One Person's Culture is another Person's Crime: A Cultural Defence in South African law?

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If there are rituals performed ... that do not pass the test of constitutionality they should not prevail merely because they are part of a religion [or culture]. Neither should the followers of a religious [or cultural] belief regard themselves as outside the law merely because they have a constitutional right to practise their religion [or culture] together with other members of their religious [or cultural] community.

- **Prof Christa Rautenbach**

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SUMMARY

The South African legal system is dualistic in nature with the one part consisting of the Western common law and the other consisting of African customary law. Although these two legal systems enjoy equal recognition, they regularly come into conflict with each other due to their divergent value systems. It is especially within the context of the South African criminal law that this conflict becomes apparent, because an accused's conduct can be viewed as lawful in terms of African customary law, but unlawful in terms of the South African common law. In such cases the accused may attempt to raise a cultural defence by putting forth evidence of his cultural background or values to convince the court that his *prima facie* unlawful conduct is actually lawful and that he should escape criminal liability. Alternatively, an accused may put forth evidence of his cultural background or values in an attempt to receive a lighter sentence. The question which therefore arises is whether a so-called "cultural defence" exists in the South African criminal law, and if so, what the influence of such a defence on the South African criminal law is.

The conflict between African Customary law and the South African common law in the context of the criminal law arises due to the fact that the indigenous belief in witchcraft, (including witch-killings), the indigenous belief in the *tokoloshe* and the use of *muti*-medicine (including *muti*-murders), as well as the phenomenon of "necklacing" and the custom of *ukuthwala* can result in the commission of various common law crimes. In the case of witch-killings, the perpetrators can be charged with the common law crimes of murder or, if the victim survives, attempted murder, common assault or assault with intent to do grievous bodily harm. Similarly, necklacing, as a method used for killing witches, can also result in the commission of these common law crimes. What is more, the perpetrators of witch-killings can also be charged with the statutory crimes of accusing someone of witchcraft, pointing the victim out as being a witch or wizard or injuring a person based on information received from a traditional healer, or similar person.

The indigenous belief in the *tokoloshe* can lead to the commission of the common law crimes of murder or, if the victim survives, common assault or assault with intent to do grievous bodily harm. The perpetrators of *muti*-murders can also face charges of murder or attempted murder, if the victim survives. The indigenous custom of *ukuthwala* can result in the commission of common law crimes such as abduction, kidnapping and common assault, as well as the statutory crime of rape.

A perusal of South African case law dealing with the indigenous beliefs and customs above reveals that the accused in such cases have indeed attempted to put forth evidence of their indigenous beliefs or customs to persuade the criminal courts that they should escape criminal liability for a particular crime. In fact, these arguments were raised within the context of the existing common law defences such as private defence, necessity, involuntary conduct and a lack of criminal capacity. However, the South African criminal courts have up till now in general been unwilling to accept arguments of indigenous beliefs and customs to serve as a defence, either alone or within the context of the existing defences above, for the commission of a common law or statutory crime.

They have, however, been more willing to accept evidence of an accused's indigenous belief or custom to serve as a mitigating factor during sentencing. The extent to which an accused's cultural background will serve as a mitigating factor will, of course, depend on the facts and circumstances of each case. As a result an accused who is charged with the commission of a culturally motivated crime has no guarantee that his cultural background and values will in fact be considered as a mitigating factor during his criminal trial. It is thus ultimately concluded that a so-called "cultural defence" does not exist in the South African Criminal law.

The indigenous beliefs and customs above not only result in the commission of common law or statutory crimes, but also in the infringement of various fundamental human rights in the Constitution. Witch-killings result in the infringement of the constitutional right to life and the right to freedom and security of the person. However, witches and wizards who are persecuted

for practising witchcraft are also denied their right to a fair trial entrenched in the Constitution. Similarly, *muti*-murders and necklacing also result in the infringement of the right to life and the right to freedom and security of the person entrenched in the Constitution. The custom of *ukuthwala* results in the infringement of the right to equality, the right to freedom and security of the person, the right to live in an environment that is not harmful to health or well-being, the right not to be subjected to slavery, servitude or forced labour, the right to basic education and other constitutional safeguards aimed at protecting children.

In light of the constitutional right to freedom of culture and the right to freely participate in a cultural life of one's choosing the question can be asked whether the time has come to formally recognise a cultural defence in the South African criminal law. In this study it is argued that these constitutional rights do not warrant the formal recognition of a cultural defence. Instead, it is recommended that the conflict between African customary law and the South African common law can be resolved by bringing indigenous beliefs and customs in line with the values that underpin the Constitution as the supreme law of South Africa. Of course, this does not mean that the courts should ignore cultural considerations during a criminal trial if and when they arise. In fact, as pointed out in this study, the courts have a constitutional duty to apply African customary law when that law is applicable. It goes without saying that, when an accused attempts to escape criminal liability for his unlawful conduct by raising arguments of his cultural background, African customary law will be applicable and must be considered by the court. This in turn raises the question as to how the criminal courts can ensure that they give enough consideration to the possibility that an accused's criminal conduct was culturally motivated so as to comply with their constitutional mandate referred to above. Although it would be nearly impossible to formulate a perfect or flawless approach according to which a judicial officer can adjudicate criminal matters involving culturally motivated crimes, the author suggests the following practical approach which may provide some guidance to judicial officers in dealing with cases involving culturally motivated crimes:

- Step 1: Consider whether the commission of the crime was culturally motivated or not. If it seems as though the accused did not commit a culturally motivated crime, the trial can continue on that basis. If, however, it is evident that the accused indeed committed a culturally motivated crime, step 2 follows.
- Step 2: Once it has been determined that the commission of the crime was culturally motivated, the next step is to determine which indigenous belief or custom led to the commission of the crime. Once the relevant indigenous belief or custom has been identified, step 3 follows.
- Step 3: When it is clear which indigenous belief or custom led to the accused's commission of the crime, the next step is to determine whether arguments pertaining to that particular indigenous belief or custom may be raised within the context of the existing defences in the South African Criminal law in order to exclude the accused's criminal liability. If an accused relies on one of the existing defences in the South African criminal law, he will have to lay a proper evidential foundation for his defence before the court. In assessing the evidence put forth by the accused, the judicial officer must consider the judgment and reasoning in previous cases dealing with the particular indigenous belief or custom. A judicial officer must also consider the values underpinning the Constitution when conducting such an assessment. If a judicial officer upholds an accused's defence, the accused is acquitted. However, if the judicial officer rejects an accused's defence, the accused must be convicted and step 4 follows.
- Step 4: Once an accused has been convicted, a court should consider whether arguments of his cultural background can serve as an extenuating circumstance, mitigating the punishment to be imposed on him.

However, the practical approach above merely serves as a suggestion to judicial officers in dealing with culturally motivated crimes and ultimately it will be up to the judiciary to develop both the Western common law and

African customary law to resolve the criminal law conflicts between these two legal systems.

The research for this study was concluded in November 2013.

OPSOM**MING**

Die Suid-Afrikaanse regstelsel is dualisties van aard met een deel wat uit die Westerse gemenereg bestaan en die ander deel uit Afrika gewoontereg. Alhoewel hierdie twee regstelsels gelyke erkenning geniet, kom hulle gereeld in konflik met mekaar weens hul uiteenlopende waardesisteme. Dit is veral in die konteks van die Suid-Afrikaanse strafreg wat hierdie konflik duidelik word, aangesien 'n beskuldigde se handeling in die Afrika gewoontereg as regmatig beskou kan word, maar as onregmatig in die Suid-Afrikaanse gemenereg. In sodange sake kan die beskuldigde poog om 'n kulturele verweer te opper deur getuienis rakende sy kulturele agtergrond of waardes aan te bied ten einde die hof te oortuig dat sy *prima facie* wederregtelike optrede eintlik regmatig is en dat hy strafregtelike aanspreeklikheid moet vryspring. Alternatiewelik kan 'n beskuldigde getuienis rakende sy kulturele agtergrond of waardes aanbied in 'n poging om 'n ligter vonnis te kry. Die vraag wat dus ontstaan is of 'n sogenaamde “kulturele verweer” in die Suid-Afrikaanse strafreg bestaan, en indien wel, wat die invloed van sodanige verweer op die Suid-Afrikaanse strafreg is.

Die konflik tussen Afrika gewoontereg en die Suid-Afrikaanse gemenereg in die konteks van strafsake ontstaan weens die feit dat die inheemse geloof in toorkuns (insluitende heksemoorde), die inheemse geloof in die *tokoloshe,* die gebruik van *muti*-medisyne (insluitende *muti*-moorde), sowel as die fenomeen van “necklacing” en die inheemse gebruik van *ukuthwala* kan lei tot die pleeg van verskeie gemeenregtelike en statutêre misdrywe. In die geval van heksemoorde kan die daders aangekla word van die gemeenregtelike misdrywe van moord en, indien die slagoffer oorleef, poging tot moord, aanranding gewoon of aanranding met die opset om ernstig te beseer. As 'n metode wat gebruik word om hekse dood te maak, kan die fenomeen van necklacing ook lei tot die pleging van hierdie gemeenregtelike misdrywe. Verder kan die daders van heksemoorde ook aangekla word van die statutêre misdrywe van iemand van toorkuns beskuldig, die slagoffer uit te wys as 'n heks of 'n towenaar of die besering

van 'n persoon gebaseer op inligting verkry vanaf 'n tradisionele geneesheer of soortgelyke persoon.

Die inheemse geloof in die *tokoloshe* kan lei tot die pleging van die gemeenregtelike misdrywe van moord of, indien die slagoffer oorleef, aanranding gewoon of aanranding met die opset om ernstig te beseer. Die daders van *muti*-moorde kan ook op aanklagte van moord of poging tot moord, indien die slagoffer oorleef, teregstaan. Die inheemse gebruik van *ukuthwala* kan lei tot die pleging van gemeenregtelike misdrywe soos abduksie, menseroof en aanranding gewoon, sowel as die statutêre misdryf van verkragting.

'n Studie van Suid-Afrikaanse regspraak waarin bogenoemde inheemse gelowe en gebruike ter sprake gekom het, openbaar dat die beskuldigde(s) in sodanige sake wel gepoog het om getuienis van hulle inheemse gelowe of gebruike aan te bied ten einde die strafhowe te oortuig dat hulle strafregtelike aanspreeklikheid vir 'n bepaalde misdryf moet vryspring. Trouens, hierdie argumente is binne die konteks van bestaande gemeenregtelike verwere soos noodweer, noodtoestand, onwillekeurige gedrag en ontoerekeningsvatbaarheid geopper. Tot op hede was die Suid-Afrikaanse strafhowe egter oor die algemeen ongewillig om argumente te aanvaar dat hierdie inheemse gelowe en gebruike as verwere moet dien, hetsy alleen of binne die konteks van die bestaande verwere hierbo, vir die pleging van 'n gemeenregtelike of statutêre misdryf.

Hulle was egter meer gewillig om getuienis rakende 'n beskuldigde se inheemse geloof of gebruik as 'n strafversagtende faktor gedurende vonnis te aanvaar. Die mate waartoe 'n beskuldigde se kulturele agtergrond as 'n strafversagtende faktor sal dien, sal natuurlik van die feite en omstandighede van die saak afhang. As gevolg daarvan het 'n beskuldigde wie van die pleging van 'n kulturele misdryf aangekla word, geen waarborg dat sy kulturele agtergrond en waardes wel as 'n strafversagtende faktor gedurende sy verhoor oorweeg sal word nie. Daar word dus uiteindelik tot die gevoltrekking gekom dat 'n sogenaamde “kulturele verweer” nie in die Suid-Afrikaanse strafreg bestaan nie.

Die inheemse gelowe en gebruike hierbo lei nie net tot die pleging van gemeenregtelike of statutêre misdrywe nie, maar ook tot die skending van verskeie fundamentele regte in die Grondwet. Heksemoorde lei tot die skending van die grondwetlike reg op lewe en die reg op vryheid en sekuriteit van die persoon. Verder, hekse en towenaars wie vir die beoefening van toorkuns vervolg word, word ook van die reg op 'n billike verhoor in die Grondwet ontneem. *Muti*-moorde en necklacing lei ook tot die skending van die reg op lewe en die reg op vryheid en sekuriteit van die persoon in die Grondwet. Die gebruik van *ukuthwala* lei tot die skending van die reg op gelykheid, die reg op vryheid en sekuriteit van die persoon, die reg om in 'n omgewing wat nie vir gesondheid of welstand gevaarlik is nie, die reg op basiese onderrig en ander grondwetlike beskermingsmaatreëls wat daarop gerig is om kinders te beskerm.

In die lig van die grondwetlike reg op kulturele vryheid en die reg om vrylik aan 'n kulturele lewe van eie keuse deel te neem, kan die vraag gevra word of die tyd aangebreek het om 'n formele kulturele verweer in die Suid-Afrikaanse strafreg te erken. In hierdie studie word geargumenteer dat hierdie grondwetlike regte nie die formele erkenning van 'n kulturele verweer regverdig nie. Daar word eerder aanbeveel dat die konflik tussen die Afrika gewoontereg en die Suid-Afrikaanse gemenereg opgelos moet word deur die inheemse gelowe en gebruike te hervorm ten einde dit in lyn met die waardes wat die Grondwet as hoogste gesag in Suid-Afrika onderlê, te bring. Natuurlik, dit beteken nie dat die howe kulturele oorwegings gedurende 'n strafverhoor moet ignoreer indien en wanneer dit ter sprake kom nie. Trouens, soos uitgewys in hierdie studie, rus daar 'n konstitusionele plig op die howe om Afrika gewoontereg toe te pas wanneer daardie reg toepasbaar is. Dit spreek vanself dat, wanneer 'n beskuldige poog om strafregtelike aanspreeklikheid vir sy wederregtelike optrede vry te spring deur argumente rakense sy kulturele agtergrond te opper, die Afrika gewoontereg toepasbaar is en deur die hof oorweeg moet word. Daar kan egter gevrae word hoe die strafhowe kan verseker dat hul genoeg oorweging skenk aan die moontlikheid dat 'n beskuldigde se strafregtelike gedrag kultureel gemotiveer was al dan nie ten einde aan hulle konstitusionele mandaat hierbo na

verwys, te voldoen. Alhoewel dit byna onmoontlik sal wees om 'n perfekte of foutlose benadering te formuleer waarvolgens 'n regterlike beampte strafsake wat kultureel gemotiveerde misdrywe insluit te bereg, stel die outeur die volgende benadering voor wat leiding aan regterlike beamptes kan bied wanneer hulle aangeleenthede rakende kulturele misdrywe bereg:

- Stap 1: Oorweeg om die pleging van die misdryf kultureel-gemotiveerd was al dan nie. Indien dit blyk asof die beskuldigde nie 'n kultureel-gemotiveerde misdryf gepleeg het nie, kan die verhoor op daardie basis voortduur. Indien dit egter duidelik is dat die beskuldigde wel 'n kultureel-gemotiveerde misdryf gepleeg het, volg stap 2.
- Stap 2: Sodra daar vasgestel is dat die pleging van die misdryf kultureel-gemotiveerd was, is die volgende stap om vas te stel welke inheemse geloof of gebruik tot die pleging van die misdryf aanleiding gegee het. Sodra die relevante inheemse geloof of gebruik geïdentifiseer is, volg stap 3.
- Stap 3: Wanneer dit duidelik is welke inheemse geloof of gebruik tot die beskuldigde se misdryfpleging aanleiding gegee het, is die volgende stap om vas te stel of argumente rakende daardie besondere inheemse geloof of gebruik binne die konteks van die bestaande verwere in die Suid-Afrikaanse strafreg geopper kan word ten einde die beskuldigde se strafregtelike aanspreeklikheid uit te sluit. Indien 'n beskuldigde op een van die bestaande verwere in die Suid-Afrikaanse strafreg steun, sal hy 'n behoorlike getuienis grondslag vir sy verweer voor die hof moet plaas. Wanneer die getuienis wat deur die beskuldigde aangebied word oorweeg word, moet die regtelike beampte die uitspraak en redes vir die uitspraak in vorige sake wat oor die besondere inheemse geloof of gebruik handel, oorweeg. 'n Regtelike beampte moet ook die waardes wat die Grondwet onderlê oorweeg wanneer hy sodanige assessering doen. Indien 'n regtelike beampte 'n beskuldigde se verweer handhaaf, word die beskuldigde vrygespreek. Indien die regtelike beampte egter die beskuldigde se verweer van die hand wys, moet die beskuldigde skuldig bevind word en stap 4 volg.

- Stap 4: Sodra die beskuldigde skuldig bevind is, behoort 'n hof te oorweeg of argumente rakende sy kulturele agtergrond as 'n strafversagtende faktor kan dien.

Die praktiese benadering hierbo dien egter slegs as 'n voorstel aan regtelike beamptes wanneer hulle met kultureel-gemotiveerde misdrywe te doen kry en uiteindelik sal dit die taak van die regbank wees om die Westerse gemenereg en die Afrika gewoontereg te ontwikkel ten einde die strafregelike konflik tussen hierdie twee regstelsels op te los.

Die navorsing vir hierdie studie is in November 2013 afgehandel.

KEY WORDS

cultural defence – common law – African customary law – criminal law – witchcraft – witch-killing – *muti* – *muti*-murder – necklacing – *ukuthwala* – unlawfulness – conduct – culpability - Constitution – cultural freedom

TREFWOORDE

kulturele verweer – gemenereg – Afrika gewoontereg – strafreg – toorkuns – heksemoord – *muti* – *muti*-moord – necklacing – *ukuthwala* – wederregtelikheid – handeling – toerekeningsvatbaarheid – Grondwet – kulturele vryheid

LIST OF ABBREVIATIONS

Acta Criminologica	*Acta Criminologica:* Southern African Journal of Criminology
Afr Health Mon	African Health Monitor
Afr Hum Rts LJ	African Human Rights Law Journal
Ann Surv SA Law	Annual Survey of SA Law
Ariz J Int'l & Comp L	Arizona Journal of International and Comparative Law
Berkeley J Int'l L	Berkeley Journal of International Law
Cal L Rev	California Law Review
Can JL & Soc	Canadian Journal of Law and Society
CILSA	Comparative and International Law Journal of Southern Africa
Comm L World Rev	Anglo-American Law Review (now Common Law World Review)
Comp Stud S Asia, Africa & Mid East	Comparative Studies of South Asia, Africa and the Middle East
Constitution	*Constitution of the Republic of South Africa*, 1996
Crim Just J	Criminal Justice Journal
East Med Health J	Eastern Mediterranean Health Journal
Elec J Comp L	Electronic Journal of Comparative Law

Eur J Crime Crim L & Crim Just	European Journal of Crime, Criminal Law and Criminal Justice
GCRO	Gauteng City Region Observatory
Georgia J of Int & Comp L	Georgia Journal of International and Comparative Law
Harv L Rev	Harvard Law Review
Harv Women's LJ	Harvard's Women's Law Journal
Human Rts Br	Human Rights Brief
Interim Constitution	*Constitution of the Republic of South Africa* 200 of 1993
Int J Sociol Anthropol	International Journal of Sociology and Anthropology
IPJP	Indo-Pacific Journal of Phenomenology
J Fam L & Prac	Journal of Family Law and Practice
J Mod Afr Stud	Journal of Modern African Studies
JJS	Journal for Juridical Science
JLP	Journal of Legal Pluralism and Unofficial Law
McGill LJ	McGill Law Journal
NM L Rev	New Mexico Law Review
Ohio St LJ	Ohio State Law Journal
OHLJ	Osgoode Hall Law Journal

PELJ	Potchefstroom Electronic Law Journal
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal on Human Rights
S Afr J Psych	South African Journal of Psychology
S Afr Med J	South African Medical Journal
SALJ	South African Law Journal
SAJHE	South African Journal of Higher Education
SAPL	South African Journal of Public Law
S Cal Interdisc LJ	Southern California Interdisciplinary Law Journal
Southern Calif Rev L & Women's Stud	Southern California Review of Law and Women's Studies
Stell LR	Stellenbosch Law Review
THP	*Traditional Health Practitioners Act* 35 of 2004
THRHR	Journal of Contemporary Roman-Dutch law Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Tul L Rev	Tulane Law Review

U Botswana LJ	University of Botswana Law Journal
U Haw L Rev	University of Hawaii Law Review
UCLA Pac Basin LJ	UCLA Pacific Basin Law Journal
Uni Psych	Unisa Psychologia
Unif L Rev	Uniform Law Rev
Wash & Lee L Rev	Washington & Lee Law Review
Wm & Mary J Women & L	*William & Mary Journal of Women and the Law*
WSA	*Witchcraft Suppression Act* 3 of 1957

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CHAPTER 1
INTRODUCTION

1.1 Background and problem statement

1.1.1 Introduction

South Africa has been labelled a rainbow nation due to the "many religions, diverse cultures, and rich traditions" present in the country.[1] It has a multicultural society in which a variety of legal systems can be observed.[2] However, as is shown below and in the following Chapter,[3] only two of these legal systems enjoy official recognition in the South African law.[4] These two legal systems, collectively referred to as the "state laws" in South Africa, are the Western[5] common law and African customary law.[6]

The *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution), which is the supreme law in the country,[7] recognises the diversity of the South African population in a number of ways.[8] The preamble to the Constitution, for example, expressly states that South Africa belongs to everyone living in it "united in our diversity".[9] Furthermore, section 15 of the Constitution affords every individual in South Africa the right to freedom of religion, whilst section 30 emphasises every individual's right to participate in a cultural life of his[10] own choosing.[11] In addition to that, section 31 states that people belonging to a cultural, religious or language community may not be denied the right to enjoy their culture, with other members of

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1 *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 (18 July 2012) par 1.
2 Par 2.1; Rautenbach *SAJHR* 326; Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3, 5 and 17.
3 See paras 1.1.2 and 2.2.
4 Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3, 9 and 17.
5 See par 1.1.2 for an explanation of this term.
6 See paras 1.1.1 and 2.2 as well as Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3, 9, 17.
7 Section 2 of the Constitution. See par 2.2.2 where the content of this section is given.
8 *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) 816A. See par 2.2.2 for a discussion of the various ways in which the Constitution recognises the diversity of the South African population.
9 S 1 of the Constitution. This section is further discussed in par 7.2.
10 In this study the male form also includes the female form, unless expressly stated otherwise.
11 These sections are discussed in more detail in par 7.2.

that community or to exercise their religion.[12] The equality clause[13] in the Constitution also prohibits unfair discrimination based on, among others, religion and culture.

The provisions of the equality clause are also embodied in national legislation. Section 6 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, for example, stipulates that neither the State nor any individual may unfairly discriminate against another individual, while section 8(d) of the Act specifically prohibits unfair discrimination based on traditional, cultural or religious practises. The sections referred to above will be discussed in more detail in Chapters 2 and 7.

1.1.2 Dual nature of South African law

The multicultural nature of the South African society is further reflected in the dualistic nature of the South African legal system.[14] The official legal system in South Africa is made up of the Western common law,[15] on the one hand, and African customary law,[16] on the other.[17] Rautenbach, Bekker and Goolam[18] point out that the common law in South Africa has been labelled "Western law" due to the fact that:

> ... it shares a basic intellectual and jurisprudential tradition with other legal systems belonging to the Romano-Germanic and common-law legal families.

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12 This section is discussed in more detail in par 7.2.
13 S 9 of the Constitution. For a further discussion of this section see par 7.2.
14 This matter is further discussed in par 2.2.1.
15 See par 2.2.1 for a brief exposition of the make-up of the Western common law in South Africa.
16 See par 2.2.1 for a brief exposition of the make-up of African customary law in South Africa.
17 See par 2.2.1 as well as Rautenbach and Matthee *JLP* 111; Rautenbach *SAJHR* 326; Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 17; Schoeman-Malan *PELJ* 107; Tetley *Unif L Rev* 604; Kleyn and Viljoen *Beginner's Guide* 39.
18 Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3 footnote 2.

In Chapter 2 it is pointed out that the term "African customary law" can be defined in various ways.[19] However, in its simplest terms, African customary law can be understood as the "various laws of the indigenous people of South Africa".[20] Although African customary law now forms part of the official legal system in South Africa, that was not always the case. As shown below[21] and in Chapter 2,[22] African customary law only received official recognition at the advent of the new constitutional dispensation in South Africa.

Apart from the two officially recognised legal systems above, there are also various other legal systems in South Africa that do not enjoy official recognition.[23] These legal systems are collectively referred to as the "non-state laws" in South Africa and include, for example, the Muslim, Hindu and Jewish legal systems. [24] A discussion of these non-official legal systems falls outside the scope of this study.

1.1.3 Recognition of African customary law

Although the common law was initially in a preferential position,[25] the *Constitution of the Republic of South Africa* 200 of 1993 (hereafter the Interim Constitution) awarded indirect recognition to African customary law in sections 181(1)-(2) and principles XIII and XI.[26] With the enactment of the current Constitution the position of African customary law was further

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19 See par 2.2.
20 Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3 footnote 1.
21 See par 1.1.3.
22 See par 2.2.2.
23 Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3, 17.
24 Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3, 9, 17.
25 *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) par 148; *Alexkor Ltd and Another v Richterveld Community and Others* 2003 12 BCLR 1301 (CC) par 56.
26 See par 2.2.2 as well as Rautenbach *Stell LR* 107, Ludsin *Berkeley J Int'l L* 68, Rautenbach and Matthee *JLP* 112 footnote 12, Rautenbach *Stell LR* 107 and Rautenbach *Elec J Comp L* 4 footnote 16.

strengthened in sections 39(2)-(3), 211, 212(2) and Part A of Schedule 4.[27] In case law there is also no doubt anymore as to the place of African customary law in the South African legal system. In *Alexkor Ltd v Richtersveld Community*,[28] for example, the Constitutional Court held that African customary law is no longer subordinate to the common law, but instead forms "an integral part of our law". The court further held that the validity of African customary law is no longer determined by common law, but by the Constitution.[29] In the ground-breaking case, *Bhe v The Magistrate, Khayelitsha*,[30] the Constitutional Court held that in the new constitutional dispensation South African courts are obliged to apply African customary law when that law is applicable. The Court further held that any court's application of customary law must always be subject to the provisions of the Constitution.[31]

Although the common law and African customary law are now on equal footing in the South African legal system,[32] it does not mean that these two legal systems coexist in legal harmony. In fact, in Chapter 4 it is shown that, due to the equal status afforded to these two legal systems, the South African law now has to deal with various conflict situations that can arise between these two systems.[33] It is especially in the context of the South

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27 These sections are discussed in more detail in paras 2.2.2.

28 2003 12 BCLR 1301 (CC) par 51.

29 *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) par 51. Also see par 2.2.2.

30 2005 1 SA 580 (CC) par 148. Also see par 2.2.2.

31 2005 1 SA 580 (CC) par 148. Also see par 2.2.2.

32 Sibanda *Human Rts Br* 31.

33 Examples of such conflict were present in the law of marriage and succession in the common law and African customary law. Marriages concluded in terms of African customary law did not enjoy recognition in terms of the South African common law. However, to resolve this conflict, the legislature passed the *Recognition of Customary Marriages Act* 120 of 1998, which now affords recognition for marriages concluded in terms of African customary law. Similarly, in the case of *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) the rule of male primogeniture in the African customary law of succession came under constitutional scrutiny. The rule of male primogeniture entailed that only the eldest male descendant of the deceased may inherit. Woman

African criminal law that the conflict between these two legal systems becomes apparent, because as is shown in Chapter 4,[34] the conduct of an individual can be viewed as an indigenous belief or custom in terms of African customary law, but at the same time be considered to be a crime in terms of the South African common law.[35] The duality of the South African legal system is therefore also prevalent in the South African Criminal law.

1.1.4 Dual nature of South African criminal law

The South African common law and African customary law both have their own unique criminal law principles.[36] Although there are important differences between these criminal legal systems, there are also various similarities.[37] Both systems, for example, acknowledge and define various categories of crimes and both systems prescribe punishment for the commission of a crime.[38] However, it is here where the similarities between these two legal systems end, because as is shown in the following Chapter,[39] the nature, purpose and forms of punishment in these two systems differ quite considerably.[40]

The differences between the South African common law and African customary law in the context of the criminal law can be attributed to the different value systems that underpin these two legal systems.[41] Whereas South African common law is based on an individualistic value system, where the

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and their male descendents were therefore excluded from inheriting. After testing the rule against the equality clause (section 9) of the Constitution the Constitutional Court held that the rule was unconstitutional, because it unfairly discriminated against women. See paras 209-210 of the judgment in this regard.

34 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.

35 See chapter 4 for a detailed discussion of this conflict between the South African common law and African customary law.

36 See par 2.3 as well as Rautenbach and Matthee *JLP* 113.

37 These similarities and differences are discussed in more detail in par 2.3.

38 See par 2.3.

39 See par 2.3 below.

40 See par 2.3 where these differences are discussed in more detail.

41 The value systems of the South African common law and African customary law are discussed in more detail in par 2.4.

individual enjoys preference over the community,[42] African customary law is based on a communalistic value system where the community enjoys preference over the individual.[43] The divergent value systems of these two legal systems also result in a difference in the source of law and norms in these two systems. In African customary law the community is viewed as the source of law and norms, while the individual is the source of law and norms in the South African common law.[44]

As a result of the difference in the value systems of the common law and African customary law, it is inevitable that conflict situations can arise when the South African criminal law has to deal with offences committed by people living under a system of African customary law.[45] In fact, South Africa's past is riddled with cases where the Western courts had to deal with situations where indigenous beliefs and customs led to the commission of common law crimes.[46] In general, the accused in these cases attempted to escape criminal liability by putting forth evidence of their cultural background and values to try and persuade the courts that their commission of a crime was motivated by cultural norms, traditions, practices and/or values. For example, in the case of *R v Njova*[47] the accused was charged with abduction because he carried off a minor girl against her parents' will in

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42 See par 2.4 as well as Van der Walt *Potchefstroom: Instituut vir Reformatoriese Studie* 101, 111-113; Rautenbach *Elec J Comp L* 12; Carstens *De Jure* 11; Keevy *JJS* 29.

43 See par 2.4 as well as Van der Walt *Potchefstroom: Instituut vir Reformatoriese Studie* 101, 111-113; Rautenbach *Elec J Comp L* 12; Carstens *De Jure* 11; Ludsin *Berkeley J Int'l L* 70.

44 See par 2.4 as well as Van der Walt *Potchefstroom: Instituut vir Reformatoriese Studie* 118.

45 Labuschagne *SACJ* 246; Rautenbach and Matthee *JLP* 116, 118. These conflict situations are discussed in chapter 3.

46 See chapter 3 as well as Labuschagne *SACJ* 472; *Bennett U Botswana LJ* 5; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 136. For examples of these situations see the cases of *R v Njova* 1906 20 EDC 71, *Ncedani v R* 1908 22 EDC 243, *R v Swartbooi* 1916 EDL 170, *R v Mane* 1948 1 All SA 128 (E), *R v Sita* 1954 4 SA 20 (E), *R v Ngang* 1960 2 SA 363 (T), *S v Ngema* 1992 2 SASV 650 (D).

47 1906 20 EDC 71.

order to have sexual intercourse with her. In another case, *R v Ncedani*,[48] the accused was also charged with abduction because he carried off a minor girl against her parents' will for purposes of marriage. In both cases the courts refused to accept arguments of the indigenous custom of *ukuthwala*[49] as a defence to a charge of abduction.[50]

In recent times the legal conundrum referred to above, *viz* whether arguments of an accused's cultural background and values can serve as a justification for the commission of a common law crime, has been labelled the "cultural defence" in criminal law.[51]

1.1.5 Cultural defence and the South African criminal law

In Chapter 4 it is shown that no official cultural defence currently exists in the South African criminal law. However, despite the non-existence of such a defence, there are still various scenarios in the South African criminal law where a cultural defence becomes relevant. The most common scenarios in which a cultural defence can be raised are those related to the indigenous beliefs in witchcraft,[52] (including witch-killings)[53] the *tokoloshe*[54] and *muti*-medicine[55] (including *muti*-murders[56]), as well as the phenomenon of necklacing,[57] and the custom of *ukuthwala*.[58] Although these indigenous beliefs and customs and the possibility of raising a cultural defence in each

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48 1908 22 EDC 243.
49 See par 4.6.2 for an explanation of the indigenous custom of *ukuthwala*.
50 *R v Njova* 1906 EDC 71 72; *Ncedani v R* 1908 EDC 243, 245. See par 4.6.3 where these two cases are further discussed and where the common law crime of abduction is defined and discussed within the context of the indigenous custom of *ukuthwala*.
51 See par 3.1 as well as Carstens *De Jure* 1-25; Torry *JLP* 127-161; *Bennett U Botswana LJ* 3-26.
52 See par 4.2.
53 See par 4.2.
54 See par 4.3.
55 See par 4.4.
56 See par 4.4.
57 See par 4.5.
58 See par 4.6.

are discussed in detail in Chapter 4,[59] a brief overview of each is provided below.[60]

1.1.5.1 Indigenous belief in witchcraft and witch-killings

Witchcraft refers to the bewitchment of a person and is attributed to those who employ magic to inflict all kinds of evil on other individuals.[61] The practitioners of witchcraft can be male ("wizard") or female ("witch") and are believed by some cultures to cause death, illness and evil.[62]

The suspected practitioner of witchcraft is pointed out by a witchdoctor[63] or traditional healer[64] through the process of "smelling out".[65] Although witches and wizards were traditionally burned to death, the identified individual can be killed in various other ways.[66]

In the South African criminal law the perpetrator of a witch-killing can be prosecuted for the common law crimes of murder[67] or, if the victim survives, attempted murder,[68] common assault[69] or assault with the intent to commit grievous bodily harm.[70] Apart from these common law crimes, the accused can also be charged with various statutory crimes in terms of the

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59 See paras 4.2.6, 4.3.4, 4.4.4, 4.5.4 and 4.6.4.
60 See paras 1.1.5.1-1.1.5.5.
61 See Labuschagne *SACJ* 247, Ivey and Myers *S Afr J Psych* 56, Quarmyne *Wm & Mary J Women & L* 478 and Petrus and Bogopa *IPJP* 3 for various definitions of witchcraft. Also see par 4.2.2 where withcraft is discussed in more detail.
62 See par 4.2.2 as well as Carstens *De Jure* 4, Igwe *Skeptic* 73, Ivey and Myers *S Afr J Psych* 56, Ludsin *Berkeley J Int'l L* 76, 97, Quarmyne *Wm & Mary J Women & L* 480, and *S v Mafunisa* 1986 3 SA 495 (V) 496J-497D.
63 The term "witchdoctor" is explained in footnote 103 of Chapter 4.
64 The term "traditional healer" is explained in footnote 102 of Chapter 4.
65 See par 4.2.3 as well as Ludsin *Berkeley J Int'l L* 78.
66 See par 4.2.3 as well as Carstens *De Jure* 7; Minnaar, Wentzel and Payze "Witch Killing" 184 for an overview of the various methods used to kill witches.
67 See par 4.2.4 for a definition of this common law crime.
68 See par 4.2.4. A brief explanation of attempted murder is provided in footnote 166 of Chapter 4.
69 See par 4.2.4 for a definition of this common law crime.
70 See par 4.2.4 where this common law crime is discussed in more detail.

Witchcraft Suppression Act.[71] In terms of this Act it is a statutory crime to accuse someone of witchcraft or to point someone out as being a witch or wizard.[72] Injuring a person based on information received from a traditional healer, or similar person, is also a statutory crime.[73] Although these statutory provisions were enacted for the purpose of curtailing witch-killings, these killings still continue.[74]

Whether an accused is charged with one of the common law or statutory crimes above the cultural defence comes to the fore when a South African criminal court has to deal with a crime resulting from the indigenous belief in witchcraft. In such instances a court has to determine whether such a belief can either serve as a defence excluding criminal liability[75] or, at the very least, serve as a mitigating factor during sentencing.[76] In Chapter 4,[77] it is shown that, the South African courts have yet to accept a belief in witchcraft as a valid defence in the criminal law. What is also shown in Chapter 4 is that the case law dealing with the indigenous belief in withcraft and witch-killings were all decided before the enactment of the final Constitution.[78] Therefore, in light of the right to cultural freedom in the Constitution, the question whether an accused can rely on an indigenous belief in witchcraft to escape criminal liability is still a moot point in the South African law.[79]

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71 3 of 1957. See par 4.2.5 where these crimes are discussed in more detail.
72 S 1(a) of the Act. These statutory crimes are discussed in more detail in par 4.2.5.
73 S 1(e) of the Act. These statutory crimes are discussed in more detail in par 4.2.5.
74 See Petrus *Int J Sociol Anthropol* 1 where the author highlights a number of recent withchraft-related murders in the Eastern Cape Province.
75 This aspect is discussed in more detail in par 6.2.
76 This aspect is discussed in more detail in par 6.4.
77 See par 4.2.4.
78 See paras 4.2.4 and 4.2.6.
79 See par 4.2.6.

1.1.5.2 Indigenous belief in *tokoloshe*

The indigenous belief in the *tokoloshe* can lead to the commission of common law crimes such as murder[80] or, if the victim survives, common assault[81] or assault with the intent to commit grievous bodily harm.[82] When charged with one or more of these crimes an accused may attempt to raise a cultural defence by putting forth evidence of his indigenous belief in the *tokoloshe* to try and justify his conduct and escape criminal liability.[83]

1.1.5.3 Indigenous belief in *muti* and *muti*-murders

Muti refers to herbs or medicine and is used by various African cultures.[84] Normally people within these cultural groups would go to a traditional healer for *muti* to help them overcome personal problems, to fulfil their ambitions or to get back at their enemies.[85] *Muti* that contains no human body parts has no sinister significance and therefore creates no problems in the South African criminal law.[86] However, the human tongue, eyes, heart and genitalia normally deliver the strongest *muti* and body parts needed for the manufacturing of *muti* is obtained by committing *muti*-murders.[87]

A *muti*-murder is a ritual during which a particular victim is chosen because he meets certain requirements and is then killed in order to obtain the spe-

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80 See par 4.2.4 for a definition of this common law crime.
81 See par 4.2.4 for a definition of this common law crime.
82 See par 4.2.4 where this common law crime is discussed in more detail.
83 See par 4.3.4.
84 See par 4.4.1 and Rautenbach *Obiter* 521-522, Carstens *De Jure* 12 and Eastman "Rainbow Healing" 184.
85 See par 4.4.1 as well as Carstens *De Jure* 13 and Eastman "Rainbow Healing" 189.
86 See par 4.4.2.
87 See par 4.4.1 as well as *S v Modisadife* 1980 3 SA 860 (A), *S v Mavhungu* 1981 1 SA 56 (A) 61A-61B, 62D-62E, 63A, Sapa 2007 http://www.sowetanlive.co.za/sowetan/archive /2007/11/14/muti-killer_denied-bail, Dlamini 2009 http://www.sowetanlive.co. za/sowetan/archive/.../muti-mur-der-comes-to-city-suburb, Sapa 2010 http://www.iol.co.za/news/south-africa/man-jailed-for-witchcraft-murder-1.477-536, Sapa 2011 http://www.iol.co.za/news/crime-courts/boy-s-ear-penis-cut-off-1.1203975, Anon 2011 http://www.sowetanlive.co.za/news/2011/.../police-on-trail-of-pos-sible-muti-serial-killer, Sapa 2011 http://www.iol.co.za/news/crime-courts/killer-grins-at-muti-murder-sentence-1.1187916.

cific body parts needed for the *muti* from that victim.[88] In order to ensure the strength of the *muti* the body parts must be removed while the victim is still alive.[89] In most cases, the victim of a *muti*-murder dies during or shortly after the body parts have been removed.[90]

Muti-murderers normally face charges of murder or attempted murder, if the victim survives the ordeal.[91] An accused may then attempt to raise a cultural defence by putting forth evidence of his indigenous belief in *muti* to justify his conduct. A South African criminal court will then have to consider whether the killing or attempted killing of another human being can be justified as part of an accused's indigenous belief in *muti*.[92] Alternatively, a criminal court will have to consider whether this belief can serve as a mitigating factor during sentencing.

In Chapter 4,[93] however, it is shown that, the South African criminal courts have yet to accept the indigenous belief in *muti* as either a valid defence in the criminal law or as a mitigating factor during sentencing.[94] What is also shown is that the case law dealing with the *muti*-murders resulting from the indigenous belief in *muti* was all decided before the enactment of the Constitution. The question which therefore arises is whether the constitutional right to freedom of culture and cultural practices is wide enough to justify the killing of another human being. This question is further explored in Chapter 7.[95]

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88 See par 4.4.2 as well as Carstens *De Jure* 12 and Petrus *Int J Sociol Anthropol* 1.
89 See par 4.4.2 as well as Carstens *De Jure* 12-13.
90 See par 4.4.2 as well as Carstens *De Jure* 12-13.
91 See par 4.4.3.
92 See par 4.4.4.
93 See par 4.4.3.
94 See par 4.4.3.
95 See paras 7.2.2.2 and 7.3.

1.1.5.4 Phenomenon of necklacing

The phenomenon of necklacing serves as another example in which the conflict between the South African common law and African customary law manifests itself.[96] Necklacing refers to the practice of placing a tyre, filled with petrol or paraffin, around a victim's neck and then setting fire to it.[97] The victim's hands are often cut off or tied behind his back.[98] Sometimes the victim himself is doused with petrol or paraffin.[99] The victim can even be forced to drink petrol or paraffin before he is set alight.[100] Initially the purpose of necklacing was to eliminate informants (*impimpi*) and bring about political change during the era of apartheid in South Africa,[101] but today it is still being used as the preferred method for killing witches.[102]

Necklacing can lead to the commission of common law crimes such as murder[103] or attempted murder[104] and/or assault,[105] if the victim survives. During a criminal trial an accused charged with one or more of these crimes may put forth evidence of his belief in witchcraft[106] in an attempt to persuade the court that the killing of the deceased was necessary in order to prevent harm from coming to either himself or the community. A criminal court then has to consider whether it is a valid defence in terms of the

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96 Necklacing is discussed in more detail in par 4.5.

97 See par 4.5.2 as well as Carstens *De Jure* 16; Moosage *Kronos* 137; Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 164.

98 See par 4.5.2 as well as Carstens *De Jure* 16-17.

99 See par 4.5.2 as well as Carstens *De Jure* 17; Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 164.

100 See par 4.5.2 as well as Carstens *De Jure* 17; Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 164.

101 See par 4.5.2 as well as See Carstens *De Jure* 329, Moosage *Kronos* 137 and Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 155.

102 See par 4.5.1 as well as Carstens *De Jure* 328, Moosage *Kronos* 137 and Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 155.

103 See par 4.5.3.

104 See par 4.5.3.

105 See par 4.5.3 as well as Carstens *De Jure* 17.

106 See par 4.2.1 and 4.2.2 where the belief in withcraft in explained in more detail.

South African criminal law to kill another human based on an indigenous belief in witchcraft.[107] As mentioned earlier[108] and as is shown in Chapter 4,[109] the criminal courts have been reluctant in accepting that the indigenous belief in witchcraft can serve as a defence in the South African criminal law. In fact, as mentioned earlier[110] and in Chapter 4,[111] witch-killings are outlawed in terms of the *Witchcraft Suppression Act*. However, this Act has not been very effective in curbing the prevalence of witch-killing and the question whether an accused can escape criminal liability based on an indigenous belief in witchcraft is still a moot point in South Africa.[112] In fact, in light of the right to freedom of culture and cultural practices afforded in the Constitution it can be asked whether the killing of another human being as a result of an indigenous belief in witchcraft can be justified based on these constitutional rights.[113]

1.1.5.5 Indigenous custom of *ukuthwala*

Another example of an indigenous custom that can lead to the commission of a common law crime is the custom of *ukuthwala*.[114] In terms of this custom a woman is carried off by her prospective husband, his friends or family to the residence of the husband's father or guardian.[115] The custom of *ukuthwala* can take on one of three forms. The first form takes place with the agreement of all the parties involved.[116] With the second form of *ukuthwala* the carrying off takes place with the consent of both the woman and

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107 See par 4.2.6.
108 See par 1.1.2.
109 See par 4.2.6.
110 See par 1.1.3.
111 See par 4.2.5.
112 See par 4.2.5 as well as Dhlodhlo *De Rebus* 410; Hund *CILSA* 368; Ludsin *Berkeley J Int'l L* 87.
113 This question is further explored in paras 7.2.2.3 and 7.3.
114 See par 4.6.
115 See par 4.6.2.
116 See par 4.6.2 as well as Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7; Olivier *et al* "Indigenous Law" par 89.

prospective husband's families, but without the woman's consent.[117] With the last form of *ukuthwala* the carrying off is accompanied by violence and here both the woman as well as her father or guardian's permission is lacking.[118] What should also be noted is that, in the case of the last two forms of *ukuthwala,* it often happens that the woman and prospective husband engage in sexual intercourse.[119] It must, however, be noted that, in the case of the third form of *ukuthwala,* the sexual intercourse usually takes place without the woman's consent.

The custom of *ukuthwala* can result in the commission of various common law crimes, namely abduction,[120] kidnapping[121] and common assault[122] as well as the statutory crime of rape.[123] Once again, the cultural defence comes to the fore where an accused is charged with one, or more, of the crimes above. In such an instance a criminal court has to consider whether the accused should escape criminal liability for his conduct simply because of the fact that *ukuthwala* is an acceptable custom in terms of his particular culture. In Chapter 4 it is shown that the criminal courts have always rejected arguments of the custom of *ukuthwala* as a valid defence for escaping criminal liability based on the crimes above.[124] However, as with the indigenous beliefs and customs discussed above, the South African case law dealing with the instances where the custom of *ukuthwala* led to the commission of crimes predates the enactment of the final Constitution.[125]

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117 See par 4.6.2 as well as Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7; Olivier *et al* "Indigenous Law" par 89.

118 See par 4.6.2 as well as Labuschagne and Schoeman *JJS* 35; Rautenbach and Matthee *JLP* 119; Mwambene and Sloth-Nielsen *J Fam L & Prac* 8; Olivier *et al* "Indigenous Law" par 89.

119 See par 4.6.2.

120 See par 4.6.3 for a definition of the common law crime of abduction.

121 See par 4.6.3 for a definition of the common law crime of kidnapping.

122 For a definition of this crime see par 4.2.4 and for a discussion of this crime in the context of *ukuthwala* see par 4.6.3.

123 See par 4.6.3 for a definition of this crime and a detailed discussion thereof within the context of *ukuthwala*.

124 See par 4.6.3.

125 See par 4.6.3 and 4.6.4.

Therefore, the question can be raised whether the conduct of an accused who commits a common law or statutory crime in the name of *ukuthwala* can be justified by relying on the constitutional rights to freedom of culture and cultural practices.[126]

1.1.6 Cultural defence and the South African criminal law revisited

From the discussion above,[127] as well as in Chapter 4,[128] it is clear that problems can arise when a person's conduct is condoned in terms of African customary law, but not in terms of the South African common law.[129] In those instances, the question arises whether an accused can rely on a so-called "cultural defence" when charged with the commission of what is considered to be a "culturally motivated crime".[130] In Chapter 3 it is shown that the cultural defence can be defined in various ways.[131] However, for present purposes it is sufficient to note that, by raising a cultural defence an accused attempts to put evidence of his cultural background and values before a criminal court in an attempt to escape criminal liability or, at least, receive a lighter sentence.[132] The practical effect of a cultural defence is that the accused, because of his cultural background and values, did not intend to commit a crime or did not necessarily realise that he was indeed committing a crime.[133] What the accused actually alleges in the last instance is that he did not possess the necessary criminal capacity in order to be found guilty.[134]

When raised during a criminal trial in a Western court, a cultural defence can play a role in two instances. Firstly, it can play a role when determining

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126 This question is further explored in paras 7.2.2.4 and 7.3.
127 See par 1.1.5.
128 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.
129 Also see Rautenbach and Matthee *JLP* 116, 118 and Petrus *Acta Criminologica* 123, 124.
130 The term "culturally motivated crime" is defined in par 3.2.
131 See par 3.2.
132 See par 3.2 as well as Golding *Ratio Juris* 146-147, Van Broeck *Eur J Crime Crim L & Crim Just* 28-29 and .
133 See par 4.2 as well as Volpp *Harv Women's LJ* 57.
134 See par 3.2 as well as Volpp *Harv Women's LJ* 57.

whether the requirements for criminal liability have been met.[135] In terms of the South African common law there are five requirements that have to be met in order to establish criminal liability,[136] namely legality,[137] conduct,[138] compliance with the definitional elements of a crime,[139] unlawfulness[140] and culpability.[141] To be held criminally liable the State needs to prove all five elements beyond reasonable doubt.

When considering the role of a cultural defence on the elements of criminal liability, the relationship between an indigenous belief or custom and the element of culpability is very important.[142] An accused is not necessarily

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135 Carstens *De Jure* 1; Rautenbach and Matthee *JLP* 114.

136 Burchell and Milton *Principles of Criminal Law* 138; Rautenbach and Matthee *JLP* 116; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142. Kemp *et al Criminal law* 22-25, however, argues that criminal liability is only based on three principal elements, *viz* unlawful conduct, culpability and fault.

137 The term "legality" means that an accused's conduct will only constitute a crime if, at the time of commission thereof, the conduct is considered to be a crime in terms of the law. See Snyman *Criminal Law* 36, Burchell and Milton *Principles of Criminal Law* 94, Kemp *et al Criminal law* 17 and footnote 27 in Rautenbach and Matthee *JLP* 116.

138 Conduct can take on the form of either an act or omission. See paras 6.1-6.2 as well as Snyman *Criminal Law* 51, Burchell and Milton *Principles of Criminal Law* 178, 185, Kemp *et al Criminal law* 44, Rautenbach and Matthee *JLP* 116 footnote 28 and *R v Mkize* 1959 2 SA 260 (N) 260 for a more comprehensive discussion of what is considered to be conduct for purposes of criminal liability.

139 Each crime is defined in its own unique way in order to distinguish it from other crimes. Therefore, in order to be found guilty of a particular crime an accused must comply with the unique definition of a particular crime. See Snyman *Criminal Law* 71, Burchell and Milton *Principles of Criminal Law* 49, 55-58, Kemp *et al Criminal law* 22, 25 and Rautenbach and Matthee *JLP* 116 footnote 29.

140 The term "unlawfulness" means that an accused's conduct must comply with the definition of a crime, whether it be a common law or statutory crime. For a more comprehensive discussion of the element of unlawfulness see par 5.2, Snyman *Criminal Law* 97, Burchell and Milton *Principles of Criminal Law* 226, Kemp *et al Criminal law* 22-25, Rautenbach and Matthee *JLP* 116 footnote 30, Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142, *R v Mkize* 1959 2 SA 260 (N) 260 and *S v Engelbrecht* 2005 2 SACR 41 (W) 53G, 105I-105J.

141 For a more comprehensive discussion of the element of culpability see par 6.3 as well as Burchell and Milton *Principles of Criminal Law* 358, Kemp *et al Criminal law* 22-25, Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142, Rautenbach and Matthee *JLP* 116 and *R v Mkize* 1959 2 SA 260 (N) 260.

