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Reforming the Purposes of Sentencing to Affirm African Values in Namibia

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Abstract

This article considers the current sentencing purposes in Namibia. It discusses the legislator's failure to articulate these purposes, leaving this to the judiciary, and identifies the dangers that arise from this legislative lacuna. It establishes that current sentencing purposes are fundamentally premised upon a retributivist philosophy, transplanted into Namibia during the colonial period. The article thus advocates for sentencing reform, aimed at restoring a paradigm based on African values. It does so by analysing African indigenous justice systems, using *Ubuntu* as an Afrocentric value. The article establishes how *Ubuntu* is contemporarily mirrored by restorative notions of justice that prioritize victims, offenders and the community, thereby asserting sentencing purposes that promote reconciliation, reparation and offender re-integration. In juxtaposing this with other sentencing purposes, the article critiques comparable jurisdictions that have recently incorporated restorative justice and proposes a set of draft sentencing purposes in the appendix.

Keywords

Afrocentricity, restorative justice, retribution, sentencing, *Ubuntu*

INTRODUCTION

Although sentencing arises at the conclusion of the criminal process, it lies at the very heart of criminal justice. Through sentencing, an independent judiciary may authorize the state to punish a person after conviction for an offence. While many vexing questions around sentencing processes exist, the most basic, yet perplexing, underlying question is arguably: what *is* or *are* the purpose(s) of sentencing? Only once those purposes are settled will it be possible to determine the most appropriate sentencing model(s). Easton

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and Piper posit that punishment[1] rests on moral reasons that are the expression of moral condemnation in response to rule infringements, and that punishment is seen as a device for expressing attitudes of resentment and indignation.[2] They view punishment as having symbolic significance, which is largely absent from other kinds of penalties and is an expression of vindictive resentment.[3] For them, a key feature of punishment is that it rests on a moral foundation, expressing a moral judgment reflective of, and based on, reasons stemming from an authoritative source, usually the state.[4] This ensures "anti-impunity" for violating the law.[5] Societal values are given a central role in defining moral standards and the appropriate responses to their transgression.[6]

Contextualized to Namibia, this article commences by considering why the purposes of sentencing should be expressly stated in statutes and argues what these purposes should be. It then provides an overview of Namibia's sentencing framework, with the aim of extracting and deconstructing those judicially established sentencing purposes. It proceeds to identify gaps and inadequacies stemming from existing sentencing purposes, while arguing that an African values orientation, premised upon *Ubuntu* and prioritizing restorative justice notions, should be re-invigorated and affirmed. Namibia is juxtaposed with the comparable common law jurisdictions of New Zealand and Canada, which have statutorily expressed sentencing purposes from which best practices may be derived. The article concludes by proposing a draft legislative amendment for reforming Namibian sentencing on the basis of restorative justice.

AN OVERVIEW OF SENTENCING AND THE NEED FOR LEGISLATED SENTENCING PURPOSES

To date, the determination of Namibia's sentencing purposes has been left entirely in the hands of the judiciary (as opposed to the people's elected representatives in Parliament) to resolve. However, there is merit in having sentencing purposes as the direct and express subject of legislation. For example, Roberts and Von Hirsch have highlighted the merits of enumerating the purposes as this prevents judges from following their individual philosophies,

1 The laws and academic commentary on the issue of sentencing (for example the Namibian Criminal Procedure Act, 1977, Act No 51 of 1977) employ the terms "sentencing" and "punishment" interchangeably. While a distinction can be made, for the purposes of this article, sentencing and punishment are employed as synonyms.

2 S Easton and C Piper *Sentencing and Punishment: The Quest for Justice* (3rd ed, 2012, Oxford University Press) at 4.

3 Ibid.

4 Ibid.

5 N Walker *Why Punish?* (1987, Oxford University Press) at 25.

6 P Robinson *Intuitions of Justice and the Utility of Desert* (2013, Oxford University Press).

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given that sentencing "means different things to different people".[7] Legislative pronouncement thus averts the risk of substantial variation in both the choice and application of various sentencing purposes. Hence, academic commentators urge legislators to pronounce sentencing purposes expressly, for the benefit of judicial officers and the wider public, as this is likely to result in greater consistency in sentencing: offenders whose offences and circumstances are similar should receive broadly similar sentences, regardless of who happens to be on the bench.[8]

Although legislative drafters are confronted with the complex challenge of reconciling diverse and frequently contradictory sentencing purposes, this is not impossible, nor does it necessarily require the promotion of a single sentencing purpose at the expense of all others.[9] This article, therefore, advocates the use of African values as yardsticks in establishing these purposes, as purposes offer guidance and affect sentencing practices, but must specify the conditions under which certain aims are to be favoured over others.[10] The penultimate part of this article considers a number of sentencing purposes. However, the article first provides a contextualized and succinct overview of Namibian sentencing theory and practice by reflecting on existing sentencing purposes.

As a common law jurisdiction, Namibia's criminal justice system is adversarial[11] and is primarily anchored in legislation as interpreted and applied through judicial decisions, which have, in turn, fundamentally shaped sentencing theory and practice over the years. Chapter 28 of the Criminal Procedure Act, 1977 (the Act) prescribes sentencing processes. The Act was originally enacted by apartheid-South Africa's Parliament in 1977 and made applicable to South-West Africa (today Namibia).[12] From its drafting, there is no evidence to suggest that the white minority South African legislature of circa 1976–77 took any meaningful notice of the majority black indigenous population's jurisprudential philosophies, values, cultures and norms or that they were consulted in order to solicit their views in criminal justice reforms. This is attributable to ideologies of colonialism and apartheid that were entrenched in the legal and policy fabric of the white socio-political classes, ideologies that were only repudiated by the Namibian Constitution (the Constitution).[13]

Nevertheless, the Act was "frozen" at Namibia's independence, thereby surviving the advent of democratization through article 140(1) of the

7 J Roberts and A Von Hirsch "Legislating the purposes and principles of sentencing" In J Roberts and D Cole (eds) *Making Sense of Sentencing* (1999, University of Toronto Press) 48 at 49.

8 A Von Hirsch, A Ashworth and J Roberts *Principled Sentencing* (3rd ed, 2009, Hart).

9 Roberts and Von Hirsch "Legislating the purposes", above at note 7 at 50.

10 Ibid.

11 C Mapaure, N Ndeunyema, H Masake, F Weyulu and L Shaparara *The Law of Pre-Trial Criminal Procedure in Namibia* (2014, University of Namibia Press) at 77–88.

12 The Act, sec 343.

13 The Constitution, preamble and art 23.

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Constitution, which deems all pre-independence laws to be of full force and effect, unless repealed by Parliament or declared unconstitutional by Namibian courts. While the Act has had eight separate amendments since the adoption of the Constitution in 1990, none has affected provisions concerning sentencing or punishment.[14] However, numerous sentencing provisions for specific offences in separate statutes have been impugned in Namibian courts.[15]

Although Namibian legislation does not explicitly stipulate any sentencing purposes, these can be inferred from both Roman-Dutch common law[16] and judicial decisions. Arguably, sentencing purposes can also be inferred from the choice of punishment available, as set out in the Act.[17] Under the heading "Nature of punishment", section 276(1) of the Act provides:

> "Subject to the provisions of this Act and any other law and of the common law,[18] the following sentences may be passed …, namely -
> a) ~~the sentence of death~~;[19]
> b) imprisonment;
> c) periodical imprisonment;
> d) declaration as a habitual criminal;
> e) committal to any institution established by law;
> f) a fine;
> g) ~~a whipping~~."[20]

Although not expressly stated, these "punishments" are self-evidently arranged in descending order of severity: from (unconditional) imprisonment to fining. Section 283 proceeds explicitly to provide that courts have discretion as to the punishment to be imposed, except where a minimum penalty is prescribed by the law creating the offence or prescribing a specific penalty. Hence, although restrained by principles such as proportionality, fairness and justice, the courts presently retain a relatively wide margin of discretion as to the sentencing purpose(s) they engage and realize through their authority to *prescribe* the nature of punishment.

Given this paucity in legislative detail on sentencing purposes, it is unsurprising that the judiciary has assumed the mantle to define and develop

14 S Terblanche "Sentencing in Namibia: The main changes since independence" (2013) 26/1 *South African Journal of Criminal Justice* 21 at 22.

15 The Stock Theft Amendment Act, 2004. See *Daniel v Attorney-General* 2011 (1) NR 330 (HC); *Kamahere v Namibia* 2016 (4) NR 919 (SC); *S v Gaingob* 2018 (1) NR 211 (SC).

