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Incorporating Africanness into the legal curricula: The case for criminal and procedural law

Summary

Criminal and procedural law has recently come under scrutiny and been criticised as being the 'white-man's law'. The claim is that this academic discipline of law, as conceptualised and studied thus far, has remained too Eurocentric and lego-centric, incorporating only Western legal concepts and not embodying African values and cultures. Criminal and procedural law studies are described as Western concepts created from the viewpoint of a dominant Western culture which does not take sufficient cognisance of other cultural traditions and therefore lacks certain elements of legitimacy. There has been increasing pressure on these subjects to Africanise the law and to make it relevant to the greater South African population. Combining indigenous legal concepts and general legal theory, this article examines the current situation and endeavours to develop methods to account for the effect of African law on criminal and procedural law. The article concludes that recognition should be given to the Africanisation (or South Africanisation) of law. Law students need to be better equipped to understand the manifold pluralities within and between legal systems in order to produce lawyers and judges who are "thoroughly grounded in the cultural milieu of the society in which the courts are based".[1]

Inkorporering van Afrika-waardes en -kulture in die regskurrikula: 'n Saak vir straf- en prosesreg

Straf-en prosesreg het onlangs onder die soeklig gekom en is as synde die 'Witman se wet' gekritiseer. Die bewering is dat hierdie akademiese regsdissipline, soos tot dusver gekonseptualiseer en bestudeer, te Eurosentries en lego-sentries gebly het wat slegs Westerse regsbegrippe inkorporeer en nie Afrika-waardes en -kulture nie. Straf-en prosesregstudies word beskryf as Westerse konsepte wat uit die oogpunt van 'n dominante Westerse kultuur geskep is wat nie voldoende kennis van ander kulturele tradisies neem nie en dus sekere elemente van legitimiteit ontbreek. Daar is toenemende druk op hierdie vakke om die wet te Afrikaniseer en om dit meer relevant tot die groter Suid-Afrikaanse bevolking te maak. Deur inheemse regskonsepte en die algemene regsteorie te kombineer, ondersoek hierdie studie die huidige situasie en strewe daarna om metodes te ontwikkel wat om die effek van Afrika gewoontereg op die straf- en prosesreg te verantwoord. Die gevolgtrekking word gemaak dat erkenning aan die Afrikanisering (of Suid-Afrikanisering) van die wet gegee moet word. Regstudente moet beter toegerus word om die veelvuldige pluraliteite binne asook tussen verskillende regstelsels te verstaan, ten einde regspraktisyne en regters te produseer wat "deeglik gegrond is in die kulturele milieu van die gemeenskap waarin die howe gebaseer is".[2]

1 Uwais & Gutto 1995:361.
2 Uwais & Gutto 1995:361.

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1. Introduction

The wave of African Renaissance sweeping through South Africa has brought transformation on many levels in the new legal dispensation of South Africa. One of the many ways in which this is manifested is through a (re-) emergence of the diversity of alternative African legal traditions. This revival can be considered a direct result of the colonial system of criminal justice which "clamp(ed) down ... a vast system of law and administration which was for the most part quite unsuited to the people".[3] On a 'civilising mission', the Colonisers "selectively offered their African subjects western educations and a broad exposure to European institutions; but this ... proved to be an ambiguous legacy for it increased the social distance between the governing elite and an overwhelming agrarian populace".[4]

African universities have similarly been regarded as producing Western-influenced graduates who become an elite group, out of touch with their own indigenous world view. Research and teaching has always been Eurocentrically done within the dictates of the colonial and apartheid regimes.[5] Matos opines that:

> the major 'disease' of education in Africa is the systematic attempt to ignore and dismiss the intrinsic value of African culture, customs and practices. Indeed, there is a tendency to treat the African learners and societies as if they were *tabula rasa*, void of any knowledge or value system, on which foreign cultures and knowledge could be imprinted without resistance.[6]

The current call has been for enhancing the relevance of university education by promoting the "revisiting of our African identities in the courses on offer".[7] This article will examine the current situation and attempt to explore possibilities in which Africanness may be employed in the criminal and procedural law curricula.

