ask<sup>21</sup> e.g. to make sure that a defiler never gets a job in a children's home, or that a corrupt person does not become a judge, and at the time ensuring that petty offences like traffic offences do not lead to denial of a job.

## 1.2 Statement of Problem

In contemporary Kenyan society, the intersection between employment practices and the rights of ex-offenders presents a complex dilemma that warrants careful examination. Employers often resort to criminal record checks, ostensibly to ensure a secure work environment and to make informed hiring decisions.<sup>22</sup> However, the insistence on obtaining a certificate of good conduct may contribute to perpetuating discrimination against ex-offenders, as it is well-established that the mere existence of a criminal history often results in a prejudiced perception that hampers their chances of securing employment.<sup>23</sup> Moreover, it raises issues of fairness and social justice, as ex-offenders, having served their sentences, face continued barriers to reintegration into society.<sup>24</sup>

There is a disconnect between the right of privacy as guaranteed under Article 31<sup>25</sup> of the Constitution and the mandatory nature of demanding for criminal records. Article 31 (c) provides that every person has the right to privacy which includes the right not to have information relating to their family or private affairs unnecessarily revealed. This paper argues that criminal records are a private affair especially if they do not relate the job. Additionally, the operative phrase of Article 31 (c) is the necessity of the information being sought. In our case, it the necessity of the information being sought by an employer. While there cannot be a blanket mechanism to deal with

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<sup>20</sup> Kenya National Commission on Human Rights, Decriminalisation and Reclassification of Petty Offences in Kenya, <https://www.knchr.org/Portals/0/PETTY%20OFFENCES%20-%20FINAL%20FINAL.pdf> 10 October 2023, 1.

<sup>21</sup> Carr Nicola, Dwyer Clare & Larrauri, Elena: *Young People, Criminal Records and Employment Barriers*, 2015.

<sup>22</sup> Victor Mosoti, "Reforming The Laws On Public Procurement In The Developing World: The Example Of Kenya" (2005) 54 *International and Comparative Law Quarterly* 621.

<sup>23</sup> JD Mujuzi, "Disregarding Criminal Records for the Purpose Employment in Mauritius: The Making of the Certificate of Character Act and Issues That Need to Be Addressed" (2014) 36 *Statute Law Review* 59.

<sup>24</sup> Olivier Boiral, "The Certification of Corporate Conduct: Issues and Prospects" (2003) 142 *International Labour Review* 317.

<sup>25</sup> Article 31, Constitution of Kenya (2010).

what qualifies as necessary information to an employer specific jobs should inherently provide what amounts to necessary information. A person who was convicted for loitering has a criminal record but that the said person is not qualified to hold a job by dint of that particular criminal record is far-fetched. On the other hand, a person convicted of defilement under the sexual offences Act, 2006 may not be fit, though educationally qualified, to work with children.

### **1.3 Statement of Objectives**

This study sought to evaluate whether the demand for a certificate of good conduct by employers in Kenya impedes the right to privacy of ex-offenders. Therefore, the specific research objectives include:

- i. To analyse the legal framework governing the use of certificate of good conduct in employment.
- ii. To examine the impact of criminal record checks on employment opportunities for ex-offenders.
- iii. To evaluate the stigma associated with criminal history in employment.
- iv. To propose policy recommendations to balance employer needs and ex-offenders' privacy rights.

### **1.4 Hypothesis**

The demand for a certificate of good conduct by employers in Kenya, as manifested through criminal record checks, negatively impacts the employment opportunities for ex-offenders and infringes upon their right to privacy. This hypothesis posits that the stigma associated with a criminal history, coupled with the pervasive use of police clearance certificates in the recruitment process, creates barriers for ex-offenders, leading to a compromised right to privacy and diminished employment prospects.

### **1.5 Research Questions**

- i. What are the existing legal provisions in Kenya regarding the use of certificate of good conduct by employers during the hiring process, and how do these align with principles of privacy and non-discrimination?

- ii. To what extent do employers consider criminal record checks as a significant factor in hiring decisions, and how does this impact the employment prospects of ex-offenders?
- iii. What is the level of stigma attached to individuals with a criminal history in the Kenyan job market, and how does this influence employers' perceptions and decisions?
- iv. What policy recommendations can be proposed to strike a balance between employers' legitimate concerns and the protection of privacy rights for ex-offenders in Kenya?

## **1.6 Significance of the Study**

This research addresses a pressing concern regarding the potential infringement on the right to privacy of individuals with a criminal history. The demand for a certificate of good conduct implies a mandatory disclosure of an individual's past transgressions, which may have long-term repercussions on their ability to secure gainful employment. By investigating this phenomenon in the context of Kenyan employment practices, the study contributes to the broader discourse on the balance between privacy rights and societal expectations, shedding light on the potential human rights implications of such demands.

Secondly, the research has practical implications for policymakers and legal practitioners in Kenya. Understanding the impact of requiring a police clearance certificate on the employability of ex-offenders allows for a nuanced evaluation of existing laws and regulations. It provides an evidence-based foundation for potential reforms that may strike a better balance between the legitimate interests of employers in ensuring a safe working environment and the rights of ex-offenders to fair employment opportunities without undue discrimination.

Moreover, the study's findings may inform the development of guidelines or policies that guide employers in making informed decisions about hiring individuals with a criminal record. This could contribute to the creation of a more inclusive and rehabilitative approach to workforce integration, acknowledging that individuals who have served their sentences deserve a fair chance at reintegration into society through meaningful employment.

Furthermore, the research is socially significant as it addresses the issue of stigma associated with criminal records. By highlighting how the demand for a certificate of good conduct may perpetuate

societal prejudices against ex-offenders, it can contribute to changing perceptions and fostering a more compassionate and understanding community. This has the potential to reshape societal attitudes towards rehabilitation and reintegration, promoting a culture that values second chances and supports the broader goal of reducing recidivism.

## **1.7 Theoretical Framework**

### **1.7.1 Labelling Theory**

Labelling theory, developed by Howard S. Becker in the early 1960s, is a sociological perspective that focuses on the process of social deviance and how societal reactions to deviant behaviour contribute to the construction of social identities. Becker's work, particularly his influential book "Outsiders: Studies in the Sociology of Deviance," challenged traditional criminological approaches that emphasized the inherent nature of criminal behaviour.<sup>26</sup> Instead, labelling theory shifts the focus from the individual act of deviance to the societal reaction to that act.

One of the key concepts and elements of labelling theory is deviance as a social construction. According to Becker, deviance is not an inherent quality of an act but rather a social construct. It suggests that certain behaviours are labelled as deviant by society based on prevailing norms, values, and expectations. He argued that deviance is relative and varies across cultures and historical contexts. What is considered deviant in one society may not be deviant in another. Labelling theory emphasizes the significance of the process through which individuals are labelled as deviant by authorities or other members of society. This labelling can be formal (e.g., legal sanctions) or informal (e.g., societal judgments). The act of labelling often leads to the creation of social roles and identities, designating individuals as "criminals," "outsiders," or "deviants."<sup>27</sup>

Becker introduced the concept of secondary deviance to explain how individuals, once labelled as deviant, may adopt the deviant identity and engage in further deviant behaviour. The societal reaction itself can contribute to a cycle of deviance.<sup>28</sup> In the context of this research, labelling

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<sup>26</sup> Howard S Becker, *Outsiders* (Simon and Schuster 2008).

<sup>27</sup> RK Kerckhoff, "Outsiders: Studies in the Sociology of Deviance. By Howard S. Becker. New York: The Free Press of Glencoe, 1963. 179 Pp. \$5.00" (1964) 42 *Social Forces* 389.

<sup>28</sup> Charles Wellford, "Labelling Theory and Criminology: An Assessment" (1975) 22 *Social Problems* 332.

theory becomes a relevant framework for understanding how the demand for a certificate of good conduct contributes to the stigmatization of ex-offenders. When employers request criminal record checks as part of the process of recruitment, they are essentially labelling individuals with a criminal history. This label can lead to the reinforcement of societal stereotypes and prejudices, creating a barrier for employment seeking ex-offenders. The act of seeking a police clearance certificate becomes more than a routine background check; it becomes a mechanism for attaching a deviant label to individuals, potentially hindering their reintegration into society.

Furthermore, labelling theory also draws attention to the concept of a “master status,” wherein an individual’s deviant label becomes their dominant and defining characteristic. This dominant label can overshadow other aspects of their identity.<sup>29</sup> In the context of this research, the criminal history of ex-offenders, highlighted by the certificate of good conduct, may overshadow other aspects of their identity and qualifications. This narrow focus on their criminal past can lead to systemic discrimination in the job market, limiting opportunities for rehabilitation and reintegration. Therefore, the labelling theory encourages an analysis of the consequences of such labels on the reintegration of ex-offenders into society and their ability to secure employment.

### **1.7.2 Disparate Impact Theory**

Disparate impact theory, also known as adverse impact theory, is a legal concept that originated in the context of employment discrimination law. It addresses situations where a seemingly neutral policy or practice disproportionately affects a particular group based on race, colour, religion, sex, national origin, age, or other protected characteristics.<sup>30</sup> Disparate impact theory recognizes that discrimination can occur not only through intentional bias (disparate treatment) but also through seemingly neutral actions that have a discriminatory impact on a protected group. The theory is commonly used in employment discrimination cases to challenge hiring practices, promotions, testing procedures, and other employment policies that disproportionately affect certain groups.<sup>31</sup>

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<sup>29</sup> Ibid

<sup>30</sup> Anthony Evans, *The Roles Of Workforce Development For Minorities Improving Retention And Examining Disparate Impact And Disparate Treatment* (GRIN Verlag 2018).

<sup>31</sup> Elaine Shoben W, “Unintentional Discrimination: Disparate Impact,” *Employment Regulation in the Workplace* (Routledge 2015) <<http://dx.doi.org/10.4324/9781315704821-12>> accessed January 25, 2024.

The disparate impact theory emerged as a legal doctrine in the United States (US) with the passage of Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination in employment on the basis of race, colour, religion, sex, or national origin. The U.S. Supreme Court, in the landmark case *Griggs v. Duke Power Co.* (1971),<sup>32</sup> played a pivotal role in establishing the disparate impact theory. In *Griggs*, the Court ruled that employment practices that are facially neutral but disproportionately exclude members of a particular racial or ethnic group may still be deemed discriminatory and therefore illegal under Title VII.<sup>33</sup>

Key elements of the disparate impact theory include facially neutral policies, statistical disparity, business necessity or job-relatedness. With regard to facially neutral policies, disparate impact cases typically involve policies, practices, or criteria that appear neutral on their face but have a discriminatory impact on a protected group.<sup>34</sup> According to Rutherglen, statistical disparity describe situations where plaintiffs in disparate impact cases often present statistical evidence demonstrating that the neutral policy has a significantly adverse impact on a particular group.<sup>35</sup> This statistical evidence helps establish a *prima facie* case of disparate impact. With reference to business necessity or job-relatedness, even if a policy has a disparate impact, it may still be lawful if the employer can demonstrate that it is a business necessity or job-related. This requires the employer to show that the policy is essential for the efficient and safe operation of the business.<sup>36</sup>

In the case of employment and criminal record checks, the disparate impact theory can be used to evaluate whether the requirement for a certificate of good conduct has a disproportionately negative effect on ex-offenders, potentially impeding their right to privacy. This theory was applied to this research by examining the policies and practices of employers in Kenya, specifically those related to the hiring process and the use of police clearance certificates. It helped assess

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<sup>32</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)

<sup>33</sup> Marilyn V Yarbrough, "Disparate Impact, Disparate Treatment, and the Displaced Homemaker" (1986) 49 *Law and Contemporary Problems* 107.

