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>> Version of Record - Nov 10, 2011

What is This?

Punishment and the body in the 'old' and 'new' South Africa: A story of punitivist humanism

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Abstract
This paper analyses official discourse about punishment in South Africa, from 1976 to 2004. It frames punishment as a form of governance which is both connected to, and separate from, the Anglo/American/European examples that are generally referred to in the literature. The shift from corporal and capital punishment to the use of long-term imprisonment is discussed within a framework that emphasizes how both the apartheid and post-apartheid state explained and attempted to justify punishment policies during times of great upheaval and change. Penality under apartheid was a complex entity, and the punishment regime under the Nationalist Party government was starting to reform during the period analyzed. This liberalization was accompanied by a lengthening of terms of imprisonment, a trend that has continued in the 'new' South Africa. The prison in post-apartheid South Africa speaks to both humanism and punitivism. This duality has contributed to its enduring nature and endless capacity to reform.

Keywords
penal policy, prison, punishment and society, punitiveness, restorative justice

> *As soon as power gave itself the function of administering life, its reason for being and the logic of its exercise and not the awakening of humanitarian feelings made it more and more difficult to apply the death penalty. How could power exercise its prerogatives by putting people to death when its main role was to ensure, sustain and multiply life, to put this life in order? (Foucault, 1980: 74)*

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Introduction

In 1992 the African National Congress (ANC) referred to 'crimes of the poor such as street crime' and linked these to 'the structural violence of the apartheid era'. It stated that 'our crime problems are *NOT* being solved by large-scale imprisonment' (ANC, 1992: 7, emphasis in original) and that 'however much one condemns those deeds' the State response should show compassion for the perpetrator (ANC, 1992: 7). Yet, despite its support of people's justice, its pro-poor stance, explicit pronouncements on the degrading nature of imprisonment (Sachs, 1986: 14) and the latter's inability to solve South Africa's crime problems (ANC, 1992: 14) once it became the ruling party the ANC did not adopt a programme of progressive penal reform. Instead, and notwithstanding the prison's strong associations with the punitive apartheid regime, long-term imprisonment has actually increased under an ANC government. Thus, between 1996 and 2003 the incarceration rate in South Africa rose from 280 to 402 per 100,000. Between 2001 and 2003, the number of people serving sentences of 10 years or more grew by almost 35 per cent (Gordon, 2006: 259). By 2000, sentences of seven to 10 years, 10 to 15 years, 15 to 20 years and 20 years to life had increased by 50 per cent, 67 per cent, 70 per cent and 124 per cent respectively. The longest sentences were, in other words, increasing the most (South African Law Commission, 2000).

This article argues against the mainstream view (Department of Safety and Security, 1996; *Hansard*, 1995; Schonteich and Louw, 2001) that the transition to the 'new' South Africa caused the crime rate to increase and that this explains the stubborn persistence of the prison. It is debatable whether crime rates actually expanded in post-apartheid South Africa, since the apartheid regime never kept adequate crime statistics and there was a substantial dark figure of crime (Shaw, 1997). What is clear, however, is that the transition to democracy was accompanied by a change in the demographics of victimization and criminalization (Super, 2010: 175). Concomitantly, with the demise of apartheid and the transition to democracy, crime and punishment policies assumed new ideological significance.

Based on an empirical analysis of the debates around criminal laws, crime and punishment policies in South Africa between 1976 and 2004, this article tracks the shift in state responses from physical violations of an offender's body (via hangings and whippings) to the use of long-term imprisonment. Official criminology—what the State says about crime—is the lens for ascertaining how the South African state has constructed 'new' accounts of its power to punish and what role these accounts play in the role of 'nation building' (Sumner, 1982: 11). The time frame includes three distinct eras: the late-apartheid years of 1976–1989; the period of multi-party negotiations for a democratic handover of power from 1990–1994; and finally, April 1994 when the ANC was first voted into power to 2004.

This South African case study adds to the theoretical literature that interprets punishment as a mode of 'social governance' and as a 'cultural discourse' that plays a crucial role in 'constructing or symbolizing, as opposed to instrumentally maintaining, social order' (Lacey and Zedner, 1995: 312). Whereas current understandings of the role and effect of punishment are primarily based on western democracies this article discusses a form of governance that is both connected to, and separate from, the Anglo/American/European examples that are generally referred to in the literature. Because the ideology

and practice of punishment is messy, contingent and rooted in 'cultural reason' (Smith, 2008: 16) western theories are not always applicable to post-colonial/post-transitional contexts. Thus, as I show in this article, although long-term imprisonment in the 'new' South Africa symbolizes the State's intention to act 'tough on crime' it is *also* justified by the Xhosa notion of *ubuntu* (and its links to restorative justice). The ideas and practices of punishment are not only culturally and historically specific but are simultaneously embedded in the class and power structures of particular societies (and their institutions). As Garland (2001: 26) has observed:

> crime control strategies and criminological ideas are not adopted because they are known to solve problems but rather because they characterise problems and identify solutions in ways that fit with the dominant culture and the power structure on which it rests.