142 Rautenbach and Matthee *JLP* 117.

guilty of a crime purely because he performed an unlawful act which meets the elements of a crime.[143] The person's conduct must also be committed with the necessary culpability.[144] Culpability consists of two elements: criminal capacity and fault (*mens rea*).[145]

Criminal capacity implies that, at the time of committing the unlawful conduct, the accused was able to a) distinguish between right and wrong and b) act according to his appreciation of what is right and what is wrong.[146] Once it has been established that a person has the necessary capacity, the investigation into the necessary fault can continue.[147]

Fault (*mens rea*) refers to the requirement that the accused's conduct must have taken place with the necessary intention (*dolus*) or negligence (*culpa*).[148] Intention consists of two elements: the cognitive element and the conative element.[149] The cognitive element consists of knowledge of the fact that the conduct is taking place, that it complies with the definitional elements of a crime and that it is unlawful.[150] The conative element consists of aiming a person's will at performing certain conduct or achieving a certain result.[151] In short, intention refers to the fact that an accused should realise that his conduct is not justified and that his conduct boils down to a crime.[152] Some common law crimes require fault in the form of negligence.[153] The test for negligence is objective and is based on the question

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143 Rautenbach and Matthee *JLP* 117.
144 Snyman *Criminal law* 34-36, 147; Rautenbach and Matthee *JLP* 117.
145 Kemp *et al Criminal law* 23.
146 Kemp *et al Criminal law* 23; Burchell and Milton *Principles of Criminal Law* 358; Rautenbach and Matthee *JLP* 117.
147 Snyman *Criminal law* 157-158.
148 Kemp *et al Criminal law* 23, 183; Burchell and Milton *Principles of Criminal Law* 455.
149 For a general explanation of the difference between the cognitive function and conative function see Kemp *et al Criminal law* 132.
150 Kemp *et al Criminal law* 132; Burchell and Milton *Principles of Criminal Law* 459-460.
151 Kemp *et al Criminal law* 132; Rautenbach and Matthee *JLP* 117.
152 Snyman *Criminal law* 182-202; Burchell and Milton *Principles of Criminal Law* 461; Kemp *et al Criminal law* 184; Rautenbach and Matthee *JLP* 117.
153 Kemp *et al Criminal law* 196; Rautenbach and Matthee *JLP* 117.

whether a reasonable person in the circumstances of the accused would have foreseen the possibility that his conduct could lead to the commission of a crime.[154] This test entails a value judgment by somebody other than the accused himself.[155]

In cases where indigenous beliefs and customs result in the commission of a common law or statutory crime it is normally the learned judge, with a value system which differs from that of the accused, who must decide whether a reasonable person in the same circumstances as the accused would have acted as he had done.[156] Rautenbach and Matthee,[157] however, point out that there may be people in South Africa who only partly adhere to indigenous African beliefs and customs.

1.2 Area of focus

As stated above,[158] problems may arise when a person's conduct is viewed as lawful when considered from a customary law perspective, but unlawful when considered from a common law perspective.[159] A perusal of South African case law dealing with this issue reveals that in such instances an accused will attempt to raise what is called a "cultural defence" by putting forth evidence of his cultural background or values to justify his *prima facie* unlawful conduct and ultimately escape criminal liability or, at the very least, receive a lighter sentence.[160] This situation raises two important questions with regard to the manner in which the South African criminal courts have to deal with conflict situations between the South African common law and African customary law. The first question is whether a so-called "cultural defence" already exists in the South African criminal law.

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154 Snyman *Criminal law* 209-210; Burchell and Milton *Principles of Criminal Law* 527-529; Kemp *et al Criminal law* 196; Rautenbach and Matthee *JLP* 117.
155 Snyman *Criminal law* 209-210, 213-215; Rautenbach and Matthee *JLP* 117.
156 Rautenbach and Matthee *JLP* 117.
157 Rautenbach and Matthee *JLP* 117.
158 See par 1.1.
159 A similar view is held by Rautenbach and Matthee *JLP* 118.
160 See Chapter 4.

The second question flows naturally from the answer to the first question above. In Chapter 2 of this study it is shown that, before the advent of the new constitutional dispensation in South Africa, African customary law took a backseat to the common law.[161] This meant that the validity of the rules, beliefs and customs in African customary law had to be tested against the values of the common law as the dominant legal system in South Africa. However, this position changed with the enactment of the interim and subsequent final Constitutions which put the South African common law and African customary law on equal footing as far as status is concerned.[162] Today the Constitution serves as the supreme law in South Africa and any "law or conduct inconsistent with it is invalid".[163] The inevitable consequence of the equal status afforded to the South African common law and African customary law and the supremacy of the Constitution is that the validity of the rules in both these systems must now be tested against the values of the Constitution and not each other. In light of this argument and considering the fact that the Constitution now affords each and every individual in South Africa the right to freedom of culture and to freely participate in a cultural life of his choosing, the second question that arises is whether these constitutional rights warrant the formal recognition of a cultural defence in the South African criminal law. As pointed out in Chapter 7,[164] although the Constitution affords individuals the right to cultural freedom, the exercise of that right can be limited under certain circumstances.

Of course, in answering the two questions above it is necessary to consider the influence of a so-called "cultural defence" on the criminal liability of an accused in the South African law. However, in this study the influence of a cultural defence on criminal liability is limited to the question whether evidence of an accused's cultural background and values can exclude the

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161 See par 2.2.2.
162 See paras 1.1.2, 1.1.3, 2.2.2 and 2.3.
163 S 2 of the Constitution.
164 See par 7.4.

elements of unlawfulness,[165] conduct[166] and culpability[167] required for criminal liability. The reason for limiting this study to these elements is because a perusal of the South African case law has revealed that a "cultural defence" is usually raised in the context of these three elements of criminal liability.

Against this background, the focus of this study can be demarcated by posing the following central research question and specific aims:

1.2.1 Central research question

Is there a so-called “cultural defence” in the South African law, and if so, what is the influence of such a defence on the South African criminal law?

1.2.2 Aims of the study

This study is not aimed at investigating whether the indigenous beliefs and practices identified earlier constitute either a delict or crime, or both, within the African customary law. Instead, this study aims to:

1. provide an overview of the current composition of the South African legal system in order to facilitate an understanding of why the South African common law and African customary law come into conflict in the context of the South African criminal law (Chapter 2);
2. elucidate on the various indigenous beliefs and customs that result in conflict between the South African common law and African customary law in the context of the South African criminal law (Chapter 4);
3. investigate whether the South African criminal legal system formally recognises a so-called "cultural defence" for accused persons who

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165 See Chapter 5.
166 See Chapter 6.
167 See Chapter 6.

commit common law and/or statutory crimes under the guise of the indigenous beliefs and customs referred to above (Chapter 4);[168]

4. determine whether the South African criminal law formally recognises a cultural defence negating the elements of criminal liability, in particular the elements of unlawfulness, conduct and culpability, in the South African criminal law (Chapters 5 and 6);
5. evaluate whether the right to freedom of culture and cultural practices entrenched in the Constitution warrants the formal recognition of a cultural defence in the South African criminal law (Chapter 7); and
6. reach a conclusion on whether the current criminal law conflicts between the South African common law and African customary law can be resolved through the process of transformative constitutionalism whereby the indigenous beliefs and customs in the African customary law can be brought in line with the values of the Constitution as the supreme law of South Africa (Chapter 7).

1.3 Research methodology

This study is mainly based on a literature study of legislation, case law, legal journals, relevant textbooks and internet sources on the topic. The focus of the study is South African law, because the formal recognition of a so-called cultural defence ultimately depends on the interpretation and implementation of the rights to cultural and religious freedom, as well as the limitation clause, entrenched in the Constitution. The research

1.4 Study outline

In order to structure this study the thesis is divided into the following chapters:

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168 See paras 1.1.5.1-1.1.5.5.

1.4.1 Chapter 2: Nature of the South African law: two sides to the coin

This Chapter provides an overview on the dualistic nature of South African law, in general, and the South African criminal law, in particular, referred to 1.1.1 and 1.1.4 above. Moreover, this Chapter provides a broad overview on the recognition of African customary law before and after the advent of the new constitutional dispensation in South Africa. This Chapter also focuses on the similarities and differences between the South African common law and African customary law in the context of the criminal law. Lastly, the difference in the value systems underpinning these two legal systems is also dealt with in this Chapter.

1.4.2 Chapter 3: Understanding the cultural defence: When theory and practice meet

The focus of this Chapter is to contextualise the cultural defence. More specifically, this Chapter focuses on defining the terms "cultural defence", "culture" and "culturally motivated crimes" that are relevant to this study. This Chapter also outlines the critical elements, the purpose and scope of the cultural defence. Furthermore, this Chapter discusses some of the arguments that can be raised in favour of and against the formal recognition of a cultural defence in any legal system.

1.4.3 Chapter 4: Common law crimes and indigenous beliefs and customs: identifying the issues

This Chapter is dedicated to an overview of the various conflict situations that arise between the South African common law and African customary law within the context of the criminal law. More specifically, this chapter identifies and discusses the various indigenous beliefs and customs that result in the commission of common law or statutory crimes.

1.4.4 Chapter 5: Influence of the cultural defence on unlawfulness

This Chapter explores the possibility of the cultural defence negating the element of unlawfulness necessary for criminal liability. More specifically, this Chapter focuses on a perusal of South African case law in which the argument was raised that an accused's cultural background and values negate the element of unlawfulness.

1.4.5 Chapter 6: Influence of the cultural defence on conduct and culpability

This Chapter explores the possibility of the cultural defence negating the elements of conduct and culpability necessary for criminal liability. More specifically, this Chapter focuses on a perusal of South African case law in which the argument was raised that an accused should escape criminal liability due to the fact that his cultural background and values excluded the elements of conduct and culpability necessary for criminal liability.

1.4.6 Chapter 7: Casting a constitutional light on the cultural defence

This Chapter is aimed at evaluating whether the various cultural rights contained in the Constitution warrants the recognition of a formal cultural defence in the criminal law. Such an evaluation will be done by weighing up the constitutional provisions that afford individuals the right to cultural freedom against the constitutional provisions that limit the exercise of the right to cultural freedom. This Chapter also considers the role to be played by reformative constitutionalism in resolving the conflict between the South African common law and African customary law in the context of the criminal law.

1.4.7 Chapter 8: Conclusion and Recommendations

This Chapter concludes with recommendations based on the theoretical background in Chapters 2, 3 and 4 and the analyses in Chapters 5, 6 and 7.

CHAPTER 2

NATURE OF THE SOUTH AFRICAN LAW: TWO SIDES TO THE COIN

2.1 Introduction

In Chapter 1 it was pointed out that South Africa is faced with many challenges due to a pluralistic society which can be described as a "mosaic of different cultural and linguistic communities".[1] The majority of South Africa's population consists of the various African communities who speak numerous languages and adhere to various cultures.[2] The minority of the South African population consists of coloured people,[3] Indians/Asians[4] and white

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1 Rautenbach "Umkhosi Ukweshwama: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage" 63; Schoeman-Malan *PELJ* 108.

2 Momoti Law and Culture 79. According to Statistics South Africa 2013 http://www.statssa.gov.za/publications/P0302/P03022013.pdf 3 it is estimated that the indigenous African communities make up 79,8 percent of South Africa's population.

3 The term "coloured" is used to refer to people of "mixed blood between the European settlers and African women". See Momoti Law and Culture 79. Coloured people are estimated to make up 9,0 per cent of the population in South Africa. See Statistics South Africa 2013 http://www.statssa.gov.za/publications/P0302/P03022013.pdf 3.

4 Estimated to make up 2,5 per cent of South Africa's population. See Statistics South Africa 2013 http://www.statssa.gov.za/publications/P0302/P030220-13.pdf 3 and Momoti Law and Culture 79.

people.[5] The various groups that make up South Africa's population can be further divided according to their ethnicity, language,[6] religion[7] and origins.[8]

South Africa therefore has a multicultural society in which a variety of legal systems, both officially recognised (state laws) and non-recognised (non-state laws),[9] can be observed.[10] The Constitution recognises the diversity of the South African population in a number of ways, which will be discussed in more detail later in this Chapter[11] as well as in Chapter 7.[12]

Despite the presence of various legal systems in South Africa, the law is essentially dual in nature, consisting of the Western common law, on the one hand, and African customary law, on the other hand.[13] In Chapter 4[14] it

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5 Estimated to make up 8 per cent of the population in South Africa. See Statistics South Africa 2013 http://www.statssa.gov.za/publications/P0302/P0302-2013.pdf 3 and Momoti Law and Culture 79.

6 The South African recognises 11 official languages: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. According to the 2011 census the majority of people in South Africa speak isiZulu (22,7 per cent). The other 10 languages are divided across the population in the following declining order: isiXhosa (16 per cent), Afrikaans (13,5 per cent), English (9.6 per cent), Sepedi (9,1 per cent), Setswana (8 per cent), Sesotho (7,6 per cent), Xitsonge (4,5 percent), SiSwati (2,6 per cent), Tshivenda (2,4 per cent) and IsiNdebele (2,1 per cent). In addition to 11 official languages, there are also local and foreign dialects spoken by 1.6 per cent of the South African population. See Statistics South Africa 2011 http://www.statssa.gov.za/Census2011/Products/Census_2011_Census_in_brief.pdf 24 in this regard.

7 It is estimated that the majority of the South African population (79 per cent) are Christians, while 7,1 per cent of the population are Catholic. An estimated 1,5 per cent of South Africans adhere to Islam, while 3,7 per cent adhere to an either an unknown or an unspecified religion. It is also estimated that 15,1 per cent of South Africa's population do not adhere to any religion whatsoever. See Central Intelligence Agency 2012 https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html#Econ.

8 Rautenbach "Umkhosi Ukweshwama: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage" 63.

9 Revisit par 1.1 for a brief explanationof the recognised and non-recognised legal systems in South Africa.

10 See par 2.2 as well as Rautenbach *SAJHR* 326; Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3, 5 and 17.

11 See par 2.2.2.

12 See par 7.2.1.

13 See par 2.2 as well as Rautenbach *SAJHR* 326; Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 5, 17 and Rautenbach and Matthee *JLP* 111.

14 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.

is shown that these two legal systems may collide within the context of the criminal law due to the competing claims and values[15] that underpin them.[16] Due to this conflict, legal scholars such as Carstens,[17] Bennett,[18] Phelps,[19] and Rautenbach and Matthee[20] argue that the time is ripe to consider whether a so-called "cultural defence"[21] is needed in the South African criminal law.[22]

In order to facilitate a further discussion on the desirability of a formal cultural defence in the South African law, the focus of this Chapter is to provide a more detailed overview of the dual nature of the South African legal system,[23] and in particular the dual nature of its criminal law.[24] More specifically, in the discussion that follows, the Western common law and African customary law are juxtaposed to facilitate a better understanding of the conflict situations that arise when these two legal systems meet in the context of the criminal law.[25] In this Chapter specific emphasis is also placed on the difference in the value systems that underpin these two legal systems as it is this difference that results in the criminal law conflicts between them.[26] These criminal law conflicts are discussed in full in Chapter 4.[27]

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15 See par 2.4.
16 In fact, as Rautenbach *Elec J Comp L* 1, 2 points out, "there has never been parity between the transplanted laws and the indigenous laws".
17 See Carstens *De Jure* 1-25.
18 Bennett *U Botswana LJ* 3-26.
19 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 135-155.
20 Rautenbach and Matthee *JLP* 107-144.
21 See Chapter 4 where the meaning and scope of the cultural defence is discussed in detail.
22 Other authors have also joined in the debate, although not necessarily within the South African context. See in this regard Hund *CILSA* 366-389.
23 See par 2.2.
24 See par 2.3.
25 See paras 2.2 and 2.3.
26 See par 2.4.
27 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.

2.2 Dual nature of South African law

2.2.1 General

As mentioned earlier,[28] the South African legal system is essentially dual in nature; a fact which also attests to the multicultural nature of the South African society.[29] Referring to South Africa's colonial past, Palmer[30] explains the origin of South African law as follows:

> In the Cape Colony, a mixed jurisdiction came about after the Dutch – who had transplanted the law of the seventeenth-century Holland to the Cape of Good Hope soon after setting up a supply base there on 6 April 1652 – handed over authority in 1806 to the English who began introducing elements of their own legal system.

The official legal system of South Africa, referred to as state law,[31] consists of two parts.[32] The first part, referred to as the "Western part",[33] consists of the Western common law which is a conglomeration of Roman-Dutch law and English law and which has been adapted by legislation and case law.[34] Generally, South African law is mostly uncodified which means that the law

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28 See par 2.1.

29 Rautenbach *SAJHR* 326; Rautenbach *SAJHR* 326; Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 5, 17. Also see Tetley *Unif L Rev* 604 where the author refers to South Africa as a "mixed jurisdiction".

30 Palmer *Mixed Jurisdictions* 83; Schoeman-Malan *PELJ* 107. Also see Tetley *Unif L Rev* 604-606 and Rautenbach *Elec J Comp L* 2-4 where the authors briefly outlines the development of South African law since the colonial period.

31 See par 1.1.

32 Rautenbach and Matthee *JLP* 111; Rautenbach *SAJHR* 326; Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 17; Schoeman-Malan PELJ 107; Tetley *Unif L Rev* 604; Kleyn and Viljoen *Beginner's Guide* 39. According to Rautenbach *Elec J Comp L* 2 the dual nature of South African law is the result of the impact of colonialism in South Africa.

33 Rautenbach *SAJHR* 326.

34 Rautenbach and Matthee *JLP* 111; Rautenbach *SAJHR* 326; Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3; Rautenbach *Elec J Comp L* 1, 2; Kleyn and Viljoen *Beginner's Guide* 39; Schoeman-Malan PELJ 107, 113; Barratt and Snyman 2012 http://www.llrx.com/features/southafrica.htm. Due to the various influences authors such as Rautenbach has also referred to South African law as a "potjiekos" mix where the term "potjiekos" refers to "South Africa's mixed legal system, consisting of common, civil and customary law layers which blend with each other as it simmers along". For a complete discussion of Rautenbach's analogy see Rautenbach *Elec J Comp L* 13-14.

must be sought in various sources such as Roman-Dutch Law, legislation, the Constitution, precedent, custom, customary law and modern legal text-books.[35]

The second part, referred to as the "African part",[36] consists of African customary law which has been defined in various ways.[37] One such definition, given by the South African Law Reform Commission,[38] describes customary law as the "rules and customs of a particular group or community" in South Africa.[39] African customary law has also been defined in South African legislation. The *Law of Evidence Amendment Act*,[40] for example, defines "indigenous law"[41] as the "law or custom as applied by the Black tribes in the Republic".[42] Another statutory definition can be found in the *Recognition of Customary Marriages Act*[43] which defines customary law as:

> The customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.

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35 Rautenbach and Matthee *JLP* 111 footnote 9; Schoeman-Malan *PELJ* 107, 113; Barratt and Snyman 2012 http://www.llrx.com/features/southafrica.htm.

36 Rautenbach *SAJHR* 326.

37 Rautenbach *SAJHR* 326.

38 The South African Law Reform Commission was previously known as the South African Law Commission. See Schoeman-Malan *PELJ* 109 footnote 9.

39 SALC *Discussion Paper 82* 2; Ludsin *Berkeley J Int'l L* 70.

40 45 of 1988. Also see Rautenbach *Elec J Comp L* 2 footnote 2 and Rautenbach and Matthee *JLP* 111 footnote 11.

41 It should be noted that both the term "indigenous law", used in the interim Constitution, as well as the term "customary law" have been retained in Schedule 4 of the Constitution. This, however, is only a matter of technicality and should not create the impression that these terms refer to two separate legal systems, because as Rautenbach *Stell LR* 107 points out, the terms "indigenous law" and "customary law" are synonyms. Rautenbach supports her submission by relying on the definition of customary law in the *Recognition of Customary Marriages Act* 120 of 1988. Rautenbach argues that the definition in the Act is broad enough to include the written and unwritten customs of South Africa's indigenous population.

42 According to the *Black Administration Act* 38 of 1927 the term "Black" refers to "any person who is a member of any aboriginal race or tribe of Africa". Also see Rautenbach *Elec J Comp L* 2 footnote 2 and Rautenbach and Matthee *JLP* 111 footnote 11 in this regard. However, as Rautenbach and Matthee point out, it is preferable to use the term "African", because term "Black" is regarded as being offensive.

43 120 of 1988. Also see Rautenbach *Elec J Comp L* 2 footnote 2 and Rautenbach and Matthee *JLP* 111 footnote 11.

Apart from the rather simplistic definitions above, there are also more elaborate definitions of African customary law given by legal scholars. Rautenbach,[44] for example, defines African customary law as the "written and unwritten law of the traditional communities" in South Africa.[45] Similarly, Keevy[46] defines African customary law as the "unwritten rules of behaviour which are contained in the flow of life" of the indigenous people in South Africa, while Ojwang[47] defines customary law as:

> 'The unwritten law of tribal African societies which reflects not only the social control systems and the cultural orientation of these societies, but also their shared values and beliefs.'

The definitions of the legal scholars above also point to another aspect of African customary law, namely that it has two versions: a codified[48] (written) version and uncodified[49] (unwritten) version.[50] The codified version of customary law constitutes the body of law that has been documented since the colonial period and which is used by the courts and academics.[51] This version of customary law, also referred to as "official" African customary

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44 Rautenbach *SAJHR* 326.

45 A similar definition is given by Rautenbach and Matthee *JLP* 111 and Kleyn and Viljoen *Beginner's Guide* 39. In light of the statistics above (footnotes 6 and 7) it can be submitted that the majority of the population in South Africa live under a system of customary law. Also see Ludsin *Berkeley J Int'l L* 70.

46 Keevy *JJS* 23.

47 Ojwang "The Meaning, Content and Significance of Tribal Law in an Emergent Nation: The Kenyan Case" 45. Also see Keevy *JJS* 24.

48 Also referred to as official customary law. See Keevy *JJS* 22, 26, Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 29, Mollema and Naidoo *JJS* 55 and *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) par 109.

49 Also referred to as 'Bantu law', 'African customary law', 'African indigenous law' or 'living customary law'. Keevy *JJS* 22, 25 groups these terms together under the collective term "African law".

50 The court in *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) footnote 51, however, also identified a third form of customary law, namely the one "used by academics for teaching purposes". Also see *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) par 151 and Keevy *JJS* 26.

51 *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) footnote 51; Keevy *JJS* 26; Mollema and Naidoo *JJS* 55.

law,[52] is considered to be the "indigenous law for indigenous people".[53] The uncodified version, on the other hand, represents the oral culture of South Africa's indigenous people which has been "meticulously preserved" and "sacredly guarded and passed on by word of mouth from generation to generation".[54] Uncodified customary law consists of the moral rules, taboos, principles, values and beliefs that regulate the relationships among indigenous African people.[55] This version of customary law therefore signifies "living" African customary law,[56] because it is the law "actually practised by African people"[57] in traditional African communities and is therefore considered to be the "indigenous law of the people".[58]

Although African customary law now forms part of the official legal system in South Africa, this was not always the case. In fact, as is shown below,[59] the recognition of African customary law was regulated by piecemeal legislation in the past. It was only with the enactment of the Constitution that African customary law was officially recognised as part and parcel of the South African legal system.[60]

2.2.2 Recognition of African customary law: then and now

Initially the Western common law was in a preferential position in South Africa, while the status of African customary law has always been controversial.[61] In fact, as Keevy[62] points out, not only was African customary law

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52 Mollema and Naidoo *JJS* 55.
53 Keevy *JJS* 27.
54 Keevy *JJS* 22-23. An important point to remember, as Keevy points out, is that although this version of customary law is unwritten it does not in any way mean that it is no longer practiced or unknown. Also see Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 29.
55 Keevy *JJS* 26.
56 Mollema and Naidoo *JJS* 55.
57 Mollema and Naidoo *JJS* 55.
58 Keevy *JJS* 22, 26.
59 See par 2.2.2.
60 See par 2.2.2.
61 Rautenbach *Stell LR* 107; Bennett *PELJ* 30; Amoah and Bennett *Afr Hum Rts LJ* 368-369; Sibanda *Human Rts Br* 31. For a brief outline of the history behind the unequal relationship between the common law and customary law in

perceived to be "primitive law ascribed to pre-literate peoples", but it also had an inferior status compared to that of colonial laws due to the fact that African customary law "juxtaposed the individual and the group, civil society and the African community, rights and tradition".[63]

Visser[64] also points out that, before 1994, when South Africa became a democracy,[65] African customary law was treated as a "stepchild" in the South African legal system.[66] This treatment of African customay law had the unfortunate consequence of disadvantaging "the many people who substantively live in accordance with autochthonous law for certain or all purposes".[67]

According to Ludsin,[68] the earlier governments of South Africa were convinced that, through the process of acculturation,[69] they could eliminate customary law altogether and replace it with the common law. The alienation of customary law during the colonial period was also highlighted in the case of *Alexkor Ltd v Richtersveld Community*[70] where the court noted that:

> ... although customary law is supposed to develop spontaneously in a given jural community, during the colonial and apartheid era it became alienated from its community origins.

The inferior position of African customary law in South Africa's pre-constitutional dispensation not only stifled the development of customary law as a formal legal discipline, but also resulted in discrepancies between

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South Africa see Rautenbach *Elec J Comp L* 1-3, Rautenbach *SAJHR* 325-326, Ludsin *Berkeley J Int'l L* 65-67 and Keevy *JJS* 26-28

62 Keevy *JJS* 27.

63 A similar argument is put forth by Amoah and Bennett *Afr Hum Rts LJ* 368.

64 Visser *Tul L Rev* 74. Also see Rautenbach *Elec J Comp L* 2.

65 Shortly thereafter South Africa received its interim Constitution, which was subsequently replaced by the final Constitution.

66 A similar statement is made by Sibanda *Human Rts Br* 31.

67 Visser *Tul L Rev* 74.

68 Ludsin *Berkeley J Int'l L* 70.

69 This process is discussed in detail in par 3.3.3.

70 2003 12 BCLR 1301 (CC) footnote 51. Also see Keevy 26 and *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) par 151.

the official version thereof and the way in which "cultural practice and ritual manifests itself in reality".[71]

However, despite efforts by the earlier governments of South Africa to eradicate customary law, it remains a vibrant part of everyday life in South Africa.[72] This is clearly attested to by the following statement of Mqeke:[73]

> We know there are two cultures in Southern Africa. These are the European culture and the indigenous African culture. By legislation the European culture was made the general culture of Southern Africa. The indigenous African culture remains, however, very much alive because it is difficult to legislate effectively for people's private lives.

Although customary law remains largely uncodified, legislative measures to regulate aspects thereof have been introduced over the years. For example, the first legislative measure to afford recognition to African customary law was section 11(1) of the *Black Administration Act*,[74] which was repealed by section 54A of the *Magistrates' Courts Act*.[75] Section 54A has,

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71 Keevy *JJS* 27.

72 Ludsin *Berkeley J Int'l L* 70.

73 Also see Ludsin *Berkeley J Int'l L* 70 footnote 34.

74 38 of 1927. This section provided as follows: "Notwithstanding the provisions of any other law, it shall be in the discretion of the Commissioners' Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except insofar as it shall have been repealed or modified: Provided that such Black law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles." See Peart *Acta Juridica* 104 in this regard.

75 32 of 1944. This section provided as follows: "(1) Notwithstanding the provisions of this Act or any other law a court may in all suits or proceedings between Blacks, including the hearing of an appeal in terms of the provisions of section 29 of this Act or section 309 of the Criminal Procedure Act, 1977 (Act 51 of 1977), involving questions of customs followed by Blacks, take judicial notice thereof and decide such questions according to the Black law applying to such customs except in so far as it has been repealed or modified: Provided that such Black law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.
(2) In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not, in the absence of any agreement between them with regard to the particular system of Black law to be applied in such suit or proceedings, apply any system of Black law other than that which is in operation at the place where the defendant or respondent resides or carries on busi-

however, also been repealed by section 1(1) of the *Law of Evidence Amendment Act*[76] which is still in force today and provides as follows:[77]

> Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

Section 1(1) above must be interpreted in terms of South Africa's interim and final Constitutions. The interim Constitution only made provision for the indirect recognition of African customary law through section 181(1) which recognised a 'traditional authority which observes a system of indigenous law'.[78] The interim Constitution also provided for the application of African customary law in the courts in terms of Principle XIII which provided that:[79]

> [t]he institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

South African law underwent significant changes since adopting the final Constitution,[80] which affected both the Western common law and African customary law in the country.[81] Probably the most significant change made by the Constitution was to replace the system of parliamentary sovereignty

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ness or is employed, or if two or more different systems are in operation at that place, not being within a tribal area, the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs." Also see Rautenbach *Stell LR* 107 and Bennett *PELJ* 30 in this regard.

76 45 of 1988.

77 Rautenbach *Elec J Comp L* 3-4; Rautenbach *Stell LR* 107.

78 Rautenbach *Stell LR* 107.

79 Principle XIII of the interim Constitution. Also see Ludsin *Berkeley J Int'l L* 68, Rautenbach and Matthee *JLP* 112 footnote 12, Rautenbach *Stell LR* 107 and Rautenbach *Elec J Comp L* 4 footnote 16.

80 Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 2.

81 Rautenbach and Matthee *JLP* 134.

with one of constitutional supremacy.[82] The supremacy of the Constitution is proclaimed in section 2 thereof, which reads as follows:

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[83]

The final Constitution also affords more explicit recognition to African customary law by providing in section 211(3) that the South African courts "must apply customary law when that law is applicable".[84] Through the use of the words "must apply customary law",[85] section 211(3) of the Constitution cemented the equal status of African customary law to that of the Western common law.[86] Furthermore, as is shown below, the Constitution places the same conditions on a court's application of African customary law than it does on a courts' application of the Western common law.[87]

Despite the fact that section 211(3) affords official recognition to African customary law, it also limits the application thereof by providing that African customary law is "subject to the Constitution and any legislation that specifically deals with customary law".[88] This is an important proviso which has a profound effect on the potential recognititon of a cultural defence in the

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82 Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 2.

83 S 2 of the Constitution. Also see Rautenbach and Matthee *JLP* 134.

84 S 211(3) of the Constitution. Also see Ludsin *Berkeley J Int'l L* 68, Rautenbach and Matthee *JLP* 112 footnote 12, Rautenbach Stell *LR* 108, Rautenbach *SAJHR* 326, Rautenbach *Elec J Comp L* 4 footnote 16, Mmusinyane *PELJ* 140, Bennett *PELJ* 30 and *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) par 148.

85 The wording in section 211(3) of the Constitution is in stark contrast to that of section 11(1) of the *Black Administration Act* 38 of 192, which only conferred a discretion on Commissioners' courts to apply customary law in matters where it was applicable.

86 Ludsin *Berkeley J Int'l L* 68. A similar view is expressed by Bennett *PELJ* 30, Sibanda *Human Rts Br* 31, 35 footnote 3 and Phakola *Justice Today* 25.

87 See section 39(2) of the Constitution as well as Ludsin *Berkeley J Int'l L* 68.

88 See section 211(3) of the Constitution as well as Ludsin *Berkeley J Int'l L* 68, Rautenbach and Matthee *JLP* 112 footnote 12; Rautenbach Stell *LR* 108; Rautenbach *SAJHR* and Rautenbach *Elec J Comp L* 4 footnote 16.

South African criminal law. This matter, however, falls outside the scope of the present discussion but is discussed in more detail in Chapter 7.[89]

Chapter 2 of the Constitution, the Bill of Rights, contains no explicit provisions providing for a particular right to be governed by African customary law.[90] Such a right can, however, be inferred from sections 15, 30 and 31 of the Constitution.[91] Collectively, these sections make up the right to cultural and religious freedom, which will be discussed in more detail in Chapter 7.[92]

There are also other provisions in the Constitution that refer to African customary law. Part A of Schedule 4, for example, includes cultural matters, indigenous law, customary law and traditional leadership in the list of functional areas of concurrent national and provincial legislative competence. Also, section 39(2) 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.

From the wording of section 39(2) above, it therefore seems as though the section accepts that African customary law now forms part of the new legal dispensation in South Africa and if it were found to be inconsistent with the Constitution, African customary law will be developed rather than replaced.[93] Furthermore, section 39(3) of the Constitution provides that:[94]

> The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

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89 See par 7.2.1.
90 Ludsin *Berkeley J Int'l L* 68.
91 Ludsin *Berkeley J Int'l L* 68. These sections are discussed in more detail in par 7.2.1.
92 See par 7.2.1.
93 Ludsin *Berkeley J Int'l L* 68 footnote 29. This matter is further dealt with in Chapter 7.
94 Also see Ludsin *Berkeley J Int'l L* 68.

Although section 39(3) also does not provide for any positive right to be governed by African customary law, it still allows people to invoke the rights afforded to them by African customary law in so far as those rights are not inconsistent with any other legislation or the Bill of Rights in the Constitution.[95]

Section 16(1) of Schedule 6 of the Constitution protects traditional courts that existed during the enactment of the Constitution.[96] In terms of section 16(1) these courts can continue to exercise jurisdiction in terms of the legislation applicable to them in so far as that legislation is consistent with the Constitution or until such legislation is amended or repealed by Parliament.[97] As far as the jurisdiction of such courts is concerned, section 211(2) of the Constitution provides that a "traditional authority"[98] is allowed to "observe a system of customary law" subject to any legislation or customs applicable to it, and only for as long as Parliament has not repealed or amended such jurisdiction.[99] It should be noted that there is currently no provision in the Constitution that prevents Parliament from removing the

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95 Also see Ludsin *Berkeley J Int'l L* 68.

96 S 16(1) of Schedule 6 reads as follows: "Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it." Also see Ludsin *Berkeley J Int'l L* 68 in this regard.

97 Ludsin *Berkeley J Int'l L* 68-69.

98 The term "traditional authority" needs explanation as the term is not defined in the Constitution. Mmusinyane *PELJ* 151-152 defines traditional authority as: "An aggregate institution which includes the position of the traditional leader or king, the deputy, the royal family, the secret advisory body, the headmen of small villages, and the traditional council." A traditional authority therefore refers to the traditional leaders of the various indigenous communities in South Africa. In terms of the *Recognition of Customary Marriages Act* 120 of 1998 and the *Traditional Leadership and Governance Framework Act* 41 of 2003 a traditional leader simply refers to "any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position". Also see Lutz and Linder *Report Commissioned by World Bank Institute's Community Empowernment and Social Inclusion Learning Program (CESI)* 12 where the authors point out that the word 'traditional' refers to historic roots of leadership, which legitimizes the execution of power". Also see Ntsebeza *Comp Stud S Asia, Africa & Mid East* 92 note 2 where the author gives a brief outline of the development of the meaning of the term "traditional authority" from the colonial period to the current post-1994 period.

99 Also see Ludsin *Berkeley J Int'l L* 69 and Mmusinyane *PELJ* 140.

jurisdiction of traditional authorities.[100] Nonetheless, for now it can be assumed that the jurisdiction of traditional leaders to adjudicate matters involving African customary law is in tact.[101]

In light of the above it can be concluded that:

> The South African *Constitutions* removed any doubt as to the status of customary law in the South African legal system; it is a part of modern South African law on a par with (and not subordinate to) common law (Roman-Dutch law).[102]

Although the Constitution removed any doubt as to the place of African customary law in the South African legal system, it is not the only place where this position is made clear. In case law there is also no doubt anymore as to the place of African customary law in the South African legal system. For example, in *Alexkor Ltd v Richtersveld Community*[103] the court held that:

> While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution.

A similar view was held by Chaskalson P in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa*[104] who rejected arguments that, in the new constitutional dispensation,

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100 Ludsin *Berkeley J Int'l L* 69.

101 Ludsin *Berkeley J Int'l L* 69, however, points out that the jurisdiction of traditional authorities is currently under review by the South Africa Law Commission.

102 Rautenbach *Elec J Comp L* 1, 4. Also see Ludsin *Berkeley J Int'l L* 68, Amoah and Bennett *Afr Hum Rts LJ* 369 and *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) paras 40, 148.

103 2003 12 BCLR 1301 (CC) par 51. Also see Rautenbach *Elec J Comp L* 4, *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) par 148, *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) 696A-696C and *Mabuza v Mbatha* 2003 4 SA 218 (C) 228D-228G.

104 2000 2 SA 674 (CC) 696A-696C.

the common law is still a "body of law separate and distinct from the Constitution". Chaskalson P[105] then continued by stating that in the new constitutional dispensation:

> [t]here are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

Also in *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*[106] the Ngcobo J held that:

> [o]ur Constitution recognises indigenous law as part of our law. Thus section 211(3) enjoins courts to "apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". The Constitution accords it the same status that other laws enjoy under it. In addition, courts are required to develop indigenous law so as to bring it in line with the rights in the Bills of Rights.

The equal status of the common law and African customary law in South Africa can, however, give rise to conflict situations between these two legal systems.[107] It is especially in the context of the criminal law that the possibilities are *legio* due to the presence of unique criminal law principles in both the common law and African customary law in South Africa.[108]

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105 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) 696A-696C.

106 2005 1 SA 580 (CC) par 148. Also see *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) 197, *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) 696A-696C and *Mabuza v Mbatha* 2003 4 SA 218 (C) 228D-228G.

107 See paras 4.24, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.

108 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3 for a detailed discussion of the conflict situations between the common law and customary law in the context of the South Africa criminal law.

2.3 Dual nature of South African criminal law

Similar to the South African legal system, the South African criminal law system also displays a dualistic character, *viz* the criminal law principles in the common law and those in African customary law.[109] Although there are important differences between these two criminal legal systems, there are also various similarities between them. For example, both system acknowledge and define various categories of crimes[110] and both systems prescribe punishment for the commission of a crime.[111] It is, however, here where the similarities end.

The most significant difference between the Western common law and African customary law is that the state is the authoritative power in the Western common law.[112] Therefore, in terms of the common law all individuals are subject to the authority of the state.[113] The notion of a state as authoritative power is, however, unknown to African customary law, which means that the African criminal law dealt with wrongs committed against the chief as the so-called 'father' of the tribe.[114]

Another significant difference between the Western common law and African customary law lies in the nature, scope and purpose of punishment. Common law punishment is not only aimed at punishing a wrongdoer for the offense he committed, but also at rehabilitating that individual so that he may be released into society again.[115] Common law punishment mostly entails a serious infringement of some of a person's basic human rights,

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109 Rautenbach and Matthee *JLP* 113.
110 The word "crime" encompasses crimes, offences, violations and contraventions. See Rautenbach and Matthee *JLP* 113 footnote 15 as well as Snyman *Criminal Law* 4, 6-7, 12; Burchell and Milton *Principles of Criminal Law* 55-58.
111 Rautenbach and Matthee *JLP* 113.
112 Mollema and Naidoo *JJS* 55.
113 Mollema and Naidoo *JJS* 55.
114 Mollema and Naidoo *JJS* 55-56.
115 Kemp *et al Criminal law* 20-22; Burchell and Milton *Principles of Criminal Law* 78-80.

such as his right to freedom of movement and privacy.[116] Common law punishment can also take on various forms such as imprisonment, declaring someone a habitual criminal, committal to an institution, corrective supervision or a fine.[117]

Contrary to the Western common law, the concept of imprisonment is unknown in African customary law.[118] Furthermore, punishment in terms of African customary law focuses on the idea of compensation or the correction of an imbalance caused by the wrongdoer's unlawful behaviour as well as maintaining equilibrium between the community and the African spirit world.[119] This focal point stems from the fact that African customary legal rules are aimed at keeping the "moral and religious order in African societies" intact.[120] A transgression in terms of African customary law is therefore regarded as:[121]

> ... an offence against the departed members of the family and against god and the spirits, even if it is the people themselves who may suffer from such a breach and who may take action to punish the offender.

African customary law therefore places a lot of emphasis on protecting the innocent, compensating victims and the shame the community instils in those who contravene the law.[122] The African notion of justice ensures that a person guilty of an offence is shunned, ostracised, ridiculed or considered to be "non-person or outcast".[123] Therefore, punishment in terms of African customary law mostly takes on one of three forms: banishment from the

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116 Snyman *Criminal Law* 4, 12.
117 S 276 *Criminal Procedure Act* 51 of 1977; Joubert (ed) *Criminal Procedure Handbook* 325; Snyman *Criminal Law* 4, 12.
118 Rautenbach *SAJHR* 330, 332; Keevy *JJS* 29; Mollema and Naidoo *JJS* 60. Keevy points out that, imprisonment in African customary law is deemed senseless as it is not the aim of this legal system to create criminals.
119 Rautenbach *SAJHR* 330, 332; Keevy *JJS* 28, 29, 31.
120 Keevy *JJS* 31.
121 Keevy *JJS* 31.
122 Keevy *JJS* 29.
123 Keevy *JJS* 29. A person who is cast out loses his status in the community as well as the ability to participate in communal activities. He will only be permitted to resume participation in such activities once has status has been restored or his offence has been purged.

community,[124] attachment of the wrongdoer's property[125] or a fine in the form of money or cattle.[126] It is also possible for these forms of punishment to be combined in that a wrongdoer can simultaneously be given a penalty and also has to pay some kind of award to the person he has wronged.[127]

The combination of punishment and compensation in African customary law points to another difference between this system and the common law.[128] While the common law makes a clear distinction between public and private law,[129] African customary law does not.[130] In fact, as Rautenbach[131] points out, African customary law tends to operate only within the sphere of private law as it mostly deals with the private relationships between individuals.[132] Ludsin[133] makes a similar observation by stating that "customary law blurs the lines between criminal and civil law", because in terms of African customary law these two areas are intertwined.[134] The result, as

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124 Mollema and Naidoo *JJS* 60. Collective shame, as Keevy *JJS* 29 points out, is an effective deterrent, because it not only affects the guilty person, but also his peers and family who collectively have to take responsibility for his actions.

125 Mollema and Naidoo *JJS* 60.

126 Rautenbach *SAJHR* 330, 332; Mollema and Naidoo *JJS* 60.

127 Rautenbach *SAJHR* 332.

128 It should, however, be noted that a combination of punishment and compensation is also possible in terms of the South African common law. Section 300 of the *Criminal Procedure Act* 51 of 1977 provides that: "Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss."

129 Rautenbach and Matthee *JLP* 111; Mollema and Naidoo *JJS* 56. While public law regulates the vertical relationship between the state and an individual, private law regulates the horizontal relationship between private individuals or groups.

130 Ludsin *Berkeley J Int'l L* 70; Rautenbach *Elec J Comp L* 4; Mollema and Naidoo *JJS* 56.

131 Rautenbach *Elec J Comp L* 4.

132 Generally, the areas of law to which customary law applies is limited to that of family law, law of property, law of delict, traditional leadership and courts and the law of intestate succession. For a brief explanation of what these disciplines entail within the context of African customary law see Rautenbach *Elec J Comp L* 4-5 footnotes 20-23 and the sources referred to.

133 Ludsin *Berkeley J Int'l L* 70. Also see Rautenbach *SAJHR* 332.

134 A similar statement is made by Mollema and Naidoo *JJS* 56.

Mollemo and Naidoo[135] point out, is that an individual's conduct can be viewed as both a crime and a delict in terms of African customary law.[136] In other words, in terms of African customary law it possible for the victim of a criminal act to not only seek punishment for the perpetrator of a crime, but also to seek compensation for the harm caused to him (victim).[137]

Another difference between the Western common law and African common law relates to the criminal law principle of causation (or causality).[138] Causation, in its simplest terms, can be explained as the principle of cause and effect and is aimed at determining whether there was a causal link between an individual's conduct and some or other prohibited consequence.[139] For example, in a case of murder, the principle of causation requires the prosecution to prove that there is a link between the conduct of the accused, which led to the death of the victim, and the actual death of the victim.[140] Causation in the Western common law is determined using a two-step enquiry.[141] The first part of the enquiry entails that a causal link between the accused's conduct and the prohibited consequence must be established.[142] This part of the enquiry is commonly referred to as factual causation.[143] As Kemp *et al*[144] point out that, factual causation is aimed at:

> … determining whether the accused's conduct was the actual or 'scientific' cause of the consequence, in that the consequence would not have occurred, either at all or when it did, if it had not been for the accused's conduct.

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135 Mollema and Naidoo *JJS* 56. Also see *Berkeley J Int'l L* 70. Also see Rautenbach *Elec J Comp L* 4 footnote 19.

136 It should, however, be pointed out that an individual's conduct can also result in both criminal and delictual liability in terms of the Western common law.

137 Ludsin *Berkeley J Int'l L* 70.

138 Mollema and Naidoo *JJS* 56.

139 Mollema and Naidoo *JJS* 56.

140 Mollema and Naidoo *JJS* 56; Kemp *et al Criminal law* 60.

141 Kemp *et al Criminal law* 61; Burchell and Milton *Principles of Criminal Law* 209.

142 Kemp *et al Criminal law* 61; Burchell and Milton *Principles of Criminal Law* 209, 212.

143 Kemp *et al Criminal law* 61; Burchell and Milton *Principles of Criminal Law* 209.

144 Kemp *et al Criminal law* 61. Also see the explanation of factual causation provided by Burchell and Milton *Principles of Criminal Law* 212.

Factual causation is determined using the *conditio sine qua non* test (also referred to as the 'but for' test).[145] This test entails that a court must determine whether the prohibited consequence would have occurred if the accused's conduct is removed from the sequence of events.[146] If the accused's conduct can be removed from the sequence of events without the prohibited consequence also disappearing, the accused will not be held criminally liable as his conduct can then not be considered to be the cause of the prohibited consequence.[147] If, however, the accused's conduct cannot be removed from the sequence of events without the prohibited consequence also disappearing, the accused will be held criminally liable as his conduct is then considered to be the cause of the prohibited consequence.[148] In other words, if, based on the facts of the particular case, no causal link between the accused's conduct and the prohibited consequence can be established, the accused will not be held criminally liable.[149]

If, however, a factual causal link between the accused's conduct and the prohibited consequence can be established the second part of the causation-enquiry must be satisfied.[150] This part entails that, once factual causation has been established, it must be determined whether the accused can be held criminally liable for the prohibited consequence caused by him.[151] This part of the enquiry is commonly referred to as legal causation.[152] Legal

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145 For an explanation of this test consult Kemp *et al Criminal law* 61-64 and Burchell and Milton *Principles of Criminal Law* 212.

146 Kemp *et al Criminal law* 61; Burchell and Milton *Principles of Criminal Law* 212.

147 Kemp *et al Criminal law* 62; Burchell and Milton *Principles of Criminal Law* 212.

148 Kemp *et al Criminal law* 62; Burchell and Milton *Principles of Criminal Law* 212.

149 Kemp *et al Criminal law* 61; Burchell and Milton *Principles of Criminal Law* 212.

150 Kemp *et al Criminal law* 61; Burchell and Milton *Principles of Criminal Law* 209.

151 Kemp *et al Criminal law* 64.

152 Kemp *et al Criminal law* 61, 64; Burchell and Milton *Principles of Criminal Law* 213.

causation is determined using the direct or proximate cause test[153] which provides that, an accused's conduct is considered to be the legal cause of a consequence if the particular consequence arose directly from the accused's conduct.[154]

Mollema and Naidoo,[155] however, point out that there are various theories for determining causation in the South African common law. These authors' argument can be supported the contention of Kemp *et al*[156] that:

> Although the *conditio sine qua non* test appears to be firmly entrenched in our law, it has not received unqualified approval from all the leading commentators.[157]

According to Mollema and Naidoo[158] one theory of causation in particular, the adequate causation theory, provides an interesting point of comparison with the approach to causation in terms of the African customary law. The adequate causation theory determines that a particular situation is the legal cause of a particular act if, according to human experience and in the normal cause of events, that act has the tendency to bring about that type of situation.[159]

African customary law, however, knows no enquiry into or theories for determining causation.[160] Instead, a particular act is considered to be the legal cause of a particular situation, because "people know from general experience that a certain act usually causes that particular effect".[161]

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153 For a comprehensive discussion on the direct or proximate cause test see Kemp *et al Criminal law* 65-72.
154 Kemp *et al Criminal law* 65; Burchell and Milton *Principles of Criminal Law* 213.
155 Mollema and Naidoo *JJS* 56.
156 Kemp *et al Criminal law* 62.
157 In fact, as Kemp *et al* point out, the *conditio sine qua non* test is subject to various criticisms. For a discussion of these criticisms see Kemp *et al Criminal law* 62-64.
158 Mollema and Naidoo *JJS* 56.
159 Mollema and Naidoo *JJS* 57.
160 Mollema and Naidoo *JJS* 57.
161 Mollema and Naidoo *JJS* 57.

Therefore, causation in African customary law is determined "intituitively" by relying on the experience of the community.[162]

The Western common law and African customary law also differ with regard to the principle of participation.[163] This principle deals with the liability of individuals who participated in the commission of a crime.[164] These individuals include perpetrators,[165] co-perpetrators,[166] and accomplices.[167] In situations where more than one person participated in the commission of a crime the common law in South Africa assigns criminal liability to some extent to each and every one of those individuals.[168] Apart from the participants above, an accused can also incur criminal liability as an accessory after the fact.[169]

African customary law, however, differs in this regard in that criminal liability is not always linked to an individual's participation in a crime as a perpetrator, co-perpetrator, accomplice or accessory after the fact.[170] In terms of African customary law, criminal liability is founded on the idea of group rights and duties which entails that a group can also be held liable for the crimes committed by its members.[171] Therefore, although an individual may not have actively participated in the commission of a crime, that individual

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162 Mollema and Naidoo *JJS* 57.
163 Mollema and Naidoo *JJS* 57.
164 Mollema and Naidoo *JJS* 57.
165 A perpetrator refers to an individual who commits the criminal act himself. See Kemp *et al Criminal law* 234.
166 A co-perpetrator refers to an individual who commits the criminal act together with other individuals. See Kemp *et al Criminal law* 234.
167 Kemp *et al Criminal law* 247 defines an accomplice as "a person who intentionally furthers or assists in the commission of a crime at any time before or during its commission, but who is someone other than a perpetrator or a co-perpetrator".
168 Kemp *et al Criminal law* 232; Burchell and Milton *Principles of Criminal Law* 570; Mollema and Naidoo *JJS* 57.
169 Kemp *et al Criminal law* 249 defines an accessory after the fact as "a person who intentionally associates himself with the crime only after its commission is complete, and who helps the perpetrator or an accomplice to evade justice".
170 Mollema and Naidoo *JJS* 58.
171 Mollema and Naidoo *JJS* 58.

can still be held criminally liable to some extent.[172] This interconnectedness of the African people also provides an explanation as to why they are prone to becoming involved in "collective criminality".[173] The concept of group rights and duties and collective association in African customary law can also be juxtaposed against the common purpose rule[174] in the Western common law. The common purpose rule holds that, where two or more individuals agree to commit a crime, each individual will be held criminally liable for the criminal conduct committed by any one of them as they all shared a common purpose to commit the particular crime.[175] Mollema and Naidoo[176] point out that the common purpose rule in the Western common law is "closer to the African notion of collective association rather than identifying individual perpetrators of a crime".

