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Majority in Numbers, Minority in Justice: A Critical Reflection on Penal Discrimination in South Africa

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Abstract

While discriminatory policing elsewhere typically targets minority groups, in South Africa the majority population historically classified as Black under apartheid faces forms of social and economic exclusion that are usually associated with minorities in other contexts. This article offers a critical criminological analysis of how deterrence-based criminal justice policies, particularly policing practices and mandatory minimum sentencing, perpetuate the marginalisation of vulnerable populations, entrench structural violence, reinforce systemic inequalities and deny disadvantaged groups equitable access to justice across all stages of the criminal process. The article recommends a shift in South Africa's criminal justice priorities by recognising structural violence as a form of social harm, integrating forensic criminologists and evidence-based risk tools into legal aid to support sentencing that redresses social marginalisation and structural violence, and strengthening Legal Aid South Africa to ensure vulnerable accused have equitable access to representation, thereby reducing penal bias and advancing constitutional commitments to justice.

Keywords: Crime control; criminal justice system; South Africa; critical criminology; penal discrimination.

Introduction

Globally, perceptions of rising crime – whether supported by empirical evidence or amplified by media discourse – have shaped public sentiment, fuelling demand for increasingly severe punitive measures. This has influenced criminal justice responses, often at the expense of transformative and rehabilitative ideals (Lattimore, 2021; Pickett et al., 2014; Rucker & Richeson, 2021; Silver et al., 2024). This phenomenon, known as the "punitive turn," is evident in criminal justice policy, where neoliberal rationality has resulted in harsher punishment and an expansion of carceral capacities (Marković, 2024; Sherry, 2022).

Tough-on-crime strategies have notably manifested through the rhetoric surrounding the "war on crime," "war on drugs" and "zero-tolerance policing," characterising crime as an existential threat requiring aggressive state intervention (Sherry, 2022; Super, 2024). This shift underscores a mounting public concern for safety and an impatience with solutions that demand time or subtlety. Consequently, governments have increasingly embraced policies emphasising deterrence via stringent penalties, intensified surveillance, and heightened enforcement capacities (Newburn, 2017; Tonry, 2007).

Bearing the imprint of its colonial past, which eroded traditional restorative legal structures, contemporary South Africa still largely adheres to punitive justice practices reminiscent of colonial influences (Hager, 2020). This support for punitive redress is echoed in public opinion, with the high crime rate prompting widespread calls for harsh, "tough on crime" policies (Cameron, 2020). In response to rising demands to "take crime seriously," the South African government introduced legislation that embodies punitive ideals, including the Criminal Law Amendment Act 105 of 1997, the Criminal Procedure Amendment Acts

of 1995 and 1997, and the Correctional Services Act 111 of 1998. The Correctional Services Act 111 of 1998 is often cited as a reformist measure aimed at aligning correctional practice with constitutional values. However, the Act's rights-based language coexists with, and in practice has been undermined by, an increasingly punitive sentencing regime and the persistence of inhumane prison conditions (Makou et al., 2017; Prison Insider, 2024).

Collectively, these legislative changes institutionalised mandatory minimum sentencing and harsher penalties for less-severe, non-priority offences as well as imposing stricter regulations for bail and parole. These trends are also evident in increasingly tough policing practices, as demonstrated by a shift from community-orientated sector policing to militant-style policing of social control characterised by militaristic strategies and practices, and the excessive use of force (Bezuidenhout, 2019; Cameron, 2017; Lamb, 2021; McMichael, 2016; Mpofu-Walsh, 2021).

It is argued in this article that a consequence of the tough-on-crime approach in South Africa is that it reinforces systemic societal inequalities and disproportionately marginalises disadvantaged groups. While punitive policies in Western contexts often target marginalised ethnic minorities (Karstedt, 2021; Wacquant, 2012) in South Africa, these policies predominantly impact the racialised poor majority. This reflects a deep intersection with the enduring legacies of apartheid-era socioeconomic stratification, where race and poverty remain intertwined.

Reflecting on the "criminal (in)justice system" in South Africa, Cartwright and Shearing (2009) observe that punitive policies are often shaped more by ideological positions or political expedience, with political actors often being incentivised to implement rapid, visible solutions rather than evidence-informed reforms (Cameron, 2020; Super, 2024). In this regard, Mpofu-Walsh (2021) argues that such policies primarily serve to bolster political visibility, allowing officials to appear proactive while failing to address the fundamental deficiencies of the criminal justice systems or the socio-economic conditions that drive crime. As a result, these policies contribute to further marginalisation of already disadvantaged groups (Cameron, 2020; Mpofu-Walsh, 2021; Super, 2024).

Against this background, this article adopts a critical criminological lens to examine penal discrimination through the framework of conflict theory – an analytical approach that remains under-developed in South African criminological scholarship. Attention then turns to two major policy responses commonly advanced by the criminal justice system: policing practices and mandatory minimum sentencing laws, both of which are argued to be inherently discriminatory in their application. The article concludes by proposing potential avenues for disrupting the ongoing reproduction of penal discrimination.

Discriminatory Penal Policy and its Link with Conflict Criminology

A major assertion of conflict theory is that society is not characterised by consensus, as mainstream theory presumes, but instead by conflict and inequality, with a structured social class system featuring different levels of hierarchy (Black, 2014; Henry & Lanier, 2018; Muncie, 2019). Rooted in critical criminology, conflict theory emerged as a direct challenge to consensus-based models of society, emphasising law's role as a tool of domination (Chambliss, 1975; Henry & Lanier, 2018; Quinney, 1970). While critical theory broadly interrogates the relationship between power and social harm, conflict theory narrows the focus to the ways legal and penal systems reproduce structural hierarchies. From this perspective, structural inequalities and power relations are not incidental, but foundational to the functioning of the legal system.

Applied to South Africa's context, the oppressed group, positioned at the bottom of the social hierarchy, comprises the poor majority, who are perceived as a threat to the state's economic and political interests and are consequently subjected to marginalisation (Coyle, 2022; Karrim, 2020; Lötter, 2018). This is evident in the sanctioning of certain behaviours, particularly those committed by specific groups within society, that "threatens or at least is perceived to be a threat to the establishment and which needs to be kept in check" (Coyle, 2022, p. 169).