The article argues that state discourse on crime and punishment is a technique of political and ideological hegemony in both a symbolic and instrumental sense. Such discourse reaches well beyond its actual effect on crime rates or its ability to prevent crime (Foucault, 1995 [1977]; Garland, 1990; Melossi and Pavarini, 1981). I emphasize the deep connections between the constitution of the political sphere and punishment (Bright, 1996) through exploring how the latter changed, in practice and rhetoric, over a period of significant social upheaval.

Although we might have expected the Nationalist Party (NP) government—which formally institutionalized apartheid and wielded power from 1948–1994—to be totally repressive, it was also reformist, albeit in a complex and contradictory fashion. The ANC too behaved contrary to expectations, given its previous pronouncements on imprisonment. Although the ANC *qua* liberation organization could distance itself from the punishment policies of the Nationalist Party, once in power it relied on similar technologies of control. As I will argue, such continuities between the way that punishment was (and is) deployed by both the Nationalist Party and the ANC make sense because both ruled (rule) over highly unequal societies where political hegemony and social control had, at times, and to varying degrees, to be coercively imposed. My examples suggest, in other words, that even when political parties explicitly aim for quite different goals, punishment is an easy and, therefore, possibly inevitable, way for them to govern social disorder.

Unlike the death penalty, which was an unadulterated expression of sovereign power and hence easily abolished, the symbolic message of the prison in the 'new' South Africa is double-sided: it speaks to both humanism and punitivism. This duality contributes to the prisons' enduring nature despite that fact that it always seems to fail to rehabilitate people. Such contradictions lead us, therefore to ask, like Foucault, whether the ascendancy of the prison in the 'new' South Africa is part of a subtle (or not so subtle) repressive social control apparatus of the modernizing South African state.

1976–1989: reform of Verwoerdian apartheid

After the 1976 Soweto youth uprising, both internal and external resistance to the South African state gained momentum. Afrikaner capital began to question the utility of apartheid and the original theories underpinning racial segregation, based on 'scientific

racism' started to lose their hegemony (Dubow, 1995; Van Zyl Smit, 1989). The political rationality underpinning the apartheid state shifted from a concept of racial supremacy to one of pluralism and a political ideology of separate development replaced that of segregation. While the majority of blacks were still treated by the Government as 'temporary sojourners' in urban areas, they were now divided into 'qualified' urban dwellers and 'disqualified' others who were 'banished' to the homelands. At this time, the 'civilising rhetoric' and 'uplifting mission' that had characterized pre-1948 colonial discourse in regard to the 'native' was replaced by a conception of society composed of distinct cultural (and later national) units (Ashworth, 1990: 153).

Such rhetorical moves fed into the Nationalist Party project of separate development, sending blacks to the 'independent' homelands, and creating separate governance structures for the different races within South Africa. The Nationalist Party's new ideological focus on the 'pursuit of economic growth' stressed so-called 'technical rational scientificity' rather than racial supremacy bringing with it a shift to 'control through welfare' via the ideology of 'separate development' (Charney, 1983: 149). This limited form of inclusiveness did not entail the conferral of full citizenship (Ashworth, 1990; Charney, 1983; Marais, 2001).

Since state discourse about punishment and punishment practices was both constituted by and constitutive of the political rationality of apartheid, it too underwent changes and mutations. The Report of the Commission of Inquiry into the Penal System of the Republic of South Africa, which released its findings in 1976, strongly criticized mandatory minimum sentences, called for pre-sentence reports, assistance by psychologists, social welfare workers and other experts prior to sentencing. It also recommended community-based alternatives to prison and diversion, rather than imprisonment, for pass law infringements (those laws which controlled the movement of blacks in white areas). The Commission further recommended that corporal punishment should be curtailed to a maximum number of five strokes administered on no more than two occasions only for violent offences or in defiance of 'lawful' authority. It supported the retention of whipping, however, on the grounds that 'African witnesses' had been unanimous in their support for it (Midgley, 1982: 401).