Apart from the principles of causation and participation referred to above, the South African common law and African customary law also differ with regard to the grounds of justification (defences) excluding unlawfulness.[177] Put simply, grounds of justification refer to situations where an accused's *prima facie* unlawful conduct will not be considered to be unlawful due to the fact that the accused had a lawful reason for acting the way he did.[178] Mollema and Naidoo[179] explain that the reason why the accused's conduct would not be considered to be unlawful is because society does not feel the social need to punish the accused for his particular conduct. The grounds of justification in the South African criminal law include private defence,[180]

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172 Mollema and Naidoo *JJS* 58.
173 Also see Mollema and Naidoo *JJS* 58.
174 The common purpose rule is further discussed in par 4.5.3.
175 Burchell and Milton *Principles of Criminal Law* 574; Mollema and Naidoo *JJS* 57. See par 4.5.3 for other definitions of the common purpose rule.
176 Mollema and Naidoo *JJS* 58.
177 Mollema and Naidoo *JJS* 58.
178 Kemp *et al Criminal law* 76.
179 Mollema and Naidoo *JJS* 58.
180 Kemp *et al Criminal law* 77 explains that this defence is referred to as "private defence" because it covers situations where "a private individual (as opposed to a police officer or other public official) uses force or violence to defend his legal interests or those of another person". Consequently, this defence includes self-defence, defence of other persons and defence of property. Also

necessity,[181] impossibility,[182] obedience to superior orders,[183] public authority,[184] lawful chastisement,[185] consent,[186] and *de minimus non curat lex*.[187] It can be said that African customary law also recognises grounds of justification excluding the unlawfulness of an accused's conduct as it rec-

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see Kemp *et al Criminal law* 77-85, Burchell and Milton *Principles of Criminal Law* 230, 246 and *S v Engelbrecht* 2005 2 SACR 41 (W) 106B in this regard.

181 An accused may rely on the defence of necessity where his *prima facie* unlawful conduct took place in a situation where he was faced with a 'choice of two evils' in that he had to choose between breaking the letter of the law or suffering some or other more serious fate. Kemp *et al Criminal law* 88 points out that the 'choice of two evils' can arise out of "some non-human agency, such as chance circumstances, a natural calamity or disaster, or some other type of emergency". Also refer to Burchell and Milton *Principles of Criminal Law* 256-279 for an explanation of this defence.

182 The defence of impossibility arises in situations where an individual has a legal duty to perform a positive act, but is unable to do so. Consult Kemp *et al Criminal law* 93-94 and Burchell and Milton *Principles of Criminal Law* 280-283 for an overview of the defence of impossibility.

183 This defence is available to members of the military and paramilitary forces, police officers and members of the protection services who commit a *prima facie* unlawful act when carrying out of the orders of their superior officers. Consult Kemp *et al Criminal law* 95-100 and Burchell and Milton *Principles of Criminal Law* 284-290 for an overview of this defence.

184 The defence of public authority is available to individuals who commit a *prima facie* unlawful act while acting under the lawful authority of the state. The individuals who may rely on this defence include officers of the court, the law and/or the State in general. Consult Kemp *et al Criminal law* 101-107 and Burchell and Milton *Principles of Criminal Law* 303-323 for an overview of the defence of public authority.

185 This defence is available to individuals who may lawfully discipline and chastise children for the purpose of correction. These individuals include parents, by virtue of their parental power, persons *in loco parentis* (for example teachers, guardians etc.) and individuals to whom the parents of the child specifically delegated the power of chastisement. Consult Kemp *et al Criminal law* 109-112 and Burchell and Milton *Principles of Criminal Law* 291-302 for an overview of this defence.

186 The defence of consent is available to an individual charged with the commission of a crime, but who had the consent of the individual affected by his (accused's) conduct to perform such conduct. Although consent can be a valid defence to some crimes in the South African criminal law, it is not a valid defence to all crimes. Consult Kemp *et al Criminal law* 114-127 and Burchell and Milton *Principles of Criminal Law* 324-347 for an overview of the defence of consent.

187 Translated, the Latin term for this defence means that 'the law is not concerned about trivialities'. This defence is, therefore, available to an accused charged with some or other trivial transgression. It should, however, be noted that this defence differs from the other defences excluding unlawfulness in that here the accused's conduct is still considered to be unlawful, but due to the triviality of the transgression, his conduct goes unpunished. Consult Kemp *et al Criminal law* 125-127 and Burchell and Milton *Principles of Criminal Law* 355-356 for an overview of this defence.

ognises certain factors that can exclude the unlawfulness of an accused's conduct.[188] For example, African customary law recognises that an individual may defend himself against an unlawful attack through the use of force.[189] This corresponds with the defence of private defence in the South African common law.[190] African customary law also recognises that an individual can act on behalf of himself or another in emergency situations, in other words situations of necessity.[191] The defence of consent can also be found in African customary law, because as Mollema and Naidoo[192] point out: "if an agnatic group has consented to a certain act and this act causes a person injury or harm, unlawfulness is excluded". It therefore seems as though there are similarities between the grounds of justification in the South African common law and African customary law,[193] although these grounds of justification are not entirely identical in these two legal systems.

There are also other fundamental differences between the common law and African customary law in South Africa.[194] For example, while the common law is aimed at vindication, customary law is aimed at reconciliation.[195] Also, despite the fact that the common law is mostly uncodified,[196] it still consists of a set of unified legal rules.[197] African customary law, however, knows no such system of unified legal rules.[198] Furthermore, as mentioned earlier,[199] the content of the common law can be found in various sources

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188 Mollema and Naidoo *JJS* 58.
189 Mollema and Naidoo *JJS* 58.
190 The defence of private defence at common law also permits an individual to defend himself against an unlawful attack through the use of force. See Kemp *et al Criminal law* 77.
191 Mollema and Naidoo *JJS* 58. Revisit Kemp *et al Criminal law* 88 for an explanation of the defence of necessity in the South African common law.
192 Mollema and Naidoo *JJS* 58.
193 Mollema and Naidoo *JJS* 58.
194 Rautenbach *Elec J Comp L* 12.
195 Rautenbach *Elec J Comp L* 12.
196 See par 2.2.
197 Rautenbach *Elec J Comp L* 12.
198 Rautenbach *Elec J Comp L* 12.
199 See par 2.2.

whereas African customary law has both "living law", where the content is mostly determined through the social practices of the individuals adhering to it, as well as "official law", which is applied by the courts or entrenched in legislation.[200] What is more, African customary law cannot be separated from its ancient beliefs such as patriarchy,[201] the ancestors, group solidarity or communitarianism.[202] These ancient African ideals cannot be found in the Western common law.[203]

2.4 Value systems of common and customary law

The differences between the South African common law and African customary law can be attributed to the fact that these two legal systems are based on different value systems. The common law is based on an individualistic value system where the individual enjoys preference over the community.[204] The common law therefore embraces an approach of "individual rights, liberties and punishment"[205] in terms of which all individuals are viewed as the bearers of rights and are separated from other individuals.[206] African customary law, on the other hand, is based on a communalistic value system where the individual's rights, needs and interests take a backseat to that of the community.[207] In this regard Ludsin[208] points out that, the notion of family lies at the heart of African customary law. In terms of African customary law a family is expected to provide for all the needs of

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200 Rautenbach *Elec J Comp L* 12; Keevy *JJS* 29; Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3 footnote 3.

201 *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) par 89; Keevy *JJS* 30, 32.

202 Keevy *JJS* 30, 32.

203 Keevy *JJS* 30.

204 Van der Walt *Potchefstroom: Instituut vir Reformatoriese Studie* 101, 111-113; Rautenbach *Elec J Comp L* 12; Carstens *De Jure* 11; Keevy *JJS* 29; Keevy *JJS* 70.

205 Keevy *JJS* 29.

206 Carstens *De Jure* 11.

207 Van der Walt *Potchefstroom: Instituut vir Reformatoriese Studie* 101, 111-113; Rautenbach *Elec J Comp L* 12; Carstens *De Jure* 11; Ludsin *Berkeley J Int'l L* 70; Keevy *JJS* 70, 72.

208 Ludsin *Berkeley J Int'l L* 70.

an individual, albeit material, social and/or emotional.[209] Bennett[210] explains this emphasis on family in African customary law as follows:

> The family is the focus of social concern, individual interests are inevitably submerged to the common weal, and the normative system tends to stress an individual's duties instead of his or her rights.

The African worldview is described by Makwe[211] as:

> … an abstraction which encompasses the total way of life of the African society. It is a psychological reality referring to shared constructs, shared patterns of belief, feeling and knowledge – which members of the group carry in their minds as a guide for conduct and the definition of reality.

Therefore, whereas the common law places emphasis on individual rights, African customary law rather focuses on the individual's obligation towards his family.[212] Fowler[213] also makes the distinction between these two value systems very clear when he says that:

> ... in the dominant Western view individuality defines the person. A consequence of this is that society is defined by the collective will of individual persons. By contrast, traditional Africans think that the social group defines the person; what is central to the human person is not individuality but membership in a community.

Molleman and Naidoo[214] make a similar assertion as Fowler by referring to the Nguni proverb of *umuntu ngumuntu ngabantu* ("a person is a person through persons")[215] which states that traditional African life is based on the the idea of a collective identity, rather than an individual identity.[216] What the Nguni proverb therefore illustrates is that there is a connectedness

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209 Ludsin *Berkeley J Int'l L* 70.
210 See Ludsin *Berkeley J Int'l L* 70 where this paragraph was quoted.
211 Makwe ER (1985) *Western and indigenous psychiatric help-seeking in an urban African population.* Unpublished master's dissertation. University of the Witwatersrand, Johannesburg, South Africa.
212 Ludsin *Berkeley J Int'l L* 70; Keevy *JJS* 70.
213 Van der Walt *Potchefstroom: Instituut vir Reformatoriese Studie* 111-112.
214 Mollema and Naidoo *JJS* 51.
215 Keevy *JJS* 65, 71-72, 74 points out that this proverb could also be translated as "I am because we are", "I am because we are and because we are, therefore, I am" and "injury to one is injury to all".
216 Also see Keevy *JJS* 62-65, 67, 70, 72 and Cornell and Van Marle *Afr Hum Rts LJ* 205 in this regard.

between an individual and his particular community in that whatever happens to the community will affect the individual and *vice versa*.[217]

The strong notion of communitarianism in African customary law also forms the cornerstone of the basic value underpinning customary law, *viz uBuntu*.[218] Although *uBuntu* is not easily definable in Western language,[219] South African legal scholars and courts have attempted to define this African value.[220] In *S v Makwanyane*,[221] for example, Mokgoro J defined *uBuntu* as a value that:

> … 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 respect for human dignity, marking a shift from confrontation to conciliation.

On another occasion Mokgoro[222] also described *uBuntu* as:

> A world-view of African societies and a determining factor in the formation of perception which influence social conduct.

From the definitions above it becomes evident that *uBuntu* constitutes the collective philosophy of the traditional, indigenous people in South Africa.[223] Furthermore, *uBuntu* represents the "shared traditional value and belief system"[224] of the indigenous people.[225] Fundamentally, *uBuntu* is a

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217 Mollema and Naidoo *JJS* 51; Bennett *PELJ* 48, 52; Keevy *JJS* 72; Cornell and Van Marle *Afr Hum Rts LJ* 206.

218 Keevy *JJS* 22, 33; Keevy *JJS* 63, 67, 70.

219 The reason for this, as pointed out by Keevy *JJS* 69, is because "there are limits to Western rationality when it comes to the understanding of the philosophy of *ubuntu*".

220 Keevy *JJS* 32. Consult Keevy *JJS* 64-67 for an overview of some of the definitions afforded to the value of *ubuntu* by legal scholars. Mokgoro *PELJ* 2 explains the difficulty in defining *ubuntu* as follows: "To define an African notion in a foreign language and from an abstract as opposed to a concrete approach to defy the very essence of the African world-view and can also be particularly elusive." Mokgoro continues to state that an attempt to define *ubuntu* in precise term is a near impossible task due to the fact that *ubuntu* is "one of those things that you recognize when you see it".

221 1995 3 SA 391 (CC) par 308. Also see Keevy *JJS* 32 and Mokgoro *PELJ* 2.

222 Mokgoro "*Ubuntu* and the Law in South Africa" 2.

223 Keevy *JJS* 33; Keevy *JJS* 63, 67, 68; Mollema and Naidoo *JJS* 51.

224 Keevy *JJS* 33; Keevy *JJS* 67-68.

225 Keevy *JJS* 33; Keevy *JJS* 67-68.

holistic worldview which engenders a "spirit of community, mutual support, sharing, interconnectedness and respect for one another" among indigenous Africans.[226] *Ubuntu* also rejects Western individuality, because it leads to the disintegration of *uBuntu* and the spirit of African brotherhood.[227]

The interim Constitution introduced the value of *uBuntu* to the South African legal systems by providing that:

> The 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.[228]

The adoption of the value of *uBuntu* in the South African law can be hailed as a milestone for South Africa, because as Bennett[229] points out this was "the first time in the history of South African law, [that] a typically African concept was adopted into the general law of the law of the land". Although the 1996 Constitution makes no reference to the value of *uBuntu*,[230] it can be argued that this African value has not lost its place in the South African legal system.[231] In fact, Constitutional Court Justice Mokgoro[232] holds the view that the "entire spirit of the South African Constitution should be interpreted to embody the spirit of *ubuntu*".[233] In this regard, Mokgoro[234] points out that the 1996 Constitution is intended to follow the constitutional princi-

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226 Keevy *JJS* 33; Keevy *JJS* 64; Bennett *PELJ* 30, 48; Cornell and Van Marle *Afr Hum Rts LJ* 206; English *SAJHR* 643.
227 Keevy *JJS* 33; Keevy *JJS* 70.
228 Post amble to the interim Constitution. Also see Mollema and Naidoo *JJS* 51 and Cornell and Van Marle *Afr Hum Rts LJ* 196, 207; English *SAJHR* 642.
229 Bennett *PELJ* 30.
230 Cornell and Van Marle *Afr Hum Rts LJ* 207.
231 English *SAJHR* 642.
232 See the discussion of Mokgoro *PELJ* 11.
233 See Mollema and Naidoo *JJS* 51.
234 Mokgoro *PELJ* 11.

ples contained in the interim Constitution. As a result, Mokgoro[235] argues that the founding principles[236] of the new Constitution coincide with the key values[237] of *uBuntu*. Mokgoro[238] further argues that:

> [T]he *ubuntu* values of collective unity and group solidarity can translate into the spirit of national unity demanded of the new South African society.

The place of *uBuntu* in the current legal system is further established by the fact that South African courts have decided many cases with due consideration of the value of *uBuntu*.[239] The first case, however, in which the value of *uBuntu* was introduced to South African jurisprudence, was the case of *S v Makwanyane*[240] where Langa J held that *uBuntu*:

> … is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and coresponsibility and the mutual enjoyment of rights by all.

In another case, *Dikoko v Mokhatla*,[241] Sachs J held that:

> Ubuntu-botho is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past. In present-day terms it has an enduring and creative character, representing the element of human solidarity that binds to-

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235 Mokgoro *PELJ* 11.

236 These principles include human dignity, equality, promotion of human rights and freedoms and multi-party democracy to ensure accountability, responsiveness and openness and the rule of law. See Mokgoro *PELJ* 11 in this regard.

237 These key values include human dignity itself, respect, inclusivity, compassion, concern for others, honesty and conformity. See Mokgoro *PELJ* 11 in this regard.

238 Mokgoro *PELJ* 26.

239 Mollema and Naidoo *JJS* 51.

240 1995 3 SA 391 (CC) 481B-481C.

241 2006 6 SA 235 (CC) 272F-272H.

> gether liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution.

Similarly, in the case of *Port Elizabeth Municipality v Various Occupiers*,[242] Sachs J also held that:

> The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It 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.

It can therefore be safely assumed that the value of *uBuntu* is part and parcel of the current South African legal system and that courts should afford due consideration to this value when making their decisions.

It goes without saying that if the value systems of the common law and African customary law differ, the source of law and norms in these two systems will also differ. In the Western common law the individual is viewed as the source of law and norms, whereas in African customary law the community is viewed as the source of law and norms.[243] African customary law, however, is considered to be an unwritten moral code which cannot be separated from the African religion and spirit world.[244] This is clearly evident from the following statement by Mutwa:[245]

> Man, know your life is not your own. You live merely to link your ancestors with your descendants. Your duty is to beget children even while you keep the Spirits of your Ancestors alive through regular sacrifices. When your ancestors command you to die, do so with no regrets.

In African customary law the ancestors therefore play an important role in the "legislation, tribal courts, judgments and punishment".[246] In fact, in many traditional African societies the ancestors are regarded as the legisla-

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242 2005 1 SA 217 (CC) 237E-238A.
243 Van der Walt *Potchefstroom: Instituut vir Reformatoriese Studie* 118.
244 Keevy *JJS* 30.
245 Mutwa *Indaba* 625. Also see Keevy *JJS* 30.
246 Keevy *JJS* 30.

tors who hand down moral rules, values and beliefs.[247] Members of the indigenous communities are expected to act according to the rules passed down by the ancestors in order to avoid being punished by them.[248]

It is submitted that the difference in the value systems of the common law and African customary law is an important consideration in the question whether or not to recognise a cultural defence in the South African criminal law. As is shown in Chapter 4,[249] the cultural defence comes to the fore when individuals adhering to a system of African customary law are charged with the commission of common law crimes in Western courts, where the values underlying the common law criminal legal system are enforced. The perpetrator of a culturally motivated crime will therefore be brought before a criminal court which does not share his cultural values, but will have to answer for conduct based on his own particular cultural values. Given that the common law and African customary law enjoy equal status in the South African law and that the South African courts have a constitutional duty to apply African customary law when that law is applicable, the question that arises is how a Western criminal court should accommodate the competing claims of the Western common law and African customary law when dealing with the perpetrator of a culturally motivated crime. This matter is further explored in Chapter 7.[250]

2.5 Conclusion

Due to the recognition afforded to African customary law by the interim and final Constitutions, the common law and African customary law now enjoy equal status in South Africa.[251] Although a lot has been done to promote

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247 Keevy *JJS* 30.
248 Keevy *JJS* 30.
249 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.
250 See par 7.3.
251 See par 2.2, Rautenbach and Matthee *JLP* 139, Ludsin *Berkeley J Int'l L* 68, Tetley *Unif L Rev* 605, Rautenbach *Elec J Comp L* 1 and *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi*

cultural rights of the indigenous people of South Africa, there is still a lot of ground that needs to be covered before the common law and African customary law can peacefully coexist in the South African legal system.[252] South Africa's criminal law, in particular, still requires some attention if peaceful harmony between the common law and customary law is to be achieved.[253]

Due to divergent value systems underpinning the common law and customary law, it is inevitable that these two legal systems will come into conflict within the context of South African criminal law.[254] In fact, in Chapter 4 it is shown that an individual adhering to African customary law can still be brought before a Western criminal court for committing a common law or statutory crime which he believed to be nothing more than a legitimate adherence to an indigenous belief or the exercise of an indigenous custom.[255]

There are various indigenous beliefs and customs that could lead to such a scenario within the South African criminal law and which lends itself to the possibility of an accused raising a cultural defence.[256] These include the indigenous belief in witchcraft[257] (including witch-killings[258]), the indigenous belief in the *tokoloshe*[259] and the use of *muti*-medicine[260] (including *muti*-

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v Sithole; South African Human Rights Commission v President of the Republic of South Africa 2005 1 SA 580 (CC) paras 40, 148.

252 Rautenbach and Matthee *JLP* 139; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 136.

253 See Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 136.

254 See par 2.3, paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3 as well as Rautenbach and Matthee *JLP* 113.

255 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3 as well as Rautenbach and Matthee *JLP* 139-140, Rautenbach *Elec J Comp L* 2, Petrus *Acta Criminologica* 123, 124 and Labuschagne *SACJ* 472 in this regard.

256 The nature and scope of the cultural defence is discussed in detail in Chapter 4.

257 See paras 4.2.1 and 4.2.2.

258 See par 4.2.3.

259 See par 4.3.

260 See par 4.4.

murders[261]), as well as the phenomenon of necklacing,[262] and the indigenous custom of *ukuthwala*.[263] In Chapter 4[264] it is shown that an accused who stands trial for committing a common law crime due to one or more of the indigenous beliefs and/or customs above, may put forth evidence of his cultural background and values in an attempt to persuade the court that his conduct was motivated by cultural norms, traditions, practices and/or values and that they should therefore escape criminal liability. What will also be shown is that the South African criminal courts have yet to accept arguments of an indigenous belief and/or custom as a defence excluding the criminal liability of an accused. However, in light of the equal status afforded to the common law and African customary law, the question arises as to how the Western criminal courts should now deal with the competing claims of these two legal systems. This question is considered in Chapter 7.[265]

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261 See par 4.4.
262 See par 4.5.
263 See par 4.6.
264 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.
265 See par 7.3.

CHAPTER 3
UNDERSTANDING THE CULTURAL DEFENCE: WHEN THEORY AND PRACTICE MEET

3.1 Introduction

The Constitution of South Africa purports to protect the cultural liberty of all who reside within its borders.[1] Cultural minorities in South Africa can therefore assert this right.[2] However, in the subsequent Chapters[3] it is shown

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1 This is evident from the right to religious freedom afforded by sections 15, 30 and 31 as well as the right to equality afforded to each and every individual in section 9 of the Constitution. These sections are discussed in more detail in par 7.2.

2 A similar argument is put forth by Renteln *Cultural Defense* 186 within the context of the American legal system.

3 See Chapters 5 and 6.

that the South African courts have been unwilling to allow culturally motivated actions to serve as a defence for criminal conduct where the interests of the state or community are thought to outweigh the right to cultural and religious freedom.[4] In other words, what is shown is that, up till now, the South African courts have been unwilling to recognise a formal cultural defence in the South African criminal law.[5] However, it is important to consider that the case law supporting this contention were all decided before 1994 and the question arises whether this is or can still continue to be the case in the post-1994 South African criminal law.[6] This question is further explored in Chapter 7.[7]

In practice, the basis and implementation of a cultural defence would depend on the manner in which the legal issue underlying the dispute is evaluated.[8] The next Chapter is aimed at surveying the range of cultural conflicts the South African criminal courts have to deal with.[9] This Chapter is aimed at surveying the theoretical issues underlying cultural conflicts in general, and the cultural defence in particular.[10]

In order to be as clear as possible as to the theoretical subtleties involved in the adjudication of cultural conflicts, this Chapter is dedicated to defining the notion of "culture",[11] the "cultural defence"[12] as well as "culturally motivated crimes".[13] Only once these concepts, as well as the instances in which they can be used,[14] have been clearly defined, can a discussion

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4 In this regard see the facts and decision of *R v Njova* 1906 20 EDC 71; *R v Ncedani* 1908 22 EDC 243; *R v Sita* 1954 4 SA 20 (E); *R v Swartbooi* 1916 EDL 170 and *R v Mane* 1948 1 All SA 128 (E). Also see Renteln *Cultural Defense* 186.
5 See par 5.2.2 and 6.3.
6 See Chapter 7.
7 See par 7.3.
8 Renteln *Cultural Defense* 187.
9 See paras 4.2-4.6.
10 Also see Chapters 5 – 8.
11 See par 3.3.2.
12 See par 3.2.
13 See paras 3.2 and 3.3.2.
14 See paras 4.2 to 4.6.

continue on whether or not a cultural defence should be formally recognised in the South African criminal law.[15] To facilitate such a discussion better, this Chapter puts forth some arguments in favour of the formal recognition of a cultural defence in a criminal legal system, as well as arguments against the formal recognition thereof.[16] What's more, this Chapter will also provide a brief overview of the purpose and scope of a cultural defence.[17]

3.2 Defining the concept "cultural defence"

From the available literature on a cultural defence it seems as though a cultural defence has a substantial definition which is always present when dealing with a cultural defence in criminal law, as well as a formal definition.[18] The formal definition construes a cultural defence as a specific doctrine which, during a criminal trial, recognises that the accused's cultural background can serve as either an excuse or a factor mitigating punishment for the crime committed by the offender.[19] The substantial definition is much more elaborate than the formal definition and various authors have provided their version of the substantial definition by defining a cultural defence in a specific context. Choi,[20] for example, refers to the perpetrator's belief system and defines the cultural defence as one that:

> … negates or mitigates criminal responsibility for acts committed under a reasonable, goodfaith belief in their propriety, based upon the actor's cultural heritage or tradition.

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15 See Van Broeck *Eur J Crime Crim L & Crim Just* 31.
16 See paras 3.5 and 3.6.
17 See par 3.4.
18 Van Broeck *Eur J Crime Crim L & Crim Just* 28-29.
19 Van Broeck *Eur J Crime Crim L & Crim Just* 29; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 135; Renteln *Southern Calif Rev L & Women's Stud* 439; Merle *Florianópolis* 7. A similar definition is provided by Sikora *Ohio St LJ* 1699. Also see Sacks *Ariz J Int'l & Comp L* 523.
20 Choi *UCLA Pac Basin LJ*81. Also see Lyman *Crim Just J* 88 and Sikora *Ohio St LJ* 1699.

Thompson,[21] on the other hand, focuses on the difference in the value system of the accused and the criminal legal system when describing the purpose and implementation of the cultural defence in the following way:

> When a recent immigrant from a foreign country with a completely different set of values commits an illegal act that would have been perfectly acceptable in the homeland, defense lawyers argue the act was not necessarily a crime.

Van Broeck[22] takes a similar approach as Thompson by defining the cultural defence in the context of the values or norms of the perpetrator, which definition reads as follows:

> A cultural defense maintains that persons socialized in a minority or foreign culture, who regularly conduct themselves in accordance with their own culture's norms, should not be held fully accountable for conduct that violates official law, if that conduct conforms to the prescriptions of their own culture.

Volpp[23] breaks away from the normative or value-based approach and defines the cultural defence in the context of the requirements for criminal liability:

> The "cultural defense" is a legal strategy that defendants use in attempts to excuse criminal behaviour or to mitigate culpability based on a lack of requisite *mens rea*.

Of course, all the definitions above correspond with the one given by Renteln, the author who first coined the term "cultural defence". Renteln[24] explains the idea behind the cultural defence in the following way:

> A cultural defense is a defense asserted by immigrants, refugees, and indigenous people based on their customs or customary law. A successful cultural defense would permit the reduction (and possible elimination) of a charge, with a concomitant reduction in punishment. The rationale behind such a claim is that an individual's behaviour is influenced to such a large extent by his or her culture that either (i) the individual simply did not believe that his or her actions contravened any laws (cognitive case),

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21 Thompson *Student Lawyer* 26.
22 Van Broeck *Eur J Crime Crim L & Crim Just* 28-29.
23 Volpp *Harv Women's LJ* 57.
24 Renteln *Southern Calif Rev L & Women's Stud* 439. Also see Bennett *U Botswana LJ* 12.

or (ii) the individual was compelled to act the way he or she did (volitional case). In both cases the individual's culpability is lessened.

Although it may seem as though the formal and substantial definition of the cultural defence are quite similar, there is, however, an important difference between the two.[25] The formal definition, on the one hand, implies the recognition of an entirely new and explicit defence within the criminal law.[26] This in turn implies that the accused will be able to put forward arguments of his cultural background to serve as either an excuse or a mitigating factor for the alleged crime committed.[27] The substantial definition, on the other hand, is intended for use in all criminal cases where an accused puts forward arguments of his cultural background and values as an excuse for his conduct.[28] In such cases the arguments of the accused are ordinarily put forward in the context of traditional criminal law defences such as private defence,[29] necessity[30] or criminal incapacity.[31]

For purposes of this study the substantial definition of the cultural defence is preferred, because, as is evident from the South African case law, up till now the perpetrators of common law or statutory crimes as a result of an indigenous belief or custom have always attempted to justify their conduct within the context of pre-existing defences in the South African law.[32] Also, in Chapter 7[33] it is argued that the right to cultural freedom entrenched in the Constitution does not warrant the formal recognition of a separate cultural defence in the South African criminal law.

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25 Van Broeck *Eur J Crime Crim L & Crim Just* 29.
26 Van Broeck *Eur J Crime Crim L & Crim Just* 29; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 137.
27 Van Broeck *Eur J Crime Crim L & Crim Just* 29; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 136.
28 Van Broeck *Eur J Crime Crim L & Crim Just* 29; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 136.
29 See par 5.2.2.
30 See par 5.2.3.
31 See par 6.3.1.
32 See paras 5.2.2, 5.2.3, 6.2, 6.3.1 and 6.3.2.
33 See par 7.3.

The definitions above reveal that there are certain practical matters associated with the cultural defence that need to be understood before the recognition of a formal cultural defence in any legal system can be considered.[34] One such practical matter is the fact that an accused can only rely on a cultural defence where he is facing criminal charges for committing what is considered to be a "culturally motivated crime".[35] Van Broeck[36] defines a culturally motivated crime as:

> ... an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation.

There is, however, a more accurate description of a culturally motivated crime which reads as follows:

> The values of individuals who are raised in minority cultures may at time conflict with the values of the majority culture. To the extent that the values of the majority are embodied in the criminal law, these individuals may face the dilemma of having to violate either their cultural values or the criminal law.[37]

From these definitions, certain critical elements of a "culturally motivated crime" can be deduced which require further clarification before the concept of a cultural defence can be fully defined and demarcated.[38] Each one of these critical elements contains certain inherent questions that need to be answered in order to conceptualise the notion of a "culturally motivated crime" and subsequently a "cultural defence" properly.[39]

The critical elements of a culturally motivated crime also apply to the cultural defence, because of the existence of an important link between the

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34 This corresponds with the view of Renteln *Cultural Defense* 206.
35 See par 4.2. A "culturally motivated crime" can also be referred to as a "cultural offence".
36 Van Broeck *Eur J Crime Crim L & Crim Just* 5.
37 Anon *Harv L Rev* 1293.
38 Van Broeck *Eur J Crime Crim L & Crim Just* 5.
39 Van Broeck *Eur J Crime Crim L & Crim Just* 5.

cultural defence and culturally motivated crimes.[40] In essence, this link boils down to the fact that the use of a cultural defence can only be logically justified if the offence committed qualifies as a culturally motivated crime.[41] Differently put, a culturally motivated crime is one where the cultural background of the accused had an important bearing on the culpability necessary for the specific crime.[42] Therefore, an accused will only be able to rely on his cultural background as a defence if that background is relevant to the case at hand.[43] Of course, an accused's cultural background will only be relevant when the crime he committed qualifies as a culturally motivated crime.[44]

Furthermore, culturally motivated crimes come in various degrees and consequently so does the cultural defence.[45] In a criminal case a judge would therefore first need to conclude that there is a relevant link between the accused and the offence before accepting arguments of a cultural defence.[46] This would prevent the absurd situation where an accused relies on a cultural defence in a case where the cultural element is entirely irrelevant.[47]

3.3 Critical elements of a cultural defence

3.3.1 Distinguishing between dominant and minority cultures

The distinction between dominant and minority cultures is neither a question of which culture was where first, nor is it a matter of numerical superiority or physical power.[48] South Africa can clearly contest to this fact be-

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40 Van Broeck *Eur J Crime Crim L & Crim Just* 30.
41 Van Broeck *Eur J Crime Crim L & Crim Just* 30.
42 Van Broeck *Eur J Crime Crim L & Crim Just* 30.
43 Van Broeck *Eur J Crime Crim L & Crim Just* 30.
44 Van Broeck *Eur J Crime Crim L & Crim Just* 30.
45 Van Broeck *Eur J Crime Crim L & Crim Just* 30.
46 Van Broeck *Eur J Crime Crim L & Crim Just* 30; Karayanni *OHJL* 382.
47 Van Broeck *Eur J Crime Crim L & Crim Just* 30.
48 Van Broeck *Eur J Crime Crim L & Crim Just* 5; Bennett *U Botswana LJ* 14.

cause, as was shown in Chapter 2,[49] the numerical majority of the South African population is made up of the indigenous African communities.[50]

However, before 1994, the indigenous African majority in South Africa was treated as subordinate and, to a certain degree, this still rings true today.[51] For this reason, as well as other contributing factors, section 31(1) of the Constitution was formulated in the following way:

> Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
>
> (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.[52]

Bennett[53] argues that the term "cultural community" in section 31 eliminates the problems associated with the term "minority" as it makes it possible to interpret culture in terms of dominant and subordinate ideologies rather than numbers or physical power.

Bennett's view corresponds with that of Van Broeck,[54] who is also of the opinion that a dominant and minority culture should be distinguished from another by looking at a legal system's cultural and ideological background

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49 See par 2.1 as well as *Ex Parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill 1995* 1996 2 SA 165 (CC) par 81, Bennett *U Botswana LJ* 14, Momoti Law and Culture 79.

50 See Statistics South Africa 2013 http://www.statssa.gov.za/publications/P0302/P03022013.pdf 3.

51 This can be deduced from *Ex Parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill 1995* 1996 2 SA 165 (CC) par 81. Also see Bennett *U Botswana LJ* 14. For an overview of the position of African customary law before and after the enactment of the Constitution see par 2.2.2.

52 The wording of section 31 is similar to that of Article 27 of the International Covenant on Civil and Political Rights discussed in par 4.6. In section 31, however, the terms "minority" and "ethnic" have been omitted.

53 Bennett *U Botswana LJ 14*. Also see *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) par 23 and Van Broeck *Eur J Crime Crim L & Crim Just* 5.

54 Van Broeck *Eur J Crime Crim L & Crim Just* 5.

or basis. A dominant culture, according to Van Broeck,[55] provides the ideological basis for the criminal law rule the accused is said to have contravened. A minority culture, on the other hand, refers to the cultural background of the accused's minority group which differs from the cultural norms and values of the dominant culture.[56] It is, therefore, the cultural norms and values present in a particular legal system, specifically its criminal law that determines which group can be viewed as the dominant one.[57] So in order to decide whether or not a particular accused belongs to a particular minority cultural group, one has to consider his cultural values and also whether or not these values are contrary to those found in the South African criminal legal system.[58] Similarly, one would need to study the legal and moral rules of the accused's minority culture and not the official law of South Africa in order to reflect on them.[59]

3.3.2 Pinning down the term "culture"

Before an accused's act can be qualified as a culturally motivated crime, it is essential to determine whether or not the norm or value, which motivated the conduct of the accused, is firmly embedded in a certain cultural group.[60] Furthermore, it is essential to determine whether or not the accused is actually a member of that particular cultural group.[61] For this purpose it is necessary to define the concepts "culture" and "cultural group".[62] In simple terms, a cultural group can be defined as a group of individuals who share a common culture.[63] The notoriously ambiguous concept of

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55 Van Broeck *Eur J Crime Crim L & Crim Just* 5.
56 Van Broeck *Eur J Crime Crim L & Crim Just* 5.
57 Van Broeck *Eur J Crime Crim L & Crim Just* 5.
58 This is evident from Van Broeck *Eur J Crime Crim L & Crim Just* 7.
59 This is evident from Van Broeck *Eur J Crime Crim L & Crim Just* 7.
60 Van Broeck *Eur J Crime Crim L & Crim Just* 8; Karayanni *OHJL* 382.
61 Van Broeck *Eur J Crime Crim L & Crim Just* 8; Karayanni *OHJL* 382.
62 Van Broeck *Eur J Crime Crim L & Crim Just* 8.
63 Van Broeck *Eur J Crime Crim L & Crim Just* 8.

"culture" is, however, not that simple to pin down as culture is "neither monolithic nor static, but is an ever evolving and very diversified reality".[64]

In traditional legal discourse, culture was viewed as a separate and discrete social system, a reality that preceded and determined the physical world.[65] Today, however, this view is unacceptable in academic circles and as a result various authors have attempted to define culture since the first definition came to light in 1871.[66] The first ever clear and comprehensive definition of culture was given by the British anthropologist Sir Edward Burnett Tylor who defined culture as:

> ... that complex whole which includes knowledge, belief, art, law, morals, custom and any other capabilities and habits acquired by man as a member of society.[67]

Since Tylor's time, many a definition has proliferated through psychologists, sociologists and anthropologists in an attempt to emphasise those aspects of culture that are deemed most important by them.[68] Even lawyers have embarked on a journey of finding a suitable definition of culture, albeit within a legal context.[69] Modern day definitions seem to draw a more clear distinction between a person's actual behaviour and the mental processes behind that person's behaviour.[70] Differently put, instead of viewing culture as observable behaviour, culture is viewed as "the values and beliefs that

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64 Van Broeck *Eur J Crime Crim L & Crim Just* 8; Bennett *U Botswana LJ* 14; Chiu *Cal L Rev* 1101. Also see Du Plessis and Rautenbach *PELJ* 30-31 where the authors point out that the difficulty in pinning down culture is also caused by the fact that culture has so "many possible multi-layered and context-dependent meanings".

65 As Bennett *U Botswana LJ* 14- 15 points out: "In legal discourse, culture is commonly taken to be a people's store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of society".

66 Bennett *U Botswana LJ* 14; Fisher *S Cal Interdisc LJ* 668; Du Plessis and Rautenbach *PELJ* 31.

67 See Fisher *S Cal Interdisc LJ* 668.

68 Fisher *S Cal Interdisc LJ* 668. These definitions were so diverse that during the 1950's there was a recorded 164 definitions in research conducted on the notion of culture.

69 Du Plessis and Rautenbach *PELJ* 31. Also see Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 4-8.

70 Fisher *S Cal Interdisc LJ* 668.

people use to interpret experience and generate behavior, and which that behavior reflects".[71] Bennett,[72] for example, defines culture as:

> … a product of human agency or a system of symbols, which offers people a means of giving meaning to their lives and orienting themselves towards the social and physical worlds.

According to Du Plessis and Rautenbach,[73] culture should be understood as an abstract, yet inherent part of human life that deals with a subliminal pattern of thinking. This pattern of thinking describes the:

> … organisation of values, norms, and symbols which guide the choices made by actors and which limit the types of interaction which may occur between individuals.[74]

Another well-accepted definition of culture is the one by Haviland[75] which defines culture as:

> … a set of rules or standards shared by members of a society which, when acted upon by the members, produce behavior that falls within a range of variance the members consider proper and acceptable.

Haviland[76] elaborates on his definition by specifying that culture's existence is found in the:

> … abstract values, beliefs, and perceptions of the world that lie behind people's behavior, and which that behaviour reflects.

Van Broeck[77] affords a broader, more abstract definition to culture by describing it as:

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71 This is the definition of Haviland as referred to in Fisher *S Cal Interdisc LJ* 668-669 and Du Plessis and Rautenbach *PELJ* 31.

72 Bennett *U Botswana LJ* 14-15. Bennett also points out that, when defining culture, one of the first distinctions that must be drawn is between the concept of delinquent criminal sub-cultures and the culture generally associated with the indigenous people in South Africa. Although delinquent criminal sub-cultures may, in many respects, conform to the definition of culture provided here, it is clear that, in the context of the cultural defence, these criminal sub-cultures are not to be included.

73 Du Plessis and Rautenbach *PELJ* 31.

74 Parsons and Shils "Values and Social Systems" 40.

75 See Fisher *S Cal Interdisc LJ* 669 where the author refers to this definition of Haviland.

76 See Fisher *S Cal Interdisc LJ* 669 for the definition by Haviland.

> ... an intersubjectif system of symbols which offers the human being an orientation toward the others, the material world, him- or herself and the non-human. This symbolic system has a cognitive as well as an evaluative function. It is handed over from one generation onto a next generation and subject to constant transformation. Even when it never achieves complete harmony, there is a certain logic and structure that binds the system together.

Another definition of culture to consider is that of Amoah and Bennett[78] who define culture as a concept denoting:

> People's store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of society.

The authors continue by stating that through the means referred to in this definition, one cultural group will be able to distinguish itself from another group.[79] This, according to Amoah and Bennett,[80] often leads to culture developing "a close and symbiotic relationship with religion, and in practice it is far from easy to disentangle the two concepts". Therefore, what the authors essentially argue is that "religion may function as a marker for culture and *vice versa*".[81] A similar view is held by Rautenbach[82] who argues that the similarities and differences between the terms "culture" and "religion" are irrelevant, because "African traditions do not draw any distinction between the concepts – they are one and the same". Rautenbach, Jansen van Rensburg and Pienaar also argue that the term "culture" is broad enough to include religion.[83] In support of their argument, these authors refer to the concept of religion as being "normally associated with the existence of a God or gods to whom some form of worship and obedi-

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77 Van Broeck *Eur J Crime Crim L & Crim Just* 8. According to Van Broeck the term "symbols" has a very broad meaning, referring to "everything that denotes something else".

78 Amoah and Bennett *Afr Hum Rts LJ* 368. Also see Phakola *Justice Today* 24.

79 Amoah and Bennett *Afr Hum Rts LJ* 368.

80 Amoah and Bennett *Afr Hum Rts LJ* 368.

81 Amoah and Bennett *Afr Hum Rts LJ* 368.

82 Rautenbach “Umkhosi Ukweshwama: Revival of a Zulu Festival in Celebration of the Universe’s Rites of Passage” 65.

83 Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 6.

ence is due".[84] The authors also point out that other definitions of religion merely require "a devotion to some or other principle and the exercise or practice of rites and observances".[85]

One definition that has received considerable attention in legal discourse is that of the 2002 UNESCO Universal Declaration on Cultural Diversity which defines culture as:

> … a set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.[86]

In South Africa even legislation and policy documents have defined culture.[87] The first example can be found in the *White Paper on Arts, Culture and Heritage*[88] where culture is defined as:

> … the dynamic totality of distinctive spiritual, material, intellectual and emotional features which characterise a society or social group. It includes the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions, heritage and beliefs developed over time and subject to change.

In terms of the *Culture Promotion Act*,[89] culture is described in rather broad terms to include an array of features. These features include the visual arts, music, the literary arts, knowledge acquisition on the applied, natural and human sciences, as well as the utilisation of leisure.[90] Although it does not provide a definition of "culture" *per se,* the *National Heritage Resources*

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84 Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 7.
85 Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 7.
86 See the preamble to the UNESCO Universal Declaration on Cultural Diversity.
87 Du Plessis and Rautenbach *PELJ* 32.
88 Of 4 June 1996. The White Paper can be accessed at www.dac.gov.za.
89 S 3(5) of the *Culture Promotion Act* 35 of 1983. Also see Du Plessis and Rautenbach *PELJ* 32.
90 S 3(5) of the *Culture Promotion Act* 35 of 1983. Also see Du Plessis and Rautenbach *PELJ* 32.

Act[91] also provides a very loose interpretation of culture by providing that once something has been labelled as being "culturally significant", then such significance would refer to an object's "aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance".

From the definition of Van Broeck[92] above, it seems as though the author suggests that moral and legal norms form part of culture's evaluative and cognitive function as these norms not only guide a person into doing what is right, but also serves as a guide for interpreting and judging the actions of others. It, therefore, seems as though Van Broeck[93] contends that moral and legal norms form part of culture.

This viewpoint, however, only partially solves the problem of defining the term "culture", as a culturally motivated crime is based on the premise that it resulted from a difference in the legal and moral norms of different cultural groups.[94] This, in turn, raises the question whether one is dealing with another culture, for it is not sufficient for a court merely to refer to the differing legal or moral norms of an accused when determining whether he belongs to a certain cultural group.[95] The problem with such an approach is that the content of culture is much broader than the content traditionally given to legal and moral norms by Western philosophy or social sciences.[96]

Although culture is a logic or structure that controls a person's entire life, feeling and world, it is also a diversified reality with momentum which is in a constant state of evolution as people's contexts, demands, needs and even

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91 S 1 of the *National Heritage Resources Act* 25 of 1999. Also see Du Plessis and Rautenbach *PELJ* 32.
92 Van Broeck *Eur J Crime Crim L & Crim Just* 8; Fisher *S Cal Interdisc LJ* 668-669.
93 Van Broeck *Eur J Crime Crim L & Crim Just* 8.
94 Van Broeck *Eur J Crime Crim L & Crim Just* 8.
95 Van Broeck *Eur J Crime Crim L & Crim Just* 8.
96 Van Broeck *Eur J Crime Crim L & Crim Just* 8-9.

time itself changes.[97] Culture is not only concerned with what is considered to be good or bad, criminal or not, but is "an encompassing system of thinking, doing and evaluating".[98] Therefore, without being entirely deterministic, culture has some overall logic as it influences various aspects of human life.[99] Legal and moral norms, therefore, only make up one aspect of culture.[100]

According to Van Broeck[101] it can be argued that, because the behaviour of certain individuals in different groups is ruled by different legal and moral principles, it means that there are different cultures that exist. Van Broeck,[102] however, argues that this leads to a circular reasoning; because if it is said that different cultures exist when a different normative system is applicable, it would mean that the terms "cultural" and "legal or moral" would overlap completely. Such a reasoning would lead to the unacceptable implication that a criminal act would be considered a culturally motivated crime if it were to be performed by a member of a group who does not consider the relevant act to be criminal.[103] Although a difference in legal and moral norms is a factor to be considered when determining whether one is dealing with another culture, it cannot be the only factor.[104]

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97 Bennett *U Botswana LJ* 15; Van Broeck *Eur J Crime Crim L & Crim Just* 8-9; Du Plessis and Rautenbach *PELJ* 31. According to Bennett this understanding of culture corresponds with recent thinking in the Constitutional Court. He refers to the case of *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) 527C where O'Regan J pointed out that: "[A]n approach to cultural rights in our Constitution must be based on the value of human dignity which means that we value cultural practices because they afford individuals the possibility and choice to live a meaningful life." O'Regan J (525A-525B) continued by saying that: "It is also important to remember that cultural, religious and linguistic communities are not static communities that can be captured in constitutional amber and preserved from change. Our constitutional understanding of culture needs to recognise that these communities, like all human communities, are dynamic."

98 Van Broeck *Eur J Crime Crim L & Crim Just* 9.

99 Van Broeck *Eur J Crime Crim L & Crim Just* 9.

100 Van Broeck *Eur J Crime Crim L & Crim Just* 9.

101 Van Broeck *Eur J Crime Crim L & Crim Just* 9.

102 Van Broeck *Eur J Crime Crim L & Crim Just* 9.

103 Van Broeck *Eur J Crime Crim L & Crim Just* 9.

104 Van Broeck *Eur J Crime Crim L & Crim Just* 9.

It is no easy task to distinguish between different cultures because, although cultures might differ quite significantly, there are still similarities between them that should not be forgotten.[105] Furthermore, culture as such is forever in a state of evolution and is constantly influenced by a wide variety of factors such as migration and acculturation.[106] Despite the need for limiting the scope of culture, culture should not be viewed as a solid or rigid construct, because, as Van Broeck[107] puts it:

> The definition of culture is deliberately kept as vague as possible to make sure that it is a 'working definition' which can be applied to a specific case.

By using a vague definition of culture it will be easier to qualify certain acts as culturally motivated crimes and as a result there will be more cases where the possibility of so-called "cultural defence" can be raised.[108] Van Broeck,[109] however, warns that if this were to happen too frequently a cultural defence will be stripped of all credibility and demoted to "just another excuse raised by a criminal".

3.3.3 The problem of acculturation (or assimilation)

Although culture serves as a tool with many purposes one of its main purposes is to distinguish groups from one another.[110] This purpose is, however, sometimes defeated as culture is extremely malleable and always overlaps with and absorbs elements from other cultures.[111] This process of

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105 Van Broeck *Eur J Crime Crim L & Crim Just* 9.
106 For a general discussion see Van Broeck *Eur J Crime Crim L & Crim Just* 9. The problem of acculturation is discussed in further detail in par 4.1.3.
107 Van Broeck *Eur J Crime Crim L & Crim Just* 9-10. The vagueness of the definition of culture, according to Van Broeck *Eur J Crime Crim L & Crim Just* 10, is also one of the strongest arguments against the use of the cultural defence and the recognition of a cultural offence. Also see par 4.8 where the arguments against the cultural defence is discussed in more detail.
108 Van Broeck *Eur J Crime Crim L & Crim Just* 10.
109 Van Broeck *Eur J Crime Crim L & Crim Just* 10.
110 Bennett *U Botswana LJ* 15.
111 Bennett *U Botswana LJ* 15.

overlapping and absorption is referred to as acculturation (or assimilation).[112]

Acculturation poses another major problem for the recognition of a formal cultural defence, because it is sometimes difficult to determine whether or not an accused was acculturated to the dominant culture.[113] There are, however, theories that suggest that the process of acculturation is inevitable.[114]

Just like culture, the concept of "acculturation" is a difficult one to define accurately.[115] However, for purposes of this discussion, acculturation can be viewed as "the process that takes place when one is confronted with another culture".[116] The process of acculturation is not isolated to only one society, but is rather a process that is operational in all societies at all times.[117] During this process, the cultural values of different cultural groups are rearranged without any discrimination or exception.[118] One cultural group's norms and values are therefore not observed while another group's norms and values are excluded or disregarded.[119] On the contrary, during this process of rearrangement members of the relevant groups would rather comply with whatever norms seem to serve their immediate circumstances.[120]

Sometimes it is even possible for the original culture to be abandoned and replaced, entirely or in part, by the cultural values of the dominant cul-

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112 Bennett *U Botswana LJ* 15. Here, the terms "acculturation" and "assimilation" are synonyms. For purposes of this discussion the term "acculturation" is preferred, because it is the one most frequently used in the literature.
113 See Chiu *Cal L Rev* 1102-1103 and Bennett *U Botswana LJ* 16 where they also mention that the dominant culture may even ignore acculturation due to eagerness on its part to perpetuate prejudices and enforce exclusion by imposing a cultural identity on a minority group.
114 Bennett *U Botswana LJ* 16.
115 Van Broeck *Eur J Crime Crim L & Crim Just* 11.
116 Van Broeck *Eur J Crime Crim L & Crim Just* 11.
117 Bennett *U Botswana LJ* 16.
118 Van Broeck *Eur J Crime Crim L & Crim Just* 11; Bennett *U Botswana LJ* 16.
119 Van Broeck *Eur J Crime Crim L & Crim Just* 11; Bennett *U Botswana LJ* 16.
120 Bennett *U Botswana LJ* 17.

ture.[121] In fact, traditionally it was the goal of the dominant culture to subject the minority culture to a complete "take-over" of the dominant culture's norms and values.[122] Van Broeck[123] is of the opinion that this method of acculturation is often taken for granted as a minority culture will, eventually, replace its traditional values with that of the dominant culture. Van Broeck[124] argues that, if this aspect of acculturation is the only one focused on, it is redundant to elaborate on a theory for culturally motivated crimes and a cultural defence. A culturally motivated crime will then merely be the effect of the transition from one culture to another and therefore serve as a sign of an incomplete acculturation process.[125] Van Broeck,[126] however, points out that if the goal is to achieve a complete acculturation process, then the criminal law can be used to achieve such goal.

