



Race, gender and socio-  
economic status in law  
enforcement in South Africa –  
are there worrying signs?

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Lukas Muntingh

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## Executive summary

In the South African context the right to equality has particular significance given the country's history of statutory unfair racial discrimination. This paper investigates, based on quantitative data, how different sub-sets in the South African population experiences law enforcement. Accepting that formal and procedural discrimination according to race was entrenched under apartheid, especially in law enforcement, the paper enquires if different population sub-sets experience different criminal justice outcomes. Despite shortcomings in the data, there is sufficient evidence to indicate that there is reason to be concerned and that further research is required.

The most reliable evidence of different outcomes in respect of race and gender is the profile of the prison population. Coloured people (adults) have a much higher rate of imprisonment (1932/100 000) than any other population group. Africans (adults) are imprisoned at a rate of 1042/100 000 while Indian and White adults are imprisoned at a rate of around 160/100 000. The high imprisonment rate for the Coloured population requires further research, but there is reason to conclude that the reasons are (at least) historical in nature as a result of the use of forced prison labour in the Western and Northern Cape and the high levels of institutionalisation of Coloured boys by the previous regime after WWII. The different population groups and genders also experience pre-trial detention differently, with Coloured females standing the highest chance of being detained pre-trial and White females the lowest chance.

Although arrest data is not available per population group, a number of observations are made. The majority of the 1.6 million arrests made in 2011/12 were for non-priority crimes. If women and children are excluded from the arrest data it was calculated that one out of every 13 South African adult men were arrested in 2011/12. Arrest and detention place poor people at the risk of further marginalisation and exclusion, and when arrests and detention are concentrated in particular geographical areas, the effect becomes structural and inter-generational in those areas.

There is little doubt that poor African and Coloured South Africans experience law enforcement, and ultimately the risk of pre-trial detention and imprisonment, very differently from Indians and Whites. Transforming the criminal justice system would require that the performance of the police and courts be assessed to determine why the trends created during apartheid apparently still persist and what steps need to be taken at policy and practice levels to turn this around. Twenty years after the end of apartheid it is simply not acceptable to practice criminal justice without asking questions about how the poor and historically disadvantaged are affected by the system that is supposed to make society safer.

# Race, gender and socio-economic status in law enforcement in South Africa – are there worrying signs?

by

Lukas Muntingh<sup>1</sup>

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## 1. Introduction

Section 9 of the Constitution guarantees the right to equality, and more specifically that the state may not unfairly discriminate, directly or indirectly, against anyone (s9(3)). Discrimination on the basis of certain grounds, such as race and gender, is presumed to be unfair unless proved otherwise (s9(5)). In the South African context the right to equality has particular significance given the country's history of statutory unfair racial discrimination. In *Brink v Kitshoff NO* the Constitutional Court noted that apartheid

systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.<sup>2</sup>

The legacy of this system had an enduring impact on poverty and income inequality in South Africa. The Poverty and Inequality Report (PIR) prepared for then Deputy-President Thabo Mbeki,<sup>3</sup> captures this distributional reality in its calculation that South Africa was economically two worlds: one, populated by black South Africans, where the Human Development Index (HDI) was equivalent to that of Zimbabwe or Swaziland. The other, was the world of white South Africa in which the HDI rested comfortably between that of Israel and Italy.

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<sup>2</sup> CCT15/95; [1996] ZACC 9; 1996 (4) SA 197; 1996 (6) BCLR 752 (15 May 1996), para 40.

<sup>3</sup> May, J. (2001) Poverty and inequality in South Africa, Centre for Social and Development Studies, University of Natal.

In addition to the devastating impact of the apartheid economic model, was the unequal application of law enforcement. Foremost amongst these was the regularity with which people who were not white were arrested. Such arrests were made primarily in terms of discriminatory laws such as the infamous “influx control” or “pass” laws, through which the system of migrant labour was controlled. Between 1921 and 1986 over 17 million people were arrested in terms of influx control laws.<sup>4</sup> The entire population of South Africa in 1921 was just short of 7 million people<sup>5</sup>, growing to just over 30 million in 1986. This suggests a considerable portion of the adult population experienced arrest over this time.

Substantive discrimination under apartheid also resulted in the unequal application of criminal law in the criminal justice system, leading to differences in outcomes of criminal justice processes. This was observable in almost every aspect of the criminal justice process.<sup>6</sup> It was especially visible in the imposition of the death penalty under apartheid, for “there was a greater likelihood that a black would be hanged for killing a white or for raping a white woman than would a white who had killed a black or raped a black woman. This implied that the race of the victim had an effect on the sentencing process.”<sup>7</sup> Of the 1070 people who were executed at Pretoria’s gallows between 1980 and 1988, 97% were Black (76% were Africans, 29% Coloureds and 0.2% Asian).<sup>8</sup>

Racially discriminatory laws have been abolished. Unfortunately the evidence suggests there remains an inequality in terms of the *outcomes* of the enforcement of law in South Africa. This paper is therefore more concerned with substantial equality than formal equality. Formal equality merely requires that all persons are equal bearers of rights, but substantive equality demands an investigation into the facts of people’s social and economic conditions to determine if the Constitution’s equality requirement is met in practice.<sup>9</sup> Such an enquiry would therefore raise the possibility of *unfair* discrimination by the state, whether directly or indirectly. Unfair discrimination is prohibited by the

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<sup>4</sup>Wilson, F. and Ramphela, M. (1989) *Uprooting poverty – the South African challenge*, Cape Town: David Phillip, pp. 209.

<sup>5</sup>Union of South Africa Office of Census and Statistics, Official Year Book, 1924.Pretoria, 1925.p. 39.

<sup>6</sup>Dlamini, C.R.M. (1988) The influence of race on the administration of justice in South Africa, *South African Journal on Human Rights*, Vol 1, pp. 37-54.

<sup>7</sup>Dlamini, C.R.M. (1988) The influence of race on the administration of justice in South Africa, *South African Journal on Human Rights*, Vol 1, pp. 40.

<sup>8</sup>Bekker, J. (1989) *Profile of a Death Row Prisoner*, Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 6, 27 July.

<sup>9</sup> ‘We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context’ para 41 (*President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997)) Also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) para 61, Currie, I. and De Waal, J. (2005) ‘Equality’ in Currie, I. and De Waal, J. (eds) *The Bill of Rights Handbook* (5th edition) Cape Town: Juta, pp. 232-233.

Constitution and presumed to be unfair on the grounds listed in section 9(3) of the Constitution, being on “ race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” Unfair discrimination has a hurtful impact and occurs “when law or conduct, for no good reason, treats some people as inferior or incapable or less deserving of respect than others. It also occurs when law and conduct perpetuates or does nothing to remedy existing disadvantage and marginalisation”.<sup>10</sup>

This paper explores whether there is evidence to suggest that the apparent inequality in terms of the law enforcement *outcomes* in South Africa is the result of the unequal application of the law in terms of race, gender and socio-economic status and consequently whether the constitutional expectation of a transformed and non-discriminatory criminal justice system has been met. The strongest evidence of inequality of outcomes found in this paper lies in the imprisonment rates for different race groups. The imprisonment rate of adult Coloured men is 12 times and for African men six times higher than the rate of imprisonment for White men. This calls out for explanation.

This paper is therefore exploratory in nature and in broad terms raises questions about race, gender, socio-economic status<sup>11</sup> and law enforcement. Given South Africa’s history, this is regarded as a valid field of inquiry and the question has been raised in research pre- and post-1994.<sup>12</sup> The Constitution and ensuing law reform require that all people be treated equally and if this is not the case that remedial steps be taken. Indeed the Constitutional Court has said:

Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has on-going negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely.”<sup>13</sup>

A 2002 report on racism and discrimination in the prison system recommended that research should be undertaken to determine the extent of racial discrimination in the criminal justice system more broadly and emphasized that it is important in South Africa to monitor the potentially negative effect

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<sup>10</sup> Currie, I. and De Waal, J. (2005) ‘Equality’ in Currie, I. and De Waal, J. (eds) *The Bill of Rights Handbook* (5th edition) Cape Town: Juta, p. 244.

<sup>11</sup> Although discrimination on the basis of socio-economic status is not amongst the types of discrimination presumed by the Constitution to be unfair, the Constitution does not rule out any grounds as possible sources of unfair discrimination.

