Decolonising the South African Criminal Procedure: Towards a Critical Approach to the Use of *uBuntu* in Sentencing

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Abstract

South African Criminal Procedure has colonial roots which are yet to be fully uprooted. While several sections of the *Criminal Procedure Act* 51 of 1977 have been declared unconstitutional, much of the Act remains steeped in colonial legacies. Moreover, the minimum sentencing legislation, passed after democracy, also resembles the laws enforced by colonisers. This article challenges the colonial nature of the South African Criminal Procedure Regime and calls for its decolonisation. It proposes and endorses the use of *ubuntu* in sentencing proceedings to promote a culture of decolonisation. *uBuntu* is an African value which confronts the retributive and colonial nature of Criminal Procedure. The article builds on the current literature on decolonisation in South African law by focussing specifically on the decolonisation of Criminal Procedure and on how *ubuntu* can be adopted to assist in the process. While the Constitutional Court in *Makwanyane* 1995 3 SA 391 (CC) was praised for its interpretation of *ubuntu* in the abolition of the death penalty, subsequent criminal courts have been loath to apply it. This needs to change. The article is presented in four parts. Firstly, it looks at the concepts of colonisation, decolonisation and *ubuntu*. It then examines the historical colonial roots of sentencing in South Africa from 1652 up until the enactment of the *Criminal Procedure Act*, the current regime. Thirdly it analyses how *ubuntu* can be utilised and applied by presiding officers during sentencing. The study concludes by making several recommendations.

Keywords

uBbuntu; sentencing; South Africa; decolonisation; *Criminal Procedure Act*; colonisation; minimum sentencing; retribution.

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1 Introduction

In 1810 Saartjie Baartman left South Africa for England. She looked forward to making a fortune overseas. Instead she became one of the first South African victims of human trafficking, and once she had died a French museum pickled her brain and genitals.[1] Her remains were returned to South Africa only in 2002. She was a victim of colonisation. Colonialism is a crime and egregiously genocidal.[2] Colonial processes continue to oppress the oppressed in South Africa.[3] Indeed, "the transition to the 'new' South Africa did not restore full, integral, comprehensive and unencumbered sovereignty to the indigenous peoples conquered in the unjust wars of colonisation."[4] The transition from Apartheid was a compromise and the legal system has also been compromised. There has, however, been some hope. In 1998 Justice Mokgoro wrote an article about *ubuntu,* the role that it can play in the African renaissance, and demonstrated "the potential that traditional African values of *ubuntu* have for influencing the development of a new South African law and jurisprudence."[5] Africanisation and decolonisation have made slow progress in the new democratic dispensation but there has been some good progress in transformative constitutionalism as depicted by the landmark Constitutional Court judgments over the last few decades. The Africanisation and decolonisation of the South African criminal justice system has similarly had its ups and downs. South African criminal procedure is codified in the *Criminal Procedure Act* 51 of 1977 (*CPA*).[6] The roots, however, can be found in Roman-Dutch Law and predominantly in English law.[7] The South African criminal justice system therefore exhibits aspects of colonialism.

There have been many amendments to the *CPA* since the rise of democracy in 1994 and important transformative and decolonial jurisprudence by the Judiciary, but more needs to be done to address the matter. This article focusses on how a more progressive stance on decolonisation in relation to criminal procedure could lead to a more effective system and one that would be appreciated by its citizens. Insufficient academic attention has been given to the decolonisation of the

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1 Saartjie Baartman Centre for Women and Children date unknown http://www.saartjiebaartmancentre.org.za/about-us/saartjie-baartmans-story/.

2 Williams *The American Indian* 6.

3 See Nielsen and Robyn *Colonialism is Crime* 1.

4 Ramose 2007 *GLR* 313.

5 Mokgoro 1998 *PELJ* 17.

6 The *Criminal Procedure Act* 51 of 1977 (the *CPA)* contains over 340 sections.

7 Van der Merwe "Basic Introduction to Criminal Procedure" 22.

Law of Criminal Procedure in South Africa.[8] Most scholarship has focussed on the decolonisation of South African legal education.[9] It is important for South Africa to ensure that it decolonises fully, considering that it was subjected to centuries of colonialism. Decolonisation broadly refers to giving a voice and listening to non-Western individuals.[10] In South Africa western individuals were in control of the country during the establishment of the formal criminal justice system and created a colonial system of justice.

This paper will examine how the law of criminal procedure could be further decolonised by analysing how the values of *ubuntu* could be better applied during sentencing proceedings. Sentencing is an aspect of criminal procedure and provides an ideal platform for judicial officers to apply the values of *ubuntu*. Sentencing is one of the last stages of the criminal justice process and also the most difficult one for judicial officers and offenders alike. It is complex because the life and prospects of the convicted offender at this stage are solely in the hands of the magistrate or judge. The presiding officers wield significant power, which was especially evident prior to the advent of democracy, when judges often passed the death penalty.[11] While the days of the death penalty are well behind us, various aspects of the current sentencing regime remain steeped in colonial practices, mainly because South Africa has not done enough to formally address decolonisation in the criminal justice system. The decolonisation of the sentencing regime is imperative because South Africa cannot afford to subject its offenders as well as the victims of crimes to practices that are still colonial. The central contribution which this article makes is that the current sentencing regime has not been decolonised fully. The author argues that *ubuntu* can play a significant role in this proposed decolonisation, especially because in traditional Africa concepts such as *ubuntu*, indigenous justice, community and restoration are interlinked.[12] *uBuntu* is an African value that has been interpreted by our highest courts and debated among scholars but it seems to be a philosophical value instead of a value that can be used to the advantage of the people. While *ubuntu* played a significant role in the 1995 judgment in *S v Makwanyane*,[13] where the Constitutional Court abolished the death penalty, other criminal courts have been reluctant to apply the values of *ubuntu* during sentencing. This article questions and challenges this position.

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8 For an overview of the literature that has been written on the matter, see generally Xaba *Exploring the Principle of uBuntu*; Himonga, Taylor and Pope 2013 *PELJ*; Mokgoro 1998 *PELJ*.

9 See for example Himonga and Diallo 2017 *PELJ*; Motshabi 2018 *Strategic Review for Southern Africa*; Louw and Van Wyk 2016 *Social Work*.

10 Thambinathan and Kinsella 2012 *IJQM* 1.

11 See Magobotiti 2022 *Scientia Militaria* 104-114.

12 Schoeman "African Concept of uBuntu" 291.

13 See, for example, *S v Makwanyane* 1995 3 SA 391 (CC) para 308 (*Makwanyane*).

The article makes an important contribution to the field of law and decolonisation and adds to the current body of literature by focussing primarily on how sentencing practices could be decolonised using the African value of *ubuntu*. This is important because the South African criminal justice system as a whole still requires significant change if it is to address and eradicate its colonial roots. The article is all the more important as the author is not aware of any prior attempt to address the decolonisation of South African criminal procedure law.

The main research questions which this article examines are (a) to what extent is South African Criminal Procedure colonial, and (b) how can *ubuntu* be implemented to decolonise sentencing in South Africa? The article is presented in four parts. Firstly, it looks at the concepts of colonisation, decolonisation and *ubuntu*. It then examines the historical colonial roots of sentencing in South Africa from 1652 up until the enactment of the *CPA*, the current regime. Thirdly it analyses how *ubuntu* could be utilised and applied by presiding officers during sentencing. The study concludes by making several recommendations.

