

Surveying the prisons landscape – what the numbers tell us

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1 INTRODUCTION

As instruments of control, prisons present an interesting part of society when one reflects on the human-rights regime of a country and the maturity of a democracy. The unequal power structure between prisoners and warders, the ever-present underlying threat of violence and coercion, and the common history of secrecy and inaccessibility to the public, seen collectively, place human rights in a high-risk situation. This article will rely on some basic descriptive statistics to provide an insight into South African prisons and highlight some pertinent human-rights issues that need monitoring in a constitutional democracy. The prison population is not a representative sample of the population nor are prisons simply buildings that merely hold people for a period of time. Prisons are complex institutions that, in many respects, reflect the challenges of society on the outside. They have also developed their own unique challenges as institutions that have essentially one purpose, namely to detain people against their will and thus limit their right to freedom of association and movement.

Since 1992, the South African public has been bombarded by two facts about the prison population: first, that it has increased sharply and second, that South African prisons are overcrowded. Whilst this not untrue, there is at the same time a lot more to be said about the South African prison population based on the available figures. From a democracy and human-rights perspective, we can observe clear trends regarding who is imprisoned, for how long they are imprisoned as unsentenced prisoners, the impact of legislative reform and public sentiment, and what the future could hold for the size of the prison population.

In the prison environment, numbers are all-important and occupancy levels have a direct impact on the daily, if not hourly, quality of life of prisoners. From physical space and comfort (i.e. are there enough beds or do some prisoners sleep on the floor?) to access to specialist services (number of prisoners per social worker), occupancy levels determine nearly every aspect of prison life. Most important of all is the state's ability to ensure the safe custody of all prisoners. The number of warders

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on duty in relation to the number of prisoners placed in their care is a crucial aspect in ensuring the safety of those prisoners. High and above-capacity occupancy levels result in risks in this regard and overcrowding not only compromises the safety of prisoners but also that of warders.

This article will make observations and describe trends using available prison statistics in order to offer a quantitative perspective on the issues of democracy and human rights in South African prisons. In this sense, we are asking the question: what can and should we expect of prisons in our constitutional democracy? The Correctional Services Act 111 of 1998 was promulgated in full in October 2004 after having been in limbo for six years. The legislative framework has now, for the first time, been brought into line with the Constitution. The key section in the Constitution in this regard is 35(2)(e), which states:

Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

2 PRISON STATISTICS

Essentially three types of figures are used to describe prison populations and these are used for different purposes. It is important to distinguish them in order to apply the figures correctly:

- Date counts – for example, on 30 November 2004 there were 186 053 prisoners in South Africa
- Averages – for example, based on month-end counts, there were on average a certain number of prisoners in custody in 2004
- Admissions – for example, during 2004, 350 000 people were admitted to prisons.

It should be noted that admission figures often include prisoners released to appear in court in the morning and then admitted again in the evening.

Collating figures from a large number of prisons for a specific date and verifying the integrity and reliability of the data can be a challenging task. Some observers have expressed their concern about the Department of Correctional Services' (DCS) statistics, but at present there is no alternative nor is it possible to verify the integrity and reliability of the figures.

3 SOUTH AFRICA IN THE WORLD AND THE REGION

South Africa has one of the highest imprisonment rates in the world. The United States is without equal in terms of the size of its prison population and the per 100 000 rate of imprisonment, with more than 2 million of its citizens behind bars and a rate of 686 per 100 000 of the population in prison. South Africa has a prison population of roughly 186 000 (November 2004) which converts to a rate of 413 per 100 000 of the population. It should also be noted that imprisonment rates are spread across the entire population regardless of age and gender. Ratios that take age, gender and even race cohorts into account, often provide a startling

picture, as will be shown below. Internationally, South Africa is ranked fifteenth in the world in terms of rate of imprisonment per 100 000 of the population. In terms of the actual size of the prison population, South Africa is ranked ninth.

When comparing African countries per region as shown below, the imprisonment rate in Southern Africa is seven times that of West and Central Africa and is more than double that of Eastern and Northern Africa.²

Table 1 Imprisonment rates in Africa per region

Region	Imprisonment rate
West and Central Africa	50
Eastern Africa	122
Northern Africa	124
Southern Africa	362

The growth in the South African prison population was not isolated and similar trends were observed in other parts of the world during the 1990s. Walmsley reports that this growth ranged from 10% in Japan to an almost unbelievable 89% in The Netherlands.³ It is debatable whether it is indeed possible to seek global reasons for a general growth in prison populations, as Walmsley attempts to do. The answer may, in fact, lie in the same response (more imprisonment for longer) to different sets of stimuli. The countries South Africa is being compared with in terms of imprisonment rates and prison population size are also not a homogenous group of constitutional democracies. Some are countries in transition, which did, in real terms, experience increases in crime, whilst others may be considered dictatorial regimes using the prison system to suppress political dissent. In South Africa, the reasons for the growth in the prison population are still being debated and further views in this regard are presented later in this article.

South Africa has a large prison population and a high rate of imprisonment and it is necessary to look critically at what this means for a country that has a pervasive crime problem. On a policy level the questions that should be asked are: Where does prison fit into our range of responses to managing crime? For whom (and at what rate) is this sanction reserved? Are we clear on what we want to achieve with imprisonment? Is the use of imprisonment reducing crime?

South Africa also shares a number of characteristics with the developing and the developed world. Longer sentences have been a feature for many years of the US justice system and this trend has also been observed in the United Kingdom and Europe. The minimum sentences legislation (Act 105 of 1997) finally gave parliamentary sanction for what was already an emerging trend. In line with trends in developing country, spending on

2 Walmsley R 'Global incarceration and prison trends' *Forum on Crime and Society* (2003) vol 3 (1 and 2) 67-68.

3 *Supra* at 70.

prisons has grown significantly in real terms over the last three years, i.e. by nearly 12%.⁴ On the other hand, South Africa also exhibits the typical developing-world prison characteristics of overcrowding, large awaiting-trial populations, and rights violations.