<sup>12</sup> See for example Dlamini, C.R.M. (1988) The influence of race on the administration of justice in South Africa, *South African Journal on Human Rights*, Vol 1, pp. 37-54. Dissel, A. and Kollapen, J. (2002) *Racism and discrimination in the South African Penal System*, Research report written for Penal Reform International and the Centre for the Study of Violence and Reconciliation.

<sup>13</sup> *National Coalition of Gay and Lesbian Equality v. Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) para 60.

of racism and discrimination in the administration of justice.<sup>14</sup> Such a study has not been undertaken nor has systems been put in place to enable such monitoring. Eleven years later the need for such a study remains and this paper echoes the recommendation.

The paper notes, first, a number of methodological limitations in the available data and the data presented. This is followed by an overview of the South African population emphasising the overlap of race and class. The following section deals with imprisonment rates according to race, gender and sentence status. The paper then proceeds to analyse arrest data from the police and attempts to convey more detailed descriptions of arrest rates according to age, gender and rural/urban dynamics. Lastly, the socio-economic impact of pre-trial detention is described.

## **2. Methodological challenges**

There are notable challenges in the quantitative data presented in the paper, chief amongst which is that data disaggregated by socio-economic and population group data on people arrested is not available, while data on those in prison (sentenced or unsentenced) does not reflect socio-economic status. Whilst socio-economic data is available for the general population and much research has been done on the subject of poverty and inequality, the socio-economic dimension of law enforcement has not been studied. The paper therefore relies on other data to make observations about the socio-economic profile of people coming into contact with the criminal justice system.

In terms of arrest data, as recorded by SAPS, only national figures are available and this is also not broken down into race, age and gender of the persons arrested, except for children. More detailed figures will enable a more nuanced analysis. Given South Africa's history and the inequalities created through apartheid, and more specifically the role that law enforcement played in upholding the apartheid state, and assessing this against the transformative ideals of the Constitution, it is regrettable that more precise socio-economic and population group data is not available to assess progress made in establishing a criminal justice system that is indeed fair and equitable. Under the previous regime such data was indeed available (through the then Central Statistical Services) in respect of crimes, prosecutions, convictions and sentences with reference to race and gender, albeit for a different purpose. A further major limitation to this paper is that there is indeed no data available on sentencing according to race and gender, for sentencing is a very firm measurement of fairness in criminal justice.

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<sup>14</sup>Dissel, A. and Kollapen, J. (2002) *Racism and discrimination in the South African Penal System*, Research report written for Penal Reform International and the Centre for the Study of Violence and Reconciliation.

### 3. Race, class and poverty in South Africa

Race and class strongly overlap in South Africa. This section will provide some basic demographic and socio-economic data on the South African population as it is relevant to the subsequent sections. The aim is to provide a basic description of the population profile with reference to the intersection of race, gender and socio-economic status. The key point is that population group remains a fairly robust indicator of socio-economic status.

Table 1 provides the profile of the total South African population (52.9 million) according to 2013 estimates.<sup>15</sup> Nearly 80% of the population are categorised as African (or 42.2 million), Coloureds and Whites constitute roughly 9% of the total and Indian/Asian 2.5%. While changes are occurring in the demographic profile, the constant structure has been one of a large African majority and three numerical minorities Coloured, Indian and White population groups.

**Table 1**The South African population 2013

Population group	Male		Female		Total	
	Number	% of male population	Number	% of female population	Number	% of total population
African	20,607,800	79.8	21,676,300	79.8	42,284,100	79.81
Coloured	2,306,800	8.9	2,459,400	9.1	4,766,200	9.00
Indian	669,200	2.6	660,100	2.4	1,329,300	2.51
White	2,239,500	8.7	2,362,900	8.7	4,602,400	8.69
Total	25,823,300	100	27,158,700	100	52,982,000	100

In the second Carnegie Report on poverty (1989), Wilson and Ramphele make the point that the roots of poverty in South Africa go back centuries and that the creation of the apartheid state marked not so much a turning point but rather the beginning of a process of intensification in the assault on the poor and particularly the majority African population.<sup>16</sup> It is therefore a structural feature of South African society that race and class strongly overlap and this remains to be the case, even after the transition to democracy in 1994.

<sup>15</sup> Statistics South Africa (2013) *Mid-year population estimates*, Pretoria: SSA, P0302, p. 3.

<sup>16</sup> Wilson, F. and Ramphele, M. (1989) *Uprooting poverty – the South African challenge*, Cape Town: David Phillip, p. 204.

Table 2 presents the average monthly wage by race for the period 1993 to 2008 in 2008 Rand values.<sup>17</sup> While the average African wage increased by 22.4%, the average White wage is still four and a half times higher. Moreover, African wages moved from a very low base and the percentage increase of 22.4% may therefore be somewhat misleading. The average Indian wage showed the highest increase at 35.6%. Coloured wages has remained nearly unchanged over the period.

**Table 2 Average monthly wage by race in Rand at 2008 values**

<b>Year</b>	<b>African</b>	<b>Coloured</b>	<b>Asian</b>	<b>White</b>
1993	2104	3382	5421	10803
1997	2969	3017	5270	9506
2001	2588	3834	6315	11162
2005	3118	4381	6940	12026
2008	2576	3362	7350	11240
Change 1993 - 2008 (in %)	22.4	-0.6	35.6	4.0

Expressed as a percentage of average White monthly wages, the race hierarchy established by the apartheid state is also reflected in the average monthly wage 14 years after apartheid officially came to an end.<sup>18</sup> By 2008 average African monthly wages were still less than a quarter of average White monthly wages and average Coloured wages less than a third of average White wages.

**Table 3 Relative per capita income as a percentage (2008 values)**

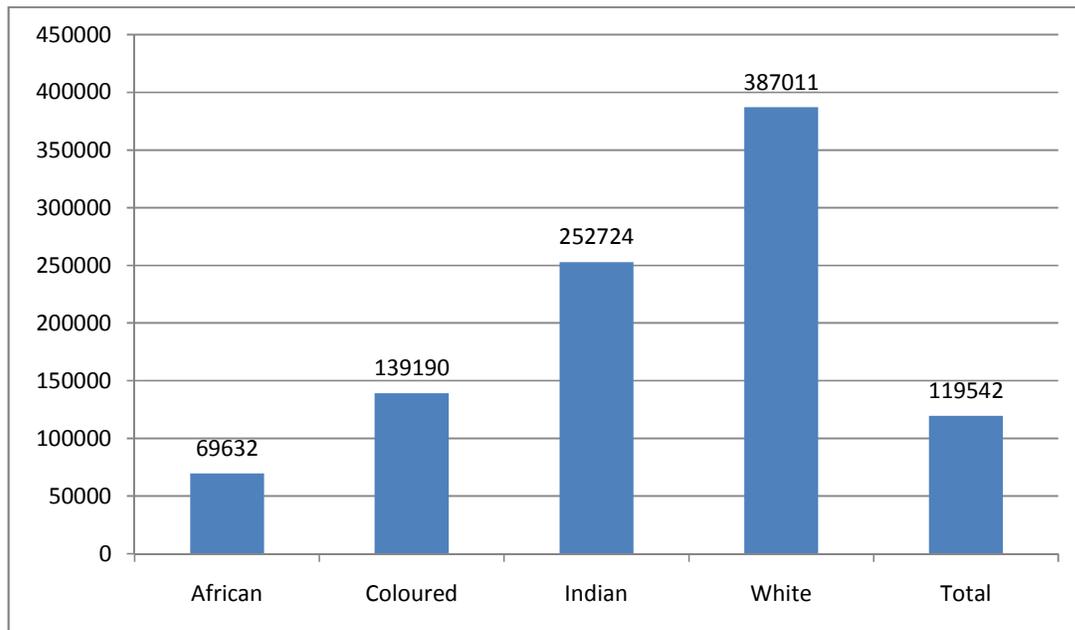
	<b>African</b>	<b>Coloured</b>	<b>Indian</b>	<b>White</b>
1993	19.5	31.3	50.2	100
1997	31.2	31.7	55.4	100
2001	23.2	34.3	56.6	100
2005	25.9	36.4	57.7	100
2008	22.9	29.9	65.4	100

<sup>17</sup>Leibbrandt, M., Woolard, I., McEwen, H. and Koep, C. (2010) *Employment and inequality outcomes in South Africa*, Cape Town: Southern Africa Labour and Development Research Unit (SALDRU) and School of Economics, University of Cape Town, p. 11.