16 The Constitution, art 66.

17 For an extensive exposition of the Act's history, see Mapaure et al *The Law of Pre-Trial*, above at note 11 at 1–15.

18 This includes customary law, given customary law's recognition as being on a par with common law. See the Constitution, art 66.

19 Death sentences are unconstitutional: id, art 6.

20 Whipping was declared unconstitutional in *Ex Parte Attorney-General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC).

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sentencing purposes. Notably, although there remains little consensus among penal theorists on the genealogy and substance of sentencing purposes, Namibian courts and scholars are yet to engage critically with these. They have only repeated and endorsed the traditional purposes ad nauseum: retribution, incapacitation or prevention, deterrence and rehabilitation.[21] While no hierarchy in sentencing purposes has been expressly prescribed, courts have taken the approach that they "must decide the objective(s) of punishment to be meted out, [considering] the circumstances of a particular case".[22] This article now considers these traditional purposes in brief, as they manifest themselves in Namibia.

Retribution

Retributive theory has a long history dating back to the 17th century western philosophy of Kant and Hegel, and even earlier to scripture subscribing to *lex talionis* [an eye for an eye, a tooth for a tooth] principles. Retribution underlies the "just deserts" perspective that modern day scholars such as Von Hirsch propound.[23] Just desert theorists argue that punishment is justified as the morally appropriate response to crime: those who culpably commit offences deserve censure to be conveyed through some hard treatment that prompts the offender to take such censure seriously, but the amount of hard treatment should remain proportionate to the degree of wrongdoing, thus respecting the offender's moral agency.[24] Since the creation of the colonial state, retribution has been the fundamental premise of Namibian penology.[25] In *S v Brandt*, the court emphasized retributive ideals in stating that society "expects that people who have done wrong will be punished, that is, the retributive purpose in punishment is important".[26] This societal assumption is, however, challenged below.

In pursuing retribution, the principle of proportionality must be followed. This ensures that the sentence is commensurate with the seriousness of the offence and the culpability of the offender. Proportionality may either be cardinal or ordinal; the former concerns the magnitude of the penalty and

21 In respect of pre-constitutionalism, see: *R v Swanepoel* 1945 AD 444; *S v Khumalo* 1984 (3) SA 327 (A). In respect of post-constitutionalism, see: *S v Tcoeib* 1992 NR 198 (HC). See also *Daniel*, above at note 15; *Kamahere*, above at note 15.

22 *S v Orina* [2011] NAHC 137 (20 May 2011), para 2 (unreported decision of the Namibian High Court).

23 A Ashworth and J Roberts "Sentencing: Theory, principle, and practice" in M Maguire, R Morgan and R Reiner (eds) *The Oxford Handbook of Criminology* (5th ed, 2012, Oxford University Press) 886 at 867.

24 Ibid.

25 C Mapaure "Philosophising about and making sense of crime and criminality in Namibia through the deterrence and rational choice theory" (2013) 1/1 *University of Namibia Students Law Review* 1 at 12.

26 1991 NR 356 (HC) at 357. See also *S v Nkasi* [2010] NAHC 9 (24 March 2010), para 3; *S v Sezuni* [2008] NAHC 91 (22 September 2008), paras 9–10.

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requiring that it not be out of proportion to the gravity of the conduct, while the latter concerns ranking of the relative seriousness of different offences.[27] Cardinal proportionality is a question of how different crimes may be measured against each other, and was explicitly recognized in *Daniel and Another v Attorney General and Others*[28] where the Namibian High Court declared the prescribed minimum sentences for livestock theft offenders (the most severe being 20 years' imprisonment without the option of a fine) to be unconstitutional, for being disproportionate to the offence. This decision was affirmed by the Supreme Court in 2017.[29]

Incapacitation (prevention)

Incapacitation is the idea of simple restraint by rendering the convicted offender incapable of offending again for a particular period of time. Obstacles are used to impede the offender from carrying out whatever criminal intentions or inclinations they may have, usually using a correctional facility's walls, but also other incapacitative techniques such as confinement through house arrest.[30] Capital punishment is a form of incapacitation, as is maiming and chemical castration, but none of these are still legal due to the constitutional sacrosanctity and inviolability of human life, and their inherently cruel, degrading and inhuman nature.[31]

Deterrence

Deterrence theory pursues a consequentialist aim that is traceable to the writings of Jeremy Bentham and like-minded penologists who generally regarded the prevention of further offences through threat of legal sanctions as the core rationale of punishment.[32] Deterrence may either be individual or general.[33] Individual deterrence sees deterring further offences by the particular offender to be the measure of punishment.[34] This is evinced within Namibia's statutory framework where the prescribed minimum sentences for first-time offenders are often significantly less than those for recidivists.[35] General deterrence, on the other hand, involves determining the punishment on the basis of what will deter others (the public) from committing similar offences, thereby pursuing a "social engineering" objective. The application

27 A Ashworth *Sentencing and Criminal Justice* (2010, Cambridge University Press) at 89.

28 2011 (1) NR 330 HC.

29 *Prosecutor General v Daniel and Others* (SA 15/2011) [2012] NASC (28 July 2017).

30 Roberts and Von Hirsch "Legislating the purposes", above at note 7 at 75. House arrest is, however, not in use in Namibia.

31 The Constitution, arts 6 and 8.

32 J Bentham *Introduction to the Principles of Morals and Legislation* (1823, Pickering and Wilson); J Andenaes "Does punishment deter crime" (1968) 11 *Criminal Law Quarterly* 76.

33 *Brandt*, above at note 26 at 357.

34 Ashworth and Roberts "Sentencing", above at note 23 at 868.

35 For example, chapter 6 (offences and penalties) of Namibia's recently enacted Electoral Act, 2014 (Act No 5 of 2014).

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of this theory has the drawback of its failure to consider the growing body of research establishing a marginal relationship between deterrence and punishment severity (as opposed to the certainty of punishment).[36] While Namibian courts[37] have recognized deterrence, seldom have these courts or scholarship grappled with moral objections relating to the "treatment of offenders as a means to benefit others".[38]

Rehabilitation

Rehabilitative theory responds to, and reduces, crime by reforming individual offenders through lessening the likelihood of their reoffending. It is forward-looking and consequentialist, owing to its object of allowing offenders to contribute to society upon their rehabilitation, thereby maximizing happiness both of offenders and within society.[39] Rehabilitation may occur with or without incarceration. The Correctional Services Act, 2012[40] prescribes the functions of Namibia's Correctional Service to include the use of rehabilitation programmes that contribute to offenders' rehabilitation and successful reintegration into the community as law-abiding citizens.[41] This is, however, of limited application as rehabilitation applies largely to offenders sentenced to periods of incarceration.

IDENTIFYING THE GAPS IN THE SENTENCING PURPOSES

The imposition of criminal punishment inevitably involves *limiting* some of an offender's fundamental rights. The extent of the limitation should depend on the purpose of the punishment, which, in turn, should link to a background theory for its justification.[42] The argument to be advanced is that the theory and practical application of sentencing purposes, as outlined, are incongruent with shared values in African-cum-Namibian society. Moreover, there is a dearth of theoretical, empirical or Afrocentric / Namibia-centric research that investigates the efficacy of different purposes, especially incapacitation, deterrence and rehabilitation. This uncovers a vivid disparity in the application and emphasis placed upon these purposes. Namibian courts have frequently overturned decisions found erring in their over-emphasis or

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36 A von Hirsch *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999, Cambridge University Press).

37 *Gaingob*, above at note 15, para 80.

38 Walker *Why Punish*, above at note 5 at 53.

39 Easton and Piper *Sentencing and Punishment*, above at note 2 at 379; *Gaingob*, above at note 15, para 80.

40 Act No 9 of 2012.

41 Id, sec 3(c) provides: "The functions of the Correctional Service are … as far as practicable, to apply such rehabilitation programmes and other meaningful and constructive activities to sentenced offenders that contribute to their rehabilitation and successful reintegration into [sic] community as law abiding citizens."