This reflects the general idea of critical criminology, which broadly scrutinises how certain actions performed by oppressed groups in society are defined as criminal but are not labelled as such when performed by members of the powerful group (Burke, 2009).

Consistent with this argument, Pillay (2012) observes that, in South Africa, the visible, intentional acts of violence consistently gain public attention and outrage, while the structural violence experienced by marginalised communities, which is not sanctioned as illegal acts, ultimately goes unnoticed as being inherently criminal. As Galtung (1969) aptly defines it, structural violence refers to "violence built into the structure"; it is normalised and often invisible, yet it produces systematic disadvantage on a mass scale (p. 171).

In South Africa, structural violence manifests as a pervasive form of social harm rooted in the unequal distribution of economic and spatial resources. The country consistently ranks among the most unequal globally, recording a Gini coefficient of 0.63 in 2023 (World Bank, 2025). Wealth distribution remains starkly imbalanced, with the richest 10% of the population controlling over 70% of household net wealth, while the bottom 60% hold only 7% (Chatterjee et al., 2022). These structural inequalities translate into measurable daily deficits for many communities. For example, recent data show that 13% of households lack access to piped water, a deprivation that disproportionately affects Black African households (Africa Check, 2024). Similarly, access to electricity remains structurally imbalanced, with 94.6% of formal households connected to the national electricity grid compared with only 58.3% in informal settlements (Stats SA, 2023).

Structural violence in South Africa is characterised by various forms of state neglect, such as exclusion from the mainstream economic sphere; limited and unsustainable employment prospects; deteriorated informal housing; a lack of access to social services; inaccessibility of formal education; and an overarching deficiency of social capital (Keller, 2021; Lötter, 2020; Morisset, 2023; Moyo-Kupeta, 2023; Pillay, 2012). These systemic deficiencies exemplify structural violence because they generate widespread harm. Yet such harms typically fall outside the legal definition of "crime," illustrating the selective manner in which the state determines what constitutes punishable conduct (Chao, 2022). Following this, conflict theorists maintain that the application of legal procedures disproportionately affects the criminal activities of certain segments of the population based on their political, social and economic standing (Bartol & Bartol, 2011; Henry & Lanier, 2018).

Another assumption, which can be seen as an extension of the first, is that the law enforcement machinery employed to enforce the hierarchical social order (represented by the SAPS in South Africa) does so by "[removing] groups and structures which are considered a threat to economic viability" (McMichael, 2016, p. 11). Adding to this is the argument that law enforcement is inherently violent in that it directly serves to subjugate individuals and/or groups threatening or challenging the rule of law (Super, 2024, pp. 107–108; Zulu, 2020). Reflecting on the local perspective, Coyle (2022) states that, "In some respects the manner in which imprisonment has been used over the years in South Africa is a paradigm of the prison as a place for the control or subjugation of the group in society which has been identified as the 'other' " (p. 169)

The prioritisation of law enforcement initiatives aimed at risk management, surveillance and social regulation in economically disadvantaged locales, such as informal settlements, has inevitably overshadowed efforts to address unemployment and mobilisation in these areas, thereby rendering them high-risk environments (Burke, 2021; Wacquant, 2012). The "war on crime", as described earlier, is intensely concentrated on what Burke (2021) describes as "derelict" regions; this exacerbates the inequitable targeting of distinct demographic groups – particularly the "high-risk" populations residing in the townships of South Africa (p. 405). Concurrently, "high-risk" populations are delineated as those segments of the national populace that are predominantly subjected to oppressive social conditions, a phenomenon referred to as the criminogenic impacts of structural violence (Lötter, 2020; Pillay, 2012).

There exists an eerie resemblance between the legal logic employed during the apartheid era, which was distinctly aimed at suppressing specific groups that were deemed to pose a threat to societal stability, and the contemporary mechanisms of penal control that operate under the guise of being legitimate instruments of social order (McMichael, 2016). In certain respects, one can observe a notable transformation of the nature of penal enforcement, transitioning from the overtly racialised policing frameworks that characterised the apartheid regime to modern policies that, while perhaps more subtle in their execution, nonetheless maintain exclusionary implications. Critically reflecting on the historical continuities underlying state control, along with the mechanisms through which these continuities shape contemporary justice policies, is essential if meaningful reform is to be implemented within the justice system.

The Majority as the Minority

It is widely acknowledged that structurally vulnerable minority groups are globally over-represented in the criminal justice process and consequently in prison populations (Coyle, 2022; Super, 2024). In many countries, including the United States, Canada and Australia, this phenomenon disproportionately affects minority groups such as African Americans and Indigenous peoples (McCausland & Baldry, 2023; Wacquant, 2012). This over-representation has been linked to targeted policing in "high-risk" communities and limited legal resources among those who are economically disadvantaged. Conflict criminologists argue that the justice system disproportionately allocates resources to prosecuting the poor (Reiman & Leighton, 2020), thus reinforcing existing social and economic inequalities – much like what Wacquant (2012) describes as the "penalization of poverty."

While discriminatory policing and harsh punitive measures elsewhere typically affect minority groups, in South Africa it is the majority population historically classified as "Black" under apartheid that is subjected to patterns of social and economic

exclusion typically associated with minority groups in other national contexts. To be sure, social and economic disadvantage remains deeply racialised, attributed to the enduring effects of apartheid (Francis & Webster, 2019), as well as the loss of focus and capacity that has occurred in the post-democratisation period due to criminality, corruption, institutional disintegration and the looting of state assets. These factors have drained moral energy and undermined institutional capacity (Cameron, 2020). Therefore, despite their numerical majority, Black South Africans are disproportionately affected by systemic inequality.

The relationship between race and poverty in South Africa is a complex one. Although class-based vulnerability is now the principal axis of exclusion (Lotter, 2018), poverty in South Africa remains highly racialised. Recent data show that Black and Coloured South Africans continue to experience poverty at far higher rates than other groups. The Income and Expenditure Survey released by Stats SA (2025) reports that, "The average household income of white-headed households was almost five times higher than that of black African-headed households and almost three times higher than the average household income of coloured-headed households."