4 OVERCROWDING IN SOUTH AFRICAN PRISONS

As noted in the introduction, the overcrowding of South African prisons is well-publicised.⁵ It should also be stated immediately that not all prisons are overcrowded and that even those that are overcrowded are not equally overcrowded. For example, as on 30 November 2004, Johannesburg Medium B was 370,15% full, whilst Vryheid Prison in Northern KwaZulu-Natal was 26,5% full.⁶ The occupation rate or overcrowding rate ranges then from close to 400% full to only 25% full, the overall rate being 163% full at the end of November 2004. In total numbers, it means that there is a shortage in space for approximately 72 000 prisoners. The DCS uses a norm for overcrowding that is static and assigns a capacity to a prison and, once a level above that capacity has been reached, that prison is defined as being overcrowded. In the case of prisoners in a communal cell, the allotted space per inmate is 3,344 square meters, and 5,0 square meters is assigned for prisoners in single cells.⁷

Defining overcrowding is, however, a bit trickier than may appear at first glance. Another approach is that of the American Correctional Association, which applies a different norm applicable to prisoners who are out of their cells for more than 10 hours in a day as opposed to prisoners who spend less time out of their cells.⁸ Overcrowding is not only about numbers: it has a strong qualitative aspect to it. Another view of overcrowding is that it essentially has three elements:⁹

- density, which is an objective measure (in terms of physical space);
- perception, which is a subjective measure; and
- the number of people for a given density.

4 Muntingh I. 'A review of the correctional services budget 2004/5 to 2006/7' (2004) 7 *CSPRI Newsletter*, accessed at http://www.easynail.co.za/BackIssues/CSPRI/9November_Issue38.html.

5 For a more detailed discussion on overcrowding and the legal implications, see Steinberg J 'Prison overcrowding and the constitutional right to adequate accommodation in South Africa' (2005) Paper Commissioned by the Centre for the Study of Violence and Reconciliation.

6 Johannesburg Medium B has a capacity of 1 300 and held 4 812 sentenced prisoners only, and Vryheid prison has a capacity of 748 and held 21 awaiting-trial prisoners and 177 sentenced prisoners as on 30 November 2004.

7 Van Zyl Smit D 'Swimming against the tide - Controlling the size of the prison population in South Africa' in Dixon B and Van der Spuy E *Justice Gained* (2005) 227-258 at 230.

8 Submission by Bloemfontein Correctional Contracts (Pty) Ltd to the Portfolio Committee on Corrections on the Draft White Paper on Corrections, 3 February 2004, at 4.

9 Turner S *et al* 'Health and safety effects of crowding - Hazard identification' [RAS/04/DRAFT] (2005) Rail and Safety Standards Board, <http://www.rssb.co.uk/pdf/reports/research/t307%20health%20and%20safety%20effects%20of%20crowding.pdf>, 146.

Using these three elements in combination to assess whether a particular prison is overcrowded at a particular time, but also over a protracted period, could be the most accurate measurement. A fourth variable that could be added to the above is time or duration.

Internationally there is no norm for what constitutes overcrowding but the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has, in terms of its objective to prevent torture, set down a minimum that is worth taking note of. It does not state what overcrowding is but does provide a quantitative measure of what would constitute torture, inhuman and degrading treatment, as a measurement of floor space.¹⁰ It regards 4.5m² as a 'very small' space, 6m² as rather small, and a cell of 8-10m² as satisfactory per prisoner.

Overcrowding also influences the manner in which prisoners perceive and respond to events. Research by Lawrence and Andrews¹¹ firstly confirmed existing research illustrating the link between subjective definitions of overcrowding with both stress and arousal and demonstrating that increases in both stress and arousal have been directly associated with increases in violent and aggressive behaviour. Secondly, Lawrence and Andrews found that overcrowding has been associated with more negative and aggressive perceptions of an event or occurrence. In other words, in an overcrowded prison it is more likely that an event may be perceived as aggressive, thus increasing the chances of an aggressive response. Their research, therefore, goes some way in explaining why overcrowded situations are more tense and strained and why there is a propensity for aggressive and violent responses. Increases in overcrowding have also been associated with increases in prisoner suicides and incidents of self-harm.¹²

Considering these factors together, it is apparent that imprisonment, especially in overcrowded conditions, can be extremely taxing on any individual's physical and mental health. Overcrowding places an additional burden on the individual and may change a deeply unpleasant situation into a torturous and degrading one. This was the view held by the European Court of Human Rights in *Kalashnikov v Russia*.¹³ The Court found in favour of the applicant on the bases of three violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe), namely Articles 3, 5.3 and 6.1. Article 3 is an unqualified protection against torture, and the Court made specific reference to overcrowded and unsanitary conditions, going to great lengths to explain how the collective impact of overcrowded conditions ultimately constituted torture:

10 International Centre for Prisons Studies 'Dealing with prison overcrowding' Guidance Note 4 (2004) King's College, London, at 2-3.

11 Lawrence C and Andrews K 'The influence of perceived crowding on male inmates' Perception of Aggressive Events' *Aggressive Behaviour* (2004) Volume 30 at 281.

12 *Supra* at 275.

13 *Kalashnikov v Russia*, Application 47095/99, European Court of Human Rights, Strasbourg, 15 July 2002.

Moreover, on account of the acute overcrowding, the inmates in the applicant's cell had to sleep taking turns, on the basis of eight-hour shifts of sleep per prisoner. It appears from his request for release from custody on 16 June 1999, that at that time he was sharing his bed with two other inmates. Sleeping conditions were further aggravated by the constant lighting in the cell, as well as the general commotion and noise from the large number of inmates. The resulting deprivation of sleep must have constituted a heavy physical and psychological burden on the applicant.

Overcrowding is, therefore, not only about not having enough beds. The numbers translate into a situation that constitutes torturous and degrading treatment on a daily and continuous basis that is aggravated by staff shortages and infrastructure stress. The long-term emotional and psychological effects can only be traumatic.

Overcrowding also has a negative impact on the staff of a prison; this can be observed by means of such indicators as staff turnover, excessive leave, sick-leave and absenteeism. Figures presented to the Public Accounts Committee of DCS employee leave confirm this. Compared to their colleagues in the Defence Force and Police Services, DCS employees took the highest number of sick leave and disability leave days per year for 2003/4.¹⁴

5 GEOGRAPHICAL LOCATION OF PRISONS

The number of functional prisons in South Africa varies from month to month, depending on repairs or general maintenance. As at 30 November 2004, there were 236 active prisons in South Africa and four were closed for repairs.

Table 2 Prisons per region

Region ¹⁵	Active Prisons	Temp Closed	Total
Eastern Cape Region	42	2	44
Gauteng Region	26	0	26
KwaZulu-Natal Region	40	1	41
Limpopo, Mpumalanga & N-West Region	38	1	39
NCape & Free State Region	47	0	47
Western Cape Region	43	0	43
RSA Total	236	4	240

14 Standing Committee on Public Accounts, Draft Resolution on Correctional Services, 16 February 2005. Accessed 1 June 2005 at <http://www.pmg.org.za/docs/2005/050216draftresolution.htm>

15 The Department of Correctional Services is divided into seven regions as opposed to the nine provinces, as indicated in the table.