Due to the purported 'great faith' that many black South Africans had in corporal punishment (Minister of Justice, quoted in Midgley, 1982: 402) the Government did not implement all of the Commission's recommendations in respect of corporal punishment. It did, however, in the 1977 Criminal Procedure Act, reduce the maximum age at which a whipping could be imposed (from 50 to 30 years); reduce the maximum number of strokes (from 10 to seven); and provide that adults could only be whipped on two occasions, although this did not apply to 'juveniles'. There was thus a decline in the use of whipping as a mode of punishment for adult offenders (D'Olieveira and D'Olieveira, 1983). In an attempt to 'humanize' this punishment the Act stated that juveniles had to be whipped over their clothing, as opposed to their bare buttocks.

The official rhetoric at this time asserted that South Africa was a 'heterogenous' society consisting of different races at various stages of development. There was a 'very large unsophisticated population with different standards to those that we, who embrace western civilization have in SA' (*Hansard*, 1977a: cols 3260–3261). 'Whipping' was 'something that Africans … understand' (*Hansard*, 1977a: col. 3275). Hanging was also

appropriate given the 'unsophisticated' nature of the majority of the population (*Hansard*, 1977a: col. 4392).

Such views justified racial differentiation in sentencing. Thus, in 1977, the court held in *S v Scheepers* that the magistrate had erred in taking sentences imposed on blacks as guidelines for white defendants. The body was a major site of punishment in respect of the young black juvenile offender and probation services were virtually non-existent (Brown, 1985; Harcourt-Baldwin, 1981). Instead, corporal punishment was the primary form of diversion from prison sentences. By the early 1990s, the State was carrying out more than 32,000 whippings on young people per year (Skelton, 2005).

The Nationalist Party supported the imposition of corporal punishment by informal courts set up by 'tribal' or 'homeland' representatives in the townships. Known as *makgotla* these courts settled disputes based on purported 'indigenous law'. Presented as voluntary and progressive, part of the 'Black man's' heritage, *makgotla* passed on some limited self-government powers to black communities while also encouraging the punishment and control of 'young hooligans and criminals' both of whom posed challenges to the Apartheid regime. As one Nationalist Party MP stated:

> It really is necessary for young hooligans like those in our Black residential areas to be dealt with in a traditional way … parents prefer to take the children to the makgotla, instead of to the police, because … the punishment is much more effective. The makgotla gives the uncontrollable boy or tsotsi a thorough thrashing—as they put it: 25 strokes without counting. (*Hansard*, 1977b: col. 11251)

The mid-1980s saw an increase in imprisonment rates and a lengthening of prison sentences. During this period petty apartheid was being dismantled[1] and the role that race played in criminalization and victimization patterns started to change. Poor black men were not kept away from the white population to the same extent as they had been under Verwoerdian apartheid. The police were focusing on combating political resistance in the black townships, making it difficult to maintain their ubiquitous presence in white neighbourhoods. The criminalization of political activists, increased together with the intensification of political protest from the mid-1980s onwards (Super, 2010: 171). These developments had an effect on the demographics of the prison population. Whereas in June 1980 57,509 prisoners were serving sentences of two years and more, by the end of 1985 this figure had increased to 67,545. More than half (58%) were serving sentences of more than two years, while over one-third (35.6%) were sentenced to between two and five years. Over a five-year period, in other words, such figures correlated to an increase of 10,000 long-term prisoners (Department of Justice, 1986). In contrast, of the much larger group of 90,000 people sentenced to terms of imprisonment of one to four months in 1979, many avoided prison terms: where there were employers who were looking for short-term workers these prisoners were immediately placed on parole. It was, according to the Minister of Prisons only 'recidivists' who served their full sentences (*Hansard*, 1979).

The State acknowledged the problem of overcrowded prisons and in 1983 introduced community-based sentences, coupled with a widening of the offences for which corporal punishment could be imposed. The crimes of arson, public violence, sedition and malicious damage to property were added to the list of corporally punishable offences.[2] This

was in response to a dramatic increase in the number of 'public violence' offences at a time when political resistance was at its peak and the country was subject to a State of Emergency, a situation akin to martial law (Super, 2010).

Reflecting the general control over disorder, in 1987 the Department of Prisons created a new category of death row prisoner: those sentenced to death for 'political unrest'.[3] That same year the death sentence was at an all time high, with 164 executions, as opposed to the 115 that occurred in 1984. In large part these numbers were driven by those sentenced to death for political unrest, the first of whom went to the gallows in September 1987. Their numbers peaked at 117 in 1988 before dropping precipitously to 53 in 1989.

