

TRANSFORMATION & TROUBLE

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CRIME, JUSTICE, AND PARTICIPATION IN DEMOCRATIC SOUTH AFRICA

Diana R. Gordon

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To Gail Gerhart & Tom Karis

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Preface

HOW MUCH CAN BE EXPECTED of criminal justice systems in countries making the transition from authoritarian rule to democracy? What credence can be given to vows of accountability, transparency, participation, and equal representation in criminal justice as free and fair elections usher in determinedly democratic regimes? How are obstacles to realizing these aspirations—resource constraints, political differences, habits of the past—overcome; or do they defeat even the best intentions of reformers? Given that democratization is a continuing process, what does a democratized justice system look like, anyway? Are there some universal features; or are cultural divides—of East and West, North and South, traditional and modern—and the economic chasms between postindustrial countries and developing ones unbridgeable? These are questions that drew me to study South African efforts to transform the country's police and courts after apartheid.

For a quarter of a century I have written about the politics of criminal justice in the United States, always with a nagging concern that my reformist critiques of domestic policy lacked a bedrock understanding of how and whether criminal justice could live up to *any* realistic set of democratic ideals. Neither political scientists nor criminologists have successfully adumbrated, in my view, how the state can further the human dignity and emancipation that is the largest aim of a democratic system through its criminal justice practices. Although liberal democracies profess to protect their citizens against arbitrary surveillance, arrest, prosecution, and confinement—and some live up to this ideal with commendable consistency—no country that I knew of when I started thinking about this problem in the 1970s had fashioned its political system with the affirmative object of building criminal justice institutions that reflected democratic aims. So when dawn broke over the new era in South Africa—when President F. W. de Klerk unbanned the African National Congress in February 1990 (it had been an illegal organization for the previous thirty years); when Nelson Mandela walked free of twenty-seven years of

confinement a few days later; when South Africa's whites voted in a 1992 referendum to continue negotiations that would lead to majority rule; when it was finally possible to believe that the blood of the those who had resisted apartheid had not been shed in vain—I thought the country's planned reforms of criminal justice presented a natural experiment from which I could learn. For South Africa the present was truly the beginning of the future, with a set of democratic ambitions that detached it decisively from the past.

Conditions for thoroughgoing reform seemed auspicious. The rhetoric was heartfelt, and the world was watching to see if it was matched with action. As a police official—one of the “clean” middle-management Afrikaners who welcomed democratic transition—said to me on my first research trip in early 1994, “We don't have any choice but to get it right.” I set out to see how police and courts would approach that challenge and whether the new government would support a program that protected its citizens—all of them, not just the affluent minority—and encouraged equitable resolution of their social conflicts.

My book presents a mixed picture of progress a decade later. Despite occasional painful lapses, liberal institutions that respect the citizenry, foster integrity, and protect rights operate with reasonable consistency and seem likely to endure. The Western ideal of a rule of law that constrains police, courts, and executive zeal is intact. The early vision of a more open, participatory, pluralistic justice system has, however, been scrapped, and the formalities of constitutional protection reach far too few people. Furthermore, the new regime has heeded the siren song of punitive policy directions adopted in the United States (and, to a lesser extent, in some other Western countries), retreating to a distressing degree from the rights orientation it initially embraced.

I think I have concluded, with Michel Foucault, that truly popular justice—the grassroots initiative that can right wrongs, monitor police and courts, and foster consensus and reconciliation—is inevitably compromised by state intervention that imposes forms and practices necessary for modern (and crime-ridden) countries. (Foucault thought that the court, with its contending parties and an umpire, was a “particularly disastrous model for the clarification and political development of popular justice.”)¹ However, I continue to believe in deliberative democracy and in its potential to make modest inroads into relations of power in both fledgling and mature democracies. Participatory, public-empowering mechanisms tolerated (and even funded) by the state but independent of it in most respects can and should flourish—along with fair and competent professionals—in democratizing countries; and civil society must prick the state's conscience with challenges to its policies and to its overall domination in the maintenance of order. Whether any pressure exerted

by responsible citizens and professionals on government can significantly address the structural causes of crime is open to question.