2. Africanness and Africanisation

Africanness is generally understood as comprising African philosophy, ontology and epistemology. However, there is no single knowledge system that subsumes the many African world views[8] as ethnicity and a plurality of cultures provide for variances in the African paradigm. This absence of African universals extends to African law, which is "more than any other family of laws a truly extended family, due to the absence of centralising political and religious forces. This inherent plurality has made the study of African laws

3 Galanter 1996:461.
4 Manikas 1995:374.
5 Gutto 2008:1.
6 Matos 2000:18.
7 Bandawe 2005:289.
8 Horsthemke 2004:36.

an immensely fragmented experience".[9] De Vos argues that by reason of the numerous different African legal traditions and systems, "it might not be very helpful to talk of the 'Africanisation' of our law because it could mean many different things to many different people".[10] He prefers the terms 'South Africanisation' or 'indigenisation' of the law.

Notwithstanding the heterogeneity and dynamism of the African continent, there are commonalities that unite the African experience.[11] These similarities are sufficiently close to draw referents to the collective African consciousness. The one main African philosophical theme that defines the purpose of life and the nature of human conduct is *ubuntu*. Traditional African life centres on a collective identity as in the Nguni proverb: '*Umuntu ngumuntu ngabantu'* (A person is a person through persons). This saying illustrates a communal embeddedness and connectedness of a person to others. Thus, the individual is affected by what happens to the whole group, as indeed the whole group is affected by what happens to an individual. *Ubuntu* encourages cooperation and not competition, character takes priority over achievement, and tolerance is embraced over condemnation. The interim Constitution firmly placed *ubuntu* in a legal milieu. Justice Mokgoro,[12] for example, contended that the entire spirit of the South African Constitution should be interpreted to embody the spirit of *ubuntu*.

Subsequently many cases have indeed been decided taking the concept of *ubuntu* into consideration. In the *Dikoko* judgment, for example, Justice Sachs commented at paragraph 113 that *ubuntu*

> is intrinsic to and constitutive of our constitutional culture. … it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitution values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution.[13]

The ideal of *ubuntu* has a profound effect on both the institutions of law and the actual rules and processes that guide legal conflict. As Himonga[14] argues, in most living customary law institutions there is no formal lawyer present on either side; the rules of evidence are extremely flexible since the main purpose of the hearing is to let both sides tell their story; what is sought is a solution and not a winner-takes-all verdict. The solution entails the restoration of the breach of the social relationship, and therefore the remedies available go considerably beyond those of either the Roman Dutch private law or the English common law.

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9 Menski 2006:21.
10 De Vos 2009:29.
11 Bandawe 2005:290.
12 See Mokgoro 1998:7 and 11.
13 *Dikoko v Mokhatla* 2006 6 SA 235 CC; 2007 1 BCLR 1 CC.
14 Himonga 1997:78.

3. The criminal and procedural law curricula

The sources, concepts and processes of criminal and procedural law are Western-based. Considering the history of law in South Africa, this seems to be the norm for almost all branches of the law. The main sources of criminal law are common law, which originated from Roman-Dutch law with some influences from English criminal law, and legislation, of which the Constitution of the Republic of South Africa is the most important Act. The criminal law has been developed casuistically, on the basis that it should be uniformly applicable to all.

The courses in the criminal and procedural law study at the University of South Africa, and indeed at the majority of South African universities, consist of the general principles of criminal law; specific crimes; pre-trial; trial and post-trial criminal procedure; the presentation, assessment and admissibility of evidence; sentencing, and the various medical and media law subjects. As such, the legal curricula will follow the prescriptions for these programmes.

4. Is Africanisation of the law possible?

African law and Western law are two diverse concepts. While African law is unspecialised, Western law is highly regulated. African law is not a system of "codes, courts and constables"[15] - laws defined with certainty, clarity and well-formulated rules. Is there a point of convergence? De Vos remarks that there is no

> such a thing as 'pure' African law that we could return to. The romantic notion that there was still a 'pure' African system of law, uncorrupted by our colonial experience, might be emotionally appealing but does not accord with the harsh realities. Colonialism has forever changed South Africa (and the rest of Africa) and it would be foolish to deny this.[16]

This situation was already apparent at the beginning of the 20th century when Mumba lamented that the European methods of administration of justice had destroyed

