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Sentencing practice, policy, and reform in southern and eastern Africa

Editorial

This special issue of the *South African Journal of Criminal Justice* explores sentencing in a number of African jurisdictions. The essays constitute a step towards filling a significant gap in the international sentencing literature. They are based upon presentations made to an international seminar held at the University of Oxford in June 2019.* The issue had its genesis some time ago, when the editors independently grew increasingly frustrated at the dearth of scholarship on sentencing on the African continent. Julian Roberts's interest in Africa comes from having been born in Kenya and raised in Tanzania, whereas Stephan Terblanche considers himself African in marrow and bone.

In 1967, Judge Hiemstra contrasted the attention given to the question of guilt or innocence of the accused person with the determination of sentence: no time, talent or resources are spared to adjudicate verdict, whereas sentencing usually occupies only a few minutes of court time (VC Hiemstra *Suid-Afrikaanse Strafproses* (1967) 407). Hiemstra's comments echoed and reaffirmed similar sentiments expressed by many commentators. A notable example may be found in Nigel Walker's colourful phrase that, '[if] the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby' (Walker *Sentencing in a Rational Society* (1969) 1). The question is to what extent these sentiments remain true, half a century later, in Africa.

Recent decades have witnessed a resurgence of interest in sentencing around the world. This activity has naturally attracted a significant degree of scholarship. Regrettably, almost all of this work has focused on the Western jurisdictions, particularly the United States and England and Wales. (For recent scholarship on sentencing reform in Western

* The editors express their gratitude to the University of Oxford Africa Initiative, the Faculty of Law, and the Centre of Criminology for financial support. We are also very grateful to the authors for travelling to Oxford to share their work in this seminar.

jurisdictions, see M Tonry (ed) *Sentencing policies and practices in Western countries. Comparative and cross-national perspectives* (2016); C Spohn & P Brennan (eds) *Handbook on sentencing policies and practices in the 21st Century. Corrections and sentencing* (2019); JV Roberts & L Harris 'Sentencing guidelines outside the United States' in Spohn & Brennan (ibid)).

One explanation for this emphasis on western jurisdictions is that sentencing guidelines originated in the United States of America in the 1970s. However, we should not assume, simply because guidelines have been operating the longest in the US that they represent the most useful approach to structuring judicial discretion. This is particularly true for multiracial and post-colonial societies such as those in southern and eastern Africa. The iconic two-dimensional grid structure used in approximately 20 US jurisdictions has attracted little interest outside the US. In addition, most US guidelines have evolved little since their creation in the 1970s and 1980s (JV Roberts 'The evolution of sentencing guidelines: Comparing Minnesota and England and Wales' (2019) *Crime and Justice* 187). The guidelines in Minnesota, for example, now operates three sentencing grids instead of one, but otherwise, the architecture and the level of guidance is largely unchanged since 1980 (R Frase 'Sentencing guidelines in Minnesota, 1978–2003' (2005) 32 *Crime and Justice* 131). The same is true for most other US guidelines. More recently, a more comprehensive system of guidance has emerged in England and Wales (JV Roberts & A Ashworth 'The evolution of sentencing policy and practice in England and Wales, 1996–2015' in Tonry (op cit) 307). This approach has been modified and adopted in several other jurisdictions including South Korea, Uganda and Bahrain.

Many jurisdictions have proposed or implemented reforms, usually with a view to imposing greater structure on the exercise of judicial discretion. Most commonly, this involves some form of sentencing guidelines scheme, whether derived from the judiciary or originating in an autonomous statutory body known as a Sentencing Council or Commission.

Sentencing Reform in Southern and Eastern Africa

Structured sentencing has also been slowly evolving across the continent of Africa in recent years. A number of countries have now implemented sophisticated schemes to assist courts at sentencing. Guidelines operate in several African jurisdictions, including Uganda, Kenya, and Ethiopia – these developments are discussed in some detail in this special issue. In most jurisdictions without guidelines, there have been calls for greater guidance, even if only in the form of more practice directions from the appellate courts (cf, eg, regarding sentencing in

Nigeria, U Idem & N Udofia 'Sentencing and the administration of criminal justice in Nigeria' (2017) 4(1) *Donnish Journal of Law and Conflict Resolution* 1–10).

The criminal justice systems of African nations face socio-economic challenges not found in western nations. In this respect, the need for sentencing reform is even more pressing in Africa than elsewhere. And although a number of African countries have created guideline schemes there are other schemes as well – guidelines represent only one strategy for reform.

The contributors to this issue provide portraits of sentencing, and discuss common problems as well as potential solutions. These essays are arranged roughly from south to north: South Africa, Namibia, Botswana, Zambia, Tanzania, Kenya, Uganda and Ethiopia. Obviously, it would have been ideal to include contributions from all the countries – we hope to fill at least some of the gaps in future.

Some themes are clear from this issue. All the jurisdictions have general principles of sentencing, which tend to be wide and are often inconsistent and contradictory, whether they have been placed on a statutory footing or simply emerged from the case law. Disparity in sentencing is a major concern in all jurisdictions where sentencers exercise great discretion with little guidance. Even where guidelines have been implemented, concerns about disparity persist. High, or rising, rates of imprisonment, lengthy prison sentences as a result of mandatory sentencing laws and prisons lacking adequate facilities and programs all contribute to high re-offending rates. Prison overcrowding is a problem in all the jurisdictions included here. All jurisdictions need to exercise greater control over the volume of admissions to custody, and to expand the use of noncustodial sanctions.

Finally, it is noteworthy that in all jurisdictions, customary law and indigenous traditions play some role in dealing with criminal acts, and in many there is a desire for a return to a more traditional way of dealing with crime and its effect on broken relationships. Sentencing reform across Africa will need to respect and accommodate these traditions in any sentencing reform initiative.

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