From a conflict theory perspective, this concentration of disadvantage exposes Black and Coloured communities to heightened surveillance, criminalisation and punitive responses. These disparities permeate the criminal justice system, from policing practices to sentencing outcomes and incarceration rates. Echoing this reality, the former Minister of Justice and Correctional Services, Ronald Lamola, stated that the country's prison population is "largely constituted by those from disadvantaged backgrounds, particularly young black males" (Parliamentary Monitoring Group, 2020). Likewise, Mpofu-Walsh (2021) observes that violent crime "is still disproportionately committed by Black men and still disproportionately affects Black people" (pp. 135-136). However, Lötter (2018) rightfully maintains that, "in South Africa, a society that has just emerged from centuries of slavery in which the majority are non-white South Africans, the poor are made up across all racial boundaries, and the discourse of race is (understandably) thoroughly unpopular and politically incorrect" (p. 146). Thus, scholars caution against explaining these disparities purely in terms of ethnicity. Although South Africa has emerged from centuries of racial exclusion, the economic injustices rooted in apartheid continue to disadvantage Black populations (Altbeker, 2008).

Mass incarceration in the United States and South Africa share similarities (Lötter, 2018). For example, the war on crime has seen the enforcement of minimum sentences for non-violent drug offences and petty crimes that disproportionately impact young Black men, even though non-violent drug use is prevalent among all races (Mpofu-Walsh, 2021, p. 140).

However, focusing on ethnicity alone is inadequate in the South African context. Instead, it is a class-based vulnerability that perpetuates marginalisation. From this vantage point, class rather than race appears to be the defining characteristic that exposes people to criminal justice intervention, despite the historical and continuing interplay between race and economic disadvantage. Coyle (2022, p. 169) highlights that, for much of the twentieth century, South Africa's minority white population treated the Black majority as "the other", as reflected in the prison population. Although Black individuals remain the majority of those imprisoned, their common denominator today is not merely ethnicity; rather, it is their position among the economically marginalised groups of society. In a similar vein, Lötter (2018) boldly argues that "our poor doubles as the new "race" for purposes of exploitation" (p. 146).

While penal discrimination in the United States, Canada, and Australia, for example, often targets racially defined minorities, in South Africa the issue arises in a majority Black population where poverty functions as the principal axis of exclusion. This perspective aligns with conflict criminology in asserting that, regardless of whether a group constitutes a numerical minority or majority, it is the economically and socially marginalised – those lacking financial and social capital – who remain most vulnerable to over-policing and harsher penal measures (Reiman & Leighton, 2020). Thus, although a deeply racialised history shapes contemporary inequality in South Africa, the current era of incarceration is characterised by class-based discrimination, wherein disadvantage supplants race as the main driver of punitive disparities (Lötter, 2018). Against this backdrop of class-based penal disparities, it becomes essential to examine how contemporary policy responses have exacerbated rather than alleviated these inequalities.

Misguided Policy Solutions

Despite being framed as strategies to enhance public safety and reduce crime, several policy responses have proven counter-productive. In the sections that follow, the impacts of aggressive policing, mandatory minimum sentencing and the harms of overcrowding are examined to illustrate how these measures often aggravate, rather than alleviate, the very problems they were intended to solve.

Policing

The initial and primary point of contact for any individual who becomes involved in the criminal justice system is invariably the police force. Heavily policed, predominantly Black and Coloured townships are profoundly characterised by high levels of poverty, unemployment and limited access to essential services, creating conditions where coercive force is routinely substituted for meaningful social intervention (Cameron, 2020). In neighbourhoods where poverty and crime are rampant, it is not uncommon to see police officers adopting aggressive tactics toward criminal suspects. This mandate can sometimes lead to the use of force, which can manifest in various forms, from verbal commands to physical restraint, and in extreme cases the deployment of lethal force – a scenario where "violence is met with violence" (Bezuidenhout & Kempen, 2023; Govender & Pillay, 2022, p. 42). This dynamic enforces a cycle of mistrust, fear and resentment between these communities and police officials.

The inherent violence in law enforcement is not only rooted in the physical nature of their work, but also in the structural and systemic factors that shape their practices (Super, 2024, pp. 108–109). For instance, the "war on crime" and "war on drugs" rhetoric of the past few decades has contributed to a culture of aggression and militarisation within law enforcement agencies, leading to increased reliance on heavy-handed tactics targeted in specific geographical areas (Lamb, 2018; McMichael, 2016, pp. 10–11). This resonates with Bezuidenhout and Kempen's (2023) observation that in many cases in democratic South Africa, the police become the aggressors as opposed to the protectors. Building on this, McMichael (2016, p. 6) argues that the situation in South Africa has escalated to a point where, "rather than being neutral managers of the law, the police are depicted as the primary enforcers of state repression." He refers to this critique as the "war on the poor" (2016, p. 6).

The stark reality is that those who are most vulnerable to exploitation, abuse and criminal victimisation are also those who are most likely to be subjected to police brutality. This is partly due to a systemic bias that perpetuates the notion that poverty is coupled with criminality, leading to a cycle of harassment, intimidation and violence (Zulu, 2020).

Empirical evidence underscores the scale of violence perpetrated by police officers under the guise of public safety. Data from the Independent Police Investigative Directorate (IPID, 2024) reveal that between April 2023 and March 2024, 460 deaths resulted from police action. During the same period, 3176 cases of assault, 621 complaints involving the discharge of official firearms, 273 cases of torture and 212 deaths in police custody were recorded. The magnitude of these figures illustrates how deeply violence has become entrenched in policing practices.

Mandatory Minimum Sentencing

Mandatory minimum sentencing laws were introduced in South Africa in 1997 amidst escalating public concern regarding the violent nature of crime, apparent demands for punitive responses to crime, and perceived judicial leniency within the criminal justice system (Cameron, 2020). As a result, mandatory minimums, enacted through the Criminal Law Amendment Act 105 of 1997, prescribed fixed minimum prison terms for various serious offences, including murder, sexual assault, drug violations and firearm-related crimes. This legislative framework represented a significant paradigm shift in South Africa's sentencing approach by constraining judicial discretion in criminal cases in favour of predetermined punishments, in combination with the Magistrates' Court Amendment Act 1998, which expanded the sentencing jurisdiction of the district and regional courts (Giffard & Muntingh, 2007; Muntingh, 2009).

The mandatory minimum sentencing framework was initially implemented as a provisional two-year measure in 1998; however, the policy's temporary status underwent repeated extensions due to political reluctance to appear lenient on crime until it was permanently established in 2007 (Cameron, 2020; Muntingh, 2009).