2 Conceptualising decolonisation and *ubuntu*: A South African perspective

2.1 Colonisation versus decolonisation

In order to understand the meaning of decolonisation it is necessary to examine what is meant by colonisation. Apart from its mission to "civilise" and christianise[14] Ramose describes colonialism as having the intention "to annihilate and obliterate all the experiences of the indigenous conquered peoples, replacing their experience and knowledge with [the colonisers'] own unilaterally defined meaning of experience, knowledge and truth."[15] Wa Thiong'o defines classic colonialism in Africa to mean:

> the exploitation of Africa's natural resources and the exploitation of African labour by European capital. Africa became the source of raw materials, the source of cheap labour and also a market for European goods. This exploitation was accompanied by direct political rule and direct oppression and suppression of the people by colonial armies and police.[16]

Colonisation also involves an arbitrary replacement of the conquered people's culture – a calculated exercise.[17] South Africa's colonisation by the Dutch in 1652 and by the British in 1795 was deliberate and systematic. Roman-Dutch Law, reformed religion, capitalism and slavery were some of

14 Christianisation refers to the spreading of the gospel by the colonisers, and in an African context the gospel was communicated by Westerners to Africans. See Van der Merwe 2016 *Stellenbosch Theological Journal* 581.

15 Ramose 2007 *GLR* 313.

16 Wa Thiong'o *Writers in Politics* 119.

17 Sesanti 2019 *JBS* 434.

the tools used to colonise the Cape at the time.[18] The English employed strategies similar to those of the Dutch and also introduced English legal principles, including civil and criminal procedure. Finally, internal colonisation took place during the 20th century when South Africa was under Afrikaner rule.[19] Decolonisation could therefore start in earnest only after 1994 with the fall of Apartheid - or did it?

Decolonisation, like colonisation, does not have a universal definition. It can be defined as "both a calculated process of military engagement and diplomatic negotiation between the two contending parties: colonial and anticolonial."[20] It was also inevitable, though it took longer in some countries than in others.[21] This sense of inevitability was referenced by the United Nations when the General Assembly passed the *Declaration on the Granting of Independence to Colonial Countries and People* on 14 December 1960,[22] which states that "the peoples of the world ardently desire the end of colonialism in all its manifestations."[23] Decolonisation further involves a commitment to end racism and to reimagine the world in terms of a progressive political project.[24] Apart from its political manifestation, it also includes economic, cultural and psychological elements.[25] Decolonisation is achieved not only by the achievement of political independence but also by the achievement of economic control.[26] In South Africa the achievement of economic control and land redistribution have failed, which has prevented actual decolonisation. This failed decolonisation is often attributed to the tendency of the decolonised world to mimic the Western world.[27] This is regularly seen in so-called decolonised education which actually includes the elements of a western curriculum and propagates a western ideology that is subtly designed to westernise African minds.[28] If South African law students are taught a westernised law degree then how can we expect our future lawyers to decolonise the justice system? The concept of "decolonisation" has not been discussed in great detail by our courts but it did surface in the recent case of *Afriforum v Economic Freedom Fighters,* where the Economic Freedom Fighters stated

18 Oliver and Oliver 2017 *HTS Theological Studies* 4-5. Also see Mudimbe's work on how religious missions fostered colonialism, Mudimbe *Invention of Africa* 44-97.
19 See Oliver and Oliver 2017 *HTS Theological Studies* 5.
20 Betts "Decolonization" 23.
21 Betts "Decolonization" 24.
22 *Declaration on the Granting of Independence to Colonial Countries and Peoples* UN Doc A/RES/1514(XV) (1960).
23 *Declaration on the Granting of Independence to Colonial Countries and Peoples* UN Doc A/RES/1514(XV) (1960).
24 Horton 2021 *The Lancet* 1950.
25 Gardiner "Decolonization" 269.
26 Betts "Decolonization" 29.
27 Betts "Decolonization" 34.
28 See Hlatshwayo and Alexander 2017 *Journal of Education* 52.

that free and decolonised education is one of its non-negotiable pillars.[29] After the #FeesMustFall movement, which started in South Africa in 2015, there has been some progress in decolonising higher education by requesting law faculties to include Decolonisation, "Africanisation" and Transformative Constitutionalism in their curriculum.[30] Africanisation refers to the affirmation of the African identity and culture in the global arena and not about excluding Europeans.[31] Transformative Constitutionalism, on the other hand, generally refers to transforming a nation's social and political institutions and power relationships in a participatory and democratic direction.[32] All in all, the progress of incorporating these theories has been slow and it can be argued that the LLB curriculum has not been fully decolonised. Merely including elements of "Africanisation" and Decolonisation into the curriculum will not suffice. The degree needs a complete overhaul. Only then will we see some kind of significant change.

Decolonisation can be considered to be violent in that "the naked truth of decolonisation evokes for us the searing bullets and blood-stained knives which emanate from it."[33] This was seen during the Truth and Reconciliation Commission (TRC) hearings in South Africa during the mid-90s, when victims had to relive their horrific apartheid experiences.[34] Apart from the economic, cultural, educational and psychological elements, the legal impact of decolonisation is important. This could take the form of acknowledging human rights abuses, holding those to account who committed atrocities during colonial times, or restructuring the legal system, the issue to which this article aims to contribute. It seems therefore, as discussed above, that the South African transition has not included a meaningful push for decolonisation.

2.2 South Africa in a state of limbo

Scholars such as Ramose and Madlingozi have labelled the South African *Constitution* colonial and it can only be decolonised if the coloniser's "right of conquest" is terminated.[35] Madlingozi posits that

> terminating this assumed right would begin the process of terminating the bifurcated world because this putative right grounds the colonisers' self-arrogation of the power to draw a line that separates humans from those who

29 *Afriforum v Economic Freedom Fighters* (EQ 04/2020) [2022] ZAGPJHC 599 (25 August 2022) para 69.

30 See Council on Higher Education 2017 *Briefly Speaking* 1-12. See generally Naude 2019 *J Bus Ethics* 23-37.

31 Makgoba *Mokoka* 199.

32 Klare 1998 *SAJHR* 146.

33 Fanon *Wretched of the Earth* 29-30.

34 See generally TRC 1998 https://www.justice.gov.za/trc/report/, and in particular the third volume of the TRC Report dealing with the testimonies of the victims of the TRC.