<sup>18</sup> Calculations were made using the data presented in Table 3 as per Leibbrandt, M., Woolard, I., McEwen, H. and Koep, C. (2010) *Employment and inequality outcomes in South Africa*, Cape Town: Southern Africa Labour and Development Research Unit (SALDRU) and School of Economics, University of Cape Town, p. 11.

While wage income would only reflect people participating in the formal economy, this profile is also broadly reflected in the household income as per head of household income for 2010/11, as shown in Figure 1 below.<sup>19</sup> This would be inclusive of all sources of income, and not only wages. While average White household income is in excess of R387 000, African average household income has not even gone above R70 000; or 18% of White household income. Coloured household income is at R140 000 with Indian household income at R252 000 per annum.

**Figure 1 Average annual household income by population groups of household head, 2010/11, Rand**



Post-2000 there has been some improvement in the average income of Africans, but this has been largely ascribed to social grant payments as opposed to widespread entry into the labour market.<sup>20</sup> In 2007 it was still the case that 40% of Africans and 16% of Coloureds lived in poverty, but only 6% of Indians and 1% of Whites.<sup>21</sup> The race-income hierarchy is a robust one, even if different measures of poverty are used and even if recent changes are taken into account: the majority African population is

<sup>19</sup> Statistics South Africa (2012) *Income and expenditure Survey (IES) 2010/2011*, p. 2.

<sup>20</sup> Van der Berg, S. (2010) *Current poverty and income distribution in the context of South African history*, Stellenbosch Economic Working Papers: 22/10, p. 13.

<sup>21</sup> Van der Berg, S. (2010) *Current poverty and income distribution in the context of South African history*, Stellenbosch Economic Working Papers: 22/10, p. 14.

on average worse off economically than the Coloured population who is worse off than the Indian population, who in turn is worse off than the White population.<sup>22</sup>

In terms of escaping poverty, access to education is essential and being excluded from education makes it all the more difficult to enter the labour market. Under apartheid the education system was designed to benefit a minority whilst the majority of Africans were excluded from, or with limited access to education. For example, in the 1960's Whites received on average eight more years of education than Africans. This started changing rapidly after the 1960's but by 2008 Africans and Coloureds still achieved 1.5 grades lower than Whites and Indians.<sup>23</sup> Despite massive investments in education post-1994, the inequalities in education have remained remarkably persistent, indicating that African children are receiving education of a particularly poor quality.<sup>24</sup>

The disparities in the application of arrest and detention, as described below, exacerbate these structural racial inequalities. Excessive and arbitrary arrest and detention have socio-economic consequences. It is incumbent on the state in the light of our history to be alive to the ways in which law enforcement reinforces these inequalities.

## 4. Imprisonment rates

### 4.1 Overall rates and rural/urban populations

South Africans are not imprisoned at an even rate and there are substantial differences in respect of age, race and gender. The first major differentiation is in respect of age. The Child Justice Act requires that only children older than 14 years of age may be imprisoned; either awaiting trial or sentenced.<sup>25</sup> It is also the case that the number of children imprisoned in South Africa has declined rapidly from a high of 4484 in March 2000 to 846 by February 2011.<sup>26</sup> The decline can be attributed

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<sup>22</sup>Leibbrandt, M. et al. (2010) *Trends in South African Income Distribution and Poverty since the Fall of Apartheid*, OECD Social, Employment and Migration Working Papers, No. 101, OECD Publishing, para 24, p. 15. <http://dx.doi.org/10.1787/5kmms0t7p1ms-en>

<sup>23</sup>Leibbrandt, M., Woolard, I., McEwen, H. and Koep, C. (2010) *Employment and inequality outcomes in South Africa*, Cape Town: Southern Africa Labour and Development Research Unit (SALDRU) and School of Economics, University of Cape Town, p. 39.

<sup>24</sup>Leibbrandt, M., Woolard, I., McEwen, H. and Koep, C. (2010) *Employment and inequality outcomes in South Africa*, Cape Town: Southern Africa Labour and Development Research Unit (SALDRU) and School of Economics, University of Cape Town, p. 39.

<sup>25</sup> Child Justice Act (75 of 2008) sections 30(1)(b) and 77(1)(a).

<sup>26</sup> Muntingh, L. and Ballard, C. (2012) *Report on children in prison in South Africa*, Bellville, Community Law Centre, p. 12.

in part by sustained advocacy from children’s rights groups to avoid the imprisonment of children and a positive response from the judiciary and government broadly. In respect of children it can indeed be concluded that constitutionalism brought about a significant improvement to children’s experience of and exposure to the criminal justice system, as reflected in the Child Justice Act (75 of 2008) and post-1994 jurisprudence. For the purposes of this paper, however, the changes suggest that in calculating rates of imprisonment, children under the age of 18 should be excluded from the analysis. Consequently population data used reflects only that segment of the population who are 18 years and older of age and younger than 65 years to calculate the per 100 000 rates of imprisonment.

The second major differentiation is between men and women: women make up roughly 2.3% of the total prison population. This distribution is broadly consistent with prison populations elsewhere in the world and is consequently expected in South Africa (and is not argued to be the result of unfair discrimination on the basis of gender in law enforcement). The reasons for the widely differing rates of imprisonment of men and women are beyond the scope of this paper; however the widely differing rates do mean it is necessary to consider men and women separately when carrying out any analysis.

Figures 2 and 3 below present the imprisonment rates for each of the race groups and gender. The prison population data are from March 2011 as the most recent data available detailing the prison population profile. National population data used are from 2013 household estimates. Despite the differences in date, the general profiles presented have remained relatively stable over time.

**Figure 2 Male imprisonment per 100 000 of the population: males aged 18 and older up to and including 65 years;**

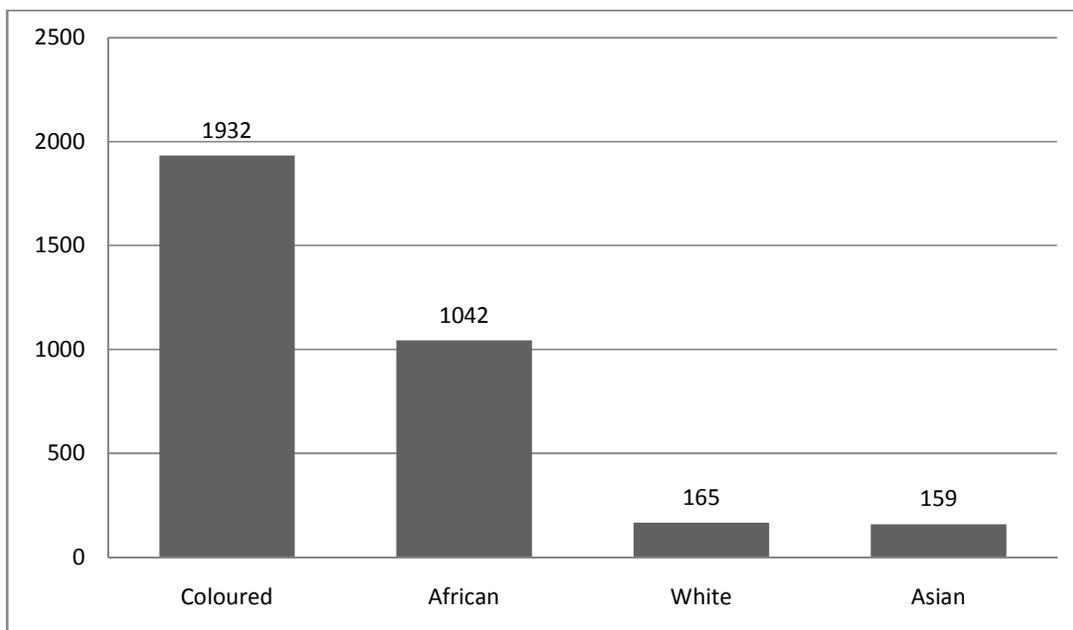
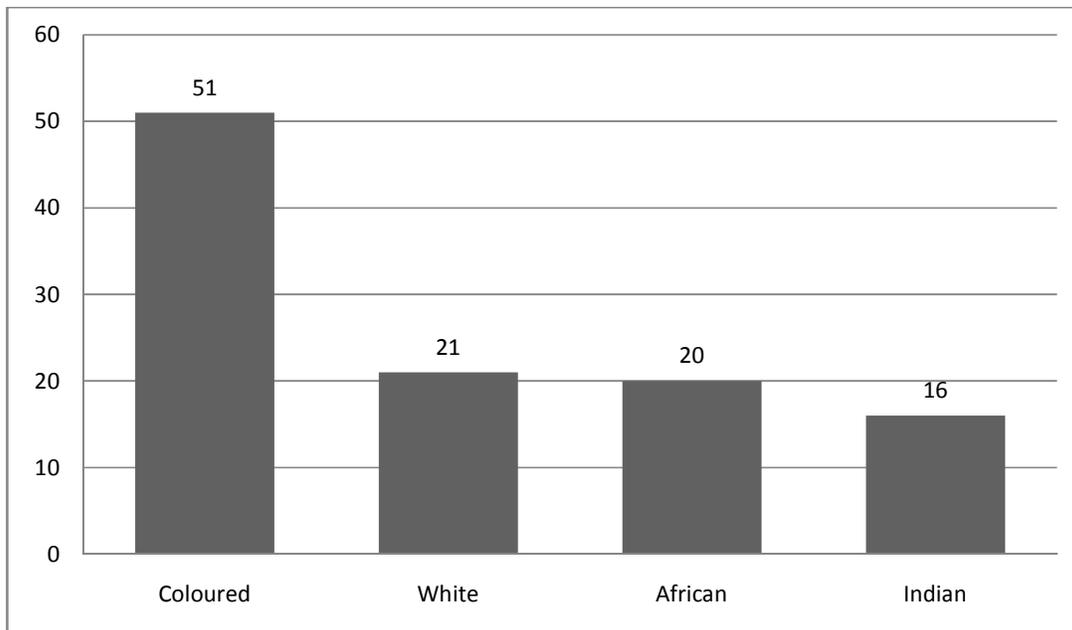