<sup>34</sup> United States Congress, *A General Overview of Disparate Impact Theory* (Createspace Independent Publishing Platform 2017).

<sup>35</sup> Rutherglen G, "Disparate Impact under Title VII: An Objective Theory of Discrimination" (1987) 73 *Virginia Law Review* 1297.

<sup>36</sup> Anthony Evans, *The Roles Of Workforce Development For Minorities Improving Retention And Examining Disparate Impact And Disparate Treatment* (GRIN Verlag 2018).

whether these practices result in a disproportionate negative impact on ex-offenders compared to individuals without a criminal history. Moreover, the research will delve into the business necessity of such requirements. While employers may argue that the demand for a certificate of good conduct is essential for the safety and security of the workplace, it is crucial to critically evaluate whether such demands are truly necessary for the job at hand and if there are less discriminatory alternatives that still achieve the employer's legitimate objectives.

Labelling theory and disparate impact theory provide complementary perspectives on the issue of discrimination, particularly regarding employment practices and criminal records checks. Labelling theory postulates that the application of labels, such as "ex-offender," can significantly shape individuals' identities and opportunities within society.<sup>37</sup> When an individual is branded with a criminal record, they may face pervasive stigma and discrimination, effectively limiting their access to employment and other social opportunities. This stigmatization occurs irrespective of the nature or severity of the offense committed and can perpetuate a cycle of disadvantage for individuals who have already served their sentences.

Disparate impact theory, on the other hand, focuses on the unintentional but discriminatory effects of seemingly neutral policies or practices. While criminal record checks by employers may appear to be a routine part of the hiring process aimed at ensuring workplace safety and security, they can disproportionately exclude ex-offenders who are already disproportionately affected by socioeconomic challenges. Thus, even though the policy of conducting criminal record checks may not explicitly target ex-offenders, its implementation results in a disparate impact on this group, worsening existing inequalities and violating their right to privacy and equal opportunity.

## **1.8 Literature Review**

The demand for a certificate of good conduct by employers in Kenya and its potential impact on the right to privacy of ex-offenders is a complex issue that intersects with constitutional rights, international labor standards, and human rights principles. There seems to be little academic material on the right to privacy with regards to criminal records requirement during recruitment.

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<sup>37</sup> Anthony Evans, *The Roles Of Workforce Development For Minorities Improving Retention And Examining Disparate Impact And Disparate Treatment* (GRIN Verlag 2018).

Most discussions on criminal records in relation to employment are grounded on discrimination but not privacy.

Responding to the research question I have set out, Elena explains that continental European countries are inclined to disclose only recent convictions while the United Kingdom and common law countries tend to disclose all cautions, convictions and police records.<sup>38</sup> She advises that there should be a balance between the aims of employer processes of selection and the person's right to privacy. More to this, the scholar suggests a system that does not disclose old convictions implying that firstly, all the convictions are subject to being expunged and secondly that old convictions to not be disclosed after certain period of time and also cease to be public.<sup>39</sup>

Scholars like Mark and Hellen from Netherlands argue for and against the protection of the privacy of ex-offenders. Giving the examples of health history and marital status, they contend that job applicants are not required to disclose personal information that is irrelevant to the job because it is an unnecessary invasion of privacy.<sup>40</sup> They add that criminal record falls into the same category especially if it involves a distant conviction that is not related to the job. Though ex-offenders are entitled to privacy, Mark and Hellen hold that employers are entitled to protect their property destruction which may occur through ex-offenders.<sup>41</sup>

In the US, Lucken notes that there are two distinct certificates offered to individuals with criminal records: the certificate of relief from disabilities and the certificate of good conduct.<sup>42</sup> These certificates diverge primarily in their eligibility prerequisites: while the certificate of relief from disabilities caters to misdemeanants and first-time felony offenders, the certificate of good conduct is tailored for repeat offenders. The certificate of relief from disabilities may be granted at any

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<sup>38</sup> Pijoan Elena L, 'Criminal record disclosure and the right to privacy' University Pompeu Fabra, 2014, 723\_ <[https://www.researchgate.net/publication/289591252\\_Criminal\\_record\\_disclosure\\_and\\_the\\_right\\_to\\_privacy](https://www.researchgate.net/publication/289591252_Criminal_record_disclosure_and_the_right_to_privacy)> on January 2014.

<sup>39</sup> Pijoan Elena L, 'Criminal record disclosure and the right to privacy' University Pompeu Fabra, 2014, 735\_ <[https://www.researchgate.net/publication/289591252\\_Criminal\\_record\\_disclosure\\_and\\_the\\_right\\_to\\_privacy](https://www.researchgate.net/publication/289591252_Criminal_record_disclosure_and_the_right_to_privacy)> on January 2014.

<sup>40</sup> Lam H and Harcourt M, 'The use of criminal record in employment decisions: The rights of ex-offenders, employers and the public' *Journal of business ethics*, 2003, 241 <<https://www.jstor.org.ezproxy.library.strathmore.edu/>> on 3 October 2003.

<sup>41</sup> Ibid

<sup>42</sup> Karol Lucken and Lucille M Ponte, "A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis" (2008) 30 *Law & Policy* 46.

point following sentencing by a court where no prison term is involved, or after release from confinement by the state Board of Parole. Conversely, the certificate of good conduct is exclusively attainable from the Parole Board, but only subsequent to a waiting period ranging from one to five years of demonstrated “good conduct,” the duration dependent on the gravity of the offense.

Despite the variance in procedural pathways, the statutory criteria for eligibility for both certificates remain largely consistent. They necessitate a demonstration of rehabilitation deemed “consistent with rehabilitation” and deemed to serve the “public interest.” Notwithstanding their differences in origin and timing, both certificates hold similar legal implications. They absolve eligible individuals of “any forfeiture or disability” and effectively eliminate any employment barriers automatically imposed by law due to a prior conviction.<sup>43</sup> Moreover, they establish a legal presumption of rehabilitation that employers and licensing boards are obliged to acknowledge, and which holds judicial enforceability. In essence, these certificates serve as vital tools in reintegrating individuals with criminal records into society, providing avenues for professional and social re-engagement while affirming the principles of rehabilitation and the public interest.

In Mauritius, several employers mandate that both prospective and current employees furnish a certificate of character, previously known as a certificate of morality. This document ascertains whether individuals have any criminal history. The presence of a criminal record in Mauritius often poses significant challenges for individuals seeking employment, potentially leading to difficulty securing a job or even termination from current employment positions. Annually, a substantial number of employees undergo the process of obtaining these certificates, seeking to validate their suitability for employment. The year 2012 marked the implementation of the Certificate of Character Act, a key legislation that outlines the procedures and criteria concerning the evaluation of an individual's criminal history. Among its provisions, the act outlines circumstances wherein a person's criminal record may be disregarded, enabling such individuals to be considered as though they have never been convicted of an offence. The acquisition of a ‘clean’ record through

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<sup>43</sup> Alec C Ewald, “Rights Restoration and the Entanglement of US Criminal and Civil Law: A Study of New York’s ‘Certificates of Relief’” (2016) 41 Law & Social Inquiry 5.

this legal framework significantly amplifies an individual's opportunities in the job market, expanding their opportunities for gainful employment.<sup>44</sup>

In Kenya, the demand for certificates of good conduct extends beyond the public service sector to encompass various roles within the private sector as well. While it is a common requirement for individuals seeking employment in government agencies, law enforcement, or other public service roles, many private sector employers also request these certificates as part of their hiring process. This practice stems from a desire to mitigate potential risks associated with hiring individuals with criminal records and to uphold standards of integrity and trust within their organizations. Additionally, some industries, such as finance, security, and childcare, place a particular emphasis on ensuring the integrity and reliability of their employees, leading to a widespread expectation of presenting a certificate of good conduct as evidence of an individual's suitability for employment.

The demand for certificates of good conduct in both public and private sectors reflects a broader societal concern with security and risk management, as employers seek to protect their interests and reputation while ensuring a safe and trustworthy work environment. However, this practice has also raised questions about its impact on the rights and opportunities of ex-offenders, who may face barriers to employment and social reintegration due to their past criminal history. As such, there is a need to critically evaluate the implications of this requirement and explore alternative approaches that balance the legitimate concerns of employers with the rights and dignity of individuals with criminal records.

Mohamed from the United Kingdom notes that the reason why individuals with criminal records face invasion of privacy is because the society views them as targets for scrutiny.<sup>45</sup> More to this, these difficulties imposed on ex-offenders act as an additional punishment adding to the one deemed fit by the court. This then results to frustration and employment barriers which in turn cause them to return to a life of crime.<sup>46</sup> The writer supports that criminal records should be

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<sup>44</sup> JD Mujuzi, "Disregarding Criminal Records for the Purpose Employment in Mauritius: The Making of the Certificate of Character Act and Issues That Need to Be Addressed" (2014) 36 Statute Law Review 59.

<sup>45</sup> Alsalehi M, 'Privacy, Criminal records and employment. Should punishment extend beyond what court has already imposed?' London School of Economics, 2008 \_< <https://www.grin.com/document/342983>> on 2008.

<sup>46</sup> Ibid

accessible to employers but limits it convictions as opposed to arrests. He proposes that governments should work with large organizations to put in place procedures and policies to recruit ex-offenders. Despite it being an invasion of privacy, the writer observes that studies show ex-offenders are likely to commit another crime something which on occasion permits exposure of criminal records.

Germans like Kenyans, are requested a certificate of good conduct. This only applies to welfare services as there are no laws on the processing of criminal records in the business area.<sup>47</sup> Due to employee privacy, employers are only allowed to ask about ongoing proceedings or past convictions in cases where there is reasonable doubt about the suitability of a certain candidate. This is because in Germany convictions are deleted after a period of time and the law provides that employers have no interest in asking about convictions that have already been deleted from the criminal register.<sup>48</sup>

## **1.9 Research Design & Methodology**

The research is through desktop research of both primary and secondary sources. The primary sources include, inter alia, international, regional and national statutes, legislations and bills and case laws. The study also relied heavily on secondary sources including books, chapters in books, journal articles, working papers, dissertations, country reports and online sources. These sources were also be relied on to provide empirical data regarding the employment history of ex-offenders in Kenya.