Indeed, and notwithstanding ongoing concerns over public order, the State rapidly, and perhaps surprisingly, abandoned the death penalty over a short time. Many questions were raised in the 1988 parliamentary debates about the manner in which hangings were carried out (*Hansard*, 1988) while, over the same period, the number of reprieves grew year on year from 18 in 1987 to 49 in 1988 and to 63 in 1989. In 1987, the State President reprieved nearly half (42%) of those convicted to death (*Hansard*, 1990: col. 11612), and by 1989, the sum of reprieves had exceeded the total of executions (Devenish, 1992: 13). The last execution took place on 14 November 1989, just before the start of official negotiations between the ANC and the Nationalist Party. This transition period is discussed in the next section.

1990–1994: transitioning into the 'new' South Africa

The release of Nelson Mandela, and the unbanning of the ANC and the South African Communist Party (SACP) in February 1990, led to discussions between the Nationalist Party government and the ANC, the signing of the Groote Schuur and Pretoria Minutes in May and August and negotiations through the Convention for a Democratic South Africa forum for a democratic political regime. The death penalty was one of the first technologies of punishment to be affected by these negotiations.

On 20 February 1990 the State President announced that mandatory capital punishment was to be removed from the statute book and a range of offences, including housebreaking with aggravating circumstances, were taken off the list for which the death penalty could be imposed. Death row prisoners were now also afforded an automatic right of appeal (Davis and Le Roux, 2009: 128). This scaling down, an attempt to humanize and civilize government, through killing fewer people, was presented by the Nationalist Party (NP) as part of an evolutionary 'civilising process' (*Hansard*, 1990: col. 11185), and significantly reduced the number of people sentenced to death row; 105 people were sentenced to death between July 1990 and March 1992 as opposed to 406 in the corresponding period in the previous two years. The 'constitutional state objective' (Department of Justice, 1992: 25) was later extended to include a moratorium on executions. The South African Law Commission proposal, that the death penalty be 'depoliticised' and dealt with by the future constitutional court, resulted in a suspension of capital punishment on 27 March 1991 (Department of Justice, 1992: 10).

As the Government and the ANC started formally to negotiate on the transition to democracy, there was considerable uncertainty as to what was going to happen in the

future South Africa. Longstanding fears of blacks and communists, 'die swaart en rooi gevaar' (the black and red danger), were replaced by anxieties over the dangerous criminal; stories about political violence dominated the media. Such fears were not entirely rhetorical: police annual reports during this transition period reflected a shift in the patterns of victimization—there was a dramatic increase in the number of attacks on 'civilians in their own homes' (i.e. white victims of crime) and attacks on police (Department of Law and Order, 1992, cited in Super, 2010: 171).

In 1992 the Minister of Justice made a speech on bail in which he referred to 'new and fresh ideas on the abuse of bail and the fact that it is granted too readily … coming from all over' (*Hansard*, 1992: col. 5719). Even the liberal opposition Democratic Party complained about the ease with which bail was granted and one MP suggested looking at the USA where high bail was set for serious offences (*Hansard*, 1992: col. 5682). Other examples of a more punitive approach included the 1992 Criminal Procedure Second Amendment Bill that introduced strict measures to deal with 'unrest-related' and other forms of violent crime. The 1992 Drugs and Drug Trafficking Bill introduced a 25-year maximum sentence for dealing in drugs as well as search and seizure provisions and evidential presumptions. This followed the 1990 Abuse of Dependence Producing Substances Bill that provided for heavier penalties—'the principle objective … to indicate the legislature's earnestness to combat the drug menace, and heed the public's call for firmer action against drug offenders' (*Hansard*, 1990: col. 10736). All told, the move to liberalization was coupled with harsher pro-minimum sentencing, drug and bail reforms that together resulted in a greater use of imprisonment. Such bifurcation has deepened in the post-apartheid era, with these two seemingly contradictory trends occurring together.