Figure 2 (male imprisonment rate) shows that the imprisonment rate for Coloured males is around 12 times the rates for Asian and White males (at 1932/100 000 of the population), and nearly double (1.9) times the rate for African males (1042/100 000 of the population). The rate for Coloured males mean, in effect, that one out of every 52 coloured males in South Africa (or just more than 2%) between the ages of 18 and 66 years is imprisoned at any one time. Coloured men aged 18 to 65 years are 12 times more likely to be imprisoned than their White and Indian counterparts. African men aged 15 to 65 years are also six times more likely to be imprisoned than White males.

**Figure 3 Female imprisonment rate per 100 000 of the population: females aged 18 and older up to and including 65 years**

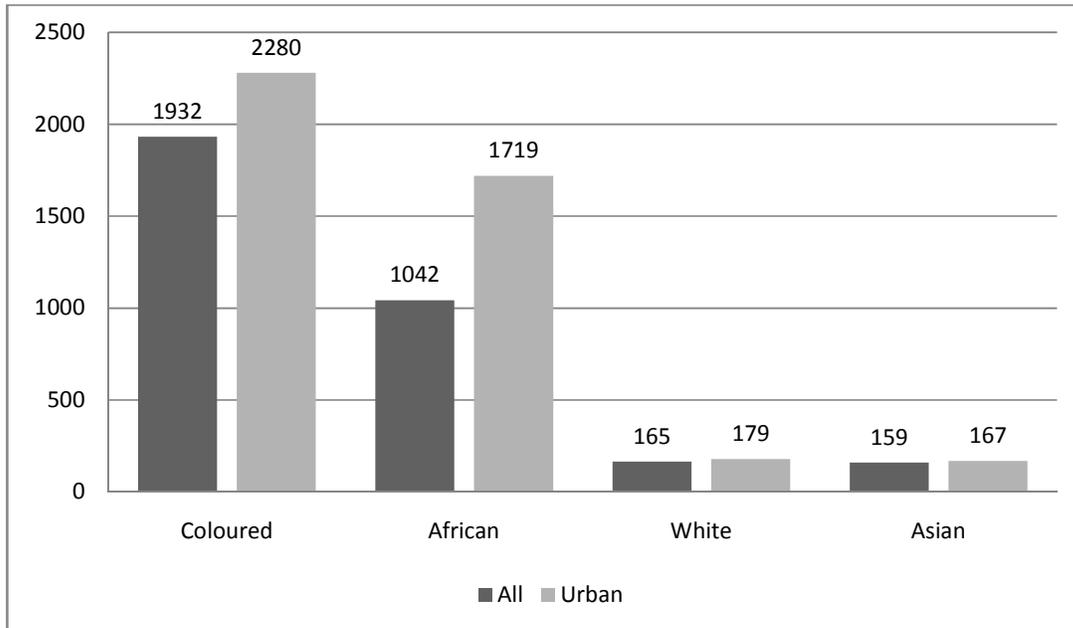


In respect of female prisoners (Figure 3), Coloured females have the highest rate at 51 per 100 000 of the population. However, the rates for the other population groups are similar to each other and range from 15 to 21 per 100 000 of the population.

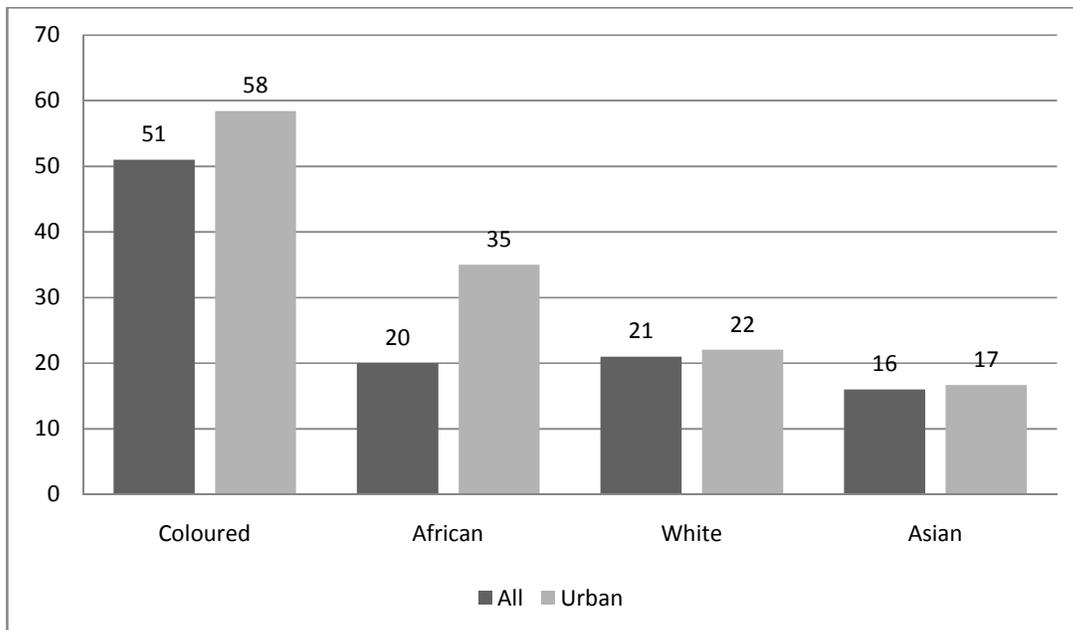
What are the possible reasons for these trends? The perhaps unexpectedly high rate for white women provides a clue to one of the factors in operation. Law enforcement in South Africa is predominantly an urban phenomenon; furthermore the largest prisons are located in urban areas. The rural population of South Africa, which is subject to the lowest levels of law enforcement, is overwhelmingly African, while most White and Asian people live in urban areas. Thus, if the rural population is excluded from the analysis a somewhat different pattern emerges, as shown in Figures 4 and 5. For men, the gap between the rate applicable to Coloured and African men closes. For women, the same order of rates

that emerges for men appears, with the rate for African women becoming noticeably higher (from 20 to 35/100 000) but Coloured (urban) females less so, from 51 to 58/100 000. The rates for urban Indian and White females changes slightly.