During the period covered by this book there have been important efforts to remedy prison conditions. The corrections bureaucracy was demilitarized, and its employees became civil servants. The South African constitution provides for “conditions of detention that are consistent with human dignity,” and the courts have fleshed out that principle by finding a prisoner’s right to vote and to be treated for HIV and AIDS.² A judicial inspectorate monitors prison conditions, and citizens will have input into future parole decisions. But democratizing the prisons has proved at least as great a challenge as democratizing police and courts; a current analysis concludes that delay in implementing the progressive Correctional Services Act of 1998 “suggests that neither prisoners’ rights nor public participation are high priorities.”³ I decided early in this project that I could not do justice to the special issues that prison reform in South Africa presents. I also think that corrections is to some extent the tail of the dog; if police and courts were democratized in ways envisioned by the early reformers, reform of some aspects of prison life and administration would follow.

I sometimes agonize over how long it has taken me to write this book—perhaps five years of thinking about it and another three to write it. Dirk van Zyl Smit, a thoughtful and distinguished South African criminologist, has, however, explained the struggle to my satisfaction: of the promise of criminal justice reform in democratic South Africa he writes, “Working out the logical implications of these primarily individual and defensive rights in the wider context of a constitution that also seeks to guarantee some social and economic rights, as well as rights of democratic participation, is a major and fascinating intellectual task.”⁴ I say amen to that.

Many people have helped beyond any reasonable expectation. Some were correspondents, who advised me from all corners of the world, often by the magical (if often pesky) medium of e-mail. Alice Hills helped me think about how police in South Africa might be different from those in other democratizing countries in sub-Saharan Africa; Steven Gelb helped me understand the government’s shifting perspectives on criminal justice in the context of South Africa’s post-apartheid foreign policy. Adrian Louw gave me the perspective of the thoughtful but frustrated white citizen confronted with high crime levels in post-apartheid society. Ineke van Kessel and Monique Marks sent me papers on the difficulties of transformation for the police that fill a real lacuna in the literature. Neil Boister shared his knowledge of the importation of U.S. policies abroad. Patrick Bond exposed me to the dark side of some of South Africa’s economic choices. Ted Leggett and Anton du Plessis answered innumerable data questions. Francois Botha’s wit and wisdom has given me much more than just his impressive expertise on the magistracy. John Cartwright supplied

me with an insider's view of the Community Peace Programme operating in Western Cape and Eastern Cape. Keith Gottschalk patiently answered never-ending e-mail inquiries about what was going on in South Africa when I was nine thousand miles away.

Colleagues in South Africa and New York have shared information and given me invaluable advice along the way, among them Wilfried Schärf, Dirk van Zyl Smit, Janine Rauch, Jonny Steinberg, Louise Stack, Jeremy Seekings, Cheryl Frank, David Greenberg, Jim Levine, Todd Clear, John Harbeson, Ned Schneier, and Steve Ellmann. Penny Andrews, Gail Gerhart, Richard Goldstone, Andrew Lawrence, Velile Notshulwana, Jeremy Seekings, Nicoli Natrass, Martin Schönteich, and Steve Kahanovitz read chapters and gave me useful comments. Michael Keating was my kindly but critical editor at home and told me when to stop. Barbara Swartz was the invaluable friend who put up with my hand-wringing and assured me that I would finish the book. Sinead Coleman and Sandrine Dikambi provided invaluable research and administrative assistance. I have been lucky to have financial support from the Research Foundation of the City University of New York and to be welcomed with office space at various times by the Centre for Policy Studies in Johannesburg, the Institute of Criminology of the University of Cape Town, and the Human Sciences Research Council in Pretoria.