As a government in waiting, the ANC embraced the discourses of freedom and non-racialism as the counterpoint to authoritarian repression. It wanted to prove that it was the very antithesis of the Nationalist Party, stating that:

> Our norms, our personnel, our procedures, our style of work, our relationships are not only not a copy of those in society from which we have come—they are the exact opposite. While racist justice is prejudiced, dishonest, cruel, elitist, pompous, ultra-technical and dedicated to serving the interests of the minority, our justice must be fair, humane, honest comradely, democratic, accessible, popular, equal for all members, and dedicated to serving the interests of the people as a whole. We do not take our standards from the enemy. (ANC, 1985: 7–8)

The ANC supported community policing as a means to legitimate the police, and thereby prevent crime and embraced restorative justice and progressive constitutional provisions on bail and fair trial. As a liberation movement it had claimed that its acts, designated as criminal/terrorist by the apartheid government, were politically motivated and justified by the fact that it was fighting a just war against an unjust state. Now, in the awkward position of transitioning from liberation movement into government in waiting it acknowledged the existence of 'criminal elements' within its ranks. This was to counter the claim by the State that the ANC Self-Defence Units (SDUs) were involved in crimes of violence and other criminal actions (Super, 2010). This talk of criminal elements prefigured the divide between politics and criminality that would come to figure

strongly in ANC discourse, when, as government, it was no longer fighting against the apartheid state, but against a new enemy—the figure of the criminal, now stripped of any claim to political justification.

1994–2004: consolidating the 'new' South Africa

The prison in the 'new' South Africa is chameleon-like in its symbolism. On the one hand it represents an attempt by the State to show that it is doing something about crime and on the other it has also been imbued with an ethos of transformation, as evidenced by talk of the 'restorative prison' (Department of Correctional Services, 2001). Both a punitive state discourse about the need for imprisonment together with a milder restorative justice discourse about its nature and purpose serve to justify the prisons' existence in the 'new' South Africa. Both are, in a sense, discursive manoeuvres since the prison does not effectively combat crime and many would argue that the concept of a humane prison is a contradiction in terms. Yet the prison, in as much as it has replaced capital punishment for the most serious of offenders, is justified and characterized as part of an overall humanizing process, closely associated with the concept of *ubuntu*. *Ubuntu* both legitimates the law in the 'new' South Africa, presented as evidence of its transformation, while at the same time is recognized and hailed, and brought into operation, by the law itself. *Ubuntu* was extensively referred to by the Constitutional Court in the *Makwanyane* matter, discussed below.

Ubuntu and the body

The Constitutional Court abolished capital punishment in 1995 in its very first case, *Makwanyane*, in which all 11 judges unanimously rejected the death penalty as being against South Africa's constitutional principles. In the words of Davis and Le Roux (2009: 120): '*Makwanyane* represented a foundational moment, a line drawn in the sands of South Africa's history marking the start of a new legal era.' This may well be the case but it also led to an emphasis on the rehabilitative potential of imprisonment, which in turn has legitimated deepening punitive practice and sentiment.

The notion of *ubuntu* figured strongly in the judgment, yet the precise meaning of *ubuntu* is unclear. It is a slippery catch-all concept interpreted slightly differently by each judge. Judge Chaskalson stated that: 'Retribution ought not to be given undue weight in the balancing process' (para. 130) and specifically referred to the 'commitment' contained in the Interim Constitution for:

> the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and *revenge*. These can now be addressed on the basis that there is a need for understanding but *not for vengeance*, a need for reparation but *not for retaliation*, a need for *ubuntu* but *not for victimisation*. (para. 130, emphases added)

Judge Mokgoro translated *ubuntu* as 'humaneness … as personhood and morality' (para. 308), a type of Durkheimian metaphor for the collective conscience, of the 'rainbow

heritage', its 'spirit' emphasizing 'respect for human dignity, marking a shift from confrontation to conciliation'.

Judge Sachs traced out an African/indigenous jurisprudence that linked the principles of *ubuntu* with a humane justice system—one that did not endorse the use of death as a form of punishment. In doing so he quoted from outdated and patronizing anthropological texts[4] to bolster his argument that traditional African society did not support the death penalty because it had a rational system of meting out justice and 'relatively well-developed judicial processes' (para. 382).

Judge Langa described *ubuntu* as a 'culture' that emphasized communality and regulated 'the exercise of rights by the emphasis it lays on sharing and co-responsibility' (para. 224). It supported a 'reformative theory' of punishment so 'that the person may, at a certain stage, become a normal law-abiding and useful member of the community once again' (para. 242). Significantly, Langa made clear that a 'necessary consequence of its application' entailed that the offender has to be 'imprisoned for a long period for the purpose of rehabilitation'. An individual could only cease to be a 'danger to society' through 'treatment and training' (para. 243).