**Figure 4 Male imprisonment per 100 000 of the population: males aged 18 and older up to and including 65 years; urban and total**



**Figure 5 Female imprisonment per 100 000 of the population: males aged 18 and older up to and including 65 years; urban and total**

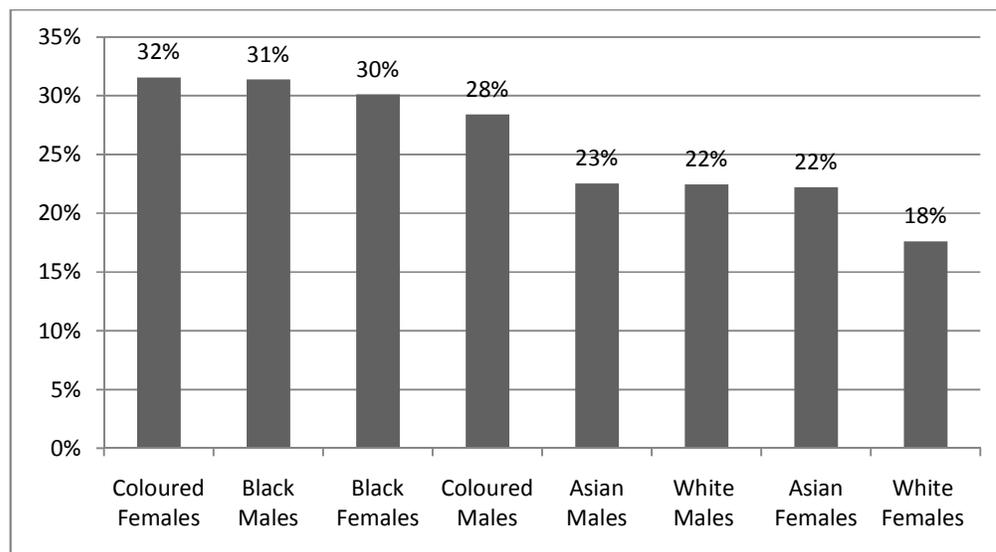


However, what remains obvious is that taking rural-urban racial dynamics into account does not succeed in eliminating the disparity in imprisonment rates. The imprisonment rate for Coloured and African men remains much higher than the rate applicable to White and Asian men, and similarly for women. The concern deepens when imprisonment is differentiated by whether or not a person has been convicted and sentenced, or whether they are awaiting trial.

#### 4.2 Ratios of sentenced and awaiting trial prisoners by race

A further differentiation can be made in respect of sentence status. Figure 6 below shows the awaiting trial prison population according to population group and gender as at February 2011. While between 18% and 22% of White and Indian prisoners are awaiting trial, a higher proportion, between 28% and 32% of Black and Coloured prisoners are awaiting trial. The ratio of awaiting trial to sentenced in a prison population is an indication of the extent to which persons held awaiting trial, are eventually convicted and sentenced. A prison population with a low percentage of awaiting trial prisoners is suggestive of a system which tends not to incarcerate awaiting trial. Conversely a prison population with a large percentage of awaiting trial prisoners tends to hold people awaiting trial, but tends not to convert those awaiting trial prisoners into sentenced prisoners. The differing rates by race suggest that African and Coloured people are most likely to be held awaiting trial, without that incarceration being converted to an eventual sentence. This in turn is suggestive of a discriminatory impact of the way the system operates, rather than of difference in underlying criminality.

**Figure 6 Awaiting trial population per population group and gender, February 2011.**



Indeed if pre-trial detention imprisonment rates are calculated on urban populations, the differences by race are stark – Coloured men have a rate of pre-trial incarceration which is 18 times as high as that of white men. The rate of sentenced imprisonment is, however, “only” 12 times as high as that of white men.

### 4.3 Explanations for the observed trends

The most notable aspect of the data referred to above is the over-representation of the Coloured population in the prison population. As indicated above, the disparity between the African and Coloured imprisoned population rates is lessened when taking urban-rural dynamics into account, but this does not sufficiently account for the observed differences amongst all the races which must be explained to avoid the state being accused of unfair discrimination.

Two 2004 papers by Leggett attempted to put forward some reasons for the high imprisonment rate of the Coloured population, but noted that these required further research.<sup>27</sup> His analysis dwelt mainly on reasons which suggested a higher level of criminality among the Coloured population. He commenced his analysis with showing that the violent crime rate in the Western and Northern Cape Provinces is considerably higher than elsewhere in the country. Leggett placed the emphasis on urbanisation, economic marginalisation, involvement in gangsterism and substance abuse as key drivers in violent crime in traditionally Coloured areas of residence. These he argued should be regarded as interactive and that there is no single reason. Subsequent research has continued to confirm the factors identified by Leggett in respect of foetal alcohol syndrome<sup>28</sup> (specifically the “dopstelsel”<sup>29</sup>) and gangsterism on the Cape Flats.<sup>30</sup> If Leggett is correct and rates of imprisonment are primarily a function of rates of criminality, then the disparity in imprisonment rates, particularly the high rate applicable to the Coloured population, does not suggest any unfair discrimination in law enforcement.

But under apartheid the different population groups had different but also in-group common experiences of the ordering of society and the social engineering pursued by the apartheid state. The Constitution requires more than the removal of discrimination but also the remedying of the harm caused by past discrimination and the Apartheid system. The Coloured population was used

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<sup>27</sup>Leggett, T. (2004) What’s up in the Cape? - Crime rates in Western and Northern Cape provinces, *SACQ* No. 7.  
Leggett, T. (2004) Still marginal - Crime in the coloured community, *SACQ* No. 7.

<sup>28</sup>Rendall-Mkosi, K. et al (2008) *Foetal Alcohol Spectrum Disorder in South Africa: Situational and Gap Analysis*, Pretoria: University of Pretoria.

<sup>29</sup>Falletisch, L.A. (2008) *Understanding the legacy of dependency and powerlessness experienced by farm workers on wine farms in the Western Cape*, Unpublished Masters dissertation (Social Work), University of Stellenbosch.

<sup>30</sup>Standing, A. (2011) *The Social Contradictions of Organised Crime on the Cape Flats*, Pretoria: ISS, ISS Paper no. 74.

extensively in forced prison labour in the Western Cape from colonial times until the 1980's when the practice was abolished.<sup>31</sup> However, by then there had already been established a pattern of high imprisonment to supply this form of labour in the then Cape Province (which included the present-day Western and Northern Cape provinces) where the majority of the Coloured population resides.<sup>32</sup> It was especially during the 1950s that the use of prison labour on private farms increased.<sup>33</sup> By 1986 there were 22 prisons accommodating some 10 000 prisoners at outstations where they were used as labour.<sup>34</sup>

History also points to the large scale institutionalisation of Coloured boys after the Second World War as a result of government's response to deal with poverty in the Coloured population in Cape Town and surrounds.<sup>35</sup> Boys, either in need of care or in conflict with the law, were sent to facilities such as Ottery School of Industries and Porter Reformatory for young boys, being institutionalised in large numbers, Coloured boys developed protective networks that would last well beyond their stay at one of these institutions and continue to serve them on the streets and, for some, ultimately in prison. Research from elsewhere has also found that the effects of institutionalisation may indeed be more severe the younger it starts and that their post-institutionalisation problems will be more challenging.<sup>36</sup> It would then follow that an inter-generational impact of imprisonment developed. Children growing up in families where an adult is or was imprisoned are four to five more likely to be imprisoned in later life.<sup>37</sup>

The issue here is that the Coloured population in the Western Cape and Northern Cape experienced colonial and later the apartheid government policies in a particular way and this contributed to a set a shared and collective experiences appearing to contribute to a higher than the norm imprisonment rate. Given that this is partly a result of past discriminatory practices, what are the obligations on the state today in terms of remedy? Is there an obligation on the state today to break the cycle of

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<sup>31</sup> Worger, W. (2004) Convict Labour, Industrialists and the State in the US South and South Africa, 1870–1930. *Journal of Southern African Studies*, Volume 30, Number 1.

<sup>32</sup> Worger, W. (2004) Convict Labour, Industrialists and the State in the US South and South Africa, 1870–1930. *Journal of Southern African Studies*, Volume 30, Number 1. Van Zyl Smit, D. (1999) South Africa. In Van Zyl Smit, D. and Dünkel, F. (eds) *Prison Labour: Salvation Or Slavery? - International Perspectives*, Ashgate: Aldershot, pp. 210-240. Corry, T.M. (1977) *Prison labour in South Africa*, Cape Town, NICRO. Van Zyl Smit, D. (1992) *South African Prison Law and Practice*, Durban: Butterworth Publishers.