35 Ramose 2007 *GLR* 321; Madlingozi 2017 *Stell LR* 140.

> are deemed sub-human; those who have the right to conquer and those who are liable to be conquered; those who form part of the polity and those banished to its underside.[36]

These arguments also fall within the broader concept of recolonisation, where one country perpetuates and reinstates its former control over another country.[37] Another concept that is also important to note is that of neo-colonialism, where "social and economic inequalities in former colonising and colonised states were and continue to be evident…"[38] In the case of South Africa, it is arguable that we have never been decolonised, let alone recolonised, but that we are in a state of neo-colonialism. Madlingozi frames South Africa's current state of affairs as one of neo-apartheid.[39] He explains the concept of neo-apartheid as colonialism which "has survived the so-called transition from apartheid to post-apartheid in that impoverished black people remain ensnared in a zone of stasis" while they feel excluded from the "miracle" of the new South Africa.[40] It has been over 25 years since democracy and the "miracle" is only true for a few. Ndlovu-Gatsheni concludes that "South Africa is a typical example of a society where the myths of decolonisation and illusions of freedom are manifesting themselves in broad daylight in a most detestable form."[41] The situation on the ground remains tense. The 2021 riots in Gauteng and KwaZulu-Natal underlined the inequality in South Africa and COVID-19 exposed the reality of a neo-apartheid state.[42]

At the height of the COVID-19 pandemic, thousands of people were arrested in South Africa, convicted and sentenced for violating COVID-19 regulations.[43] Some of the crimes were trivial, such as not wearing a mask in public and driving around during curfews. Moreover, the sentences that the offenders received were too harsh and left many of the offenders with a criminal record, even those who decided to pay an admission of guilt fine.[44] It must also be acknowledged that the pandemic presented the criminal justice system with unique challenges never faced before as it was not business as usual – but business unusual. It is argued that the State should have adopted a more restorative approach to COVID-19-related offences, which could have included informal mediation instead of convictions that led

36 Madlingozi 2017 *Stell LR* 140-141.
37 Horton 2021 *The Lancet* 1950.
38 Maekawa 2014 *J Imp & Commonw Hist* 334. Also see generally Nkrumah *Neo-Colonialism*.
39 See generally Madlingozi 2017 *Stell LR*.
40 Madlingozi 2017 *Stell LR* 125.
41 Ndlovu-Gatsheni 2012 *TWQ* 77.
42 See Harris-Cik 2021 *Acta Criminologica* i.
43 See for example, Lubaale 2020 *SACJ* 684-706.
44 The payment of admission of guilt fines is regulated by s 57 of the *CPA*. For a comprehensive overview of admission of guilt fines, see Van As and Erasmus 2020 *SACQ* 57-67.

to criminal records.[45] Restorative justice includes the healing of the offender and the victim and the involvement of the community in the process of justice.[46] Restorative justice is in direct contrast with the punitive way in which the State dealt with COVID-19 offences. It is good to be able to note, however, that the South African parliament passed a bill on 19 September 2023 which would expunge the criminal records of those offenders who committed minor crimes during the pandemic, which include not wearing a mask, curfew-related offences and other such offences.[47]

The *Criminal Law Amendment Act* 105 of 1997 (the *CLAA*) provides for minimum sentences, another harsh form of sentencing in South Africa. This reflects a criminal justice system that is focussed on punishment. The author argues that the South African criminal justice system has colonial roots and is sometimes unnecessarily retributive. These colonial roots are apparent in the fact that the South African criminal justice system is solely based on punishing the offender and does not include the community in seeking justice, which would lean more towards an approach consistent with the African value of *ubuntu*. Subjecting young adults and first-time offenders to minimum sentencing laws and imposing severe penalties and sentences on offenders during the COVID-19 lockdowns showcased the flaws in South Africa's criminal justice system. A restorative approach or an approach steeped in *ubuntu* should have been adopted. Most of these flaws in the system should have been amended since the advent of democracy, yet 30 years later criminal procedure has not been decolonised fully. Surely, more should have been done to address these concerns by now. In this regard Ramose observes that:

> [d]etention without trial is clearly an instance of law working against the protection and recognition of human dignity. This is what we have now with the new dispensation: a law that actively retards the process of justice for the indigenous conquered peoples of South Africa. It is quite ironical that most of the so called negotiators including Mandela himself were trained lawyers, how could they not see that? Seriously ironical. [Cyril] Ramaphosa, lawyer, Matthew Phosa, lawyer, Mandela, lawyer. Where did they study the law, how could they not see? I don't think it makes sense! It just cannot make sense.[48]

Our country has been in a state of limbo since 1994, like a teenager with an identity crisis - a rainbow nation, colourful yes, but heavily sedated and confused. The author believes that the process to fully decolonise South Africa will be a painstaking one, but one that needs to happen sooner rather than later. It is argued that *ubuntu* could be the solution, the ultimate way to

45 See Staff Writer 2021 https://businesstech.co.za/news/lifestyle/481707/over-400000-people-have-been-arrested-for-breaking-south-africas-covid-19-rules/.

46 See Bean *Punishment* 13.

47 Maseko 2023 https://www.bbc.com/news/world-africa-66877630.

48 Ramose 2016 *PINS* 97.

eradicate colonialism and its remnants for good – or at least in the realms of criminal procedure.

2.3 The value and philosophy of ubuntu

uBuntu is of significant value in the decolonising project and hence requires a deeper understanding and exploration. It is the foundational value of all Africans. It is a beautiful value and philosophy grounded in compassion and respect for others. Mbiti euphorically defines *ubuntu* as "I am because we are, and since we are, therefore, I am."[49] In Nguni languages *ubuntu* is a short form of the acclaimed African principle known in full as *umuntu ngumuntu ngabantu* (in the Zulu language) and in Sotho it is translated as *motho ke motho ka batho*.[50] These phrases can be loosely translated as "a person is a person through other persons."[51] *uBuntu* is difficult to define as it is a state of being.[52] It is a personal experience and something that you realise when you see it.[53] "Ubuntu represents the African ontology of humanness and the essence of African humanity."[54] It is a living value. It seeks to instil humanity, human dignity and social protection amongst humans.[55] The Kwazulu-Natal High Court Division in *S v Mncube* defined it "as a fundamental African value embracing dignity, human interdependence, respect, neighbourly love and concern."[56] It involves a sense of integration and hospitality towards strangers.[57] *uBuntu* is also known as one of the narratives of return, as it has been used to restore the identity and dignity of Africans.[58] It has been an informal and tacit philosophy for centuries among Africans south of the Sahara.[59] It is therefore an important value for the African Union, which used the slogan "Africa, ubuntu! – stronger together" to encourage African States in the fight against COVID-19.[60]

Despite the fact that *ubuntu* is a special African form of community orientation and is located within African traditional communities,[61] the value of *ubuntu* is global, being loosely related to the generally accepted notions

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49 Mbiti *African Religions* 141. Also see Etieyibo "uBuntu and the Environment" 635.
50 Letseka 2012 *Stud Philos Educ* 48.
51 Letseka 2012 *Stud Philos Educ* 48.
52 Mnyongani 2010 *Obiter* 135.
53 Mokgoro 1998 *PELJ* 18.
54 Dauda "African Humanism and Ethics" 476.
55 Tshoose 2009 *AJLS* 12.
56 *S v Mncube* (Judgment on Sentence) (CCP42/2021) [2023] ZAKZPHC 16 (17 February 2023) para 1.
57 Tshoose 2009 *AJLS* 13.
58 Matolino and Kwindingwi 2013 *SAJP* 198.
59 Van der Walt and Oosthuizen 2021 *PiE* 89.
60 See AU 2020 https://au.int/en/videos/20200521/stronger-together-covid19. Also see Henrico 2016 *US-China Law Review* 823.
61 See Tshoose 2009 *AJLS* 13.

of our common humanity and the need to care for others. Chief Seattle of the Duwamish and Suquamish tribes in 1854 held that

> the earth does not belong to man; man belongs to the earth. This we know. All things are connected like the blood which unites one family. All things are connected.[62]

Harper Lee, the American novelist who authored *To Kill a Mockingbird,* wrote:

> you never really understand a person until you consider things from his point of view. Until you climb inside of his skin and walk around in it.[63]

uBuntu refers to community and not solitude. Dr Martin Luther King Jr explained that:

> All life is interrelated. We are all caught in an inescapable network of mutuality, tied into a single garment of destiny. Whatever affects one directly, affects all indirectly.[64]

uBuntu is truly a global phenomenon, a connection that all humans share, and has been influential in healing transitional societies or at least ensuring relative peace and reconciliation in turmoil, such as in the case in South Africa.[65] It has not, however, had the desired impact in relation to South African law reform.