In this way then the Constitutional Court re-legitimated the ideology of rehabilitation via imprisonment, which it perceived as being consonant with *ubuntu*, albeit for the purposes of avoiding death. Similarly, in the case of *S v Williams* the Court ruled that corporal punishment of juveniles was unconstitutional, and referred to the introduction of correctional supervision as being a 'milestone in the process of "humanising" the criminal justice system' because it 'assisted in the shift of emphasis from retribution to rehabilitation' (para 67).[5]

In 1994, in the immediate euphoric aftermath of the first democratic elections, national discourse was peppered with restorative justice words and phrases. Politicians and policy makers promised and advocated 'healing', 'reconciliation', 'reparation', 'transcending', 'restoring honor and dignity', 'regaining our humanity' and 'validation' (Skelton, 2005: 375–376). Somewhat unexpectedly, however, all parties at this time also called for a tough approach to crime. From the far right Freedom Front, to the middle of the road Democratic Party, to the leftwing Pan African Congress, crime had become a major political issue.

The politics of crime in the 'new' South Africa

The State in the 'new' South Africa faced (and still faces) a host of tangible problems including structural poverty, extreme inequality, violent crime,[6] a large population of poor black men crowded into informal settlements in the townships and service delivery protests. These problems are caused by and imbricated in the dysfunctionalities created by institutionalized apartheid and racial capitalism (Glaser, 1998; Kinoch, 2005). By criminalizing and imprisoning the usual suspects—poor black and 'coloured'[7] males as well as black foreigners (especially undocumented ones)—ANC politicians have redefined the problem from state ineffectiveness to the criminal 'other'.

In the 'new' South Africa the punitive discourse against crime has served to recement society's moral core, to draw a line between the 'us' and 'them'. At the 1995 opening of Parliament, for example, then President Nelson Mandela (1995) asserted

that: 'We must take the war to the criminals and no longer allow the situation in which we are mere sitting ducks for those in our society who, for whatever reason, are bent on engaging in criminal and anti-social activities.' The country was at a 'crossroad', he said, in respect of its 'approach to the combating of crime'. '[C]rime and violence' were 'destroy[ing] the basic elements of our democracy' (quoted in Department of Safety and Security, 1999: 9).

This harsh language was surprising given the ANC's previous pronouncements on the causes of crime. As a liberation organization, the ANC had, for the most part, ignored the problem of crime in the 'old' South Africa, focusing instead on the liberation struggle. It was easy for it to be against the prison when it was not governing[8] but once in power it had to rule and this included showing that it had the crime problem under control. Even when it does not actually prevent crime, punishment performs a powerful expressive and communicative function. As Durkheim (1982) pointed out, punishment reinforces social solidarity and society's collective consciousness even though it does not eliminate crime. Of course this 'solidarity' is socially constructed and class based and poor black citizens are *still* the targets of prison policies.

By 1996 the Government stood accused of inept governing on multiple fronts—not just crime—and the economy was also perceived to be lagging (Johnson, 2009). Human Sciences Research Council surveys revealed that whereas in 1995, only 10 per cent of respondents viewed crime as the most pressing concern, this figure had almost doubled by early 1997. In November 1998, more than 20 per cent of the respondents ranked crime as their top concern, just behind service delivery (24 per cent) and jobs (23 per cent). The increase in the fear of crime was directly proportionate to the decline in the belief in the State's ability to deal with it. Whereas in 1994 76 per cent of the sample believed that the Government was to some extent in control of the crime situation, by 1995, 83 per cent believed that it had little or no control (Alence and Pimstone, 1999). While the Government claims that crime rates have stabilized and, in fact, police Annual Reports do show that they have dropped substantially since 2001, most people do not believe the official statistics (Department of Safety and Security, 2003; Du Plessis and Louw, 2005; Schonteich, 2001; Shaw and Gastrow, 2001). Instead, popular discourse generally presents the Government as being both unable and unwilling to do anything about crime.

In the face of mounting criticisms the ANC government became defensive. Politicians, of all stripes began to support harsh sentencing reforms that appeared primarily to serve 'ideological goals' (Tonry, 2009: 369) rather than to address the problem of crime.[9] Though often ineffective in reducing crime, such reforms demonstrated that the State was doing something about the problem of crime. As such South Africa appears to mirror criminological arguments over the limits of the 'sovereign state'. Unable to guarantee economic, social or other security, the State turned to criminal justice as a means to appease its citizens. As Garland (1996: 461) puts it: 'a willingness to deliver harsh punishments to convicted offenders magically compensates a failure to deliver security to the population at large' and 'it gives the impression that something is being done, here and now. It, like the waging of war, exemplifies the sovereign mode of state action.'