<sup>33</sup> Van Zyl Smit, D. (1992) *South African Prison Law and Practice*, Durban: Butterworth Publishers, p. 31.

<sup>34</sup> Dissel, A. and Kollapen, J. (2002) *Racism and discrimination in the South African Penal System*, Research report written for Penal Reform International and the Centre for the Study of Violence and Reconciliation, p. 15.

<sup>35</sup> Badroodien, A. (2004) Race, welfare, and 'correctional' education: the experience of indigent 'coloured' boys under apartheid. In Kallaway, P. *The history of education under apartheid 1948-1994: the doors of learning and culture shall be opened*, Cape Town: Pearson Education South Africa, p. 312.

<sup>36</sup> Haney, C. (2003) The psychological impact of incarceration – implications for post-prison adjustment. In Travis, J. and Waul, M. (eds) *Prisoners once removed – the impact of incarceration communities, families and children*, Chicago: Urban Institute, p. 39.

<sup>37</sup> Farrington, D. (2007) Origins of violent behaviour over the life span. In D. Flannery, A. Vazsonyi, & I. Waldman, *The Cambridge Handbook of Violent Behaviour and Aggression* (pp. 19-48). Cambridge: Cambridge University Press.

imprisonment, rooted in past discrimination, by, for example, providing alternative responses or legislating to reduce the use of short term imprisonment for less serious offences? Substantial reform in arrest and imprisonment policies and practices may indeed be required to address the harmful effects on certain sub-sets in the population.

Furthermore, neither Leggett's analysis nor the above accounts for the even higher pre-trial detention rates of the African and Coloured populations. If the pre-trial system operated with similar impact one would expect there to be similar disparities amongst the races with respect to sentenced imprisonment rates and pre-trial detention rates. But this is not the case, suggesting that the operation of the criminal justice system at the pre-trial phase has a discriminatory impact on African and Coloured people.

At this point it should be noted that none of the above data takes into account arrests which do not result in detention in a prison. People arrested and held in police cells are not captured by imprisonment data, yet arrest, as described in section 5, is a common occurrence.

The available data does not indicate arrests by race and thus racially unequal trends cannot be demonstrated. However, what the available data does suggest is that the rate at which South Africans are currently arrested rivals the situation experienced during apartheid. Unfortunately there is little evidence to suggest these arrests are not arbitrary and excessive.

## 5. Arrest rates

One of the police's core functions is to apprehend criminal suspects with the aim of bringing the person to justice. Being arrested is therefore a critical step in the criminal justice process from a rights perspective because, by definition, it deprives a person of his or her liberty. It is therefore important to determine if this power of the state is used in a judicious, fair and equitable manner.

The number of people arrested by the South African Police Service (SAPS) is not insignificant. In 2011/12 SAPS executed 1 613 254 arrests<sup>38</sup> or roughly 3045 per 100 000 of the total population (all ages, genders and races). Comparatively, the arrest rate for the USA was 4478/100 000 of the population in 2009<sup>39</sup> even though the USA has fewer police officers per 100 000 of the population.<sup>40</sup> It should be noted that the majority (52%) of the arrests executed by SAPS were not for priority

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<sup>38</sup> SAPS (2012) *SAPS Annual Report 2011/12*, p. 66-67.

<sup>39</sup> Crime in the United States website "Arrests" <https://www2.fbi.gov/ucr/cius2009/arrests/index.html> Accessed 10 June 2013.

<sup>40</sup> Website Public Intelligence. Net <http://publicintelligence.net/global-private-securitypolice-officer-personnel-levels-by-countryper-capita-2011/> . Accessed 26 June 2013.

crimes<sup>41</sup> and were merely categorised as “Other”. It is unknown what this category constitutes as it is not broken down in the SAPS annual reports, but the implication is nonetheless that the majority of arrests are made for crimes that are not classified by the police as priority crimes. It seems strange that a law enforcement agency would devote its key activity to something that is not a priority.<sup>42</sup> One can speculate that these may be minor offences not posing a threat to public safety.

The national rate of 3045 per 100 000 is, however, calculated evenly across the entire population – from infants to the oldest citizen, as well as women. It is, however, the case that young adult men stand a far greater chance of being arrested than children, women, and the elderly and some adjustments are therefore required to calculate a more indicative arrest rate. If certain categories of people are excluded, then the arrest rate changes substantially. In the calculations below:

- Children younger than 18 years are excluded because those under 10 years cannot be arrested<sup>43</sup> and those aged 11 to 17 years of age constitute a known and small percentage of total arrests. In 2010/11 a total of 75 435 children were arrested by SAPS, representing 4.7% of total arrests.<sup>44</sup> However, children under the age of 18 years constitute 34% of the total population. To include them would skew the calculations. Both the arrests of children and children in the population are thus excluded in the calculations below.
- Persons older than 65 years are excluded since it can be assumed that very few of them are arrested and they constitute only 5% of the total population.<sup>45</sup>
- Substantially more men than women are arrested and calculations are made accordingly, accounting for 16.5%, 18% and 21.8% of arrests being of females. The three proportions are

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<sup>41</sup> Priority crimes include the following: Murder (including farm murders); Attempted murders (including attempted farm murders); Sexual offences (including rape and attempted rape and indecent assault); Assault GBH ; Common assault; Aggravated robbery (includes hijacking of cars and trucks, house robbery, business robbery, CIT robbery, bank robbery and robbery with a firearm); Common robbery; Arson; Malicious damage to property; Illegal possession of firearms and ammunition; Drug-related crime (offences under the Drugs and Drug Trafficking Act, 1992 (Act No. 40 of 1992) and the Medicines and Related Substances Amendment Act); Driving under the influence of liquor and drugs; Burglary at residential premises; Burglary at business premises; Theft of motor vehicle and motorcycle; Theft off or from motor vehicles; Stock theft; Commercial crime (fraud); Shoplifting; Other theft.

<sup>42</sup>Muntingh, L. “Police need to get their priorities right on arrests”, Opinion piece, *The Argus*, 29 October 2012.

<sup>43</sup>section 9(1) Child Justice Act (75 of 2008).

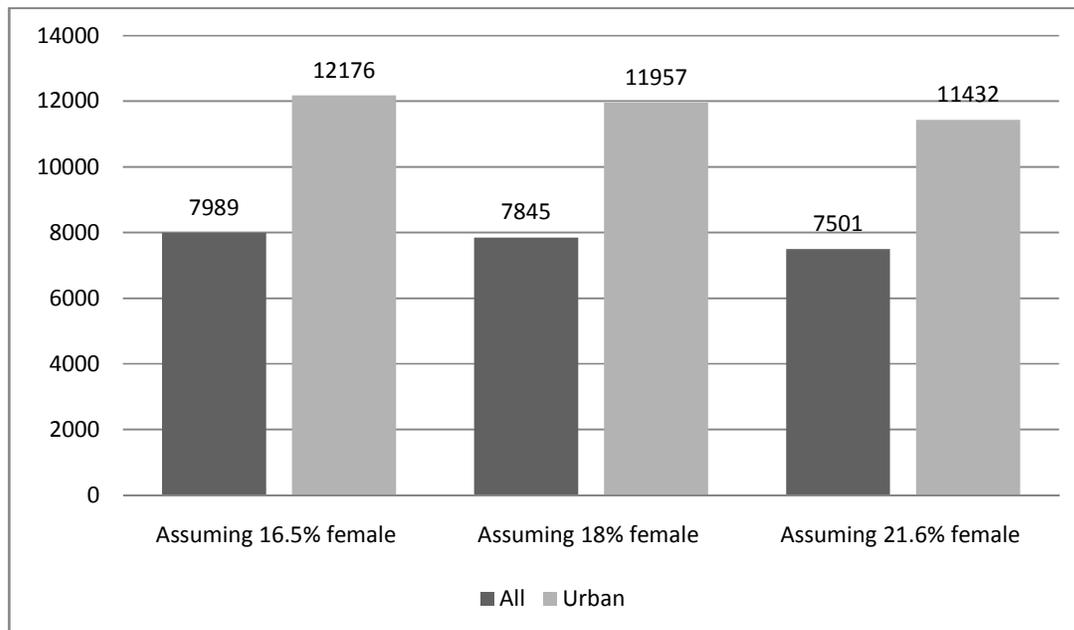
<sup>44</sup>PMG report on the meeting of the Portfolio Committee on Justice and Constitutional Development, 22 June 2011, <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act> Accessed 19 June 2013.