42 L Lazarus *Contrasting Prisoners' Rights* (2004, Oxford University Press) at 3.

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under-emphasis of one or more sentencing purposes. For example, in the 2012 *Van Wyk* decision, a convicted fraudster was sentenced to a wholly suspended three-year prison term.[43] On appeal, the court adopted a strong retributivist approach by overturning the first instance decision and imposing a ten year prison term, with five years suspended. Although the appeal court observed that the offender was of "good character", "in need of limited rehabilitation" and that "her family had lost almost everything",[44] it justified the custodial sentence by reasoning: "[o]ne cannot but feel deeply for [the family]. Regrettably, one cannot allow one's sympathy for them to deter one from imposing the kind of sentence dictated by the interests of justice and society".[45]

This reasoning makes it apparent that the "interests of society" are often related to traditional sentencing purposes; however, even when they are not, sentencers are still expected to consider general sentencing purposes as expounded above.[46] Terblanche, commenting on the South African sentencing approach, which is similar to Namibia's, observes that a typical sentence judgment will include reference to all four purposes, despite the fact that a single sentence rarely has the potential to achieve more than one or two of them.[47]

Additionally, although there are clear distinctions between the *purposes* and *principles* of sentencing, these are frequently conflated. The three Namibian principles of sentencing are derived from *S v Zinn*, where it was stated that "[w]hat has to be considered is the triad consisting of the crime, the offender and the interests of society" (triad of Zinn).[48] This triad is however basic, legally vague and insufficiently rigorous. In an era of asserting victims' rights within criminal procedures, the triad of Zinn fails to respond to victims' needs and their role. Some argue that this conflation is a direct consequence of legislative failure to prescribe a principled, clear and unambiguous framework for exercising sentencing discretion, coupled with the judiciary's failure adequately to fill this void by developing firm rules in response.[49] The absence of firm guidance that calibrates which sentencing purpose(s) carry more or less weight increases uncertainty and inconsistency.[50]

The adverse consequences of this may be seen in custodial sentences. Globally, imprisonment remains among a judicial officer's most authoritative powers, with the widest-reaching ramifications. Namibia relies heavily on

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43 *S v Van Wyk* (SA 94/2011) [2012] NASC (15 November 2012), paras 26–27.

44 Ibid.

45 Ibid.

46 S Terblanche "The discretionary effect of mitigating and aggravating factors: A South African case study" in J Roberts (ed) *Mitigation and Aggravation at Sentencing* (2011, Cambridge University Press) 261 at 264.

47 Ibid.

48 1969 (2) SA 537 (A) at 540.

49 Ibid.

50 Ibid.

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imprisonment. Her correctional facilities held an inmate population of 3,560 in May 2015.[51] Incarceration conditions have been found to be below internationally accepted standards. Poor conditions such as chronic overcrowding, poor sanitation and hygiene, nutritionally deficient diets, and physical and sexual violence amongst inmates are common.[52] Incarceration also has unintended adverse consequences for family members and society at large.[53] This reality encourages the parsimonious use of sentences of incarceration.[54]

In light of the gaps arising from the tenuous sentencing purposes regime in Namibia, this article explores solutions towards law reform in addressing sentencing shortcomings in light of ongoing consultations regarding Namibia's criminal justice reforms to legislate for plea bargaining. The central argument is that there should be legislatively prescribed sentencing purposes that override the present common law purposes. (The question of sentencing principles, while also problematic, is outside the scope of this article.) The article engages critically with what these purposes should be, advancing the proposition that they should affirm African values that find great legitimacy among Namibians. This ushers in a new approach to legislative drafting by paying particular attention to statutes that directly affect the lives of ordinary people, and being sensitive to issues that intersect with societal custom, culture and values.

TOWARDS AFFIRMING AN AFRICAN VALUES-BASED PARADIGM IN SENTENCING PURPOSES

This section argues that an African values-based paradigm should inform Namibian sentencing purposes. It highlights a number of justifications. The nature of law is such that it consists of various norms, which constitute obligatory rules of behaviour for societal members.[55] These legal norms are closely related to various social values, being either a direct expression of them or serving them indirectly. The degree to which these legal norms command obedience largely depends on the extent to which they express or accord with generally accepted social values.[56] With specific reference to sentencing, Ashworth argues that, because it occurs after determining criminal liability and may be characterized as a public, judicial assessment of the degree to

51 "World prison brief: Namibia", available at: <https://www.prisonstudies.org/country/namibia> (last accessed 17 September 2019).

52 Office of the Ombudsman *Human Rights Baseline Study Report in Namibia* (2013, University of Namibia) at 102.

53 Ibid. US Department of State *Namibia 2014 Human Rights Report*, available at: <https://2009-2017.state.gov/documents/organization/236600.pdf> (last accessed 29 August 2019).

54 Ashworth *Sentencing*, above at note 27 at 99.

55 Y Dror "Values and the law" (1957) 17/4 *Antioch Review* 440; T Elias *The Nature of African Customary Law* (1954, Manchester University Press).

56 Lazarus *Contrasting Prisoners' Rights*, above at note 42 at 11.

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which the offender may rightly be ordered to suffer legal punishment, the social-ethical values that society wishes to uphold should inform any sentencing system reform.[57] With this in mind, Robinson advocates the alignment of sentencing practices with community values, claiming that "closer alignment will enhance the moral credibility of the law and thereby promote compliance with the criminal law".[58]

Moreover, various judiciaries have also asserted the importance of societal values in influencing law and interpretation. The Namibian Supreme Courts' monumental decision in *Ex Parte Attorney-General: In re Corporal Punishment by Organs of State* evinces this as, in declaring corporal punishment by state organs to be unconstitutional, it relied heavily upon social values, pointing out that Namibians were "freed from the social values, ideologies, perceptions and political and general beliefs held by the former colonial power, which imposed them on the Namibian people".[59] The 1986 African Charter on Human and Peoples' Rights (African Charter), which Namibia has ratified, duly binds the state to promote and protect the morals and traditional values recognized by the community.[60]

Values can and have been plausibly derived from a multiplicity of sources, including religious or animistic convictions. However, state secularity[61] is one of Namibia's founding principles and the constitutional entrenchment of religious pluralism[62] restrains religious influences upon law-making and judicial processes. Hence, this article, in attempting to tease out law reform options, focuses on social-cultural sources of values that could inform sentencing philosophy.[63]

In developing a justice system and legal culture that society will legitimately recognize as retaining moral integrity and validity, and one that society will enduringly endeavour to uphold and enforce, Namibia should re-visit her heritage, broadly being the cultural and traditional values of African orientation, values that were largely relegated to obscurity during the epoch of colonialism. Here, a brief historical contextualization is incisive. Over the 20th century, various colonial authorities of European extraction super-imposed laws with an exogenous genesis. In crudely transplanting those western ideologies onto African soil, no interest was taken to consider their interaction with, and impact upon, the indigenous laws, social tenets and customs that

57 A Ashworth "Criminal justice and deserved sentences" (1989) 36 *Criminal Law Review* 340 at 341.

58 Cited in J Roberts and K Keisjer "Democratising punishment: Sentencing, community views and values" (2014) 16/4 *Punishment & Society* 474 at 477.

59 *In re Corporal Punishment*, above at note 20, para 2.

60 African Charter, art 17(3).

61 The Constitution, preamble.

62 Id, art 21(1)(c) provides for the right to the freedom to practise any religion and to manifest such practice.

63 Id, art 66(1).

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were expected to co-exist within colonial territories.[64] Although the superimposition of legal culture theoretically ceased with the transition to constitutional democracy, the Constitution sensibly recognizes the legality of all legislation enacted pre-1990, unless it is declared unconstitutional or subsequently repealed by Parliament.[65] This avoided a potentially damaging legal vacuum at independence. Nonetheless, the practical challenges that would likely have arisen with a non-succession in legal normativity do not negate the reality that values reflected in Namibia's legal framework pre-1990 (specifically sentencing derived from legislation and judicial decisions) are premised upon Eurocentric outlooks. By making provision for the repeal and amendment of pre-1990 laws, the founders of the Constitution ensured that the external values that informed sentencing were not cast in stone, but retained the ability to be amenable and recast gradually, allowing for the redemption and revitalization of indigenous African values within the legal culture.[66]

Against this background, it is both appropriate and necessary for Namibia's sentencing purposes to draw on Afrocentric values and philosophies. According to Asante, Afrocentricity reflects "African genius and African values created, reconstructed, and derived from [African] history and experiences in [Africa's] best interests".[67] This paradigm asserts African social agency and pursues decoloniality. Mapaure makes the clarion call for re-invigorating African values in order to achieve the overarching political goals of regional and continental integration in African legal theory.[68] These shared values were once virulently rejected and ostracized as worthless, primitive and backward by imperial architects of African "modern" legal systems.[69] With this in mind, African ontology and epistemology should be re-visited, revitalized and reinvigorated where appropriate.[70]

Nevertheless, the substance and manner in which African values manifest themselves are not blindly or uncritically lauded or romanticized. Legal norms and standards, especially those contained in human rights instruments, have come to influence the application of Afrocentric values on punishment. In exemplifying this, Elias records how, under *certain* African

64 D Kuwali "Decoding Afrocentrism: Decolonizing legal theory" in O Onazi (ed) *African Legal Theory and Contemporary Problems* (2014, Springer) 71 at 72.