> the communal structure of the native ... No more could a clan be considered as a body. No more could a father speak for his son or vice versa; the offender must come forward in person. In this the European came with his individualism and thrust it on the native. If there is any one thing more than all others which has changed and spoiled a primitive people with no education for guidance, it is this individualism. I hate individualism because it has suddenly torn the son from the father, or one man from another. I hate it because it gives a false air that a person should not consider the feelings of others in his action. I hate it for its selfishness and because it has propagated crime. But individualism has come to stay and has to be faced.[17]

15 Malinowski 1934:xii.
16 De Vos 2009:29.
17 As quoted by Morrison 1919:108.

Indigenous African law has already been transformed through the assimilation of Western concepts and is still evolving. Moreover, the influence of the Roman-Dutch common law on the South African legal system is vast. The harmonisation of Roman-Dutch common law and indigenous African law is, however, possible if the Constitution of South Africa is considered. The Constitution already contains indigenous values which may guide transformation of the South African legal system. The Constitution recognises customary law and common law as equal legal systems of law (in section 211(3), Chapter 12), subject only to the Constitution itself. The Constitutional Court has already Africanised property law in South Africa (cf. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)). Similarly, the law of defamation was infused "with the value of *ubuntu – botho* by proposing a remedial shift in the law of defamation from almost exclusive preoccupation with monetary awards to a more flexible and broad-based approach that involves and encourages apology".[18]

Still, one cannot envisage a total integration of Western law and African law, as Chanock cautions: "the postcolonial assumption that once custom was really incorporated into law as real customary law ... the gap [between state law and custom] would be closed and the imported state and African law reunited, was false".[19] According to him, this gap "exists everywhere – to show that state law is only a part of social ordering and regulation – and that it need not be closed".[20]

5. Incorporating Africanness into the criminal and procedural law curriculum

To date the practice at the School of Law at the University of South Africa (and indeed at most schools of law in South Africa) has been the inclusion of a single component of African customary or indigenous law in the Bachelor of Laws (LLB) curriculum. These courses are offered as either a compulsory component or an optional ancillary of the LLB degree. While it has to be conceded that this practice affords some recognition of African law, it is problematic in that African law is taught in isolation from the rest of the law. It does not form part of the mainstream core courses and is relegated to a subordinate position. This subsidiary situation, according to Chanock, is evident foremost in its "racist" designated title "… because it implie(s) an absence of agency ... Not being called African law, which might have hinted at cultural parity, it denie(s) the possibility of a culture that transcend(s) tribe and locality".[21]

In order to rectify this imbalance of representation of indigenous African law in the current curricula, Gutto[22] proposes that the curricula be infused with

18 De Vos 2009:30.
19 Chanock 1998:ix.
20 Chanock 1998: ix.
21 Chanock 1998:ix.
22 Gutto 2008:3.

African philosophical and epistemological underpinnings. Reviewing the case for the criminal and procedural law curriculum, two options are available: a total overhaul of the entire criminal system and concepts, and an amalgamation of Africanness into current curricula by adopting a comparative approach.

5.1 Total overhaul of the present criminal and procedural law curriculum

Complete '*Africanisation*' of the present criminal and procedural law curriculum would imply the total overhaul of the existing criminal and procedural system and its replacement with customary law. This would, however, pose numerous problems. First, it would not be a true reflection of reality since the complete replacement of an established system of common law with customary law would necessitate some prior form of legislative intervention. In other words, Parliament would first have to intervene through the enactment of legislation which could effect these drastic changes to the existing legal system.

Secondly, according to section 211(3) of the South African *Constitution* (Act 108 of 1996) "the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". In practice, therefore, should a court that is seized with a matter, find that customary law applies, the applicable rules of customary law should not conflict with the rights in the Bill of Rights. This issue arose in the joint cases of *Bhe & Others v Magistrate Khayelitsha & Others* 2005 1 SA 580 CC; *Shibi v Sithole & Others* 2005 1 SA 580 CC; 2005 1 BCLR 1 CC, and *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 B.C.L.R. 1 CC where the customary law rule relating to male primogeniture in intestate succession was declared invalid since it discriminated against women and thus violated the right to equality.