## **1.10 Assumptions**

Assumptions are the foundational beliefs or conditions that are considered to be true but may not have direct evidence for the research. Below are eight assumptions relevant to the study:

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<sup>47</sup> Chamber H, 'Processing of personal data related to criminal convictions for employment purposes' One Trust Data Guidance, June 2022, 6.

<sup>48</sup> Chamber H, 'Processing of personal data related to criminal convictions for employment purposes' One Trust Data Guidance, June 2022, 6.

1. Assumption about employment practices: There is an assumption that employers in Kenya commonly request a certificate of good conduct or criminal record checks as a standard part of their recruitment process.
2. Assumption about privacy rights: There is an assumption that individuals have a reasonable expectation of privacy regarding their criminal history, and that this right is recognized and valued in the legal and societal context of Kenya.
3. Assumption about stigma: There is an assumption that individuals with a criminal history face societal stigma, making it challenging for them to secure employment even without explicit information from a certificate of good conduct.
4. Assumption about the impact of criminal history: There is an assumption that the disclosure of a criminal history through a certificate of good conduct significantly influences employers' decisions in the hiring process.

### **1.11 Limitations**

The study focuses specifically on the Kenyan context, and the results may not be easily applicable to other jurisdictions with different legal systems, cultural norms, and societal attitudes towards ex-offenders. Moreover, economic considerations, such as the state of the job market and the availability of employment opportunities, can influence employers' decisions. The study might not capture the full spectrum of factors that contribute to the reluctance of employers to hire ex-offenders, as economic conditions play a crucial role in shaping hiring practices. Finally, societal attitudes towards ex-offenders and the demand for certificates of good conduct may evolve over time. The study may not capture the potential changes in public perception, legal frameworks, or employment practices that could occur in the future.

### **1.12 Chapter Breakdown**

Chapter one discusses the study background, problem statement; objectives, hypothesis, research questions, significance, theoretical framework, literature review, and the methodology used.

Chapter two presents a comprehensive literature review on the existing legal provisions in Kenya regarding the use of certificate of good conduct by employers during the hiring process, and how they align with principles of privacy and non-discrimination.

Chapter three discusses the extent to which employers consider criminal record checks as a significant factor in hiring decisions, and how it impacts the employment prospects of ex-offenders.

Chapter four discusses the level of stigma attached to individuals with a criminal history in the Kenyan job market, and how it influences employers' perceptions and decisions in Kenya.

Chapter five concludes the dissertation and proposes policy recommendations to strike a balance between employers' legitimate concerns and the protection of privacy rights for ex-offenders in Kenya.



## CHAPTER TWO

### LEGAL FRAMEWORK GOVERNING THE USE OF CERTIFICATE OF GOOD CONDUCT IN EMPLOYMENT

#### 2.1 Introduction

This chapter delves into an examination of the existing legal framework governing the acquisition and utilization of certificates of good conduct by employers. Central to this inquiry is an exploration of how these legal provisions, particularly Article 31(C) of the constitution interact with and potentially impact the right to privacy and the non-discrimination principle concerning individuals with prior criminal records. Given the stigma attached to criminal histories and the consequential barriers to employment faced by ex-offenders, this analysis seeks to dissect the balance between employers' legitimate interests in ensuring a safe and trustworthy workforce and the rights of individuals to privacy and fair treatment in the employment sphere. Through a comprehensive review of relevant statutes, regulations, and case law, this chapter aims to illuminate the legal framework surrounding the use of certificates of good conduct in Kenya, critically assessing the alignment of these provisions with constitutional guarantees of privacy and principles of non-discrimination in the employment setting.

#### 2.2 Legal Framework for Employment and Criminal Records in Kenya

The ILO sets global labor standards, and Kenya is a member state bound by these conventions. Convention No. 111 on Discrimination in Employment and Occupation provides insights into international norms concerning fair employment practices and the prohibition of discrimination based on criminal records. Adopted in 1958, the convention highlights the principle that all individuals should enjoy equal opportunities and treatment in employment and occupation, without any form of discrimination based on race, color, sex, religion, political opinion, national extraction, or social origin. It obliges member states to formulate and implement policies that promote equality in employment, ensuring that discriminatory practices are eradicated, and individuals have the right to pursue their chosen occupations without prejudice.<sup>49</sup> Convention No. 111 stands as a

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<sup>49</sup> Tzehainesh Teklè, "ILO Convention 111 Discrimination (Employment and Occupation) Convention, 1958 (No. 111)," *International and European Labour Law* (Nomos Verlagsgesellschaft mbH & Co KG 2018) <<http://dx.doi.org/10.5771/9783845266190-628>> accessed January 25, 2024.

crucial pillar in the international effort to foster inclusive and fair labor practices across diverse settings.

The Human Rights Committee issues General Comments that provide authoritative interpretations of the International Covenant on Civil and Political Rights (ICCPR), to which Kenya is a party. General Comment No. 18 on Non-discrimination articulates the committee's stance on protecting individuals from arbitrary or unlawful interference with their privacy, emphasizing the need for proportionality in any limitations imposed.<sup>50</sup> This authoritative interpretation elucidates that the right to privacy is inherently linked to the prohibition of discrimination, emphasizing that state parties must ensure that laws and practices do not lead to arbitrary or unlawful interference with an individual's privacy. The General Comment asserts that any limitations on privacy rights must be proportionate, necessary, and not discriminatory in nature, thereby reinforcing the overarching commitment to safeguarding individuals from unwarranted intrusions into their private lives and ensuring equal protection under the law.<sup>51</sup>

Considering regional instruments, the African Charter on Human and Peoples' Rights, to which Kenya is a signatory, may be relevant. The Charter emphasizes the right to work and just conditions of employment, affirming individuals' entitlement to gainful employment under equitable and satisfactory conditions. It accentuates the right of everyone to enjoy of favorable conditions of work, ensuring that individuals are treated with dignity in the workplace. Additionally, the Charter condemns discrimination in all its forms, promoting equal opportunities and access to employment without prejudice.<sup>52</sup> By recognizing the significance of work in individuals' lives and advocating for non-discrimination, the African Charter on Human and Peoples' Rights establishes a framework that supports fair and inclusive employment practices across member states. Assessing whether the Charter promises a right to privacy and how it balances against the interest of employers in conducting criminal record checks is crucial.

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<sup>50</sup> Helen Keller and Leena Grover, "General Comments of the Human Rights Committee and Their Legitimacy," *UN Human Rights Treaty Bodies* (Cambridge University Press 2012)  
<<http://dx.doi.org/10.1017/cbo9781139047593.005>> accessed January 25, 2024.

<sup>51</sup> *Ibid.*

<sup>52</sup> Murray Rachel, "29 Articles 30–40: The African Commission on Human and Peoples' Rights," *The African Charter on Human and Peoples' Rights* (Oxford University Press 2019)  
<<http://dx.doi.org/10.1093/law/9780198810582.003.0029>> accessed January 25, 2024.

While there are eight (8) major laws that protect employees in Kenya, the legal framework surrounding employment is primarily governed by the Employment Act of 2007, which sets out the obligations and rights of both employees and employers in the country. Besides the Constitution of Kenya 2010, other statutes and regulations complement the Employment Act to ensure fair employment practices and protect the rights of workers. These include the Labour Relations Act, 2007; the Labour Institution Act, 2007; Occupational Safety and Health Act, 2007; the Work Injury Benefits Act, 2007; the Industrial Court Act, 2011; the Employment and Labour Relations Court Act, 2014; and the Labour Relations (Procedure) Rules 2016.

Kenya has specific labor laws that govern the employment relationship. The Employment Act, for instance, outlines the rights and obligations of employers and employees. While the Act aims to provide employees the right to privacy,<sup>53</sup> it barely addresses the issue of employers seeking criminal record checks and the potential implications for individuals with a criminal history. However, the Data Protection Act No. 24 of 2019 and the Data Protection Regulations, 2021 play a pivotal role in these advancements. This legislations operationalize the constitutional provisions under Article 31 (c) and (d), specifically safeguarding the right to privacy and, in particular, the right to prevent unnecessary requisition or revelation of information related to an individual's family or private matters or the unwarranted infringement upon the privacy of their communications.<sup>54</sup> In accordance with the Employment Act, employers gather information about employees, which inherently comprises personal data and sensitive personal data, falling within the purview of this regulatory framework. It is essential to recognize that while the Employment Act empowers employers to acquire information from employees for contractual purposes, the law delineates the essential parameters within which such data should be processed.

The 2010 Kenyan Constitution is a fundamental reference point for understanding employment rights and privacy concerns. The cornerstone of labour protection in Kenya lies within the framework of the Constitution, which safeguards the rights of employees. Embedded within Article 27 is the principle of equality and freedom from discrimination, ensuring that both women

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<sup>53</sup> Employment (Amendment) Act, No. 15 of 2022

<sup>54</sup> Constitution of Kenya (2010), article 31(c) and (d)

and men enjoy equitable treatment and access to opportunities across economic and social domains.<sup>55</sup> Article 27 (4) the Constitution explicitly prohibits any form of discrimination against employees, whether direct or indirect, based on various factors such as race, gender, pregnancy, or language, among others.<sup>56</sup>

Article 41(1) of the Constitution guarantees every person the right to fair labor practices.<sup>57</sup> However, the same Constitution also permits limitations on rights, provided they are reasonable and justifiable under Article 24. Furthermore, Article 41 addresses the particulars of labour relations, affirming the fundamental right of every individual to just and fair treatment in the workplace.<sup>58</sup> It emphasises the importance of upholding the rights and dignity of individuals seeking employment, including those with a criminal history. Just and fair treatment necessitates a balanced approach that considers rehabilitation, reintegration, and the principle of non-discrimination. Employers should refrain from unjustly excluding ex-offenders from employment opportunities solely based on their past convictions, recognizing that everyone deserves a chance for redemption and meaningful participation in society.

The Employment Act of 2007 establishes the fundamental principles of employment relationships, including terms and conditions of employment, wages, termination procedures, and non-discrimination in recruitment and promotion. It emphasizes the equal treatment principle for all job seekers and prohibits discrimination based on various factors, including race, gender, religion, and disability. However, the Act does not explicitly address the specific issue of employers' use of certificates of good conduct during the hiring process.

In consonance with the constitutional mandate articulated in Article 27, the Act's Section 5 emphasizes the imperative of non-discrimination within the realm of employment. This stipulation extends across all facets of the employment spectrum, encompassing recruitment, training, promotions, conditions and terms of employment, as well as the termination process.<sup>59</sup> Upholding

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<sup>55</sup> Article 27, Constitution of Kenya (2010).

<sup>56</sup> Ibid.

<sup>57</sup> Constitution of Kenya (2010), article 41(1)

<sup>58</sup> Article 41, Constitution of Kenya (2010).

<sup>59</sup> Section 5, *Employment Act* (Act No. 1 of 2007).

the principles of equality and fairness, the Act explicitly prohibits direct or indirect discrimination on the basis of race, gender, ethnicity, language, religion, political affiliation, nationality, disability, pregnancy, mental status, or HIV status. It is important to note that while the Act staunchly opposes discrimination, it also delineates a clear distinction between discriminatory practices and affirmative action measures as well as preferences necessitated by the inherent requirements of a particular job role. However, this section of the Act remains categorically silent about how to treat employees with criminal records in Kenya.