65 The Constitution, art 140.

66 K Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal of Human Rights* 146.

67 M Asante *Afrocentricity* (1988, Africa World Press) at viii.

68 C Mapaure "Reinvigorating African values for SADC" (2011) 1/1 *SADC Law Journal* 148 at 154.

69 E Hoebe *The Law of Primitive Man* (1954, Harvard University Press). Philosophers have long propelled this myth of Africa. George Hegel, for instance, is quoted as having held the view that: "Africa is no historical part of the world; it has no movement or development to exhibit … Egypt … does not belong to the African Spirit": T Obenga "Egypt: Ancient history of African philosophy" in K Wiredu *A Companion to African Philosophy* (2004, Blackwell Publishing Ltd) 31 at 33.

70 Mapaure "Reinvigorating African values", above at note 68 at 149.

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customary laws, sorcery, witchcraft, wilful murder and treason *were* punishable by death executed through the shooting, spearing, hanging, drowning or impalement of the convicted.[71] These forms of punishment may contemporarily be described as serving a dual purpose of offender retribution, incapacitation and generally deterring the community. A reinvigoration of similar value-based rationales is not what this article promotes. In addition to the plethora of moral objections and concerns regarding effectiveness, capital punishment and cruel, inhuman and degrading treatment are peremptorily prohibited under domestic, regional and international legal instruments.[72] Moreover, African customary law is "living" law, allowing its adaptation to changing circumstances and alignment directly with the wishes of the society it binds, retaining a unique quantity of dynamism.[73]

This article's invocation of values under the umbrella term "Africa" does not imply a continent that is a homogeneous sociological grouping or monolithic body.[74] Similarly, it would be inaccurate to refer to African customary "law" but rather "laws", given the ultra-plurality of value systems that co-exist, albeit pervasively weather-beaten and made subservient to imposed values embedded in the "received law" by the history and legacy of colonial occupation outlined above. Indeed, no culture is static; Africans, in their diversity, have cross-pollinated their values with others, thereby enhancing their viability and adaptability to political, technological, economic and social changes.[75] Hence, Afrocentric values, in the context of this article, refer to those generalizable and unifying values, norms and ethos of the dynamic, pluralistic and heterogeneous societies that constitute Africa.

PUNISHMENT UNDER AFRICAN INDIGENOUS JUSTICE SYSTEMS AND *UBUNTU*

This section draws upon African indigenous justice systems (AIJS)[76] by invoking the meta-concept of *Ubuntu* to explore Afrocentric values informing African punishment. The choice of *Ubuntu* as the prism through which to understand African values and their choices of punishment is motivated by three primary reasons: the epistemology of *Ubuntu* is ubiquitous and omnipresent across various AIJS; *Ubuntu* is generally accepted across religious, political, traditional and community sectors, as well as within academic scholarship, as accurately reflecting an African worldview; there is an advanced understanding of *Ubuntu* as it has been extensively explored,

71 O Elias *The Nature of African Customary Law* (1956, Manchester University Press) at 260.

72 African Charter, art 5; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, art 1.

73 P Ongyango *African Customary Law* (2013, Law Africa Publishers).

74 O Elechi, S Morris and E Schauer "Restoring justice (Ubuntu): An African perspective" (2010) 20/1 *International Criminal Justice Review* 73 at 74.

75 Id at 73.

76 Id at 75.

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deconstructed and endorsed in African socio-cultural life, academic literature and even leading judicial pronouncements on the continent.

The etymological origins and meanings of *Ubuntu*

With the tissue of African language being figurative, it should not be a surprise that *Ubuntu*'s etymology derives from the Bantu language groups. Its most popular form of expression is *Umuntu ngumuntu ngabantu*, an Nguni expression, which roughly translates as "a human being is a human being through (the otherness of) other human beings".[77] Albeit of Nguni extraction, terms with a uniform ideological meaning can be traced beyond groups of Nguni extraction and across sub-Saharan African societies: *Gimuntu* (giKwese in Angola), *Bomoto* (iBobangi in Congo), *Umundu* (Kikuyu in Kenya), *Vumuntu* (shiTsonga in Mozambique), *Uuntu* (Oshindonga in Namibia) and *Bumuntu* (kiSukuma in Tanzania), demonstrating that the basic idea of *Ubuntu* is shared by indigenous peoples in sub-Saharan Africa.[78] Sheik Anta Diop has even demonstrated permeation of *Ubuntu* north of the Africa / sub-Saharan Africa divide, through the concept *Ma'at* in Egyptology.[79] Consequently, *Ubuntu* remains an anchoring feature across African societies. The continental ubiquity of *Ubuntu* is important to highlight in recognizing the reality that contemporary Namibian territory was conceived arbitrarily with little regard to the differences in ethnicity and ways of life. Therefore, despite Namibia's diversity in ethnicity and values,[80] *Ubuntu* is evidently a unifying value that cuts across *all* Namibian communities of African indigeneity, thereby implying a form of belonging that is neither based on a social contract understanding nor a notion of national homogeneity.[81]

Moving to substance, *Ubuntu* is said to resist easy definition.[82] It is "recognised when practiced [sic]", "exists only when people interact with each

77 Ibid.

78 C Gade "What is *Ubuntu*? Different interpretations among South Africans of African descent" (2012) 31/3 *South African Journal of Philosophy* 484 at 486; N Kamwangamalu "Ubuntu in South Africa: A sociolinguistic perspective to a pan-African concept" (1999) 13/2 *Critical Arts: South-North Cultural and Media Studies* 24 at 25; D Louw "The African concept of Ubuntu and restorative justice" in D Sullivan and L Tifft (eds) *Handbook of Restorative Justice* (2008, Routledge) 161.

79 Sheik A Diop *Pre-Colonial Black Africa: A Comparative Study of the Political and Social Systems of Europe and Black Africa: From Antiquity to the Formation of Modern States* (1988, Columbia University Press) at 141.

80 Within a population of approximately 2.5 million people, there are 13 distinct ethnic groups and 52 traditional authorities, each with its own customs and law: MO Hinz "Traditional governance and African customary law" in N Horn and A Bösl (eds) *Human Rights and the Rule of Law in Namibia* (2008, Konrad Adenauer Stiftung) 59.

81 D Cornell "Transitional justice versus substantive revolution" in D Cornell *Law and Revolution in South Africa* (2014, Fordham University Press) 1 at 1.

82 C Himonga, M Taylor and A Pope "Reflections on judicial views of Ubuntu" (2013) 16/5 *Potchefstroom Electronic Law Journal* 372 at 374.

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other"[83] and "cannot be neatly categorized and defined [as] any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea".[84] This definitional nebulosity may partly be attributed to the reality that the substance of *Ubuntu* is often communicated creatively, with varied societal interpretations. This is because, as Ongyango[85] and Mapaure[86] suggest, African customary laws reflect values enshrined by ancestors, being persistently passed down generations through oral traditions that include idioms, musicology and folklore, becoming binding on community members "since time immemorial".[87]

In this light, a description (as opposed to a rigid, singular definition) of *Ubuntu* is appropriate. *Ubuntu* represents multi-generational experiences and is a multi-dimensional, relational worldview representing the core values of African ontologies: interconnectedness, common humanity, collective sharing, obedience, humility, solidarity, communalism, dignity and responsibility to each other.[88] Similarly, it is a prescription for treating others as one would like to be treated, representing a command to care for one other and embrace the principle of reciprocity and mutual support.[89]

Ubuntu within punishment

As an African philosophy of punishment, *Ubuntu* is evident in its enduring usage for settling disputes daily and in conflict resolution at different levels, whether within family or community contexts, or in post-conflict nation-state contexts such as South Africa's Truth and Reconciliation Commission.[90] Accordingly, in AIJS, the most important objective of punishment is to promote communal welfare by reconciling divergent interests and maintaining societal equilibrium.[91] This prompts the conclusion that social harmony during and after punishment lies at the heart of *Ubuntu*.[92]

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83 J Faris "African customary law and common law in South Africa" (2015) 10/2 *International Journal of African Renaissance Studies* 171 at 178.

84 J Mokgoro "Ubuntu and the law in South Africa" (1998) 1/1 *Potchefstroom Electronic Law Journal* 1 at 2–3.

85 Ongyango *African Customary Law*, above at note 73 at 153–57.

86 Mapaure "Reinvigorating African values", above at note 68 at 152.

87 "Since time immemorial" is the formula used in the traditional context to ascertain legitimacy in an African traditional context: Hinz "Traditional governance", above at note 80 at 59.