Thirdly, the present, democratic South African state's commitment to international human rights is unquestionable and evidenced by its signature and ratification of a number of binding international human rights instruments. These include, *inter alia*, the International Covenant on Civil and Political Rights, 1966, the Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989. Replacing the current, established system of criminal and procedural common law with customary law could mean that South Africa is failing in its international obligations, especially considering the subordinate status of women in customary law. On a positive note, however, it has to be conceded that a number of customary law rules that discriminated against women have been repealed by statute. The *Recognition of Customary Marriages Act* 120 of 1998, for example, repealed the discriminatory practice whereby women in African customary unions were subject to the marital power of their husbands. There remain, however, a number of practices in customary law which would not meet the rigorous standards set by these international human rights instruments. Some potential areas of conflict with South Africa's Bill of Rights and international human rights obligations are the traditional practices of virginity testing of girls, the compulsory circumcision of

adolescent boys, and corporal punishment. As regards corporal punishment, in traditional customary law, parents have the power to discipline their children since children are considered "wayward and irresponsible and hence in need of firm control".[23]

5.2 A comparative approach to the teaching of criminal and procedural law

It is envisaged that Africanness could be incorporated into the criminal and procedural law curriculum by employing a comparative approach to the study of criminal and procedural law. It is noteworthy that this is not a novel idea in the teaching of law since the South African common law is often compared and contrasted with the legal principles in the jurisdictions of other Commonwealth countries, the USA and Continental Europe.

However using customary law as a point of comparison could pose several problems. First, there is the quandary of which version of customary law to use as a point of comparison. As discussed earlier, there are several versions or systems of customary law in South Africa. Bennett[24] refers to "official" customary law which is the version that is applied by the state bureaucracy. However, this version of customary law is not necessarily a true reflection of the customary law that is actually practised by African people or their "living" customary law. Given the heterogeneity of the African people in South Africa, the "living" customary law may differ from one group to another and from an urban to a rural setting. Moreover, the living customary law is to a large extent an oral tradition and constantly changing. In the words of Labuschagne and Van den Heever, "indigenous customary law is … contrary to what is frequently averred, not stagnant, but is in a dynamic process of adaptation and change".[25]

Secondly, there is a paucity of authoritative legal material that deals specifically with African customary criminal and procedural law. The more recently published sources of customary law omit any discussion of criminal and procedural law.[26] The works that address the subject in some detail are outdated, with a few works predating the existence of the South African Constitution.[27] Finally, adopting a comparative approach with the established Roman-Dutch and English common law could prove difficult since salient points of comparison do not always exist in customary law. The most fundamental difference is that in the common law the state is the "authoritative power",[28] and individuals are subjects of the state. On the other hand, in customary law the concept of the state was unknown. Rather the "criminal law dealt with

23 Bennett 2004:329.
24 Bennett 2009:6.
25 Labuschagne & Van den Heever 2002:89.
26 For example, Bennett 2004.
27 For example, Myburgh 1980, 1990.
28 Snyman 2008:3.

wrongs against the chief in his capacity as 'father'… of the tribe".[29] Moreover, in customary law, the distinction between private and public law (or the distinction between the law of delict and criminal law) is not as well defined as it is in the common law. This is summed up by Labuschagne and Van den Heever who state that "in studying indigenous law it must continuously be borne in mind that there is no clear distinction, as is the case in most Western legal systems, between criminal and private law sanctions …".[30] Often, an act could be considered both a crime and a delict. For example, "in traditional customary law, the theft of cattle was considered to constitute a serious delict as well as a crime".[31]

Since the teaching of criminal law also includes the teaching of specific crimes such as murder and rape, this could also prove to be problematic if a strictly comparative approach were to be used since, according to Myburgh, "… in indigenous criminal law … offences are not clearly defined and … the different forms of *mens rea* are not clearly distinguished".[32] Ostensibly then, adopting a strictly comparative approach would not be a simple or feasible option given the number of problems outlined above.

It is the authors' submission, however, that the criminal and procedural law syllabus could still be "infused with Africaness" by using African law as a point of comparison, examining areas of convergence (or similarity) and areas of divergence. Problem areas within the field of African law, that are worthy of further research and development, could also be considered for inclusion in the syllabus. The dilemma with this approach is of course that all evaluations are made on the basis of what is considered law in Western societies.