Table 2 shows that prisons are not distributed evenly across the country and that they are not predominantly situated close to the metropolitan centres or where the highest crime levels are. The highest number of prisons is situated in the Free State-Northern Cape Region. This can be attributed to the prison construction programme of the apartheid government that had a disproportionate number of prisons built in the Free State. The lowest number of prisons is located in the Gauteng Province. A closer analysis of, for example, the exact locality of prisons in the Western Cape clearly shows that these prisons are situated in the agricultural areas of the province where they would have provided cheap labour to the surrounding farms under the apartheid government.¹⁶ The geographical location of prisons is, therefore, not arbitrary or coincidental. More often than not, their location is motivated by broader political-economic concerns that find application in the construction phase and/or the operation of prisons. The result, however, is that prisons are often not located close to where the prisoners originate from. This means that visits from friends and family become difficult, placing relationships under further strain.

Receiving visits from and communicating with one's family whilst detained (sentenced and unsentenced) are constitutional rights. In section 35(2)(f), the Constitution provides for visits from the person's spouse or partner, next-of-kin, chosen religious counsellor, and chosen medical practitioner. Regular contact between prisoners and families is a key ingredient to a successful reintegration process and thus a reduction in re-offending. The question then arises as to the state's responsibility for facilitating and supporting visits to prisoners by next-of-kin, especially if this has a direct impact on successful reintegration and can limit the chances of re-offending.

6 AGE

The South African prison population is organised in three age-based categories: children (under the age of 18 years), juveniles (18 to 21 years) and adults (21 years and older). The separation of children from adults is obligatory in terms of domestic as well as international law. 'Juveniles' is a category created to give effect to the notion that these young men should not be exposed to hardened repeat offenders and long-term prisoners. As a category, 'juveniles' has no legal standing; thus, separation is only on the basis of available space and resources.

Table 3 Age profile of the prison population

Age	< 18 Years	18 – 21 years	21 – 25 years	> 25 years
Number	3 365	22 883	49 062	110 743
Percentage	1,8	12,3	26,4	59,5

¹⁶ Steinberg J *The Number* (2004) Jonathan Ball Publishers, Johannesburg, at 176.

Table 3 presents the age profile of the prison population. Whilst the census categories do not overlap perfectly with the age categories presented here, there is sufficient information for us to state that the age categories younger than 18 years, 18 to 21 years and 21 to 25 years are over-represented when compared to the general population.¹⁷ Whilst the age group 15 to 24 years makes up 11,8% of the total population, it constitutes an estimated 40,5% of the prison population.

Whilst section 29 of the Correctional Services Amendment Act 14 of 1996 prohibits the detention of a child under the age of 14 years on remand in a prison, there is no restriction on sentenced children once they have attained the age of criminal capacity. The following figure presents the age profile of children in prison as on 30 November 2004. Of the total number of children in custody, 3 365, 50,6% or 1 704 were unsentenced. This figure included 8 boys under the age of 14 years being held in contravention of section 29 of the Correctional Services Amendment Act 14 of 1996.

Table 4 Age profile of children in prison as on 30 November 2004

Age	7-13 years	14 years	15 years	16 year	17 years
Number	21	123	394	1 005	1 822
Percentage	0,6	3,6	11,7	29,9	54,1

Since 1993, there has been a concerted effort on the part of NGOs and government departments to reduce the number of imprisoned children awaiting trial. The construction of secure care facilities, the development of diversion programmes, legislative reform and numerous innovative efforts at ground level have not markedly changed the overall situation. By November 2004, there were more than double the number of children awaiting trial in prisons than the 698 in September 1996.¹⁸ Nonetheless, the scale on which children are imprisoned in South Africa, sentenced and unsentenced, is in direct violation of Article 37(b) of the UN Convention on the Rights of the Child, Beijing Rules 17(c) and 17(d) as well as section 28(1)(g) of the South African Constitution.

There are at present not sufficient measures to protect children from imprisonment, and criminal justice officials are nearly unrestrained in this regard. The Committee on the Rights of the Child, when commenting on state party reports, is often at pains to emphasise that deprivation of liberty should only be used as a measure of last resort. This means that other measures must have been exhausted and, if detention is used, it must be for the shortest possible period.¹⁹ There is at this stage the expectation that the Child Justice Bill [B 49 of 2002] will bring about a drastic

17 See Statistics South Africa *Stats in Brief 2004* Pretoria (2004) at 22-23.

18 *Article 40*, vol 1 (May 1999) (1).

19 Hodgken R and Newell P *Implementation Handbook for the Convention on the Rights of the Child* (2002) UNICEF, New York 550-551.

reform in the treatment of children in the criminal justice system, in addition to improving the position regarding the sentencing of children.

7 MORTALITY AND LIFE EXPECTANCY

Since 1996, the number of prisoners dying of natural causes has risen sharply whilst the number of prisoners dying of unnatural causes has remained more or less stable. The DCS Annual Report for 2003/4 reports 45 deaths due to unnatural causes. The Annual Report of the Judicial Inspectorate for the same period reports 56 unnatural deaths. Departmental annual reports from previous years are not consistent in the classification of the figures but there does not appear to be a trend showing a rapid increase in deaths due to unnatural causes. If there is a trend, then it is downward, especially seen against the background of the size of the prison population. Figures on suicides are also not available from the annual reports. A closer investigation into unnatural deaths is warranted in order to track correlations with other variables.

The table below clearly shows the rapid increase in deaths due to natural causes that many observers have explained are related to HIV/AIDS.^{20 21} Overcrowded conditions, poor ventilation and compromised security continue to place the health of prisoners at risk. The link between HIV/AIDS and tuberculosis (TB) is well-documented in international literature. The incidence of TB has been found to be seven to eight times higher in prison than outside prison, based on a study done at Westville Prison in 2002.²² TB in the prison environment also presents a major challenge in that treatment programmes are interrupted as prisoners under treatment are released and are not able to continue their treatment in the community. The emergence of multi-drug resistant tuberculosis (MDRTB) is life-threatening to any individual but even more so to a person with compromised immunity.²³

A second study, also done at Westville Prison (at Medium B Prison), used a sample of 271 prisoners on a voluntary basis to test HIV status. Of the 271, 80, or 39%, were found to be HIV-positive. Another noteworthy finding from the study is that the infection is highest among younger prisoners (under 29 years) who have been in prison for fewer than four years. Once HIV-positive, it appears that life expectancy in prison is unlikely to be more than five years.²⁴

20 Office of the Inspecting Judge of Prisons *Annual Report of the Judicial Inspectorate of Prisons 2003/4* Cape Town, at 17.