The 1997 Criminal Law Amendment Act introduced minimum sentences of five, seven, 10, 15, 20, 25 years and life for a range of offences including categories of theft, corruption,

drug dealing, assault, rape and murder. It obliged a magistrate and judge to impose the prescribed minimum sentence unless 'substantial and compelling' circumstances justified a lesser sentence. Presented as an emergency measure to combat high crime levels despite substantial evidence that it is precisely the cycle of repeated periods of incarceration that is most destructive of individuals and prisonized communities (Murakawa and Beckett, 2010, citing Clear, 2007, Clear et al., 2001; Travis, 2005; Urban Institute, 2006), this Act has had a particularly deleterious impact on the prison population. Although the minimum sentence provisions were enacted on a temporary basis they have been consistently extended. Their effect has been to increase the number of prisoners serving long and life sentences. Whereas in January 1998 (prior to the implementation of minimum sentencing) only 24 per cent of the sentenced prison population was serving a prison term of longer than 10 years by 2004 this had increased to 48 per cent (Fagan, 2004).

In 1998 a pre-election year, when crime featured heavily in the election campaigns of all the political parties an ANC MP said:

> We are going to see to it that criminals get the message that crime does not pay. It is the ANC that has in the past year made legislation making bail more difficult and prescribing minimum sentences for serious offences, something which despite all their hard talk, the NP never did … It is the ANC that has said we are going to increase the capacity of our jails by 30%, precisely so we do not have this problem of overcrowding which leads to a periodic bursting policy for prisoners. (*Hansard*, 1998: col. 4932)

According to the Deputy Minister of Justice mandatory minimum sentences and bail laws were 'progressive' (*Hansard*, 1999: col. 2756). The fact that prisons were overcrowded meant that the police were doing their job:

> If one goes to Pollsmoor Central and every other prison or holding cell in this country, one finds that they are bursting at the seams … Those people who are at Pollsmoor and other prisons did not take themselves to those prisons: they were arrested by the police. The police wake up every morning to do their job. This is why we are on top of the crime situation. It is not out of control. The South African crime situation is not out of control. The police are handling this situation and all what we need … is to fully rally behind the police and to declare that the fight against crime is our fight. (Minister of Safety and Security, *Hansard*, 2001: col. 2470)

Conclusion

Just as American republicanism, as observed by Tocqueville, produced both freedom and coercion (Ayers, 1984: 71), so too has democratization in the 'new' South Africa been accompanied by an increase in long-term imprisonment. In apartheid South Africa the black body was an important site and symbol of punishment. The criminal law was overtly used to uphold the power and status of a white minority and black and coloured males were disproportionately imprisoned. This criminalization and these apartheid policies have left historic residues that the new regime has not dealt with adequately. In post-apartheid South Africa the State, in a show of force, has relied on the ferocity of its power to punish, as a means of asserting its dominance. It is now criminals and no longer the

apartheid police whom the ANC regards as dangerous for human rights. Yet, race has continued to play a crucial role and it is still the 'non-white' and the poor whose bodies are imprisoned.

Whereas Foucault saw prisons historically as expressions of the disciplinary impulse that swept over society, in contemporary South Africa they reveal both a punitive impulse and the State's powerlessness in the face of crime. What marks penal discourse in South Africa, and renders it different from that in advanced liberal/post-welfare societies (Feeley and Simon, 1992; Garland, 2001) is that the prison in the 'new' South Africa symbolizes both punitiveness and rehabilitation. On the one hand the prison demonstrates the Government's willingness to tackle crime and to punish criminals. On the other hand, in the context of the demise of the death penalty and corporal punishment, it is also a symbol of a humanizing shift. The latter indicates, rhetorically at least, the 'benevolence' or good intentions of the Government to strive towards fair, equitable and rehabilitative punishment in a democratic South Africa.

Just as the emergence of the penitentiary was a 'project constitutive of liberal democracy' (Dumm, 1987: 6) in the early USA so too has the prison in South Africa, reinvented (discursively at least), as the reintegrative prison, played a central role in constituting the newly democratizing and liberalizing South Africa. The values that symbolize the ethos of the new South Africa—democracy, struggle morality, individualism, restorative justice, freedom, human rights—have also come to reinforce and underpin South Africa's simultaneous embrace of neo-liberal ideology, responsibility, the government of the self, the transformative power of work, active citizenship and the necessity of good governance (in which crime control plays such a crucial role).