5.3 A comparative approach examining areas of convergence and divergence in African law and criminal and procedural law and areas worthy of further research and development

There are several general principles of criminal law which could be contrasted with their African law equivalents. One of the first general principles which could be considered is causation (or causality) which in law is the principle of cause and effect. Causation determines whether there "was a causal link"[33] between the accused's conduct and the prohibited result. In the crime of murder, the causation requirement requires the prosecution to establish this link between an accused's act of causing the death of the victim and the actual death of the victim.

There are several theories of causation in the South African common law, but one theory in particular, the adequate causation theory, could make for an interesting point of comparison with the African approach to causation.

29 Bekker 1993:13.
30 Labuschagne & Van den Heever 2002:90.
31 Olivier *et al*. 1995:131.
32 Myburgh 1990:7.
33 Snyman 2008:80.

In terms of the theory of adequate causation, "an act is a legal cause of a situation, if, according to human experience, in the normal course of events, the act has a tendency to bring about that type of situation".[34] In African law, however, while there are no theories of causation *per se*, "in each case people know from general experience that a certain act usually causes that particular effect".[35] Oluwole confirms that "once we can establish a constantly conjoined occurrence, we have the right to suspect causal-relationship. And to strengthen our suspicion we need to prove the constancy by many repetitions. The more times it is repeated, the greater our faith in its truth and reality".[36] Causation in African law is thus "approached intuitively"[37] and is based on the experience of the community.

The Western notion of causality of a crime is, according to Ovens,[38] from a linear perspective whereas indigenous African law follows a circular or holistic approach. This is because African thought consists of two basic notions of causality, namely primary or non-mechanistic and secondary or mechanistic.[39] For example, a Westerner will attribute a taxi accident to a mechanical failure or error of judgement by the driver which is considered the primary cause of the accident. In African philosophy there is no room for chance or accident. The injured party in the above taxi accident would ascribe this mishap to being individually and deliberately targeted for some personal motive and ask: "Why me?".[40] Thus the African concept of causality postulates a personal cause behind every event. It restates the principle that not only must every effect have a cause, "but that every conjunction of effects must likewise have its distinct cause".[41] As a result of this world and spiritual view which ascribes responsibility for an action to an external force more powerful than themselves, African people rarely see themselves in an active role. All calamities are caused either by evil spirits or by the ancestors as punishment. As such, the person held responsible for a criminal act is viewed as a victim of predetermined, outside forces. It is obvious that this philosophy will impact on the Western concept of an act. It is submitted that this belief could be taken into consideration as a mitigating factor in sentencing.

A second general principle of criminal law which could be considered is the principle of participation. Participation considers the liability of participants to a crime who could include perpetrators, co-perpetrators, accomplices and accessories after the fact. In the South African common law, in situations where "… more than one person may be involved in the commission of a crime, the law assigns liability to such persons".[42] Each participant who is linked to a crime is therefore criminally liable to some extent. An interesting difference in

34 Snyman 2008:85.
35 Whelpton *et al.* 2008:137.
36 Oluwole 1978:32.
37 Myburgh 1990:101.
38 Ovens 2009:1.
39 Sogolo 2002:192.
40 Sogolo 2002:198.
41 O'Donohue 1981:29.
42 Burchell 2008:570.

African law is that criminal liability is not always linked to actual participation in a crime as a perpetrator, co-perpetrator, accomplice or accessory after the fact. Criminal liability is based on "group rights and duties" so that "a group is also liable for the crimes of its members".[43] A person (or persons) not linked to the commission of a crime as a participant can be liable to some extent, therefore, when a crime is committed. If, for example, a fine has to be paid, "it must be paid by the group, represented by its head".[44] Ovens[45] observes that this interconnectedness of Africans makes them prone to becoming involved in collective criminality.

It is submitted that the African law concept of group rights and duties and collective association can be juxtaposed against the criminal law doctrine of "common purpose". In terms of the latter doctrine, "where two or more people agree to commit a crime … each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design … liability arises from their common purpose to commit the crime".[46] The common law doctrine of 'common purpose' is closer to the African notion of collective association rather than identifying individual perpetrators of a crime.