88 Elechi et al "Restoring justice", above at note 74 at 75; Kamwangamalu "Ubuntu in South Africa", above at note 78 at 26.

89 Ibid.

90 DW Nabudere "Ubuntu philosophy: Memory and reconciliation" (2005) at 1, available at: <http://repositories.lib.utexas.edu/bitstream/handle/2152/4521/3621.pdf?...1> (last accessed 29 August 2019). See also C Gade "Restorative justice and the South African Truth and Reconciliation process" (2013) 32/1 *South African Journal of Philosophy* 10.

91 Elias *The Nature of African Customary Law*, above at note 71 at 153.

92 T Bennet "Ubuntu: An African equity" (2011) 14/4 *Potchefstroom Electronic Law Journal* 30 at 35.

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Jurisprudentially, the relevance of *Ubuntu* in pursuing justice through penal policy is arguably most authoritatively revealed in the South African *Makwanyane* decision on the constitutionality of capital punishment, which Namibian courts frequently cite with approval.[93] In giving *Ubuntu* a fuller exposition, Mokgoro J explained that, "[*Ubuntu* describes] the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit [marks] a shift from confrontation to conciliation".[94] Concurring, Langa J continued:

> "[*Ubuntu*] recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community [that] such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same … to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."[95]

Ubuntu, together with its attendant emphasis upon communitarian ideals, may therefore be seen as generally, but not unreservedly, distinct from the western / Kantian worldview of individualism.[96] Accordingly, Kamatali opines that "modern" (western) criminal justice systems have been dominated by the conception that individuals have free will and are able to make rational, self-interested choices; as autonomous moral agents, individuals can fairly be held accountable and punished for their choices.[97] Nabudere has argued in favour of the rejuvenation of *Ubuntu* as it "enables Africans to deal with their problems in a positive manner by drawing on the humanistic values they have inherited and perpetuated throughout their history".[98] With specific reference to criminal deviance, *Ubuntu* posits that the obligation towards, and concern for, one another is not extinguished by the wrongful conduct of a societal member.[99]

Moreover, it is manifestly true that African values are premised upon the communitarianism that *Ubuntu* reflects. African Union[100] legal instruments

93 *S v Myburgh* 2008 (2) NR 592 (SC).

94 1995 (3) SA 391 (CC), para 308.

95 Id, para 224.

96 J Holleman "An anthropological approach to Bantu law" (1949) 10 *Rhodes-Livingstone Journal* 51; J Cobbah "African values and the human rights debate: An African perspective" (1987) 9/3 *Human Rights Quarterly* 323.

97 J Kamatali "The challenge of linking international criminal justice and national reconciliation: The case of the ICTR" (2003) 16 *Leiden Journal of International Law* 115.

98 Nabudere "Ubuntu philosophy", above at note 90 at 2.

99 Elechi et al "Restoring justice", above at note 74 at 75.

100 Namibia is one of the 54 member states of the African Union, which was established in 2002 through the adoption of the Constitutive Act of the African Union, thereby

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attest to this, the most notable being the African Charter, which centralizes "peoples" and "community", thereby emphasising the collectivity of rights.[101] Idowu has, however, moved to debunk the view that African communalism makes the "individuals status precarious [as it] has no respect for individual rights".[102] He argues that the existence of communal bonds does not vitiate the individual's state, given that there is wide and general recognition of the rights of the individual *and* rights of the collective, making the relationship between individual and group a symbiotic one.[103] Applied to criminality, the failure of an individual to perform their legal obligations may "lead to severe disruptions of general relationships, and even ultimately to the break-up of the group".[104] This implies that the individual vis-à-vis community relationship is one of mutual dependence where the individual spells out and safeguards their rights within the ambience of the communal life and spirit. In turn, continuity community is enhanced by the type of reciprocity it receives from the free and unhindered dispositions of rational individuals within its enclave. Within this reciprocity in relationship, individual life is not only enhanced, but also derives meaning and significance.[105]

AFFIRMING *UBUNTU* IN SENTENCING

Going forward, this article argues that an *Ubuntu* inspired response to offending resonates with, mirrors and is suitably encapsulated by, restorative justice as an African criminal justice philosophy. Although Albert Eglash is credited with coining the phrase "restorative justice" in 1977, its practice and manifestation is neither recent nor a western invention.[106] The substance and practice of restorative justice has been established as commonplace within various systems including AIJS[107] but, after the state emerged as the dominant, centralizing power in African societies, it lost its primary status.[108] Colonial African

contd
replacing its predecessor, the Organisation of African Unity, which had been established in 1963.

101 African Charter, preamble, arts 17 and 27. See also F Viljoen *International Human Rights Law in Africa* (2nd ed, 2012, Oxford University Press).

102 W Idowu "African philosophy of law: Transcending the boundaries between myth and reality" (2004) 4/2 *Enter-Text Journal* 52 at 64–65.

103 Id at 65.

104 Ibid.

105 Ibid.

106 Cited in L Walgrave "Restorative justice: An alternative for responding to crime?" in S Shoham, O Beck and M Kett *The International Handbook of Penology and Criminal Justice* (2008, CRC Press) 613 at 615.

107 E Amadi *Ethics in Nigerian Culture* (1982, Heinemann) at 18; J Braithwaite "Restorative justice: Assessing optimistic and pessimistic accounts" (1999) 25 *Crime and Justice* 1 at 1. However, it is notable that Daly disputes this as a "mythical, extraordinary claim": K Daly "Restorative justice: The real story" 2002 4/1 *Punishment and Society* 55 at 62.

108 Elechi et al "Restoring justice", above at note 74.

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states, including Namibia, rejected the restorativism that AIJS embraced, in favour of retributivism. This is unsurprising seeing that these states were predicated upon the monopolization of violence and its dispensation to subdue and subjugate black Africans in the struggle for their political and economic independence.

With this reality in mind, this article draws on scholarship exploring restorative justice given its development over the last three decades, particularly through the works of Braithwaite.[109] Although restorative justice remains conceptually amorphous, Walgrave's well-received definition describes it as "an option for doing justice after the occurrence of an offense that is primarily oriented towards repairing the individual, relational, and social harm that is caused by the offense".[110] While restorative justice may denote both processes and outcomes spanning the entire criminal justice spectrum, the focus of this article is exclusively on restorative justice at sentencing and not during the fact-find stages. Here, *Ubuntu*-inspired restorative justice foregrounds the three interest groups of victim, offender and community. Although this trinity is to an extent relevant in Namibia's contemporary sentencing through the application of the triad of Zinn discussed above,[111] an African understanding of restorative justice through *Ubuntu* offers a unique and authentic substantive approach to sentencing purposes, as this article now explores.

The victim(s)

AIJS are victim-centric, in that victim restoration is the primary goal. Elechi contends that both the victim's vindication and empowerment are central to conflict resolution. Vindication stems from the "acknowledgment by the offender and other relevant community members that he or she has suffered some harm and losses"[112] while empowerment involves "being accorded the opportunity to bring their complaints to the community's constituted justice centres".[113] Victims would play active roles in bringing offenders to justice, defining their harms and losses, and searching for solutions acceptable to them. Currently, Namibian sentencing does not adequately provide for victims' interests and the representation of their concerns.

The offender(s)

Under AIJS, the goal is "the restoration of relationships and social cohesion rather than the promotion of social control or other penal ideology".[114] Law and social control are used as means for protecting the public and properties,

109 C Menkel-Meadow "Restorative justice: What is it and does it work?" (2007) 3 *Annual Review Law Social Science* 10 at 10.1–10.27.