Working in a foreign country becomes much easier when you have friends there. I must thank Lael Bethlehem, Emilia Podesta, David Unterhalter, Helet and Chris Merklings, Nicoli Natrass, Jeremy Seekings, Michael Osborne, Verna and Bev Gower, Mynda and Tony Mansfield, Morley and Joanna Nkosi—and especially Gail Gerhart and the late John Gerhart, as well as Myrna Kaplan—for providing hospitality and encouragement on many South African visits. I am most grateful to Tuntufye Mwamwenda for welcoming me to Umtata and to Given Mkhari for giving me a glimpse of the struggles of young Africans to assume positions of significance in post-apartheid South Africa. David A. Gordon, a South African advocate (the term for a senior trial lawyer), stirred my initial interest in South Africa forty years ago and made it politically and financially possible for me to make my first trip in 1991 to see how the country was changing.

Finally, my interviewees—too numerous to mention individually—were uniformly thoughtful and ready to share their experiences. Very busy people paused in building their new society to guide me—judges and magistrates, local and national police officials, people in research institutes or grassroots groups, community activists and lay assessors. I especially learned from the staff of the Centre for the Study of Violence and Reconciliation and the Institute for Security Studies. And I must mention with sadness one person who gave me three lengthy interviews of uncommon intelligence and usefulness—Mduduzi Mashiyane, a talented organizer who died much too soon in July 2002.

My greatest debt is expressed in the dedication. Gail Gerhart and Tom Karis have contributed immeasurably to the English-speaking world's understanding of South African struggles for freedom and equality through their multivolume documentary history of African politics in South Africa, *From Protest to Challenge*. To me they gave generously of their knowledge and served as exemplars of the observer who sheds light on a country not his or her own.

Terminology when referring to the various racial and ethnic groups that have created South Africa's history can be confusing, even to residents of the country. *Black*, for example, is sometimes used to refer to Africans and sometimes to all those who are not white, that is, Africans, coloureds (mixed-race people), and Indians. The problem is compounded when discussing the past, as a number of terms used for centuries are no longer appropriate or accurate (*Hottentots*, for example, when referring to people whom anthropologists more correctly call *Khoikhoi*).

In this book the indigenous people found by white settlers in the Cape, who later mixed with whites and Asians, will be called *Khoikhoi* in historical discussions and *Coloured* in modern ones. Nguni-speaking people (also called Bantu-speaking in much of the historical literature) will either be identified by their particular ethnicity (e.g., Xhosa, Zulu, Swazi) or, more generally, as Africans. I will use *black* as a collective identification for all groups who are not of European origin. *Dutch* will refer to the original white settlers and the Dutch East India Company officials who led them; their descendants will be called *Boers* in the days when they were striking out on their own, leaving the Cape Colony to develop the territory to the north and east, and *Afrikaners* as they came into the towns and formed their own governments. *British* will refer to the immediate colonizers—the Parliament in England that set policy and the officials who came to South Africa to carry it out—while *English* will designate South Africans whose ancestors came from the United Kingdom and whose primary language is English.

Finally, when referring to contemporary white residents of South Africa, I will follow the lead of G. H. L. Le May, who says in a preface to *The Afrikaners*, “I have tried to avoid the word ‘European’ which has often been used to distinguish between whites and nonwhites. It has always seemed to be inappropriate as a description of those who have left their European origins far in the past.” And, of course, *nonwhite* suggests that the standard for all racial designations is whiteness, so I don't use that either. *Native* is used only in reference to particular laws or—in quotes—as designations of policy (e.g., “native problem”). *Tribe* is not used because it is not relevant after colonialism altered the sovereign status of traditional groups.

Abbreviations

ANC	African National Congress
CPF	Community Police Forum
CPP	Community Peace Programme
ICD	Independent Complaints Directorate
IMF	International Monetary Fund
JSC	Judicial Service Commission
PAC	Pan Africanist Congress
SADF	South African Defence Force
SANDF	South African National Defence Force (renamed SADF after apartheid ended)
SAP	South African Police
SAPS	South African Police Service (renamed SAP after apartheid ended)
TRC	Truth and Reconciliation Commission
UDF	United Democratic Front