The Preamble of the *Promotion of National Unity and Reconciliation Act* 34 of 1995, the legislation that regulated the South African TRC, states that "there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization."[66] Reconciliation in South Africa was facilitated through a political dialogue, which included a compromise between the former rulers and the incumbents in the context of incomplete decolonisation.[67]

The 1993 interim *Constitution* included the value of *ubuntu* in its postamble by stating that:[68]

> [t]he adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

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62 Kaiser "Chief Seattle" 527.
63 Lee *To Kill a Mockingbird* 36.
64 King Jr 1967 https://soundcloud.com/user-763792570/dr-martin-luther-king-jr-a-christmas-sermon-1967.
65 See Eliastam 2015 *Verbum et Ecclesia* 1.
66 *Promotion of National Unity and Reconciliation Act* 34 of 1995.
67 Mandaza "Reconciliation and Social Justice" 509.
68 See Postamble of the *Constitution of the Republic of South Africa Act* 200 of 1993.

The *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) omits any reference to the word *ubuntu*. No explanation was provided for the omission. The justification for the exclusion, according to several authors, is that the spirit of *ubuntu* is captured in various parts of the *Constitution* including the Preamble, where the words "united in our diversity" and provisions related to the development of customary law can be linked to *ubuntu*.[69] The Constitutional Court and other high courts have also made concerted efforts to apply the value of *ubuntu* in selected cases, a matter which this paper will discuss shortly, and especially in the light of criminal cases.[70]

Before we can examine how *ubuntu* can contribute to decolonising sentencing, an analysis of the colonial roots of criminal procedure and more specifically sentencing in South Africa is apt.

3 Colonial criminal procedure in South Africa

When South Africa became a colony of the Dutch in the 17th century, the indigenous peoples had their own unwritten laws and this included criminal procedure, and more generally, ways to deal with offenders in their communities.[71] This was, however, egregiously overshadowed and supplanted during the colonial periods between 1650 and 1994. This forceful dominance and manifestation of European legal principles over indigenous law fuelled racism at the time as indigenous law was seldom recognised as valid law.[72] The indigenous people were not prepared for the savagery imposed on them by colonial criminal procedure. This colonial system is still operational in South Africa today as South African Criminal Procedure was never formally decolonised. Below I examine some important periods between 1652 and 1977, just before the passing of the *CPA*.

3.1 1652-1806

When the Dutch occupied and colonised the Cape in 1652 the Roman-Dutch law system of criminal procedure was introduced. The criminal court structure in the Cape differed from that of the Netherlands as the High Court, located in Cape Town, was known as the *Raad van Justisie* and had both civil and criminal jurisdiction.[73] Appeals were heard by the Supreme Court of Batavia.[74] Criminal procedure at the time was regulated by the Ordinance

69 See, for example, Netshitomboni *uBuntu* 7; Himonga, Taylor and Pope 2013 *PELJ* 373.
70 See section 4.1 of this article.
71 For a history of criminal procedure in indigenous societies, see generally Maine *Early History of Institutions*.
72 Du Bois 2004 *IJLI* 218.
73 Dugard *South African Criminal Law* 18.
74 Dugard *South African Criminal Law* 18.

of 1570,[75] a Roman-Dutch law, also applicable in the Netherlands during the seventeenth and eighteenth centuries.[76] The Prosecutor at the time had limited powers as the Court decided whether a prosecution should proceed or not.[77] The Ordinance embodied a barbarous system of criminal justice and included sentences such as breaking on the wheel,[78] hanging, and strangling.[79] The torture of prisoners (and in particular slaves) was the order of the day, as captured by this statement by Botha:

> [t]he early Cape records show that not only the rack, but also the thumbscrew was used for this purpose. The degree of torture seems to have varied. We read of the prisoner being brought into the torture room *ad actum proximum*. The accused was hoisted up by a rope tied to his hands and suspended by a pulley from the ceiling. Weights were attached to his great toes. These weights varied according to the degree of torture. "Full torture" consisted of 50 lb. weights being suspended from each of the great toes.[80]

Other sentences included whipping, banishment, branding, dismemberment, imprisonment, fines and the confiscation of property.[81]

3.2 1806-1910

With the British occupation in the early 19th century, Roman-Dutch law remained in force in the Cape. The English made a few changes to the court structure, however.[82] In addition to the *Raad van Justisie*, a High Court of Appeals for criminal cases was established, replacing the Supreme Court of Batavia.[83] Circuit courts were established and certain procedures were introduced, such as an accused appearing before a court within eight days.[84] The accused were allowed the representation of counsel but only when the trial started.[85] To add insult to injury, convicted offenders were even forced to pay the costs of the criminal proceedings.[86] The different forms of sentencing employed during the Dutch colonisation were still in force.[87] In 1827 the Supreme Court for the Cape of Good Hope was

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75 The Ordinance which dealt exclusively with criminal procedure was passed by Philip II of Spain on 9th July 1570.

76 See Geldenhuys and Joubert *Criminal Procedure Handbook* 15; Dugard *South African Criminal Law* 5-6, 18.

77 Dugard *South African Criminal Law* 18.

78 This consisted of tying an offender to a big wooden wheel in a public square, breaking an offender's bones with a wooden wheel, applying other methods of torture and then letting the offender die. See Medievalists.net 2019 https://www.medievalists.net/2019/09/archaeologists-discover-medieval-man-broken-on-the-wheel/.

79 Dugard *South African Criminal Law* 10.

80 Botha 1915 *SALJ* 322.

81 Dugard *South African Criminal Law* 19.

82 Lansdown, Hoal and Lansdown *South African Criminal Law* 7.

83 Dugard *South African Criminal Law* 19-20.

84 Dugard *South African Criminal Law* 21.

85 Dugard *South African Criminal Law* 22.

86 Dugard *South African Criminal Law* 23.

87 Dugard *South African Criminal Law* 23.

established.[88] In 1828 the British enacted the Cape Criminal Procedure Ordinance and shortly thereafter the *Evidence Ordinance* of 1830.[89] These ordinances regulated criminal procedure until the early 20th century. In 1869 it was decided that the death penalty was not to be carried out in public any more.[90] The colonies of the Cape, Natal, Orange Free State and Transvaal had their own courts and followed the 1828 and 1830 Cape ordinances.[91] Today, many elements of English criminal procedure and to a lesser extent Roman-Dutch law, are part of our current criminal procedure regime.