110 Walgrave "Restorative justice", above at note 106 at 621.

111 Above at note at 48.

112 Elechi et al "Restoring justice", above at note 74 at 75.

113 Ibid.

114 Id at 77.

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and maintaining civil peace in communities. Offender accountability is given importance and punishment is not meted for the sake of punishment or in rigid obedience of the law, but as a means of restoration for the victim. Therefore, there is no emphasis upon just deserts or retribution.[115] In AIJS settings, the communitarian principle dictates that, "the family and community members also reap the rewards of the accomplishments of their own and as such must bear the burden of their liability too".[116] Moreover, punishment is finite, always allowing offenders to have the option and opportunity to make amends and have their community standing restored.[117]

The community

Given the centrality of communitarian notions within AIJS, community interests are an integral part of delivering justice. Faris concisely sums this up: "[a] dispute is not an isolated event confined to settling individual interests. The whole community is affected. Every member of the community is interconnected with its other members, including the disputants, irrespective of whether the one or the other is the victim or wrongdoer. Wrongdoing affects the whole community and the responsibility rests with the community to remedy the wrong".[118]

Community is aptly revealed if one considers that African conceptions of "family" in both matrilineal and patrilineal cultures incorporate the extended family and those who are not consanguineously related or associated by, for example, marriage. Moreover, Elias aptly observes how AIJS use "fictions" for effecting necessary adjustments in legal rules to enhance community. For instance, Africans call a distant, sometimes unrelated, village head "father", while remote cousins and even friends are "brothers". It is only when one appreciates that these terms are used for politeness and in the interests of group solidarity that one discovers that, when the proper occasion arises, sociological and physiological fraternity, and similarly paternity, can be emphatically differentiated.[119] Elechi, therefore, argues that the prevailing state emphasis on punishment and incarceration in response to violation of the law is destructive, not only to the actual offender as the individual confined, but also to their family, community and society at large.[120] The use of punishment is thus directed towards re-integrating offenders back into the community. Re-integration is deemed to serve, and does serve, the practical purpose of allowing offenders to remain productive members of the community, who contribute to its survival.[121]

115 Daly "Restorative justice", above at note 107 at 62.
116 Elechi et al "Restoring justice", above at note 74 at 77.
117 Ibid.
118 Faris "African customary law", above at note 83 at 181–82.
119 Elias *The Nature*, above at note 71 at 176–77.
120 Elechi et al "Restoring justice", above at note 74 at 79.
121 Id at 78.

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AIJS, RESTORATIVE JUSTICE AND RE-INTEGRATIVE SHAMING

AIJS cohere with Braithwaite's much-vaunted "re-integrative shaming" thesis as an approach to punishment.[122] Braithwaite has maintained that communitarian societies with social conditions conducive to re-integrative shaming are more likely to engage in the practice, which "treats offenders respectfully and also maintains the offenders' connection to the community".[123] Braithwaite, however, finds that, while state shaming is less potent than shaming by proximate communities, *effective* state shaming is a factor that assists societies in maintaining low crime rates.[124] Therefore, for Braithwaite, restorative justice seeks to re-integrate the offender by acknowledging the shame of wrongdoing, but then offering ways to expiate that shame through a more constructive and pedagogical process.[125]

Embedded in AIJSs' orientation to punishment are peace, relationship-building and social harmony. Sanctions are applied "only as a last resort after all other efforts have failed to realign the recalcitrant individual".[126] *Ubuntu* dictates that the pure or dominant pursuit of retributivist ideals through punishment for its own sake is contradictory to the prevailing principle that human beings are inherently good and capable of change in society.[127] In this view, the preoccupation with imprisonment as a way of dispensing criminal justice does not sit comfortably with AIJS to the extent that "punishment of the offender and a corresponding satisfaction of the offended [the victim and community] are two distinct questions that must be faced if real justice is to be achieved".[128]

Elias, in his seminal study of African customary laws, establishes that imprisonment was not in widespread use as an indigenous institution for criminal punishment.[129] The practice of contemporary restorative approaches in AIJS included apologies, restitution, acknowledgements of harm and injury, efforts to provide healing and the reintegration of offenders. This occurred with or without additional punishment. Among Namibia's indigenous communities,

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122 J Braithwaite *Crime, Shame and Reintegration* (1989, Cambridge University Press) at 80.

123 Id at 84–86.

124 Id at 97.

125 Id at 178.

126 Elechi et al "Restoring justice", above at note 74 at 80.

127 Desmond Tutu rather simplistically dichotomizes African and western criminal justice by stating that "western justice is largely retributive. The African understanding is far more restorative - not so much to punish as to redress or restore a balance that has been knocked askew": K Clamp and J Doak "More than words: Restorative justice concepts in transitional setting" (2012) 12 *International Criminal Law Review* 339 at 341. However, Daly and others extensively criticize this binary reductionism as mythical, arguing that proponents "seem to assume that an ideal justice system should be of one type only that it should be pure and not contaminated by or mixed with others": Daly "Restorative justice", above at note 107 at 62.

128 Elias *The Nature*, above at note 71 at 287.

129 Id at 262.

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this is captured in the aaKwanyama proverb, *oku kokota po omahodi*, meaning that a response to wrongdoing is aimed at wiping away the tears. Aligned with AIJS, Braithwaite takes the view that "punishment as moral education almost certainly reduces more crime than punishment as deterrence".[130] In situations where the offence is grave or serious, legal practices are still not vindictive, but are aimed at making the punishment fit the crime committed.[131] This all points to why the deprivation of individual liberty through imprisonment as an indigenous institution for punishment has been rejected in AIJS.[132] Nevertheless, this does not mean that incarceration as punishment is regarded as antithetical to restorative justice. At face value, one may view restorative justice as an alternative *form of* punishment rather than an alternative *form to* punishment.[133] Daly is correctly critical of this outlook arguing that, while characterizing restorative justice as moving away from punishment towards the guiding, correcting, educating or instructing of offenders by "justice elites" (normative theorists and practitioners) is well intended, it finds no empirical basis.[134] Daly argues that the offenders on the receiving end of this treatment comprehend and experience restorative justice as punishment, because restorative justice leads to mandatory obligations for offenders and is thus punishment.[135] In accepting Daly's perspective, accentuating restorative justice as an alternative to punishment may also prove counterproductive as offenders will treat the claim that they are not being punished, hence do not need protection from unwarranted or excessive punishment, as hypocritical.[136] Further, victims might see it as a denial of the validity of "retributive emotions - such as indignation and resentment - which they feel towards the offender", while the community may see it as "trivializing" crime through the state's response to it.[137]

Importantly, Elechi contends that, despite restorative goals in AIJS, retributive punishment has its place in the maintenance of law and order, and is rationalized as a means to an end rather than an end in itself. Retributive punishments are sometimes deemed necessary for recidivists or those posing serious threats to life or property, thereby justifying dispensing with restorative means. Here, punishments are justified as "an attempt to reinforce moral boundaries in punishing the evil-minded and giving reassurance to those who conform to society's norms".[138] AIJS recognize both individual and

130 Braithwaite *Crime, Shame*, above at note 122 at 178.

131 Kuwali "Decoding Afrocentrism", above at note 64 at 82.

132 Elias *The Nature*, above at note 71 at 262.

133 Walgrave "Restorative justice", above at note 106 at 645.

134 K Daly "Revisiting the relationship between retributive and restorative justice" in H Strang and J Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (2000, Ashgate) 33 at 40.

135 Ibid.

136 Cited in G Johnstone "Restorative justice: A form of punishment?" in Von Hirsch, Ashworth and Roberts *Principled Sentencing*, above at note 8, 198 at 209.

137 Ibid.

138 Elechi et al "Restoring justice", above at note 74 at 80.

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general deterrence as aims of punishment. However, because of the strong communitarian values in AIJS, retributive and general deterrence punishment is applied with restraint and caution. Therefore, reintegrating alienated individuals into the community remains the primary goal of AIJS, towards re-establishing community equilibrium and harmony.[139]

COMPARTIVE PERSPECTIVES IN THE PURSUIT OF *UBUNTU*-INSPIRED RESTORATIVE JUSTICE IN NAMIBIAN SENTENCING PURPOSES

As established above, Namibia's current sentencing purposes, being a colonial relic, prioritize retributive practices through punitive measures that include fines and imprisonment. This is at the expense of other recognized sentencing purposes, particularly those with a restorative outlook. An *Ubuntu*-inspired sentencing framework would stress that communities, not just the state, also take collective responsibility for ensuring offender reform and rehabilitation back into society. This article therefore investigates the challenging question of how to affirm *Ubuntu* through the reform of existing sentencing purposes, by considering two jurisdictions with codified sentencing purposes: New Zealand and, to a lesser extent, Canada. Through comparison, one is reminded that no legal system is immune from legal normativity that strongly idealizes one's culture and legal institutions, thereby treating them as inherent in the general nature of the law.[140] In acknowledging this reality, this article comparatively juxtaposes jurisdictions that apply restorative justice practices within their sentencing schemes. This is on the basis that, as Kamba holds, the most important practical purposes behind comparativism are revealed when it is employed as an aid in the legislative process and in law reform.[141] Similarly, Lazarus highlights the benefits of distancing one's self from one's local environment with the aim of bringing out the "strangeness in the familiar".[142]

Admittedly, as *Ubuntu* is uniquely African, it may have been most appropriate to draw comparisons with other African states. However, there are no suitable common law comparators. South Africa, for example, has neither codified its sentencing purposes nor endeavoured to affirm African values within its sentencing scheme.[143] Although the values that inform western societal approaches to punishment are not necessarily synchronized with the Afrocentric values advocated in this article, Canada and New Zealand remain suitable comparators: like Namibia, they are settler colonies, constitutional democracies and apply common law traditions. Most significantly, both

139 Ibid.

140 W Kamba "Comparative law: A theoretical framework" (1974) 23 *International and Comparative Law Quarterly* 485 at 495.