21 Goyer K 'HIV/AIDS in prisons – problems, policies and potential' (2004) 1 *Aids Law Project Newsletter*.

22 Pillay M and Sturm AW 'The prevalence and molecular epidemiology of tuberculosis in a South African prison' (2005) Paper delivered at Correctional Services National Policy and Research Conference, 30–31 March 2005, Krugersdorp.

23 'HIV/AIDS in Prison: Treatment, intervention and reform – A submission to the Jali Commission' by the Aids Law Project, 9 March 2004, at 42.

24 Goyer K *et al* 'HIV/AIDS at Westville medium B – an analysis of prevalence and policy' in *HIV/AIDS in Prison: Treatment, intervention and Reform – A Submission to the Jali Commission by the Aids Law Project*, 9 March 2004, at 25.

The combination of identifiable risk factors, as well as those more insidious factors characteristic of prisons, places prisoners in general in a substantially higher risk category than the general population. Overcrowding contributes greatly to reducing the life expectancy of those prisoners living with HIV/AIDS by exacerbating existing risks, and creating new risks by placing people in an unnatural environment under increasing stress.

Table 5 Natural deaths and medical releases

Year	1996	1997	1998	1999	2000	2001	2002	2003
Natural deaths	211	327	534	737	1 087	1 169	1 389	1 683
Medical releases	49	47	47	59	60	51	88	117

Section 79 of the Correctional Services Act 111 of 1998 makes provision for the release of terminally ill prisoners on parole or correctional supervision on medical grounds. Given the prevalence of AIDS in prisons (inferred from the number of natural deaths), the number of medical releases does not reflect this trend, as shown in Table 5.

The AIDS pandemic has presented prisons with a new range of rights challenges. For example, it remains to be seen whether prisoners have the same access to anti-retroviral treatment as those citizens living on the outside.

8 GENDER

The genders are not equally represented in the prison population: whilst there is a 48:52 ratio between males and females in the total population, this ratio is 98:2 in the prison population. On 30 November 2004, there were 4 118 women and 181 935 males in South African prisons. The over-representation of males in the prison population is a worldwide trend. It is interesting to note, however, that the imprisonment of women in South Africa is slightly lower than in developed countries,²⁵ as shown in the table below. In developed countries, the increase in female prisoners has been associated with the drug trade and drug law enforcement policies.

Table 6 Percentage of women in prison population

Country	Women as percentage of prison population
Canada	9,0
Australia	7,0
USA	6,9
England and Wales	6,0
South Africa	2,3

25 Office of the Inspecting Judge of Prisons *Women in South African Prisons* (2004), Cape Town, at 4.

More than half the female prison population in South Africa are there for the commission of only three offences, namely theft, serious assault and murder, as is shown in Table 7.²⁶

Table 7 Offence profile of imprisoned females in South Africa, top six crimes

Offence	Totals	Percentage
Economic crimes other	173	4,2
Robbery common	178	4,3
Fraud and forgery	316	7,6
Assault serious	438	10,5
Theft other	879	21,2
Murder	914	22,0
Total	4 152	100

Compared to their male counterparts, women generally serve shorter sentences and are concentrated in the 0–12 months and 2–5 years categories, as is shown in the graph below.²⁷ There is a range of issues regarding gender and imprisonment that require further investigation.

Two issues have recently attracted attention. The first concerns women who are imprisoned for killing their abusive partners. It is estimated that there are currently 164 women in prison for this crime.²⁸ There is also a growing body of research²⁹ supporting domestic violence as a defence in such cases, and the Supreme Court of Appeal accepted this in *Ferreira and Others v The State*.³⁰

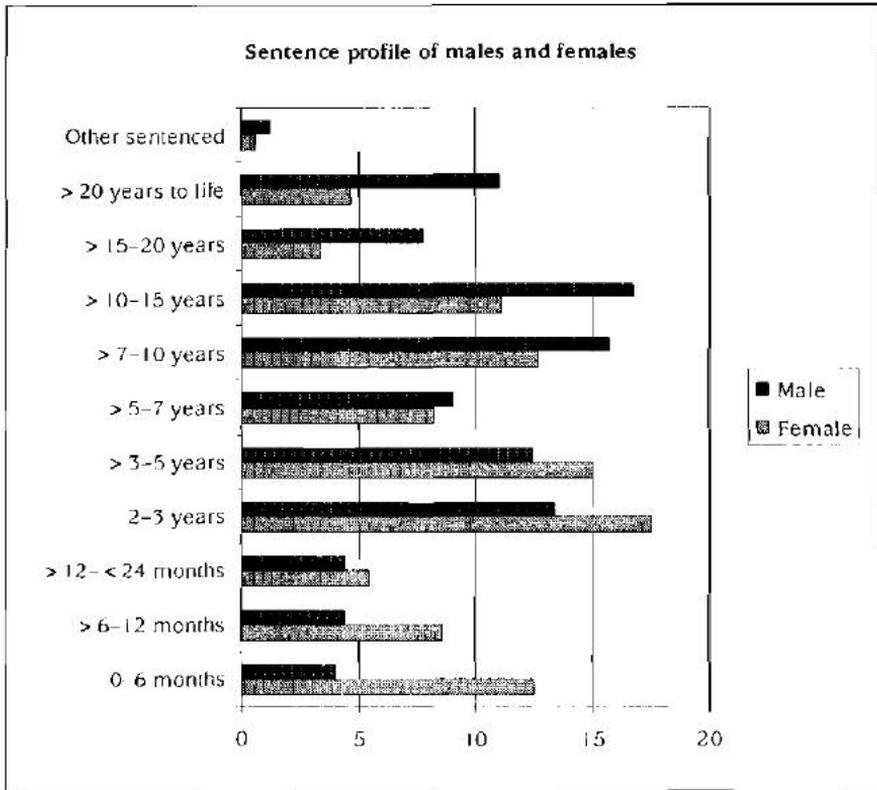
26 *Supra* 9–10.

27 Department of Correctional Services *Annual Report 2003/4* (2004) Pretoria 27.

28 'Women Imprisoned for Domestic Violence' Oral submission to Correctional Services Portfolio Committee by Adv T Majokweni of NPA-SOCA Unit on 20 August 2004. Accessed on 9/6/2005 from <http://www.pmg.org.za/docs/2004/appendices/040820women.htm>

29 See, for example, Iudsin H 'Legal defenses for battered women who kill their abusers: Discussion Document 1' (2003) *Research paper written for the Centre for the Study of Violence and Reconciliation* and Iudsin H 'South African criminal law and battered women who kill: Discussion Document 2' (2003) *Research paper written for the Centre for the Study of Violence and Reconciliation*.