3.3 1910-1977

Before South Africa became a Union in 1910 the *South Africa Act*, 1909 established the Supreme Court of South Africa. The Highest Court at the time was the Judicial Committee of the Privy Council, the court of final appeal for the UK overseas territories and Crown dependencies, which still exists today.[92] In 1917 the *Criminal Procedure and Evidence Act* 31 of 1917 was enacted and regulated the entire criminal justice process, from arrests to pardons.[93] The Act, which contained over 392 sections, is what most of the current Act is based on.[94] At the time, jury trials were in effect but the accused did not have a choice to have a trial by jury or a trial by judge, which the 1917 Act included.[95] The 1917 Act abolished most barbaric sentences but the death penalty, whipping and other less heinous sentences remained intact. In 1955 the 1917 Act was repealed and replaced by the *Criminal Procedure Act* 56 of 1955. The 1955 Act was amended by 30 statutes and trial by jury was eventually abolished in 1969, eight years after South Africa became a Republic.[96] The jury system was never a success in South Africa as only white people were elected jurors, which led to racially charged jury results, yet another form of colonial criminal imposition.[97] Before 1955 only murder, rape and treason were punishable by death, with murder carrying a compulsory death sentence.[98] Punishment under the 1955 Act and the subsequent amendments took a turn for the worse. The following discretionary death penalty offences, amongst others, were included in the late 50s and 60s: robbery and housebreaking with aggravating circumstances, sabotage, terrorism, and kidnapping and child stealing.[99]

88 Erasmus 2013 *Fundamina* 273.
89 See Lansdown, Hoal and Lansdown *South African Criminal Law* 7.
90 Dugard *South African Criminal Law* 27.
91 See Lansdown, Hoal and Lansdown *South African Criminal Law* 7.
92 For its latest judgments, see the Judicial Committee of the Privy Council date unknown https://www.jcpc.uk/.
93 See generally Le Roux-Kemp and Horne 2011 *SACJ* 268.
94 Dugard *South African Criminal Law* 34.
95 Dugard *South African Criminal Law* 34.
96 Dugard *South African Criminal Law* 41-42.
97 See Dugard *South African Criminal Law* 42-43.
98 Dugard *South African Criminal Law* 46.
99 Dugard *South African Criminal Law* 46-47.

This resulted in South Africa's becoming the highest ranked country in the world in relation to executions, especially during the mid-60s, with 122 prisoners executed in 1966.[100]

3.4 The Criminal Procedure Act 51 of 1977 (the CPA)

The current *CPA* (or the Act) has been amended 75 times, which indicates how South Africa has attempted to sever the Act from its colonial roots. The abolition of the death penalty in *Makwanyane* was an important anticolonial change and stressed the significance of *ubuntu* and human dignity.[101] The *Constitution* has played a major role in destroying the colonial foundations of the Act.[102] Needless to say, this was not possible during apartheid as a result of parliamentary sovereignty.[103] It is submitted, however, that several provisions of the sentencing regime of the Act, which this paper focusses on, are still colonial. Three of those provisions are discussed below.

A form of neocolonial punishment is the payment of an admission of guilt fine. This fine, which is a form of sentence in South African law, is regulated by section 57 of the Act. The fine can be issued by a police officer or a prosecutor once the accused has admitted that he has committed one of the offences, which are mainly minor offences.[104] The accused does not have to appear in court since the fine can be issued before or after an accused appears in court.[105] What makes this fine colonial in nature and against the spirit of *ubuntu* is that the accused obtains a criminal record after paying the admission of guilt fine.[106] It is argued that this sentence, which is aimed at severely punishing the offender for committing a minor offence, is not in line with the spirit of *ubuntu,* as alternatives to a criminal record could be explored, including community service.

The accused are sometimes not informed that the payment of the fine will result in a conviction and criminal record. In *S v Parsons* the Court held that the police officer had not informed the accused that an admission of the commission of the offence in question, namely disturbing the peace, would result in a conviction and criminal record.[107] The Court held that there was

100 Van Niekerk 1967 *Annual Survey* 471-472.

101 *Makwanyane* para 149.

102 See for example *Makwanyane*; *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 11 BCLR 1105 (CC) (*Centre for Child Law*); *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC).

103 For a discussion of parliamentary sovereignty in the late 1980s in South Africa, see Dlamini 1989 *De Rebus*.

104 See s 57 of the *CPA*.

105 See ss 57(1)(*a*) and 57A of the *CPA*.

106 Section 57(6) of the *CPA*.

107 See *S v Parsons* 2013 1 SACR 38 (WCC). Also see Van As and Erasmus 2020 *SACQ* 59. For other cases involving the payment of admission of guilt fines, see *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 4 SA 738 (A); *S v Gilgannon* (040/2013) [2013] ZAGPJHC 226 (29 August 2013); *S v Karan* 2019 2 SACR 334 (WCC).

a duty on every police officer to inform the accused of all the consequences of the payment of these fines.[108] The payment of a traffic fine is also regarded as a conviction and a sentence but a criminal record is not attached to it. This section of the *CPA* is unnecessarily severe and should be reviewed as it makes little sense to punish with the imposition of criminal records individuals who commit minor crimes. This is not in the spirit of *ubuntu*.

Sentencing is regulated in general under Chapter 28 of the Act as well as the *CLAA*. Life imprisonment is currently the most severe sentence after the abolition of the death penalty in 1995.[109] This sentence is effectively reserved for accused who must be permanently removed from society.[110] The imposition of the sentence means that the accused must stay in prison for the rest of his/her life,[111] even though release on parole, after serving 25 years, is provided for in the *Correctional Services Act* 111 of 1998.[112] This sentence is fundamentally retributive and colonial because it was inherited from the colonisers and does not fall within the spirit of *ubuntu*. Harsh punitive sentences were not part of the social structure of indigenous cultures, as people lived in close proximity to one another and reconciliation was often used to respond to crime.[113] Similarly, Ndeunyema explains that "Namibia's current sentencing purposes, being a colonial relic, prioritize retributive practices through punitive measures that include fines and imprisonment."[114] Retributive sentences such as life imprisonment are inherently colonial as they do not embody African values, but rather a Western approach to criminal law.[115]

Former Justice of the Constitutional Court, Judge Edwin Cameron, who opposes life sentences and minimum sentencing legislation explains that:

> [t]he major response to the crime wave in our country should be to recognise that the sole inhibiting institutional response to criminal conduct is the certainty of detection, the certainty of follow up, the certainty of arraignment, the certainty of prosecution – and the certainty of punishment. In this certainty, the length of sentence plays no role. In other words, whether a potential rapist faces a sentence of 2, 5, 10 years or life, it is not the length of sentence but the certainty of sentencing that will make them stop.[116]

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108 *S v Parsons* 2013 1 SACR 38 (WCC) paras 4-5.
109 Section 276(1)(*b*) of the *CPA*.
110 *S v Bull* 2001 2 SACR 681 (SCA) para 21.
111 *S v T* 1997 1 SACR 496 (SCA) 498g-h.
112 Section 73(6)(*b*)(iv) of the *Correctional Services Act* 111 of 1998. This section also provides that an accused, sentenced to life imprisonment may be released on parole when s/he reaches the age of 65, providing s/he has already served 15 years of the sentence. Also see Terblanche *Guide to Sentencing* 268.
113 Louw and Van Wyk 2016 *Social Work* 491.
114 Ndeunyema 2019 *JAL* 349.
115 See generally Ndeunyema 2019 *JAL*.
116 Cameron 2020 *SACQ* 7.