South Africa has one of the highest rates of inequality in the world. It is therefore not surprising that as apartheid was dismantled, prison sentences lengthened. There has always been a pool of people over whom both the Nationalist Party and ANC governments could not establish hegemony, and therefore over whom they had to use the State's coercive power to punish. The punishment of this group, who have been consigned to the slagheap of a society, that was and is based on responsibilization, empowerment and gross disparities between the haves and have-nots.

Penality in post-apartheid South Africa, like everything else, was not written on a clean slate. Garland (1985: 155) provides a useful image of the social realm as a 'multi-layered mosaic', one that is the: 'product of layer upon layer of organisational forms, techniques and regulatory practices, each one partial in its operation, each one dealing with the residues and traces of previous strategies as well as its contemporary rivals and limitations'. Despite the fact that imprisonment is 'a violent deprivation of liberty imposed as a severe and painful punishment' (Carlen, 2005: 431) it remains as a stopgap measure, an organizational form encroaching (Hannah-Moffat, 2002) on more innovative forms (such as non-custodial measures). As an institution and ideology it is the one that has been able to 'most easily absorb different elements and adapt' to various strategies of government—'in contrast to capital and corporal punishment' (Garland, 1985: 155). There is no doubt that the prison is a significant institution in the making of the modern state (Dumm, 1987; Foucault, 1995 [1977]; Gottschalk, 2006; Ignatieff, 1978; Meranze, 1996) and as such the literature referred to in this article provides a relevant framework for understanding the prisons' place in the construction of the democratic or 'new' South Africa.

Yet, there are also important differences in the sense that the South African state has justified the prison in the 'new' South Africa in terms of *both* the punitive 'lock-em up' discourse as well the more benign discourse of restorative justice and *ubuntu*. It is because the prison has this seemingly endless capacity to reform (Cruikshank, 2004; Foucault, 1995 [1977]) that it has survived as a technology of punishment used by the two seemingly opposed regimes of apartheid and democratic South Africa. Punishment was already being reformed in the 'old' South Africa; and the State had started a liberalizing process back in the mid-1970s. The 'new' South Africa has continued this endless cycle of reforms, with the prison at its centre, even though the justifications and ideological underpinnings of it have changed dramatically.

Notes

1. Reforms included allowing non-racial trade unions; granting residence rights (not citizenship) to a select few black people; repealing laws prohibiting interracial sexual intercourse; repealing the pass laws; and increasing the funding of black welfare in the housing, health and education sectors.
2. Although bestiality and homosexuality were removed from the list of offences for which an adult could be whipped.
3. A total of 1219 people were executed between 1980 and 1989 and 1842 death sentences were handed down (Davis and Le Roux, 2009: 127).
4. For example he referred to a classic study of the Tsonga-speaking people by Henri Junod who observed that: 'the Bantus possess a strong sense of justice. They believe in social order and in the observance of the laws, and, although these laws were not written, they are universal and perfectly well known.' The Cape Law Journal, in a long and admiring report on what it refers to as a Kafir Law Suit, declares that in a typical trial 'the Socratic method of debate appears in all its perfection' (377).
5. The 1997 Abolition of Corporal Punishment Act abolished judicial corporal punishment and provided that any law which authorized corporal punishment by a court of law, including a court of traditional leaders, was repealed to the extent that it authorized such punishment.
6. Despite the fact that murder declined from 68 murders per 100,000 in 1995–1996 to 43 in 2003–2004 and to 34 in 2009-2010 it is still comparatively high (Gould et al., 2010; United Nations Office on Drugs and Crime, 2005). Although reported rape has decreased from 115.3 per 100,000 in 1994 to 113.7 in 2004, this too, is a high figure.
7. Even though prison statistics are no longer kept on a racialized basis, the vast majority of South Africa's prison population is still poor and 'non-white'. On 31 May 2003, blacks constituted 69.7 per cent of the female prison population, coloureds 21.2 per cent, Asians just under 1 per cent and whites 8.3 per cent. Black men made up 76.6 per cent of the male prison population, coloureds 20.7 per cent, whites 2.2 per cent and Asians 0.5 per cent. According to the 2001 census, blacks constituted 79 per cent of the population, coloureds 8.9 per cent, Asians 2.5 per cent and whites 9.6 per cent. Thus, coloured men and women were the most overrepresented in the prison population. White men had the lowest rates of imprisonment in

proportion to their presence in the population (Vetten and Bhana, 2005: 259).
8.   It should however be noted that the ANC utilized detention without trial in its camps as well as the death penalty for those who had committed treason against the movement.
9.   See Tonry (2009: 398) and his discussion of the 'latent' function of sentencing.

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