The theory of acculturation is not a perfect one for it is not only based on morally and ethically unstable grounds, but also ignores an important social reality, which is that, when acculturation is taken for granted, it is very easy to forget that those cultural values that are in conflict with the criminal law form an integral and fundamental part of the cultural group and therefore remain persistent.[127] What this social reality attempts to illustrate is that, when confronted with a dominant culture, a minority culture will not always surrender its traditional values to the dominant culture.[128] In fact, some values may even become more important due to a process of "ethnicity-creation and reinforcement".[129] It is not that simple merely to say that cer-

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121 Van Broeck *Eur J Crime Crim L & Crim Just* 11.
122 See Van Broeck *Eur J Crime Crim L & Crim Just* 11 where she points out that traditionally it was the goal of the dominant groups that the minority groups "abandon their 'primitive' habits and take over their (dominant groups') values and culture.
123 Van Broeck *Eur J Crime Crim L & Crim Just* 11-12.
124 Van Broeck *Eur J Crime Crim L & Crim Just* 12.
125 Van Broeck *Eur J Crime Crim L & Crim Just* 12.
126 Van Broeck also points out that such a reasoning could lead to a form of "ethnocide". See Van Broeck *Eur J Crime Crim L & Crim Just* 12. Also see Bennett *U Botswana LJ* 17 and Chiu *Cal L Rev* 1106.
127 Van Broeck *Eur J Crime Crim L & Crim Just* 12.
128 Van Broeck *Eur J Crime Crim L & Crim Just* 12.
129 Van Broeck *Eur J Crime Crim L & Crim Just* 12.

tain practices will just disappear, nor is it that simple to say that an individual who has not been living with his cultural group for a considerable amount of time cannot enjoy the benefit of a cultural defence.[130] It is, therefore, not possible to conclude that certain practices will disappear all by themselves or that a cultural defence cannot be used by an individual who has been living outside of his culture for a considerable amount of time.[131]

Another factor that reinforces the social reality above is the position the minority group holds within the dominant group.[132] Individuals often rely more on other members of their cultural group for support and are keener to maintain the group's identity where that group is in a socially and economically inferior position or even the victim of discrimination by the dominant group.[133] Concepts such as "honour" and "identity" then become more and more important, because they are seen as an individual's or minority group's only wealth.[134] The behaviour of individuals under such circumstances is entirely understandable considering that individuals have the need to be fully accepted by their social groups, especially if the social reality of the overall society is of such a nature that those in charge do not entirely accept a certain individual.[135] An individual therefore has no option but to conform to the minority culture for if he refuses to do so, he risks being socially expelled from the group and also loses his source of support.[136] At the end of the day this results in the individual having his freedom of choice severely limited and subsequently certain cultural values remain compulsory.[137]

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130 Van Broeck *Eur J Crime Crim L & Crim Just* 12.
131 Van Broeck *Eur J Crime Crim L & Crim Just* 12.
132 Van Broeck *Eur J Crime Crim L & Crim Just* 12-13.
133 Van Broeck *Eur J Crime Crim L & Crim Just* 12, 20; Bennett *U Botswana LJ* 17, 19.
134 Bennett *U Botswana LJ* 17; Van Broeck *Eur J Crime Crim L & Crim Just* 13.
135 Van Broeck *Eur J Crime Crim L & Crim Just* 13.
136 Van Broeck *Eur J Crime Crim L & Crim Just* 13; Bennett *U Botswana LJ* 17.
137 Van Broeck *Eur J Crime Crim L & Crim Just* 13.

It should, however, be kept in mind that should a minority group be dominated by another culture for a considerable time it would not necessarily result in a loss of cultural values.[138] For example, although it may seem as though a member of an ethnic group in South Africa has become "Westernised" or acculturated, when looking at that individual's physical culture (clothes, cars, houses, etc), it does not necessarily mean that he is completely acculturated.[139] The question whether an individual has been acculturated or not should be determined on a case-to-case basis.[140] Such a determination is especially relevant when dealing with the third-generation members of a minority cultural group because, as Bennett[141] points out, when dealing with these third-generation members, the difficulty lies in determining whether their behaviour is still motivated by their grandparents' culture. While some of the minority group's values and norms may have been lost over time, third-generation members may still reinforce other values and norms themselves so that it may serve as symbols of the minority group's identity.[142] According to Sams,[143] a court would face two difficulties in this regard: firstly, in distinguishing between *bona fide* foreign newcomers (those individuals who have acculturated) and other cultural minority groups who may try to abuse the protection afforded by the cultural defence and secondly, distinguishing between individual accused persons who may legitimately rely on a cultural defence from those who have adequately acculturated into the dominant culture so that they may be held accountable for their actions. It is, therefore, not possible to set a time limit on the use of a cultural defence since there is no evidence that an individu-

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138 Van Broeck *Eur J Crime Crim L & Crim Just* 13; Renteln *Southern Calif Rev L & Women's Stud* 496. The opposite is, however, also possible, in other words a minority culture may lose its cultural values due to a long domination by another culture or even only after a relatively short period of domination.

139 Van Broeck *Eur J Crime Crim L & Crim Just* 14. Also see the explanation provided by Bennett *U Botswana LJ* 17-18 as well as that of Renteln *Southern Calif Rev L & Women's Stud* 496.

140 Van Broeck *Eur J Crime Crim L & Crim Just* 13.

141 Bennett *U Botswana LJ* 16-17.

142 Bennett *U Botswana LJ 17*; Van Broeck *Eur J Crime Crim L & Crim Just* 12.

143 Sams *Georgia J of Int & Comp L* 345.

al has become acculturated within any specific periods of time.[144] On the contrary, Renteln[145] argues that:

> ... cultural defences may be particularly appropriate in cases where individuals have clearly acted upon cultural assumptions which constitute an important ingredient in their worldview, no matter how long they have resided in the new country.

What is therefore clear is that, despite people's radically different values and lifestyles they still manage to co-exist and co-operate.[146] However, the question that arises is how a criminal court should go about determining to what extent an accused complies with the norms and values of his particular culture when raising the cultural defence during criminal proceedings.[147] According to Bennett[148] a court would need to consider factors such as the accused's education, language proficiency, occupation, place of upbringing and place of residence[149] when making such a determination. Bennett,[150] however, also points out that, should a court determine that a particular accused has acculturated to a certain degree it should still not lose sight of the fact that the accused may have complied with traditional cultural norms for special reasons.

According to Van Broeck,[151] there is one principle that underlies all the above factors, namely that culture is not essential, yet cannot be "reified", because, as was shown earlier,[152] culture is a social reality that undergoes

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144 Van Broeck *Eur J Crime Crim L & Crim Just* 13; Sams *Georgia J of Int & Comp L* 347; Samuels *Comm L World Rev* 242; Renteln *Southern Calif Rev L & Women's Stud* 496; Torry *JLP* 132.

145 Renteln *Southern Calif Rev L & Women's Stud* 496.

146 Bennett *U Botswana LJ* 17.

147 Bennett *U Botswana LJ* 17. Also see Torry *JLP* 132 where the author points out that "[a]s a procedural matter, an assimilation cut-off point is needed to screen for culture defense elegibility".

148 Bennett *U Botswana LJ* 17-18. See Torry *JLP* 132-133 for a discussion of the difficulty in deciding which criteria to use to prove acculturation or otherwise.

149 According to Bennett *U Botswana LJ* 18 an accused's place of residence usually implies the contrast between urban and rural residence which go hand in hand with associations of tradition versus modernity.

150 Bennett *U Botswana LJ* 18.

151 Van Broeck *Eur J Crime Crim L & Crim Just* 15.

152 See par 4.3.2 as well as Howes *McGill LJ* 1004.

constant change. Therefore, as Van Broeck[153] points out, it would be a mistake to use a 'static, closed and essentialised' concept of culture in the debate surrounding a cultural defence.

3.3.4 Determining whether the minority culture required, condoned, endorsed, promoted or regards the accused's act as obligatory

It does not necessarily mean to say that, if an accused adheres to the rules of a particular minority cultural group, his act was required or even approved by that group.[154] One of the reasons for this situation is that the dominant and minority cultures may share the same values or, alternatively, that there are no significant differences in their values.[155] Furthermore, it may be that all the members of a cultural group acknowledge the same values and norms, but are not all expected to act in the same way.[156] This is because culture is not uniform and the role to be played by each individual in the group according to his social hierarchy is determined by various factors, such as age and gender.[157] This is especially true in African customary law as this legal system is made up of patriarchal hierarchies[158] where rights are assigned to members of a particular community based on their communal membership and the notion of family, status and achievement.[159] Each member in the community therefore has a certain role to play within the community structure and must fulfil that role.[160] Should a particular individual challenge the hierarchy within the community, it causes a disruption in the balance, peace and harmony of the community.[161]

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153 Van Broeck *Eur J Crime Crim L & Crim Just* 15.
154 Bennett *U Botswana LJ 17.* Also see Van Broeck *Eur J Crime Crim L & Crim Just* 15.
155 Bennett *U Botswana LJ* 17.
156 Bennett *U Botswana LJ* 17; Van Broeck *Eur J Crime Crim L & Crim Just* 10.
157 Van Broeck *Eur J Crime Crim L & Crim Just* 10-11; Bennett *U Botswana LJ* 17; Keevy *JJS* 38.
158 See Keevy *JJS* 37-38 for an overview of the hierarchy within African communities.
159 Keevy *JJS* 36.
160 Keevy *JJS* 36.
161 Keevy *JJS* 36.

Therefore, according to Van Broeck,[162] when dealing with a culturally motivated crime, the question should not be whether every member of a certain cultural group is expected to act in the same way as the accused under the relevant circumstances, but rather whether the accused was supposed to act the way he did. Differently put, a court would need to consider the behavioural pattern associated with the accused's social position within his particular cultural group.[163] Take, for example, the practice of *ukuthwala*.[164] Although *ukuthwala* is permitted in certain (but not all) African communities as a method for negotiating a marriage, it does not necessarily mean that it is obligatory in those cultures.[165] There are, of course, other options available to a man when negotiating a marriage.[166] These alternative options should be considered by a court as they may have a critical bearing on the culpability of the accused.[167]

When a criminal court passes judgement on the actions of an accused, this judgement can be accompanied by varying degrees of approval or disapproval.[168] In Chapter 2 it was shown that it is usually the Western common law, particularly the criminal law, in South Africa that disapproves of the apparent criminal behaviour of an accused living according to African customary law.[169] The accused's minority culture may, however, react entirely different to his behaviour in that the group may not necessarily appreciate the accused's behaviour as being "good", but still condone it.[170] In other words, when considering the circumstances in which the accused's conduct

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162 Van Broeck *Eur J Crime Crim L & Crim Just* 11.
163 Van Broeck *Eur J Crime Crim L & Crim Just* 11; Sikora *Ohio St LJ* 1699; Karayanni *OHJL* 382.
164 This is the example used by Bennett *U Botswana LJ* 17.
165 See in this regard Bennett *U Botswana LJ* 17. For an overview of the custom of *ukuthwala* see paras 4.6.1 and 4.6.2.
166 Bennett *U Botswana LJ* 17.
167 Bennett *U Botswana LJ* 17.
168 Van Broeck *Eur J Crime Crim L & Crim Just* 15.
169 Van Broeck *Eur J Crime Crim L & Crim Just* 15. Also see paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3 where the clash between the Western common law and African customary law in terms of the South African criminal law are highlighted.
170 Van Broeck *Eur J Crime Crim L & Crim Just* 15.

took place, the accused's minority group may consider his behaviour to be acceptable and subsequently not disapprove of it entirely or even at all.[171] The minority group may even regard the accused's behaviour as normal under the relevant circumstances and therefore not disapprove of it.[172] It may even be that the accused's minority group approves of his behaviour as they consider it to be necessary under the circumstances.[173]

It should, however, be kept in mind that the members of the accused's minority group may have differing opinions on whether or not to approve or disapprove of his behaviour.[174] If this were to happen, then the general view of the entire minority group will be the deciding factor in determining whether the accused's behaviour was appropriate or not under the circumstances.[175]

What is clear from the above is that different (legal) cultures are not always in conflict.[176] However, in the case of conflict the guiding principle should be the appreciation of the accused's behaviour by him and his minority group, on the one hand, and the appreciation thereof by the legal system of the dominant culture, on the other.[177]

3.3.5 Accused's act must meet the requirements of the minority culture

The last element that needs to be present before a cultural defence can be available to an accused entails that his conduct must have taken place according to the cultural norms of his minority culture and must therefore

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171 Van Broeck *Eur J Crime Crim L & Crim Just* 15.
172 Van Broeck *Eur J Crime Crim L & Crim Just* 15.
173 Van Broeck *Eur J Crime Crim L & Crim Just* 15. If, however, the accused does not act accordingly under the circumstances his conduct may be disapproved of.
174 Van Broeck *Eur J Crime Crim L & Crim Just* 15.
175 Van Broeck *Eur J Crime Crim L & Crim Just* 15.
176 Van Broeck *Eur J Crime Crim L & Crim Just* 16.
177 Van Broeck *Eur J Crime Crim L & Crim Just* 16.

have met all the requirements for the relevant cultural custom.[178] Although these cultural norms can prescribe that the different persons within the group are expected to behave in different ways, they are also very situational.[179] In this regard Van Broeck[180] refers to the reasoning that many of the arguments against an accused's use of the cultural defence is based on the fear that the defence could not only result in chaos, but also lead to the accused's opinion being raised above the law. Van Broeck,[181] however, is of the opinion that such a reasoning is flawed because it does not consider the fact that although behaviour may be culturally different, it is also very structured. In South Africa, for example, an African man cannot attempt to negotiate a marriage by simply going around abducting young girls, assaulting and having sexual intercourse with them and then justify his conduct as being merely the exercise of the indigenous custom of *ukuthwala*.[182] As is shown in the following Chapter,[183] there are certain requirements that have to be met in carrying out the practice of *ukuthwala*.

An accused's behaviour must therefore be placed in the context of its causes and reactions when determining whether or not the accused acted according to the values of his minority group.[184] This would be the fundamental step in a court's determination of whether or not the accused's alleged crime was motivated by his cultural values and to what extent he

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178 Bennett *U Botswana LJ* 17-18; Van Broeck *Eur J Crime Crim L & Crim Just* 16. Bennett, however, points out that is no easy task to determine what exactly the requirements for a particular cultural practice is due to the fact that acculturation causes rapid social change and a constant change in peoples' attitudes and behaviour. In fact, it is highly unlikely that the members of a minority cultural group will even fully agree on all of the elements of a traditional practice. Also see in this regard Howes *McGill LJ* 1004; Van Broeck *Eur J Crime Crim L & Crim Just* 15.

179 See par 4.1.4 as well as Van Broeck *Eur J Crime Crim L & Crim Just* 16-17.

180 Van Broeck *Eur J Crime Crim L & Crim Just* 17.

181 Van Broeck *Eur J Crime Crim L & Crim Just* 17.

182 Also see the example of honour killings given by Van Broeck *Eur J Crime Crim L & Crim Just* 17.

183 See par 4.6.2.

184 Van Broeck *Eur J Crime Crim L & Crim Just* 17.

may use his cultural values and background as a defence.[185] This would also result in an objective evaluation of the accused's act.[186]

3.3.6 Direct relation between the accused's act and the minority culture

The motivation behind an accused's conduct must have been his culture and not merely the result of socio-economic circumstances.[187] In other words, it should not be said that the accused merely conformed to the minority culture. Instead, there should be a direct link between the accused's conduct and a norm of the minority culture.[188] Bennett[189] feels that this will be a difficult task for the courts as they will need to find a connection between the accused's culture and alleged criminal act when determining the plausibility of a cultural defence.

The reason for the difficulty above lies in the fact that members of minority groups are all too often in socially and economically inferior positions, which situations are most likely to lead to high crime rates.[190] Here, the practice of *ukuthwala* can once again serve as an example. As Bennett[191] points out, individuals sometimes resort to the practice of *ukuthwala* for economic reasons: to avoid the time and cost of a formal marriage proposal and wedding or the guardians of young girls may resort to the practice because they are in need of an immediate source of income.[192]

The possibility of confusing culture with socio-economic circumstances was evident in the case of *Mabena v Letsoala*[193] where the court was required

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185 Van Broeck *Eur J Crime Crim L & Crim Just* 17.
186 Van Broeck *Eur J Crime Crim L & Crim Just* 17.
187 Bennett *U Botswana LJ* 19; Van Broeck *Eur J Crime Crim L & Crim Just* 19.
188 Bennett *Botswana LJ* 18; Van Broeck *Eur J Crime Crim L & Crim Just* 19, 21-22.
189 Bennett *U Botswana LJ* 18.
190 Bennett *U Botswana LJ* 19; Van Broeck *Eur J Crime Crim L & Crim Just* 20. Also see par 4.1.3.
191 Bennett *U Botswana LJ* 8, 19.
192 Bennett *U Botswana LJ* 18.
193 1998 2 SA 1068 (T).

to decide whether the respondent's mother could negotiate and receive *lobolo*. As per agreement between the parties, a sum of R600 *lobolo* was paid to the respondent's mother in the presence of the bride's uncle.[194] Official Pedi customary law, however, dictates that the groom or his guardian should have negotiated *lobolo* with the bride's father, but as the bride's father had abandoned the family, it was agreed that the uncle would receive the *lobolo*.[195] The court, however, accepted the respondent's averment that the bride's mother was permitted to perform this function due to the existence of a new, gender-neutral practice.[196] The court's willingness to accept such allegation can be based on the fact that it is not essential anymore and also because permitting women to participate in the marriage negotiations correlated with the "spirit, purport and objects" of the prohibition on gender discrimination in the Constitution.[197] In fact, the court did not even think to question the respondent's contention that women were permitted to receive bridewealth, although she had simply alleged that: 'My people and I, we do not engage in these customary traditions. We did it as it pleased my mother.'[198] If, however, the court had ventured into the matter a bit further it might have found that the only reason why the respondent's mother had received the *lobolo* was because the male head of her household was not available to do so.[199] There is, of course, also the possibility that the respondent might have acted as a result of social conditions unique to her circumstances or that she is a particularly strong-willed person who cannot be bothered by old-fashioned, sexist behaviour.

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194 *Mabena v Letsoala* 1998 2 SA 1068 (T) 1068H, 1070G-1070I. Traditionally *lobolo* is negotiated by the father of the bride. However, seeing as though the bride's father had abandoned the family the uncle received the *lobolo*.

195 *Mabena v Letsoala* 1998 2 SA 1068 (T) 1068H, 1070G-1070I.

196 *Mabena v Letsoala* 1998 2 SA 1068 (T) 1074E-1074F, 1075D.

197 See 39(2) of the Constitution.

198 *Mabena v Letsoala* 1998 2 SA 1068 (T) 1070I.

199 *Mabena v Letsoala* 1998 2 SA 1068 (T) 1074E.

3.4 Purpose and scope of the cultural defence

The purpose of the cultural defence is to allow the accused to introduce evidence of his cultural background that is relevant to the circumstances of his case.[200] If successful, the cultural defence would either result in the criminal charge(s) against the accused being dropped or, at the very least, result in a reduction of the prescribed sentence.[201]

The rationale behind this claim is that an accused's culture had such an influence on his behaviour that he either felt compelled to act the way he did or he did not believe that the law prohibited him from acting in the way that he did.[202] Regardless of whichever scenario reflects the true state of affairs in a particular case, both lead to the culpability of the accused being reduced.[203]

As part of the debate on the recognition of a formal cultural defence in the South African criminal law, it is essential to outline the conditions in which such a defence would be relevant, as not all crimes committed by members of a minority culture group can be considered to be culturally motivated crimes.[204] It is here where the theories on culturally motivated crimes and the cultural defence meet.[205]

As was shown earlier, only those criminal acts committed as a direct result of the accused's cultural background are considered to be culturally motivated crimes.[206] The same argument applies to the cultural defence.[207] Not

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200 Renteln *Cultural Defense* 187.
201 Renteln *Cultural Defense* 187.
202 Renteln *Cultural Defense* 187.
203 Renteln *Cultural Defense* 187.
204 See Van Broeck *Eur J Crime Crim L & Crim Just* 29 in this regard. Van Broeck, however, felt that it was necessary to consider these conditions without going into the debate on the recognition of a formal cultural defence. Also see Kim *NM L Rev* 121.
205 Van Broeck *Eur J Crime Crim L & Crim Just* 29.
206 See par 4.1.6. Also see Van Broeck *Eur J Crime Crim L & Crim Just* 29.
207 Van Broeck *Eur J Crime Crim L & Crim Just* 29. In fact, all of the arguments regarding the identification of culturally motivated crimes and the diverse character thereof can be applied in a similar manner to the cultural defence.

all criminal cases involving members of minority cultural groups fall within the scope of the cultural defence.[208] From a logical viewpoint, it is absolutely essential that there be a relevant link between the crime and the accused's cultural background and values.[209] This also means that, similar culturally motivated crimes, the cultural defence's application should be shaped according to the specific circumstances of each case.[210] In other words, rather than saying that the cultural defence may result in the accused being acquitted of all charges against him, it should be said that there is a link between the extent to which the accused can rely on the cultural defence and the degree to which his conduct was motivated by his cultural background.[211]

3.5 Arguments in favour of the formal recognition of the cultural defence in South African law

The case for a cultural defence is supported by various arguments in favour of its formal recognition.[212] Renteln,[213] for example, argues in favour of a cultural defence as she is of the opinion that an individual's perceptions are shaped and his actions influenced by enculturation. According to her an individual also acquires cultural categories unconsciously and is therefore unaware of the fact that he has internalised them.[214] The cultural defence therefore rests on the premise that individuals are, to a great extent, influenced by their culture which results in their thinking and acting according to their culture and upbringing.[215]

Another argument in favour of the formal recognition of a cultural defence is that of individualised justice. As part of the notion of individualised justice, a

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208 Van Broeck *Eur J Crime Crim L & Crim Just* 29.
209 Van Broeck *Eur J Crime Crim L & Crim Just* 29-30.
210 Van Broeck *Eur J Crime Crim L & Crim Just* 30.
211 Van Broeck *Eur J Crime Crim L & Crim Just* 30.
212 Sacks *Ariz J Int'l & Comp L* 529; Sikora *Ohio St LJ* 1703.
213 Renteln *Can JL & Soc* 47; Karayanni *OHJL* 375.
214 Renteln *Can JL & Soc* 48.
215 Renteln *Can JL & Soc* 48; Karayanni *OHJL* 375.

legal system would need to consider the influence of culture on the individual accused and his consequential behaviour.[216] Renteln[217] argues that, should a judge consider an accused's cultural background, he would not be embarking on a venture that is fundamentally different than considering other social attributes such as gender, age, and mental state. Such an approach does not radically differ from the existing policy in South Africa's criminal justice system.[218] Insofar as individualised justice is part of the South African legal system, culture is just another factor to consider when considering a suitable sentence to impose on an accused.[219]

The formal recognition of a cultural defence can further be supported by well-established principles of law in the South African Constitution.[220] These principles include the right to a fair trial,[221] freedom or religion,[222] the freedom to participate in a cultural life of own choice[223] and equal protection of the law.[224] In fact, in Chapter 7[225] it is shown that these principles can be used as the primary motivation for the formal recognition of a cultural defence in the South African Criminal law.

Another argument that may be used to support the formal recognition of a cultural defence is based on the normative principle in international human rights law which entails that all states have an obligation to protect the right to culture.[226] Although the right to culture is contained in various international instruments,[227] the most important formulation can be found in article

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216 See Renteln *Can JL & Soc* 48, Karayanni *OHJL* 375 and Sacks *Ariz J Int'l & Comp L* 530 in this regard.
217 Renteln *Can JL & Soc* 48. Also see Karayanni *OHJL* 375.
218 This argument corresponds with that of Renteln *Can JL & Soc* 48.
219 This argument is based on that of Renteln *Can JL & Soc* 48.
220 This can be deduced from the argument of Renteln *Can JL & Soc* 48.
221 S 35(3) of the Constitution.
222 S 15(1), 31(1) of the Constitution.
223 S 30, 31(1) of the Constitution.
224 S 9(1) of the Constitution.
225 See par 7.2.
226 See Renteln *Can JL & Soc* 48.
227 These instruments include *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* of 2005, the UNESCO Universal Declaration

27 of the *International Covenant on Civil and Political Rights* which reads as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The right to cultural freedom in article 27 can be interpreted as imposing a duty on states to protect the right to culture through the necessary steps.[228] Renteln[229] argues that the right to culture should, at the very least, mean that an accused who commits a culturally motivated crime should have the opportunity to tell a court of law what motivated his actions. According to her such an interpretation would entail that the right to culture would justify the use of a cultural defence.[230] In Chapter 7,[231] however, it is argued that the right to freedom of culture in South Africa does not warrant the formal recognition of a cultural defence.

What seems clear from the discussion above is that the formal recognition of a cultural defence could ensure that evidence of an accused's cultural background would be considered by a South African court during a criminal trial.[232] However, such a consideration does not necessarily mean that evidence of an accused's cultural background will have an effect on the outcomes of a case.[233] In fact, the effect of admitting cultural evidence in a particular case is an entirely separate question,[234] namely whether the evidence can exclude an accused's criminal liability for a culturally motivat-

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on Cultural Diversity (Universal Declaration) and the International Covenant on Civil and Political Rights. Also see Renteln *Can JL & Soc* 48.

228 Renteln *Can JL & Soc* 48.

229 This can be deduced from the argument of Renteln *Can JL & Soc* 48.

230 Renteln *Can JL & Soc* 48. Also see Karayanni *OHJL* 377.

231 See par 7.3.

232 This can be deduced from the argument of Renteln *Can JL & Soc* 49.

233 Renteln *Can JL & Soc* 49.

234 Renteln *Can JL & Soc* 49.

ed crime[235] or, at the very least, serve as a mitigating circumstance during sentencing.[236]

The rationale for formally recognising a cultural defence in the South African criminal law would not so much lie in a desire to be culturally sensitive, but rather to ensure that all citizens enjoy equal protection of the law.[237] This argument of equal protection of the law for all citizens is also in line with the Constitution which provides that all individuals are "equal before the law and has the right to equal protection and benefit of the law".[238] According to Renteln[239] an equal application of the law in this context does not merely entail that all cases involving cultural conflicts should be treated equally, but also that individuals should, in general, be treated equally.[240] Renteln[241] further argues that individual justice entails that the legal system should not only focus on the accused and his actions, but also on the accused's motive and intent when committing the act.[242] Of course, in order to determine an accused's motive and intent behind the commission of a particular crime, evidence of the accused's cultural background will have to be introduced during trial.

3.6 Arguments against the formal recognition of the cultural defence in South African law

Although several key arguments can be raised in favour of the formal recognition of a cultural defence in the South African law, there are equally as many arguments that can be raised against such a step.[243] Some of the

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235 See Chapters 5 and 6 where the influence of an accused's cultural background on the elements of unlawfulness and culpability are considered.
236 See par 6.4 for a discussion on how evidence of an accused's cultural background can impact on the sentence imposed for a particular crime.
237 Renteln *Cultural Defense* 187. Also see Sacks *Ariz J Int'l & Comp L* 530.
238 S 9(1) of the Constitution.
239 Renteln *Cultural Defense* 187.
240 Renteln *Cultural Defense* 187. Also see Sacks *Ariz J Int'l & Comp L* 530.
241 Renteln *Cultural Defense* 187.
242 Renteln *Cultural Defense* 187.
243 Renteln *Cultural Defense* 192; Sacks *Ariz J Int'l & Comp L* 529; Sikora *Ohio St LJ* 1703.

arguments against the recognition of a cultural defence are based on matters of principle, while others are opposed to the idea for practical reasons.[244] Many of these arguments are also merely different versions of the criminal law theory of deterrence.[245] According to Renteln,[246] the theory of deterrence is founded upon the idea that "the law must sanction deviant acts to uphold the social order". Renteln's formulation of the theory of deterrence corresponds with that of Burchell[247] who states that, "since punishment involves pain or suffering, rational people will avoid engaging in conduct that will expose them to punishment". As punishment can only be inflicted for crimes, it logically follows that only conduct which has been defined as a crime will be avoided.[248] Therefore, the purpose of punishment is to prevent people from committing crimes.[249]

The theory of deterrence can take on one of two forms, individual or general.[250] Individual deterrence is aimed at teaching the offender a lesson so that he will be deterred from repeating his offence.[251] General deterrence, on the other hand, rests on the idea that persons threatened with punishment will refrain from committing a crime.[252]

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244 Renteln *Cultural Defense* 192.
245 Renteln *Cultural Defense* 192.
246 Renteln *Cultural Defense* 192. This is also often referred to as the 'crime control model'.
247 Burchell *Principles of Criminal Law* 74.
248 Burchell *Principles of Criminal Law* 74.
249 Burchell *Principles of Criminal Law* 74.
250 Burchell *Principles of Criminal Law* 74; Renteln *Cultural Defense* 192. Renteln refers to individual deterrence as 'specific' deterrence. A close analysis of Renteln's construct of specific deterrence, however, reveals that it is identical to individual deterrence. Since 'individual deterrence' is the term used in South African literature on criminal law, it is the term preferred for this discussion.
251 Burchell *Principles of Criminal Law* 74-75; Renteln *Cultural Defense* 192. According to Burchell this purpose of punishment is frequently emphasized by the courts. Burchell further points out that, the validity of this theory hinges on the probability that the accused will commit another crime. Obviously, if the accused commits another crime the previous punishment has not served its purpose.
252 Burchell *Principles of Criminal Law* 75; Renteln *Cultural Defense* 192. As Burchell *Principles of Criminal Law* 75 points out, it is for this very reason that the doctrine of legality requires that every definition of crime should include a

However, the question that arises is whether the deterrence theory would be undermined if a cultural defence were to reduce an accused's culpability and subsequently lead to a reduced sentence.[253] In this regard, Renteln[254] refers to the common worry that a cultural defence will undermine both types of deterrence, because if a person is not punished for a culturally motivated crime, he may continue to follow tradition and therefore commit the act again.[255] Furthermore, members of the accused's minority group might be fooled into thinking that they may perpetuate the tradition while being exempt from punishment.[256] In this regard the notion of a cultural defence is also subject to criticism in that the perpetuation of the tradition will eventually weaken the criminal justice system as it would entail that there are separate legal rules applicable to different groups within the same national political system.[257] This concern goes deeper by including a fear that anarchy may ensue if legal rules were not applied to individuals in a uniform way.[258] It goes without saying that a criminal legal system will lose all certainty and predictability if individuals and groups were left to decide for themselves which laws they will comply with and which not.[259]

While some criticisms are aimed at the possibility of widespread anarchy, others are more worried about the impact the cultural defence will have on particular groups.[260] Last-mentioned is mainly concerned with the possibility that a cultural defence will mostly be used in an attempt to undermine the rights of vulnerable groups which, in turn, will undermine the deterrent

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description of the punishment for the commission of a crime. Such a general notification of the consequences for criminal conduct, it is assumed, will deter persons generally from committing criminal acts. If, in spite of this threat of punishment, a person commits a crime he must then suffer punishment so as to show others that the law is serious in prohibiting such criminal conduct.

253 Renteln *Cultural Defense* 192.
254 Renteln *Cultural Defense* 192.
255 Renteln *Cultural Defense* 192. Also see Sacks *Ariz J Int'l & Comp L* 541-542.
256 Renteln *Cultural Defense* 192.
257 Renteln *Cultural Defense* 192.
258 Renteln *Cultural Defense* 192.
259 Renteln *Cultural Defense* 192. Also see Sacks *Ariz J Int'l & Comp L* 541-542.
260 Renteln *Cultural Defense* 192.

function of the law.[261] The vulnerable groups thought of here are women and children[262] and therefore not vulnerable groups in the context of particular cultural groups. This criticism is entirely plausible, especially in South Africa because, as the perusal of South African case law and media reports in Chapter 4 reveals,[263] women and children are more often than not the victims of culturally motivated crimes. In explaining the rationale behind this criticism Sikora[264] points out that:

> If there was a stand-alone cultural defense available for use by a defendant charged with injuring or killing his wife or children, the cultural defense might work to condone family violence, an action typically condemned by American society.

Although Sikora is referring to the American legal system, the same argument is true for the South African legal system. In fact, the eradicaton of domestic violence is such a high priority in South Africa that the legislator enacted the *Domestic Violence Act*[265] to curb the prevalence of domestic violence in the country. This Act recognises that:

> [D]omestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective.[266]

The purpose of the *Domestic Violence Act* is to "afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide" by introducing measures to ensure that the provisions of the Act are given full effect.[267] In doing so the provisions of the Constitution, in particular the right to equality[268] and the right to freedom and security of the

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261 Renteln *Cultural Defense* 192. Also see Sacks *Ariz J Int'l & Comp L* 542-546.
262 Sikora *Ohio St LJ* 1709.
263 See paras 4.3.1, 4.3.3, 4.4.1, 4.4.3, 4.6.1 and 4.6.3.
264 Sikora *Ohio St LJ* 1709.
265 116 of 1998.
266 See the preamble to the *Domestic Violence Act* 118 of 1998.
267 See the preamble to the *Domestic Violence Act*.
268 S 9 of the Constitution.

person,[269] as well as South Africa's international commitment and obligation towards ending violence against women and children, must be given due consideration.[270] The emphasis placed on the consideration of women and children's rights in the *Domestic Violence Act* plays a very important role in the South African legal system, because as Du Preez[271] points out:

> [T]he most worthy token of respect that we as South Africans can show towards women and girls on this International Women's Day - and everyother day - is honoring the promises, rights and protections that our Constitution and the Bill of Rights afford to women, girls and all other South Africans. If we do so, we will ensure that women are afforded the respect, equality, dignity and humanity to which they - and all of us - are entitled to as human beings.

Another principle-based argument against the cultural defence is founded upon the tacit assumption that every person should be held accountable to the same standards.[272] The cultural defence can, therefore, be opposed on the grounds that it violates the principle of equal treatment and protection under the law.[273]

Critics also argue that the cultural defence would undermine one important goal of punishment, namely rehabilitation.[274] Rehabilitation is aimed at readjusting the criminal to the demands of society and transforming him into a law-abiding citizen by imposing an individualised punishment on him.[275] Rehabilitation is achieved by subjecting the convicted accused to rehabilitative programs while he is detained in prison or another similar institution.[276] Alternatively, the convicted accused can be given a suspended sentence with the condition that he completes a reformative pro-

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269 S 12 of the Constitution.
270 See the preamble to the *Domestic Violence Act*.
271 Du Preez 2013 http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=117079&cat_id=0. Although Du Preez only refers to the rights of women it is submitted here that the same argument applies to children.
272 Renteln *Cultural Defense* 193.
273 Renteln *Cultural Defense* 193.
274 Renteln *Cultural Defense* 193.
275 Burchell *Principles of Criminal Law* 78-79.
276 Burchell *Principles of Criminal Law* 78-79.

gramme.[277] According to Renteln this process of punishment will ultimately make the convicted accused realise that he deserves the punishment.[278] Once he has come to this realisation, he will change his behaviour and start the recovery process. [279] Given the purpose of rehabilitation, it can therefore be argued that, by formally recognizing a cultural defence, the perpetrator of a culturally motivated crime would not be rehabilitated as his conduct would, in effect, be condoned.

Another criticism against the formal recognition of a cultural defence is that the use of such a defence promotes the establishment of stereotypes.[280] The fear in this regard, as Renteln[281] points out, is that by recognising a formal cultural defence a legal system would be "fossilizing cultures as a reductive stereotype". As a result, the use of expert testimony during trial will only be justified after it has been determined that the accused can be adequately fitted to the profile of a specific stereotype.[282] In this regard a cultural defence can be opposed on the basis that it reinforces false, out-dated stereotypes.[283]

A more fundamental argument against the formal recognition of a cultural defence, and which adds to the one above, is that the notion of culture is all too often based on prejudice.[284] In many cases a minority group would be subjected to a particular cultural identity by the dominant culture and this would, in turn, perpetuate prejudices and exclusions.[285] Van Broeck,[286] however, points out that, although this is a reality, it does not mean that the concept of culture as such should just be discarded. Also, rather than relying on prejudice and common knowledge when dealing with the concept of

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277 Burchell *Principles of Criminal Law* 78-79.
278 Renteln *Cultural Defense* 193.
279 Renteln *Cultural Defense* 193.
280 Renteln *Cultural Defense* 193.
281 See Renteln *Cultural Defense* 193 in this regard.
282 Renteln *Cultural Defense* 193.
283 Renteln *Cultural Defense* 193.
284 Van Broeck *Eur J Crime Crim L & Crim Just* 10.
285 Van Broeck *Eur J Crime Crim L & Crim Just* 10.
286 Van Broeck *Eur J Crime Crim L & Crim Just* 10.

culture, expert evidence should be used.[287] In other words, the risk of imposing an alleged and prejudiced culture on the accused's group would be avoided by looking at the values of the accused.[288]

Probably one of the strongest arguments against the formal recognition of the cultural defence is that the concept of "culture" is too vague.[289] In fact, some authors even go so far as to question the utility of the concept, because in their opinion the concepts "cultures" and "cultural groups" might be impossible to identify.[290] Although it is not easy to distinguish between different cultural groups, it does not necessarily mean that culture is entirely without meaning.[291]

While the arguments above are based on matters of principle, there are also arguments based on practical considerations. The first such argument is concerned with the difficulties anticipated in the implementation of the cultural defence.[292] One criticism that goes to the very root of this problem is that it would be almost impossible to distinguish between legitimate and illegitimate uses of the cultural defence.[293] This argument is based on the difficulty in proving the existence of specific customs.[294]

Another criticism is that a cultural defence would cause a "slippery slope" effect or even open up Pandora's Box.[295] Here, the trepidations are based on their concern that some accused will either pretend to be members of a specific cultural group, falsely claim certain practices to be traditional or even lie by saying that their actions were culturally motivated, while in fact they were not, just so that they will have a cultural defence at their dispos-

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287 Van Broeck *Eur J Crime Crim L & Crim Just* 10.
288 Van Broeck *Eur J Crime Crim L & Crim Just* 10.
289 Van Broeck *Eur J Crime Crim L & Crim Just* 10. Revisit par 4.2.
290 Van Broeck *Eur J Crime Crim L & Crim Just* 10.
291 Van Broeck *Eur J Crime Crim L & Crim Just* 10.
292 Renteln *Cultural Defense* 193.
293 Renteln *Cultural Defense* 193.
294 Renteln *Cultural Defense* 193.
295 Renteln *Cultural Defense* 194.

al.[296] In other words, the fear is that the formal recognition of a cultural defence will encourage, instead of discourage, those individuals with criminal tendencies to commit crimes as they would be able to escape liability by fraudulently claiming to be members of a particular cultural group.[297]

A last objection against the formal recognition of a cultural defence is that culture is more appropriately considered during the sentencing phase and therefore there is no need to consider a cultural defence during trial.[298] The argument here is that there is no reason why an accused should not be able to introduce evidence of his cultural background during the sentencing phase as almost anything can be considered during this phase.[299]

3.7 Conclusion

The formal and substantial definition of a cultural defence both reflect the ultimate purpose thereof, namely the recognition that an accused's cultural background and values can either exclude his criminal liability or, at the very least, serve as a mitigating factor during sentencing.[300] However, while the formal definition implies the recognition of an entirely separate defence based on an accused's cultural background and values, the substantial definition implies that evidence of an accused's cultural background and values can be put forth within the context of existing criminal law defences.[301]

In this Chapter it was indicated that, for purposes of this study, the substantial definition of the cultural definition is preferred for two reasons. Firstly, in South Africa accused charged with the commission of common law or statutory crimes have attempted to justify their conduct by putting forth arguments of their cultural background and values within the context of pre-

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296 Renteln *Cultural Defense* 194.
297 Renteln *Cultural Defense* 194.
298 Renteln *Cultural Defense* 194.
299 Renteln *Cultural Defense* 194.
300 See par 3.2.
301 See par 3.2.

existing defences in the South African criminal law.[302] Secondly, in Chapter 7[303] it is argued that the right to cultural freedom entrenched in the Constitution does not warrant the formal recognition of a cultural defence in the South African criminal law.

The scope of a cultural defence to justify the conduct of the accused is limited to cases where the accused is charged with the commission of a culturally motivated crime.[304] A culturally motivated crime, in essence, refers to conduct that is considered to be lawful in the eyes of an accused's minority culture, but unlawful in terms of the official or dominant legal system.[305]

In this Chapter it was shown that six elements need to be present before an accused's conduct will constitute a culturally motivated crime.[306] Firstly, it must be proven that an accused belongs to a minority culture and not the dominant culture.[307] Next, it must be proven that the relevant norm or value that motivated the accused's commission of a crime forms part of the culture of the accused's cultural group.[308] In this Chapter it was shown that the notion of "culture" is notoriously ambigious and difficult to define.[309] However, for purposes of this study, culture can be simply understood as a "way of life".[310] What was also shown is that the definition of culture is broad enough to include religion.[311] The third element of a culturally motivated crime entails proof that the accused did not become acculturated to

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302 See par 7.4. For examples of these situations see the cases of *R v Njova* 1906 20 EDC 71, *Ncedani v R*1908 22 EDC 243, *R v Swartbooi* 1916 EDL 170, *R v Mane* 1948 1 All SA 128 (E), *R v Sita* 1954 4 SA 20 (E), *R v Ngang* 1960 2 SA 363 (T), *S v Ngema* 1992 2 SASV 650 (D).
303 See par 7.3.
304 See par 3.2.
305 See par 3.2.
306 See par 3.2.
307 See par 3.3.1.
308 See par 3.3.2.
309 See par 3.3.2.
310 See par 3.3.2.
311 See par 3.3.2.

the dominant culture.[312] Once it has been ascertained that the accused has not become acculturated to the dominant culture, it must be determined whether the accused's conduct was required, condoned, endorsed, promoted or regarded as obligatory by his minority cultural group.[313] The fifth element of a culturally motivated crime entails that an accused's conduct must meet all the requirements for a particular custom in terms of his minority culture.[314] Lastly, a culturally motivated crime can only be inferred once it has been shown that the accused's conduct was motivated by his cultural background and values and nothing else.[315] Considering that a cultural defence can only be used for purposes of culturally motivated crimes, the elements referred to above also apply to the cultural defence.[316] In other words, a cultural defence cannot be raised if one of the elements above are absent.[317]

In light of the discussion in this Chapter, the discussion in the following Chapter is aimed at providing an overview of the indigenous beliefs and customs in South Africa that open up the possibility of an accused raising a cultural defence during a criminal trial.[318]

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312 See par 3.3.3.
313 See par 3.3.4.
314 See par 3.3.5.
315 See par 3.3.6.
316 See par 3.2.
317 See par 3.2.
318 See paras 4.2 to 4.6.

CHAPTER 4
COMMON LAW CRIMES AND INDIGENOUS BELIEFS AND CUSTOMS: IDENTIFYING THE ISSUES

4.1 Introduction

In Chapter 2 it was pointed out that the different value systems of the Western common law and African customary law can give rise to complex conflict situations within the South African criminal law.[1] This conflict is caused due to a particular person's actions being viewed as a crime in terms of the South African common law while simultaneously being viewed as an indigenous belief or custom in terms of African customary law.[2] Since the earliest of times the Western courts had to deal with situations where indigenous African beliefs and customs have played a role in the commission of common law crimes.[3] During such criminal trials accused persons have attempted to put forth evidence of their cultural background and values to try and persuade the courts that their commission of crimes was motivated by cultural norms, traditions, practices and/or values.[4] Some authors refer to this phenomenon as the "cultural defence"[5] in criminal law,[6] which was discussed in detail in Chapter 3.[7]

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1 Revisit Chapter 2 for a discussion of the differences between the value systems of the common law and African customary law. Labuschagne *SACJ* 246.

2 Rautenbach and Matthee *JLP* 116, 118; Petrus *Acta Criminologica* 123, 124.

3 Labuschagne *SACJ* 472; Bennett *U Botswana LJ* 5; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 136; Amoah and Bennett *Afr Hum Rts LJ* 369. For examples of these situations see the cases of *R v Njova* 1906 20 EDC 71, *Ncedani v R*1908 22 EDC 243, *R v Swartbooi* 1916 EDL 170, *R v Mane* 1948 1 All SA 128 (E), *R v Sita* 1954 4 SA 20 (E), *R v Ngang* 1960 2 SA 363 (T), *S v Ngema* 1992 2 SASV 650 (D) as well as paras 4.6.3 and 4.4.3 where these cases are discussed in more detail.

4 See again the cases of *R v Njova* 1906 20 EDC 71, *Ncedani v R* 1908 22 EDC 243, *R v Swartbooi* 1916 EDL 170, *R v Mane* 1948 1 All SA 128 (E), *R v Sita* 1954 4 SA 20 (E), *R v Ngang* 1960 2 SA 363 (T) and *S v Ngema* 1992 2 SASV 650 (D). Also see Amoah and Bennett *Afr Hum Rts LJ* 369.

5 For a detailed discussion on the meaning of the term "cultural defence" (also referred to as the 'cultural defense') see par 4.2.

6 See Carstens *De Jure* 1-25; Torry *JLP* 127-161; Bennett *U Botswana LJ* 3-26; in this regard. It should, however, be noted that, in recent years a signifi-

A perusal of South African case law reveals that the situations where the defence of an indigenous belief or custom has come under the scrutiny of the criminal courts are those related to the indigenous belief in witchcraft,[8] (including witch-killings[9]), the indigenous belief in the *tokoloshe*[10] and the use of *muti*-medicine[11] (including *muti*-murders[12]), as well as the phenomenon of necklacing,[13] and the custom of *ukuthwala*.[14]

It would be a redundant exercise to facilitate a discussion on the formal recognition of the cultural defence without a proper understanding of the indigenous beliefs and customs intended to fall within the scope of the defence.[15] What is more, these practices should also be assessed within the entire context of the cultural defence's possible application in the criminal law.[16] Although last-mentioned does not form part of the discussion in this Chapter, it receives noteworthy attention in subsequent Chapters.[17]

The aim of this Chapter is to set the scene for a later discussion on the approach of the South African criminal courts in dealing with indigenous beliefs and customs that result in the commission of common law and stat-

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cant amount of research on the cultural defence has seen the light. As a result, it would be a near impossible task to compile a comprehensive list of all the scholarly writings pertaining to the cultural defence and hence the reader is referred to the bibliographical references in the two leading publications on this topic, namely Renteln *Cultural Defense* 5-390 and Foblets and Renteln *Multicultural Jurisprudence* 1-367.

7 See par 3.2.
8 See paras 4.2.1 and 4.2.2
9 See par 4.2.3.
10 See par 4.3.
11 See par 4.4.1.
12 See par 4.4.2.
13 See par 4.5.
14 See par 4.6.
15 Carstens *De Jure* 2-3. Carstens also points out that, if any of the arguments in favour of or against the cultural defence are to be given any serious consideration it is both necessary and important to have a full understanding of the nature and scope of the cultural practices intended to fall within the scope by the cultural defence. For a discussion of the arguments for and against the cultural defence see paras 3.5 and 3.6.
16 Carstens *De Jure* 2-3.
17 See Chapters 5 and 6.

utory crimes.[18] More specifically, this Chapter attempts to elucidate on the worldview that underpins the indigenous beliefs and customs mentioned above in order to provide a better understanding of the concerns and dilemmas of the South African criminal courts in dealing with common law crimes committed in the name of culture.[19] This is followed by a survey of the legal issues present when Western common law and African customary law meet within the context of the criminal law.[20] The discussion is concluded with an indication of the various ways in which the cultural defence can be invoked by an accused when facing criminal charges for actions performed in consequence of an indigenous belief or custom.[21]

4.2 Witch-killings[22]

During the 1980s and 1990s the Limpopo Province[23] of South Africa saw a dramatic increase in the prevalence of witch-killings.[24] According to Carstens,[25] this increase was the direct result of the political unrest that pre-

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18 A similar approach is followed by Ludsin *Berkeley J Int'l L* 73-110. The approach of the South African courts is dealt with in Chapters 5 and 6.

19 Ludsin *Berkeley J Int'l L* 73. See paras 4.2.1, 4.3.1, 4.4.1, 4.5.1 and 4.6.1.

20 See paras 4.2.4, 4.3.3, 4.4.3, 4.4.2, 4.5.3 and 4.6.3.

21 See paras 4.2.6, 4.3.4, 4.4.4, 4.5.4 and 4.6.4.

22 Also referred to as "witch purging".

23 Before 2003 this province was known as the "Northern Province" where after it was officially changed to "Limpopo Province". See Kohnert *J Mod Afr Stud* 218 and Anon 2008 http://www.south-africa-info.com/limpopo/main.htm and Anon 2011 http://www.statoids.com/uza.html.

24 Carstens *De Jure* 3, 6; Hund *CILSA* 366-367; Kohnert *J Mod Afr Stud* 218, 221. Also see Minnaar, Wentzel and Payze "Witch killing" 175 where it is pointed out that the police in the Northern Province received reports of 455 witchcraft-related cased during the period of January 1990 to April 1995. Of these 455 cases most of the victims were elderly people. What is interesting is that 55% of these cases were reported between April of 1994 and April of 1995; in other words, during the first year of South Africa's new constitutional dispensation. Furthermore, 104 cases were reported to the police during the period January to May 1996 alone; the year in which the final Constitution was adopted. Of these 104 cases only 11 arrests were made. Kohnert also points out that: "… in March 1990, a climate of terror reigned and anyone accused of being a witch was killed on the spot; in some villages, up to five accused witches were burnt each night." For more statistics see Petrus and Makgoshing *Acta Criminologica* 100.

25 Carstens *De Jure* 3. Carstens further points out that scope and brutality of these killings attracted such widespread concern that a provincial commission of enquiry, the Ralushai Commission, was appointed to investigate the mat-

ceded the advent of South Africa's constitutional democracy in 1994.[26] The practice of witch-killing was, however, not limited to the Northern Province, but was also present in the province of KwaZulu-Natal and the Eastern Cape.[27]

Traditionally those accused of practising witchcraft were merely expelled from their villages.[28] However, between the 1980s and early 1990s killing became the accepted method of eradicating the problem of witchcraft.[29] The South African legislator attempted to curb the prevalence of witch-killings by passing the *Witchcraft Suppression Act*[30] which outlaws various witchcraft-related acts.[31] Since then witchcraft has also become the convenient scapegoat for the killing of rivals, opponents and even those who are unpopular in a particular community.[32] Despite the fact that the practice of witchcraft and witch-killing is strongly rooted in a "deeply lived dedication and devotion to spiritual beliefs", African religion cannot be viewed as the sole reason for the increase in witch-killings.[33] Other reasons include: jealousy,[34] gender-related power struggles,[35] a loss of faith in tradition,[36] as well as the outlawing of witchcraft by the *Witchcraft Supression Act*.[37]

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ter. The Commission's final report was published in 1996 and contained essential information regarding witch-killings.

26 Kohnert *J Mod Afr Stud* 221.

27 Minnaar, Wentzel and Payze "Witch Killing" 176. Also see Jonck *JJS* 203 and *S v Mokonto* 1971 2 SA 319 (A) 320D-320E.

28 Minnaar, Wentzel and Payze "Witch Killing" 176; Carstens *De Jure* 6; Also see Hund *CILSA* 367; Kohnert *J Mod Afr Stud* 223.

29 Minnaar, Wentzel and Payze "Witch Killing" 176; Kohnert *J Mod Afr Stud* 223.

30 3 of 1957.