These statements by Cameron are insightful and underscore how the length of a sentence should not be regarded as the holy grail. It is more about the South African Police Service arresting suspects and the National Prosecuting Authority (NPA) ensuring that offenders are successfully charged and prosecuted. The majority of people,[117] however, are generally in favour of harsh punishments and the public plays an integral role in creating new legislation through public participation.[118] The Constitutional Court held in *S v Makwanyane* that the majority of South African citizens were in favour of the death penalty, but this, fortunately, did not alter the decision of the Court to abolish the death penalty.[119] The Supreme Court of Appeal importantly held that a sentencing policy that caters exclusively for public opinion is inherently flawed.[120] This general view of retribution by the public is an example of how colonialism and apartheid have infiltrated the African heritage and values and feeling of humanity for one another.[121] These views should be challenged by government and *ubuntu* should be promoted in relation to sentencing practices.

It is clear from the above that the *CPA* has not been fully decolonised. This is the Act that lecturers teach to young legal scholars at universities, that police officers must enforce, that prosecutors must enforce, and that Judges must interpret on a daily basis. The CPA simply cannot remain colonial in nature.

Apart from the *CPA*, various other Acts of parliament and provisions also form part of the South African criminal procedure regime and must be read in conjunction with the *Criminal Procedure Act*.[122] One of these laws is known as the Minimum Sentencing Legislation,[123] another colonial law which is regulated by the *CLAA*.

3.5 Minimum sentencing legislation

South African legislators, including the Dutch and British colonial rulers, have on several occasions limited the discretion of judicial officials. The South African laws at material times were subordinate to the parent laws in either the Netherlands or Britain as the relevant colonial powers. Section 1 of the *Cattle Theft Repression Act* 16 of 1864 compelled judges to impose a minimum sentence of three years for the theft of sheep and cattle.[124] This

117 See generally *Makwanyane* paras 87-89.
118 Goliath 2022 *Obiter* 787-788.
119 *Makwanyane* para 87.
120 *S v Mhlakaza* 1997 2 All SA 185 (A) para 7. Also see *S v Robertson* (CC 4112020) [2022] ZAWCHC 104 (18 May 2022) para 24.
121 See Ndeunyema 2019 *JAL* 331.
122 See, for example, the *Criminal Law Amendment Act* 105 of 1997 (*CLAA*) and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.
123 See s 51 of the *CLAA*.
124 See Farlam 2003 *Fundamina* 2.

led to an enormous surge in the number of prisoners in the Cape at the time and forced the legislature to pass a Bill granting more discretion to judges.[125] In the 1970s minimum sentencing legislation was passed, which forced presiding officers to impose minimum sentences against their will, but nevertheless fell out of favour for two decades until 1997.[126] *CLAA* introduced minimum sentences for certain offences. For example, life imprisonment is prescribed for accused who have been convicted of rape with aggravating circumstances and premeditated murder.[127] If a court is convinced that there are substantial and compelling reasons to impose a lesser sentence than the minimum sentence it may impose such a sentence.[128] The constitutionality of the minimum sentencing legislation was tested in *S v Malgas*[129] *and S v Dodo*.[130] The Supreme Court of Appeal and the Constitutional Court respectively decided in these cases that section 51 of the *CLAA* is not unconstitutional as it was found to be consistent with an offender's fair trial rights and the separation of powers principle.[131]

Moreover, the *CLAA* initially provided that minimum sentencing legislation was applicable to children between the ages of 16 and 18.[132] This matter was before the Constitutional Court in *Centre for Child Law v Minister for Justice and Constitutional Development* in 2009 and the Court decided that the imposition of minimum sentences violated the rights of children between the ages of 16 and 18 and was not in their best interests.[133] It is inexplicable that the legislature initially decided to compel judges to enforce this neo-colonial law on children between the ages of 16-18. It is argued that the *CLAA*, although enacted after 1994, is a neocolonial experiment because it does not exhibit any characteristics of *ubuntu* and African philosophy. In fact, it removes the discretion of judges to impose lesser sentences where they believe the offender should rather be subjected to restorative justice practices or where a lower-than-average sentence is appropriate.[134] It is further argued that because the criminal justice system was never formally decolonised, new criminal procedure laws such as the *CLAA* were not subjected to anticolonial critique in Parliament. South Africa has had a violent past, and imposing minimum sentences on violent offenders would at first glance therefore seem to be justified. It is also in line with public opinion. Indeed, the judges in *Makwanyane* held that the majority of the

125 Farlam 2003 *Fundamina* 2.
126 Dugard *South African Criminal Law* 47; Terblanche *Guide to Sentencing* 49.
127 Section 51(1) of the *CLAA*.
128 Section 51(3)(*a*) of the *CLAA*.
129 *S v Malgas* 2001 3 All SA 220 (A).
130 *S v Dodo* 2001 3 SA 382 (CC).
131 *Dodo* para 49; *Malgas* para 18. See also Terblanche "Sentence" 399-441.
132 Section 51(6) of *CLAA*.
133 *Centre for Child Law* para 78. See also Terblanche "Sentence" 412.
134 See Muntingh *South African Prison Reform* 385; Cameron 2020 *SACQ* 3.

public were in favour of the death penalty.[135] Why would Parliament then want to object to the *CLAA*? Importantly, the minimum sentencing legislation was supposed to be a temporary solution to the problem of crime in South Africa when it was passed in the late 1990s.[136] The *Criminal Law (Sentencing) Amendment Act* 38 of 2007, however, extended the system until it was expressly scrapped.[137] Parliament therefore knew that the minimum sentencing legislation was retributive and not a permanent solution to the problem of crime, but has continued to extend it. It is argued that this is an example of how retributive sentencing practices are ingrained in the DNA of the South African criminal justice system. The minimum sentencing laws should never have been extended in 2007. This extension by parliament of a retributive regime is an outcome of the fact that South Africa as a society has never truly decolonised.[138] We cannot therefore expect criminal procedure and sentencing to be subjected to decolonisation if the executive, the legislature and the judiciary have not been decolonised.

Minimum sentences have now been applied in our courts for over 25 years and the consequences are dire, because just as in 1864, the prisons have as a result started to become more and more overcrowded.[139] Again and again the law makers make the same mistakes concerning minimum sentencing legislation.[140] The COVID-19 pandemic further exposed South Africa's deteriorating prison system, which remains a site for sexually transmitted diseases, HIV and TB.[141] Such overcrowded institutions are not a place to rehabilitate offenders and are contrary to the spirit of *ubuntu*. This is not surprising, since the word "*ubuntu*" was not mentioned once in the *Malgas* and *Dodo* cases.