The implementation of mandatory minimums projected specific outcomes. One explicit aim was to deter potential offenders through the threat of severe punishment, in accordance with deterrence principles. This goal was predicated on the assumption that enhancing sentencing severity would reduce violent crime rates (Goliath, 2022; Muntingh, 2009). In practice, however, this effect has not materialised. There is little to no reliable evidence to substantiate the deterrent effect of mandatory minimum sentences. Research consistently demonstrates that escalating sentence severity and intensifying the punitive conditions of imprisonment do not reduce crime rates (Cameron, 2020; Goliath, 2022; Tonry, 2007), thereby undermining the deterrence rationale on which harsh sentencing policies are premised.

A further objective of mandatory minimums was to promote consistency in criminal sentencing by limiting unwarranted leniency by individual judges. Before the 1997 legislation, sentencing in South Africa had traditionally been within the purview of judges (Terblanche, 2017). The mandatory minimum regime curtailed this discretion by binding judges to predetermined penalties in most cases. While the legislation permitted some discretion to judges in imposing lesser sentences in cases with

substantial and compelling circumstances, this provision offers restricted flexibility and has been inconsistently applied across jurisdictions due to its ambiguity (Muntingh, 2009). Mandatory minimum sentences often produce punishments that violate the principle of proportionality by removing judicial discretion to consider an offender's circumstances or the situational context of the offence. Moreover, the enforcement of these sentences disproportionately affects young Black men, particularly in cases involving petty and non-violent offences (Mpofu-Walsh, 2021).

Mandatory minimum sentencing laws have resulted in a significant backlog of trials, which in turn has led to an alarmingly high prevalence of individuals being held in remand detention without having been convicted of any crime. In the year 2024, an analysis of the total inmate population, which amounted to 156,623 individuals, revealed that a substantial portion of this total, 59,381 individuals, were classified as remand detainees (JICS, 2024). It is particularly distressing that a considerable number, 3752 remand detainees, found themselves incarcerated for a period exceeding two years, raising serious concerns regarding the fairness and efficiency of the judicial process. Equally concerning is the reality that 2344 detainees remain remanded solely because they lack the financial means to pay bail set at an amount that is less than 1000 ZAR (JICS, 2024), which during the first quarter of the year 2024 was approximately equivalent to US$53, underscoring the intersection of economic disparity and the justice system.

Individuals of low socio-economic status frequently encounter barriers when attempting to obtain legal representation, hindering their ability to mitigate severe sentences. Given the limited resources available to law enforcement and prosecutorial agencies in South Africa, decisions about providing legal aid can depend heavily on resource availability (Holness, 2021). Moreover, the legal aid provision does not have clearly defined criteria regarding the types of criminal offences that qualify for assistance, generally leading to inconsistencies and uncertainty about who qualifies for aid (Partha et al., 2024). The criteria applied for granting legal aid in practice may disadvantage individuals who are unfamiliar with procedural specifics and those involved in minor offences because resources are prioritised for severe cases (Mkhize, 2020). Consequently, a disparity emerges within the legal system, where individuals with limited financial resources face challenges in attaining equitable access to justice, ultimately resulting in disproportionate remand and punishments (Mpofu-Walsh, 2021).

Extended and non-suspendable sentences, particularly the increase of life terms for offences carrying mandatory life imprisonment, have increased the inmate population well beyond institutional capacity, raising serious concerns about unconstitutional conditions within them (Cameron, 2020; Goliath, 2022). However, Giffard and Muntingh's (2007) analysis of the prison population in the years following the enactment of mandatory minimum sentencing legislation found that the expansion of the jurisdiction of the magistrates' and regional courts, which allowed district courts to impose up to three years' and regional courts up to 15 years' imprisonment, had a more significant effect on the prison population growth than the impact of mandatory minimums alone.

Harms of Overcrowding

South Africa's prison population exceeds official capacity, with an average overcrowding rate approaching 46% (Parliament, 2025). Overcrowding directly compromises health, safety and human dignity, as prisons are plagued by physical and sexual violence – including gang rape and assault – as well as serious health hazards, unconstitutional living conditions and severely limited access to medical and psychological services (Cameron, 2020; Hlatshaneni, 2019; JICS, 2024; Makou et al., 2017; Prison Insider, 2024).

The overcrowding attributable to mandatory minimum sentences and the overarching reach of magistrates' and regional courts imposes substantial human and economic costs. According to Collins (2009), in a nation that possesses finite resources, imprisoning individuals is overly expensive, does not consistently serve as an effective method of deterrence and does not successfully rehabilitate individuals. On the contrary, it perpetuates and solidifies criminal cultures and lifestyles. As Henson, Nguyen and Olaghere (2023) rightfully note, "If punishment or the threat of punishment deterred crime, recidivism would be obsolete" (p. 20). The fundamental problem with imprisonment as a penal strategy is that it disrupts access to stable employment, secure housing, family relationships and community networks, all factors known to mitigate criminal behaviour. By severing these protective ties, imprisonment often leaves individuals more socially and economically marginalised, thereby increasing their vulnerability to reoffending.

Among the many harms of imprisonment, overcrowding stands out as especially destructive. It naturally contributes to the appalling state of prison conditions, including physical and sexual abuse, gang rape and assault, health hazards, unconstitutional living conditions and limited access to psychological and medical services (Cameron, 2020; Hlatshaneni, 2019; Makou et al., 2017; Prison Insider, 2024). It has been widely documented that South African prisons are perceived as being "crime schools," which are essentially detrimental environments for rehabilitation and the positive societal growth of offenders, who emerge

from prison worse off in terms of criminal behaviour than when they were first admitted (Bekker, 2000; Khwela, 2015). It is perhaps ironic that the responsibility of the DCS, according to the White Paper on Corrections in South Africa (South African Government, 2005), "is first and foremost to correct offending behaviour, in a secure, safe and humane environment, to facilitate the achievement of rehabilitation and avoidance of recidivism" (p. 38). One might ask what conditions are necessary for the development of compassion, self-awareness and other behavioural insights that rehabilitation aims to promote in individuals. Certainly, it is the opposite of the conditions of imprisonment – at least in South African prisons, where overcrowding, violence and entrenched gang cultures foster further criminalisation rather than reform.