Section 6 of the legislation expressly prohibits any form of sexual harassment directed towards employees within their workplace. Sexual harassment, as defined under Section 6, encompasses various actions undertaken by the employer, their representatives, or co-workers, including but not limited to:

- a) Solicitation of sexual intercourse, physical contact, or any other form of sexual activity, whether implied or expressed;
- b) Offering preferential treatment in employment as a means of coercion;
- c) Threatening employees with detrimental treatment in their employment status;
- d) Intimidating employees regarding their current or future employment status;
- e) Utilizing sexually explicit language, whether written or verbal;
- f) Displaying visual material of a sexual nature;
- g) Engaging in physical behaviours of a sexual nature that create a hostile or unwelcome environment, adversely affecting the employee's job satisfaction, performance, or employment.<sup>60</sup>

As regards the abovementioned actions detailing sexual harassment, a person convicted of defilement under the Sexual Offences Act, 2006 in Kenya may not be considered fit to work with children, despite being educationally qualified, due to the grave breach of trust and the potential risk they pose to the safety and well-being of children. Defilement constitutes a serious offense involving the sexual abuse and exploitation of minors, which inherently undermines the

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<sup>60</sup> Section 6, *Employment Act* (Act No. 1 of 2007).

fundamental principles of child protection and welfare.<sup>61</sup> Individuals convicted of such crimes demonstrate a significant lapse in moral character and judgment, raising concerns about their ability to maintain appropriate boundaries and uphold the welfare of children in professional settings. The nature of the offense suggests a profound disregard for the rights and dignity of children, rendering individuals convicted of defilement unsuitable for positions involving direct interaction or responsibility for the care, guidance, and supervision of children. Thus, while educational qualifications may indicate competency in certain areas, the gravity of a defilement conviction highlights the necessity of prioritizing child safety and safeguarding measures in employment decisions concerning roles involving children.

The Labour Relations Act 2007 serves as the principal legal framework governing collective bargaining and labour relations within Kenya. Consolidating the Trade Disputes Act and the Trade Unions Act, this legislation has streamlined operational procedures, fostering enhanced efficiency and responsiveness in employment relations while nurturing labour peace across the nation. Central to its provisions is the facilitation of the collective bargaining process, urging participating parties to engage in negotiations in good faith.<sup>62</sup> Within the ambit of this Act, there exists a mandatory requirement for parties to disclose pertinent information that may shed light on their respective bargaining positions, thereby fostering transparency and equitable negotiation practices. Moreover, the legislation reaffirms the pivotal role of the Industrial Court in overseeing the registration and endorsement of collective bargaining agreements, ensuring their adherence to established legal standards and fair labour practices.<sup>63</sup>

Furthermore, the Act enshrines protections for specific categories of employees against discriminatory practices. It stipulates that if an employee belongs to a protected group and faces discrimination based on their group status, legal recourse against the employer is available. However, it is important to note that membership in a protected group does not confer immunity against disciplinary measures or termination. Nonetheless, the implementation of human resource

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<sup>61</sup> Njue FN and Materu SF, 'The Legal, Practical and Policy Dilemmas in Enforcing the Sexual Offences Act of Kenya in Relation to Consensual Adolescent Sex.' *Journal of African Law*, 2021, 270.

<sup>62</sup> Section 54, *Labour Relations Act* (Act No. 14 of 2007).

<sup>63</sup> Muindi M, Muli E and Gichuki N, Unravelling the Triangle: Clarifying the Employment Status within Outsourcing Triangular Employment Relationships in Kenya. *International Journal of Law and Policy*, 2021, p. 7.

policies may sometimes be inadvertently overlooked under the purview of this legislation, potentially leading to legal disputes and litigation.

According to Section 6 of the Labour Institution Act 2007, any member of the board, with the exception of the chairman, can face removal from office under specific circumstances. This includes instances where the member has been found guilty of an offense involving fraud or dishonesty. Additionally, if a member is convicted of a criminal offense and subsequently receives a sentence of imprisonment surpassing six months or incurs a fine exceeding ten thousand shillings, they are subject to potential removal from their position.<sup>64</sup> In regard to this provision, it is imperative that as an ex-offender, the member would not qualify for a certificate of good conduct, without mentioning having the opportunity to be employed in a similar organisation.

The Judicial Act of 2011<sup>65</sup> also dictates that parliament must establish provisions for judicial services and the administration of the Judiciary. Although Judges hold the status of state officers, the constitution emphasizes their obligation to integrity by stipulating that they must be selected from individuals characterized by high moral standing, integrity, and impartiality. The benchmark for judges' integrity is further delineated in the Judicial Service Code of Conduct. In accordance with this standard, applicants are obligated to acquire and append clearances from various state and non-state entities to their applications including a certificate of good conduct from the Directorate of Criminal Investigations (DCI).

A certificate of good conduct serves to affirm that the applicant possesses a clean criminal record, aiding in the determination of their integrity by showcasing a consistent history of honesty and upstanding moral character across diverse spheres of life.<sup>66</sup> The assessment of the judge's integrity involves ensuring a fair process wherein the individual is accorded a hearing, including the opportunity to cross-examine any individual presenting adverse information against them. Additional criteria include the right to access documents, materials, and evidence to be considered

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<sup>64</sup> Section 6, *Labour Institution Act 2007* (Act No. 12 of 2007).

<sup>65</sup> Section 3, *Judicial Act* (Act No. 1 of 2011).

<sup>66</sup> Heydon G and Naylor B, 'Criminal record checking and employment: The importance of policy proximity' *Sage Journals*, 2017\_< <https://journals.sagepub.com/doi/10.1177/0004865817723410>> on 8 August 2017.

in the administrative decision-making process, as well as the entitlement to receive explanations for the eventual decision rendered.

The Leadership and Integrity Act<sup>67</sup> both historically and presently, aims to lend legislative force to the principles outlined in chapter 6 of the constitution. Within Article 73, there is an endorsement of leadership characterized by personal integrity, objectivity, and impartiality; a form of leadership that is characterized by selflessness, champions public integrity, and upholds the ethos of the Law. Furthermore, Article 75 explicitly asserts that, regardless of whether in public arenas, official capacities, private domains, or in collaboration with others, a state officer is expected to conduct themselves in a manner that refrains from diminishing the dignity of the office they occupy. While primarily focusing on the conduct of public officials, certain provisions within the Act can have implications for the private sector, particularly concerning the hiring process and the use of certificates of good conduct by employers.

One key aspect of the Act is its emphasis on upholding principles of integrity and non-discrimination, which are essential in fostering a fair and just society. By requiring public officers to adhere to strict integrity standards, the Act sets a precedent for similar expectations within the private sector. Employers, guided by these principles, should refrain from unfairly discriminating against ex-offenders solely based on their criminal history. Furthermore, the Act mandates transparency and accountability, which could extend to the hiring process, ensuring that decisions regarding the use of certificates of good conduct are made fairly and without bias. This aligns with the broader principles of privacy and non-discrimination, as it encourages employers to consider an individual's qualifications and character in a manner that respects their privacy rights while also promoting inclusivity and equal opportunity in employment. Thus, by incorporating the values espoused in the Leadership and Integrity Act, employers can balance between safeguarding their interests and respecting the rights of ex-offenders to contribute to a more equitable and just society.

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<sup>67</sup> Section 6, *Leadership and Integrity Act* 2012 (Act No. 19 of 2012, Act No. 47 of 2012).

### 2.3 Privacy Rights and Non-Discrimination Principles in Kenya

Kenya, like many jurisdictions, recognizes the fundamental right to privacy as enshrined in its constitution and various international human rights instruments. Article 2 of Kenya's Constitution states that "the general rules of international law shall form part of the law of Kenya. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."<sup>68</sup> Kenya is a signatory to the Universal Declaration of Human Rights ('UDHR') and has ratified the International Covenant on Civil and Political Rights ('ICCPR'). Article 17 of the ICCPR, which reinforces Article 12 of the UDHR, provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".<sup>69</sup> The Human Rights Committee has noted that states parties to the ICCPR have an obligation to "adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right."<sup>70</sup>

Article 31 of the Kenyan Constitution explicitly protects the right to privacy, stating that every person has the right to privacy, which includes the right not to have their person, home, or property searched, their possessions seized, information relating to their family or private affairs unnecessarily disclosed, or their privacy of communication infringed.<sup>71</sup> This constitutional provision emphasises the importance Kenya places on safeguarding individuals' privacy from unwarranted intrusion by the state or private entities. The right to privacy extends to various aspects of an individual's life, including their criminal history and rehabilitation status.

Therefore, Kenya's commitment to international human rights instruments, including the UDHR and the ICCPR significantly influences the legal framework regarding the issuance and demand for certificates of good conduct by employers in Kenya, particularly concerning the right to privacy. The right to privacy, as articulated in international human rights instruments, places limitations on the extent to which employers can demand intrusive information, such as an

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<sup>68</sup> Article 2, Constitution of Kenya (2010).

<sup>69</sup> Article 17, *International Covenant on Civil and Political Rights*. 19 December 1966, 999 UNTS 171.

<sup>70</sup> UN General Assembly, "Universal Declaration of Human Rights," 217 (III) A (Paris, 1948), <http://www.un.org/en/universal-declaration-human-rights/> (accessed February 16, 2024). General Comment No. 16 (1988), para. 1

<sup>71</sup> Article 31, Constitution of Kenya (2010).

individual's criminal history, as a condition of employment. Employers must respect the privacy rights of job applicants and ensure that any requests for sensitive personal information are justified, proportionate, and non-arbitrary. The UDHR and the ICCPR prohibit arbitrary interference with individuals' privacy rights. Employers in Kenya must refrain from imposing blanket policies that automatically exclude individuals with criminal records without considering the specific circumstances and relevance of such records to the job requirements. Any interference with privacy, including the requirement for certificates of good conduct, must be lawful, justified, and proportionate.

Both the UDHR and the ICCPR emphasise the principle of non-discrimination, which prohibits unfair treatment based on arbitrary factors, including past criminal convictions. Employers in Kenya are obligated to adopt non-discriminatory hiring practices that treat all job applicants fairly and assess their suitability based on relevant qualifications and merits, rather than solely on the basis of their criminal history. In the context of the issuance and demand for certificates of good conduct by employers, these international standards provide a framework for ensuring that employment practices in Kenya align with fundamental human rights principles and contribute to promoting dignity, fairness, and equality in the workplace.

The Data Protection Act of 2019 establishes a comprehensive legislative framework for the management of data, encompassing various mediums such as print, tape, film, and electronic formats.<sup>72</sup> Its primary aim is to ensure the protection of personal data handled by entities, both public and private. Enacting Article 31(c) of the Constitution, the Act upholds individuals' rights to prevent unnecessary disclosure of information pertaining to their private or familial matters, as well as Article 31(d), safeguarding against infringements on the privacy of their communications.<sup>73</sup>

This legislation meticulously governs the entire spectrum of personal data operations, including collection, retrieval, processing, storage, utilization, and disclosure. Notably, it extends its purview to electronic means, reflecting the evolving process of data management in contemporary society. However, a notable gap in the legislation lies in its failure to explicitly address the protection of

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<sup>72</sup> Section 38, *Data Protection Act* (Act No. 24 of 2019).