Yet what is the role of the *Constitution* in interpreting the Law of Criminal Procedure? Section 39(2) of the *Constitution* provides that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." When it comes to statutory interpretation, presiding officers are not bound by what statutory law provides but by what the *Constitution*, as the supreme law, provides.[142] The *Constitution* therefore through our courts should play an instrumental role in ensuring that colonial laws are abolished.[143] However, colonial laws cannot

135 *Makwanyane* para 87.
136 Terblanche "Sentence" 441.
137 Terblanche "Sentence" 441.
138 See generally Madlingozi 2017 *Stell LR*; Ngcukaitobi *The Land is Ours*.
139 See Cameron 2020 *SACQ* 3. Also see Goliath 2022 *Obiter* 787.
140 See Farlam 2003 *Fundamina* 2.
141 See Cameron 2020 *SACQ* 5.
142 *Centre for Child Law* para 107.
143 See *Makwanyane* para 333 for a discussion of the death penalty as a colonial sentence.

be abolished if challenges to colonial laws are not brought to court, or when parliament continues to rule that retributive and neo-colonial laws such as the minimum sentencing laws are legitimate. It is therefore important for civil society and other role players to challenge any laws that are colonial and overly retributive. This will ensure that the courts have the opportunity to measure these laws against the *Constitution* and determine whether they are within the spirit, purport and objects of the Bill of Rights.[144] The other problem is that while it can be argued that *ubuntu* falls within the ambit of "spirit, purport and objects", I argue that this is not sufficient. *uBuntu* needs to be expressly part of the *Constitution.*

4 Applying *ubuntu* in sentencing proceedings

This section of the paper analyses the use of or failure to use *ubuntu* by South African courts. Since the word *ubuntu* does not appear in *the Constitution* or any other law applicable in our courts on a daily basis, it is left to the discretion of the judiciary to apply *ubuntu* in sentencing proceedings.

4.1 Ubuntu *jurisprudence*

The landmark case involving the applicability of *ubuntu* in sentencing proceedings remains the case where the Constitutional Court abolished one of the most severe colonial sentences in the history of South Africa, the death penalty. In *S v Makwanyane* the court held that:

> [g]enerally, ubuntu translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing 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 emphasises a respect for human dignity, marking a shift from confrontation to conciliation. In South Africa ubuntu has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly prized. It is values like these that [s 39(1)(a)] requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.[145]

uBuntu also permeates other areas of the law including civil litigation. The Constitutional Court in *MEC for Education: KwaZulu Natal v Pillay* declared unconstitutional a school's decision to force a pupil to remove her nose stud

144 See Currie and De Waal *Bill of Rights Handbook* 148.
145 *Makwanyane* para 308.

which she wore in accordance with Hindu tradition.[146] The court applied *ubuntu* and held that

> cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.[147]

uBuntu has also featured prominently in cases involving socio-economic rights. The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* dealt with an eviction order and held that *ubuntu*

> combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.[148]

During the 2020 lockdown the courts also added important judgments regarding religious gatherings and how important it is to apply the value and ideals of *ubuntu* in these matters.[149] The value of *ubuntu* was also raised in South Africa's most publicised case at the time, that of the trial for murder of Oscar Pistorius.[150] Barry Roux, Pistorius's defence attorney, argued that *ubuntu* should be applied at his sentencing.[151] He argued that society had become used to the idea that imprisonment has become the most appropriate sentence in murder cases and instead called for punishment that addressed the interest of all parties.[152]

These references to *ubuntu* speak about the South Africa we all dream of and where we are truly one. *uBuntu* focusses on healing instead of revenge, unity instead of division, building up and not breaking down, respect and not tyranny. This is the power of *ubuntu* in criminal and civil proceedings, and which led eventually to the decision that the death penalty was not a sentence fit for a new South Africa. However, the imposition of minimum sentencing legislation and other colonial sentences has left offenders stranded and without hope in a country that apparently lives by the spirit of

146 *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) paras 4-5.

147 *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) para 53.

148 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37. Also see *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 38; Currie and De Waal *Bill of Rights Handbook* 590.

149 *Mohamed v President of the Republic of South Africa* 2020 5 SA 553 (GP) para 63. Also see *Moela v Habib* (Gauteng Division, Johannesburg) (unreported) case number 2020/9215 of 23 March 2020 para 60.

150 See *Director of Public Prosecutions, Gauteng v Pistorius* 2016 1 SACR 431 (SCA).

151 See News24 2014 https://www.news24.com/News24/oscar-has-lost-everything-roux-20141017-2.

152 News24 2014 https://www.news24.com/News24/oscar-has-lost-everything-roux-20141017-2.

ubuntu. A sentenced offender cannot develop and achieve his full potential if the justice system leaves him to his own devices and with a lack of support from the community and the judiciary.[153] This is not a decolonised system of criminal justice. This colonial system is not challenged when *ubuntu* is omitted from criminal proceedings.

4.2 Exclusion of ubuntu *from criminal proceedings*

Although *ubuntu* featured in the postamble of the 1993 *Constitution,* the inclusion of *ubuntu* in post-apartheid jurisprudence, especially in the field of criminal procedure, is scant.[154] It was disappointing that the Constitutional Court did not include any reference to the omission of *ubuntu* in the certification judgment of the 1996 *Constitution*.[155] This is surprising seeing that the certification judgment was delivered a year after *ubuntu* had been reflected on by the court in *S v Makwanyane*.[156] The assumption would have been that *ubuntu* would become a staple in criminal cases after *Makwanyane*, but this was not to be. Instead, courts apply mechanical sentencing guidelines bereft of *ubuntu*.[157]

In a recent sentencing judgment, where the Southern Circuit High Court sentenced a serial murderer to multiple life imprisonment terms, Judge Wille started his judgment by referring to the following sentencing guidelines and how sentencing is approached in South Africa:

> [s]entencing often requires more thought and consideration than is traditionally given to this very difficult process. Sentencing involves a very delicate balancing act, taking into account, inter alia, the seriousness of the offences perpetrated by the offender, the offender's personal circumstances and the vested interests of society. This is often referred to as the triad in *Zinn*. The imposing of sentence on an offender, therefore of necessity, requires an evaluative and objective analysis of a number of difficult and differing factors.[158]

In *S v Mudyiwayana* the court concluded the judgment by explaining the importance of deterrence and retribution and that rehabilitation or a reformative sentencing approach would not be applicable in this case since the offender is not a "fallen angel".[159] The court then ruled that parole should not be considered in this case by the court and indicated that it is up to the parole board to consider parole.[160] In effect, the judge might well have

153 See, for example, Gyekye "Person and Community in African Thought" 321.
154 Cornell and Van Marle 2005 *AHRLJ* 196.
155 See, for example, *Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC).
156 See *Makwanyane* paras 225-227.
157 See generally Cameron 2020 *SACQ*.
158 *S v Mudyiwayana* (CC17/2020) [2022] ZAWCHC 23 (2 March 2022) (*S v Mudyiwayana*) para 1.
159 *S v Mudyiwayana* para 45.
160 *S v Mudyiwayana* para 46.

sentenced the accused to life without parole, a brutal sentence which is not included in the *CPA*. The author is not blind to the fact that this offender is a dangerous person and should not be walking in our streets. However, the tone of the judgment is severely retributive and lacks the conciliatory tone and reference to comity included in *Makwanyane*.[161]

While Wille J in *S v Mudyiwayana* clearly applied a retributive form of punishment on the offender, it is worth noting how he referred to reformative and rehabilitative sentencing, which are generally known as restorative justice. In *S v Matyityi* Ponnan J held that "restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the State - it is an injury or wrong done to another person."[162] Restorative justice has a significant impact on the victims of crime and has been shown to be more satisfying for them, simply because they are part of the criminal justice process.[163] In effect, adopting restorative justice processes during sentencing is a reflection of *ubuntu*, because the offender is not seen only as an individual acting against the State, but also as an individual whose relationships with the family of the victim and the familial state need to be restored.[164] This is a truly communal process and it can be said to be anticolonial. Restorative justice will not be applicable in all cases, especially those that are more serious, but if the family of the victim is open to reconciliation, the path should be cleared for such a sentencing option.