Essentially, and to summarise the above accounts, imprisonment as our primary sentencing regime functions by: (1) isolating offenders from society; (2) limiting family and community ties; (3) subjecting them to trauma and violations of human rights; (4) constraining them to a criminal culture; (5) exposing them to pro-criminal attitudes by gang members (Cameron, 2020; De Wet, 2014; Gaum et al., 2006) – none of which serves a rehabilitative agenda. The question remains: Can an offender get "new hope and encouragement," as the DCS claims, in an environment of abuse, disease and violence, which has admittedly lost its mandate of rehabilitation due to these conditions?

To return to the earlier point about Altbeker's (2007) calls for more forcible policing and higher rates of incarceration, Collins (2009) responds with the critique that "Altbeker's solution to the problem of violent crime ultimately boils down to putting more people in jail" (p. 36). Consistent with the argument raised in this article is Collins' (2009) view that "if our problem is that young men are being socialised in cultures that normalise violent crime, then South African prisons are probably the worst possible places to put them" (p. 36). De Wet (2014) offers a similar account: "To reduce recidivism, make prisons less crowded and safer – and put as few people as possible in them."

South Africa's experience with mandatory minimum sentencing illustrates the complex trade-offs inherent in rigid sentencing frameworks: while such policies may satisfy public demands for punitive responses to crime and create an appearance of consistency, they constrain judicial discretion, contribute to prison overcrowding and have little deterrent value for reducing crime rates.

Recommendations

In light of the various challenges that plague an equitable legal framework as well as formal crime control strategies, the following quote from Mashele (2009, pp. xiv–xv) carries particular relevance:

> How to deal with the crime situation in South Africa is a matter of debate. There are those who argue that priority should be given to addressing the social factors that create the conditions within which crime flourishes. Others believe fixing the criminal justice system is the solution... However efficient, a criminal justice system cannot solve the problem of crime if the social conditions that create and sustain high levels of inequality and poverty are not addressed.

In line with addressing structural factors that sustain high crime rates, policies aimed at reducing crime at the structural level should logically address these underlying factors by investing in community development, mobilising communities and improving access to education and employment opportunities. However, in terms of crime policy formation, these types of systemic prevention recommendations and initiates suffer various challenges regarding implementation, largely because structural causes of crime require radical social reformation strategies (Bunge, 2006). To address geographical stratification of crime in high-risk areas, for example, would necessitate changing the structural conditions that make them high-risk areas in the first place. However, as Mpofu-Walsh (2021) reminds us, "South Africa is unique in coupling economic inequality with severe state incapacity – especially in the area of criminal justice" (p. 135).

An alternative pathway for policy reformulation would involve an inquiry into the mechanisms for fixing the criminal justice system itself, as articulated earlier by Mashele (2009).

The arguments developed in this article highlight three priority areas for reform if South Africa's criminal justice system is to become more equitable: recognising structural violence as a justice issue, strengthening the role of expert evidence and improving support for vulnerable accused in criminal trials.

Recognising Structural Violence as a Justice Issue

The legacy of apartheid-era social control strategies continues to manifest in the form of hyper-criminalising street crime and a parallel failure to prosecute elite corruption with similar urgency or severity. At present, the law criminalises the coping strategies of the poor while excusing the neglect that produces those conditions. For example, the revelations contained in the *State of Capture* report by Madonsela (2016) and subsequent analyses of the Zuma-era political economy (Chipkin & Swilling, 2018) expose a pattern of state-sanctioned economic injury that has undermined key democratic institutions, yet resulted in limited criminal accountability. Advocate Thuli Madonsela's (2016) report and the subsequent Zondo Commission (2018–2022) revealed that corruption at the highest levels of government was not only pervasive but also crippling to state capacity. This underscores how state capture functions as a form of structural violence, diverting resources from essential services while the justice system continues to disproportionately target those who are already structurally disadvantaged.

Within this context, the criminal justice system's persistent focus on street-level crime and interpersonal violence reflects an ideologically selective construction of criminality that obscures the harms perpetrated by political and economic elites (Super, 2013). As a result, South Africa's criminal justice policies risk entrenching the very inequalities that drive much of the violence they claim to address. Addressing elite corruption and other forms of structural violence with the same urgency afforded to street crime is essential. Recognising structural violence as a form of social harm deserving of legal sanction would help to rebalance criminal accountability and advance a more equitable justice system.

Advancing Expert Evidence

This article proposes that, to create a more equitable justice system and avoid perpetuating structural violence, forensic criminologists and evidence-based risk assessment tools should be integrated to support fair trials. Currently, the use of criminologists as expert witnesses – whether for pre-sentence reports, offender profiling or risk assessments – remains sporadic and under-utilised in court settings predominantly due to financially inaccessibility, a lack of state resources and limited awareness of the value of criminological input (Boleu, 2025; Diko et al., 2019). As a result, pre-sentence reports and specialist assessments are rarely employed in ordinary cases, despite their potential to highlight mitigating circumstances, rehabilitation prospects and diversion options.

Research highlights the value of utilising criminologists in court procedures due to their ability to explain the multiple dimensions of criminality, offering insights into offenders, victims and the broader societal context and consequences of criminality. Furthermore, criminologists have an in-depth understanding of the legal framework governing criminal proceedings (Boleu, 2025; Hesselink & Booyens, 2017). By contextualising individual cases within broader structural and legal dynamics, which shape both crime and victimisation, criminologists can help to ensure that sentencing and justice outcomes address criminal behaviour without reinforcing the very inequalities and systemic risks that contribute to it.

Advancing the use of expert evidence in South Africa's criminal justice system will require both state investment and the political will to transform entrenched practices that perpetuate structural inequality. Specifically, this article proposes expanding the role of Legal Aid South Africa, the statutory body responsible for providing legal representation to indigent defendants, to include multidisciplinary teams of forensic criminologists, social workers and psychologists. These services should be made available at no cost to defendants who cannot afford private experts, enabling courts to draw on specialised insights into offending, victimisation and the structural conditions that shape crime. Furthermore, awareness must be developed among magistrates, judges and defence attorneys about the value of utilising forensic criminologists and structured risk-assessment tools in advancing fairer and more proportionate justice outcomes.