<sup>73</sup> Article 31, *Constitution of Kenya* (2010).

data stored in the “cloud” – synchronized storage centres for digital data. With many employers already embracing cloud computing technology to store employee records, this gap in legislation may infringe on the right to privacy of individuals with criminal history, especially if their subsequent employers openly access their records from previous employers without their consent.

In addition, the emergence of cloud repositories presents a particular challenge, especially concerning data stored in servers located outside Kenya’s jurisdiction. This issue becomes pronounced in scenarios involving individuals with prior offenses seeking employment opportunities abroad, where potential employers may or may not mandate a certificate of good conduct. The absence of explicit provisions regarding cloud data protection raises complex jurisdictional questions, amplifying concerns surrounding data security and privacy in an increasingly interconnected world.

When viewed through the lenses of the labelling theory and the disparate impact theory, the issuance and demand for certificates of good conduct by employers in Kenya have significant implications for the right to privacy of ex-offenders. Labelling theory posits that societal reactions and labels attached to individuals, particularly those deemed deviant or criminal, can significantly shape their self-perception and subsequent opportunities in society.<sup>74</sup> In the context of ex-offenders seeking employment, the requirement for certificates of good conduct effectively labels individuals based on their past criminal history, reinforcing societal perceptions of them as inherently untrustworthy or undesirable employees.

The issuance of certificates of good conduct and their subsequent demand by employers perpetuate this labelling process. Ex-offenders are compelled to disclose their criminal history, often resulting in stigmatization and discrimination in the job market. The mere existence of a criminal record, regardless of the nature of the offense or the individual’s rehabilitation efforts, can overshadow other qualifications and achievements, effectively limiting employment opportunities and perpetuating cycles of marginalization and exclusion.

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<sup>74</sup> RK Kerckhoff, “Outsiders: Studies in the Sociology of Deviance. By Howard S. Becker. New York: The Free Press of Glencoe, 1963. 179 Pp. \$5.00” (1964) 42 Social Forces 389.

The disparate impact theory, a concept within anti-discrimination law, recognizes that seemingly neutral policies or practices may disproportionately disadvantage certain groups based on protected characteristics. In the case of certificates of good conduct, while the requirement may appear neutral on its face, it disproportionately affects ex-offenders, who are more likely to have criminal records compared to the general population. By mandating the submission of certificates of good conduct as part of the hiring process, employers effectively create barriers to employment for ex-offenders, regardless of their qualifications or suitability for the job. This disparate impact perpetuates systemic inequalities and denies individuals with criminal histories the opportunity to reintegrate into society and contribute meaningfully to the workforce.<sup>75</sup>

## 2.4 Chapter Summary

The chapter delved into the complex relationship between employment practices, criminal records, privacy rights, and non-discrimination within the legal framework of Kenya. It begins by dissecting the existing legal provisions surrounding employment, which are pertinent to the utilization of certificates of good conduct by employers. The chapter also highlights the significance of understanding the legal framework governing the employment sphere and the specific regulations surrounding the acquisition and utilization of certificates of good conduct. Privacy rights also emerge as a central theme, with an emphasis on how the demand for certificates of good conduct intersects with the privacy concerns of ex-offenders. The stigma associated with criminal histories amplifies the scrutiny on the privacy implications of such demands.

Eventually, the chapter serves as a comprehensive examination of the legal process surrounding the use of certificates of good conduct by employers in Kenya. It emphasises the necessity of aligning employment practices with constitutional principles of privacy and non-discrimination, while also laying the groundwork for further exploration into the intersection of employment, criminal records, and fundamental rights in Kenya. The next chapter discusses the extent to which employers consider criminal record checks as a significant factor in hiring decisions, and how it impacts the employment prospects of ex-offenders.

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<sup>75</sup> Elaine Shoben W, "Unintentional Discrimination: Disparate Impact," *Employment Regulation in the Workplace* (Routledge 2015) <<http://dx.doi.org/10.4324/9781315704821-12>> accessed January 25, 2024.

## CHAPTER THREE

### THE IMPACT OF CRIMINAL RECORD CHECKS ON EMPLOYMENT OPPORTUNITIES FOR EX-OFFENDERS

#### 3.1 Introduction

This chapter discusses the extent to which employers consider criminal record checks as a significant factor in hiring decisions, and how it impacts the employment opportunities for ex-offenders. In regard to Kenya's employment practices, the demand for a certificate of good conduct by employers casts a shadow over the employment opportunities of individuals with past convictions. This chapter explores the extent to which employers prioritize criminal record checks in their hiring decisions, and subsequently, its effects on the professions of ex-offenders. An in-depth examination of existing literature also sheds light on why employment doesn't work for ex-offenders despite criminal record checks in Kenya.

#### 3.2 Understanding the Context of Criminal Record Checks and Employment Opportunities in Kenya

The process of conducting a criminal record check involves gathering and reviewing background information pertaining to an individual's involvement in criminal activities, if any.<sup>76</sup> In Kenya, such background investigations primarily focus on pre-employment screenings and employers' assessments of the behavioural conduct of their current employees, both during and outside of their assigned duties as well as their financial transactions before and after employment. The objective behind these checks is to uncover any potential criminal and fraudulent activities in which employees may have engaged on.<sup>77</sup>

Prior to initiating employee background checks within Kenya, it is vital to consider the historical context within which this practice has evolved. This is because Kenya maintains stringent regulations concerning employee privacy, necessitating adherence to these legal frameworks throughout the background check process to ensure compliance, and safeguard both employer

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<sup>76</sup> Devah Pager, "The Mark of a Criminal Record" (2003) 108 *American Journal of Sociology* 937.

<sup>77</sup> Scott H Decker and others, "Criminal Stigma, Race, and Ethnicity: The Consequences of Imprisonment for Employment" (2015) 43 *Journal of Criminal Justice* 108.

interests and employee privacy rights. Upon its establishment in 1911, the Kenya Prison Services operated under the jurisdiction of the Ministry of Home Affairs, Heritage, and Sports. Its primary objective encompasses the containment and safe custody of offenders, the facilitation of rehabilitation and reform initiatives, the administration of justice, and the promotion of opportunities for social reintegration among prisoners. These mandates are enshrined within the Prisons Act Cap 90, and Borstal Institutions Act Cap 92, and Public Service Commission Act.

In conjunction with the Kenya Prison Services, the DCI department is mandated to issue the certificate of good conduct. Criticism has been levelled against the Kenya Prison Services regarding its effectiveness in fulfilling these constitutional obligations. According to the Ministry of Interior and National Administration's website, currently, the population in Kenyan prisons is approximately 54,000, with only 52% already sentenced, while the rest still awaiting trial.<sup>78</sup> Despite substantial governmental investments in rehabilitation programs, the institution has faced scrutiny due to escalating recidivism rates. Statistics indicate a notable increase in recidivism from 25.4% in 2002 to 47% by 2022.<sup>79</sup> This trend emphasises challenges within the Kenya Prison Department's capacity to achieve its mandated goals effectively. Despite concerted efforts and financial resources allocated to rehabilitation endeavours, the persistent rise in recidivism rates highlights systemic shortcomings that warrant critical examination and potential reforms within the correctional system.

The DCI recently acknowledged its concerted efforts to address a significant backlog of police clearance certificate applications that have besieged the system since April 2023. This backlog, as indicated by the DCI, stems from a malfunction encountered in the Automated Fingerprint Identification System (APFIS), resulting in the agency grappling with an accumulation of over 600,000 pending applications, even following the restoration of the system in September 2023.<sup>80</sup> In response to this challenge, the Principal Criminal Registrar at the DCI has outlined a comprehensive strategy aimed at mitigating the crisis. This strategy entails the implementation of

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<sup>78</sup> – <https://www.correctional.go.ke/kenya-prisons-service> > on 29 February 2024.

<sup>79</sup> Evans Oruta and Willem Luyt, "Factors of Recidivism among Reintegrated Inmates in Kenya" [2022] *Journal of Law, Policy and Globalization* 109.

<sup>80</sup> – <https://www.citizen.digital/news/dci-addresses-delay-in-issuance-of-police-clearance-certificates-n331115> > on 29 February 2024.

a dual approach, combining both automated and manual processing methods for handling the backlog of applications. Not only does this backlog have a negative impact on the criminal record checks, but also on the employment opportunities for ex-offenders in Kenya. This trend emphasises challenges within the DCI Department's capacity to achieve its mandated goals effectively.

The Employment (Amendment) Act No. 15 of 2022 brought about revisions to Section 9 of the Employment Act. The amended provision states that employers are now permitted to request job applicants to furnish any clearance or compliance certificate only subsequent to extending a job offer and expressing intent to formalize the employment relationship through a written contract.<sup>81</sup> Furthermore, prior to conducting any background checks, it is mandatory for employers to secure consent from the prospective employee. This consent can be obtained through the execution of a formal consent form detailing the nature of information to be collected and its intended use. Nevertheless, employers retain the prerogative to rescind the employment offer in instances where the job applicant fails to satisfy the provisions outlined in Chapter Six of the constitution or declines to provide the requisite clearance and compliance certificates.

A number of scholars assert that securing employment represents a fundamental step in the social reintegration process for ex-offenders. Leslie claims that employment serves as a primary "routine activity" for the majority of adults, and maintaining steady work has been shown to diminish the incentives that drive individuals toward criminal behaviour.<sup>82</sup> Consequently, imposing barriers to employment, such as the mandated requirement of a certificate of good conduct for positions in both public and private sectors, as mandated by the Kenyan government, obstructs the reintegration efforts of ex-offenders back into the society. This hindrance inhibits their ability to establish stability and contributes to perpetuating cycles of criminality.

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<sup>81</sup> Section 4, *Employment (Amendment) Act* (Act No. 15 of 2022).

<sup>82</sup> Dacia L Leslie, "Helping Ex-Offenders Lead Reintegrated Lives," *Recidivism in the Caribbean* (Springer International Publishing 2019) <[http://dx.doi.org/10.1007/978-3-030-12907-1\\_3](http://dx.doi.org/10.1007/978-3-030-12907-1_3)> accessed February 29, 2024.

### 3.3 Why Criminal Record Checks for Employment Doesn't Work for Ex-Offenders

Even with criminal record checks, the obvious failure to consistently improve employment opportunities for ex-offenders and prevent recidivism rates in Kenya begs a clear question: “why?” Observational research has consistently indicated that individuals seeking employment with prior criminal records encounter considerable challenges in securing legitimate work opportunities. Studies repeatedly demonstrate that a significant proportion, ranging from 50% to 80%, of those formerly incarcerated remain unemployed in the formal labour market approximately six months post-release.<sup>83</sup> The determination of a causal relationship between the existence of criminal record checks and diminished employment prospects poses a considerable challenge, even though studies suggest that conventional measures of human capital alone fail to account for the hiring disadvantage associated with a criminal history.<sup>84</sup> Employers, it appears, regard a criminal record as a detriment when evaluating job applicants, leading to a discernible hiring penalty for individuals with such records.