30 *Ferreira and Others v The State* (SCA) (Case 245/03 unreported) and Nicholson C 'When wives kill their husbands' (August 2004) *De Rebus*.



The second aspect of gender is male rape and male consensual sex in prisons. Underlying this is our understanding of gender in a male prison and the uses of gender and its intermingling with violence and coercion. The recent work done by Gear and Ngubeni³¹ provides an insight into this phenomenon that has by and large remained obscured from public and academic scrutiny. Gender, violence, prison gangs, age and power structures form a complicated nexus that results in the widespread victimisation of primarily young male prisoners, and, at this stage, there are very limited resources available to assist them.

9 RACE

The race profile of the South African prison population presents an interesting picture and clearly shows an over-representation of the male coloured population. Given the low number of females in prisons, they are excluded from this profile.

31 Gear S and Ngubeni K 'Daai ding: Sex, sexual violence and coercion in men's prisons' (2002) *Research paper written for the Centre for the Study of Violence and Reconciliation*.

Table 8 Race profile of the male prison population

Race	Prison population as on 30 November 2005	General population 2003	Per 10 000 ratio
Asian	733	556 278	131,8
Black	144 874	17 562 179	824,9
Coloured	32 986	1 979 934	1 666,0
White	3 342	2 051 917	162,9

Table 8 shows that the imprisonment rate for coloured males is more than double the rate for black males and ten times the rate for white males. Whilst coloured males represent only 4,3% of the country's total population, they represent 17,7% of the prison population. Similarly, black males constitute 37,8% of the general population but constitute 77,9% of the prison population. It should also be noted that the imprisonment rate per 100 000 for the Indian population is slightly lower than that for the white population. The over-representation of coloured males in the prison population has been ascribed by some researchers to a combination of factors such as historical factors, relative social status, population density, gangsterism, and substance abuse.³² The link between prison and community has become an engrained one in the poorer communities of the Western and Northern Cape provinces where the coloured population is in the majority. From this perspective, it is apparent that the race profile of the prison population is not a simple reflection of marginalisation and exclusion in the general population, but that there are additional factors not easily explained by simple race and class categorisations.

10 UNSENTENCED PRISONERS

On 31 December 1993, there were 21 540 prisoners awaiting trial in South African prisons.³³ The 1999 DCS Annual Report reflects an awaiting-trial population of 58 231. By November 2004, this figure had dropped slightly to 48 452.³⁴ There are continuing debates as to the exact reasons for the rapid increase in awaiting-trial prisoners from 1993 to 2004.³⁵ The unsentenced prison population makes a significant contribution to the current overcrowding level, but it is important to see exactly where the awaiting-trial population is being held and also to reflect on the detention cycle time.

32 See Thomson JDS 'A murderous legacy – Coloured homicide trends' (March 2004) 7 *SA Crime Quarterly* and Leggett T 'Still marginal – Crime in the coloured community' (March 2004) 7 *SA Crime Quarterly*.

33 Department of Correctional Services *Annual Report, 1993*.

34 Department of Correctional Services, Management Statistics for November 2004.

35 A report submitted to the Correctional Services Portfolio Committee on 15 November 2004 cites a number of reasons for the increase, but excludes the possibility that poor performance and low productivity in the court system is a contributing factor and, rather, apports responsibility to the increased effectiveness of SAPS detection services.

Table 9 Location of the unsentenced prison population

Province	Prison	Capacity	Unsentenced prisoners	Percentage of total
Gauteng	Vereeniging	786	933	1,9
	Odi	891	989	2,0
	Krugersdorp	1 757	1 476	3,0
	Modderbee	2 993	2 115	4,4
	Boksburg	2 012	2 141	4,4
	Pretoria Local	2 171	3 162	6,5
	Johannesburg Med. A	2 630	6 593	13,6
Mpumalanga	Nelspruit	828	959	2,0
WCape	Goodwood	2 115	998	2,1
	Pollsmoor Med. A	1 111	1 211	2,5
	Pollsmoor Max.	1 872	2 515	5,2
Free State	Grootvlei Maximum	918	1 099	2,3
KZ-Natal	Pietermaritzburg	1 330	1 755	3,6
	Durban Med. A	2 308	4 456	9,2
ECape	St Albans Med. A	1 446	2 055	4,2
Totals			32 457	67,0

From Table 9 it can be seen that 67% of the awaiting-trial prison population are being kept in 15 prisons out of a possible 153 prisons where awaiting-trial prisoners were found, as at 30 November 2004. The remaining 138 prisons were detaining 32% of the awaiting-trial prison population. A further observation is that the top 15 awaiting-trial prisons are situated in metropolitan areas.

It is by now also well known that some prisoners can remain unsentenced in prison for months if not years. The DCS keeps records of those unsentenced prisoners who have been in custody for longer than three months. Table 10 sets out the profile of awaiting-trial prisoners (as on 30 November 2004) who had been in custody for a period in excess of three months. A total of 21 330 prisoners (or 44% of the unsentenced population) had been awaiting trial for more than three months. Of this group, 5 674 had been awaiting trial for more than 12 months. This group of prisoners is also not spread evenly across the regions. Gauteng region holds 40% of this category of prisoners, compared to Limpopo, Mpumalanga and North-West Region which collectively hold 8,3% of this group of awaiting-trial prisoners. The Office of the Inspecting Judge reports that unsentenced prisoners will be awaiting trial for an average of three months before their cases are finalised. The Judge reports further that, of the total awaiting-trial population, 60% will be released without being convicted.³⁶

³⁶ Office of the Inspecting Judge of Prisons *Annual report of the Judicial Inspectorate of Prisons* (2004) at 22.

Table 10 Prisoners awaiting trial for more than 3 months as on 30 Nov 2004

Months	3-6	6-9	9-12	12-15	15-18	18-24	24 +
Number	8 387	4 472	2 797	1 878	1 108	1 350	1 338

People are also in prison because they cannot afford bail. Even if these are relatively low amounts, they remain in custody because of poverty, not because they are a threat to society. In his 2003/4 Annual Report, the Inspecting Judge for Prisons estimated this figure to stand at 13 000, thus indicating that more than 25% of the awaiting-trial population were in custody because they could not afford bail.³⁷ From a human rights and democracy perspective, the awaiting-trial situation is not one of 'the occasional case that falls through the cracks' but, rather, a pervasive violation of the right to a speedy trial and the right to safe and humane custody. The wastage of resources in managing the awaiting-trial population is enormous, considering that the cost of imprisonment is estimated to be R114,00 per day and that 60% of the unsentenced population will be released without being convicted after being imprisoned for an average of 90 days.