Punishment is foreign to the indigenous justice system, as it seeks the outcome of a prisoner of shame instead of an offender who is imprisoned.[165] Western law and justice do not include such practices as shaming.[166] The system's retributive foundation is largely based on the biblical dictum of "an eye for an eye", which has become the thrust of South African law over the centuries.[167] Such a retributive criminal justice system cultivates judges who are focussed on punishment and ignore the human element of punishment and accountability. Then again, the word *ubuntu* appears in neither the *Judicial Service Commission Act*[168] nor the Code of Judicial Conduct.[169] If judges are not compelled to apply *ubuntu* in criminal proceedings, then only a selective few will be open to applying *ubuntu* in sentencing.

161 See for example *Makwanyane* para 230.
162 *S v Matyityi* 2011 1 SACR 40 para 16-17. Also see *S v Jantjies* (CC42/20) [2022] ZAWCHC 200 (6 October 2022) para 7.
163 Imiera 2018 *De Jure* 92.
164 See generally Schoeman "African Concept of uBuntu".
165 Keevy 2009 *JJS* 29. See Ntlapo *uBuntu Justice* 70.
166 Keevy 2009 *JJS* 30.
167 See *Makwanyane* para 129.
168 *Judicial Service Commission Act* 9 of 1994.
169 GN R865 in GG 35802 of 18 October 2012.

In *S v Gordon*[170] Thulare AJ delivered a scathing reprimand of a magistrate who failed to apply *ubuntu* in relation to criminal procedure and made the following telling remark:

> the attitude of the Magistrate leaves a disconcerting revelation of a lack of knowledge or appreciation of his constitutional obligations. The principle of Ubuntu which is at the core of being and defines Africa, is simply absent. Nothing on the record gave any hope that the Magistrate played his crucial role of giving content and meaning to the rights of an unrepresented accused.[171]

What is promising in the *S v Gordon* case is that the high court judge called the magistrate out and explained the importance of *ubuntu* in our justice system. In *King v De Jager,* which dealt with a succession matter, the Constitutional Court in general terms "affirmed *ubuntu* as a principle in our law which should inform all forms of adjudication."[172] It is time to live up to this affirmation.

5 Conclusions and recommendations

uBuntu has become the Cinderella of South African criminal procedure. This study has shown that there has been a reluctance among criminal court judges to apply *ubuntu* on a regular basis.[173] *Makwanyane* was the blueprint for interpreting *ubuntu* in sentencing, as demonstrated in part 4 above. However, because judges have such a wide discretion in passing sentences, *ubuntu* has fallen through the cracks. As a result, and due to the influence of colonial practices over centuries, the current sentencing regime in South Africa does not align with the projects of Africanisation and decolonisation.[174] The criminal justice system is colonial and retributive. While the majority of South Africans still call for excessive punishment and long sentences, including the death penalty,[175] the author challenges this neo-colonial view. It is hereby submitted that *ubuntu* should be included in the *Constitution*,[176] the *CPA*, the *Judicial Service Commission Act*, the Code of Judicial Conduct and any other acts related to criminal procedure. Even though the Bill of Rights includes several rights that include reference to *ubuntu* such as the right to human dignity, the right to life and various other fundamental rights,[177] the author holds the conviction that *ubuntu* should be

170 *S v Gordon* (171298) [2018] ZAWCHC 106 (29 August 2018).
171 *S v Gordon* (171298) [2018] ZAWCHC 106 (29 August 2018) para 16.
172 *King v De Jager* 2021 4 SA 1 (CC) para 237.
173 See section 4.2 of this article.
174 See section 2 of this article for a definition of these theories.
175 See Currie and De Waal *Bill of Rights Handbook* 259.
176 Alternatively the Bill of Rights should be interpreted to include *ubuntu* as a fundamental value when interpreting law relevant to sentencing.
177 See generally Xaba *Exploring the Principle of uBuntu*; Himonga, Taylor and Pope 2013 *PELJ*; Mokgoro 1998 *PELJ*.
177 See for example Himonga and Diallo 2017 *PELJ*; Motshabi 2018 *Strategic Review for Southern Africa*.

included in the Constitution as a stand-alone fundamental value. In addition, the author submits that the inclusion of *ubuntu* in the Constitution and in legislation that is relevant to sentencing would enhance the enforcement of this value and the ability of the public to hold the judiciary accountable for the development of *ubuntu* as a fundamental value. It should be applied not only by a handful of judges but should become the norm, especially during sentencing proceedings. It should be customary for a presiding officer to interpret *ubuntu* and to connect *ubuntu* to the spirit, purport and objects of the Bill of Rights.

In the light of this critical analysis of the implementation of *ubuntu* in the South African Law of Criminal Procedure, the following recommendations are made:

(a) It is submitted that the defence should be more conscious of making representations for the consideration of *ubuntu* during sentencing. Legal Aid South Africa and the Legal Practice Council should look at holding workshops for defence counsels throughout the country focussing on the implementation of *ubuntu* in sentencing.

(b) While the inclusion of informal mediation at the NPA over the last few decades should be praised,[178] prosecutors and presiding officers, both in the magistrates' courts and in the superior courts, should be trained to incorporate *ubuntu* into their interpretation of the law.

(c) The Department of Justice (when exercising oversight over magistrates) and the Judicial Service Commission (in its oversight role over judges) should include questions about *ubuntu* and its relation to the law of criminal procedure when interviewing candidates.

(d) The admission of guilt fines should be reviewed and it is submitted that criminal records for such admissions should be expunged, even if certain conditions have to be imposed for qualifying for the said expungement. Moreover, the minimum sentences legislation should be repealed and should have no place in our law.

(e) There is a need to create a pathway for change by instituting regular national dialogues on punishment and *ubuntu* since law reform is not a one-size-fits-all solution to the problem.

Presiding officers should have the freedom to pass sentences that are fair to both the community and the offender, while at the same time promoting *ubuntu* as a fundamental value. *uBuntu* knows no boundaries and can

178 See NPA 2020 https://www.npa.gov.za/sites/default/files/New%20NPA%20Strategic%20Plan%202020_2025.pdf 54.

transform our criminal procedure, which will not only improve the lives of offenders but also the security of society at large.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
AJLS	African Journal of Legal Studies
AU	African Union
CLAA	Criminal Law Amendment Act 105 of 1997
CPA	Criminal Procedure Act 51 of 1977
GLR	Griffith Law Review
IJLI	International Journal of Legal Information
IJQM	International Journal of Qualitative Methods
JAL	Journal of African Law
J Bus Ethics	Journal of Business Ethics
JBS	Journal of Black Studies
J Imp & Commonw Hist	Journal of Imperial and Commonwealth History
JJS	Journal of Juridical Science
NPA	National Prosecuting Authority
PELJ	Potchefstroom Electronic Law Journal
PiE	Perspectives in Education
PINS	Psychology in Society
SACQ	South African Crime Quarterly
SACJ	South African Journal of Criminal Justice

SAJHR	South African Journal on Human Rights
SAJP	South African Journal of Philosophy
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
Stud Philos Educ	Studies in Philosophy and Education
TRC	Truth and Reconciliation Commission
TWQ	Third World Quarterly