Individuals with a criminal history face well-documented challenges in securing employment, with criminal record checks worsening their already difficult circumstances. It is widely acknowledged that many individuals involved with the criminal justice system struggle to find and maintain employment, often leaving them with diminished prospects for future employment opportunities. Webb<sup>85</sup> astutely notes that individuals often enter the criminal justice system with limited employability and emerge even less employable. A study titled “Returning Home” targeted US prisoners who had served at least one year in state correctional facilities and were reintegrating into their communities. The findings revealed that nearly two-thirds (65%) of individuals with a criminal history secured employment at some point within the eight months following their release

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<sup>83</sup> Gökhan Savaş and Talip Eryalçın, “An Applied Research on the Employment of Ex-Convicts and Probationer” (2020) 31 *Toplum ve Sosyal Hizmet* 336.

<sup>84</sup> Kristal May S Vivares, “The Reintegration of Ex-Convicts in Society: A Case Study” (2023) 6 *International Journal of Social Science and Human Research*.

<sup>85</sup> Patrick Webb, “14. Employment Discrimination Based on a Criminal Record,” *The Eternal Criminal Record* (Harvard University Press 2015) <<http://dx.doi.org/10.4159/harvard.9780674735842.c19>> accessed February 29, 2024.

from prison. However, the study also revealed a concerning trend: less than half (45%) of these individuals remained employed during the same period.<sup>86</sup>

The employment challenges faced by individuals with criminal histories are often deep-rooted and enduring. Research by Apel and Sweeten<sup>87</sup> illustrates that young people experiencing their first spell of incarceration typically exhibit unstable work histories long before their convictions. For instance, they are statistically less likely to have been employed at any point in the year preceding their conviction, with only 60% reporting employment compared to 67% among young people who are convicted but not incarcerated.

Individuals with a history of criminal records also encounter disparities during the job search process, partly due to their typically low skill levels and limited education, rendering them less appealing to prospective employers. For instance, findings from the Supported Work<sup>88</sup> evaluation, a program in the US offering temporary employment to ex-offenders in unskilled positions, reveal that only slightly over a quarter (27%) of participants had completed at least 12 years of schooling. Comparatively, merely 35% of individuals incarcerated in jails and prisons possess a high-school qualification, in contrast to 82% of the general population. In this regard, individuals in Kenya with criminal records share similarities with other challenging-to-employ groups, such as lower-primary school dropouts, who lack some of the credentials highly valued by potential employers.

Studies have highlighted the shortcomings of rehabilitation programs implemented within correctional facilities, both in developed and developing nations. A US-based survey sheds light on employment perspectives. Out of 100 respondents surveyed regarding job opportunities related to prison work experience, the overwhelming majority, constituting 90%, expressed dissatisfaction, stating that prison work did not significantly contribute to their professional

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<sup>86</sup> - <https://www.urban.org/policy-centers/justice-policy-center/projects/returning-home-study-understanding-challenges-prisoner-reentry> > on 29 February 2024.

<sup>87</sup> Robert Apel and Gary Sweeten, "The Impact of Incarceration on Employment during the Transition to Adulthood" (2010) 57 Social Problems 448.

<sup>88</sup> - <https://www.ojp.gov/ncjrs/virtual-library/abstracts/supported-work-evaluation-final-benefit-cost-analysis> > on 29 February 2024.

growth.<sup>89</sup> Within this group, 15% acknowledged that while the prison experience did not offer opportunities to acquire new skills, it did assist in maintaining skills acquired prior to incarceration. Conversely, 41% of respondents found value in the prison experience, citing the acquisition of job knowledge and employable skills as a novel and beneficial aspect of their confinement. Additionally, 16% noted that the physical demands of prison labour prepared them for similar roles post-release, particularly in heavy labour jobs. The remaining 9% of respondents expressed contentment with their social status and employment situations post-incarceration, indicating a degree of satisfaction derived from their prison experience.<sup>90</sup> These findings accentuate the varied perceptions and outcomes associated with prison-based work programs, reflecting the complexities inherent in rehabilitation efforts within correctional systems.

Factors such as lack of experience, inadequate qualifications, diminished self-esteem, and deficient basic skills are some of the formidable challenges that individuals with prior convictions encounter in securing employment.<sup>91</sup> Even among those possessing skills, obstacles such as mismatches between available job vacancies and skill sets, coupled with the absence of conducive work environments, further hinder their employability. These impediments, intensified by societal hostility, significantly impede the effective re-socialization and reintegration of ex-convicts into mainstream society.

However, in their study, Shinkfield and Lavelle<sup>92</sup> sheds light on a promising avenue for addressing recidivism rates. The study, encompassing 1,200 individuals with prior convictions, of whom 600 participated in an employment assistance program while the remaining 600 did not, revealed compelling results. The findings indicate that participation in employment assistance programs correlates with a reduction in recidivism rates among ex-convicts. Consequently, facilitating access to employment opportunities for individuals post-incarceration not only diminishes the

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<sup>89</sup> Sesha Kethineni and David N Falcone, "Employment and Ex-Offenders in the United States: Effects of Legal and Extra Legal Factors" (2007) 54 Probation Journal 36.

<sup>90</sup> Ibid

<sup>91</sup> Patrick Webb, "14. Employment Discrimination Based on a Criminal Record," *The Eternal Criminal Record* (Harvard University Press 2015) <<http://dx.doi.org/10.4159/harvard.9780674735842.c19>> accessed February 29, 2024.

<sup>92</sup> Joseph Graffam, Alison J Shinkfield and Barbara Lavelle, "Recidivism Among Participants of an Employment Assistance Program for Prisoners and Offenders" (2012) 58 International Journal of Offender Therapy and Comparative Criminology 348.

likelihood of recidivism but also renders crime and subsequent re-incarceration less attractive. In essence, the prospect of gainful employment serves to mitigate the utility of criminal activities, thereby contributing to a decrease in recidivism rates.

An important consideration emerges regarding the ramifications of criminal records on career paths, particularly within tightly regulated professions. Within certain sectors, there exist potential limitations that can significantly impact employment opportunities for individuals with prior convictions. Take, for instance, the case of a Driving Under the Influence (DUI) or Operating While Intoxicated (OWI) charge. Such charges pose a substantial concern for ex-offenders seeking roles involving driving responsibilities, particularly within industries that mandate a pristine driving record.<sup>93</sup> Employers in these sectors may perceive a DUI or OWI charge as a prominent warning sign, potentially resulting in the denial of employment opportunities for affected individuals. This accentuates the intricate interplay between criminal history and occupational pathways, particularly in sectors where regulatory compliance and safety standards are paramount.

In related sectors such as childcare and associated fields, ramifications also persist for ex-offenders. For instance, a conviction associated with endangering children might overshadow an individual's aspirations in pursuing vocations dedicated to the welfare and safety of minors. The exacting standards inherent in these professions frequently necessitate a profound level of trust, thereby heightening the difficulty for individuals with specific criminal histories to secure entry into such domains.<sup>94</sup>

In addition, when individuals pursue or uphold professional licenses, they encounter potential hurdles if they possess a criminal record. Licensing boards exert the authority to adjudicate on professional licenses, with convictions prompting various actions. These actions may encompass denying a license application, revoking an existing license, or temporarily suspending a license.<sup>95</sup> Such determinations typically hinge on evaluating whether the criminal offense poses an

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<sup>93</sup> Francisco Alonso and others, "Driving under the Influence of Alcohol: Frequency, Reasons, Perceived Risk and Punishment" (2015) 10 Substance Abuse Treatment, Prevention, and Policy.

<sup>94</sup> Sessa Kethineni and David N Falcone, "Employment and Ex-Offenders in the United States: Effects of Legal and Extra Legal Factors" (2007) 54 Probation Journal 36.

<sup>95</sup> Karol Lucken and Lucille M Ponte, "A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis" (2008) 30 Law & Policy 46.

unreasonable risk to public safety and if the crime correlates directly with the duties and obligations of the respective profession. Consider the scenario of a healthcare professional seeking a medical license. Should they possess a criminal record involving fraud, their eligibility could be imperilled, given the paramount importance of honesty and ethical conduct in the medical field. Similarly, an individual aspiring to attain a real estate license might confront obstacles if their criminal history includes instances of fraud or financial misconduct, which could cast doubts on their integrity within the financial sector.

The labelling theory offers a relevant lens through which to understand why criminal record checks for employment often fail ex-offenders. According to this theory, individuals who have been labelled as criminals or ex-offenders face significant social stigma and negative perceptions from society. Once an individual receives this label, it becomes a defining characteristic that shapes how they are perceived and treated by others. In the context of employment, ex-offenders are often viewed through the lens of their criminal history, with their qualifications, skills, and potential contributions being overshadowed by the stigma associated with their past actions.<sup>96</sup>

Employers, influenced by societal norms and perceptions, may hesitate to hire ex-offenders due to concerns about potential risks, reliability, and workplace dynamics. Even if an ex-offender possesses the requisite qualifications and skills for a job, the label of a criminal record may lead employers to perceive them as untrustworthy or prone to repeating past mistakes. This bias extends a cycle of exclusion, where ex-offenders are systematically denied opportunities for meaningful employment based solely on their criminal history.

Furthermore, the disparate impact theory highlights the disproportionate and adverse effects that employment practices, such as criminal record checks, can have on certain groups, including ex-offenders. While presumably intended to protect the interests of employers and ensure workplace safety, the blanket use of criminal record checks often results in the exclusion of individuals from marginalized communities who have been disproportionately impacted by the criminal justice

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<sup>96</sup> RK Kerckhoff, "Outsiders: Studies in the Sociology of Deviance. By Howard S. Becker. New York: The Free Press of Glencoe, 1963. 179 Pp. \$5.00" (1964) 42 Social Forces 389.

system.<sup>97</sup> In many cases, ex-offenders come from backgrounds characterized by socioeconomic disadvantage, systemic discrimination, and limited access to resources and opportunities. As a result, they are more likely to have interactions with the criminal justice system and subsequently face barriers to employment.<sup>98</sup>

The application of criminal record checks without considering contextual factors such as the nature of the offense, rehabilitation efforts, and individual circumstances perpetuates systemic inequalities and reinforces the cycle of poverty and marginalization. By relying solely on past criminal history as a determinant of employability, employers overlook the potential for redemption, rehabilitation, and the ability of ex-offenders to contribute positively to the workforce and society. Thus, the indiscriminate use of criminal record checks not only undermines the principles of fairness and equal opportunity but also perpetuates social exclusion and hinders the reintegration of ex-offenders into the community.