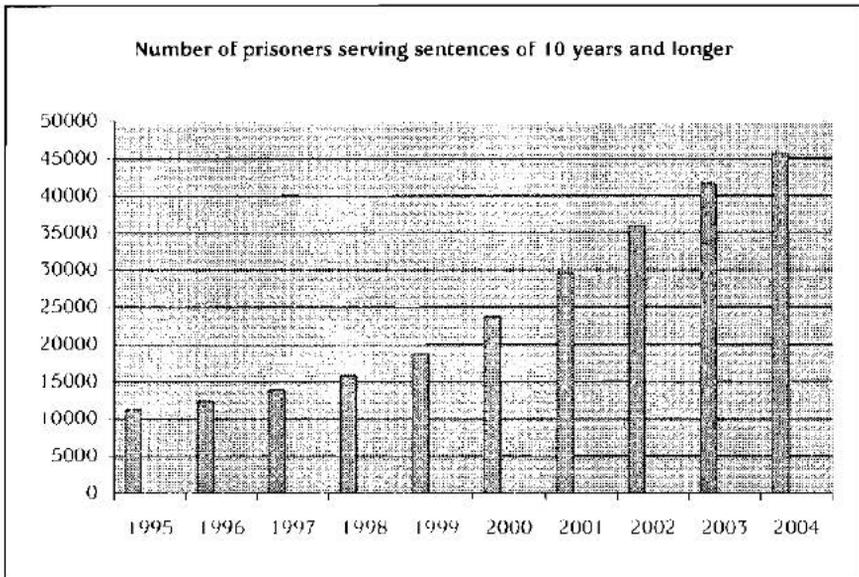
11 SENTENCED PRISONERS

The profile of the sentenced prison population in South Africa has changed substantially over the last 15 years, and the most marked shift has been the phenomenal growth in long-term prisoners. It is especially since 1998 that this has taken place, although this trend was already visible prior to the enactment of the so-called minimum sentences legislation (Act 105 of 1997) and the Magistrates Amendment Act 66 of 1998. Whether it was the minimum-sentences legislation alone or together with the Magistrates Amendment Act, supported by a more punitive attitude from the bench, that resulted in the rapid growth of long-term prisoners is an issue for further research. It is, however, undeniable that the courts are handing down prison sentences that keep people in prison for far longer than was previously the case. There is, at this stage, no evidence to demonstrate that substantially more offenders are being sentenced to imprisonment. The figures suggest rather that the number of convictions has remained stable, and has even declined for a number of years. From 2000 to 2002 there was only a nominal increase in the number of convictions.³⁸ Nonetheless, the relatively few offenders that are convicted do, in fact, bear the full brunt of the law. They have, to some extent, become the scapegoats for a society trying to deal with unacceptably high crime levels.

37 *Supra* 23.

38 Leggett T *et al* 'Criminal justice review' (2003) 88 *ISS Monograph Series* Institute for Security Studies, Pretoria, at 42.

The following graph shows the number of prisoners serving sentences of ten years or more from 1995 to 2004.³⁹



The number of prisoners serving life sentences⁴⁰ has also increased sharply since 1995, from 433 to 5 112 by 2004 – more than a tenfold increase. Life sentences are also not reserved for hardened repeat offenders. From January 2000 to 31 March 2005, a total of 100 offenders who were under the age of 21 years at the time of sentencing were sentenced to life imprisonment.⁴¹ Of this group of 100, eight were children under the age of 18 years at the time when sentence was passed and a further 23 were 18 years old at the time of sentencing. By implication, they would have been under the age of 18 years at the time the offence was committed.

An amendment made to the Correctional Services Act 111 of 1998 in 2001 further requires prisoners who have been sentenced in terms of the minimum-sentences legislation to serve four-fifths of their sentence before they can be considered for parole.⁴² It is abundantly clear that overcrowding is being exacerbated by the increase in sentence lengths. It is also clear that this was not a consequence considered by Parliament when it passed Act 105 of 1997. There is, at this stage, no evidence to indicate that longer sentences are more effective as a deterrent.⁴³ The purpose is then solely incapacitation, with the added benefit of political mileage in the eyes of the public.

39 Figures received from the Office of the Inspecting Judge in personal correspondence, 2005.

40 A life sentence means in effect that 25 years must be served before the prisoner can be considered for parole (s 73(6)(b)(iv) of the Correctional Services Act 111 of 1998).

41 Figures made available by the Office of the Inspecting Judge, 2005.

42 S 73(6)(b)(v) of the Correctional Services Act 111 of 1998.

43 See note 5 above at 7.

12 REHABILITATION SERVICES AVAILABLE TO PRISONERS

The White Paper on Corrections, launched in March 2005, places rehabilitation at the centre of the Department's purpose:

The White Paper presents a new Vision and an updated Mission for the Department in which the centrality of rehabilitation, a fundamental contribution to societal corrections and the commitment to be one of the best in the world, are paramount features. The White Paper also forwards and discusses ten objectives for the Department in pursuance of the objectives of correction and rehabilitation.⁴⁴

The White Paper paints an ambitious picture for South African prisons, especially if the current situation is taken into consideration. At present, it is indeed a small percentage of sentenced prisoners who receive the benefit of quality and focused educational, social work and psychological services. The 2003/4 DCS Annual Report sketches a picture that stands in strong contrast to the aspirations of the White Paper on Corrections. Table 11 lists the number of posts and the number of posts filled for selected employee categories out of the total staff complement of 35 675 posts (of which 32 832 were filled at the time).

Table 11 Rehabilitation staff and posts in the Department of Correctional Services, 31 March 2004⁴⁵

Post description	Number of posts	Number of posts filled	Ratio post: sentenced prisoners
Educationists	490	329	388
Professional nurse	980	513	249
Psychologists and vocational counsellors	113	28	4 565
Social worker and related professionals	634	434	294

The current staff levels, coupled with the vacancy levels, make it impossible for the 127 000 sentenced prisoners to receive services that will adequately prepare them for life outside prison. Civil society organisations are active in many prisons, and organisations such as Khulisa and NICRO secure donor funding to bolster the capacity of the DCS in this regard. Education and general support services are also severely undermined by the manner in which the DCS manages the daily routine of most prisons. The five-day workweek concentrates staff in a full capacity shift from 07:00 to 16:00, which severely shortens the available time for education and recreation, and most prisoners are usually locked up by 15:30, if not earlier, until the next morning at 07:30. Staff shortages further curtail education and support services as security arrangements need to be

44 Department of Correctional Services *White Paper on Corrections in South Africa* (2005) at 13.

45 See note 27 above at 106-107.

made. If security staff is not available, such activities cannot take place. Breaches in security resulting in escapes have a severely negative impact on educational and rehabilitation services as security is stepped up and the general movement of prisoners is restricted. Access to educational services, access by NGOs and access to work on the prison farms are curtailed and prisoners can spend up to 23 hours a day locked up.