<sup>45</sup> There are no accurate and recent statistics available on the age profile of arrested persons in South Africa. However, a 2002 survey of arrested persons in Cape Town, Johannesburg and Durban found that between 13% and 25% of arrestees were 36 years or older (Leggett, T. (2002) *Drugs and crime in South Africa – a study in three cities*, Pretoria: ISS, Monograph 69, Appendix.

derived from the gender profile of arrests in three cities in a 2002 survey.<sup>46</sup> Admittedly these were urban-based surveys and the proportion of females arrested in rural areas is unknown.

According to Statistics SA there are a total of 16 073 161 men between the ages of 18 and 65 in South Africa.<sup>47</sup> If the total number of arrests of 1 613 254 less the number of children arrested (75 435), is spread across this group but deducting a percentage for female arrests, the per 100 000 rate ranges from 7989 to 7501 for men arrested in 2011/12, as shown in Figure 7 below. The chart shows that if 16.5% of total arrests were females and are thus excluded, 7989 men were arrested per 100 000 of the male population; and if 21.6% of all arrests were females and thus excluded, the arrest rate for men is 7501 per 100 000 of the male population. Simply put, in 2011/12 one out of approximately every 13 South African men aged 18 - 65 years were arrested. Compared to the national rate of 3045 per 100 000, it then follows that the rate for adult men aged 16 to 65 years is approximately 2.5 times higher than the national rate which is calculated across the national population. The ratio of one out of every 13 adult men aged 18 – 65 years seems at least at face value to be excessive, but it is even more disconcerting that more than half of these arrests were for crimes that are not priority crimes.

**Figure 7 Calculated arrest rates per 100 000 for South African men, aged 16 -65 years, All and Urban populations**



Similar to the imprisonment rate discussed above, it is also possible to make a distinction between the total male population aged 18 to 65 years and the urban population in this age cohort. As noted

<sup>46</sup> Leggett, T. (2002) *Drugs and crime in South Africa – a study in three cities*, Pretoria: ISS, Monograph 69, Appendix

<sup>47</sup> The data was extracted from an interactive function at <http://interactive.statssa.gov.za/superweb/login.do> Accessed 19 June 2013.

already, policing services are more prevalent and accessible in urban areas and urban men are thus at a great risk of arrest than rural men. Using the same proportions of females being arrested and thus excluding them, the arrest rate for adult men aged 18-65 years then range from 11 432 to 12 176 per 100 000 of the population. Based on this it can be concluded that the more indicative arrests rate lies somewhere between these two extremes which can also be expressed as between 1 out of every 8 (only the urban adult male population) to 1 out of every 13 adult men (the total adult male population) aged 18 to 65 years are arrested annually in South Africa. It is also possible that certain individual men are arrested repeatedly in the course of a year.

Apart from the overall arrests rates, it is also important to analyse what people are arrested for and arrests per crime category are presented in Table 4 below.<sup>48</sup>

**Table 4 Arrests per crime category 2010/11 and 2011/12**

<b>Crime</b>	<b>2010/11</b>	<b>2011/12</b>	<b>% 2010/11</b>	<b>% 2011/12</b>
Murder (including farm murders)	14756	14741	2.2	1.9
Attempted murders (including attempted farm murders)	7424	7329	1.1	1.0
Sexual offences (including rape and attempted rape and indecent assault)	26803	26502	4.0	3.5
Assault GBH	120706	127929	17.9	16.8
Common assault	64099	73136	9.5	9.6
Aggravated robbery <sup>49</sup>	25077	28008	3.7	3.7
Common robbery	24137	25557	3.6	3.4
<b>Contact related</b>				
Arson	1748	1845	0.3	0.2
Malicious damage to property	30874	35643	4.6	4.7
<b>Crimes dependent on police action for detection</b>				
Illegal possession of firearms and ammunition	10262	10630	1.5	1.4
Drug-related crime <sup>50</sup>	92620	133478	13.7	17.5
Driving under the influence of liquor and drugs	46256	54100	6.8	7.1
<b>Property-related and other serious crime</b>				
Burglary at residential premises	43508	43657	6.4	5.7
Burglary at business premises	7281	8101	1.1	1.1
Theft of motor vehicle and motorcycle	6375	6718	0.9	0.9
Theft off or from motor vehicles	5855	6899	0.9	0.9
Stock theft	4806	5163	0.7	0.7
Commercial crime (fraud)	13748	15395	2.0	2.0

<sup>48</sup> It should be noted that there are minor discrepancies (roughly 0.9%) in the totals provided in the SAPS annual reports and the calculated totals presented here. The reason for this could not be established.

<sup>49</sup> This includes hijacking of cars and trucks, house robbery, business robbery, CIT robbery, bank robbery and robbery with a firearm.

<sup>50</sup> Offences under the Drugs and Drug Trafficking Act, 1992 (Act No. 40 of 1992) and the Medicines and Related Substances Amendment Act.

<b>Crime</b>	<b>2010/11</b>	<b>2011/12</b>	<b>% 2010/11</b>	<b>% 2011/12</b>
Shoplifting	55685	55456	8.2	7.3
Other theft	73290	81217	10.9	10.7
<b>All priority crime</b>	675310	761504	100.0	100.0
<b>Other crime</b>	763663	836114	53.07	52.34
TOTAL	1,438,973	1,597,618		

The top five crime categories (see shaded rows), excluding “Other crime” (the second last row in Table 4), make up more than 61% of arrests for the two years under review, being: Assault GBH, Common assault, Drug-related crime, Other theft, and Shoplifting. In 2010/11 Drug-related crimes accounted for the second highest and in 2011/12 the highest proportion of arrests (excluding Other). Although exact data is not available it can be assumed, with a fair amount of confidence that the overwhelming majority of these arrests were for the possession of small quantities of drugs and controlled substances.

The SAPS annual report also notes that in 2011/12 nearly 2.5 million “Stop and searches” and 20.1 million “Person searches” were carried out. With close to half of South Africa’s population being searched by the police at least once in 2011/12 it is hardly surprising that drug possession accounted for nearly one in five arrests or 17.5%. However, “Stop and search” and “Person searches” do not yield high results and if both types of searches are combined<sup>51</sup> and compared to the number of arrests made for crimes dependent on police action in 2011/12, it shows that for every one arrest made in this category, 114 searches had to be conducted – by all accounts a labour intensive process. The effectiveness of this form of policing requires further investigation.

If the category “Other” is added to the above five crime categories, these six crime categories then make up 81% of total arrests.

The question can also be posed whether the crime profile of arrests correspond broadly with the charge profile of cases enrolled at courts. If this is indeed the case, it implies that suspects are arrested appropriately and there is a prima facie case to proceed with to the next stage of the criminal justice process. Using data from the 2011/12 SAPS Annual Report and a sample of court cases from three magistrates’ courts (Durban and Johannesburg and Mitchell’s Plain)<sup>52</sup>, the two profiles were compared. As noted already, 48% of arrests were for priority crimes, but 90.8% of cases appearing in these three courts were classified as priority crimes. This implies that a large proportion of arrests never proceed to court and detained persons are presumably released from police custody without

<sup>51</sup> Other forms of police action are also noted in the annual reports being roadblocks, cordon and searches, vehicles searches premises searches and firearms checks. If these totals are added to the calculations the ration will be even higher.

<sup>52</sup>Karth, V. (2008) *Between a rock and hard place*, Cape Town: Open Society Foundation (SA).

being charged. If this is indeed the case, this has serious constitutional rights consequences with reference to the right to be free from arbitrary detention. Although this data cannot be regarded as representative, it does indicate an extremely worrying trend, namely, that of the slightly more than half of all arrests (non-priority crimes), a very small percentage (roughly 10%) actually proceed to court. The data from the three magistrates' courts also showed that 53.9% of cases that did proceed to court were either withdrawn or struck from the roll.<sup>53</sup> It follows then that (1) large numbers of people are searched by the police, (2) a significant proportion are arrested for minor or non-priority crimes, (3) very few of these arrests proceed to court, and (4) more than half of those that do proceed to court do not proceed to trial.