Within the context of this recommendation, it is acknowledged that risk assessment tools have been criticised for reinforcing structural inequalities, particularly when social disadvantage is treated as a risk factor (Harcourt, 2005; van Eijk, 2020). However, the proposal here emphasises that, when these tools are applied transparently and combined with structured professional judgement approaches, they can serve as safeguards against sentencing practices shaped by "tough on crime" ideologies. Evidence from South Africa already demonstrates this potential of pre-sentence reports incorporating criminological expertise to enable courts to move beyond one-size-fits-all sentencing. For example, Hesselink and Booyens (2017) show how such reports humanise offenders and present context-sensitive sentencing options, while Diko, Olofinbiyi, and Steyn (2019) highlight their role in guiding courts towards more proportionate, non-custodial outcomes.

Supporting Vulnerable Accused in Criminal Trials

It is further recommended that South Africa's legal aid system be both strengthened and expanded. This includes revising and clarifying eligibility criteria to ensure that no vulnerable accused person is excluded from assistance due to narrowly defined guidelines (Partha et al., 2024). At present, resource constraints result in many indigent defendants being turned away, not

because their cases lack merit but because Legal Aid South Africa (LASA) lacks the capacity and resources to assist them (Holness, 2021). Chronic under-funding has left legal aid offices overstretched, with staffing and budgetary levels insufficient to meet the growing demand (Mkhize, 2020).

To address this imbalance, it is recommended that the government substantially increase funding to LASA and related pro bono initiatives, enabling them to cover a wider range of offences and legal matters (Holness, 2021; Mkhize, 2020). These financial reforms should be accompanied by the publication of clear eligibility guidelines and proactive outreach efforts to ensure the public are aware of their right to legal representation, thereby advancing the constitutional commitment to equal access to justice (Mkhize, 2020).

In practice, the state prosecutes with vast resources, while defendants unable to afford legal representation must rely on over-stretched legal aid practitioners who often lack the time and capacity to prepare cases fully (Partha et al., 2024). Greater state investment in defence services would help to redress this imbalance. For vulnerable accused, such as those with limited education or social support, this would create a fairer opportunity to avoid unjust convictions and disproportionate sentences. Without such investment, penal controls will continue to fall most heavily on marginalised populations, while well-resourced offenders navigate the system with relative ease, perpetuating unequal access to justice.

Conclusion

South Africa's post-1994 period has shifted away from transformative justice towards a trajectory of symbolic politics marked by the state's prioritisation of appearing "tough on crime," despite empirical evidence questioning the effectiveness of such approaches. Critical criminology insights reveal that, instead of acting as a fair and neutral force, the state actually maintains discriminatory mechanisms in a country still shaped by deep racial inequalities that continue to marginalise the poor majority. The persistence of police brutality, unequal access to legal representation, disproportionate sentencing and the over-representation of disadvantaged groups in the prison population underscores the continuity of apartheid-era patterns of penal repression, raising uncomfortable questions about the perpetuation of a historical pattern of penal violence and discrimination against society's vulnerable populations.

The reforms proposed in this article are modest, yet significant. They recognise structural violence as a form of social harm, tempering punitive sentencing through independent criminological evidence and investing in meaningful support for vulnerable accused. If implemented with genuine commitment, these measures could begin to shift the criminal justice system away from one that perpetuates exclusion towards one grounded in equity and justice. Instead of waging a "war on crime" that disproportionately targets marginalised groups, the state must invest in addressing the structural and grassroots causes of crime and commit to serving community interests through inclusive, restorative and evidence-based approaches. Bridging the gap between critical criminological insight, public policy and the lived realities of disadvantaged populations is crucial in realising this goal.

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References

Africa Check. (2024). *Election factsheet: Water in South Africa*. https://africacheck.org/fact-checks/factsheets/election-factsheet-water-south-africa

Altbeker, A. (2007). *A country at war with itself: South Africa's crisis of crime*. Jonathan Ball.

Altbeker, A. (2008). *Adding injury to insult*. Centre for the Study of Violence and Reconciliation. https://www.csvr.org.za/docs/study/4.Book_SocioEconomic_20_03_2009.pdf

Bartol, C. R., & Bartol, A. M. (2011). *Criminal behaviour: A psychological approach*. Prentice Hall.

Bekker, P. M. (2000). The maximum length of imprisonment imposed by South African courts after the constitutional abolition of the death penalty: A comparative note on the position in the United States of America. *Comparative and International Law Journal of Southern Africa, 33*(2), 136–157.

Bezuidenhout, C. (2019). Policing in the multi-cultural and multi-ethnic environment of South Africa. In J. F. Albrecht, G. den Heyer, & P. Stanislas (Eds.), *Policing and minority communities: Contemporary issues and global perspectives* (pp. 301–317). Springer. https://doi.org/10.1007/978-3-030-19182-5_18

Bezuidenhout, C., & Kempen, A. (2023). When the protectors become the aggressors: Police brutality in South Africa. In J. F. Albrecht, & G. den Heyer (Eds.), *Police use of force: Global perspectives and policy implications* (pp. 267–287). Springer. https://doi.org/10.1007/978-3-031-22705-9_13

Black, P. (2014). Conflict theories of crime. In J. S. Albanese (Ed.), *The encyclopedia of criminology and criminal justice* (pp. 1–6). Wiley Blackwell. https://www.researchgate.net/publication/282816469_Conflict_Theories_of_Crime

Boleu, K. (2025). The value of criminologists in the South African criminal justice system: Court work. *Acta Criminologica: African Journal of Criminology & Victimology, 38*(1), 63–80.

Bunge, M. (2006). A systemic perspective on crime. In P. H. Wikström, & R. J. Sampson (Eds.), *The explanation of crime: Context, mechanisms and development* (pp. 8–30). Cambridge University Press.

Burke, R. H. (2021). *Contemporary criminological theory: Crime and criminal behaviour in the age of moral uncertainty*. Routledge.

Cameron, E. (2017). *Imprisoning the nation: Minimum sentences in South Africa* [Dean's Distinguished Lecture]. University of the Western Cape.

Cameron, E. (2020). Comment and analysis: The crisis of criminal justice in South Africa. *South African Crime Quarterly, 69*, 1–15. https://doi.org/10.17159/2413-3108/2020/i68a9253

Cartwright, J., & Shearing, C. (2009). Introduction. In Institute for Security Studies (Ed.), *Criminal (in)justice in South Africa: A civil society perspective* (pp. 1–10). Institute for Security Studies.