### **3.4. Chapter Summary**

The chapter delved into issues surrounding criminal record checks and their influence on employment opportunities for ex-offenders in Kenya. It begins by contextualizing the practice of employers seeking police clearance certificates as part of the recruitment process. The chapter also discussed challenges ex-offenders face in securing employment despite their qualifications and aspirations. It explores various reasons why traditional employment avenues often fail to accommodate individuals with a criminal history, touching upon employer biases, and systemic barriers that contribute to their marginalized status in the job market. Case studies, surveys, and relevant literature has shed light on the ways in which the existence of a criminal record influences employer perceptions and shapes the employment prospects of ex-offenders.

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<sup>97</sup> Elaine Shoben W, "Unintentional Discrimination: Disparate Impact," *Employment Regulation in the Workplace* (Routledge 2015) <<http://dx.doi.org/10.4324/9781315704821-12>> accessed January 25, 2024.

<sup>98</sup> Ibid

## CHAPTER FOUR

### THE STIGMA ASSOCIATED WITH CRIMINAL HISTORY IN EMPLOYMENT

#### 4.1 Introduction

This chapter discusses the level of stigma attached to individuals with a criminal history in the Kenyan job market, and how it influences employers' perceptions and decisions. The chapter also delves into a number of reasons why employers in different countries are disinclined to contracting job applicants who have criminal record.

#### 4.2 Hidden Obstacles to Employment Opportunities for Ex-Offenders

The journey of many ex-offenders who secure employment and avail themselves to various paces of work remains fraught with challenges. In Kenya, the pursuit of gainful employment following a criminal conviction presents a daunting challenge for ex-offenders, worsened by an inescapable demand for certificates of good conduct by prospective employers. As such, it is important to examine the hidden obstacles within Kenya's employment setting that antagonise ex-offenders, with regard to the extent to which employers prioritize criminal record checks in their hiring decisions.

The issue of unemployment among individuals with criminal records and its detrimental impact on society resonates globally. Despite its widespread prevalence, societal attitudes towards former convicts remain largely indifferent and negative. A seminar report conducted by the United Nations Asia and Far East Institute in 2011 highlighted the constant challenges associated with reintegrating ex-convicts into Caribbean societies, citing prevailing negative perceptions as a formidable barrier.<sup>99</sup> The reluctance or aversion of the public towards ex-offenders significantly influences governmental and prison service efforts aimed at rehabilitation and reintegration. Given the potential influence of societal attitudes on governmental initiatives, understanding employers' willingness to engage with ex-convicts emerges as a crucial inquiry.

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<sup>99</sup> Michael Plachta, "Extradition and the Principle Aut Dedere Aut Judicare in the New Polish Legislation" (1998) 6 European Journal of Crime, Criminal Law and Criminal Justice 94.

Despite making significant qualitative strides during their parole periods, ex-offenders often find themselves subjected to strict monitoring and disproportionately penalized for minor infractions such as alcohol consumption or possession of marijuana. In Kenya, this monitoring extends beyond their release from incarceration, often continuing throughout their parole or probation periods. The stringent oversight reflects a systemic approach aimed at minimizing risks associated with recidivism and maintaining public safety.<sup>100</sup> This phenomenon, as highlighted by Joan Petersilia, highlights a troubling irony faced by ex-convicts, who despite their efforts, frequently face the threat of losing their jobs due to perceived poor performance at work.<sup>101</sup> However, this intensive supervision presents significant obstacles to employment opportunities for ex-offenders. Firstly, the fear of potential violations and subsequent incarceration may deter ex-offenders from pursuing employment opportunities altogether. The constant threat of being returned to prison for minor infractions creates a climate of uncertainty and anxiety, undermining their confidence in securing stable employment.<sup>102</sup>

Moreover, the strict monitoring and punitive measures for minor violations contribute to the perpetuation of a cycle of exclusion and marginalization.<sup>103</sup> Ex-offenders, despite their efforts to reintegrate into society and lead law-abiding lives, face ongoing stigma and discrimination in the job market. Employers may be reluctant to hire individuals with criminal records, especially if they perceive them as high-risk or unreliable employees due to their past involvement with the criminal justice system. The combination of limited job prospects and the looming threat of re-incarceration perpetuates a sense of hopelessness and disempowerment among ex-offenders. This dynamic further exacerbates the challenges they face in rebuilding their lives and achieving financial stability post-release.

Studies have established a correlation between high recidivism rates and the unemployment rate, coupled with the reluctance of employers to hire ex-convicts. Securing employment significantly diminishes an individual's likelihood of re-offending, thereby fostering a more constructive

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<sup>100</sup> Steven D Eberth, Mioara Diaconu and Caitlin Koob, "A Cautionary Tale of a Prisoner Re-Entry Initiative: Lessons Learned" (2022) 17, *The International Journal of Interdisciplinary Social and Community Studies* 167.

<sup>101</sup> Kyle C Ward, "Post-Release, Rural Re-Entry and Recidivism" [2022], *The Encyclopedia of Rural Crime* 237.

<sup>102</sup> Ibid

<sup>103</sup> Emmanuel Agyapong Wiafe, "Willingness of Employers to Employ Ex-Convicts among Selected SMEs in the Western Region of Ghana" (2021) 7 *Cogent Social Sciences*.

lifestyle and elevating the deterrent effect of criminal behaviour.<sup>104</sup> However, the absence of marketable and sustainable skills often leaves many individuals vulnerable to engaging in criminal activities. Moreover, the perceived failure of rehabilitation and reintegration efforts, compounded by the lack of viable employment opportunities for ex-convicts, worsens the challenges they face. Various factors contribute to rendering ex-convicts less competitive candidates for available job positions, thus amplifying employers' reservations about hiring them. This confluence of circumstances highlights the intricate dynamics at play, highlighting the multifaceted nature of the barriers confronting ex-convicts seeking meaningful employment opportunities.<sup>105</sup>

The justification for public awareness of an ex-offenders' criminal history diminishes steadily after six or seven years of incarceration, as the risk of reoffending declines.<sup>106</sup> While public safety concerns necessitate that organizations and society at large retain the ability to identify ex-offenders criminal activities, the lingering stigma associated with a criminal record becomes increasingly burdensome for those who have left their past transgressions behind, a trend particularly noticeable among former juvenile offenders seeking employment. Implementing time limits on the dissemination of criminal backgrounds would afford individuals who have demonstrated a commitment to a crime-free life over a specified period the opportunity for a fresh start. Such measures would balance public safety imperatives with the prospects of rehabilitation and societal reintegration for ex-offenders.

Although employers may argue that requesting police clearance certificates is a standard procedure to ensure the safety and security of their workplace, this practice can have discriminatory effects on ex-offenders. Due to systemic inequalities in the criminal justice system and societal biases against ex-offenders, individuals from marginalized communities may be disproportionately affected by such requirements, further entrenching cycles of poverty and marginalization. The disparate impact theory suggests that employers should critically evaluate whether the requirement for police clearance certificates is truly necessary for assessing job-related qualifications. Instead

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<sup>104</sup> Robert J Sampson and John H Laub, "Desistance from Crime over the Life Course," *Handbooks of Sociology and Social Research* (Springer US) <[http://dx.doi.org/10.1007/978-0-306-48247-2\\_14](http://dx.doi.org/10.1007/978-0-306-48247-2_14)> accessed February 29, 2024.

<sup>105</sup> Thomas K. Kenemore and Ida Roldan, "Staying Straight: Lessons from Ex-Offenders" (2005) 34 *Clinical Social Work Journal* 5.

<sup>106</sup> Megan C Kurlychek, Robert Brame and Shawn D Bushway, "scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?\*" (2006) 5 *Criminology & Public Policy* 483.

of relying solely on criminal history as a screening criterion, employers in Kenya could consider implementing alternative methods, such as skills assessments or interviews focused on qualifications and experiences relevant to the job role. By adopting more inclusive hiring practices, employers can mitigate the disparate impact on ex-offenders while still ensuring the safety and integrity of their workforce.<sup>107</sup>

### **4.3 Stigma Associated with the Re-entry of Ex-prisoners into Employment**

Advocates of criminal record screening assert that such checks provide employers with valuable insights necessary for making informed hiring decisions concerning risk management. According to Georgina Heydon and Bronwyn Naylor,<sup>108</sup> employers utilize background checks to anticipate potential behaviours in applicants that could pose risks to their businesses, such as workplace violence, drug use, theft, or other disruptive conduct. Central to this argument is the belief that past behaviour serves as a reliable indicator of future conduct. Consequently, laws governing criminal record screening often rely on this rationale to determine when employers may justifiably base their decisions on such information.<sup>109</sup>

For instance, an offense related to theft may raise greater concerns for a truck driver with unrestricted access to valuable cargo compared to a telemarketer. Similarly, an embezzlement offense may be more pertinent for a financial adviser than for a bus driver.<sup>110</sup> This prevalent emphasis on establishing a link between prior offenses and future job responsibilities highlights the concept of “repetition risk” – the notion that the relevance of a prior offense lies in its potential to predict similar future behaviour. Another aspect of this argument revolves around employers’ apprehensions regarding potential litigation for negligent hiring.<sup>111</sup> In the event that a future employee causes harm while on the job, employers may face liability if they hired an applicant

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<sup>107</sup> United States Congress, *A General Overview of Disparate Impact Theory* (Createspace Independent Publishing Platform 2017).

<sup>108</sup> Georgina Heydon and Bronwyn Naylor, “Criminal Record Checking and Employment: The Importance of Policy and Proximity” (2017) 51 *Australian & New Zealand Journal of Criminology* 372.

<sup>109</sup> James B Jacobs, *The Eternal Criminal Record* (Harvard University Press 2015).

<sup>110</sup> U.S. Equal Employment Opportunities Commission, “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act” (*US EEOC*, 2012) <[http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)> accessed March 28, 2024.

<sup>111</sup> Tara E Martin and others, “Hiring People With Criminal Records in South Carolina: Examining Businesses’ Hiring Practices and Views on Incentives” (2019) 31 *Criminal Justice Policy Review* 532.

with a criminal record indicating a propensity for similar future misconduct, as determined by a jury.

Evidence suggests that individuals with a criminal history face significant stigma in the job market. For instance, Kayla M Hoskins and Kaelyn Sanders<sup>112</sup> found that job applicants disclosing a prison sentence during their job interviews experienced a 50% reduction in call-back rates. This study concluded that criminal records effectively shut doors in employment contexts. Many individuals with criminal records often encounter this reality first-hand during their job search endeavours, frequently expressing the belief that their criminal history has impeded their employment prospects. This trend poses a particular challenge for contemporary prisoner re-entry initiatives, given the substantial increase in the utilization of criminal history records as part of the hiring process over the past twenty years.<sup>113</sup>

Individuals transitioning from incarceration often encounter numerous hurdles in their pursuit of employment, with one notable challenge being the hesitance of prospective employers to hire former prisoners. According to Holzer, Raphael, and Stoll,<sup>114</sup> employers tend to perceive ex-offenders as the least favourable candidates, primarily due to concerns regarding potential legal liabilities stemming from improper conduct or mishandling of public interactions or property. Moreover, research indicates that employers who refrain from conducting background checks may implicitly discriminate against certain demographic groups, particularly undereducated black men, by presuming them to be ex-offenders without substantiated evidence.<sup>115</sup>

A study highlighted that a significant proportion of ex-offenders struggled to secure employment independently, often due to inadequate knowledge of the job search process or encountering employers unwilling to hire individuals with a criminal history.<sup>116</sup> Consequently, many relied on

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<sup>112</sup> Kayla M Hoskins and Kaelyn Sanders, "Race and Re-Entry after Incarceration," *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Oxford University Press 2019).