It is debatable whether there is a right to rehabilitation, as the process of rehabilitation is itself a highly subjective one. The DCS does, however, have a duty (set out in section 2(c) of the Correctional Services Act) to provide an environment and resources that would facilitate rehabilitation and reintegration. The DCS does not deny this responsibility, as is evident from the White Paper on Corrections. What appears to be the problem at this stage is its ability to translate policy into delivery to ensure that prisoners have access to the services that would equip them to deal with the risks that they will need to manage upon their release if they are to avoid re-offending.

13 THE RIGHT TO VOTE

Given South Africa's history, the right to vote is a sensitive one and it is, therefore, even more surprising that each general election since 1994 has involved litigation on prisoners' right to vote, the most recent case being *Minister of Home Affairs v NICRO* in which the constitutionality of the Electoral Laws Amendment Act 34 of 2003 was tested.⁴⁶ At the core of the matter lies our understanding of citizenship:

Central to the issue of the rights of prisoners to vote is our understanding of citizenship. In modern times, the imprisoned offender does not suffer 'social death' leading to forfeiture of all civil rights. The history of democracy is indeed one of growing inclusion. Sachs J described this notion of citizenship as follows in *August and Another v Electoral Commission and Others*: 'the universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts'.⁴⁷

The Constitutional Court based its decision to declare the relevant sections of the Electoral Laws Amendment Act unconstitutional essentially on three points.⁴⁸ The first was that the Electoral Laws Amendment Act resulted, in effect, in the disenfranchisement of all prisoners serving a term of imprisonment without the option of a fine and this limitation of the right to vote does not conform to the requirements set out in section 36(1) of the Constitution. Second, the state failed to provide the court with sufficient information as to why it sought to disenfranchise the group of prisoners targeted and what purpose the disenfranchisement was intended to serve.

46 *Minister of Home Affairs and Others v NICRO and Others* 2004 (5) BCLR 445 (CC).

47 Muntingh L, 'South African Constitutional Court rules on inmates' right to vote' (December 2004) *Corrections Today* at 76-79.

48 Muntingh L 'Constitutional Court rules on the right of prisoners to vote' (2003) 3 *CS/PI Newsletter*, accessed on 6 June 2005 at http://www.easimail.co.za/BackIssues/CSPI/28September_Issue18.html

Third, the Electoral Laws Amendment Act provided for a blanket exclusion, which had long since failed scrutiny in the first *Sauvé v Canada* case.

The question then arises: what did this mean for the prison population? One of the consequences of the decision was that the Independent Electoral Commission (IEC) had to return to all prisons and register those prisoners who then became eligible to participate in the 2004 elections. The IEC provided the following information as to the results of the second registration drive and further indicated how many prisoners in fact participated in the elections:⁴⁹

Table 12 Voter registration and turn-out

January 2004 registration drive	March 2004 registration drive	Total prisoners registered	Voter turnout
9 930	27 350	37 280	33 133

The Constitutional Court decision thus resulted in an additional 27 350 prisoners' registering for the April 2004 elections. This should be regarded as significant, given the time constraints under which it happened. On the down side, it should also be noted that only 33 133 prisoners of a total prison population of roughly 180 000 participated in the election. The value of *Minister of Home Affairs v NICRO* does not, however, lie in the number of prisoners who participated but rather in the principle confirmed by the Constitutional Court that every citizen counts, including those in prison.

14 COMPLAINTS LODGED BY PRISONERS

Prisoners can lodge complaints through two mechanisms. The first is the 'G365 Register for Complaints and Requests' that is kept at all prisons and in which the complaints of prisoners must be recorded. The second channel is through the Independent Prison Visitors (IPVs) that were established in terms of Chapters 9 and 10 of the Correctional Services Act 111 of 1998.⁵⁰ Section 93 of the Correctional Services Act described the powers, functions and duties of an IPV in dealing with prisoner complaints by conducting regular visits, interviewing prisoners in private, and recording complaints in an official diary, monitoring the manner in which they have been dealt with, and discussing complaints with the head of prison with a view to resolving these.⁵¹

49 Muntingh L 'The quantitative impact of *Minister of Home Affairs v NICRO*' (2004) 10 *CSPRI Newsletter*, accessed on 6 June 2005 from http://www.easimail.co.za/BackIssues/CSPRI/4April_Issue173.html

50 Chapters 9 and 10 of the Correctional Services Act were promulgated on 19 February 1999 to make provision for the establishment of the Judicial Inspectorate of Prisons.

51 For a more detailed description and analysis of the IPV system, please see Gallinetti J 'Report on the evaluation of the Independent Prison Visitors System' (2004) 5 *CSPRI Research Paper*.

Table 13 lists the ten most frequently lodged complaints by prisoners with IPVs during the 2003/4 financial year.⁵² Two trends are immediately visible. First, the number of complaints lodged: more than 240 000. Second, after the category 'Other', 'Requests for transfers to other prisons' is the highest category.

Table 13 Complaints lodged with IPVs by prisoners in 2003/4

Category	Number	Percent
Inhumane treatment	9 439	3,9
Food	9 624	4,0
Appeal	9 683	4,0
Bail/Appeal	9 886	4,1
Communication with families	10 338	4,3
Conditions	11 745	4,9
Parole	12 336	5,1
Health care	19 329	8,0
Transfers	37 106	15,4
Other	85 526	35,5
Total	241 247	100

The IPV system has made a significant impact in improving civil society involvement in and oversight over corrections. The IPV system also collects an enormous amount of information which can be used more effectively to promote the rights of prisoners through monitoring as well as to identify good practice in complaint resolution.