A third area that falls within the scope of the general principles of criminal law is grounds of justification or the defences which exclude unlawfulness. These are defences which arise from the fact that there are situations where society would regard otherwise criminal conduct as void of unlawfulness. In other words, society does not consider the "social need to punish the accused for the performance of the conduct in question".[47] These defences include, *inter alia*, self-defence, necessity, consent and obedience to superior orders. In African law there are several grounds of justification which to some extent overlap with those in the common law. According to Myburgh, in African law, "factors excluding unlawfulness are recognized".[48] It is accepted, for example, "that a person may forcibly defend himself … against an unlawful attack without being criminally liable".[49] Furthermore, "acting under necessity (in emergency) on behalf of oneself or ones agnates … excludes unlawfulness".[50] As regards consent "if an agnatic group has consented to a certain act and this act causes a person injury or harm, unlawfulness is excluded".[51] It is evident therefore that there are similarities between the grounds of justification in African law and those in the common law that would facilitate a comparative study.

Within the field of specific crimes, it is submitted that a comparative study of certain specific crimes would illustrate the glaring differences between African

43 Whelpton *et al.* 2008:138.
44 Whelpton *et al.* 2008:139.
45 Ovens 2009:8.
46 Burchell 2008:574.
47 Burchell 2008:226.
48 Myburgh 1990:101.
49 Whelpton *et al.* 2008:142.
50 Myburgh 1990:101.
51 Whelpton *et al.* 2008:142.

law and common law. The first specific crime which could be considered is rape. Rape in traditional African law is "characterised by … violence".[52] Moreover, the woman who is the victim of rape "has to offer resistance"[53] to the attacker. The requirements of violence and the offering of resistance and the fact that only a woman can be the victim of rape illustrates that there are more points of divergence between the crime of rape in African law and the new statutory, gender neutral crime of rape created by the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007. In the latter crime, violence and the offering of resistance by the victim are not requirements. Moreover, it is possible for a male or a female to be raped.

The second specific crime is assault which in the common law requires "the application of force … either directly or indirectly"[54] to another person. Not only physically attacking a person, but also, according to Burchell, "inspiring of fear in the mind of a person that he … is about to suffer physical harm"[55] qualifies as assault. Similarly, in African law assault is regarded as "intentionally inflicting bodily injury on another".[56] However, in African law, assault is "associated with blood and bodily injury" which "defiles the community".[57] When blood has been spilled, the community is negatively affected and there has to be a "purifactory and conciliatory meal",[58] paid for by the offender, which compensates for the defilement. There are many elements of restorative justice[59] in the African crime of assault and many points of divergence with its common law counterpart.

Considering that Africanness can be infused into the curricula of the general principles of criminal law and specific crimes by employing an equitable comparative approach, a brief examination of how this can be effected within the curriculum of procedural law will be attempted.

The general principle of procedure in traditional African courts is that the onus is on the accused to prove his innocence in court. This is a contradiction of the common law where one is innocent until proven guilty. Customary court sessions are always held in public and are open to all adult members of the public. All parties are given the privilege to speak and very little interruption of the speaker is allowed. The trial is inquisitorial in nature and no evidence is excluded.[60] The role of extraordinary evidence, for example, in the pointing or 'smelling' out of sorcerers, is well known in indigenous law.[61] All proceedings are conducted orally and no written records of cases are kept. Presently,

52 Myburgh 1990:104.
53 Whelpton *et al.* 2008:152.
54 Snyman 2008:456.
55 Burchell 2008:680.
56 Myburgh 1990:104.
57 Whelpton *et al.* 2008:150.
58 Myburgh 1990:104.
59 Restorative justice and its inclusion in the curriculum are discussed later in this article.
60 Whelpton 2005:354-355.
61 Ludsin 2003:62.

however, all chief's courts keep a court record in which "basic information regarding a case must be recorded"[62]. As can be deduced, African indigenous court procedures are informal but orderly.

Known forms of punishment in traditional African law included "death, banishment, confiscation of some or all of the guilty person's family property … a fine in livestock".[63] True to its communal roots where parents are responsible for the wrongs of their children, "a whole family group could be punished for the crime of one of its members. In cases of sorcery, for instance, the whole family could be banished or even killed".[64] When corporal punishment had to be meted out, the transgressor was punished as an individual although the entire group would be prosecuted. There are clearly many differences between traditional African forms of punishment and the current South African law. Moreover, corporal and capital punishment have both been rendered unconstitutional by the Constitutional Court (cf. *S v Williams* 1995 3 SA 632 CC; *S v Makwanyane* 1995 3 SA 391 CC) and can thus no longer be used as forms of punishing an offender.