<<http://dx.doi.org/10.1093/acrefore/9780190264079.013.341>> accessed March 28, 2024.

<sup>113</sup> Ikponwosa O Ekunwe and Richard S Jones, *Global Perspectives on Re-Entry* (University of Tampere 2011).

<sup>114</sup> Harry J Holzer and others, *Can Employers Play a More Positive Role in Prisoner Reentry?* (2002).

<sup>115</sup> Harry J Holzer and Michael A Stoll, "Employer Demand for Welfare Recipients by Race" (2003) 21 *Journal of Labor Economics* 210.

<sup>116</sup> Christy A Visher, Sara A Debus-Sherrill and Jennifer Yahner, "Employment after Prison: A Longitudinal Study of Former Prisoners" (2010) 28 *Justice Quarterly* 698.

assistance from their social networks, such as family and friends, for both job leads and financial support. Visher and Kachnowski's<sup>117</sup> findings highlighted the persistent challenge faced by ex-offenders in obtaining employment post-release, despite recognizing its importance and maintaining optimism about their prospects. Additionally, research indicates a temporary surge in employment immediately following release from incarceration, attributed in part to post-release supervision measures, which contrasts with diminished employment rates observed eighteen months thereafter.

A significant body of research has extensively explored the relationship between employment status and criminal behaviour. Studies indicate that individuals grappling with unemployment exhibit a higher propensity for engaging in criminal activities compared to their employed counterparts. Moreover, empirical evidence suggests that individuals bearing a criminal record encounter formidable hurdles in securing gainful employment, exacerbating their socioeconomic marginalization. Freeman's seminal investigation in 1994 emphasises the changing aspects at play, indicating that although the link between unemployment and crime may not be linear, periods of incarceration detrimentally affect long-term employment prospects.<sup>118</sup> This body of scholarship consistently reveals an adverse correlation between criminal convictions and success in the labour market, with ex-prisoners encountering difficulties in obtaining employment opportunities, often relegated to lower-paying positions.<sup>119</sup> Collectively, these findings reinforce the broader consensus that a state of joblessness correlates positively with involvement in criminal activities in Kenya.

When individuals are labelled as criminals or ex-offenders, society often attaches a stigma to them. This stigma can amplify the negative perceptions associated with their criminal history, making it challenging for them to reintegrate into society, including securing employment. In Kenya, where societal biases against ex-offenders are already prevalent, this amplification of stigma can further exacerbate their difficulties in finding gainful employment. According to the labelling theory, individuals who are labelled as criminals may internalize this label, leading to a self-fulfilling

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<sup>117</sup> Christy Visher and others, "Baltimore Prisoners' Experiences Returning Home" [2004] PsycEXTRA Dataset.

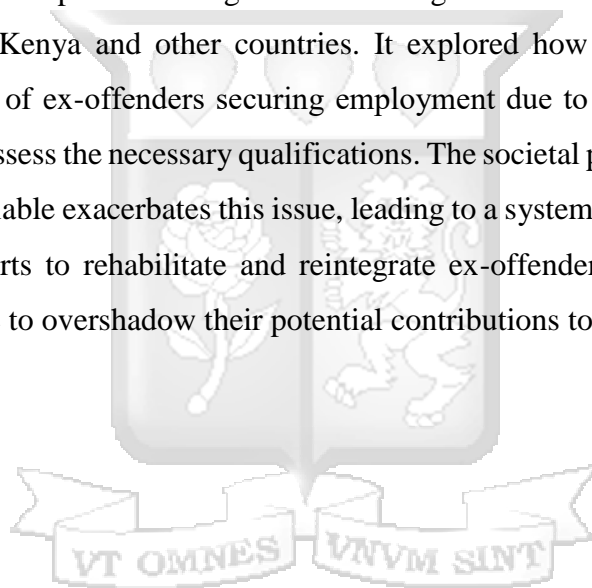
<sup>118</sup> Richard Freeman, "Crime and the Job Market" (National Bureau of Economic Research 1994) <<http://dx.doi.org/10.3386/w4910>> accessed March 28, 2024.

<sup>119</sup> Harry J Holzer and others, *Can Employers Play a More Positive Role in Prisoner Reentry?* (2002).

prophecy where they conform to societal expectations of criminal behaviour.<sup>120</sup> In the employment context, ex-offenders perceive themselves as unworthy or incapable due to societal labels, which can undermine their confidence and hinder their job search efforts. In Kenya, employers' insistence on obtaining police clearance certificates perpetuates the stigmatization of ex-offenders by reinforcing the notion that their criminal history is the most salient aspect of their identity. This interactionist perspective highlights how institutional practices can contribute to the maintenance of stigmas associated with criminal history in employment settings.

#### 4.4 Chapter Summary

The chapter delved into the pervasive stigma surrounding individuals with a criminal history seeking employment in Kenya and other countries. It explored how this stigma significantly diminishes the prospects of ex-offenders securing employment due to employers' reluctance to hire them, even if they possess the necessary qualifications. The societal perception of ex-offenders as untrustworthy or unreliable exacerbates this issue, leading to a systemic bias against them in the job market. Despite efforts to rehabilitate and reintegrate ex-offenders into society, their past criminal records continue to overshadow their potential contributions to the workforce.



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<sup>120</sup> Frederic P Miller, Agnes F Vandome and John McBrewster, *Labeling Theory: Labeling Theory, Sociology, Howard S. Becker, Labelling, Deviance (Sociology), Norm (Sociology), Self-Concept, Behavior, Self-Fulfilling Prophecy, Stereotype, Disability, Mental Disorder* (2009).

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS FOR REFORMS

#### 5.1 Introduction

This chapter concludes the dissertation and proposes policy recommendations to strike a balance between employers' legitimate concerns and the protection of privacy rights for ex-offenders in Kenya. With the increasing demand for a certificate of good conduct as part of the recruitment process, ex-offenders often face significant hurdles in securing employment due to the stigma associated with their criminal history. This chapter aims to propose policy recommendations that balance between addressing employers needs for safety and security in their workforce while safeguarding the privacy rights and opportunities for reintegration of ex-offenders into society. It also seeks to provide actionable insights to policymakers, employers, and relevant authorities to foster a fair and inclusive employment environment in Kenya.

#### 5.2 Conclusion

The findings of this research confirm the hypothesis that the demand for certificates of good conduct by employers in Kenya negatively impacts the employment opportunities for ex-offenders and infringes upon their right to privacy. The assumptions regarding employment practices, privacy rights, stigma, and the impact of criminal history are validated through the empirical analysis. The analysis of the legal framework governing the use of certificates of good conduct in employment revealed a significant reliance on such documents by employers in Kenya. This reliance stems from provisions within various laws and regulations that either explicitly require or strongly encourage employers to conduct criminal record checks as part of their recruitment process. This finding supports the hypothesis that the demand for certificates of good conduct by employers in Kenya is prevalent, aligning with the first assumption that employers commonly conduct criminal record checks as a standard part of their recruitment process.

Examination of the impact of criminal record checks on employment opportunities for ex-offenders indicated a substantial hindrance caused by the requirement for a certificate of good conduct. The stigma associated with a criminal history exacerbates the challenges faced by ex-offenders, contributing to their diminished employment prospects. This outcome supports the

hypothesis that the demand for certificates of good conduct negatively impacts the employment opportunities for ex-offenders. Furthermore, it reinforces the third assumption that individuals with a criminal history face societal stigma, making it challenging for them to secure employment even without explicit information from a certificate of good conduct.

The evaluation of the stigma associated with criminal history in employment highlighted the persistent nature of societal biases against individuals with a criminal record. Even in the absence of explicit information from a certificate of good conduct, ex-offenders encounter substantial barriers to employment due to prejudicial attitudes. This finding reinforces the hypothesis that societal stigma plays a significant role in impeding the employment prospects of ex-offenders, aligning with the third assumption about stigma.

The proposal of policy recommendations aimed at balancing employer needs and ex-offenders' privacy rights is crucial in addressing the identified challenges. While recognizing the legitimate concerns of employers regarding the integrity and safety of their workforce, it is imperative to safeguard the privacy rights of ex-offenders and mitigate the adverse effects of stigma. Policy interventions should focus on promoting fair hiring practices, providing avenues for rehabilitation and reintegration, and enhancing support systems for ex-offenders seeking employment. These recommendations are essential for fostering inclusivity and upholding the right to privacy for all individuals, including ex-offenders. This conclusion aligns with the hypothesis that the demand for certificates of good conduct infringes upon the privacy rights of ex-offenders, highlighting the need for policy interventions to address this imbalance. Therefore, policy interventions must be prioritized to address these challenges effectively and promote a more equitable and inclusive employment setting in Kenya.

### **5.3 Recommendations**

To balance employer needs with ex-offenders' privacy rights regarding the demand for a certificate of good conduct in Kenya, this research proposes the following policy recommendations:

#### **1. Reevaluation of Hiring Criteria**

Encourage employers to reevaluate their hiring criteria to focus more on job-relevant qualifications and skills rather than solely relying on a certificate of good conduct. This shift would allow ex-

offenders to compete fairly based on their abilities and qualifications rather than being automatically excluded due to their criminal history.

## **2. Education and Awareness Programs**

Implement education and awareness programs targeted at employers to raise awareness about the potential biases associated with demanding certificates of good conduct. These programs can emphasize the importance of giving individuals with criminal records a second chance and highlight success stories of ex-offenders who have successfully reintegrated into the workforce.

## **3. Alternative Screening Methods**

Encourage employers to adopt alternative screening methods, such as conducting individualized assessments or considering rehabilitation efforts, rather than relying solely on a certificate of good conduct. This approach would allow employers to assess ex-offenders on a case-by-case basis and consider factors such as the nature of the offense, the individual's rehabilitation efforts, and their potential for reintegration into society.

## **4. Incentives for Employers**

Provide incentives for employers who actively support the reintegration of ex-offenders into the workforce, such as tax credits or subsidies for training programs. By incentivizing employers to hire ex-offenders, this policy would help reduce barriers to employment and promote a more inclusive workforce while also addressing the concerns of employers regarding risk management.

## **5. Enhanced Rehabilitation Programs**

Invest in enhanced rehabilitation programs aimed at reducing recidivism rates and facilitating the successful reintegration of ex-offenders into society. By addressing the root causes of criminal behavior and providing support services such as job training, counseling, and education, these programs can increase the likelihood of ex-offenders securing employment and lead to positive outcomes for both individuals and society as a whole.

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