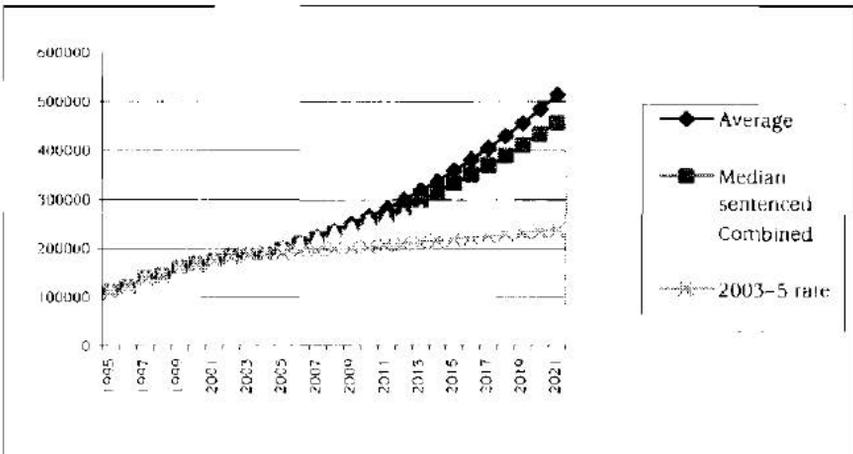
15 FUTURE PRISON POPULATION

Since 1990 there has been an unprecedented increase in the prison population compelling the question as to where this trend will lead. For most of the 1990s it was, in fact, the unsentenced prison population that was the main driver of the increase in the total prison population. However, by 1998 this situation started to change. The awaiting-trial population fluctuates between 45 000 and 55 000 but it is indeed the sentenced population that has shown a persistent increase, especially the longer-sentence categories, as alluded to above. The size of the future prison population will be highly dependent on policy and legislation, which are subject to the political will to reduce the prison population.

⁵² Office of the Inspecting Judge: *Annual report of the judicial Inspectorate of Prisons* (2004) Cape Town at 13.

The following graph presents four possible scenarios for the growth of the prison population from 2005 to 2021, a sixteen-year period. It should be emphasised that these are possible scenarios and there is a range of predictable and unpredictable variables that may influence the results. The scenarios were calculated as follows:

- *Average for 10 years:* This is the average annual growth rate in the total prison population from 1995 to 2004, calculated to be 6,14 %.
- *Median for sentenced population:* This is a median calculated for the annual growth in the sentenced prison population, making the assumption that the sentenced population will for the next 16 years be the main driver of the prison population and not the awaiting-trial population. This is calculated to be 5,4 %.
- *2003–2005 rate:* This is the average growth rate for the period 2003 to 2005 and is calculated to be 1,42 %.
- *Combined rate:* This rate works with two calculations, the first (5,4%) applying to the period 2005 to 2011, and the second (2,5%) from 2012 to 2021. This is based on the assumption that the minimum-sentences legislation will remain in place for the time being but that, by 2012, there would have been either sentencing reform or we would see, for a variety of reasons, a reduction in the number of people being sentenced to imprisonment.



The four scenarios present somewhat divergent results. The best-case scenario forecasts a prison population of 237 231 by 2021 and the worst-case scenario a prison population of 513 887 by 2021. The current capacity of South Africa prisons is 113 825 and, once the four new planned prisons with a total projected additional 12 000 beds are functioning, this capacity will increase to 125 825, leaving a shortfall of 111 407 on the best-case scenario by 2021, assuming that no more prisons are built.

The combined rate is regarded as the more likely scenario to occur, indicating that we need to prepare for a prison population of approximately 336 000 by 2021, unless drastic measures are implemented to achieve a different result. Controlling the size of the prison population

should be a strategic objective and it is, therefore, critical to ensure that current legislation and policies are supportive of this objective.

16 CONCLUSIONS

The preceding article has described in broad terms some trends relating to prisons and imprisonment in South African and also alluded to some important contextual factors.⁵³ In a constitutional democracy, the emphasis must be placed on a human-rights approach to prisons and prison management. The history of South African prisons and more specifically the manner in which prisons and, more broadly, the criminal justice system were managed after 1990 have resulted in a particular set of circumstances that we now experience as challenging from a human-rights perspective. South Africa has a large prison population and also a high rate of imprisonment. These are the first warning signs of possible rights violations. The Correctional Service Act 111 of 1998 created a framework that, for the first time, sets out the minimum requirements for humane detention. The White Paper on Corrections, which was developed some six years after the Act, places the emphasis on rehabilitation and reintegration and finds itself to some extent at odds with the Act.

From the above we can conclude that, in some prisons, overcrowding has taken on such dimensions that detention under these conditions can indeed be described as 'torturous and degrading treatment'. Overcrowding has a pervasive impact not only prisoners but also on prison staff and the safety of both prisoners and warders is at risk in such conditions. The impact of overcrowding has been well documented in international literature and it suffices to say that bringing the South African prison population in line with prison capacity is key to transforming the current security-oriented system to one that is aimed at rehabilitation and reintegration, as proposed in the White Paper on Corrections.

The prison system is also a mirror to the court system. In this regard, three important trends are noted. First, offenders are being sentenced to increasingly longer terms of imprisonment and there has been a sharp increase in the imposition of life sentences, even on children. Secondly, due to the slow processing of cases by the courts, which is exacerbated by the poor application of bail legislation, a large number of alleged offenders spend excessively long periods awaiting trial in prison, only to be released without being convicted. Thirdly, the awaiting-trial population is concentrated in metropolitan areas in a limited number of prisons, indicating that the problem is associated with a limited number of courts.

On a demographic level, the prison population also reflects an overrepresentation of younger males (18–25 years) when compared to the rest of the population. At the same time, there is a significant number of sentenced and unsentenced children in prison, a long-standing problem that, despite many efforts and initiatives, has remained unresolved.

53 Due to the fact that Jali Commission had, at the time of writing, not completed its work, the issue of corruption has not been dealt with in this paper.

Furthermore, coloured males are highly over-represented in the prison population, compared to their Asian, black and white counterparts. There is no single explanation for this and initial indications point toward a complex of factors. Nonetheless, this racial over-representation is worthy of further investigation. On the other hand, women make up a very small percentage (2.3%) of the prison population and their offence profile differs somewhat from that of their male counterparts. They also serve shorter sentences on average.

Oversight over prisons has been greatly enhanced by the establishment of the Judicial Inspectorate for Prisons. The IPV system provides the opportunity for civil society input at operational level. A further positive development has been the litigation since 1994 in respect of prisoners' right to vote. This firmly established the position of prisoners as full citizens.

The future size of the prison population is a matter for speculation but we can make some projections based on current figures. Managing the size of the prison population should be a strategic objective based on the need for imprisonment in an overall response to crime. It should not be something that 'develops organically as we go along'. The cost of imprisonment (both construction and operation) is excessively high and at this stage, there is no clear evidence to indicate that greater use of imprisonment results in less crime. The very selective use of imprisonment as a sentencing option is required and this can only happen within the broader context of sentencing reform.

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