Chambliss, W. J. (1975). Toward a political economy of crime. *Theory and Society, 2*, 149–170. http://www.jstor.org/stable/656788

Chatterjee, A., Czajka, L., & Gethin, A. (2022). Wealth inequality in South Africa, 1993–2017. *The World Bank Economic Review, 36*(1), 19–36. https://doi.org/10.1093/wber/lhab012

Chao, Y.-H. (2022). Critical criminology: Past, present, and future. *Contemporary Challenges: The Global Crime, Justice and Security Journal, 3*, 28–44. https://doi.org/10.2218/ccj.v3.7032

Chipkin, I., & Swilling, M. (2018). *Shadow state: The politics of state capture*. Wits University Press.

Collins, A. (2009). Taking on Altbeker. A country at war with itself: The debate continues. *SA Crime Quarterly, 28*, 35–38. https://doi.org/10.17159/2413-3108/2009/i28a906

Coyle, A. (2022). *Prisons of the world*. Policy Press.

De Wet, P. (2014, October 16). Jail can make offenders more violent. *Mail & Guardian*. https://mg.co.za/article/2014-10-16-jail-can-make-offenders-more-violent

Diko, B., Olofinbiyi, S. A., & Steyn, J. (2019). A cause to unravel the role of criminologists in compiling pre-sentence reports: A South African perspective. *Cogent Social Sciences, 5*(1). https://doi.org/10.1080/23311886.2019.1704601

Francis, D., & Webster, E. (2019). Poverty and inequality in South Africa: Critical reflections. *Development Southern Africa, 36*(6), 788–802, https://doi.org/10.1080/0376835X.2019.166670 3

Galtung, J. (1969). Violence, peace, and peace research. *Journal of Peace Research, 6*(3), 176–191. https://doi.org/10.1177/002234336900600301

Gaum, G., Hoffman, S., & Venter, J. H. (2006). Factors that influence adult recidivism: An exploratory study in Pollsmoor prison. *South African Journal of Psychology, 36*(2), 407–424.

Giffard, C., & Muntingh, L. (2007). The numbering of days: Sentencing and prison population growth. *SA Crime Quarterly, 20*. https://doi.org/10.17159/2413-3108/2007/v0i20a972

Goliath, A. (2022). A short critique of minimum sentences. *Obiter, 43*(4), 779–796.

Govender, D., & Pillay, K. (2022). Policing in South Africa: A critical evaluation. *Insight on Africa, 14*(1), 40–56. https://doi.org/10.1177/09750878211048169

Hager, L. (2020). The dissolution of universal partnerships in South African law: Lessons to be learnt from Botswana, Zimbabwe and Namibia. *De Jure Law Journal*, 123–139. https://doi.org/10.17159/2225-7160/2020/v53a9

Harcourt, B. E. (2005). *Against prediction: Sentencing, policing, and punishing in an actuarial age*. University of Chicago.
Henry, S., & Lanier, M. M. (2018). Conflict and radical theories. In S. Henry & M. M. Lanier (Eds.), *The essential criminology reader*. Routledge.
Henson, A., Nguyen, T. T., & Olaghere, A. (2023). Revising the critical gaze: An inversion of criminological theories to center race, racism, and resistance. *Critical Criminology, 31*(1), 17–33. https://doi.org/10.1007/s10612-022-09665-6
Hesselink, A., & Booyens, K. (2017). The significance of criminological pre-sentence evaluation reports for rehabilitation directives in custodial settings: Sex offender docket analysis. *Acta Criminologica, 30*(4), 55–71.
Hlatshaneni, S. (2019). Not yet guilty, but still imprisoned for years. *The Citizen*. https://www.citizen.co.za/news/south-africa/crime/not-yet-guilty-but-still-imprisoned-for-years
Holness, D. (2021). Access to justice in South Africa. In A. Paternoster, B. Garth, C. Alves, D. Esteves, & E. Johnson Jr (Eds.), *Access to justice*. Global Access to Justice Project. http://www.globalaccesstojustice.com/
IPID. (2024). *Independent Police Investigative Directorate National Department Vote No. 24: Annual Report 2023/2024 financial year*. https://nationalgovernment.co.za/department_annual/527/2024-independent-police-investigative-directorate-(ipid)-annual-report.pdf
JICS. (2024). *Fourth quarterly performance report*. Judicial Inspectorate for Correctional Services. http://www.jics.gov.za/wp-content/uploads/2024/05/JICS-QR4-2023-24.pdf
Karrim, A. (2020). Analysis | Police brutality: Why it's easier for cops and soldiers to target poor, Black people. *News24*. https://www.news24.com/news24/analysis-police-brutality-why-its-easier-for-cops-and-soldiers-to-target-poor-black-people-20200605
Karstedt, S. (2021). Inequality and punishment: A global paradox? *Journal of Criminology, 54*(1), 5–20. https://doi.org/10.1177/26338076211014590
Keller, M. (2021). Poor service delivery deprives people of dignity and their basic human rights. Amnesty International South Africa. https://amnesty.org.za/poor-service-delivery-deprives-people-of-dignity-and-their-basic-human-rights
Khwela, M. N. (2015). Effects of incarceration on recidivism in South Africa. *Journal of Public Administration, 50*(2), 407–413.
Lamb, G. (2018). Police militarisation and the "war on crime" in South Africa. *Journal of Southern African Studies, 44*(5), 933–949. https://doi.org/10.1080/03057070.2018.1503831
Lamb, G. (2021). Safeguarding the republic? The South African Police Service, legitimacy and the tribulations of policing a violent democracy. *Journal of Asian and African Studies, 56*(1), 92–108. https://doi.org/10.1177/0021909620946853
Lattimore, P. K. (2021). Reflections on criminal justice reform: Challenges and opportunities. *American Journal of Criminal Justice, 47*(1), 1071–1098. 10.1007/s12103-022-09713-5
Lötter, C. (2018). *The integration of ex-offenders in South Africa based on the contemporary Chinese model: An interdisciplinary study*. PhD thesis, University of the Free State.
Lötter, C. (2020). Critical theory and praxis in post-apartheid South Africa: The case for a critical criminology. *Acta Academica, 52*(2), 106–130. https://doi.org/10.18820/24150479/aa52i2/6
Madonsela, T. N. (2016). *State of capture*. Public Protector South Africa. https://www.saflii.org/images/329756472-State-of-Capture.pdf
Makou, G., Skosana, I., & Hopkins, R. (2017). *Factsheet: The state of South Africa's prisons*. https://africacheck.org/factsheets/factsheet-the-state-of-south-africas-prisons
Marković, A. (2024, December 2-3). *Neoliberalism and the penal turn: Reproduction of capitalism through the prison system [Keynote presentation]*. In Proceedings of the International Scientific Conference "Life in Prison: Criminological, Penological, Psychological, Sociological, Legal, Security, and Medical Issues, Belgrade, Serbia (pp. 93–100). https://doi.org/10.47152/PrisonLIFE2024.22
Mashele, P. (2009). Preface. In *Criminal (In)justice in South Africa: A civil society perspective*. Institute for Security Studies.
McCausland, R., & Baldry, E. (2023). Who does Australia lock up? The social determinants of justice. *International Journal for Crime, Justice and Social Democracy, 12*(3), 37–53. https://doi.org/10.5204/ijcjsd.2504
McMichael, C. (2016). Police wars and state repression in South Africa. *Journal of Asian and African Studies, 51*(1), 3–16. https://doi.org/10.1177/0021909614541086
Mkhize, S. (2020). Legal aid bodies and access to justice in South Africa. *ESR Review, 21*(4), 16–21.
Morisset, J. (2023). How can the state better deliver services in South Africa? *World Bank Blogs*. https://blogs.worldbank.org/africacan/how-can-state-better-deliver-services-south-africa-afe-1223
Moyo-Kupeta, A. (2023, March 22). We are near yet still so far: A human rights approach to addressing inequality in SA. *Human Rights Day 2023 by SundayTimesZA*.
Mpofu-Walsh, S. (2021). *The new apartheid*. Tafelberg.
Muncie, J. (2019). Conflict theory. In E. McLaughlin & J. Muncie (Eds.), *The Sage dictionary of criminology* (4th ed.). Sage.
Muntingh, L. (2009). Sentencing. In *Criminal (In)justice in South Africa: A civil society perspective*. Institute for Security Studies.
Newburn, T. (2017). *Criminology* (3rd ed.). Routledge.