In contradistinction to Western institutionalised environments for punishment and correction, in traditional African culture there was no incarceration. According to Myburgh, "imprisonment was unknown".[65] To date, customary courts do not impose a sentence of imprisonment. Uwais and Gutto, among many others, fervently believe that:

> imprisonment is rarely the best form of punishment. In practice, prisons destroy the offenders and contribute to recidivism instead of helping them to reform and reintegrate into society. In sentencing, negative consequences of imprisonment, both to the offender, their family and society as a whole should be considered.[66]

The South African courts are already implementing these restorative justice models as in the cases of *Du Plooy v Minister of Correctional Services* 2004 3 All SA 613 T, 2004 JOL 12850 T (which dealt with medical parole) and *S v M* 2007 18; 2008 3 SA 232 CC (which dealt with the right of children to parental care), where the value of *ubuntu* was again relied on to contemplate alternative punishment for convicted criminals.

In sentencing and rehabilitation programmes applicable to Africans, the African concept of time is another factor to consider. Western sentencing programmes are future-oriented, focusing on the person and personality of the offender as found in the reformative theory of punishment. It is hypothesised that the African concept of time is two-dimensional; with an extended history, a present (actual time) and almost no future (potential time).[67] In terms of this theory, incarcerated Africans consequently find it difficult to accept future-

62 Whelpton 2005:104.
63 Myburgh 1990:69.
64 Whelpton *et al.* 2008:16.
65 Myburgh 1990:69.
66 Uwais & Gutto 1995:360.
67 Ovens 2009:8.

oriented rehabilitation programmes.[68] If any African criminal theories are created or incorporated into the legal curricula and the legal system, "it should also assist the judiciary and direct the court in a scientific and theoretical manner, to impose the most suitable sentences and to individualise punishment".[69]

The study of criminal procedure could also integrate more alternative dispute resolution practices, for these practices bear a close resemblance to traditional African decision-making processes. According to Pretorius, "alternative dispute resolution denotes all forms of dispute resolution other than litigation or adjudication through the courts", [70] and includes methods such as problem-solving, negotiation, mediation and conciliation. Since the resolution of disputes takes place outside the mainstream court system, some academics prefer the term "non-adjudicatory dispute resolution".[71] Pretorius, on the other hand, suggests the term "appropriate dispute resolution" since the methods used are "best suited" to resolving disputes.[72] However, the term "alternative dispute resolution" remains "firmly entrenched in practice".[73] As regards the resolution of disputes in traditional African society, clans have always had sophisticated, effective and efficient social control systems. Problems were communally dealt with in traditional African homesteads in terms of the *imbizo*/*inkundla* (Zulu) or *kgotla* (Tswana) systems. Burning issues that affect the entire community were discussed by all adult members at the chief's homestead and suitable solutions were explored. It is submitted that parallels may be drawn between the aforementioned African methods of dispute resolution and the alternative dispute-resolution methods of informal discussions, problem-solving and negotiation. Since alternative dispute resolution refers to methods of solving disputes that fall outside the court system, it is submitted that it could incorporate the study of traditional African methods of dispute resolution.

In the actual adjudicatory or court process in African law, there was always

> ample time for the circulation and discussion of a case before it actually came to the headman or chief's court. This gave the public a chance to weigh the evidence with tribal law and custom and for the exchange of views on which the judges set their verdict..[74]

As such, decision-making was not based on majority vote but on consensus and constant consultation – a practice akin to the abolished jury system. One wonders whether the jury system would provide for a more Africanised judicial decision-making.

An effective alternative to retributive justice which could also be incorporated into the field of procedural law studies is restorative justice.

68 Ovens 2009:8
69 Ovens 2009:3.
70 Pretorius 1993:1.
71 Hurter 2007:253.
72 Pretorius 1993:1.
73 Hurter 2007:253.
74 Mumba quoted in Morrison 1919:108.