31 See par 4.2.5.

32 Minnaar, Wentzel and Payze "Witch Killing" 176.

33 Minnaar, Wentzel and Payze "Witch Killing" 176; Quarmyne *Wm & Mary J Women & L* 478.

34 Carstens *De Jure* 6; Ludsin *Berkeley J Int'l L* 80; Quarmyne *Wm & Mary J Women & L* 478. This matter is further dealt with in par 4.2.3.

35 Discussed in par 4.2.3.

36 Minnaar, Wentzel and Payze "Witch Killing" 186.

37 Discussed in par 4.2.5.

4.2.1 Witchcraft in general

The belief in witchcraft forms an integral part of the African continent's traditional religious heritage,[38] especially that of South Africa.[39] According to Igwe,[40] several writings on African indigenous religious systems attest to this fact. For example, an expert on Zulu custom has been quoted as saying that:

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38 See Igwe *Skeptic* 72-73 where the author refers to examples of a belief in witchcraft in the Democratic Republic of the Congo and Malawi. Also see Ludsin *Berkeley J Int'l L* 64; Mihálik and Cassim *SALJ* 139, Kohnert *J Mod Afr Stud* 220, Petrus *Acta Criminologica* 125 and Petrus and Bogopa *IPJP* 2.

39 Ludsin *Berkeley J Int'l L* 64, 73; Hoctor *Obiter* 382. According to Ivey and Myers *S Afr J Psych* 54-55 the belief in witchcraft remains prevalent in the black communities of South Africa despite the influence of "Western rational-scientific explanatory frameworks". Where these communities' vulnerability is exposed due to natural phenomena, psychological distress or the unknown they tend to turn toward the occult or mystical forces to explain these events. This is especially the case when these communities are confronted by adverse or apparently inexplicable events. However, a belief in the supernatural is not only present among African cultures. Contemporary Westerners also believe in the existence of good and evil spiritual beings in the form of angels, demons and even Satan. Recent media reports attest to this fact. For example, in 2008 Morne Harmse, armed with a samurai sword, went on a rampage at his school, slashing a fellow pupil's throat and injuring three others. During trial Harmse testified that Satan himself ordered him to carry out this attack. An expert witness, however, testified that although there was evidence to suggest that Harmse was "dabbling in the occult", his behaviour did not correspond with that of a practising Satanist. See Du Plessis and Roestoff 2008 http://www.beeld.com/Suid-Afrika/Nuus/Satan-se-ek-moet-moor-20100617, Gifford 2009 http://www.iol.co.za/news/south-africa/sword-killer-tried-witchcraft-expert-1.457023, Foss 2009 http://www.iol. co.za/news/southafrica/devil-didn-t-make-him-do-it-1.457081 and Sapa 2009 http://www.iol.co.za/news /south-africa/harmse-was-seeking-a-power-to-manipulate-1.457010. In another recent case 6 youths were arrested and charged with murder and attempted murder for dousing two girls with petrol and setting them alight as part of a suspected satanic ritual. See Mashabane 2011 http://www.citizen.co.za/citizen/content/en/citizen/localnews?oid=241862&sn=Detail&pid=800&High-Courtfor%E2%80%98satanic%E2%80%99-case-. In cases where these communities' vulnerability is exposed due to natural phenomena, psychological distress or the unknown they tend to turn toward the occult or mystical forces to explain these events. This is especially the case when these communities are confronted by adverse or apparently inexplicable events.

40 Igwe *Skeptic* 72.

> [w]itchcraft existed during the days of our forefathers, it exists and will continue to exist.[41]

A similar view to that of Igwe is held by Jonck[42] who believes that the time will never come when nobody believes in witchcraft anymore. Jonck[43] supports her argument by pointing out that, even after more than a 150 years' worth of exposure to Western civilization, the belief in witchcraft of the indigenous black population in Zululand can still not be eradicated.[44] Also, as pointed out earlier,[45] the majority of people residing in the rural and urban areas of the Limpopo Province foster a profound belief in witchcraft.[46] Therefore, in the words of Petrus and Bogopa,[47] it can be assumed that:

> [w]ithin African communities, witchcraft is regarded by most, if not all, as a reality.

A closer scrutiny of the belief in witchcraft reveals that the belief is fuelled by factors such as fear, ignorance, poverty and religion.[48] Of these factors fear is the foremost driving force behind witchcraft and witch-killing.[49] Fear in itself can have various sources, both natural and otherwise.[50] For example, the aging-process with its accompanying illnesses instils fear in those who regard the traits of old age as a sign of sinister intentions.[51] Furthermore, mere coincidences[52] or nonconformity[53] in people's everyday lives

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41 See Dhlodhlo *De Rebus* 409 in this regard. For further examples see Igwe *Skeptic* 72.
42 Jonck *JJS* 203.
43 Jonck *JJS* 203.
44 Also see *S v Mokonto* 1971 2 SA 319 (A) 320D-320E.
45 See par 4.2.
46 Carstens *De Jure* 5.
47 Petrus and Bogopa *IPJP* 2. Also see Petrus *Acta Criminologica* 125.
48 Igwe *Skeptic* 74; Mafico and Chavunduka *Zambezia* 123.
49 Igwe *Skeptic* 74; Petrus *Acta Criminologica* 125.
50 Igwe *Skeptic* 74.
51 Igwe *Skeptic* 74. According to Ludsin *Berkeley J Int'l L* 81 witchcraft is associated with the more elder members of a community due to a perception that their "active power of adulthood slips away into infertility and infirmity, and that their status rests purely on their control of esotreric knowledge".
52 Igwe *Skeptic* 74 refers to the example of birds flying into a bush just as an old woman emerged from the bush.

also fuel their fear that supernatural powers are at work.[54] The last-mentioned can be attributed to the supposition underlying the belief in witchcraft, namely that there are no coincidences or randomness of events.[55]

Insofar as ignorance is concerned, Igwe[56] points out that the belief in witchcraft is rooted in a lack of knowledge, especially with regard to nature and basic medical science. In fact, Igwe[57] describes witchcraft as a pre-scientific belief that forms part of African traditional medicine. Consequently it is inevitable and sometimes unfortunate that certain beliefs are upheld merely because the majority of a particular community accept it and not because these beliefs have a valid scientific basis.[58]

Another great cause of witchcraft is poverty.[59] Witchcraft accusations are rampant in many poverty-stricken indigenous communities, both rural and urban, as sick people prefer traditional healing[60] to western healing,[61]

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53 Here Igwe *Skeptic* 74 provides the examples of a high infant mortality rate and the premature death of healthy elderly people.

54 Mafico and Chavunduka *Zambezia* 127.

55 Labuschagne *SACJ* 247; Mafico and Chavunduka *Zambezia* 127.

56 Igwe *Skeptic* 74. In this regard more emphasis placed on intuitive knowledge. This means that those who believe in witchcraft rather rely on their subjective experience and personal knowledge than scientific, deductive or empirical methods to explain a certain situation or event. See in this regard Ivey and Myers *S Afr J Psych* 55-56. Also see Labuschagne *SACJ* 247 who points out that, in rural and urban poverty-stricken areas a belief in witchcraft flourishes due to a lack of medical knowledge.

57 Igwe *Skeptic* 74; Labuschagne *SACJ* 248. In terms of section 1 of the *Traditional Health Practitioners Act* 35 of 2004 traditional medicine refers to any object or substance used during the course of a traditional health practice for a purpose described in the Act. These purposes include the diagnosis, treatment or prevention of physical or mental illness. Traditional medicine can also be used for curative or therapeutic purposes which include maintaining or restoring a person's physical or mental health or well-being. Traditional medicine, however, does not include any dependence-producing or dangerous substances or drugs. Generally traditional medicine entails *muti* which is further dealt with in par 3.5.1.

58 Ivey and Myers *S Afr J Psych* 56.

59 Igwe *Skeptic* 74; Ludsin *Berkeley J Int'l L* 80; Mafico and Chavunduka *Zambezia* 123.

60 Rautenbach *Obiter* 520. According to Eastman "Rainbow Healing" 183-185 it is difficult to define the scope of traditional healing due to the fact that there are different types of traditional healers. Despite this definitional obstacle, the

which is too expensive for them to afford.[62] In fact, it is estimated that between 70 to 80 percent of indigenous South Africans make use of traditional healing.[63] What is more, the poorest members of a particular community may also turn to witchcraft in the hopes of gaining the fortune of the wealthier members.[64] In turn, the wealthier members of the community fear that the poorer members will employ witchcraft to force a redistribution of wealth in the community.[65]

Religion is probably the most important cause of witchcraft, as it provides the "subsoil in which the belief and practice of witchcraft thrives".[66] In terms of traditional African religion, there is no such thing as a "randomness of event".[67] Anything and everything is explained and interpreted in terms of

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author explains that, in broad terms, traditional healing can be understood as the: "… religious, spiritual, personal or supernatural divination to aid in determining the cause of the problem complained of, coupled with application of, inter alia, herbal concoctions, spells and charms, inspired by the wisdom of kin and ancestors, as remedies." The term "traditional healing" can also be explained with reference to the meaning of "traditional health practice" in the *Traditional Health Practitioners Act* 35 of 2004. In terms of the Act a traditional health practice is defined as a: "Function, activity, process or service based on a traditional philosophy that includes the utilisation of traditional medicine or traditional practice." Therefore, the power of traditional healing lies in faith and belief and not in empirical fact, as is the case with western healing.

61 Western healing refers to the use of "Western medicine" or "modern medicine" which entails science-based biomedical health care. See Eastman "Rainbow Healing" 183.

62 Igwe *Skeptic* 74; Rautenbach *Obiter* 520; Nattrass *Social Dynamics* 162; Eastman "Rainbow Healing" 196; Xaba Date Unknown http://www.ces.fe.uc.pt/eman-cipa/research/en/ft/tri-unfo/.html.

63 Eastman "Rainbow Healing" 184; Sambo *Afr Health Mon* 4; Kasilo *et al Afr Health Mon* 7; Rautenbach *Obiter* 518-519; Minister of Health 2004 http://www.doh.gov.za/docs/sp/2004/sp0330.html; Phila Date Unknown http://www.healthlink.org.za/pphc/Phila/summary/vol3_no23.htm. Other sources have, however, noted that it is not easy to determine exactly how many people consult traditional healers. See, for example Nattrass *Social Dynamics* 161-182 in this regard.

64 Ludsin *Berkeley J Int'l L* 80. This does not mean that the wealthier members are immune from witchcraft accusations as these members are often believed to have gained their wealth through the use of witchcraft. However, according to Ludsin this seems to be quietly condoned.

65 Ludsin *Berkeley J Int'l L* 80.

66 Igwe Skeptic 74.

67 Igwe *Skeptic* 74; Labuschagne *SACJ* 247. Most Africans retain this witchcraft mentality even after embracing other faiths such as Islam or Christianity.

the spiritual and supernatural.[68] Whenever a misfortune occurs, indigenous Africans always ask two questions: Firstly, how the misfortune came to be or took place and secondly, why it came to be or took place.[69] What is therefore relevant to the understanding of African witchcraft and bewitchment is the African understanding of causality.[70] Every misfortune is caused by an enemy's hostile and evil spiritual doing.[71] For example, indigenous Africans do not believe that a person dies as a result of natural causes, but rather that one person is killed by another.[72] Also, if considerable hardship or illness strikes a person then those with whom the victim had a conflict are the first to be suspected of being a witch or wizard.[73] It can, therefore, be safely assumed that the belief in witchcraft is a predominant

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68 Igwe *Skeptic* 74; Labuschagne *SACJ* 248; Ludsin *Berkeley J Int'l L* 74; Mihálik and Cassim *S African LJ* 129; Mafico and Chavunduka *Zambezia* 127; Quarmyne *Wm & Mary J Women & L* 476; Eastman "Rainbow Healing" 186-187.

69 Labuschagne *SACJ* 248; Ludsin *Berkeley J Int'l L* 74; Mafico and Chavunduka *Zambezia* 128; Quarmyne *Wm & Mary J Women & L* 476. The first question is answered by way of empirical observation while the second question is attributed to witchcraft.

70 Ivey and Myers *S Afr J Psych* 56; Petrus and Bogopa *IPJP* 2. For another example of the understanding of causality see Ludsin *Berkeley J Int'l L* 75 where the author refers to the Venda's belief in a "cosmic good shared by all members of a community" where a person's status in the community determines his portion of that good. This cosmic good is believed to be infinite which means that one person's share will need to decrease before another person's share can increase. Witchcraft is used to achieve this change in the cosmic good. Also see Mihálik and Cassim *SALJ* 129 and Petrus and Bogopa *IPJP* 3 in this regard.

71 Ivey and Myers *S Afr J Psych* 56; Ludsin *Berkeley J Int'l L* 75; Mafico and Chavunduka *Zambezia* 127; Lillejord and Mkabela *SAJHE* 260; Quarmyne *Wm & Mary J Women & L* 476; Xaba Date Unknown http://www.ces.fe.uc.pt /emancipa/research/en/ft/tri-unfo/.html. This "fetish mentality", as Igwe *Skeptic* 74 calls it, has, to a great extent, undermined indigenous African communities' growth and their development of reason, science, and free inquiry. Furthermore, the fetish mentality of the indigenous African culture has resulted in unnecessary suffering, hatred and conflict in families as well as the torture and maltreatment of innocent people

72 Igwe *Skeptic* 74; Mafico and Chavunduka *Zambezia* 128; Petrus and Bogopa *IPJP* 2; Lillejord and Mkabela *SAJHE* 260.

73 Ludsin *Berkeley J Int'l L* 81; Mafico and Chavunduka *Zambezia* 127, 128; Petrus and Bogopa *IPJP* 2. In most cases it would be the victim's family members or those in a close relationship with him who would be suspected of the bewitchment.

feature in the thinking, perception and lives of both educated and non-educated Africans.[74]

4.2.2 Witchcraft in theory and practice

A focal point in African communities' belief in witchcraft is that the human and spiritual worlds are constantly interacting with each other.[75] Africans believe that, after death, relatives turn into ancestral spirits who continue to play an important role in their (the living's) daily lives.[76]

Another focal point in the belief of witchcraft is that some people possess magical powers which they use to inflict harm on others.[77] The term "witchcraft"[78] refers to the practice of bewitching[79] a person by using secretive and evil magical means[80] to inflict harm on the person.[81] The bewitchment

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74 Igwe *Skeptic* 72; Ludsin *Berkeley J Int'l L* 64; Quarmyne *Wm & Mary J Women & L* 476.

75 Ivey and Myers *S Afr J Psych* 55-56; Ludsin *Berkeley J Int'l L* 74; Mihálik and Cassim *SALJ* 129; Petrus and Bogopa *IPJP* 3; Eastman "Rainbow Healing" 187.

76 Ivey and Myers *S Afr J Psych* 55; Eastman "Rainbow Healing" 186-187. For a general discussion on the role of ancestral spirits in the daily lives of indigenous Africans see Ludsin *Berkeley J Int'l L* 74.

77 Igwe *Skeptic* 73. Also see Mbiti *African Religions and Philosophy* 147, Mihálik and Cassim *SALJ* 129, Petrus *Acta Criminologica* 125 and Petrus and Bogopa *IPJP* 3 in this regard.

78 The various ethnic groups in South Africa each have their own term for witchcraft. In Sesotho witchcraft is referred to as *moloi,* and in Tsivenda it is referred to as *vhuloi*. Among the Nguni's witchcraft is referred to as *umthakathi*, while *ukuthakatha* refers to the practicing of witchcraft. See Carstens *De Jure* 4 and Petrus and Bogopa *IPJP* 3 in this regard.

79 According to Labuschagne *SACJ* 247 bewitchment is a form of witchcraft that exists in using 'evil magic against others employing herbs, medicines, charms etc'. According to Ludsin *Berkeley J Int'l L* 76 a person is bewitched when that person is under a spell or a curse. Also see Ivey and Myers *S Afr J Psych* 56.

80 Carstens *De Jure* 4; Petrus and Bogopa *IPJP* 3. According to Igwe *Skeptic* 73 the term "magical means" refers to "the practice of using a variety of techniques, such as incantations, to exert supernatural control over the forces of nature". An example of these magical means is a drug or magic referred to as *musika* in Tshivenda, *letwa* in Sesotho or *kusikela* in Xitsonga and which can be used for various kinds of evil. It can be used to harm or kill another human being from a distance; an aggrieved owner can use it against the thief who stole from him or the bereaved family of a deceased can use it against the person responsible for the deceased's death. See Carstens *De Jure* 3.

81 This definition is similar to the one of Labuschagne *SACJ* 247 who defines witchcraft as a 'mystical and innate power which is used by its possessor to

of others is regarded as the epitome of evil magic.[82] As bewitchment involves the manipulation of evil, it is a pervasive belief in African cultures which provides a functional role during times of illness, misfortune and death.[83]

Various animals, like owls and cats, and articles, such as mirrors and whirlwinds, are associated with the practice of witchcraft.[84] Lightning, which can be perceived as good or bad, is also a distinct element associated with witchcraft.[85] Similarly, Africans also distinguish between good (positive) and evil (negative) witchcraft.[86] Traditionally men are associated with good witchcraft which entails the use of supernatural powers to the benefit of others by, for example, providing them with rain, healing or protection against potential evil.[87] Women and children, on the other hand, are asso-

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harm people'. Also see Ivey and Myers *S Afr J Psych* 56, Quarmyne *Wm & Mary J Women & L* 478 and Petrus and Bogopa *IPJP* 3 for other definitions of witchcraft.

82 Ivey and Myers *S Afr J Psych* 56.

83 Ivey and Myers *S Afr J Psych* 56 also point out that bewitchment beliefs 'permeate the very fabric of life and determine the manner in which people perceive the manifold misfortunes of life'.

84 Carstens *De Jure* 5; Ashforth *Social Dynamics* 214; Quarmyne *Wm & Mary J Women & L* 479. Other articles also associated with witchcraft include gramophone records, saucers, razor blades, brown bread, traditional dishes, pot-lids, plates, spoons, traditional horns which are blown at night and books. Furthermore, animals such as bats, baboons, pole cats, hyenas, birds, rats, insects and snakes are also associated with witchcraft. It is believed that witches and wizards operate at night by taking on the form of these animals. Igwe *Skeptic* 73, for example, refers to the image of "witches leaving their bodies at night and flying off to meet with others of their kind". Also see Ludsin *Berkeley J Int'l L* 76 in this regard.

85 Carstens *De Jure* 5; Ludsin *Berkeley J Int'l L* 76; Quarmyne *Wm & Mary J Women & L* 479. Good lightning is believed to be caused by the mythical thunder bird and neither damages crops and dwellings nor harms animals and humans. Bad lightning (*tladi*), on the other hand, is believed to be caused by human beings who put *muti* near the place where they want the lightning to strike. For a further discussion on *muti* see par 3.5.

86 Igwe *Skeptic* 72; Ivey and Myers *S Afr J Psych* 56. Also see Ludsin *Berkeley J Int'l L* 74, 76 where the author points out that ancestral spirits are also perceived to be either good or bad.

87 Igwe *Skeptic* 72-73; Ivey and Myers *S Afr J Psych* 56.

ciated with evil witchcraft which entails the use of supernatural powers to inflict harm on others.[88]

A clear distinction is also made between witchcraft practised during the day and witchcraft practised at night.[89] Women are believed to inherit their powers from their mothers and practise them at night by bewitching people through the use of evil spirits.[90] However, those who practise witchcraft during the day are considered to be the most dangerous of all witchcraft practitioners as the services of these persons can be bought.[91] These practitioners make use of magic formulas, spells or medicines capable of causing harm to others, rather than unidentified mystical powers.[92]

The female and male practitioners of witchcraft are called a "witch" and "wizard" respectively.[93] Both these terms can be defined in various ways.[94] Quarmyne,[95] for example, defines a witch as:

> [A] person with an incorrigible, conscious tendency to kill or disable others by magical means or as someone who secretly uses supernatural power for nefarious purposes.

In *S v Mafunisa*,[96] Van der Spuy AJ explained that a witch is considered to be a "female magician or sorceress"[97] who supposedly has "dealings with the devil or evil" and can therefore perform supernatural acts. In the same

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88 Igwe *Skeptic* 72-73; Ivey and Myers *S Afr J Psych* 55-56. Therefore, despite the distinction in gender, both male and female practitioners of witchcraft are believed to possess magical powers.

89 Ludsin *Berkeley J Int'l L* 76; Mafico and Chavunduka *Zambezia* 132.

90 Quarmyne *Wm & Mary J Women & L* 478-480. They do this with or without a particular motive. See Ludsin *Berkeley J Int'l L* 76, 80.

91 Ludsin *Berkeley J Int'l L* 76.

92 Ludsin *Berkeley J Int'l L* 76; Quarmyne *Wm & Mary J Women & L* 480. They do not inherit their powers but are capable of learning it from others.

93 Carstens *De Jure* 4; Ivey and Myers *S Afr J Psych* 56; Ludsin *Berkeley J Int'l L* 97; *S v Mafunisa* 1986 3 SA 495 (V) 496J-497D.

94 It should, however, be noted that the terminology referring to witches and wizards are gender neutral among the different groups. See Minnaar, Wentzel and Payze "Witch Killing" 181, Labuschagne *SACJ* 248-249 in this regard, Ludsin *Berkeley J Int'l L* 97.

95 Quarmyne *Wm & Mary J Women & L* 477.

96 1986 3 SA 495 (V) 496J-497A.

97 Other names include 'heks, towenares, towenaar'. See *S v Mafunisa* 1986 3 SA 495 (V) 498E.

case Van der Spuy[98] also described a wizard[99] as a "man skilled in the occult arts and a person who practices witchcraft".

There are various ways in which a person can become a witch or wizard.[100] Some are born as a witch or wizard,[101] while others acquire witchcraft through medicine given to them by a traditional healer[102] or witchdoctor.[103]

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98 *S v Mafunisa* 1986 3 SA 495 (V) 497.

99 Other names include 'towenaar, dolosgooier en duisendkunstenaar'. See *S v Mafunisa* 1986 3 SA 495 (V) 498E.

100 Quarmyne *Wm & Mary J Women & L* 476 point out that, while men can learn witchcraft, women are believed to inherit their powers from their mothers.

101 Carstens *De Jure* 5; Ludsin *Berkeley J Int'l L* 76; Ashforth *Social Dynamics* 215; Quarmyne *Wm & Mary J Women & L* 480. Some cultures believe that a baby who is thrown against a wall and clings to the surface of the wall without falling, will grow up to become a witch or wizard. Furthermore, as Igwe *Skeptic* 73 points out, any child who eats, swims or talks in his dreams is considered to be a witch or wizard.

102 Ahmed *et al East Med Health J* 79-85 and Rautenbach *Obiter* 518 defines a "traditional healer" as: "An educated or lay person who claims an ability or a healing power to cure ailments, or a particular skill to treat specific types of complaints or afflictions and who might have gained a reputation in his own community or elsewhere." According to Carstens *De Jure* 13 the term "traditional healer" is an umbrella term for all practitioners who heal by way of traditional African methods. Included in this term are "*igquirha*" (Xhosa) which refers to a "priest, diviner, physician, pharmacist, psychologist, judge and controller of evil". An *igquirha* heals a person's ailments through "scarification, potions, fomentations, decoctions and enemas of plant or animal origin". Individuals can also consult a *sangoma* who makes a diagnosis by way of divination like, for example, throwing bones. A *sangoma* can also provide an individual with herbs, animal products or scarification as a form of treatment. A true *sangoma*, however, shuns any and all forms of witchcraft. Also see Nattrass *Social Dynamics* 161, 162.

103 Carstens *De Jure* 5; Ludsin *Berkeley J Int'l L* 76. According to Rautenbach *Obiter* 525 the term "witchdoctor" is the collective term used for the different classes of traditional healers found amongst the *Zulus*. These classes include the following: *nyangas*, who are herbalists or diviners, *sangomas*, who are spiritualists called on by the ancestral spirits, *sanusi*, spiritualists and loremasters who outrank *nyangas* and *sangomas* and *thwasa*, who are nothing more than *sangomas* undergoing training. These classes of traditional healers have earned the name "witchdoctor" due to their ability to counteract spells put on people by witches. A further distinction is made between a *sangoma* as diviner-medium, who possesses the power to make a diagnosis through spiritual means and an *inyanga* as herbalist, who chooses and applies relevant remedies. Most traditional healers, however, prefer to be called a "traditional healer" instead of one of the terms above, because, for example, the term "sangoma" also refers to a person who causes harm to others. See Muller and Steyn *Society in Transition* 149 and Rautenbach *Obiter* 526.

According to Ashforth[104] witches can even be trained by skilled masters[105] or acquire their power through:

> … direct communication with higher powers such as the ancestors, spirits (evil ones in the case of witches, of course), or the Holy Spirit.

The practitioners of witchcraft are usually older than 20 years of age and are mostly middle-aged females.[106]

As far as the gender distribution is concerned, women are more likely than men to be accused of practising witchcraft.[107] With regard to race, it is believed that white people can neither be the practitioners nor the victims of witchcraft.[108] The practitioners of witchcraft are also believed to be omnipresent.[109] Therefore, those who are susceptible to their destructive forces are always on guard.[110] Although witches and wizards are generally con-

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104 Ashforth *Social Dynamics* 215.

105 For example, their mothers. See Quarmyne *Wm & Mary J Women & L* 479, 480 where the authors point out that a mother will train her children in witchcraft by "sending them to procure the exuviae of prospective victims".

106 Carstens *De Jure* 6. Also see Igwe *Skeptic* 73 where he refers to the belief in Tanzania that any old woman with grey hair and red eyes is a witch.

107 See Igwe *Skeptic* 73; Ludsin *Berkeley J Int'l L* 80-81; Quarmyne *Wm & Mary J Women & L* 476, 478, 479 and Kohnert *J Mod Afr Stud* 223-224. In fact, as Carstens *De Jure* 5 points out, only one male is accused of practicing witchcraft for every two females accused. Also, as pointed out by Ludsin, older women are more likely to be accused of witchcraft because: '[i]f they are women living alone they are feared as were the old wise women of Europe. Why have they lived so long? Clearly they must have obtained new soul-vitality, most likely from devouring the soul of a tender child.' There are various reasons for this gender distribution. Supposedly, women are more envious of their neighbours who are in a more advantageous material position than they. Women are also more prone to sexual jealousy. Furthermore, female reproductive processes such as menstruation, pregnancy and even childbirth are considered to be the result of supernatural powers and therefore impure. See Minnaar, Wentzel and Payze "Witch Killing" 187-188 for a further discussion.

108 Carstens *De Jure* 5; Mafico and Chavunduka *Zambezia* 129.

109 Meaning to be "present everywhere at the same time". See Anon 2012 http://dictionary.reference.com/browse/omnipresent.

110 Ivey and Myers *S Afr J Psych* 56. This is especially the case if those susceptible acquire great wealth as this will leave them vulnerable to attacks by envious witches and wizards.

sidered to be anti-social and outsiders,[111] they may also live peacefully with others in a particular community.[112]

The characteristic traits that are considered to be common among witches and wizards are those of strange behaviour, staring fiercely at others and having an ugly, monstrous appearance.[113] This, however, is not always the case, because as Igwe[114] points out, a pretty young girl who behaves rudely or has a reckless, careless or destructive character can also, under certain circumstances, be considered to be a witch. Other characteristic traits associated with witches and wizards include being very secretive and taking great care in avoiding detection and/or recognition.[115] Furthermore, witches are believed to operate outside the norms of society and are not limited by the laws of nature.[116]

4.2.3 Witch-killing in general

When a person is suspected of being a witch or a wizard, that person is pointed out by a witchdoctor[117] or traditional healer[118] through the process of "smelling out".[119] An example of such a smelling out process is that of a

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111 Ludsin *Berkeley J Int'l L* 81; Quarmyne *Wm & Mary J Women & L* 479.
112 Ivey and Myers *S Afr J Psych* 56-57.
113 Igwe *Skeptic* 73.
114 See Igwe *Skeptic* 73 and the example of Nigeria referred to.
115 Ashforth *Social Dynamics* 215, 218; Ivey and Myers *S Afr J Psych* 57; Quarmyne *Wm & Mary J Women & L* 478.
116 Ivey and Myers *S Afr J Psych* 57. They are, for example, believed "to be able to fly through the air and to enter houses through the tiniest of cracks". See Ludsin *Berkeley J Int'l L* 76-77 for a discussion of the various powers attributed to witches and wizards.
117 See footnote 103 above where the term "witchdoctor" is discussed in detail.
118 See footnote 102 above where the term "traditional healer" is discussed in detail. Dhlodhlo *De Rebus* 409, however, points out that a witch or wizard is not directly named or identified by an *isangoma*. An *isangoma* identifies the witch or wizard, not by their physical appearance, but by their relationship to the person who is bewitched. Also see Labuschagne *SACJ* 249 in this regard.
119 Ludsin *Berkeley J Int'l L* 78. This process is also referred to as "divination". Divination is carried out by the traditional healer who uses divining bones that consist of the knuckle bones of animals, pieces of wood, shells and other articles. These divining bones are called *ditaola* in Sesotho, *thangu* in Tshivenda and *tihlolo* in Xitsonga. See Carstens *De Jure* 3, 5 in this regard.

"mirror or television system" used by a *seipone*.[120] A *seipone*[121] is a prophet or traditional healer who makes use of crushed and fermented leaves to smell out a witch.[122] When a client[123] goes to see the *seipone,* he is given a potion to drink which contains these leaves.[124] The leaves have an intoxicating effect and in order to hasten the process of intoxication, the client is ordered to sit in the sun after drinking the potion.[125] Once intoxicated, the *seipone* takes her to a dark room with a white cloth pasted on the wall.[126] The client is then instructed to look at the cloth in which she will see images of both familiar and unfamiliar people.[127] Supposedly these are the people who bewitched her.[128] Afterwards the client is given another substance to remove the potion's intoxicating effect.[129]

Witches are killed in various ways. Traditionally witches are burned to death, because of a belief that fire destroys their souls and subsequently breaks any and all ties they might have with their ancestors.[130] Another method for killing witches, and one which is mostly used during the night, is to wire the door to a witches' dwelling shut while the victim is asleep inside, dousing the roof with an accelerant, like petrol or paraffin, and setting fire to it.[131] When a witch or wizard is killed during the day, it is normally done through the method of necklacing[132] or by holding them spread-eagled over

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120 For further examples see Dhlodhlo *De Rebus* 409 where the author explains the process of *umhlalo* used by the Zulu's and Ludsin *Berkeley J Int'l L* 78-77 where the author explains the process of divination, trial by ordeal and smelling out.
121 Also called a "mirror" in Sesotho and *Xivoni* in Xitsonga.
122 Carstens *De Jure* 3.
123 Although reference is only made to a female client it should be kept in mind that the client be male as well.
124 Carstens *De Jure* 3-4.
125 Carstens *De Jure* 3-4.
126 Carstens *De Jure* 4.
127 Carstens *De Jure* 4.
128 Carstens *De Jure* 4.
129 Carstens *De Jure* 4. This is done in order to prevent the client from becoming demented.
130 Carstens *De Jure* 7; Minnaar, Wentzel and Payze "Witch Killing" 184.
131 Carstens *De Jure* 7; Minnaar, Wentzel and Payze "Witch Killing" 184.
132 See par 4.3.2.

an open fire and slowly roasting them to death.[133] Other methods include strangulation, drowning, being shot or hurled from a precipice.[134] Whichever method is used, the witch's possessions must be destroyed afterwards.[135] Where a witch or wizard was not killed by way of burning, the body is burned afterwards.[136] Furthermore, whichever method is used, the killing of witches and wizards is always done in a ritual fashion.[137] Petrus[138] points out that the rationalism and motive behind the ritual killing of witches and wizards is because these practitioners of witchcraft always act against established authority and must therefore 'be killed and killed in a ritual fashion'.

There are various reasons for killing witches.[139] Probably the most important reason is that the wielders of supernatural powers fulfil their inherent craving for sin or crime by using arcane knowledge or magical substances[140] for malevolent purposes, such as destroying property and causing death,[141] sickness[142] and evil[143] without any provocation.[144] Witch-

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133 Carstens *De Jure* 7.

134 According to Carstens *De Jure* 7 the last method is the one favoured in the Eastern Cape.

135 Carstens *De Jure* 7.

136 Carstens *De Jure* 7; Minnaar, Wentzel and Payze "Witch Killing" 184.

137 Petrus *Acta Criminologica* 127.

138 Petrus *Acta Criminologica* 127.

139 Mafico and Chavunduka *Zambezia* 123, for example, refers to poverty, rampant disease, groundless hatred and fear as the type of evils which accompany the belief in witchcraft. These factors all contribute to the prevalence of witch-killings.

140 The magical substances referred to here is *muti*, which is further discussed in par 4.4.1.

141 Ivey and Myers *S Afr J Psych* 56.

142 Ivey and Myers *S Afr J Psych* 56. It is believed that witches and wizards cause diseases such as headaches, malaria, dysentery, epilepsy and convulsions.

143 This evil includes infertility, miscarriages, business failures, accidents etc. See Igwe *Skeptic* 73-74 in this regard.

144 In fact, Ludsin *Berkeley J Int'l L* 75, points out that: "Witches practice their craft for revenge, others because they are simply evil and still others in hopes of gaining luck through the misfortune of another." Also see Carstens *De Jure* 4, Ivey and Myers *S Afr J Psych* 56 and Igwe *Skeptic* 73-74. Igwe, however, is sceptical about the various powers attributed to witches. According to him, all of the incidents apparently caused by witches and wizards can be explained in a rational, scientific and naturalistic way.

killings are also carried out due to a jealousy for material belongings among the individuals of a particular community.[145] In the past, especially during the 1990s, witch-killings were also carried out to achieve political aims.[146] Lastly, the power struggles associated with gender roles in the various indigenous communities of South Africa also play an important role in the prevalence of witch-killings.[147]

For example, in the Venda communities, women often have to assume leadership positions which traditionally belong to the male domain, due to the absence of their migrant labour husbands.[148] It should, however, be noted that Venda men are not automatically elevated to positions of power in society or politics.[149] The Venda communities follow a dual descent system in terms of which status is passed down patrilineally as well as matrilineally.[150] Therefore, in an attempt to resolve the ensuing gendered power struggles, accusations of witchcraft are then made against women in a leadership position.[151] Men rarely question such allegations because of a stereotype established through a Venda saying, namely that "all women are the same and all women are witches".[152] This saying is premised on the belief that women have a lot of secrets; secrets which accumulate as they grow older.[153] It is, therefore, not uncommon to find that older women are the chief suspects when some mysterious or supernatural occurrence takes place, for they have accumulated more secrets than younger women and are therefore considered to know more about the mysteries of life.[154] What

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145 Carstens *De Jure* 6; Ludsin *Berkeley J Int'l L* 80; Quarmyne *Wm & Mary J Women & L* 478; *R v Fundakabi* 1948 3 SA 810 (A) 820.
146 Carstens *De Jure* 6.
147 Carstens *De Jure* 6.
148 Minnaar, Wentzel and Payze "Witch Killing" 187.
149 Minnaar, Wentzel and Payze "Witch Killing" 187.
150 Minnaar, Wentzel and Payze "Witch Killing" 187.
151 Minnaar, Wentzel and Payze "Witch Killing" 187.
152 Minnaar, Wentzel and Payze "Witch Killing" 187.
153 According to Minnaar, Wentzel and Payze "Witch Killing" 187 this perception has its roots in the "culturally ingrained social division of sex roles".
154 Minnaar, Wentzel and Payze "Witch Killing" 188; Ludsin *Berkeley J Int'l L* 80-81; Quarmyne *Wm & Mary J Women & L* 479, 483. Witchcraft accusations

reinforces men's belief in the secrecy of women is the fact that they are usually excluded from discussions between women.[155] As a result, men conjecture that women only discuss secrets whenever they (women) gather.[156]

4.2.4 Witch-killing and the South African criminal law

According to Ludsin[157] there are two schools of thought on the topic of witchcraft:

> … those who say that witches do not exist and those who say that witches do exist. This difference of opinion extends to the present system of justice in the courts. Traditional courts agree that witches exist, whilst formal courts say that witches do not exist.[158]

Jonck,[159] however, contends that in a country like South Africa, with its multicultural society, criminal courts need to consider the possibility that a belief in witchcraft can play a significant role in the commission of gruesome murders. A similar point was made in the case of *R v Kukubula*[160] where Clayden FJ stated that:

> One of the evils aimed at by the law which prohibits the naming of witches and wizards is that such naming can [have a] great mental effect on the person named. That possible effect of his action is present to the mind of the wrongdoer. And if in a particular case it is shown that the imputation of witchcraft has had such effect on the mind of a person as to drive him to self destruction, it cannot, we consider, be said that the result must be ignored in punishing the criminal. It was we consider permissible for the Court to pay regard to it.

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against older women are also reinforced by their physical appearance and their inability to defend themselves physically.

155 Minnaar, Wentzel and Payze "Witch Killing" 187-188.

156 Minnaar, Wentzel and Payze "Witch Killing" 188.

157 Ludsin *Berkeley J Int'l L* 64. Here Ludsin refers to the findings of the Ralushai Commission's Report of 1998. See Comm. on Gender Equality *Report of the National Conference on Witchcraft Violence* 15.

158 Also see Mafico and Chavunduka *Zambezia* 119 and Petrus and Makgoshing *Acta Criminologica* 100.

159 Jonck *JJS* 202.

160 1959 1 SA 286 (FC) 287E-287F. In this case the appellant pleaded guilty to contravening sections 3 and 8(a) of the *Witchcraft Suppression Act* 3 of 1957 and was subsequently sentenced to 9 months' imprisonment with hard labour.

The question whether a belief in witchcraft should serve as a mitigating factor or even as a ground of justification is still a moot point in the South African criminal law.[161] From the discussion above it seems as though there are *prima facie* grounds to justify the killing of witches; at least when viewed from an African customary law perspective.[162] In fact, as Labuschagne[163] points out, the belief in witchcraft is so embedded in the cultural heritage of the indigenous population that the criminal law will not be able to change it.

However, in terms of the common law there are no grounds of justification for the killing of witches and the perpetrator thereof can be charged with an array of common law crimes. The first such crime is that of murder, as the conscious and deliberate decision to take the life of another person in an unlawful and intentional way constitutes a common law crime in South Africa.[164] If, however, the victim survives the attack, the perpetrators can be charged with the crime of attempted murder.[165] The third charge which an accused can face is that of common assault. Common assault is defined as:

> [t]he unlawful and intentional application of force to the complainant, or inspiring a belief of imminent use of force against the complainant.[166]

In the last instance, and considering the gruesome nature of some of the methods employed to kill suspected witches,[167] the perpetrator can be

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161 Jonck *JJS* 202; Hoctor *Obiter* 380

162 See par 4.2.2.

163 Labuschagne *SACJ* 266.

164 *S v Ndlovu* 1984 3 SA 23 (A) 26G-26H; Burchell *Principles of Criminal Law* 667; Kemp *et al Criminal law* 271. Murder is outlawed as a crime against life as it infringes a person's legal interest in his life. See Burchell *Principles of Criminal Law* 667-671 and Kemp *et al Criminal law* 271-274 for a more comprehensive discussion on the common law crime of murder.

165 In simple terms, attempted murder can be described as the scenario where an accused had the necessary intention to kill another living human being, but was unsuccessful in his attempt. See Kemp *et al Criminal law* 274 in this regard. Also see *S v Ndlovu* 1984 3 SA 23 (A) 26H-27B and *S v Moloto* 1982 1 SA 844 (A) 850A for a general discussion of attempted murder.

166 Kemp *et al Criminal law* 279. Also see ; Burchell and Milton *Principles of Criminal law* 680.

charged with assault with the intent to do grievous bodily harm. Although the requirements for this crime seem to be identical to that of common assault, there are two important aspects to consider.[168] Firstly, it is not necessary that the victim actually suffers from grievous bodily harm before the perpetrator can be charged and/or convicted.[169] All that is required is that the accused had the intention of inflicting such harm.[170] Secondly, there is no clear definition of what constitutes grievous bodily harm.[171] Therefore, courts will have to determine the content of this qualification on a case-to-case basis. Courts can, of course, look towards previous decisions for assistance in this regard. For example, in the case of *R v Edwards,*[172] the Court considered grievous bodily harm as "such as to seriously interfere with health". In another case, *S v Mbelu*,[173] Miller J pointed out that:

> [H]owever one expresses it, it is at least clear that there must be an intent to do more than inflict the casual and comparatively insignificant and superficial injuries which would ordinarily follow upon assault. There must be an intent to injure and to injure in a serious respect.

Not only do the perpetrator(s) of a witch-killing run the risk of being charged with the common law crimes above, but they can also face criminal charges for various statutory crimes in terms of the *Witchcraft Suppression* Act.[174]

4.2.5 Witch-killing and the Witchcraft Suppression Act 3 of 1957

Despite the common law crimes above,[175] the perpetrator of a witch-killing can also be charged with various crimes in terms of the *Witchcraft Sup-*

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167 See par 4.2.3.
168 Kemp *et al Criminal law* 284; Burchell and Milton *Principles of Criminal law* 688.
169 Kemp *et al Criminal law* 284; Burchell and Milton *Principles of Criminal law* 690.
170 Kemp *et al Criminal law* 284; Burchell and Milton *Principles of Criminal law* 690.
171 Kemp *et al Criminal law* 284. Also see Burchell and Milton *Principles of Criminal law* 689-690.
172 1957 R & N 107 109-110.
173 1966 1 PH H176 (N).
174 3 of 1957. See par 4.2.5 for a discussion of these statutory crimes.

pression Act.[176] In terms of the Act it is a statutory offence to both accuse a person of practising witchcraft and to point someone out as being a witch or wizard.[177] The Act also outlaws the injuring and killing of a person based on information received from a traditional healer, witchdoctor or similar person.[178] Furthermore, in terms of the Act it is also a statutory crime to profess or to pretend to use witchcraft,[179] to solicit a witchdoctor or witch-finder to point out a witch or wizard,[180] and to use pretended witchcraft for financial gain.[181]

An accused convicted of contravening the *Witchcraft Suppression Act* faces punishment in the form of a fine or imprisonment.[182] Where an accused's accusation or smelling out resulted in the death of an alleged witch or wizard, he can face a sentence of twenty years imprisonment.[183]

It is interesting to note that the *Witchcraft Suppression Act* creates a rebuttable presumption for cases involving witch-killing. If an accused is found guilty of contravening sections 1(a) and (b) of the Act and the alleged witch or wizard was killed, the death is considered to be the direct result of the accused's accusation or smelling out.[184]

Despite the fact that the *Witchcraft Suppression Act* was enacted for the sole purpose of curtailing witchcraft and witch-killings, both practices still

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175 See par 4.2.4.

176 The *Witchcraft Suppression Act* was not the first attempt by the South African government to curtail witchcraft and witch-killings. The earlier statutes targeting witchcraft and witch-killings included the *Cape of Good Hope Act* 24 of 1886, the *Black Territories' Penal Code Chapter XI Act* 2 of 1895, the *Witchcraft Suppression Act* of 1895, the *Natal Law* 19 of 1891 and the *Transvaal Ordinance* 15 of 1904. See Ludsin *Berkeley J Int'l L* 89.

177 S 1(a) of the Act. Also Carstens *De Jure* 7 and Ludsin *Berkeley J Int'l L* 87.

178 S 1(e) of the Act. Also Carstens *De Jure* 7.

179 S 1(b) and (d) of the Act. Also see Ludsin *Berkeley J Int'l L* 87, 90.

180 S 1(c) of the Act. Also see Ludsin *Berkeley J Int'l L* 87, 90.

181 S 1(d), (e) and (f) of the Act. Also see Ludsin *Berkeley J Int'l L* 87, 90.

182 SS 1(i) – (iv) of the Act. Also see Ludsin *Berkeley J Int'l L* 90.

183 S 1(i) of the Act. Also see Ludsin *Berkeley J Int'l L* 90.

184 S 2 of the Act. Also see Ludsin *Berkeley J Int'l L* 90.

continue to take place.[185] According to Ludsin,[186] there are mainly two reasons for the continued prevalence of witchcraft accusations and witch-killings. First, the Act deprived both chiefs and customary law of their legitimacy in their communities by undermining the authority of chiefs and the community's faith in customary law.[187] This is evident from the following opinion of a tribal chief:

> We have to work hard to wipe out this evil (witchcraft), but we cannot do our work effectively because the police arrest us ... . It seems there is a conflict with the Western way of settling things though. Whites don't believe someone can send lightning to kill – but we do, and we know it has been done for ages.[188]

Legally speaking, the chiefs were bound to comply with the *Witchcraft Suppression Act* and only did so out of fear of losing their power.[189] While some chiefs covertly heard and mediated cases involving witchcraft in the past, most chiefs, however, refused to hear such matters.[190] The result, and also the second reason advanced by Ludsin,[191] is that the communities started to take justice into their own hands when it came to accusations of witchcraft. These communities felt that the Act, and by implication the chiefs,[192] protected witches by punishing the victims of witchcraft and not the act of witchcraft itself.[193] Differently put, in the eyes of those who believed in witchcraft, the Act allowed witches and wizards to run free and cause harm at will, while those who attempt to stop witches and wizards

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185 See Dhlodhlo *De Rebus* 410; Hund *CILSA* 368; Ludsin *Berkeley J Int'l L* 87.
186 Ludsin *Berkeley J Int'l L* 87.
187 For a detailed discussion of the manner in which the traditional courts dealt with accusations of witchcraft before the enactment of the Act see Ludsin *Berkeley J Int'l L* 84-87.
188 See Dhlodhlo *De Rebus* 410.
189 Ludsin *Berkeley J Int'l L* 87.
190 Ludsin *Berkeley J Int'l L* 87.
191 Another reason, advanced by Petrus and Makgoshing *Acta Criminologica* 100, for people taking the law into their own hands is because the formal courts did not acknowledge complaints related to witchcraft.
192 Because chiefs dismissed accusations of witchcraft, community members were under the impression that they (chiefs) were protecting witches by siding with the government. See Ludsin *Berkeley J Int'l L* 87.
193 Ludsin *Berkeley J Int'l L* 87-88, 90-91.

are punished.[194] This viewpoint is still held today. To illustrate, Damon Leff,[195] director of the South African Pagan Rights Alliance, was reported as saying that the Act was not drafted against actual witches, but against traditional healers and some traditional practices. The South African Pagan Rights Alliance called for a review of the Act.[196] Eventually, in 2010, the Justice Minister approved the decision that "Project 135 – Review of witchcraft legislation" be included in the South African Law Reform Commission's programme.[197]

The reason for the South African Pagan Rights Alliance's call for a review of the *Withcraft Suppression Act* is that the organisation believes that the Act "institutionalised prejudice against witchcraft per se".[198] According to Leff,[199] witchcraft is regarded as a *bona fide* religion, as actual witches and wizards[200] are a visible religious minority in South Africa. The problem, however, as Leff[201] points out, is that stereotypical African cultural beliefs reject the notion of witchcraft as a constitutionally protected religion. As a result, actual witches and wizards face a lot of prejudice because in terms of traditional African beliefs, witches and wizards will always be guilty when accusations of misfortune, illness or untimely death are made, as these

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194 Ludsin *Berkeley J Int'l L* 87, 91.

195 De Lange 2012 http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=2934098&sn=Detail& pid=40&Rights-of-witches-'violated'.

196 De Lange 2012 http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=2934098&sn=Detail& pid=40&Rights-of-witches-'violated'.

197 De Lange 2012 http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=2934098&sn=Detail& pid=40&Rights-of-witches-'violated'; Department of Justice and Constitutional Development 2011 http://www. justice.gov.za/salrc/progress.htm; South African Law Reform Commission *Thirty Eighth Annual Report* 44.

198 De Lange 2012 http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=2934098&sn=Detail& pid=40&Rights-of-witches-'violated'.

199 De Lange 2012 http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=2934098&sn=Detail& pid=40&Rights-of-witches-'violated'.

200 In other words, witches and wizards belonging to Pagan organisations such as South African Pagan Rights Alliance and the South African Pagan Council. See De Lange 2012 http://www.citizen.co.za/citizen/content/en/citizen/localnews?oid=2934 098&sn=Detail& pid=40&Rights-of-witches-'violated'.

201 De Lange 2012 http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=2934098&sn=Detail& pid=40&Rights-of-witches-'violated'.

acts are commonly associated with the nature of the practice of witchcraft.[202] Indigenous communities therefore still feel obligated to resort to alternative methods (witch-killings) for dealing with witchcraft manifestations.[203] However, the South African Pagan Rights Alliance believes that witchcraft accusations cannot be legislated away and should be seen for what they are: "untested hearsay based on fear, ignorance and superstition".[204]

Regardless of the viewpoint looked at, what seems to be clear is that the *Witchcraft Suppression Act* has failed dismally in achieving its objectives of eradicating the belief in witchcraft.[205] In fact, as Ludsin[206] points out, it seems as though there have been more cases involving witchcraft violence before the Western courts than prosecutions under the Act. Consequently, the Western courts also had to develop their own mechanism for dealing with witchcraft-related offences beyond the Act, as a perusal of South African case law reveals that accused persons have attempted to justify their commission of a crime by relying on their indigenous belief in witchcraft.[207]

4.2.6 Witch-killing and the cultural defence

The cultural defence comes to the fore when the perpetrator of a witch-killing stands trial for committing any of the crimes mentioned above.[208] In such an instance, the perpetrators of a witch-killing may advance the argument that they were oblivious to the fact that their conduct was unlawful

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202 De Lange 2012 http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=2934098&sn=Detail& pid=40&Rights-of-witches-'violated'.

203 Ludsin *Berkeley J Int'l L* 87.

204 De Lange 2012 http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=2934098&sn=Detail& pid=40&Rights-of-witches-'violated'.

205 Ludsin *Berkeley J Int'l L* 91; De Lange 2012 http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=2934098&sn=Detail&pid=40&Rights-of-witches-'violated'.

206 Ludsin *Berkeley J Int'l L* 91.

207 Ludsin *Berkeley J Int'l L* 91.

208 A belief in African witchcraft has been construed as a cultural defence from both an anthropological as well as a jurisprudential point of view. See in this regard Carstens *De Jure* 9 and Hund *CILSA* 368.

and that they lacked such knowledge due to a belief in witchcraft, which has formed part of their minority group's culture for centuries.[209] A perusal of South African case law reveals that,[210] as a matter of principle and due to the statutory provisions aimed at suppressing witchcraft and witch-killings,[211] the South African courts have yet to accept a belief in witchcraft as a valid defence for the killing of another human being.[212] However, the South African case law dealing with the indigenous belief in withcraft and the commission of witch-killlings as a result thereof, all predate the enactment of the Constitution. It can therefore be argued that, in light of the right to cultural freedom afforded by the Constitution, the formal recognition of a cultural defence in the context of witch-killings remains a moot point in the South African criminal law.[213] This matter is returned to in Chapter 7.[214]

4.3 Belief in tokoloshe[215]

Apart from the symptomatic manifestations of witchcraft discussed above, people are also inclined to believe in the presence of witchcraft when there is supposed evidence of *muti*,[216] zombies[217] and familiars.[218] Familiars are

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209 Carstens *De Jure* 9. What the accused is actually contending is that he lacked knowledge of the unlawfulness of his actions when he committed the killing. This matter is dealt with in par 6.3.1.