141 Id at 491.

142 Lazarus *Contrasting Prisoners' Rights*, above at note 42 at 3.

143 S Terblanche *The Guide to Sentencing in South Africa* (2016, Lexis-Nexis).

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have further undergone relatively recent legislative changes that re-orient sentencing towards restorative justice. Moreover, in light of the increasing pursuit of the "indigenisation of justice systems",[144] as this article advances, it is notable that New Zealand's sentencing reforms borrow heavily from traditional Maori values in responding to criminal offending.[145]

To commence, when New Zealand's legislature enacted the Sentencing Act of 2002,[146] it was the first expression of sentencing purposes and principles for judges to follow.[147] Determining sentencing purposes was among the most vexing legislative questions for sentencing reform. Roberts observes that New Zealand had a broad choice between deontological and utilitarian considerations, including whether judges should "seek to recognize harm, and affirm community values, or attempt to influence the offender's (and others') behaviour by deterring, rehabilitating or incapacitating?"[148] thereby begging the question: "[w]hich is more important: crime control or just deserts?"[149] The legislature resolved this by expressly introducing restorative justice for adult offenders, which is permissive rather than mandatory. Section 7(1) of the Sentencing Act lists eight sentencing purposes:

> "The purposes for which a court may sentence or otherwise deal with an offender are -
>
> a) to hold the offender accountable for harm done to the victim and the community by the offending; or
> b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
> c) to provide for the interests of the victim of the offence; or
> d) to provide reparation for harm done by the offending; or
> e) to denounce the conduct in which the offender was involved; or
> f) to deter the offender or other persons from committing the same or a similar offence; or
> g) to protect the community from the offender; or
> h) to assist in the offender's rehabilitation and reintegration; or
> i) a combination of 2 or more of the purposes in paragraphs (a) to (h)."[150]

144 M Findlay "Decolonising restoration and justice: Restoration in transitional cultures" (2000) 39/4 *The Howard Journal of Criminal Justice* 398.

145 J Hess "Addressing the overrepresentation of the Maori in New Zealand's criminal justice system at the sentencing stage: How Australia can provide a model for change" (2011) 20/1 *Pacific Rim Law & Policy Journal* 180.

146 Act No 9 of 2002, read together with New Zealand's Victims' Rights Act, 2002.

147 J Roberts "An analysis of the statutory statement of the purposes and principles of sentencing in New Zealand" (2003) 36/3 *Australia and New Zealand Journal of Criminology* 254.

148 Id at 255.

149 Ibid.

150 Similar sentencing purposes exist under sec 7(1) of the Capital Territory Crimes (Sentencing) Act, 2005 (Australia).

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The ordering of these purposes does not establish a hierarchy, as section 7(2) states: "[t]o avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to". Although the Sentencing Act adopts a commendable restorative justice approach, Roberts takes a critical view, arguing that it offers little guidance to judges, but merely retains all the traditional purposes (save for punishment) for courts' use.[151] Omitting to refer to "punishment" as a purpose was deliberate, which is consistent with a growing trend to eschew the term in favour of more specific and creative functions of the sentencing process.[152]

Restorative notions feature in the purposes stated above. This is exemplified by section 7(1)(b), which provides for the promotion of an offender's sense of responsibility and acknowledges harm done to the victim.[153] The sentencing principles listed under section 8(j) of the Sentencing Act also peremptorily require courts to take into account "any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur". Additionally, section 10(1) acknowledges even more explicitly the importance of restoration by permitting a court to take into account: any offers of amends (whether financial, work or service) from an offender to their victim; agreements between an offender and their victim to remedy the wrong, loss or damage; the response by the offender or their family to the offending; any measures taken or proposed for compensating or apologizing to the victim; or any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.

From this, Roberts draws the conclusion that the Sentencing Act "effectively creates a window of opportunity for counsel to initiate and develop restorative steps",[154] as it vests courts with the statutory power to adjourn proceedings after conviction but before sentencing, for the court to enable a restorative process to occur or be fulfilled.[155] Similarly, section 10(4) empowers the court to adjourn proceedings until one of a number of restorative arrangements has been completed.

In giving effect to these stated purposes of "dealing with offenders", the Sentencing Act was amended in 2007 to introduce section 10A,[156] which pioneers guidance regarding the purposes for which sentences should be used. This was achieved by establishing a hierarchy of sanctions or orders, which can be tiered (in decreasing severity) as follows: imprisonment; home detention; curfew with electronic monitoring and / or intensive supervision;

151 Roberts "An analysis of the statutory statement", above at note 147 at 267.

152 Id at 257. Sec 8 of the Sentencing Act also contains ten principles of sentencing.

153 On the application of restorative justice, see for example: *R v Martin* (2017) NZHC 1571 (7 July 2017), para 16; *Solicitor-General v Heta* [2018] NZHC 2453, para 19.

154 Sec 25.

155 Roberts "An analysis of the statutory statement", above at note 147 at 257.

156 As amended by Sentencing Amendment Act, 2007, sec 7.

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community work and / or supervision; monetary penalties (fines and / or reparation); and discharges with or without conviction.[157]

In sections 11 to 17, the Sentencing Act proceeds to prescribe extensive details of the circumstances and manner in which a court is to impose a sentence or order. Worthy of emphasis is that the imposition of imprisonment as a sentence is only permitted if it is directed towards certain enumerated sentencing principles,[158] the rationale being to ensure that imprisonment is not only reduced but also used in a principled manner.[159]

Moving to Canada, 1996 was the first time that Canada's Parliament codified sentencing purposes. Instructively, the role of community values in sentencing was expressly recognized as important, in that it was reported that one of the goals of the reforms undertaken in 1996 was to "promote a closer relationship between the practice of court and community values".[160] Section 718 of the Criminal Code of Canada commences with a fundamental statement of sentencing purpose: "to contribute, along with crime prevention initiatives, respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives".[161] Compared to the position in New Zealand, it is self-evident that these listed objectives are not as weighted towards restorative justice, given their inclusion of denunciation, deterrence, incapacitation and rehabilitation.[162] Restorative justice sentencing is predominantly pursued through victim reparations and the acknowledgement of harm to victims and the community, while sanctions that merely punish offenders without generating any tangible benefit to the victim are less important.[163] What is noteworthy is that a survey of Canadian sentencing purposes deemed that the public was likely embrace a more restorative, less punitive orientation to sentencing.[164]

Given that the foregoing discussion finds restorative approaches to sentencing compatible with the Afrocentric value of *Ubuntu*, this section explores how this can be invigorated within Namibia's sentencing framework. At present, restorative justice operates at the core of various Namibian traditional communities and their courts, but remains marginalized in mainstream criminal justice.

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157 W Young and A King "Sentencing practice and guidance in New Zealand" (2010) 22/4 *Federal Sentencing Reporter* 256.

158 See text to note 151 above.

159 Roberts "An analysis of the statutory statement", above at note 147 at 249.

160 J Roberts, N Crutcher and P Verbrugge "Public attitudes to sentencing in Canada: Exploring recent findings" (2007) 49/1 *Canadian Journal of Criminology and Criminal Justice* 75 at 81.

161 Interestingly, sec 718(2)(e) of the Canadian Criminal Code introduces a "remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing". See *R v Ipeelee* [2012] 1 SCR 433; *R v Gladue* [1999] 1 SCR 688.

162 Roberts et al "Public attitudes to sentencing", above at note 160 at 82.

163 Ibid.

164 Id at 97.

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The quandary deconstructed here is how to *legislate* for restorative justice. Namibians have collectively demonstrated an appetite for, and embracing of, *Ubuntu* through applying transitional justice mechanisms directed towards restoration, reconciliation and mutual co-existence with former belligerents after the struggle for liberation.[165] Retributivist notions were not pursued against those who perpetrated crimes of grave atrocity. However, restorative justice has not been formally transplanted into the post-independence sentencing framework, either legislatively or judicially. This necessitates correction.

The New Zealand and Canadian purposes of sentencing both provide a meaningful starting point for reforming Namibian sentencing purposes, as they borrow heavily from traditional values of the peoples in their jurisdictions and are largely oriented towards restorative justice. However, in both jurisdictions, traditional sentencing purposes also remain at the courts' disposal. This "pick and mix" approach is one that Namibia should avoid. Ashworth (writing in the context of England and Wales) argues that "picking and mixing" has a low rule of law value as it invites inconsistency "by requiring judges to consider a variety of different purposes and then, presumably, giving priority to one".[166] With *Ubuntu* sentencing purposes, retribution that looks at the past would not be on an equal footing with forward-looking restoration and reparation between victims, offenders and communities. Moreover, a hierarchical formulation of sanctions according to severity aligns with *Ubuntu*, as imprisonment is only of last resort.