While retributive justice focuses on punishment of the offender, restorative justice aims to repair the harm caused while holding the offender responsible. According to Maguire *et al*., the United Nations defines restorative justice as a process "in which the victim, the offender and … any other individuals or community members affected by a crime participate actively together in the resolution of matters arising from the crime."[75] Restorative justice is not only more inclusive than retributive justice in that it involves the victim, the offender and other interested parties, but there is also the element of restoring the harm caused by the crime. According to Terblanche, this is effected by "compensation, restitution … and … any imaginable way in which restoration can be effected".[76] As was illustrated earlier in the case of assault and the *imbizo* and *kgotla* systems, traditional African methods of dispute resolution could involve the participation of an entire community. Moreover, the concepts of restitution and compensation, in order to remedy the wrong, are commonplace and occasionally even take the form of a "purifactory and conciliatory meal" (as was the case with assault). These indigenous African remedies, which encourage inclusive participation, restitution and reparation, resonate with the restorative justice practices of family group conferencing and group mediation.

On a positive note, it is encouraging that South African courts have taken some cognisance of restorative justice. Terblanche,[77] in referring to some practical applications of restorative justice in South Africa, cites the case of *S v Maluleke*[78]. In this case the presiding judge, in imposing a suspended sentence for murder, added the condition of sending an elder from the family of the offender to the home of the victim in order to apologise. This was in accordance with a traditional African custom. Similarly, in the case of *S v Shibane*[79], an offender was ordered to pay compensation to a victim.

Since restorative justice can be applied to all offenders across the criminal justice system irrespective of race or culture, it could have additional benefits such as reducing recidivism and fostering community respect for the law and justice system. In the words of Bronitt "… the search for legitimacy is redirected away from the state and its power to punish, towards community-based initiatives that offer the prospect of reintegration and restoration for offenders, victims and communities affected by crime".[80]

A final area that is worthy of research within the field of procedural law is the issue of jurisdiction. Jurisdiction is a conflict area in that both the Magistrates' Courts and the courts of traditional leaders may serve as courts of first instance in matters involving African law. Jurisdiction may sometimes overlap with regard to the person, the cause of action and the area.[81] This area

75 Maguire *et al*. 2007:182.
76 Terblanche 2007:175.
77 Terblanche 2007:176.
78 Unreported case CC 83/04, dated 13 June 2006 T
79 2005 JOL 15671 T
80 Bronitt 2009:139.
81 Ludsin 2003:71.

of 'concurrent jurisdiction' has not yet been properly investigated.[82] There is no certainty whether, for example, principles such as '*res judicata'* (the matter is decided upon and closed) or '*alibi pendes'* (the matter is still pending) can be applied. It is submitted that these issues are worthy of further study and research within the field of procedural law.

6. Conclusion

This study has endeavoured to explore the feasibility of integrating Africanness and indigenous law into the criminal and procedural curricula in tertiary education. It was observed that, similar to law, which is an inherently dynamic organism, growing with precedent and participation, Africanness is not a static concept, but a flexible and evolving process. As such, indigenous African legal theoretical concepts must not only be relevant but also applicable in a constantly changing society.

Knowledge gained in a criminal and procedural law course, interspersed with African perspectives, need not only be acquired but also needs to encompass the purpose for which it is acquired. Learning about cultural plurality within diverse legal theories will empower students to think for themselves:

> If law students can, from the start, develop sensitivity for how different concepts of law have been historically growing within a specific socio-cultural environment, they have also been taught to function as humans, not just to think as lawyers. ... It is necessarily an integral part of legal methodology, informing all our systems of thought and behaviour, resulting in an integrated legal education which frees itself from the shackles of 'black box theories' and the virtual coma induced by dominant paradigms of legal positivism.[83]

Menski applauds post-apartheid South Africa especially for recognising the importance of legal diversity "in order to survive as a rainbow nation".[84] He credits the new South African hybrid legal system as "clearly not turning out as a carbon copy of Western legal systems".[85]

It is understandable that incorporating Africanness into current legal curricula causes discomfort for many legal academics and lawyers. However, the current globalisation of crime and culture inevitably necessitates a changing climate of legal education which reconciles legal traditions and respects diversity in law. It is believed that the capacity of legal students will be augmented in a blend of Western and indigenous knowledge which will not only meet international standards, but also enhance them:

> In this way, universities will produce graduates who are not only sensitized to the worldviews of the indigenous populations they will

82 Whelpton 2008:110.
83 Menski 2006:18.
84 Menski 2006:14.
85 Menski 2006:22.

> serve, but who will have the ability to enrich the global context by bringing to it uniquely African perspectives.[86]

86 Bandawe 2005:290.

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