210 See par 4.2.4.

211 See par 4.2.5.

212 Carstens *De Jure* 9; Ludsin *Berkeley J Int'l L* 91.

213 Carstens *De Jure* 9.

214 See par 7.3.

215 Also referred to as a "tikoloshe", "tokolosh", "tikoloshi" and "tikaloshe". See in this regard Rautenbach and Matthee *JLP* 126 and Ivey and Myers *S Afr J Psych* 58.

216 The issues pertaining to the use of *muti* by indigenous African communities is discussed in par 4.4.

217 The term "zombie", also called the "living dead", is used to refer to a corpse that has been revived through the use of witchcraft. It is believed that zombies are people who offended witches and who were then turned into zombies as punishment. A witch would turn a person into a zombie by first capturing his aura or shadow after which she would gradually possess the person's body parts until the person's outer shell is the only thing that remains for the family to bury. Zombies are commonly believed to serve witches as slaves who operate at night by performing menial tasks such as household chores, field labour and even the construction of buildings. See Ivey and Myers *S Afr J Psych* 58, Ludsin *Berkeley J Int'l L* 76, Minnaar, Wentzel and Payze "Witch killing" 182.

entities associated with witches and are even considered to be the subjects in service of witches.[219] These subjects typically include animals and mythical figures such as the *tokoloshe*: a creature from African folklore.[220]

4.3.1 Tokoloshe in general

In Southern Africa there are a multitude of stories about *tokoloshe*-sightings.[221] In Zimbabwe, for example, a director of security for the Zimbabwean parliament claimed that he was assaulted by an invisible *tokoloshe*.[222] He gave the following encounter of his ordeal:

> 'They were beating me about the head, shouting things like, "You are an unfair boss! You want too much money!" They were trying to knock me into the road so I would be run over by a car.'[223]

He claimed that the *tokoloshe* had been sent to him by an employee who got wind that he (employee) was on the verge of being fired from his job.[224]

In another sighting, also in Zimbabwe, the *tokoloshe* was even confused with an alien.[225] One morning in September of 1994, a group of elementary school learners allegedly saw a flying object land on the school grounds, after which they saw a small man, with long black hair and huge eyes make his way towards them.[226] However, when the small man noticed them, he vanished, reappeared at the object and took off in it.[227] The smaller children were convinced that what they saw was a *tokoloshe*; a demon who eats children. The older learners, however, were convinced that it was an

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218 Ivey and Myers *S Afr J Psych* 58.
219 Ivey and Myers *S Afr J Psych* 58.
220 Ivey and Myers *S Afr J Psych* 58; Rautenbach and Matthee *JLP* 126.
221 Lillejord and Mkabela *SAJHE* 261.
222 Lillejord and Mkabela *SAJHE* 261.
223 Lillejord and Mkabela *SAJHE* 261.
224 Lillejord and Mkabela *SAJHE* 261.
225 Lillejord and Mkabela *SAJHE* 261.
226 Lillejord and Mkabela *SAJHE* 261.
227 Lillejord and Mkabela *SAJHE* 261.

alien because it communicated a message to them that the human race was destroying the planet through pollution.[228]

In another example, this time from Botswana, a security officer at a school claimed that he was being harassed by strange creatures that looked like small human beings but who also had the ability to turn into a snake.[229] Sometimes, the stories of *tokoloshe*-encounters can even be linked to sexual fantasies. In Guruve, Zimbabwe, for example, six female school-teachers accused a male colleague of using a *tokoloshe* to cast a spell on them so that he could have sex with them in their sleep.[230]

Althought stories about the belief in the *tokoloshe* might seem odd to people from other cultures, the *tokoloshe* remains a part of many Africans' spiritual system.[231] However, instead of traditional narrations depicting the *tokoloshe* as a friendly creature who helps children, stories like the ones above nurture the scary version of the *tokoloshe*, namely that of a creature susceptible to witchcraft.[232] These stories, according to Lillejord and Mkabela,[233] differ considerably from the traditional tales about the *tokoloshe* which:

> ... [reflects] the life in the homestead, the role of the parents and children and the importance of their favourite food (*amasi*).

The result, as pointed out by Lillejord and Mkabela,[234] is that the stories of people's culture are gradually being replaced by scary stories, which in turn reveals that witchcraft still plays a pivotal role in the African communities in Southern Africa.

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228 Lillejord and Mkabela *SAJHE* 261.
229 Lillejord and Mkabela *SAJHE* 261.
230 Lillejord and Mkabela *SAJHE* 261.
231 Lillejord and Mkabela *SAJHE* 261.
232 Lillejord and Mkabela *SAJHE* 261.
233 Lillejord and Mkabela *SAJHE* 261.
234 Lillejord and Mkabela *SAJHE* 261.

4.3.2 Tokoloshe in theory and practice

Witches are believed to create a *tokoloshe* through *muti* to, among other things, serve as a sexual partner for the witch.[235] There are various descriptions afforded to a *tokoloshe*.[236] Ivey and Myers,[237] for example, describe a *tokoloshe* as a "short, hairy, baboon-like being, with vicious teeth and a huge penis". A *tokoloshe* can, however, also be female, in which case it possesses excessively large breasts.[238] Mkhize,[239] on the other hand, describes a *tokoloshe* as a "fabulous, short and hairy-looking elf said to be mischievous and fond of women and sour milk". A *tokoloshe* has also been described as a "dwarf, a gremlin, or a hairy creature resembling a monkey"[240] with black eyes and small ears and which is "much dreaded by most natives".[241] As far as the habitat of the *tokoloshe* is concerned, there are again various descriptions. The "humanised" (elf-like) *tokoloshe* is believed to live in the woods near a river, while the "monkey-like" *tokoloshe* is believed to live in small caves on a mountain side or among the rocks near a river.[242]

Although the descriptions of a *tokoloshe* may vary across cultural groups, the characteristics afforded to it seem to be universal. For example, a *tokoloshe* is believed to be invisible to adults and therefore only visible to children.[243] Furthermore, this mythical creature has the ability to turn itself invisible when visiting townships and suburbs where it harms people in

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235 Ivey and Myers *S Afr J Psych* 58. Also see Mihálik and Cassim *SALJ* 129 and Petrus and Bogopa *IPJP* 3.

236 Rautenbach and Matthee *JLP* 126; Lillejord and Mkabela *SAJHE* 259; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.

237 Ivey and Myers *S Afr J Psych* 58.

238 Ivey and Myers *S Afr J Psych* 58.

239 Mkhize "Mind, Genre, and Culture: A Critical Evaluation of the Phenomenon of Tokoloshe "Sightings" among Prepubescent Girls in KwaZulu-Natal".

240 Rautenbach and Matthee *JLP* 126; Lillejord and Mkabela *SAJHE* 259.

241 *R v Ngang* 1960 3 SA 363 (T) 364B-364C; Rautenbach and Matthee *JLP* 127; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.

242 Lillejord and Mkabela *SAJHE* 260.

243 Rautenbach and Matthee *JLP* 126; Lillejord and Mkabela *SAJHE* 260.

their sleep or poisons[244] their food.[245] A *tokoloshe* is also believed to possess the power to transform into animals such as snakes, frogs or cats.[246] Of course, the stories of a *tokoloshe*'s transformational powers support the use of witchcraft as it supports the African notion that, whatever happens to a person, that event or occurrence was caused by another person.[247] This leads to the unfortunate situation of some people being identified as evil, while others are misused as evil forces.[248] Therefore, a *tokoloshe* can either cause harm by itself or be used by a person(s) to inflict harm on others.[249]

4.3.3 Indigenous belief in the tokoloshe and the South African criminal law

In the past the South African courts had to deal with situations where the belief in the *tokoloshe* led to an accused being charged with the commission of a common law crime. For example, in the case of *R v Ngang*,[250] the accused was charged with assault with the intent to do grievous bodily harm.[251] While sleeping, the accused had dreamt that he was being attacked by a *tokoloshe.*[252] In an attempt to defend himself he got up and stabbed at the "thing" he believed to be the *tokoloshe,* but which was in fact

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244 In this context, and based on the reasoning of Natrass *Social Dynamics* 163, the word "poison" should be understood as referring to the use of witchcraft, because, it serves as the basis for interpreting the dangers arising from witchcraft.

245 Lillejord and Mkabela *SAJHE* 260.

246 Lillejord and Mkabela *SAJHE* 260.

247 Lillejord and Mkabela *SAJHE* 260. Also see par 4.2.1.

248 Lillejord and Mkabela *SAJHE* 260.

249 Lillejord and Mkabela *SAJHE* 260.

250 1960 3 SA 363 (T).

251 *R v Ngang* 1960 3 SA 363 (T) 363H; Rautenbach and Matthee *JLP* 126; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.

252 *R v Ngang* 1960 3 SA 363 (T) 364C-364E; Rautenbach and Matthee *JLP* 126; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.

the complainant.[253] The accused was subsequently convicted as charged.[254] However, on appeal Bresler J[255] found that the accused acted "involuntarily or automatically"[256] and should therefore escape criminal liability. Bresler J[257] based his judgment on the reasoning that:

> This was not proved to be a case merely of mistaken belief in magic or witchcraft or something like that by a person whose mind was not otherwise affected so that a possibility of finding the necessary mens rea could be said to arise.

In the case of *S v Ngema*,[258] the facts were similar to that of *Ngang*, except that the accused was charged with murder. Here the accused was also asleep when he dreamt that a *tokoloshe* was "throttling" him.[259] This frightened the accused so much that he woke up, grabbed a cane knife which was leaning against his leg and struck three fatal blows to the "thing" he thought was the *tokoloshe*, but which turned out to be a two-year old toddler.[260] After testing the accused's conduct against that of a reasonable person in the same circumstances, the court found the accused guilty of culpable homicide. The court held the view that:

> … the accused acted unreasonably in warding off the perceived danger in the way that he did, and that he was therefore negligent in killing the deceased.[261]

In another *tokoloshe*-related case, *R v Mbombela*,[262] the accused was found guilty of murder.[263] Here the accused, whom the court described as being "rather below normal intelligence", hacked to death a "form" which he

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253 *R v Ngang* 1960 3 SA 363 (T) 364C-364E; Rautenbach and Matthee *JLP* 126; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.
254 *R v Ngang* 1960 3 SA 363 (T) 363B.
255 *R v Ngang* 1960 3 SA 363 (T) 363F, 366F.
256 Voluntary conduct as a requirement for criminal liability is further explored in par 6.2.
257 *R v Ngang* 1960 3 SA 363 (T) 363E-363F, 366E-366G.
258 *S v Ngema* 1992 2 All SA 436 (D).
259 *S v Ngema* 1992 2 All SA 436 (D).
260 *S v Ngema* 1992 2 All SA 436 (D).
261 *S v Ngema* 1992 2 All SA 436 (D).
262 1933 AD 269.
263 Carstens *De Jure* 9.

believed to be a *tokoloshe* after being alerted to the form's presence in a hut by children who were playing nearby and who were frightened by it.[264] However, after striking the "form" with a hatchet and dragging it out of the hut the accused realised that he had in fact killed his younger nephew.[265] Mbombela attempted to put forth a defence that he had genuinely believed that what he was killing was not a human being, but an evil spirit.[266] The court, however, rejected his defence and found him guilty of murder.[267] On appeal, Mbombela's defence was also unsuccessful, because after testing Mbombela's actions against that of a reasonable person in his circumstances, the court of appeal found that his mistake regarding the object he was striking at was unreasonable.[268]

4.3.4 Indigenous belief in the tokoloshe and the cultural defence

What is evident from the discussion above is that not only indigenous customs can lead to conflict between the common law and African customary law in South Africa, but also indigenous beliefs in the existence of supernatural beings like the *tokoloshe*.[269] In cases involving indigenous beliefs the cultural defence is raised in an attempt to persuade the court that the accused's commission of the crime was motivated by his belief in the supernatural.

In light of the above, it seems as though the formal recognition of a cultural defence in the context of a belief in supernatural creatures is also still open to debate in the South African law. Like witch-killing and necklacing, this matter is further explored later in the discussion within the context of the

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264 1933 AD 269; Carstens *De Jure* 9.
265 1933 AD 269; Carstens *De Jure* 9.
266 Carstens *De Jure* 10.
267 Carstens *De Jure* 10.
268 Carstens *De Jure* 10.
269 Rautenbach and Matthee *JLP* 126.

requirements for criminal liability in an attempt to resolve the legal complexities pertaining to indigenous beliefs and the South African criminal law.[270]

4.4 Muti-murders

As pointed out earlier,[271] the majority of South Africa's indigenous communities make use of traditional medicine,[272] commonly referred to as "*muti*",[273] which has been part of South Africa's history for quite some time.[274] *Muti* can consist of various substances such as plants and herbs,[275] which creates no problem in the South African criminal law. *Muti* can, however, also contain human body parts,[276] which creates a problem in the South African criminal law, because the body parts needed for the manufacturing of *muti* is acquired through a *muti*-murder.[277]

Although a *muti*-murder can only be inferred once the mutilated corpse of a victim is discovered, it does not mean that this practice is in any way rare.[278] In fact, in recent years there have been a number of reports on *muti*-murders in the media. In 2001, for example, the mutilated body of a mother was found in Mount Frere in the Eastern Cape.[279] She was the unfortunate victim of a *muti*-murder as her facial skin, genitalia, breasts, hands and feet

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270 See Chapters 5 and 6.
271 See par 3.2.1.
272 See par 3.2.1, Eastman "Rainbow Healing" 184, 196, Sambo *Afr Health Mon* 4; Kasilo *et al Afr Health Mon* 7, Rautenbach *Obiter* 518-520, Minister of Health 2004 http://www.doh.gov.za/docs/sp/2004 /sp0330.html, Phila Date Unknown http://www.healthlink.org.za/pphc/Phila /summary/vol 3_no23.htm. Revisit footnote 57 above for an explanation of what is meant with "traditional medicine".
273 See par 3.4.1 for a detailed discussion of the term "*muti*". Carstens points out that, although the term "*muti*" is of *isiZulu* origin, it now forms part of the English language in South Africa. *Muti* is referred to as "*muschonga*" in Tshivenda, "*murhi*" in Xitsonga and "*sehlare*" in Sesotho.
274 Rautenbach *Obiter* 521-522; Carstens *De Jure* 12; Eastman "Rainbow Healing" 184.
275 See par 4.4.1.
276 See par 4.4.1.
277 See par 4.4.2.
278 Carstens *De Jure* 18.
279 Petrus *Int J Sociol Anthropol* 1.

had been removed.[280] Later, in 2007, there was a report of a seven year old boy who was beheaded and whose testicles were removed in an alleged *muti* transaction.[281] Then, in 2009 the body of an unidentified man was found under a big tree next to the Old Pretoria Main Road.[282] The man's right ear and lips had been removed.[283] Although it was the first time in his 18 years at the Bramley police station that police spokesperson Inspector Moses Maphakela had been confronted with a killing of this nature, he immediately knew that the body parts had been removed for purposes of *muti*.[284]

In March of 2010 there was another report of a 45-year-old Zululand man, Mathenjwa Mangomezulu, who was sentenced to 20 years imprisonment by the Pietermaritzburg High Court for helping his friend, Mcwecwe Mngomezulu, murder Mcwecwe's 75-year-old sister, Nongoziba.[285] The accused twisted Nongoziba's neck, cut out her tongue, oesophagus and eyes and disposed of her body by throwing it over a cliff.[286] Nongoziba was the unfortunate victim of a *muti*-murder as her brother intended selling her body parts to a witchdoctor for a mere R5000.[287] Mathenjwa's defence was that he did not believe in witchcraft[288] and only took part in the murder for

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280 Petrus *Int J Sociol Anthropol* 1.

281 Sapa 2007 http://www.sowetanlive.co.za/sowetan/archive/2007/11/14/muti-killer_denied-bail.

282 Dlamini 2009 http://www.sowetanlive.co.za/sowetan/archive/.../muti-murder-comes-to-city-suburb.

283 Dlamini 2009 http://www.sowetanlive.co.za/sowetan/archive/.../muti-murder-comes-to-city-suburb.

284 In this regard, Inspector Maphakela commented that: "We are schocked at what happened. It is clear that the criminals wanted the body parts for muti." See Dlamini 2009 http://www.sowetanlive.co.za/sowetan/archive/.../mu-ti-murder-comes-to-city-suburb.

285 Anon 2010 http://www.iol.co.za/news/south-africa/man-jailed-for-witchcraft-murder-1.477536.

286 Anon 2010 http://www.iol.co.za/news/south-africa/man-jailed-for-witchcraft-murder-1.477536.

287 Anon 2010 http://www.iol.co.za/news/south-africa/man-jailed-for-witchcraft-murder-1.477536.

288 See par 3.5.1 where it is shown that the belief in *muti* and witchcraft often overlap.

financial gain.[289] Although Pillay J[290] was able to find substantial and compelling circumstances not to impose a sentence of life imprisonment on Mathenjwa, she stressed the fact that:

> ... it was a tragic reflection that he, who did not believe in witchcraft, agreed to help murder an old woman for money.

In another recent case (2011), Brian Mangwale received a sentence of life imprisonment for the gruesome murder of 10-year-old Masego Kgomo during December of 2009.[291] During sentencing, evidence was presented that Masego was still alive during the removal of her womb and breast, which were subsequently sold to a traditional healer for a mere R4800.[292] This evidence served as aggravating circumstances for imposing the sentence of life imprisonment.

The incidences above represent only a fraction of the *muti*-murders committed annually. The number of *muti*-murders that occur every year is estimated to be much higher because as Carstens[293] points out, the morgues in Durban alone receive 12 to 15 *muti*-corpses annually. Nonetheless, what these murders all have in common is that they are based on the African belief in *muti*.

4.4.1 Muti in general

Muti is an ambiguous term referring to magical substances, like herbs or medicine.[294] People in indigenous communities would consult a traditional

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289 Mathenjwa was paid a mere R600 for his part in the murder. See Anon 2010 http://www.iol.co.za/news/south-africa/man-jailed-for-witchcraft-murder-1.477-536.

290 Anon 2010 http://www.iol.co.za/news/south-africa/man-jailed-for-witchcraft-murder-1.477536.

291 Anon 2011 http://www.iol.co.za/news/crim-courts/killer-grins-at-muti-murder-sentence-1.11879.

292 Anon 2011 http://www.iol.co.za/news/crim-courts/killer-grins-at-muti-murder-sentence-1.11879.

293 Carstens *De Jure* 13.

294 Ivey and Myers *S Afr J Psych* 57; Ashforth *Social Dynamics* 211-212; Eastman "Rainbow Healing" 188. The term "*muti*" has botanical roots and literally translated it refers to a tree or plants. See Carstens *De Jure* 12.

healer for *muti* to help them overcome personal problems, to achieve success or even to take revenge on their enemies.[295]

The intention of the user plays a very important role in the belief in *muti*.[296] Depending on the purpose for which it is sought, *muti* can be used to either achieve something good,[297] such as to heal an individual,[298] or something evil,[299] like causing another harm.[300] Differently put, *muti* can either be used on a person without any evil or negative intentions or it can be used for destructive purposes, in which case it usually involves the use of witchcraft.[301] Therefore, the indigenous belief in *muti* and witchcraft often overlap, due to a belief that people absorb elements from their surroundings which leaves them vulnerable to bewitchment.[302] However, indigenous people may also consult a traditional healer for *muti* to help prevent them from being bewitched.[303]

Although bewitchment can take on various forms, the most frequently described forms are those caused by poisoning[304] or spirit possession.[305] In

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295 Carstens *De Jure* 13; Eastman "Rainbow Healing" 189. Consult Ashforth *Social Dynamics* 213 for a cursory overview of the other uses *muti*.

296 Ivey and Myers *S Afr J Psych* 57; Ashforth *Social Dynamics* 212.

297 This type of *muti* is referred to as "*umuthi omhlope*" or "white *muti*". See Ashforth *Social Dynamics* 212.

298 Ashforth *Social Dynamics* 212, 213. Carstens *De Jure* 14-15 points out that, although traditional healers deny using human body parts to treat patients, an old traditional healer in the Northern Province was reported as saying that the fractured bones of a patient can be mended by using the bone of a person killed by a motor vehicle. This is done by burning one portion of the bone to ashes while grinding the other portion into powder. The powder and ashes are then mixed and rubbed into the injured area where cuts were made with a razor blade. Also see Anon 2003 http://app1.chinadaily.com.cn/star2003/0814/fe21-2.html.

299 This type of *muti* is referred to as "*umuthi omnyama*" or "black *muti*". See Ashforth *Social Dynamics* 212.

300 Ivey and Myers *S Afr J Psych* 57; Ashforth *Social Dynamics* 212.

301 Ivey and Myers *S Afr J Psych* 57; Ashforth *Social Dynamics* 212. Revisit par 4.2.1 and 4.2.2 for a general discussion of witchcraft.

302 See in this regard Ivey and Myers *S Afr J Psych* 57, Ashforth *Social Dynamics* 212-213 and Petrus *Acta Criminologica* 123, 124. Also see par 4.2.1 and 4.2.2 for a general discussion of witchcraft.

303 Nattrass *Social Dynamics* 162-163.

304 According to Nattrass *Social Dynamics* 163 the word "poisoning" in this context refers to witchcraft, because the notion of poison serves as the basis for

South Africa one the most common forms of bewitchment is "*idliso*".[306] *Idliso* refers to the poisoning of an intended victim by placing *muti* in his food or drink.[307] The victim can also be bewitched by placing *muti* where he is expected to walk, in which case he will absorb it into his body when he walks over or past the *muti*.[308] Other forms of bewitchment include placing *muti* near the intended victim by, for example, putting it in his bed, on the roof of his house or burying it in his backyard.[309] It is possible for the intended victim to protect himself from being bewitched by being careful about what he consumes from untrustworthy sources.[310] It is, however, more difficult to protect himself from the other modes of bewitchment above as they are mostly invisible to the intended victim.[311]

According to Ivey and Myers,[312] the bewitchment of an individual can be inferred from various symptoms such as:

> ... hallucinations, fainting daily at the same time and place, dreams or sightings of a naked person in one's room, public undressing, eating ex-

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interpreting the dangers involved with witchcraft. Also see Ashforth *Witchcraft, Violence and Democracy* 144.

305 For example, the term "*ufufunyana*" is used to refer to a person bewitched through malignant spirit possession. *Ufunfunyana* is usually prevalent in relationships marked by envy and resentment. The intended victim is bewitched by placing a concoction, consisting of soil and ants from graveyards, near the place where he is expected to walk past. The belief is that, when the victim passes the mixture he will be possessed by the spirits of the deceased and then react by, for example, weeping, screaming, being agitated, becoming anorexic and/or aggressive. For a further discussion on the manifestation of bewitchment by way of spirit possession see Ivey and Myers *S Afr J Psych* 57-58.

306 *Idliso* usually prevails in relationships involving envy and hostility. *Idliso* is also thought to be mainly practised by women seeing as though women, in their traditional role, have ready access to the intended victim's food. See Ivey and Myers *S Afr J Psych* 58.

307 Ashforth *Social Dynamics* 213; Mafico and Chavunduka *Zambezia* 132. It is believed that, if the victim does not receive the necessary treatment, he will most certainly die after consuming the *muti* or poison. See Ivey and Myers *S Afr J Psych* 58.

308 Ivey and Myers *S Afr J Psych* 57; Ashforth *Social Dynamics* 213; Mafico and Chavunduka *Zambezia* 132.

309 Ashforth *Social Dynamics* 213; Mafico and Chavunduka *Zambezia* 133.

310 Ashforth *Social Dynamics* 214.

311 Ashforth *Social Dynamics* 214.

312 Ivey and Myers *S Afr J Psych* 57.

> crement and other taboo substances, and voluntary confessions of evil doings.

These are, however, not the only symptoms. Other symptoms of bewitchment include:

> … 'word salad', uncontrolled weeping, listlessness, loss of appetite, suicide attempts, 'deranged' behavior, or odd muscular movements.[313]

Dramatic symptoms are not necessarily required to support a suspected bewitchment, because bewitchment can even be inferred from something as simple as "psychological distress involving the belief that witchcraft is being used against one".[314]

When *muti* is used to bewitch an individual, it usually consists of poisons as wells as:

> '… bodily excuviae, such as nail parings and hair clippings, or even the earth from footprints'.[315]

Alternatively, *muti* can consist of mixtures made from human urine or ground-up ants that fed on a piece of meat in a graveyard.[316] *Muti* is therefore made from various substances, especially those that are forbidden or that "exist on the periphery between the body and the external world".[317] If the *muti* contains no human body parts it has no sinister significance and therefore creates no problems.[318] It is, however, believed that *muti* made from the human tongue, eyes, heart and genitalia is the most powerful.[319]

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313 Ivey and Myers *S Afr J Psych* 57.
314 Ivey and Myers *S Afr J Psych* 57.
315 Ivey and Myers *S Afr J Psych* 57.
316 Ivey and Myers *S Afr J Psych* 57.
317 Ivey and Myers *S Afr J Psych* 57.
318 Carstens *De Jure* 12.
319 Other body parts include the ears, nose, lips eyelids, genitals and breasts. It is believed that each body part serves a specific purpose. Blood, for example, produces vitality, while the eye will either provide the consumer with farsightedness or result in the success of a business venture. The ear is believed to make people listen to a business owner's views, while breasts ensure fertility as well as customers' dependency on the business owner. This dependency is equated to that of an infant on the breast. Furthermore, a human skull is built into the foundation of a new building to ensure good business. Similarly, the use of a victim's hands, or parts thereof, in *muti* will ensure that many cli-

The body parts needed to manufacture this type of *muti* are obtained by carrying out a *muti*-murder.[320]

4.4.2 Muti-murders in theory and practice

A *muti*-murder is a ritual during which a victim, who meets certain requirements,[321] is killed in order to acquire the specific body parts needed for the making of *muti*.[322] The body parts must be removed while the victim is still alive, which usually results in the victim dying during or shortly after the removal as a result of pain, surgical shock or bleeding.[323]

A *muti*-murder therefore entails the killing of an innocent victim to obtain certain body parts from that victim.[324] It is at this point where the indigenous belief in *muti* and the South African criminal law come into conflict.

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ents are attracted to the business. As far as genitalia are concerned, it is believed that a young girl's vagina will result in productivity and wealth in any business venture, while a boy's testicles enhance sexual prowess and performance. See Carstens *De Jure* 13-14 in this regard. A perusal of reported case law and media reports on *muti*-murders concur that the body parts mentioned above are normally removed during a *muti*-murder. See in this regard *S v Modisadife* 1980 3 SA 860 (A), *S v Mavhungu* 1981 1 SA 56 (A) 61A-61B, 62D-62E, 63A, Sapa 2007 http://www.sowetanlive.co.za/sowetan/archive/2007/11/14/muti-killer_denied-bail, Dlamini 2009 http://www.sowetanlive.co.za/sowetan/archive/.../muti-mur-der-comes-to-city-suburb, Sapa 2010 http://www.iol.co.za/news/south-africa/man-jailed-for-witchcraft-murder-1.477536, Sapa 2011 http://www.iol.co.za/news/crime-courts/boy-s-ear-penis-cut-off-1.1203975, Anon 2011 http://www.sowetanlive.co.za/news/2011/.../police-on-trail-of-pos-sible-muti-serial-killer, Sapa 2011 http://www.iol.co.za/news/crime-courts/killer-grins-at-muti-murder-sentence-1.1187916.

320 Also referred to as a ritual murder or medicine murder. See Carstens *De Jure* 12, 15.

321 Like being a child or a virgin. The significance of the victim meeting certain requirements is to ensure the magical power of the *muti*. See Carstens *De Jure* 12.

322 Carstens *De Jure* 12; Petrus *Int J Sociol Anthropol* 1; *R v Fundakabi* 1948 3 SA 810 (A) 819.

323 Carstens *De Jure* 12-13. Instead of burying the body, it is disposed of by leaving it in a secluded place, dropping it from a cliff or throwing it into a river. See *S v Mavhungu* 1981 1 SA 56 (A) 61A-61B and Sapa 2010 http://www.iol.co.za/news/south-africa/man-jailed-for-witchcraft-murder-1.477536.

324 Carstens *De Jure* 12-13.

4.4.3 Muti-murders and the South African criminal law

Muti-murderers are usually prosecuted for the common law crime of murder[325] or attempted murder,[326] if the victim survives. The perpetrators of the *muti*-murder may, however, put forth evidence of their indigenous belief in *muti* and witchcraft in an attempt to persuade the court that their commission of the crime was motivated by their cultural beliefs and that they should therefore escape criminal liability. A criminal court then has to consider whether the killing of a human being due to an indigenous belief in *muti* can be a valid defence in terms of the criminal law or, at the very least, serve as a mitigating factor during sentencing.[327]

A perusal of South African case law dealing with *muti*-murders reveals that the South African courts have yet to accept an indigenous belief in *muti* as a defence excluding criminal liability.[328] The reason for the South African courts' reluctance in this regard is the fact that the criminal courts have always viewed *muti*-murders as "particularly heinous and calculated"[329] for various reasons: Firstly, *muti*-murders are "motivated by greed for personal and financial gain"[330] and secondly, it is "devoid of any real subjective belief in or fear of the supernatural".[331] As a result, *muti*-murders are also seldom able to rely on their indigenous belief in *muti* as an extenuating circum-

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325 This is inferred from Carstens *De Jure* 16. See par 4.2.4, *S v Ndlovu* 1984 3 SA 23 (A) 26G-26H; Burchell *Principles of Criminal Law* 667; Kemp *et al Criminal law* 271 for a definition of murder.

326 Revisit par 4.2.4, *S v Ndlovu* 1984 3 SA 23 (A) 26H-27B, *S v Moloto* 1982 1 SA 844 (A) 850A and Kemp *et al Criminal law* 274 for a general discussion of attempted murder.

327 See par 3.4.4.

328 See the discussion of *S v Modisadife* 1980 3 SA 860 (A) and *S v Mavhungu* 1981 1 SA 56 (A) below.

329 Carstens *De Jure* 16. In this regard see, for example, the cases of *S v Modisadife* 1980 3 SA 860 (A), *S v Mavhungu* 1981 1 SA 56 (A) 69 and the discussion by Ludsin *Berkeley J Int'l L* 96.

330 See, for example, *S v Mavhungu* 1981 1 SA 56 (A) 63C-63D, 69A. Also see the following media reports: Sapa 2010 http://www.iol.co.za/news/south-africa/man-jailed-for-witchcraft-murder-1.477536, Sapa 2011 http://www.iol.co.za/news/crime-courts/killer-grins-at-muti-murder-sentence-1.1187916.

331 Carstens *De Jure* 16; Ludsin *Berkeley J Int'l L* 96.

stance to mitigate punishment.[332] To illustrate, in the case of *S v Modisadife*,[333] the court was unwilling to accept a belief in witchcraft[334] as a mitigating factor for an appellant who, at the request of his brother, murdered his brother's eleven-year-old stepdaughter in order to acquire body parts from her for medicine that would apparently protect him from harm. The evidence suggested that, although the appellant believed in witchcraft, his belief was not "intense and urgent".[335] The court dismissed the appeal and held that:

> … in the times in which we live, the belief in witchcraft which the appellant apparently had, a fear which had nothing to do with the deceased and also was not immediate and which he could obviate by removing himself from the neighbourhood, did not make his deed any less reprehensible or reproachable.[336]

In another case, *S v Mavhungu*,[337] the appellant assisted in the killing of the deceased for the sake of acquiring body parts to be used in medicine which would make him (appellant) more successful in his work. Trollip JA,[338] however, refused to accept a belief in witchcraft as a mitigating circumstance, because in his opinion the appellant's participation in the murder was purely for his own selfish, personal benefit.

4.4.4 Muti-murders and the cultural defence

As mentioned above, the South African courts have thus far refused to accept that the indigeous belief in *muti* can serve as a defence excluding criminal liability.[339] However, as is the case with the indigenous belief in

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332 Carstens *De Jure* 16; *S v Modisadife* 1980 3 SA 860 (A) 863; *S v Mavhungu* 1981 1 SA 56 (A) 63C-63D. The possibility of *muti*-murderers relying on extenuating circumstances is further dealt with in Chapter 6.

333 1980 3 SA 860 (A) 860, 861F; Ludsin *Berkeley J Int'l L* 96.

334 See par 4.4.1 where it was pointed out that the indigenous belief in *muti* and witchcraft overlap.

335 *S v Modisadife* 1980 3 SA 860 (A) 860, 862H.

336 *S v Modisadife* 1980 3 SA 860 (A) 860, 861C-861D, 863D-863E. Also see Ludsin *Berkeley J Int'l L* 96.

337 1981 1 SA 56 (A) 61A-61B.

338 *S v Mavhungu* 1981 1 SA 56 (A) 63C-63D, 69A.

339 See par 4.4.3.

witchcraft discussed earlier,[340] the case law dealing with the indigenous belief in *muti* all predate the enactment of the Constitution.[341] Therefore, the question that now arises is whether the constitutional right to participate in a cultural life of one's choosing is wide enough to include the killing of another human being. Differently put, can the killing of another human being as part of an accused's cultural life be a valid cultural defence in terms of the South African criminal law? This matter is discussed further in Chapter 7.[342]

4.5 Necklacing[343]

Another example of the conflict that currently exists between the South African common law and African customary law within the context of the criminal law involves the phenomenon of necklacing. Necklacing has been referred to as "probably … the most brutalizing crime in South Africa".[344] Although necklacing *per se* is not a custom of any particular indigenous group in South Africa, indigenous people have been using necklacing exclusively as a tool to bring about social change and resolve conflict ever since its inception in South Africa in the mid-1980s.[345] It is therefore submitted that, considering the broad definitions afforded to the notion of culture in the previous Chapter,[346] necklacing has become so popular among South African indigenous groups that it forms part of their "way of life" and therefore falls within the scope of a cultural defence.[347] In support of this contention, an overview of the conflict situations that arise when the perpetrators of necklacing are brought before South African criminal courts and then attempt to raise a cultural defence in order to escape criminal liability

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340 See par 4.2.
341 See par 4.4.3.
342 See par 7.3.
343 Also referred to as "*itayari*". See Carstens *De Jure* 16.
344 Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 147, 153.
345 See par 4.5.1.
346 See par 3.3.2.
347 See par 4.5.2.

is provided below.[348] However, before turning towards the interplay between a cultural defence and necklacing, the discussion that follows is intended to shed some light on the dynamics of the brutal practice that is necklacing.[349]

4.5.1 Necklacing in general

Although the act of necklacing has its origins in Angola, it was used for the first time in South Africa during the 1980s and 1990s as an "instrument of terror" to bring about political change.[350] Although there has been a dramatic drop in politically motivated killings,[351] necklacing is still used today in witch-killings,[352] faction fights and kangaroo courts.[353]

4.5.2 Necklacing in theory and practice

Necklacing has been described as an "indigenous punishment"[354] whereby a tyre,[355] filled with petrol or paraffin, is placed around a victim's neck and

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348 See par 4.5.3.

349 See par 4.5.1 and 4.5.2.

350 The first recorded incident of necklacing took place in Uitenhage in the Eastern Cape in 1985. See Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153 and Moosage *Kronos* 137 in this regard. For statistics on the prevalence of necklacing during the 1980's see Moosage *Kronos* 137 and for statistics during the 1990's see Carstens *De Jure* 17.

351 Carstens *De Jure* 17; Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 155.

352 See par 4.2.3 where witch-killings are discussed in detail.

353 Also referred to as a "base", a kangaroo court is nothing more than a facility or a building where comrades can conduct their activities. Generally the operations of the court included discussing problems in the community and carrying out interrogations. The court also had a clear hierarchy and labour division. See in this regard Carstens *De Jure* 17 and Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153-154.

354 The use of the term "indigenous punishment" here should not be confused with the concept of punishment in terms of the common law or customary law described in par 2.3. "Indigenous punishment" is the term used by Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 155 to describe the consequences that met individuals who came in the way of the liberation struggle during the height of apartheid.

355 Because it is difficult to set a tyre on fire, it has to be prepared in a special way so as to ensure that a) it burns and b) it burns until the victim is dead. If the fire went out too soon the perpetrators would have to restart the entire process. Therefore, in order to prevent the tyre from going out, they stuffed it

then ignited.[356] The victim's hands are often cut off with a machete or tied behind his back with wire or rope.[357] The victim himself can even be doused with or forced to drink petrol or paraffin before he is set alight.[358] Some victims can also be killed by wiring the doors to their dwellings shut and setting fire to the dwelling leaving the victims inside to burn to death.[359] In some cases the victims are merely burned or stabbed to death without using the necklacing procedure described above.[360] Before being put to death the victims of necklacing are forcefully apprehended, violently assaulted[361] and subjected to severe humiliation by being sworn at in the presence of their family, loved ones and even the general public.[362]

As mentioned earlier, necklacing was initially used as a means to rebel against apartheid by eliminating police informants[363] in the fight for democ-

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full of cloth which was also doused with petrol or paraffin. The victim eventually died due to the combination of the burning tyre and asphyxiation. See Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 164.

356 Carstens *De Jure* 16; Moosage *Kronos* 137; Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 164.

357 Carstens *De Jure* 16-17.

358 Carstens *De Jure* 17; Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 164.

359 This is usually done at night and only if the victim is the owner of the house. If the house belonged to somebody else, such as the victim's parents, the house would be left alone. See Carstens *De Jure* 17 and Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 155 in this regard. The method described here is also the one used to kill witches. See par 4.2.3 in this regard.

360 Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 155.

361 With anything from stones, pangas or iron rods so as to immobilize them for the necklacing. See Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 160, 162-163.

362 Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 160. In most cases the relatives of the victims are aware of the fate awaiting their loved ones because of rumours in the community.

363 Also referred to as an "*impimpi*" or a "sell-out". Being an *impimpi* or sell-out was considered to be the ultimate crime during the struggle. The removal of these people through necklacing simultaneously served the purpose of instilling widespread fear among the residents of the townships. This fear either deterred the residents from committing other offences (best case scenario) or caused them to flee the townships. See Carstens *De Jure* 329, Moosage *Kronos* 137 and Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 155.

racy.[364] However, from the discussion of Nomoyi and Schurink,[365] it seems as though the act of necklacing quickly acquired a life of its own since its inception in South Africa. Shortly after being introduced to the indigenous communities in the Eastern Cape Province in the 1980s, it was not long until the practice was "hijacked" and used in trivial matters such as those involving petty jealousy, mere dislike of a person and perceptions of negative attitudes towards other people.[366]

Today, in post-apartheid South Africa, this brutal act continues to exist, mostly as the preferred method for killing witches.[367] During 2008, however, necklacing once again came to the fore in South Africa in situations of group violence that was described as being similar to those that dominated the apartheid era. In 2008 a wave of xenophobic[368] attacks against foreigners in South Africa, particularly those from Zimbabwe, resulted in the death of 62 people.[369] One such victim was Ernesto Nhamuave, who was at-

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364 See par 3.4 as well as Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 155, 158. Nomoyi and Schurink also point out that, during the struggle for democracy even comrades could become the unfortunate victims of necklacing. Comrades were forbidden to provide the police with information regarding the liberation struggle's activities. If, however, comrades would get wind of someone who defied this rule that person's defiance would be punished through necklacing.

365 Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 155.

366 Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153, 155.

367 See par 430. Also see Carstens *De Jure* 328, Moosage *Kronos* 137 and Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 155.

368 Xenophobia can be defined as an "… unreasonable fear, distrust, or hatred of strangers, foreigners, or anything perceived as foreign or different". See Anon 2011 http://www.xenophobia.org.za/.

369 Although the attacks primarily targeted foreigners living in some of South Africa's poorest urban areas, it also had an impact on foreigners who acquired citizenship by virtue of specialized skills (medical doctors, academics etc) or those with legitimate permits to either work or study in the country. The sad reality is that a great number of South Africans, and not just those living in the poorest areas, are opposed to the idea of large numbers of foreigners from other African countries in South Africa. South Africans blame these foreigners for many of the country's problems, such as the high unemployment rate and crime. It was this "blaming" that sparked the spate of xenophobic attacks in 2008. Bevan 2008 http://www.dailymail.co.uk/news/article-1024858/The-tale-flaming-man-picture-woke-world-South-Africas-xenophobia.html; LeGendre

tacked and killed by an angry mob that brutally beat him before eventually setting him on fire while he was still alive.[370]

It is, of course, not surprising that the tradition of necklacing is being continued in South Africa, for as Nyar[371] explains:

> A culture of violence is so firmly embedded within the fabric of society that it is still perceived as a legitimate means of conflict resolution in South Africa.

In light of Nyar's explanation and considering the vast array of definitions afforded to the notion of culture,[372] it is the author's submission that necklacing can today be viewed as a cultural practice for purposes of a cultural defence. Culture, in it's most simplest form, can be defined as simply "ways of living together".[373] From the discussion above it is clear that necklacing has developed as part of the way of life of the indigenous people in South Africa and therefore necklacing can be viewed as part of their cultural life.

As was shown in the previous Chapter,[374] the fact that a particular cultural practice is not a "good" practice does not necessarily mean that it cannot be considered to be culture. In fact, culture as such is not necessarily always good, but it nevertheless remains to be culture. At the same time, it should be remembered that the fact that a particular practice is considered to be part of a particular culture does not exempt that practice, or even culture, from scrutiny. The last-mentioned aspect is further explored in Chapter 7 where it is shown that, although every individual in South Africa

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2011 http:// www.humanrightsfirst.org/2011/06/03/u-n-expert-highlights-xenophobia-in-south-africa/; Anon 2010 http://www.atlanticphilanthropies.org/learning/ report-south-african-civil-society-and-xenophobia.

370 Bevan 2008 http://www.dailymail.co.uk/news/article-1024858/The-tale-flaming-man-picture-woke-world-South-Africas-xenophobia.html.

371 Nyar *GCRO* 1.

372 See par 4.3.2 for an overview of the various definitions afforded to the term "culture".

373 See the preamble to the 2002 UNESCO Universal Declaration on Cultural Diversity as well as par 3.3.2.

374 See Chapter 3.

has the right to practice his culture freely,[375] that right is always subject to the Constitution, particularly the Bill of Rights as a whole, and can even be limited in terms of section 36 of the Constitution.[376] The limitation placed on the free exercise of the constitutional right to freedom of culture is especially important in the context of necklacing because, as is shown below, the phenomenon of necklacing is in clear conflict with the South African criminal law.[377]

4.5.3 Necklacing and the South African criminal law

The unfortunate victims of necklacing are executed without being afforded a fair trial[378] in an official court of law[379] before an impartial judge. Instead, these victims are tried in kangaroo courts[380] by "comrades"[381] before being necklaced.[382] In these so-called "courts" different interrogation methods[383] are used before a decision regarding the guilt or innocence of the accused

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375 See ss 15, 30 and 31 of the Constitution discussed in par 7.2.1.
376 See par 7.3.
377 See par 4.5.3.
378 The right to a fair trial is a fundamental human right entrenched in section 35(3) of the Constitution. This right includes, *inter alia*, the accused's right to be informed of the charge against him with sufficient detail to answer to it, the right to a public trial before an ordinary court, the right to be presumed innocent and the right to adduce and challenge evidence.
379 A list of the official courts in South Africa can be found in section 166 of the Constitution, which includes the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates' Courts and courts established or recognized in terms of an Act of Parliament.
380 For an explanation of the term "kangaroo courts" refer to footnote 360 as wells as Carstens *De Jure* 17 and Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153-154.
381 A "comrade", also called a "*amaqabane*" or "*amabutho*", refers to the freedom fighters who led the township youth during the struggle for democracy. The number of comrades operating from a base is between 28 and 40. The number of comrades assigned to carry out a necklacing is determined by the number of executions scheduled to take place on a particular day. It is therefore common practice for a whole base to take part in a necklacing if it is the only one scheduled for a particular day. Local sell-outs are generally executed by local comrades, while comrades from other, faraway communities would be called in to assist with the necklacing of well-respected locals or those who were not regarded as being ‘easy meat’. See Carstens *De Jure* 17 and Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 153-154 in this regard.
382 Carstens *De Jure* 17.
383 See Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 161.

is made.[384] Normally, those accused of some or other transgression would plead innocent to all allegations against them,[385] but later plead guilty just to bring an end to their torture.[386] In fact, the possibility of an innocent verdict being given is quite slim as the comrades would savagely and gruesomely beat the accused in order to force a confession out of him.[387]

In terms of the South African criminal law, necklacing leads to the commission of the common law crimes of murder,[388] or, if the victim survives, attempted murder,[389] common assault[390] or assault with the intent to do grievous bodily harm.[391] The perpetrators of this cruel practice can therefore be charged with any of these common law offences.

Necklacing, however, is usually carried out by mobs and not individuals.[392] It might therefore be possible that some individuals did not actively partici-

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384 This, however, is not always the case. Sometimes suspects would be cross-questioned in their homes and afterwards taken directly to the place where they were to be necklaced. In the past suspects were even dragged from under their beds or wrenched from their family members before being interrogated and necklaced. Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 161.

385 Some suspects may even beg for mercy or try to "buy their innocence" by offering their captors money or possessions. Other suspects even attempt to escape, but their efforts would be in vain. Another attempt made by suspects includes apologising to the comrades in the hope that they would be merciful and spare their (suspects') lives. See Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 162.

386 Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 162.

387 Suspects can even be tortured to confess by burning them with cigarettes under their feet. See Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 161-162. Of course, to force an accused also constitutes a clear violation of that accused's rights in terms of section 35 of the Constitution. Section 35(1)(c) provides that no detained accused may be compelled to make any confession or admission.

388 Carstens *De Jure* 17. For a definition of murder see par 3.2.4 as well as *S v Ndlovu* 1984 3 SA 23 (A) 26G-26H; Burchell *Principles of Criminal Law* 667; Kemp *et al Criminal law* 271.

389 Carstens *De Jure* 17. For a general discussion on attempted murder see footnote 166, *S v Ndlovu* 1984 3 SA 23 (A) 26H-27B, *S v Moloto* 1982 1 SA 844 (A) 850A and Kemp *et al Criminal law* 274.

390 Revisit par 4.2.4 for a definition of assault.

391 Revisit par 4.2.4 where this common law crime is discussed in more detail.

392 Carstens *De Jure* 18.

pate in the killing of the victim.[393] Unfortunately for those individuals, they are not exempted from criminal liability and can still be charged with the crimes above due to the common purpose rule.[394] In laymen's terms the common purpose rule can be understood as a set of common law rules that holds accountable those individuals who participate in the commission of a crime with others.[395] In the case of *S v Motaung*[396] the common purpose rule was defined simply as a "purpose shared by two or more persons who act in concert towards the accomplishment of a common aim". In the case of *S v Thebus*,[397] Moseneke J referred to the following definition of the common purpose rule:

> Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for 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.

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393 In fact, as Nomoyi and Schurink "Ukunxityiswa Kwempimpi Itayari Njengotshaba Lomzabalazo" 158-159 points out, very few members of the communities actively took part in the necklacings during the 1980's and 1990's. These member's participation rather extended to providing the comrades with the necessary resources to carry out the necklacings or, alternatively, with the means to acquire such resources. Business people in the community would, for example, provide money and commodities such as petrol or transport, while other resources, such as tyres, wire, cloth and paper, would be provided by other members of the community. Also see Carstens *De Jure* 18.

394 Carstens *De Jure* 18.

395 *S v Thebus* 2003 6 SA 505 (CC) 521A. For a comprehensive discussion on the common purpose rule see Kemp *et al Criminal law* 234-244.

396 1990 4 SA 485 (A) 485F-485G. The deceased in this case was not only suspected of being a police informer but also the lover of a police sergeant. On the day in question, the funeral service of four young men, believed to be shot by the police, was in progress when the crowd set after and caught the deceased. The deceased was subsequently surrounded by a "bloodthirsty and violent mob" who launched a savage assault upon her. Although the deceased was eventually battered to death, she was also set alight by the mob.

397 *S v Thebus* 2003 6 SA 505 (CC) 521B-521C. This case was an appeal against the judgment and orders of the Supreme Court of Appeal. The case arose from the actions of a group of protesting residents who took action against the reputed drug dealers in their residential area. However, during a confrontation with one of the drug dealers, one innocent bystanders was killed and two others were wounded. The appellants were subsequently convicted of murder and attempted murder based on the doctrine of common purpose.

Snyman,[398] a scholar in the field of criminal law, also afforded a definition to the common purpose rule by describing the "essence" of the rule as:

> … two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.

Before an accused can be held criminally liable by virtue of the common purpose rule the accused must have shown his intention to "make common cause with those perpetrating the assault" by performing some or other positive act.[399] Put differently, the accused must have actively associated himself with the conduct of the other perpetrators in the group and all of them must have had the required intention in respect of the unlawful consequence before it can be said that a particular accused shared a common purpose with the other perpetrators.[400]

The requirements above are often worded in terms that relate to consequence crimes such as murder, robbery, malicious damage to property and arson in the South African law.[401] Ordinarily a causal *nexus* between an accused's conduct and the criminal consequence is required in order to establish criminal liability.[402] The common purpose rule, however, does

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398 Snyman *Criminal Law* 4th ed 261. Also see the cases of *S v Safatsa* 1988 1 SA 868 (A) at 894, 896, 901, *S v Mgedezi* 1989 1 SA 687 (A) 688D-688E and *S v Banda* 1990 3 SA 466 (BG) 501.

399 *S v Thebus* 2003 6 SA 505 (CC) 527D-527E; *S v Banda* 1990 3 SA 466 (BG) 501H-501I; *S v Motaung* 1990 4 SA 485 (A) 486G, 487C-487D; *S v Mgedezi* 1989 1 SA 687 (A) 706A-706B; Whiting *SALJ* 39; Kemp *et al Criminal law* 236. Kemp also point out that, there is no closed list on the type of positive acts sufficient to establish an act of association. According to the authors even a minor act, such as lending moral support to the actual perpetrator or keeping watch or standing by to lend assistance to the perpetrator, would be sufficient to constitute an act of association.

400 *S v Thebus* 2003 6 SA 505 (CC) 527D-527E; *S v Banda* 1990 3 SA 466 (BG) 501I; Whiting *SALJ* 39; Jordaan *SACJ* 52. The concept of *mens rea* is discussed in detail in Chapter 6.

401 *S v Thebus* 2003 6 SA 505 (CC) 521C-521D, 527F. In practice, however, the rule is not only confined to the crime of murder. The doctrine also finds application in crimes such as treason, public violence, robbery, housebreaking, malicious damage to property, arson, the unlawful possession of a firearm, assault, theft and fraud.

402 *S v Thebus* 2003 6 SA 505 (CC) 508A-508B, 527D. For a discussion on the requirements for factual and legal causation as well as the theories of causa-

away with the causation requirement.[403] The reason being that, with consequence crimes it is often difficult to prove that there is a causal link between the act of each person or a particular person and the criminal consequences of that act.[404] What is more, in the view of Moseneke J in the case of *S v Thebus*,[405] the requirement of causation in such cases would:

> ... have rendered nugatory and ineffectual the object of the criminal norm of common purpose and made prosecution of collaborative criminal enterprises intractable and ineffectual.