Parliament. (2025). *Media statement: Committee on correctional services calls for acceleration of trial cases at courts as part of resolving overcrowding*. https://www.parliament.gov.za/press-releases/media-statement-committee-correctional-services-calls-acceleration-trial-cases-courts-part-resolving-overcrowding

Parliamentary Monitoring Group. (2020). Lockdown case backlogs; overcrowding & release of inmates: Minister's briefing. https://pmg.org.za/committee-meeting/30529

Partha, P. G. N. A., Puspita, P. L., & Setyawan, F. (2024). Dynamics of legal aid provision in the Indonesian criminal justice system: A comparative study of the Netherlands, Australia, and South Africa. *Journal of Law, Politic and Humanities, 4*(3), 373–382. https://doi.org/10.38035/jlph.v4i3.372

Pickett, J. T., Tope, D., & Bellandi, R. (2014). "Taking back our country": Tea Party membership and support for punitive crime control policies. *Sociological Inquiry, 84*, 167–190. https://doi.org/10.1111/soin.12033

Pillay, S. (2012). *Violence and community in the everyday of post-apartheid*. https://www.uj.ac.za/wp-content/uploads/2021/10/pillay-2012-crime-violence.pdf

Prison Insider. (2024). *South Africa*. https://www.prison-insider.com/en/countryprofile/afrique-du-sud-2024?s=conditions-materielles#conditions-materielles

Quinney, R. (1970). *The social reality of crime*. Little, Brown, & Company.

Reiman, J., & Leighton, P. (2020). *The rich get richer and the poor get prison: Thinking critically about class and criminal justice* (12th ed.). Routledge.

Rucker, J. M., & Richeson, J. A. (2021). Toward an understanding of structural racism: Implications for criminal justice. *Science, 374*(6565), 286–290. https://doi.org/10.1126/science.abj7779

Sherry, M. S. (2022). *The punitive turn in American life: How the United States learned to fight crime like a war*. University of North Carolina Press.

Silver, J. R., Shi, L., & Hickert, A. (2024). Stigmatizing "evildoers": How beliefs about evil and public stigma explain criminal justice policy preferences. *Psychology, Crime & Law*, 1–24. https://doi.org/10.1080/1068316X.2024.2364286

South African Government. (2005). *White paper on corrections in South Africa*. https://www.gov.za/sites/default/files/gcis_document/202001/whitepaperoncorrectionsinsouth-africa.pdf

Stats SA. (2023). *The state of South African households in 2023*. https://www.statssa.gov.za/?p=17283

Stats SA. (2025). *Income & expenditure survey (IES) 2022/2023*. https://www.statssa.gov.za/?p=17995

Super, G. (2013). Governing through crime in South Africa: The politics of race and class in neoliberalizing regimes. In *Advances in criminology*. Routledge. https://research.ebsco.com/linkprocessor/plink?id=6440ec60-c5d3-3366-a187-de2ffc67ea40

Super, G. (2024). Porous penality and the myth of liberal punishment: Lessons from South Africa. *The British Journal of Criminology, 64*(1), 107–123. https://doi.org/10.1093/bjc/azad017

Terblanche, S. S. (2017). Twenty years of Constitutional Court judgments: What lessons are there about sentencing? *PER/PELJ, 20*. https://doi.org/10.17159/1727-3781/2017/v20i0a1499

Tonry, M. (2007). Crime does not cause punishment: The impact of sentencing policy on levels of crime. *SA Crime Quarterly, 20*, 13–20. https://doi.org/10.17159/2413-3108/2007/i20a976

van Eijk, G. (2020). Inclusion and exclusion through risk-based justice: Analysing combinations of risk assessment from pretrial detention to release. *British Journal of Criminology, 60*(4), 1080–1097. https://doi.org/10.1093/bjc/azaa012

Wacquant, L. (2012). The punitive regulation of poverty in the neoliberal age. *Criminal Justice Matters, 89*(1), 38–40. https://doi.org/10.1080/09627251.2012.721980

World Bank. (2025). *Gini index*. https://data.worldbank.org/indicator/SI.P

Zulu, A. (2020). Don't wage war against SA's poor. Mail & Guardian. https://mg.co.za/article/2020-04-08-dont-wage-war-against-sas-poor