The high arrest rates described above and particularly for offences that do not pose a threat to public safety (the category "Other"), is somewhat reminiscent of arrests for contraventions of the pass laws under apartheid. At its peak (1965-1975) arrest rates for pass law contraventions alone averaged at one every minute.<sup>54</sup> Using the arrest data from 2011/12 presented above, the arrest rate in that year was three arrests every minute for all offences and 1.6 arrests per minute for non-priority crimes. Given that the population of South Africa has not tripled from approximately 19-24 million over the period 1965-1975, the number of arrests appears to be comparable to that experienced in the height of pass law enforcement.

Exercising surveillance over and arresting large numbers of South Africans for non-priority crimes does indeed conjure up the notion of "new pass laws" being enforced by the police – policing people who look suspicious or appear as if they may be suspicious, or just a routine search and stopping of people without having reasonable grounds to suspect that they may be guilty of a criminal offence. While there is no data to confirm this, it is less likely that middle-class South Africans (of all races) will be subject to stop-and-search procedures by the police and more likely that poor people will experience the brunt of this form of policing. While there may be legitimate reasons for the police to engage in stop and search, the scale on which this is being done sounds more like a fishing expedition hoping that something will fall into the net. For this reason questions need to be raised about how the police uses person searches and arrests as a means of law enforcement and what it seeks to achieve.

Arresting people and especially large numbers of them will have consequences beyond the immediate and when they are predominantly poor people, arrest and detention may have a dire socio-economic impact.

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<sup>53</sup>Karth, V. (2008) *Between a rock and hard place*, Cape Town: Open Society Foundation (SA), p. 18.

<sup>54</sup>Wilson, F. and Ramphele, M. (1989) *Uprooting poverty – the South African challenge*, Cape Town: David Phillip, pp. 209.

## 6. Socio-economic impact of pre-trial detention

The high imprisonment rate observed in Coloureds and Africans also has implications, especially in urban environments. Given the spatial organisation of population groups created through apartheid it follows that persons imprisoned will also be geographically drawn from Coloured and African townships. High levels of imprisonment cause a form of coerced mobility which destabilises neighbourhoods when people are imprisoned and when they return again to those same neighbourhoods. Given the high rate of imprisonment of adult Coloured men aged 18-65 years in general (one out of every 52), it is plausible that in certain specific geographical areas the rates may even be much higher than this. Such a concentration of adult men moving in and out of prison will have a long term impact that is inter-generational.

An estimated 314 000 thousand people,<sup>55</sup> overwhelmingly from poor backgrounds, move through the prison system annually. As at end February 2011 some 31% of South Africa's prison population was awaiting trial with 48% of them being in custody for three months or longer already.<sup>56</sup> The proportion of awaiting trial prisoners is substantially above what is desirable and also above what the current prison infrastructure can accommodate. The problem of overcrowding is also more severe in prisons accommodating large numbers of unsentenced prisoners,<sup>57</sup> and imprisonment under such conditions may have severe implications with reference to physical and mental health.<sup>58</sup>

The excessive use of pre-trial detention in South Africa is an issue of grave concern for it can have serious socio-economic consequences for families who are already marginalised and vulnerable. The UN Special Rapporteur on Extreme Poverty and Human Rights succinctly summarises the socio-economic impact of pre-trial detention in a recent report:

The economic and social costs of detention and incarceration can be devastating for persons living in poverty. Detention and incarceration can lead to loss of income and employment and often temporary or permanent withdrawal of social benefits. Their families, particularly their children, are also directly affected. Therefore, criminal justice systems predicated on detention and incarceration, even for minor non-violent crimes, can themselves represent a significant obstacle to access to justice for persons living in poverty. Those who are poor and vulnerable

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<sup>55</sup> Office of the Inspecting Judge (2004) *Annual Report of the Judicial Inspectorate for Correctional Services 2003/4*, Cape Town, p. 18.

<sup>56</sup> Statistics supplied by the Judicial Inspectorate for Correctional Services.

<sup>57</sup> For example the following four prisons were more than 220% occupied as at February 2011 due to large number of awaiting trial prisoners: King Williams Town, Johannesburg Med. A, Umtata Med., Pollsmoor Max.

<sup>58</sup> See *Lee v Minister of Correctional Services* (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) (11 December 2012).

are likely to leave detention disproportionately financially, physically and personally disadvantaged.<sup>59</sup>

Her analysis point to an inclusive understanding of the impact of pre-trial detention that is not limited to the person deprived of his or her liberty but extends into familial life, the broader community and also inter-generational; excessive use of pre-trial detention impacts on the development of the next generation. Pre-trial detention is also linked to a range of other problems that poor people face when attempting to access justice and these are adequately described in the same report by the Special Rapporteur. A few issues will be highlighted here to reflect their inter-relatedness:

- Social and cultural barriers
  - Fear of reprisal and mistrust of the justice system
  - Socio-economic subordination
  - Lack of empowerment and access to information
- Legal and normative barriers
  - Inadequate legal framework and normative protection
  - Lack of judicial review for social policies
  - Lack of legal identity
- Institutional and structural obstacles in the justice chain
  - Location and physical accessibility
  - Inadequate capacity and resources
  - Stigma and lack of understanding of the needs of the poor
  - Excessive and arbitrary use of detention and incarceration
  - Fees and costs
  - Corruption
- Non-existent or inadequate legal assistance
- Structural problems of judicial processes
  - Excessive delays
  - Formalism
  - Differences in language and culture
  - Lack of legal standing
  - Limited impact of litigation
- Challenges in ensuring human rights are upheld in informal justice systems.<sup>60</sup>

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<sup>59</sup> A/67/278 para 50.

<sup>60</sup> A/67/278.

The excessively high rates of pre-trial detention of African and Coloured people is of particular concern given that it is African and Coloured people who are still mired in poverty.

## **7. Conclusion**

Much of what was presented in this paper is to some extent obvious and South Africans are familiar with the trend that it is predominantly poor African and Coloured people who are arrested and imprisoned. Apartheid still shapes South African society in a material way and its impact can also be seen in law enforcement. There has, however, been very little critical questioning of this and perhaps an acceptance of it. The paper attempted to raise a number of issues around the nexus of race, gender, poverty and law enforcement. At this stage there is sufficient information to conclude that there is reason to be concerned about how law enforcement is practiced and how different population groups and poor people are affected. It is equally concerning that these trends are still as persistent nearly 20 years after the transition to a constitutional democracy.

Even if it is accepted that the data presented above is far from ideal, there is little doubt that poor African and Coloured South Africans experience law enforcement, and ultimately the risk of pre-trial detention and imprisonment, very differently from Indians and Whites. High imprisonment rates, especially when concentrated in particular geographical areas have a long term destabilising effect that is inter-generational with the result that certain geographical areas will continue to contribute disproportionately to the prison population. The police's dragnet effected through millions of stop and searches does not result in effective policing aimed at solving serious crimes, but rather results in a high volume of drug-related and non-priority crime arrests of which a large proportion do not proceed to trial, either because the NPA declines to prosecute or the case is struck from the roll. However, these arrests consume valuable time and resources in a criminal justice system that is evidently overloaded. More importantly, it exposes hundreds of thousands of poor South Africans unnecessarily to the criminal justice system and potentially pre-trial detention.

The paper has also highlighted the need for further research into how the law is enforced, who is targeted and the socio-economic consequences of arrest and detention. Information systems in the criminal justice process need to collect data that is meaningful in respect of the transformative ideals of the Constitution. In other words, it should be possible to measure if all people experience criminal justice equally and that it is not only certain sectors of the population that are targeted for law enforcement and ultimately that punishments imposed are indeed fair across race and gender. An audit of police custody may indeed yield valuable information on the detainee population and what they were arrested for.

Transforming the criminal justice system would require that the performance of the police and courts be assessed to determine why the trends created during apartheid apparently still persist and what steps need to be taken at policy and practice levels to turn this around. Twenty years after the end of apartheid it is simply not acceptable anymore to practice criminal justice without asking questions about how the poor and historically disadvantaged are affected by the system that is supposed to make society safer.