Furthermore, the phenomenon of serious crimes such as necklacing committed by individuals acting in concert remains a significant societal scourge.[406] Therefore, the object of the common purpose rule, namely to satisfy the social need for control over crimes committed in the course of joint enterprises through the criminalisation thereof, serves an important purpose when it comes to acts such as necklacing.[407] The common purpose rule absolves the State from having to prove all the requirements of unlawful conduct on the part of each of the participants.[408] To illustrate, in a case of murder, the State does not need to prove that each and every participant contributed towards the victim's death.[409] It is not even necessary for the State to identify the participant who actually killed the deceased.[410] The only thing that the State has to prove is that one of the participants killed the deceased and that the rest shared a common purpose with him to commit the crime.[411] The conduct of each perpetrator is

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tion see *S v Daniëls* 1983 3 SA 275 (A) 331C-331D and *S v Mokgethi* 1990 1 SA 32 (A) 39.

403 *S v Thebus* 2003 6 SA 505 (CC) 508A-508B, 527D-527E.

404 *S v Thebus* 2003 6 SA 505 (CC) 508C-508D, 527F.

405 *S v Thebus* 2003 6 SA 505 (CC) 508D, 527F-527G. Revisit footnote 404 for a brief description of the facts of this case.

406 *S v Thebus* 2003 6 SA 505 (CC) 508C, 527E-527F.

407 *S v Thebus* 2003 6 SA 505 (CC) 508C-508C; 527E.

408 Kemp *et al Criminal law* 234; Burchell and Milton *Principles of Criminal Law* 155, 574.

409 Kemp *et al Criminal law* 234.

410 Kemp *et al Criminal law* 234.

411 Kemp *et al Criminal law* 234-235.

therefore imputed to all the other participants,[412] and as long as it can be established that each of those participants actively and intentionally participated in the conduct of the perpetrators, they would all be guilty of the offence.[413]

4.5.4 Necklacing and the cultural defence

As already opined earlier in the discussion,[414] necklacing has developed as a cultural practice between certain indigenous communities. When the perpetrators of necklacing are brought before a criminal court, they may attempt to justify their behaviour by putting forth evidence of their belief in, for example, witchcraft to try and persuade the court that they had no choice other than to kill the victim in order to prevent the deceased from either harming them or the community. The criminal courts are then confronted with the question whether the killing of another human being purely because of an indigenous belief that he was a practitioner of witchcraft can serve as a valid defence in the South African criminal law. The answer to this question seems self-evident considering the fact that witch-killing is outlawed in terms of the *Witchcraft Suppression Act*.[415] However, earlier it was shown that the Act has not been very effective in curbing the prevalence of witch-killings in South Africa.[416] Therefore, the question whether necklacing can serve as a defence for the killing of alleged witches still remains a moot point in the South African criminal law. In this regard, the question can arise whether the constitutional right to the freedom of culture and cultural practices can justify the killing of witches through the phenomenon of necklacing. This question is further explored in Chapter 7.[417]

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412 Kemp *et al Criminal law* 235; Burchell and Milton *Principles of Criminal Law* 155, 572, 574.
413 *S v Thebus* 2003 6 SA 505 (CC) 508B, 527E-527E; Burchell and Milton *Principles of Criminal Law* 574.
414 See par 4.5.2.
415 See par 4.2.5.
416 See par 4.2.5.
417 See par 7.3.

4.6 Ukuthwala

Another example of cases where the South African criminal courts had to deal with indigenous customs leading to the commission of common law crimes are those related to the practice of *ukuthwala* in preparation for a customary law marriage.[418] Although *ukuthwala* is a widespread practice,[419] it is generally associated with the Nguni[420] cultures in the Eastern and South-Eastern parts of South Africa.[421] In these communities a bride is obligated to go and live with the groom at his place of residence after marriage.[422] Therefore, in order to overcome the physical and social distance between the two families, it is necessary that the marital relationship be forged through careful negotiation.[423] This, however, does not happen in all instances. Instead, women are forced into marriage through the practice of *ukuthwala* which, in short, "sanctions the abduction of women for the purpose of marriage".[424]

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418 *Ukuthwala* is also referred to as "baleka" or "ukutheleka". See in this regard Rautenbach and Matthee *JLP* 118, Bennett *Customary Law* 212, Olivier *et al Privaatreg van die Suid-Afrikaanse Bantoesprekendes* 17-19, 352-358, Labuschagne and Schoeman *JJS* 33, Labuschagne *SACJ* 472.

419 See Mwambene and Sloth-Nielsen *J Fam L & Prac* 6 where it is also pointed out that the practice "enjoys popular support in the areas where it is still practiced".

420 The Nguni people of South Africa are made up of the Zulu, Xhosa, Ndebele, Thembu, Bomvana, Pondo and Bhaca. See Olivier *et al* "Indigenous Law" par 89 and Anon 2012 http://www.southafrica.com/blog/the-nguni-people-of-south-africa.

421 Bennett *U Botswana LJ* 6; Dukada *De Rebus* 387; Rautenbach and Matthee *JLP* 118-119; Maluleke *Justice Today* 1; Kruger and Oosthuizen *PELJ* 286.

422 Bennett *U Botswana LJ* 6.

423 Bennett *U Botswana LJ* 6.

424 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf. Also see Kruger and Oosthuizen *PELJ* 286 and Koyana and Bekker *De Jure* 139.

4.6.1 Ukuthwala in general

In recent years the practice of *ukuthwala* has received a lot of negative publicity due to numerous complaints being recorded in the media.[425] In 2009, for example, it was reported that:

> '... more than 20 Eastern Cape girls are forced to drop out of school every month to follow the traditional custom of ukuthwala (forced marriage)'.[426]

In 2011 there was another report that the community of KwaCele, near Lusikisiki, had agreed to end the practice of *ukuthwala* in exchange for criminal charges related to the custom against members of the community be dropped.[427] In 2011 a police task team had also been set up to investigate the abduction of young women in KwaZulu-Natal.[428] This came after a complaint by a school principal that children were afraid of going to school due to abductions.[429] According to the principal, the parents of the abducted children were either part of the process or chose to deal with the matter themselves, without involving the police.[430] One girl in particular had been abducted twice and in both instances her parents did not act at all.[431] In response to the scourge of *ukuthwala*-related incidents, Chief Mwelo Nokonyana, chairman of the Congress of Traditional Leaders of South Africa, criticised the practice by referring to it as:

> ... an old custom that was now being wrongly practised in several parts of the eastern Transkei.

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425 Mwambene and Sloth-Nielsen *J Fam L & Prac* 5.
426 Mwambene and Sloth-Nielsen *J Fam L & Prac* 5.
427 Sapa 2011 http://www.timeslive.co.za/local/2011/03/23/community-to-stop-ukuthwala.
428 Sapa 2011 http://www.timeslive.co.za/local/2011/02/03/police-to-probe-ukuthwala-practice.
429 Sapa 2011 http://www.timeslive.co.za/local/2011/02/03/police-to-probe-ukuthwala-practice.
430 Sapa 2011 http://www.timeslive.co.za/local/2011/02/03/police-to-probe-ukuthwala-practice.
431 Sapa 2011 http://www.timeslive.co.za/local/2011/02/03/police-to-probe-ukuthwala-practice.

In light of the above, it is not surprising that the practice of *ukuthwala* caught the attention of the South African government, which is committed to protecting the human rights of girls and young women.[432] In accordance with this commitment, the Minister of Justice and Constitutional Development issued a formal mandate to the South African Law Reform Commission to investigate the practice of *ukuthwala* as it disproportionately affects girls below the age of 18.[433] The South African Law Reform Commission requested the Gender Directorate in the Department of Justice and Constitutional Development to investigate the practice of *ukuthwala*.[434]

In 2009 the South African Law Reform Commission hosted a roundtable discussion on the practice of *ukuthwala* during which the input from various institutions, organisations, national, provincial and local government, non-governmental organisations and representatives of professional bodies was gathered in an attempt to get more insight into the practice.[435] The South African Law Reform Commission also conducted a cursory review of the South African law to determine whether adequate protection was being provided to the young girls and women who could potentially fall victim to *ukuthwala*.[436] The South African Law Reform Commission's findings showed that, to a certain extent, there are indeed laws and statutes in place to protect young girls and women against harmful cultural practic-

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432 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_uku-thwala.pdf.

433 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_uku-thwala.pdf.

434 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_uku-thwala.pdf.

435 South African Law Reform Commission *Thirty Eighth Annual Report* 45; Mwambene and Sloth-Nielsen *J Fam L & Prac* 5. For a brief overview of the input provided by these stakeholders see Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_uku-thwala.pdf.

436 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_uku-thwala.pdf.

es.[437] Two of these statutes include the *Recognition of Customary Marriages Act*[438] and the *Children's Act*[439] which are both aimed at ensuring that:

> … marriages, including customary marriages, are entered into only with the free and full consent of the intending spouses; that cultural practices affecting the welfare, dignity, normal growth and development of children are eliminated; and that harmful practices that negatively affect the rights of women are completely eradicated as required by numerous conventions acceded to by South Africa.[440]

However, the problem with the legislation above is that they do not make specific provision for the problems surrounding *ukuthwala*, and their provisions are therefore rendered nugatory when it comes to this practice.[441] What is more, the South African Law Reform Commission found that there is no single piece of legislation in South Africa that deals exclusively and comprehensively with the problem of *ukuthwala*.[442] Also, there is no piece of legislation outlining the responsibilities of, for example, the police and health professionals and the obligations of members of society who come into contact with the women affected or threatened by this practice.[443] This, according to the South African Law Reform Commission,[444] exacerbates the problems associated with *ukuthwala*, because to simply charge the perpetrators of *ukuthwala* with a variety of criminal offences[445] is proving to be a great challenge for the police and prosecuting authority in South Africa.

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437 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf.
438 120 of 1998.
439 38 of 2005.
440 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf.
441 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf.
442 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf.
443 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf.
444 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf.
445 These offences are discussed in par 4.6.3.

Although the South African Law Reform Commission acknowledges that African customary law and its associated practices play a pivotal role in the lives of a very large section of the South African population, it also recognises that African customary law must operate within the broad principles of the Constitution.[446] Therefore, on 2 December 2010 the Minister approved the inclusion of "*Project 138 – The Practice of Ukuthwala*" in the South African Law Reform Commission's programme.[447] The aim of this project is for the South African Law Reform Commission to publish a discussion paper containing preliminary law reform proposals aimed at eradicating the scourge of *ukuthwala*-related marriages.[448] Unfortunately, upon finalising this thesis, the discussion paper had not been finalised yet and was therefore not available for perusal and inclusion by the author.[449]

4.6.2 Ukuthwala in theory and practice

Traditionally, marriage negotiations are initiated by way of an intermediary who bears a formal proposal by the groom's family to the family of the prospective wife.[450] If negotiations are initiated by the bride or her family the process is considered to be "irregular".[451] Another form of such an

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446 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_uku-thwala.pdf. The influence of the Constitution on the cultural practices referred to in this Chapter is dealt with in paras 7.2.2.1-7.2.2.4.

447 South African Law Reform Commission *Thirty Eighth Annual Report* 45.

448 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_uku-thwala.pdf.

449 For the progress of the South African Law Reform Commission in this regard see Department of Justice and Constitutional Development 2011 http://www.justice.gov.za/salrc/progress.htm and South African Law Reform Commission *Thirty Eighth Annual Report* 45.

450 Bennett *U Botswana LJ* 6; Olivier *et al* "Indigenous Law" par 89. To show the prospective wife's family how serious their intentions are, the groom's family would also send gifts along with the proposal.

451 Bennett *U Botswana LJ* 6-7; Olivier *et al* "Indigenous Law" par 89. This 'irregular' situation is also referred to as a 'reverse proposal'. One example of such a 'reverse proposal' is where the girl's family initiates negotiations with the prospective husband's family. The girl's family would resort to such a step if, for example, she is of a high rank, but for some or other reason, does not attract any suitors. Another example is where the girl, in collaboration with her suitor, takes the initiative due to her situation requiring urgent action to be taken. This may be the case where the girl is, for example, promised in marriage to one man, but had fallen in love with another. Then, in order to avoid

irregular procedure is *ukuthwala*.[452] Maluleke[453] defines the practice of *ukuthwala*[454] as:

> … a form of abduction that involves kidnapping a young girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations.

The main aim of *ukuthwala* is to force the girl's family to enter into negotiations for the conclusion of a customary marriage.[455] *Ukuthwala* is therefore simply a means of achieving a customary marriage and is not a customary marriage or an engagement in itself.[456]

It is often difficult to pin down the exact requirements for a valid *ukuthwala* as different communities set different requirements for and attach different consequences to the custom.[457] The Xhosa[458] communities, for example, distinguish between three forms of *ukuthwala*.[459] The first form[460] entails an agreement between the man and the girl that the man will carry her off to

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the arranged marriage, the girl would run away to her preferred suitor after dark. If the family of the preferred suitor then decide to accept the girl, they could initiate the process for a regular proposal.

452 Bennett *U Botswana LJ* 7; Maluleke *Justice Today* 1; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6; Olivier *et al* "Indigenous Law" par 89.

453 Maluleke *Justice Today* 1. Similar definitions can be found in Koyana and Bekker *De Jure* 139, Bennett *U Botswana LJ* 7, Rautenbach and Matthee *JLP* 119, Mwambene and Sloth-Nielsen *J Fam L & Prac* 6 and Olivier *et al* "Indigenous Law" par 89. For practical examples of *ukuthwala* scenarios see the facts in the cases of *R v Njova* 1906 20 EDC 71, *Ncedani v R* 1908 22 EDC 243, *R v Swartbooi* 1916 EDL 170, *R v Mane* 1948 1 All SA 128 (E) and *R v Sita* 1954 4 SA 20 (E). The various offences related to the practice of *ukuthwala* are dealt with in par 4.6.3.

454 Which means "to carry". See Mwambene and Sloth-Nielsen *J Fam L & Prac* 6.

455 Mwambene and Sloth-Nielsen *J Fam L & Prac* 6; Koyana and Bekker *De Jure* 139; Bennett *U Botswana LJ* 7; Rautenbach and Matthee *JLP* 119; Olivier *et al* "Indigenous Law" par 89.

456 Mwambene and Sloth-Nielsen *J Fam L & Prac* 6, 7.

457 Rautenbach and Matthee *JLP* 119.

458 The Xhosas are not only the forefathers of *ukuthwala*, are also the cultural group who predominantly practice it. See Mwambene and Sloth-Nielsen *J Fam L & Prac* 5.

459 Labuschagne and Schoeman *JJS* 34-35; Rautenbach and Matthee *JLP* 119.

460 Referred to as "*ukuthwala onkungenamvumelano"* or "*ukugcagca".* Mwambene and Sloth-Nielsen *J Fam L & Prac* 7 and Olivier *et al* "Indigenous Law" par 89 also refer to this type of *ukuthwala* as a form of elopement.

his father's or guardian's homestead.[461] Normally, in a case like this, the carrying off takes place with the permission of the man's father or guardian, but without that of the girl's father or guardian.[462] A compensation head of cattle[463] must then be paid by the prospective husband to the prospective wife's father or guardian.[464] The compensation head of cattle, however, does not form part of any *lobolo* negotiations that may ensue afterwards.[465]

With the second form of *ukuthwala*,[466] both families consent to the girl being carried off, while the girl's permission is lacking.[467] In this case the girl is usually unaware of the plot between the two families and should she refuse to marry the suitor, there are certain remedies at her disposal.[468] Also, in a situation like this, the man is permitted to seduce the girl into sexual intercourse as he has the tacit permission of the girl's father or guardian.[469] As the carrying off took place with the permission of the girl's father or guardian, no compensation beast is payable.[470] The man will, however, have to compensate the girl's father or guardian if no marriage ensues and if the couple also engaged in sexual intercourse, with or without the girl falling pregnant.[471]

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461 Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7; Olivier *et al* "Indigenous Law" par 89.

462 Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119.

463 Referred to as an "*inkomo yokuthwala*".

464 Labuschagne and Schoeman *JJS* 34; Bennett *U Botswana LJ* 7.

465 Labuschagne and Schoeman *JJS* 34.

466 Referred to as "*ukuthwala kobulawu*". See Olivier *et al* "Indigenous Law" par 89.

467 Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7; Olivier *et al* "Indigenous Law" par 89. Mwambene and Sloth-Nielsen point out that, this type of *ukuthwala* often took place in instances where the girl did not agree with her parents' choice of husband or where the girl has a high ranking status, but, for some reason, does not attract any suitors.

468 She can, for example, smear her face with her own exrement or call the young man's father by his name. See Olivier *et al* "Indigenous Law" par 89 and Rautenbach and Matthee *JLP* 119.

469 Rautenbach and Matthee *JLP* 119.

470 Labuschagne and Schoeman *JJS* 34.

471 Rautenbach and Matthee *JLP* 119.

The last form of *ukuthwala* not only takes place with violence, but also without the permission of the girl, as well as that of her father or guardian.[472] Before the man is allowed to enter into marriage negotiations with the girl´s father, he is required to pay compensation for his actions.[473] Furthermore, a marriage relationship will only be forged once the man has acquired the consent of both the girl and her father.[474] Also, with this form of *ukuthwala* the man will, in addition to the compensation head of cattle, have to pay a seduction head of cattle if he engages in sexual intercourse with the girl without the necessary consent from the girl's father or guardian.[475] If a man has sexual intercourse with a *twala*'d girl, he acts contrary to customary law, as the custom does not contemplate sexual intercourse until the girl's status has been elevated to that of a prospective bride.[476]

Ukuthwala, regardless of the form, usually takes place at night.[477] Because the girl is supposed to exude maidenly pride, she is expected to "put up a show of resistance" when being carried off, whether or not she is in on the plot to carry her away.[478] On the same day of the *thwala*, or early the following day, the girl's father or guardian has to be duly informed of the carrying off, for the purpose of easing her family's mind as to her safety.[479] Traditionally the girl is placed in the care of the other women at the suitor's

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472 Labuschagne and Schoeman *JJS* 35; Rautenbach and Matthee *JLP* 119; Mwambene and Sloth-Nielsen *J Fam L & Prac* 8; Olivier *et al* "Indigenous Law" par 89.

473 Rautenbach and Matthee *JLP* 119; Olivier *et al* "Indigenous Law" par 89.

474 Rautenbach and Matthee *JLP* 119.

475 Koyana and Bekker *De Jure* 141; Bennett *U Botswana LJ* 7-8; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7.

476 Koyana and Bekker *De Jure* 141; Bennett *U Botswana LJ* 7-8; Maluleke *Justice Today* 1. Bennett further points out that, if not carried out properly, couples who consider *ukuthwala* could face an actionable delict, both in terms of the common law as well as customary law, since the custom then amounts to a violation of the guardian's control over his children.

477 Koyana and Bekker *De Jure* 139; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6.

478 Koyana and Bekker *De Jure* 139; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6, 7. Rautenbach and Matthee *JLP* 119 point out that, with the first form of *ukuthwala* the girl's show of resistance is merely a sham, because she wants to elope with the man.

479 Koyana and Bekker *De Jure* 139; Labuschagne and Schoeman *JJS* 34; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6.

homestead who then treat her with the utmost kindness and respect.[480] In addition to informing the girl's family of her being *thwala´d*, the man should tender cattle or *lobolo* to the girl's father or guardian which transforms the incident into a formal marriage proposal.[481] This gesture is also intended to establish a friendly relationship between the families and elevate the girl's status to that of a prospective wife.[482] If the offer is accepted, negotiations between the two families continue.[483] The girl is then released so that she may return to her father's home and make preparations to go to the home of her prospective husband.[484] If, however, the *thwala* has taken place without an offer for marriage by the prospective husband or his family or the girl's family rejects the tendered cattle the *thwala* is deemed to be wrongful.[485] In such a case the suitor would have to pay a fine[486] of one head of cattle, because the *thwala* is then considered to be an insult to the girl and her father or guardian which made them the laughing stock of the community.[487]

There are numerous reasons for the existence of *ukuthwala*.[488] These reasons, as pointed out by Mwambene and Sloth-Nielsen,[489] include:

> ... to force the father of the girl to give his consent; to avoid the expense of the wedding; to hasten matters if the woman is pregnant; to persuade

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480 Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6. According to Koyana and Bekker *De Jure* 141 this is an attempt to convince the girl to go through with the marriage and subsequently become part of the man's caring family.

481 Koyana and Bekker *De Jure* 141; Bennett *U Botswana LJ* 7.

482 Koyana and Bekker *De Jure* 141.

483 Koyana and Bekker *De Jure* 141; Bennett *U Botswana LJ* 7; Labuschagne and Schoeman *JJS* 34.

484 Koyana and Bekker *De Jure* 141. This is done in a 'grand style' whereby the girl is accompanied by a so-called "*duli*" party, which consists of a large group of relatives and friends. This cements the relationship between the two families.

485 Koyana and Bekker *De Jure* 141; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6.

486 Called a "*bopha*". See Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6.

487 Koyana and Bekker *De Jure* 141; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6.

488 Mwambene and Sloth-Nielsen *J Fam L & Prac* 7.

489 Mwambene and Sloth-Nielsen *J Fam L & Prac* 7.

> the woman of the seriousness of the suitor's intent; and to avoid the need to pay an immediate *lobolo* where the suitor and his or her family were unable to afford the bridewealth.

What is evident from the reasons above is that the custom of *ukuthwala* can serve an important cultural purpose within indigenous communities living according to African customary law.[490] However, what these reasons also illustrate is that a girl can be *thwala*'d without her consent.[491] It is, of course, here where the custom of *ukuthwala* and the South African criminal law do not see eye to eye.

4.6.3 Ukuthwala and the South African criminal law

Despite the fact that *ukuthwala* is a common practice among the indigenous communities of South Africa,[492] the Western courts' approach in dealing with the custom has always been one of apprehension, hesitation and suspicion.[493] This is quite understandable considering the fact that *ukuthwala*, regardless of whichever form, can give rise to various common law crimes,[494] the first of which is abduction.[495] Snyman[496] defines abduction as follows:

> A person, either male or female, commits abduction if he or she unlawfully and intentionally removes an unmarried minor, who may likewise be either male or female, from the control of his or her parents or guardian and without the consent of such parents or guardian, intending that he or

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490 Mwambene and Sloth-Nielsen *J Fam L & Prac* 7.
491 Mwambene and Sloth-Nielsen *J Fam L & Prac* 7.
492 Rautenbach and Matthee *JLP* 119. In fact, as Koyana and Bekker *De Jure* 139, 143 point out, each passing decade sees the custom of *ukuthwala* gaining popularity.
493 *R v Njova* 1906 20 EDC 72, *Ncedani v R* 1908 22 EDC 243, 245; *R v Swartbooi* 1916 EDL 170-172; *R v Mane* 1948 1 All SA 126 (E) 130; *R v Sita* 1954 4 SA 20 (E) 22E-22G, 22H. Also see Rautenbach and Matthee *JLP* 119-120; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7 and Koyana and Bekker *De Jure* 142 in this regard.
494 See Maluleke *Justice Today* 1; Olivier *et al* "Indigenous Law" par 89.
495 Olivier *et al* "Indigenous Law" par 89.
496 Snyman *Criminal Law* 403. A similar definition can be found in Kemp *et al Criminal law* 366, Burchell *Principles of Criminal Law* 762, *R v Churchill* 1959 2 SA 575 (A) 580C-580D, *S v Katelane* 1973 2 SA 230 (N) 230H-231B, *S v L* 1981 1 SA 499 (B) 500C-500D and *R v Sita* 1954 4 SA 20 (E) 22C-22E.

she or somebody else may marry or have sexual intercourse with the minor.

When considering the definition above, it becomes clear that the custom of *ukuthwala* infringes the twofold legal interests protected in the case of abduction.[497] The protected legal interests referred to here are the parents' or guardian's factual exercise of control over the minor and the parents' or guardian's right to consent to the minor's marriage.[498] These interests also refer to the two most important requirements for the crime, namely the physical removal of the minor from her parents' or guardian's control and the requirement that the removal must take place without the permission of the minor's parents or guardian.[499] In terms of the South African law it is, of course, no defence for the wrongdoer to say that the minor consented to the wrongdoer's acts, in other words, the removal of the minor from her parents' or guardian's control.[500]

In light of the above, it should be clear that the carrying off of a girl without the permission of her parents under the guise of the *ukuthwala*-custom would satisfy the requirements for the crime of abduction.[501] In fact, this has always been the view of the criminal courts in South Africa. To illustrate, the court in *R v Njova*[502] held that:

[T]he abduction by a native man of a native girl between the ages of fourteen and twenty-one for purposes of marriage or carnal knowledge is a crime.

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497 Rautenbach and Matthee *JLP* 120.

498 Kemp *et al* Criminal law 367-369; Rautenbach and Matthee *JLP* 120. Also see section 3(3) of the *Recognition of Customary Marriages Act* 120 of 1998 which reads as follows: "If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage."

499 Snyman *Criminal Law* 404; Kemp *et al Criminal law* 368-369.

500 Kemp *et al Criminal law* 367; Rautenbach and Matthee *JLP* 120.

501 Rautenbach and Matthee *JLP* 120.

502 1906 EDC 71 72; Rautenbach and Matthee *JLP* 120. In this case the accused removed the minor girl "out of the possession and against the will of" her father for the purpose of having sexual intercourse with her.

In the case of *Ncedani v R*[503] the court also made it clear that, should a minor girl be forcibly removed without her or her guardian's consent, such removal would constitute the crime of abduction. Therefore, in both these cases the courts refused to accept the argument that the indigenous custom of *ukuthwala* negated the accused's criminal liability for the common law crime of abduction.[504] More or less the same view was held by the court in *R v Sita*[505] where it was argued that the custom of *ukuthwala* remedied the lack of consent in the carrying off of a young girl. In other words, it was argued that, because the girl was carried off in terms of the custom of *ukuthwala*, the custom substituted the parent's consent and the accused could therefore disregard the parent's objection.[506] Not convinced by this argument, Reynolds JP[507] found it difficult to see how an indigenous custom could trump a common law crime and held that:

> The Common Law as regards this offence requires the consent of the parent and guardians before the girl can be taken from their possession for the purposes of marriage. Their consent is an essential and a right completely given to them and I cannot see how a right so given can be taken away by a custom.

The fact that it is possible to remedy the lack of parents' consent after the girl has been *twala'd*, could have a serious impact on the common law crime of abduction.[508] Considering the fact that in such cases the man usually pays some form of compensation or the girl consented to being *twala'd*, the parents' consent is then usually obtained as a result of some

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503 1908 EDC 245; Rautenbach and Matthee *JLP* 120-121. This is an example of a case where the girl was not carried off by the prospective husband himself. Instead, the minor girl was carried off, without the necessary consent, by three other natives for the purpose of marriage to the prospective husband.

504 *R v Njova* 1906 EDC 71 72; *Ncedani v R* 1908 EDC 243, 245. Also see Rautenbach and Matthee *JLP* 121.

505 1954 4 SA 20 (E); Rautenbach and Matthee *JLP* 121. The accused took the girl to his homestead with her consent, but without the consent of her parents. The accused was then charged with the crime of abduction, but relied on the custom of *ukuthwala* as a defence.

506 Rautenbach and Matthee *JLP* 121.

507 *R v Sita* 1954 4 SA 20 (E) 22F; Rautenbach and Matthee *JLP* 121.

508 Rautenbach and Matthee *JLP* 121. Revisit par 3.6.1 where it is explained in which circumstances the parents' consent can be acquired "after the fact".

form of social pressure.[509] This, however, does not make a difference, because even if the parents consent to the girl's removal after it has already taken place, there would still be talk of a crime committed.[510] This was made abundantly clear by the court in *R v Sita*[511] where it was held that:

> ... it would be remarkable if an accused could take away a girl despite the lack of consent or objection, and by so doing put pressure on the guardian to consent by facing the guardian with the position that that guardian might think it best to consent because of the scandal, or he feels that something may have happened to the girl and he had better make the best of the position brought about by the act of the accused. His consent must be completely voluntary.

Apart from a charge of abduction, the man who *thwala*s a girl can also be prosecuted for the crime of kidnapping.[512] Snyman[513] defines kidnapping as:

> ... unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such person is a child, the custodians of their control over the child.

In the case of kidnapping the custom of *ukuthwala* infringes the protected legal interest of freedom of movement.[514] Furthermore, in South Africa it is also possible to be charged with kidnapping even if a person consented to his own removal.[515] If, therefore, the minor girl in a case of *ukuthwala* consents to her own removal, the man could still be charged with kidnapping.[516]

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509 Rautenbach and Matthee *JLP* 121.
510 Van Tromp *Xhosa Law of Persons* 73-74; Rautenbach and Matthee *JLP* 121.
511 1954 4 SA 20 (E) 24G-24H; Rautenbach and Matthee *JLP* 121-122.
512 Rautenbach and Matthee *JLP* 122.
513 Snyman *Criminal Law* 476. Also see Kemp *et al Criminal law* 287 and Rautenbach and Matthee *JLP* 122.
514 Rautenbach and Matthee *JLP* 122; Kemp *et al Criminal law* 288. Freedom of movement is also a fundamental human right entrenched in section 21(1) of the Constitution. The crime of kidnapping therefore also constitutes a violation of a person's constitutional's rights.
515 Snyman *Criminal Law* 481; Rautenbach and Matthee *JLP* 122.
516 Rautenbach and Matthee *JLP* 122.

The custom of *ukuthwala* can also lead to the man being prosecuted for the crime of rape; that is, if he has sexual intercourse with the girl without her consent.[517] Initially rape was an offence in terms of South African common law.[518] Today, however, this offence is regulated by means of section 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*[519] which makes it a criminal offence for a "person ('A')" to:

> … unlawfully and intentionally commit an act of sexual penetration with a complainant ('B'), without the consent of B.

The issue of rape in an instance of *ukuthwala* came to the fore in *R v Mane*[520] where the girl, after being *twala'd*, was forced to have sexual intercourse with the accused on two occasions; both times without her consent. In its judgment the court stressed the fact that the custom of *ukuthwala* can only be properly observed if the girl was a consenting party thereto.[521] In this regard, the court issued the following warning:

> We wish to make it very clear that a man, who forces a woman to have connection with him after a marriage ceremony which has taken place without her consent, commits the crime of rape.[522]

Apart from rape, the forcible removal of a girl in terms of the custom of *ukuthwala* has even led to a conviction of common assault.[523] This was the

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517 Rautenbach and Matthee *JLP* 122; Maluleke *Justice Today* 2. As pointed out earlier, he would also be acting contrary to customary law. See par 3.6.1.

518 For a brief history on the crime of rape in South African Criminal law see Kemp *et al Criminal law* 313-316.

519 32 of 2007.

520 1947 EDLD 196 197-198; Rautenbach and Matthee *JLP* 123. In this case the girl was unaware of the fact that her guardian had given permission to the accused's brother to *twala* her for the purpose of marriage to the accused. When reality set in the girl refused to marry the accused and even made several attempts at escaping. She was, however, being watched by the accused and his family members and was therefore unable to do so. Her guardian even told her not to "act foolishly but to obey" the accused's orders and stay with him.

521 *R v Mane* 1947 EDLD 196 199; Rautenbach and Matthee *JLP* 123.

522 *R v Mane* 1947 EDLD 196 199; Rautenbach and Matthee *JLP* 123.

523 Rautenbach and Matthee *JLP* 123. For a definition of common assault see par 4.2.4, Kemp *et al Criminal law* 279, Burchell *Principles of Criminal Law* 161 and Snyman *Criminal Law* 55.

case in *R v Swartbooi*[524] where the court voiced its unwillingness to accept the custom of *ukuthwala* as a defence to a charge of assault and even referred to the custom as being "barbarous". Furthermore, considering that the slightest use of "force" when removing a girl without her permission is sufficient to constitute the crime of assault, it is contended that the second and third forms of *ukuthwala* discussed earlier may lead to a criminal charge of assault.[525]

4.6.4 Ukuthwala and the cultural defence

The cases discussed in the previous paragraph seem to create the impression that the position on *ukuthwala* and the crimes of rape and assault have been settled. The problem, however, is that these cases were decided before the enactment of the Constitution and it is therefore submitted that the position on *ukuthwala* is far from settled. The Constitution now affords every person in South Africa the right to freedom of culture and cultural practices.[526] This constitutional freedom opens up a new playing field in the debate on *ukuthwala,* because the question that now arises, is whether an accused charged with the commission of a crime in pursuance to the custom of *ukuthwala* can rely on a cultural defence in order to escape criminal liability. Differently put, the question that arises, is whether the accused should escape criminal liability for his criminal conduct merely because the carrying off of a girl and even having sexual intercourse with her, is considered to be an acceptable custom in terms of his particular culture. This question is further explored in Chapter 7.[527]

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524 1916 EDL 170 171-172; Rautenbach and Matthee *JLP* 123. In this case twelve accused were convicted of the crime of common assault for not only attacking and beating the complainant, but also for forcibly removing her from her home without her or her guardian's permission.

525 See par 3.6.1 and Rautenbach and Matthee *JLP* 124. For examples of the various forms of assault consult Snyman *Criminal Law* 431-433.

526 SS 15, 30, 31 of the Constitution. Also see par 7.2.1 where this matter is further explored.

527 See par 7.3.

4.7 Conclusion

The fact that the Western common law and African customary law are founded on differing value systems poses a particular challenge to the South African criminal law in that what is considered to be an indigenous belief or custom in terms of African customary law, simultaneously constitutes a crime in terms of Western common law.[528] The South African courts are therefore faced with the challenge of weighing up the competing values of these two legal systems when faced with cases where an indigenous belief or custom resulted in the commission of a common law or statutory crimes. In South African law such cases can present themselves when an individual acts in persuance of the indigenous belief in witchcraft,[529] (including witch-killings[530]), the indigenous belief in the *tokoloshe*[531] and the use of *muti*-medicine[532] (including *muti*-murders[533]), as well as the phenomenon of necklacing,[534] and the custom of *ukuthwala*.[535] In all these instances the criminal courts are faced with the decision whether or not to accept arguments of an accused's cultural background or values as a justification for his criminal conduct.

A perusal of case law revealed that, up till now, the South African courts have been unwilling to accept that an indigenous belief in witchcraft or the *tokoloshe* can justify the killing or injuring of another human being under certain circumstances. Similarly, in the case of necklacing, the South African courts have also been unwilling to accept that an accused's particular cultural beliefs or values can justify the killing of another human being in order to prevent the victim from causing harm to either the accused or the community. What the case law also revealed is that the South African

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528 See par 4.1.
529 See paras 4.2.1 and 4.2.2
530 See par 4.2.3.
531 See par 4.3.
532 See par 4.4.1.
533 See par 4.4.2.
534 See par 4.5.
535 See par 4.6.

courts have always viewed *muti*-murders with disdain and refused to accept that the indigenous belief in the power of *muti* can justify the injuring or killing of another human being. The view of the South African courts with regard to the indigenous custom of *ukuthwala* also does not differ from the above. Up till now, the South African courts have yet to accept that the removal of a young girl from her parents' or guardian's control or engaging in sexual intercourse with the girl without her permission, as part of the indigenous custom of *ukuthwala*, can serve as a valid defence excluding the criminal liability of an accused.

What became evident from the perusal of the case law referred to above, is that they were all decided before the enactment of the final Constitution. Therefore, the question arises whether an accused in the scenarios above can now raise a cultural defence by relying on the right to cultural freedom contained in the Constitution. This question is considered at length in Chapter 7.[536]

However, before it can be considered whether the right to cultural freedom warrants the recognition of a formal cultural defence,[537] the possible influence of such a defence on the elements of criminal liability, in particular the elements of unlawfulness,[538] conduct[539] and culpability[540] in the South African law, should first be considered. Furthermore, it should also be consi-dered whether an accused charged with the commission of culturally motivated crimes can raise a cultural defence within the context of the pre-existing criminal law defences, in particular private defence,[541] necessity,[542]

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536 See par 7.3.
537 See par 7.3.
538 See par 5.2.
539 See par 6.2.
540 See par 6.3.
541 See par 5.2.2.
542 See par 5.2.3.

involuntary conduct[543] and a lack of criminal capacity[544] in South Africa. These matters are discussed in Chapters 5 and 6.[545]

543 See par 6.2.
544 See par 6.3.2.
545 See Chapters 5 and 6.

CHAPTER 5

INFLUENCE OF THE CULTURAL DEFENCE ON UNLAWFULNESS

5.1 Introduction

Although the South African courts have had ample opportunity to consider arguments of an indigenous belief and/or custom in criminal cases,[1] the South African criminal law has yet to recognise a formal cultural defence.[2] If, however, a cultural defence would be formally recognised in the South African criminal law, the defence can have a twofold influence on the South African law.[3] Firstly, a cultural defence can influence the decision whether or not to prosecute the offenders for committing what is considered to be a culturally motivated crime.[4] Secondly, a cultural defence can influence the sentence to be imposed on the accused.[5]

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1 See, for example, the cases of *R v Njova* 1906 20 EDC 71, *Ncedani v R* 1908 22 EDC 243, *R v Swartbooi* 1916 EDL 170, *R v Njikelana* 1925 EDL 204, *R v Mbombela* 1933 AD 269, *R v Matomana* 1938 EDL 128, *R v Mane* 1948 1 All SA 128 (E), *R v Sita* 1954 4 SA 20 (E), *R v Ngang* 1960 2 SA 363 (T), *S v Ngema* 1992 2 SASV 650 (D) as well as paras 4.3.1, 4.3.3, 4.4.1, 4.4.3, 4.6.1 and 4.6.3 where these cases are discussed in more detail. Also see Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 136.

2 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142; Rautenbach and Matthee *JLP* 114, 133; Bennett *U Botswana LJ* 23-26; Carstens *De Jure* 18.

3 Bennett *U Botswana LJ* 19; Waldron *Wash & Lee L Rev* 10 footnote 20.

4 Bennett *U Botswana LJ* 19; Waldron *Wash & Lee L Rev* 10 footnote 20. Revisit par 4.2 for a definition of what is considered to be a culturally motivated crime.

5 Bennett *U Botswana LJ* 19; Waldron *Wash & Lee L Rev* 10 footnote 20.

What is evident, is that the desirability of recognising a formal cultural defence in the South African criminal law necessitates an understanding of the possible influence such a defence can have on the requirements for criminal liability in South Africa.[6] Not only will such an understanding reflect on how arguments of culture[7] have been dealt with by the South African criminal courts up till now, but it will also shed some light on the future accommodation of such arguments in criminal cases.[8]

The South African common law prescribes five general requirements for criminal liability,[9] namely legality,[10] conduct,[11] compliance with the definitional elements of a crime,[12] unlawfulness[13] and culpability.[14] In all criminal

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6 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142.

7 As well as religion. Revisit par 3.3.2 where it was argued that the definition of culture is broad enough to include religion.

8 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142.

9 Burchell and Milton *Principles of Criminal Law* 138; Rautenbach and Matthee *JLP* 116; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142. Also see Kemp *et al Criminal law* 22-25 where the authors argue that, essentially, there are only three principal elements for criminal liability, *viz* unlawful conduct, culpability and fault.

10 Revisit footnote 136 for a brief explanation of what is meant with the principle of legality. Also see Snyman *Criminal Law* 36, Burchell and Milton *Principles of Criminal Law* 94, Kemp *et al Criminal law* 17 and Rautenbach and Matthee *JLP* 116 footnote 27.

11 Revisit footnote 137 for a brief explanation of what is considered to be conduct in terms of the South African criminal law. For a more comprehensive discussion of this element of criminal liability see paras 6.1 and 6.2 as well as Snyman *Criminal Law* 51, Burchell and Milton *Principles of Criminal Law* 178, 185, Kemp *et al Criminal law* 44, Rautenbach and Matthee *JLP* 116 footnote 28 and *R v Mkize* 1959 2 SA 260 (N) 260.

12 Revisit footnote 138 for a brief explanation of this element of criminal liability. Also See Snyman *Criminal Law* 71, Burchell and Milton *Principles of Criminal Law* 49, 55-58, Kemp *et al Criminal law* 22, 25 and Rautenbach and Matthee *JLP* 116 footnote 29.

13 Revisit footnote 139 for a brief explanation of the term "unlawfulness". For a more comprehensive discussion on this element of criminal liability see par 5.2 as well Snyman *Criminal Law* 97, Burchell and Milton *Principles of Criminal Law* 178, 226, Kemp *et al Criminal law* 22-25, Rautenbach and Matthee *JLP* 116 footnote 30, Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142, *R v Mkize* 1959 2 SA 260 (N) 260 and *S v Engelbrecht* 2005 2 SACR 41 (W) 53G, 105I-105J For a detailed description of the term "unlawfulness".

14 Revisit footnote 140 for a brief explanation of the term "culpability". For a more comprehensive discussion of this element of criminal liability see par

cases it is the duty of the State to prove the existence of these five elements beyond reasonable doubt.[15] In the previous Chapter[16] it was shown that a conflict situation arises when certain conduct is regarded as being the legitimate exercise of an indigenous belief or custom in terms of African customary law, but at the same time as a crime in terms of the South African common law.[17]

The conflict situation above undoubtedly has an effect on the general requirements for criminal liability, particularly the requirement of unlawfulness,[18] conduct[19] and criminal capacity.[20] Moreover, the relationship between culpability and the exercise of an indigenous custom is particularly important as culpability provides the broadest scope for accommodating considerations of culture.[21] Capacity, however, does not fall within the scope of the present discussion, but is discussed in further detail in the following Chapter.[22] Instead, the focus of this Chapter is on determining whether a formal cultural defence can negate the element of unlawfulness necessary for criminal liability.[23] More specifically, in this Chapter it is con-

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6.3 as well as Burchell and Milton *Principles of Criminal Law* 358, Kemp *et al Criminal law* 22-25, Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142, Rautenbach and Matthee *JLP* 116 and *R v Mkize* 1959 2 SA 260 (N) 260.

15 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142; Kemp *et al Criminal law* 25; Burchell and Milton *Principles of Criminal Law* 138.

16 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.

17 Rautenbach and Matthee *JLP* 116. See Chapter 3 for where the conflict situations that arise when indigenous beliefs and customs lead to the commission of common law crime is discussed in detail.

18 See par 5.2 as well as Bennett *U Botswana LJ* 20; Waldron *Wash & Lee L Rev* 10 footnote 20; Carstens *De Jure* 19-20; Renteln *Southern Calif Rev L & Women's Stud* 445.

19 See par 6.2 where the influence of a cultural defence on conduct is discussed in detail.

20 Bennett *U Botswana LJ* 20; Waldron *Wash & Lee L Rev* 10 footnote 20; Carstens *De Jure* 19-20; Renteln *Southern Calif Rev L & Women's Stud* 445. The influence of the cultural defence is further dealt with in par 6.3.

21 See par 6.3 as well as Rautenbach and Matthee *JLP* 117; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142.

22 See par 6.3.

23 See par 5.2.

sidered whether an accused who commits a culturally motivated crime can escape criminal liability by relying on existing defences in the South African criminal law that negate unlawfulness.[24]

5.2 Unlawfulness and the cultural defence

5.2.1 Unlawfulness in general

Before considering whether a cultural defence can negate the element of unlawfulness, it is first necessary to understand what is meant with the term "unlawfulness". According to Grant,[25] the element of unlawfulness can be described as:

> A legal standard, determined by the legal convictions of the community as informed by die Constitution, reflected in the conduct of the reasonable person who knows everything.

Unlawfulness has also been described in the case law. For example, in *Gründlingh v Phumelela Gaming and Leisure Ltd*,[26] Farlam and Conradie JJA pointed out that the element of unlawfulness is founded on considerations of public policy and the legal convictions of the community. In *S v Engelbrecht*[27] Satchwell J pointed out that:

> It is generally accepted that the 'reasonableness' test is the vehicle to ascertain the legal convictions of the community or the community's sense of equity and justice (the *boni mores*). This has been described as an instrument of judicial policy.

Satchwell J[28] further pointed out that, when conducting the unlawfulness inquiry, a court "must be driven by the values and norms underpinning the Constitution" as the Constitution is a "system of objective, normative values

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24 See par 5.2.2-5.2.3.
25 Grant *Ann Sur SA Law* 663-664. Also see Matthee *Mishandelde Vrou-Sindroom* 35.
26 2005 4 All SA 1 2, 13. A similar formulation can be found in *ABSA Bank Ltd v Fouche* 2002 4 All SA 245 and *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 442. Also see Matthee *Mishandelde Vrou-Sindroom* 35.
27 2005 2 SACR 41 (W) 130B.
28 *S v Engelbrecht* 2005 2 SACR 41 (W) 130D.

for legal purposes". In the context of indigenous beliefs and customs, these values include the founding constitutional values of freedom, equality and human dignity,[29] as well as the constitutional right to cultural freedom.[30]

In another case, *Director of Public Prosecutions, Cape of Good Hope v Fourie*,[31] Msimang AJ also pointed out that the test for unlawfulness ultimately involves a value judgment, based on considerations of morality and policy, of what is reasonable in the circumstances in which the conduct of the accused took place. Such a value judgment, according to Herfer JA in *Government of the Republic of South Africa v Basdeo*,[32] is also based on the court's view of the legal convictions of the community and necessitates a consideration of all the facts relevant to a particular case.[33]

Unlawfulness can be negated through various grounds of justification (defences),[34] each with its own unique set of requirements, which justify the conduct of an accused in particular circumstances.[35] As pointed out earlier,[36] the following grounds of justification can be found in the South African criminal legal system: private defence,[37] necessity,[38] impossibility,[39] obedience to superior orders,[40] public authority,[41] lawful chastisement,[42] con-

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29 S 1(a) of the Constitution.

30 SS 15(1), 30 and 31 of the Constitution. See par 7.3 where these rights are discussed in detail.

31 2002 1 All SA 269 (C) 272. A similar formulation was given by Hefer JA in the case of *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 367F. Also see Matthee *Mishandelde Vrou-Sindroom* 35.

32 Government of the Republic of South Africa v Basdeo 1996 1 SA 355 (A) 367F. Also see Matthee Mishandelde Vrou-Sindroom 35.

33 Also see Grant *Ann Sur SA Law* 658.

34 Also referred to as "grounds of justification".

35 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 144; Matthee *Mishandelde Vrou-Sindroom* 36. Revisit par 2.3 for a brief explanation of the term "grounds of justification".

36 See par 2.3.

37 Revisit footnote 179 in Chapter 1 for an explanation of this ground of justification.

38 Revisit footnote 180 in Chapter 1 for an explanation of this ground of justification.

39 Revisit footnote 181 in Chapter 1 for an explanation of this ground of justification.

40 Revisit footnote 182 in Chapter 1 for an explanation of this ground of justification.

sent,[43] and *de minimus non curat lex*.[44] In the case of culturally motivated crimes it should be considered whether the indigenous belief or custom of a particular accused, which results in the commission of a common law crime, can be accommodated within the scope of one of these defences.[45] It is particularly the defences of private defence[46] and necessity[47] that are relevant to the present discussion as a perusal of case law has revealed that, in the past, accused have attempted to persuade the courts that their commission of a culturally motivated crime was justified under these grounds of justification.[48]

5.2.2 Private defence and the cultural defence

In *S v Engelbrecht*[49] Satchwell J referred to the following accepted definition of private defence:

> A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is not more harmful than necessary to ward off the attack.

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41 Revisit footnote 183 in Chapter 1 for an explanation of this ground of justification.
42 Revisit footnote 184 in Chapter 1 for an explanation of this ground of justification.
43 Revisit footnote 185 in Chapter 1 for an explanation of this ground of justification.
44 Revisit footnote 186 in Chapter 1 for an explanation of this ground of justification.
45 See par 5.2.2 and 5.2.3.
46 See par 5.2.2.
47 See par 5.2.3.
48 See the case of *S v Mokonto* 1971 2 SA 319 (A).
49 2005 2 SACR 41 (W) 106B. Also see Burchell *Criminal Law* 227, 230, Reddi *SACJ* 269; Rabie *et al* "Criminal law – General Principles" 36; *S v Ntuli* 1975 1 SA 429 (A) 436B-436F; *S v Motleleni* 1976 1 SA 403 (A) 406F-406G; *Boast v Naidoo* 2001 JOL 7767 (OK) 15-16; *S v Dingaan* 2001 JOL 8949 (Ck) 7; *Mdlalose v Masuku* 2002 JOL 9415 (D) 11; *RAF v Kramer* 2005 JOL 14942 (OK) 4; *Mugwena v Minister of Safety and Security* 2006 2 All SA 126 (HHA) 133 and *S v Malan* 2006 JOL 17331 (VCC) 12.

In *S v Mokonto*[50] the court had to consider whether an accused can rely on private defence to justify the killing of another human being due to an indigenous belief in witchcraft. The appellant in *Mokonto* was convinced that the deceased was a witch who caused the death of his two brothers.[51] The appellant confronted the deceased with these allegations to which she reacted by threatening that he (appellant) would not "see the setting of the sun" that day.[52] The appellant then fatally struck the deceased with a cane-knife.[53] The appellant not only beheaded the deceased "so that she could not rise up again and bewitch him", but also "severed her hands because they had handled the 'muti'".[54] The appellant was subsequently found guilty of murder despite his efforts to persuade the court that he had acted in private defence, because when the deceased threatened him, he truly believed that she was going to kill him "[w]ith the same thing with which she killed [his] brothers".[55] In considering the appellant's defence, Holmes JA[56] explained the criteria to apply in cases such as these in the following way:

> The accused would not have been entitled to an acquittal on the ground that he was acting in self-defence unless it appeared as a reasonable possibility on the evidence that the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury....

From the finding of Holmes JA, the general requirements for a successful reliance on private defence in the South African criminal law become clear. The first such requirement is that a person can only act in private defence against an unlawful attack which can consist of an individual attack, a se-

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50 1971 2 SA 319 (A) 320E-320F, 321I-322B.
51 *S v Mokonto* 1971 2 SA 319 (A) 321G-322D; Labuschagne *SACJ* 260.
52 *S v Mokonto* 1971 2 SA 319 (A) 320E-320F, 321C-321D; Labuschagne *SACJ* 260.
53 *S v Mokonto* 1971 2 SA 319 (A) 321B-321D; Labuschagne *SACJ* 260.
54 *S v Mokonto* 1971 2 SA 319 (A) 321G-321H.
55 *S v Mokonto* 1971 2 SA 319 (A) 323G-323H.
56 *S v Mokonto* 1971 2 SA 319 (A) 323G-323H. Holmes JA was referring to an earlier judgment by Watermeyer CJ in the case of *R v Attwood* 1946 AD 331. Also see the case of *R v Patel* 1959 3 SA 121 (A) 123.

ries of attacks or even an ongoing cycle of attacks.[57] Although it is not required that all the attacks be aimed at the person who acts in private defence, it is required that there should at least be some attack upon him.[58] Furthermore, and particularly relevant to cases such as *Mokonto,* it is not required that the attack be physical in nature.[59] In fact, according to Satchwell J in *S v Engelbrecht*,[60] the attack can include:

> … psychological and emotional abuse, degradation of life, diminution of dignity and threats to commit any such acts.

Considering this broad scope afforded to the requirement of an attack, it therefore seems as though a threat of harm through supernatural means, for example witchcraft, could fall within the scope of an attack justifying the use of private defence in the South African criminal law.