This article concludes with an Appendix, setting out a proposed draft law reforming sentencing purposes under Namibia's Criminal Procedure Act, not as a final set of purposes but to start debate regarding reform.

COMMENTARY ON APPENDIX

The reader is encouraged to read the following brief explanation of the proposals made in the Appendix.[167] Proposed section 1 commences by establishing a "fundamental principle" of sentencing, ie proportionality between the severity of the offence, the offender's degree of culpability, and the type and severity of the sentence. This is proposed in light of the present conflation between sentencing principles and purposes. The proposed section two then details the purposes of sentencing, emphasizing the relationship between proportionality as the fundamental sentencing *principle* and the fundamental sentencing *purpose* of restorative justice, to be understood through African *Ubuntu*. This is

165 A du Pisani, R Kossler and W Lindeke (eds) *The Long Aftermath of War: Reconciliation and Transition in Namibia* (2010, ArnoldBergstraesser-Institut).

166 Ashworth *Sentencing and Criminal Justice*, above at note 27 at 78.

167 In addition to New Zealand and Canada, the proposal borrows from sentencing reforms in England and Wales and Israel. Israeli reforms are reflected in the Penal Law (Amendment No 113) (2012) 2337 LSI 170, which is reproduced and translated into English in J Roberts and O Gazal-Ayal "Sentencing reform in Israel: An analysis of the statutory reforms of 2012" (2013) 46/3 *Israel Law Review* 479.

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designed to permit and require the court to reflect and affirm restorative justice through the African worldview of *Ubuntu*, thereby displacing retributive dominance. While it is acknowledged that *Ubuntu* remains external to the imported legal culture, the explicit reference to it should be seen as an affirmation of African values and juridical principles, translating into an attempt to mandate the courts to give *Ubuntu* substantive legal meaning. Proposed section 2(2) proceeds to jettison the current four sentencing purposes and replace them with a list of nine. In addition to offender accountability, these new purposes seek to accommodate victim and community interests, as is required by an African response to offending. Offenders' rehabilitation and societal re-integration is provided for, in addition to infusing in them a sense of responsibility and acknowledgement of harm. Reparations for harm caused by an offender, a significant omission from existing sentencing purposes, is specified. Deterrence, individual and general, is accommodated through proposed sections 2(2)(f) and (g). The proposal also accepts that it may be necessary to protect the community from offenders. Crucially, the proposals allow for individual *or* multiple sentencing purposes to be achieved concurrently.

The proposed section 3 considers the possible types (orders) of sentences that can be imposed in consideration of the proportionality principle and the sentencing purposes stated. The permissible orders are hierarchical, reflecting an emphasis upon restorativism. Proposed section 3(1) provides that these orders include existing orders of paying fines and committal to institutions established by law, but adds two new forms of sentence: community service and supervision, and reparations to benefit wronged victims and communities. These sentencing orders can be imposed singly or in combination. Proposed section 3(2) focuses on imprisonment sentencing orders, which are proposed as subservient to the above orders, only to be invoked where it is determined that the principle and purposes of sentencing cannot be achieved without an imprisonment order. A hierarchy is established for various forms of imprisonment: home detention, periodic imprisonment or (full) imprisonment, as a response to the problem of over-incarceration, and the indignity it brings, which is in tension with *Ubuntu*. The inclusion of imprisonment thus acknowledges that an offender's full removal from society may be appropriate and necessary in certain circumstances.

The proposed section 4 concludes the Appendix by stating a duty to give reasons for, and the effect of, an imposed sentence, to be provided in open court, in ordinary language and in general terms. This is in response to the reality that offenders are frequently unfamiliar with sentencing legalese, hence the need consciously to affirm individual deterrence and enthuse offender responsibility through the sentence. The obligation to provide reasons for the purposes and type of sentence mitigates sentencing inconsistency that grows out of "pick and mix" sentencing purposes, as Ashworth postulates.[168]

168 Ashworth *Sentencing and Criminal Justice*, above at note 27 at 78.

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CONCLUSION

This article has explored the affirmation of African values within Namibian sentencing purposes. Determining such purposes is necessary in order to avoid the confusion that stems from a multiplicity of sentencing philosophies, with their varying degrees of appeal and application by judicial officers. Scholars persuasively argue for the codification of sentencing purposes, which could result in greater consistency and certainty in sentencing. It has been demonstrated that Namibia's sentencing regime largely remains a prisoner of colonial legal history. No corrective measures have been taken to develop sentencing purposes that are congruent with the legitimate values of Namibian peoples. The failure to prescribe sentencing purposes has resulted in concerning gaps. The traditional, judicially established sentencing purposes of retribution, deterrence, prevention and rehabilitation have increasingly come under the microscope in other jurisdictions. Even when these are applied, there is no consistency: individual judges exercise discretion as to the sentencing purpose(s) applied, an aspect that was striking in the *Van Wyk* and *Brandt* decisions that emphasized retribution. Moreover, judicial decisions frequently conflate sentencing purposes with sentencing principles as a result of this uncertainty. This haphazardness should be remedied through a re-examination of responses to criminal offending and by jettisoning the historical outlook towards retribution, which represents a relic of the colonial legal system.

Having freed herself from the yoke of colonialism and the corollary of the super-imposition of external values, it is crucial that Namibia re-invigorates African values as embodied in *Ubuntu*. This will not only result in laws with moral credibility and resonance but also legitimacy, thereby effectively placing law back into the hands of the communities it strives to protect. This article has thus argued that *Ubuntu* aligns with restorative justice as a sentencing purpose. The emphasis is not upon retribution. *Ubuntu* simultaneously emphasizes communality and advocates for victim-centric criminal justice. Simultaneously, the punishment of offenders is as a means to restoration between the offender and their victim and community. AIJS do not adopt a zero-sum approach to justice. Braithwaite's theory of re-integrative shaming resonates with AIJS. It has also been established that restorative approaches in AIJS lean away from incarceration in favour of reparations, apologies, restitution, and acknowledgements of harm and injury. This has been exemplified by sentencing reforms in New Zealand and Canada, which codified plausible restorative justice purposes within sentencing. The proposals reflected in the Appendix are an attempt to start the reform debate to draft legislation that affirms African values in Namibia's sentencing purposes.

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APPENDIX: PROPOSED LEGISLATIVE AMENDMENT TO SENTENCING PURPOSES IN THE CRIMINAL PROCEDURE ACT, 1977 OF NAMIBIA

1. Fundamental principle of sentencing

The fundamental principle that the sentencing of an offender shall seek to achieve is the maintenance of proportionality between the seriousness of the offence committed by the offender, the degree of their culpability, and the type and severity of his or her sentence.

2. The purposes to be achieved through sentencing

(1) Guided by the fundamental principle set out in section 1, the sentence imposed shall promote the fundamental sentencing purpose of restorative justice that is rooted in, and understood through, African *Ubuntu*.

(2) In addition to sub-section (1), the sentence imposed shall achieve the following purposes -

- (a) holding an offender accountable for wrong done to the victim and the community by the offending; or
- (b) assisting in the offender's rehabilitation and reintegration into society; or
- (c) promoting in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
- (d) providing for the interests of the victim of the offence; or
- (e) providing reparation for harm done by the offending; or
- (f) denouncing the conduct in which the offender was involved; or
- (g) deterring the offender or other persons from committing the same or a similar offence; or
- (h) protecting the community from the offender, where necessary; or
- (i) a combination of two or more of the purposes in subsections (a) to (h).

3. Sentencing orders

(1) In order to comply with the fundamental principle of proportionality in section 1 and to achieve the purposes of sentencing in section 2, the following sentences may be passed by a competent court, namely -

- (a) an order for community service and supervision; or
- (b) an order to provide reparations; or
- (c) an order to pay a fine; or
- (d) committal to an institution established by law; or
- (e) a combination of two or more of the orders in subsections (a) to (d).

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(2) In the event that a competent court makes a determination that the purposes of sentencing in sections 1 and 2 shall not be achieved though one of the orders in subsection (1), the following sentences may be passed, namely -
   (a) home detention; or
   (b) periodic imprisonment; or
   (c) imprisonment.

4. Duty to give reasons for, and explain the effect of, a sentence

Any competent court sentencing an offender must state in open court, in ordinary language and in general terms, its detailed reasons for deciding on the sentence passed, and its effects.

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