There is, however, a further requirement that must be met before a person can rely on private defence, *viz* the attack must be actual or imminent, but not necessarily completed.[61] The important implication of the imminence requirement is that the assailant does not necessarily have to give the first blow before his intended victim can act in private defence.[62] In light of the above, it therefore seems as though the deceased's threat in *Mokonto*, *viz* that the appellant will not see the "setting of the sun today", satisfied the imminence requirement for private defence in the South African law. The question, however, is whether the person acting in private defence held a

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57 See Burchell and Milton *Principles of Criminal Law* 234; Kemp *et al Criminal law* 78, Matthee *Mishandelde Vrou-Sindroom* 41; Rabie *et al* "Criminal law - General Principles"37; *Boast v Naidoo* 2001 JOL 7767 (E) 14; *S v Njobeni* 2005 JOL 14843 (Tk) 3; *S v Malan* 2006 JOL 17331 (VCC) 61; *S v Mokati* 2005 JOL 14079 (T) 3 and *S v Engelbrecht* 2005 2 SACR 41 (W) 133A.

58 *S v Engelbrecht* 2005 2 SACR 41 (W) 133A-133B.

59 See *S v Engelbrecht* 2005 2 SACR 41 (W) 133A-133B.

60 2005 2 SACR 41 (W) 133B.

61 See Burchell and Milton *Principles of Criminal Law* 234; Kemp *et al Criminal law* 79, Matthee *Mishandelde Vrou-Sindroom* 42; Reddi *SACJ* 269-270; Rabie *et al* "Criminal law - General Principles" 37; *Boast v Naidoo* 2001 JOL 7767 (E) 15; *S v Njobeni* 2005 JOL 14843 (Tk) 3 and *S v Mokati* 2005 JOL 14079 (T) 3.

62 See Burchell and Milton *Principles of Criminal Law* 234; Matthee *Mishandelde Vrou-Sindroom* 42; Reddi *SACJ* 269 and Rabie *et al* "Criminal law - General Principles"38.

true belief that he was in danger of death or serious injury. In fact, despite the apparent imminent threat by the deceased in *Mokonto*, Holmes JA[63] identified the central issue as being whether the appellant held the belief that he was in danger of death or serious injury and whether a reasonable person in his position would have held the same belief. After a careful consideration of all the relevant circumstances of the case, Holmes JA[64] came to the following decision:

> A plea of self-defence is usually raised in the context of immediate danger, such as that posed by an upraised knife. That physical situation is absent here. The apprehended danger being that of supernatural death. As to that, the common law of South Africa in regard to murder and self-defence reflects the thinking of Western civilisation. In considering the unlawfulness of the appellant's conduct, his benighted belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the Dark Ages. It follows that the appellant's plea of self-defence and counsel's contention in favour of an acquittal cannot be upheld.

The decision in *Mokonto* raises an important issue with regard to culturally motivated crimes resulting from indigenous beliefs, *viz* where the subjective views and perceptions of the accused fit into the determination of unlawfulness.[65] Ultimately, an objective test is used to determine whether the perpetrator of a culturally motivated crime can rely on private defence to negate the unlawfulness of his behaviour.[66] In *S v Engelbrecht*,[67] Satchwell J afforded the following explanation to the objective test for unlawfulness:

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63 *S v Mokonto* 1971 2 SA 319 (A) 323H-324C.

64 *S v Mokonto* 1971 2 SA 319 (A) 324B-324D.

65 See Grant *Ann Sur SA Law* 657.

66 This is evident from Burchell and Milton *Principles of Criminal Law* 227, 242, Grant *Ann Sur SA Law* 657-658, Matthee *Mishandelde Vrou-Sindroom* 37, Reddi *SACJ* 269, Rabie *et al* "Criminal law – General Principles" 36, *S v Motleleni* 1976 1 SA 403 (A) 406C, *Kgaleng v Minister of Safety and Security* 2001 4 All SA 636 (W) 637, 647, *S v Dingaan* 2001 JOL 8949 (Ck) 7, *Mdlalose v Masuku* 2002 JOL 9415 (D) 11, *S v Dougherty* 2003 2 SACR 36 (W) 37B-37D, 44H, 45H, 46B, *RAF v Kramer* 2005 JOL 14942 (OK) 4, *S v Engelbrecht* 2005 2 SACR 41 (W) 129E-129F and *Mugwena v Minister of Safety and Security* 2006 2 All SA 126 (HHA) 127, 133.

67 2005 2 SACR 41 (W) 129E-129G. Also see *S v Motleleni* 1976 1 SA 403 (A) 406C-406E and *S v Goliath* 1972 3 All SA 69 (A) 74.

> In applying this so-called 'objective' standard our courts have tried to decide what 'the fictitious reasonable man, in the position of the accused and in the light of all the circumstances would have done', also stated as an enquiry as to what the 'reasonable man in the particular circumstances' would have done. The test is one of 'reasonableness'. The questions asked are what would the 'reasonable man' have done, was the force used 'reasonably necessary in the circumstances' or did the accused 'act reasonably and legitimately to protect himself against the deceased?'

From Satchwell J's explanation it seems as though the subjective views and perceptions of the accused are deemed irrelevant when applying the objective test to determine unlawfulness.[68] Differently put, unlawfulness is not determined through an evaluation of the accused's emotional state at the time he committed the particular act or "his perspective of the circumstances as [he] perceived them to be".[69] Instead, unlawfulness is tested through an eva-luation of all the relevant, factual circumstances the accused was exposed to, as well as the physical circumstances he was in during the commission of the unlawful act.[70] Therefore, an accused's successful reliance on private defence depends on the facts and circumstances of each particular case as judged from an external perspective.[71]

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68 Grant *Ann Sur SA Law* 658, 660; *S v Engelbrecht* 2005 2 SACR 41 (W) 129E-129G; *S v Dingaan* 2001 JOL 8949 (Ck) 7; *Mdlalose v Masuku* 2002 JOL 9415 (D) 11; *Mugwena v Minister of Safety and Security* 2006 2 All SA 126 (HHA) 127, 133; *RAF v Kramer* 2005 JOL 14942 (OK) 4; *S v Dougherty* 2003 2 SACR 36 (W) 44H, 45H; *Kgaleng v Minister of Safety and Security* 2001 4 All SA 636 (W) 637, 647.

69 Grant *Ann Sur SA Law* 658, 660; *Kgaleng v Minister of Safety and Security* 2001 4 All SA 636 (W) 637, 647; *Mdlalose v Masuku* 2002 JOL 9415 (D) 11; *S v Dougherty* 2003 2 SACR 36 (W) 44H, 45H; *S v Engelbrecht* 2005 2 SACR 41 (W) 129F. In *S v Goliath* 1972 3 All SA 69 (A) 74 the court submitted that the emotional state of an accused will only be relevant when a court needs to determine whether the accused had the necessary culpability to be held criminally liable for his conduct. Culpability is discussed in more detail in par 6.3.

70 Grant *Ann Sur SA Law* 658, 660; *Kgaleng v Minister of Safety and Security* 2001 4 All SA 636 (W) 637, 647; *Mdlalose v Masuku* 2002 JOL 9415 (D) 11; *S v Dougherty* 2003 2 SACR 36 (W) 44H, 45H; *S v Engelbrecht* 2005 2 SACR 41 (W) 129F.

71 *S v Engelbrecht* 2005 2 SACR 41 (W) 132F; Matthee *Mishandelde Vrou-Sindroom* 37; Pieterse-Spies *THRHR* 317; Grant *Ann Sur SA Law* 658; Burchell and Milton *Principles of Criminal Law* 242.

In *S v Engelbrecht*,[72] Satchwell J also observed that the test of the "reasonable man in the particular circumstances" of the accused reflects the ultimate test for unlawfulness, *viz* the legal convictions of the community as informed by the values in the Constitution. There is some justification for using the reasonable person test to determine whether the accused's conduct was unlawful and also whether he can rely on a defence, such as private defence, to negate such unlawfulness.[73] For example, in *R v Patel*[74] Holmes AJA made it clear that an accused cannot be held criminally liable for acting in private defence if, on the evidence, it appears as though his conduct was reasonable. This position was also made clear in *S v Ntuli*[75] where Holmes JA observed that, under private defence an accused:

> … may intentionally and lawfully apply such force as is reasonably necessary … [and if an accused's] defence, so tested is reasonable, both his application of force and his intention to apply it, are lawful … .

Similarly, in the case of *S v Motleleni*[76] Galgut AJA contended that:

> The question whether an accused, who relies on self-defence, has acted lawfully must be judged by objective standards. In applying these standards one must decide what the fictitious reasonable man, in the position of the accused and in the light of all the circumstances, would have done.

Furthermore, in the case of *S v De Oliveira*[77] the court held that:

> The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way.

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72 2005 2 SACR 41 (W). Also see Grant *Ann Sur SA Law* 658, *Clarke v Hurst NO* 1992 4 SA 630 (D) 651H, 652F-652G, 653B, 1103D-1103F, 1105F-1105G, *S v Gaba* 1981 3 SA 745 (O) 751D, 751F-751G and *Mpongwana v Minister of Safety and Security* 1999 2 SA 794 (C) 797J-798A, 800I. With regard to the legal convictions of the community and the values in the Constitution see *Carmichele v* Minister *of Safety and Security* 2002 1 SACR 79 (CC) 658I-659B, 659F-659G, 661E, 671G-672A, *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 432D-432F, 442B-442C, 444B-444G and *Van Eeden v Minister Of Safety And Security (Women's Legal Centre Trust, As Amicus Curiae)* 2003 1 SA 389 (SCA) 395I-396H, 397C.

73 Grant *Ann Sur SA Law* 658-659.

74 1959 3 SA 121 (A) 123B-123D.

75 1975 1 SA 429 (A) 436B-436F.

76 1976 1 SA 403 (A) 406C.

77 1993 2 SACR 59 (A) 419; Grant *Ann Sur SA Law* 659.

It therefore seems as though the reasonable person test is both appropriate to and reconcilable with the test for unlawfulness insofar as the legal convictions of the community are reflected in the conduct of a reasonable person in the circumstances of the accused.[78] Snyman,[79] however, holds the view that the reasonable person test is merely used "to determine whether X's conduct was reasonable in the sense that it accorded with what is usually acceptable in society". A court can, therefore, hypothesise about conduct that would be permissible according to the legal convictions of the community by testing such conduct against conduct which a reasonable person would find permissible under the circumstances.[80] Such an approach creates the impression that the judgment of the reasonable person in the circumstances of the accused not only corresponds with, but also represents the legal convictions of the community.[81]

Grant,[82] however, raises the concern that an application of the reasonable person test in the manner described above could result in confusion. In explaining his concern, Grant[83] refers to the "perennial dispute" in case law regarding the reasonable person test used to determine negligence. This dispute was explained by Jansen JA in *S v Ngubane*[84] in the following way:

> The view generally held by our Courts is that *culpa* is constituted by conduct falling short of a particular standard, *viz* that of the reasonable man. Although the reasonable man standard may to some extent be individualised in certain circumstances, it remains an objective standard. Some of our writers, however, propound a "subjective test" for negli-

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78 Grant *Ann Sur SA Law* 659.
79 Snyman *Criminal law* 113-114.
80 Grant *Ann Sur SA Law* 659.
81 Grant *Ann Sur SA Law* 659.
82 Grant *Ann Sur SA Law* 659.
83 Grant *Ann Sur SA Law* 659. Also see *S v Van As* 1976 2 SA 921 (A) 922B-922C, 923B, 923G-923H, 928C-928F, 928H-928J.
84 1985 3 SA 677 (A) 686E-686G, 687C-687D. A similar view was held by in the case of *S v Robson; S v Hattingh* 1991 3 SA 322 (W) 333H-334E which dealt with the offence of negligently losing a firearm. Here Kriegler held that the accused's negligence should be determined with reference to what the "reasonable lawful possessor of a firearm" would have done in the same circumstances as the accused. Kriegler J, however, stressed the fact that all other relevant factors should also be taken into account.

> gence. [If] the objective test for *culpa* is applied, the question is whether the *conduct* of the agent measured up to the standard of the reasonable man in the circumstances; if the subjective test were to be applied, the question appears to be whether the *conduct* of the agent measured up to the standard of his own capabilities.

In *S v Melk (NCO)*[85] Hefer JA also pointed to the dispute by making the following observation:

> If the so-called objective test of negligence is applied, as it generally is … the unsophisticated and uneducated shepherd will be treated no differently from the professor and no heed will be taken of the 'widely differing standards of culture, education and social awareness of the various groups of persons to whom, as citizens of South Africa, this Act applies'.

According to Grant,[86] a similar dispute may exist for the reasonable person test in the case of unlawfulness. Because an objective test is used for both unlawfulness and negligence it would seem permissible to subjectivise the test by "locating the reasonable person in the circumstances of the accused".[87] An example of such subjectification can be found in *S v Ngomane*[88] where Trollip JA held that:

> The reasonable man in appellant's situation, before stabbing the deceased, would first have waited to ascertain what the deceased wanted or was going to do, either by a further enquiry of him or from his ensuing conduct, and would first have warned him that he was armed with the assegai.

However, a subjectification of the test for unlawfulness raises the question as to how far the circumstances to be considered when applying the test for unlawfulness, as is the case with the test for negligence, should be stretched.[89] The considerations identified by Rumpff AJ in *S v Goliath*[90] seem to provide the most elaborate range of circumstances relevant to the enquiry into unlawfulness. According to Rumpff AJ:[91]

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85 1988 4 SA 561 (A) 578E-578G.
86 Grant *Ann Sur SA Law* 659.
87 Grant *Ann Sur SA Law* 659.
88 1979 2 SACR 59 (A) 863F-863G; Grant *Ann Sur SA Law* 659.
89 Grant *Ann Sur SA Law* 660.
90 1972 3 SA 1 (A) 74; Grant *Ann Sur SA Law* 660.
91 1972 3 SA 1 (A) 74; Grant *Ann Sur SA Law* 660.

> 'In deciding what the accused should or should not have done in particular circumstances, the fictitious normal person must be placed in the position of the accused, subject to all the external circumstances to which the accused was subjected and also in the position in which the accused was placed physically.'

Legal scholars have also attempted to shed some light on the circumstances to be considered by distinguishing between the reasonable person test for unlawfulness and negligence.[92] As Grant[93] points out, the authors Van der Walt and Midgley hold the view that the tests for unlawfulness and negligence are completely different. In the case of unlawfulness, the courts determine the reasonableness of the accused's conduct by looking at the matter from the point of view of a reasonable bystander and, in so doing, consider each and every relevant factor, "even those not known when the harm was suffered".[94] This approach ensures that the courts strike a balance between the interests of the plaintiff, the defendant and society.[95] Contrariwise, when determining the reasonableness of the accused's conduct in the case of negligence, a court places itself in the accused's position during the commission of the particular act.[96] In other words, the courts then determine the reasonableness of the accused's conduct objectively by only looking at the situation from the point of view of the accused.[97]

The distinction above highlights the important point that unlawfulness is determined objectively "on a diagnostic, *ex post facto* basis" by considering "all that can be known of a particular circumstance" without any consideration of the accused's subjective perspective on or view of that circumstance.[98] What should also be kept in mind is that the element of unlawful-

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92 Grant *Ann Sur SA Law* 660.
93 Grant *Ann Sur SA Law* 660.
94 Grant *Ann Sur SA Law* 660.
95 Grant *Ann Sur SA Law* 660.
96 Grant *Ann Sur SA Law* 660.
97 Grant *Ann Sur SA Law* 660.
98 Grant *Ann Sur SA Law* 660.

ness is general and applies to all persons equally.[99] The general and equal application of unlawfulness means that the conduct of the accused will remain unlawful, despite how reasonable his mistake or mental state might have been.[100] Grant[101] is of the opinion that it would be inappropriate for a court to consider the subjective views of the accused, because regardless of how far the accused's circumstances are stretched in order to locate the reasonable person therein, the mental characteristics of the accused cannot be attributed to the reasonable person. Therefore, considering the extent to which the reasonable person standard is at all appropriate to the test for unlawfulness, it would perhaps be better if the criteria was reframed as that of the "reasonable person who knows everything" so as to avoid any misdirection by the courts in this regard.[102]

From the discussion above it seems as though there is no authoritative basis for the proposition that the test for reasonableness has both an objective and a subjective component.[103] In fact, as Grant[104] points out, if a defence was to be based on the subjective views and perspectives of an accused, those views and perspectives can be found within the "domain of excuse". In other words, instead of serving as a universal defence, those views and perspectives would then serve as a personal defence or mental phenomenon "which relieves the agent of the attribution of conduct which is wrongful/unlawful".[105] At present the South African criminal law already makes provision for such defences in the form of incapacity or a lack of fault.[106] Furthermore, as the case law dealing with culturally motivated crimes show, the South African criminal law has always made provision for

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99 Grant *Ann Sur SA Law* 661. In other words, adults, children, the blind, the mute and even those suffering from a mental disorder are all treated equally under the element of unlawfulness.
100 Grant *Ann Sur SA Law* 661.
101 Grant *Ann Sur SA Law* 661-662.
102 Grant *Ann Sur SA Law* 662.
103 Grant *Ann Sur SA Law* 662.
104 Grant *Ann Sur SA Law* 663.
105 Grant *Ann Sur SA Law* 663.
106 Grant *Ann Sur SA Law* 663.

the subjective views and perspectives of an accused to serve as a mitigating factor during sentencing.[107] Last-mentioned aspect, however, does not fall within the scope of the present discussion, but will be discussed further in Chapter 6.[108]

To illustrate the irrelevance of the accused's subjective views and perspective and to distinguish the reasonable person test for unlawfulness from the one for negligence, Grant[109] provides the following scenario:

> An accused may act reasonably and lack negligence in that, given the knowledge, beliefs and perceptions of the accused, the reasonable person in the position of the accused would have apprehended the threat of harm and would have responded with lethal force. However, this very same accused may have acted unreasonably and as such unlawfully in that the reasonable person, knowing everything, would have known, for instance, that the attacker was in fact no longer a threat because he had just suffered a permanently crippling stroke, which neither the accused nor a reasonable person in the circumstances of the accused could or would know.

The scenario above illustrates the following risk in using the reasonable person test to determine unlawfulness: if it is possible for the accused to have acted both reasonably and unreasonably, it would mean that the reasonable person both would have and would not have acted in the way the accused had done.[110] The reasonable person test therefore expects the reasonable person to be "schizophrenic", because it expects of him to suffer from a "multiple personality disorder".[111] Such a situation, according to Grant,[112] would be very dangerous for the criminal legal system and therefore reaffirms the principle that unlawfulness should never be determined with reference to the accused´s subjective views and perspectives.

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107 This matter is further dealt with in par 6.4. Also see *R v Fundakabi* 1948 3 SA 810 (A), *S v Dikgale* 1965 1 SA 209 (A) 209A-209C, 214B, 214D-214E.
108 See par 6.4.
109 Grant *Ann Sur SA Law* 663.
110 Grant *Ann Sur SA Law* 663.
111 See Grant *Ann Sur SA Law* 663 where the author makes this analogy.
112 Grant *Ann Sur SA Law* 663.

Similar to the attack of the assailant, a person's actions in private defence must also meet certain requirements.[113] First, a person must realise that he is acting in private defence.[114] It is, however, possible for a person to think that he is entitled to act in private defence in certain circumstances while in fact he is not.[115] In such cases a person acts in putative private defence.[116] Putative private defence does not exclude the unlawfulness of a person's conduct, but can exclude his culpability.[117] Putative private defence, however, does not fall within the scope of the discussion in this Chapter, but will be discussed in more detail in Chapter 6.[118]

A person's conduct in private defence should also be aimed at none other than the assailant.[119] Furthermore, if a person relies on private defence it must have been necessary to protect his legally protected interests.[120] Private defence must therefore be the only way to avert the attack.[121] Whether private defence was the only way to avert the assailant's attack is once again determined according to the facts of each case.[122]

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113 Kemp *et al Criminal law* 77, 79; Matthee *Mishandelde Vrou-Sindroom* 45; Burchell and Milton *Principles of Criminal Law* 237.

114 See Burchell and Milton *Principles of Criminal Law* 242, Labuschagne *THRHR* 280 and Matthee *Mishandelde Vrou-Sindroom* 45.

115 *S v Dougherty* 2003 2 SACR 36 (W) 45H-45J; *Coetzee v Fourie* 2004 6 SA 485 (SCA) 485G-485H, 488E-488F; Burchell and Milton *Principles of Criminal Law* 243; Kemp *et al Criminal law* 85; Reddi *SACJ* 275; Matthee *Mishandelde Vrou-Sindroom* 45.

116 See *S v Dougherty* 2003 2 SACR 36 (W) 45H-45J; Burchell and Milton *Principles of Criminal Law* 243, Reddi *SACJ* 275 and Matthee *Mishandelde Vrou-Sindroom* 45 with regard to this principle.

117 *S v Dougherty* 2003 2 SACR 36 (W) 45H-45J; Burchell and Milton *Principles of Criminal Law* 243; Kemp *et al Criminal law* 85; Reddi *SACJ* 275; Matthee *Mishandelde Vrou-Sindroom* 45.

118 See par 6.3.2.

119 Burchell and Milton *Principles of Criminal Law* 242; Kemp *et al Criminal law* 82; Rabie *et al* "Criminal law – General Principles" 38; Matthee *Mishandelde Vrou-Sindroom* 45.

120 Kemp *et al Criminal law* 79; Matthee *Mishandelde Vrou-Sindroom* 45.

121 Burchell and Milton *Principles of Criminal Law* 238; Rabie *et al* "Criminal law – General Principles" 38; Labuschagne *THRHR* 280; Matthee *Mishandelde Vrou-Sindroom* 45. Also see *S v Engelbrecht* 2005 2 SACR 41 (W) 134E-134G.

122 *S v Engelbrecht* 2005 2 SACR 41 (W) 134E-134F; Matthee *Mishandelde Vrou-Sindroom* 45.

The next requirement is that there must be a reasonable balance between the attack and the accused's conduct in private defence.[123] It is not required that the nature of the protected interests of either the person acting in private defence or the assailant be proportional.[124] An assailant may therefore be killed in private defence not only when he puts another person's life in danger, but also if the latter is under threat of serious bodily injury or even rape.[125] It is also not necessary that the methods or weapons used by either the assailant or the person acting in private defence be proportional to each other.[126] Therefore, the question asked is not whether the person acting in private defence had any alternative avenue at his disposal, but rather whether the avenue he chose was reasonable.[127] Although varying opinions exist on what constitutes reasonable defensive behaviour, it is ultimately decided through an evaluation of the particular facts of each case.[128] Furthermore, all the surrounding circumstances of a particular case should be taken into account when determining whether there was a reasonable proportionality between the attack and the defen-

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123 *S v Engelbrecht* 2005 2 SACR 41 (W) 136A; Burchell and Milton *Principles of Criminal Law* 239-240; Kemp *et al Criminal law* 79-80; Reddi *SACJ* 271; Rabie *et al* "Criminal law – General Principles" 39; *Mdlalose v Masuku* 2002 JOL 9415 (D) 12; Matthee *Mishandelde Vrou-Sindroom* 46; *S v Trainor* 2003 1 SACR 35 (SCA) 41I; *S v Njobeni* 2005 JOL 14843 (Tk) 3.

124 See Kemp *et al Criminal law* 80 and Matthee *Mishandelde Vrou-Sindroom* 46 in this regard. It is also not necessary that the damage caused by the assailant and that caused by the person acting in private defence be equal in scope. See Reddi *SACJ* 271.

125 See Reddi *SACJ* 270, Burchell and Milton *Principles of Criminal Law* 240, Rabie *et al* "Criminal law – General Principles" 39, Matthee *Mishandelde Vrou-Sindroom* 46 and *Mdlalose v Masuku* 2002 JOL 9415 (D) 11.

126 In fact, in the case of *Ntsomi v Minister of Law and Order* 1990 1 SA 512 (C) 530 Van Deventer AJ pointed out that: "The victim of an unlawful assault is entitled to defend himself with whatever weapon he happens to have at hand if he has no reasonable alternative. Thus, if an offender attacks a policeman who has a dangerous weapon such as a shotgun in his hands, he D has only himself to blame if the gun is used in self-defence." Also see *Mdlalose v Masuku* 2002 JOL 9415 (D) 11, Burchell and Milton *Principles of Criminal Law* 239-241, Kemp *et al Criminal law* 80, Matthee *Mishandelde Vrou-Sindroom* 46 and Reddi *SACJ* 271.

127 Rabie *et al* "Criminal law – General Principles" 39; Burchell and Milton *Principles of Criminal Law* 240; Matthee *Mishandelde Vrou-Sindroom* 46; *Mdlalose v Masuku* 2002 JOL 9415 (D) 12.

128 Burchell and Milton *Principles of Criminal Law* 241; Matthee *Mishandelde Vrou-Sindroom* 46.

sive act.[129] These surrounding circumstances include, *inter alia*, the physical strength of the assailant and the person acting in private defence, the time and place of the attack, the nature of the threat, the protected interests that are under threat, as well as the methods or weapons at their disposal.[130]

In light of the discussion above it therefore seems unnecessary to develop the South African criminal law principles applicable to unlawfulness in order to accommodate the views and perspectives of an accused, particularly one who commits a culturally motivated crime.[131]

Furthermore, it should be kept in mind that there is no closed list of defences due to the fact that unlawfulness is not "fixed and unyielding", but rather susceptible to development due to the "fluctuating legal convictions of the community".[132] It is therefore up to a judge to ultimately decide whether the legal convictions of the community permit the killing of another as part of an indigenous belief or custom, as in *Mokonto*, because it is what the reasonable person (who knows everything) would have done in those circumstances.[133]

Phelps[134] also holds the view that, because unlawfulness is determined by way of an objective test,[135] it is highly unlikely that a formal cultural defence

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129 Burchell and Milton *Principles of Criminal Law* 241-242; Kemp *et al Criminal law* 80; Rabie *et al* "Criminal law – General Principles" 38; Reddi *SACJ* 271; Matthee *Mishandelde Vrou-Sindroom* 46; *S v Malan* 2006 JOL 17331 (VCC) 61-62.

130 There is no closed list of circumstances to be taken into account. See Burchell and Milton *Principles of Criminal Law* 241, Kemp *et al Criminal law* 80, Rabie *et al* "Criminal law – General Principles" 39, Reddi *SACJ* 269, Matthee *Mishandelde Vrou-Sindroom* 4 and *S v Trainor* 2003 1 SACR 35 (SCA) 41J-42A in this regard.

131 This argument is derived from Grant *Ann Sur SA Law* 663.

132 Grant *Ann Sur SA Law* 664; Kemp *et al Criminal law* 76-77; *Clarke v Hurst NO* 1992 4 SA 630 (D) 650J-651A.

133 Grant *Ann Sur SA Law* 664.

134 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 144.

would affect the element of unlawfulness for criminal liability. Carstens,[136] however, holds the view that arguments of culture can indeed be used to negate the element of unlawfulness, particularly under the defence of necessity.[137]

5.2.3 Necessity and the cultural defence

The defence of necessity is invoked in cases where the accused is faced with the decision of suffering some kind of evil or harm or breaking the law in order to avoid such evil or harm and he then chooses to break the law.[138] In such cases it is irrelevant whether the evil or harm is caused by the "force of surrounding circumstances or by a human agency" since the South African law does not distinguish between the last-mentioned in the case of necessity.[139] In the South African criminal law an accused can only rely on necessity where he admits to committing the criminal acts for which he is being prosecuted.[140] However, such an accused's conduct will be considered lawful if he is able to prove on a balance of probabilities that his conduct resulted from necessity.[141]

The rules governing private defence and necessity are quite similar, which often results in confusion between these defences.[142] For example, an

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135 Burchell and Milton *Principles of Criminal Law* 227; *S v Engelbrecht* 2005 2 SACR 41 (W) 129E-129G; *S v Motleleni* 1976 1 SA 403 (A) 406C-406E; *S v Goliath* 1972 3 All SA 69 (A) 74.

136 Carstens *De Jure* 19. Also see Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 144.

137 See par 5.2.3.

138 Kemp *et al Criminal law* 88; *S v Pretorius* 1975 2 SA 85 (SWA) 88I; *Chetty v Minister of Police* 1976 2 SA 450 (N) 451H; *Robbertse v Minister van Veiligheid en Sekuriteit* 1997 4 SA 168 (T) 173C; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 119B-119C, 122C-122D.

139 *S v Pretorius* 1975 2 SA 85 (SWA) 88I; Kemp *et al Criminal law* 88.

140 *S v Adams* 1979 4 SA 793 (T) 793F, 796E-796F.

141 *S v Adams* 1979 4 SA 793 (T) 797A, 797B-797C. Of course, the state has the duty to prove that the accused's conduct did not take place due to necessity. See *S v Pretorius* 1975 2 SA 85 (SWA) 89G in this regard.

142 *S v Adams* 1979 4 SA 793 (T) 796C-796D. Also see Kemp *et al Criminal law* 88.

element of necessity is always present in private defence.[143] Furthermore, whether an accused's conduct takes place under private defence or necessity, such conduct is aimed at preventing some kind of harm.[144]

However, despite the similarities above, there are also significant differences between private defence and necessity.[145] Private defence, for example, covers those situations where an accused acts against an unlawful attack or the imminent threat thereof.[146] Necessity, on the other hand, does not require the presence of an unlawful attack, but is intended to cover situations where the accused escaped from an emergency situation or the imminent threat thereof.[147] Furthermore, while an accused's conduct in private defence is directed against and intended to cause harm to the assailant, his conduct under necessity is directed against and causes harm to an innocent person.[148]

The defence of necessity can be raised to achieve one of two outcomes: it can either be raised as a defence in itself, negating the element of unlawfulness by showing that the accused's conduct was "justified by the necessity of the occasion"[149] or it can be raised in order to rebut the accused's *mens rea* (culpability).[150] As necessity is an attempt by the accused to justify his conduct, an objective test is used to determine whether his conduct is justifiable or not.[151] As with private defence, the reasonable per-

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143 *S v Pretorius* 1975 2 SA 85 (SWA) 88I.
144 *S v Pretorius* 1975 2 SA 85 (SWA) 88I.
145 *S v Adams* 1979 4 SA 793 (T) 796C-796D.
146 *S v Pretorius* 1975 2 SA 85 (SWA) 88I; *S v Kibi* 1978 4 SA 173 (E) 173A, 180A; *S v Adams* 1979 4 SA 793 (T) 796D-796E.
147 *S v Pretorius* 1975 2 SA 85 (SWA) 88I; *S v Kibi* 1978 4 SA 173 (E) 173A; *S v Adams* 1979 4 SA 793 (T) 796D-796E. Also see Kemp *et al Criminal law* 89.
148 *S v Pretorius* 1975 2 SA 85 (SWA) 89.
149 Snyman *Criminal Law* 122-139; Burchell and Milton *Principles of Criminal Law* 141-146, 226-357; Carstens *De Jure* 19; *S v Adams* 1979 4 SA 793 (T) 793F-793G, 796F; *S v Pretorius* 1975 2 SA 85 (SWA) 89A.
150 *S v Adams* 1979 4 SA 793 (T) 793F-793G, 796F. The question whether arguments of culture can exclude the culpability of the accused is dealt with in detail in Chapter 6.
151 *S v Pretorius* 1975 2 SA 85 (SWA) 89D-89E; *Chetty v Minister of Police* 1976 2 SA 450 (N) 450C-450D, 452F-452G; *S v Adams* 1979 4 SA 793 (T) 793F-

son[152] test is used to evaluate each of the requirements of the defence of necessity.[153] In applying the reasonable person test, a criminal court will therefore place itself in the position of the accused during the commission of the crime in order to assess the situation objectively in light of all the particular circumstances of the case.[154] During such an assessment, the accused's subjective views and beliefs will only be relevant in so far as they relate to the question whether a reasonable person in the position of the accused would have held the same views and beliefs.[155]

Carstens[156] provides the following example to illustrate how an accused's cultural background may be relevant to the defence of necessity:

> [A] headmen (*nkosi*) of a tribe may order/instruct one of his henchmen to assist in the killing of an elderly member of the tribe to obtain the perceived "life-giving" parts of the body (the eyes and the genitals) to be buried near the site of an annual initiation ceremony to be held to ward of evil spirits and the please/appease the ancestral spirits. In terms of the hierarchy of power a henchman cannot refuse the orders of a *nkosi* as disobedience (albeit to an objectively unlawful order) will amount to severe punishment (and even death).

Phelps,[157] however, disagrees with Carstens and criticizes his example for not revealing any new role to be played by culture within the defence of necessity. Phelps[158] further points out that the threat of punishment or death in the example given by Carstens makes it redundant for a court to consider any arguments of culture, because it can simply apply the ordinary

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793G, 796F-796G; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 122D-122E.

152 Revisit par 5.2 for a discussion of the reasonable person test.

153 *S v Pretorius* 1975 2 SA 85 (SWA) 89D-89E; *Chetty v Minister of Police* 1976 2 SA 450 (N) 450C-450D, 452F-452G; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 119B-119C, 122D-122E.

154 *S v Pretorius* 1975 2 SA 85 (SWA) 89E-89F; *Chetty v Minister of Police* 1976 2 SA 450 (N) 450C-450D, 453A-453B; *Robbertse v Minister van Veiligheid en Sekuriteit* 1997 4 SA 168 (T) 173G-173H; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 119B-119D, 123C-123D.

155 *S v Pretorius* 1975 2 SA 85 (SWA) 89D-89E.

156 Carstens *De Jure* 19.

157 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 144.

158 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 144.

rules of necessity. This means that the accused must meet the general requirements set for the defence of necessity. The first of these requirements is that a legal interest of the accused must be endangered.[159] Furthermore, the legal interest must be endangered by a threat which is imminent and has already been committed, but which is not caused due to the fault of the accused.[160] The next requirement is that it must have been necessary for the accused to avert the threat or danger.[161] The last requirement is that the means used by the accused to avert the threat or danger must be reasonable in the circumstances.[162]

Where one of the requirements above is not satisfied, the accused's act will be unlawful and criminal liability will follow, provided the necessary *mens rea* has been proved.[163] In this regard, if the accused genuinely but mistakenly believed his act was justified by necessity, he should escape liability for a crime requiring intention on the ground of absence of *mens rea* in respect of the unlawfulness of his act, provided his erroneous belief was due to mistake of fact and not of law.[164]

As it is trite law in South Africa that the defence of necessity succeeds in cases involving threats of harm and death, it would seem as though neces-

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159 *S v Pretorius* 1975 2 SA 85 (SWA) 89C-89D; *S v Kibi* 1978 4 SA 173 (E) 178H; *S v Adams* 1979 4 SA 793 (T) 793E-793F; 796A; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 119B-119C.

160 *S v Pretorius* 1975 2 SA 85 (SWA) 89C-89D; *S v Kibi* 1978 4 SA 173 (E) 178H; *S v Adams* 1979 4 SA 793 (T) 793E-793F; 796A-796B; *Robbertse v Minister van Veiligheid en Sekuriteit* 1997 4 SA 168 (T) 173C; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 123C.

161 *S v Pretorius* 1975 2 SA 85 (SWA) 89C-89D; *S v Kibi* 1978 4 SA 173 (E) 178H; *S v Adams* 1979 4 SA 793 (T) 793E-793F; 796B-796C.

162 *S v Pretorius* 1975 2 SA 85 (SWA) 89C-89D; *S v Kibi* 1978 4 SA 173 (E) 179A; *S v Adams* 1979 4 SA 793 (T) 793E-793F; 796B-796C; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 123D.

163 *S v Pretorius* 1975 2 SA 85 (SWA) 89F-89G.

164 *S v Pretorius* 1975 2 SA 85 (SWA) 89F-89G.

sity may be a good defence, in general, in the South African criminal law.[165] However, in the case of *R v Mahomed*,[166] Watermeyer AJA warned that:

> The defence of necessity must be confined within the strictest limits because, if this were not so, the danger would exist that a plea of necessity would excuse criminal acts.

The difficulty, however, lies in defining the limits mentioned above since they are not discernible from the specific examples given by the Roman and Roman-Dutch authorities nor has any attempt been made to prescribe them in the few relevant South African decisions.[167] Phelps[168] therefore argues that the objective test for unlawfulness limits the scope for considering arguments of indigenous beliefs and customs within the defence of necessity.

5.3 Conclusion

If a cultural defence were to be formally recognised in the South African criminal law it could exhonerate an accused who is charged with the commission of a culturally motivated crime or at the very least, mitigate the punishment to be imposed on the accused.[169] Therefore, as indicated in this Chapter,[170] it is necessary to consider the influence of a cultural defence on the elements of criminal liability in South Africa, in particular that of unlawfulness,[171] conduct[172] and culpability.[173] The focus of this Chapter was to consider whether an accused can put forth evidence of his cultural back-

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165 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 144; *S v Pretorius* 1975 2 SA 85 (SWA) 88C-88D, 89A-89C; *S v Kibi* 1978 4 SA 173 (E) 174B.
166 1938 AD 30. Also see *S v Kibi* 1978 4 SA 173 (E) 178G.
167 *S v Pretorius* 1975 2 SA 85 (SWA) 89B-89C.
168 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 144.
169 See par 5.1.
170 See par 5.1.
171 See par 5.2.
172 See par 6.2.
173 See par 6.3.

ground and values within the context of the defences of private defence[174] and necessity[175] to exclude the element of unlawfulness.

A perusal of South African case law dealing with the indigenous belief in witchcraft revealed that the South African courts have been unwilling to accept that a truly held belief in witchcraft can justify an accused's conduct in private defence.[176] What has become clear from the discussion in this Chapter is that the accused's truly held belief in witchcraft does not satisfy the imminence-requirement for a successful reliance on the defence of private defence.[177] Furthermore, in this Chapter it was shown that, considering that the South African criminal law already accommodates an accused's views and perspectives during the sentencing stage,[178] it is unnecessary to develop the South African criminal law principles applicable to unlawfulness in order to accommodate the views and perspectives of an accused who commits a culturally motivated crime.[179]

However, it may still be possible for an accused to raise arguments of his cultural background to exclude his conduct and culpability. This matter is discussed in the following Chapter.[180]

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174 See par 5.2.
175 See par 5.3.
176 See par 5.2.2.
177 See par 5.2.2.
178 See par 6.4.
179 See par 5.2.2.
180 See paras 6.2 and 6.3.

CHAPTER 6
INFLUENCE OF THE CULTURAL DEFENCE ON CONDUCT AND CULPABILITY

6.1 Introduction

This Chapter considers the possible influence of the cultural defence on the elements of conduct and culpability. Conduct in terms of the South African criminal law consists of either a voluntary act or an omission.[1] The focus of this Chapter is to determine whether an indigenous belief held by an accused can cause him to act involuntarily.[2]

The test for determining involuntariness contains a component of the question into an accused's culpability.[3] Both voluntariness and culpability entail a determination of whether the accused had the ability to control his bodily movements.[4] The question can therefore be asked whether an indigenous belief held by an accused could result in a view that, during the commission of a common law or statutory crime, he did not perform a voluntary act in order to be held criminally liable.

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1 Snyman *Criminal Law* 51; Burchell and Milton *Principles of Criminal Law* 178, 185; Rautenbach and Matthee *JLP* 116 footnote 28.
2 See par 5.2.
3 Burchell and Milton *Principles of Criminal Law* 183. This aspect is discussed in par 5.3.
4 See paras 6.2 and 6.3.

Criminal capacity and fault are also viewed as prerequisites for the existence of culpability.[5] Culpability forms the basis for holding an accused liable for his unlawful conduct.[6] It can therefore also be asked whether an indigenous belief or custom could result in an accused not having the necessary criminal capacity or fault and therefore the necessary culpability to be held criminally liable.[7]

6.2 Voluntary conduct and the cultural defence

The first step in determining whether an accused can be held criminally liable is to determine whether the accused performed a voluntary act that meets the definitional requirements of a particular crime.[8] Without a voluntary act it would be unnecessary to determine whether the accused had the necessary culpability to be held criminally liable as it would be necessarily excluded.[9] More specifically, without the presence of a voluntary human act, it would be unnecessary to ascertain whether the accused had the necessary criminal capacity and fault to be held criminally liable.[10]

In terms of the South African criminal law, an act can take on the form of either a voluntary act or an omission.[11] Put simply, an omission entails that the accused refrained from performing some or other act.[12] In laymen's terms, a voluntary act refers to an accused's active, positive conduct or behaviour.[13] An act will be voluntary if it was within the accused's physical power to prevent or control.[14] Voluntariness therefore implies that it should

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5 Burchell and Milton *Principles of Criminal Law* 358, 455.
6 Snyman *Criminal Law* 147, 156.
7 See par 6.3.
8 Burchell and Milton *Principles of Criminal Law* 178-179, 185; *S v Cunningham* 1996 1 SACR 631 (A) 635G-635H; *R v Mkize* 1959 2 SA 260 (N) 260, 265.
9 *R v Mkize* 1959 2 SA 260 (N) 265.
10 *R v Mkize* 1959 2 SA 260 (N) 265.
11 Kemp *et al Criminal law* 44; Burchell and Milton *Principles of Criminal Law* 178, 185-186.
12 Kemp *et al Criminal law* 44; Burchell and Milton *Principles of Criminal Law* 186.
13 Kemp *et al Criminal law* 44; Burchell and Milton *Principles of Criminal Law* 186.
14 Kemp *et al Criminal law* 22, 31.

have been possible for the accused to act positively in order to prevent the commission of a crime.[15] Voluntariness also implies that an accused must have had the ability to direct his bodily movements through his own free will.[16] This means that an accused must be able to make a decision regarding his conduct and carry out that decision in reality.[17] In essence, the human mind must therefore be in control of the act being performed before it can be considered to be a voluntary act.[18]

If, however, it was impossible for the accused to prevent the commission of a crime, he can raise impossibility as a defence.[19] Generally, the defence of impossibility has three requirements that must be met.[20] Firstly, the legal rule he is breaching must expect of the accused to perform some or other positive act.[21] Secondly, it must have been objectively and physically impossible for him to obey the legal duty imposed on him.[22] Lastly, he must not have caused the impossibility himself.[23]

If an accused acted involuntarily, he cannot be held criminally liable for his conduct.[24] Kemp *et al*[25] point out the following examples where an accused's conduct will not be considered to be voluntary conduct for purpos-

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15 Kemp *et al Criminal law* 31. Also see Burchell and Milton *Principles of Criminal Law* 179-180.

16 Kemp *et al Criminal law* 31; Burchell and Milton *Principles of Criminal Law* 179; *S v Pederson* 1998 3 All SA 321 (N) 323-324.

17 Matthee *Mishandelde Vrou-Sindroom* 60 footnote 410; Kemp *et al Criminal law* 31.

18 *S v Pederson* 1998 3 All SA 321 (N) 323-324.

19 Kemp *et al Criminal law* 93; Burchell and Milton *Principles of Criminal Law* 280.

20 Kemp *et al Criminal law* 93-94; Burchell and Milton *Principles of Criminal Law* 280.

21 Kemp *et al Criminal law* 93; Burchell and Milton *Principles of Criminal Law* 280.

22 Kemp *et al Criminal law* 93; Burchell and Milton *Principles of Criminal Law* 280.

23 Kemp *et al Criminal law* 94; Burchell and Milton *Principles of Criminal Law* 280.

24 Kemp *et al Criminal law* 22, 31; Burchell and Milton *Principles of Criminal Law* 179, 180-181; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142; *R v Mkize* 1959 2 SA 260 (N) 265; *R v Smit* 1950 4 SA 165 (O) 165.

25 Kemp *et al Criminal law* 31.

es of criminal liability: where an accused's conduct is the result of imposed physical force, uncontrollable muscular movements, sleep, unconsciousness or automatism.[26] Automatism is of particular signifance for the South African criminal law because, as mentioned below, automatism can manifest in various forms or result due to various causes.[27] The criminal courts have described involuntary conduct in a state of automatism in a number of ways, including "reacting in a mechanical way",[28] "acting mechanically without intention, volition or motive,[29] performing an act in a "state of unconsciousness"[30] or even acting "involuntarily or automatically".[31] From these descriptions it is evident that, in cases of automatism, an accused´s free will is no longer being directed towards his actions and he can therefore not be held criminally liable for the consequences thereof.[32] Kemp *et al*[33] explain the reason why an accused cannot be held criminally liable for his conduct in a state of automatism in the following way:

> A person might perform what appears to be a conscious and goal-directed action, but he might actually not be in conscious control of that action, or even be aware of what he is doing.

So far, the criminal courts have considered various situations or causes that could lead to a defence of automatism.[34] These include sleepwalking, epilepsy, hypoglycaemia (low blood sugar), blackouts, amnesia and intoxication.[35] The courts have also found that involuntary conduct in a state of automatism can result from dreams or nightmares while the accused was in

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26 Also see Burchell and Milton *Principles of Criminal Law* 180-181.
27 Kemp *et al Criminal law* 32-33.
28 *R v Dhlamini* 1955 1 SA 120 (T) 121. Also see Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.
29 *R v Dhlamini* 1955 1 SA 120 (T) 122.
30 *R v Mkize* 1959 2 SA 260 (N) 265. Also see Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.
31 *R v Ngang* 1960 3 SA 363 (T) 363, 365. Also see Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.
32 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.
33 Kemp *et al Criminal law* 31.
34 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.
35 See Kemp *et al Criminal law* 32-40 for a discussion of these forms and causes of automatism.

a "half-wakened"[36] or dissociated[37] state. What is, however, important to note is that there is no closed list of situations or causes of automatism.[38]

There is, therefore, nothing preventing indigenous beliefs and customs from being included in the list of factors leading to a state of automatism. In fact, as pointed out by Phelps,[39] criminal courts have been considering arguments of indigenous beliefs resulting in the accused's conduct being involuntary as far back as the 1960s. For example, in *R v Ngang*,[40] the accused relied on his truly held belief in the *tokoloshe* to justify stabbing the complainant.[41] The court, however, was of the opinion that the matter did not revolve around a mistaken belief in magic or witchcraft, which would have had a material bearing on the accused's culpability,[42] but rather on the question whether the accused had acted voluntarily, and found that he had not.[43] The accused was subsequently acquitted on the basis that he acted in a state of automatism.[44]

In order to reach its finding, the court in *Ngang* had to accept the veracity of the accused's belief in a *tokoloshe.*[45] What is interesting, however, is that neither the court nor the prosecution relied on expert evidence to ascertain the veracity of the accused's belief in the *tokoloshe,* which could easily have been determined if the accused´s belief was evaluated within a

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36 *R v Dhlamini* 1955 1 SA 120 (T) 121-122; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.

37 *S v Mahlinza* 1967 1 SA 408 (A) 409, 413; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.

38 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.

39 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.

40 1960 3 SA 363 (T) 366A-366F. See par 3.4.3 for a brief outline of the facts of the case.

41 *R v Ngang* 1960 3 SA 363 (T) 364C-364E.

42 This matter is further explored in par 6.3.2.

43 *R v Ngang* 1960 3 SA 363 (T) 366E-366G. See par 6.2 where the matter of voluntary conduct is discussed further.

44 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.

45 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.

broader range of evidence pertaining to the *tokoloshe*.[46] In this regard Phelps[47] points out that:

> A mere acceptance of an accused's version of culture or religion in this manner would allow offenders to invoke their beliefs with the cynical intention of escaping liability.

In the case of *S v Ngema*,[48] the accused also attempted to persuade the court that, due to his indigenous belief in the *tokoloshe*, he either did not have the necessary culpability in order to be held criminally liable or that he had acted involuntarily when he stabbed the deceased. The court, however, dismissed the accused's contention that he acted involuntarily by relying on psychiatric evidence of his conduct during and memory of the killing of the deceased.[49] The court was, however, willing to accept that the accused's belief in the *tokoloshe* reduced his blameworthiness to such an extent that he could not be found guilty of murder.[50] This case is further discussed below in the context of culpability as an element of criminal liability.

In light of the above, it does not seem necessary to introduce any new innovations to the South African criminal law when it comes to determining the voluntariness of an accused's conduct in criminal cases involving indigenous beliefs and customs.[51]

6.3 Culpability and the cultural defence

As mentioned in Chapter 1,[52] a person is not necessarily guilty of a particular crime if he commits an unlawful act that meets the definitional elements

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46 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.
47 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 143.
48 1992 2 All SA 436 (D).
49 *S v Ngema* 1992 2 All SA 436 (D).
50 *S v Ngema* 1992 2 All SA 436 (D).
51 This is, in essence, the argument put forth by Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 144.
52 See par 1.1.6. Also see Rautenbach and Matthee *JLP* 117.

of that crime.[53] Before it can be said that a person is criminally liable for his conduct, he must also have the necessary culpability.[54] Culpability is the basis on which an accused can legally be held liable for his conduct and is determined by focusing on the accused as an individual.[55] Here the question is asked whether an accused can be blamed for a crime committed by him considering his "persoonlike gawes, tekortkominge en aanleg",[56] as well as what the law expects of him in certain circumstances.[57]

Culpability requires that a person must be free to make a choice regarding his conduct and be held liable based on that choice.[58] Only once it has been established that a person has committed an unlawful act, can the question as to his culpability be raised.[59] However, before a person can be held criminally liable, culpability and unlawfulness must exist simultaneously.[60]

In the South African criminal law culpability is made up of two elements: criminal capacity and fault (*mens rea*).[61] Therefore, before it can be said that a particular accused had the necessary culpability in order to be held criminally liable, it must be clear that his conduct took place with the necessary criminal capacity, as well as with the necessary fault.[62]

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53 Snyman *Criminal law* 149; Rautenbach and Matthee *JLP* 117.
54 Rautenbach and Matthee *JLP* 117.
55 Snyman *Criminal law* 149; Burchell and Milton *Principles of Criminal Law* 455; Matthee *Mishandelde Vrou-Sindroom* 72.
56 Matthee *Mishandelde Vrou-Sindroom* 72.
57 Matthee *Mishandelde Vrou-Sindroom* 72.
58 Snyman *Criminal law* 151; Matthee *Mishandelde Vrou-Sindroom* 72.
59 Snyman *Criminal law* 149; Matthee *Mishandelde Vrou-Sindroom* 72.
60 Burchell and Milton *Principles of Criminal Law* 455; Matthee *Mishandelde Vrou-Sindroom* 72.
61 Snyman *Criminal law* 159; Kemp *et al Criminal law* 23.
62 Burchell and Milton *Principles of Criminal Law* 358; Snyman *Criminal law* 149; Kemp *et al Criminal law* 23; Rautenbach and Matthee *JLP* 116 footnote 31, 117.

6.3.1 Capacity as prerequisite for culpability

In South Africa an individual can only be held criminally liable if the State succeeds in proving that he had the requisite criminal capacity when he committed the unlawful act.[63] A person will have the necessary capacity required by law if he is mentally capable of being held liable for his unlawful conduct.[64] The test to determine whether a person has the requisite criminal capacity is twofold: firstly, it is determined whether the person has the ability to distinguish between right and wrong[65] and secondly, whether a person has the ability to conduct himself in accordance with his appreciation of what is right and what is wrong.[66] Should one of these abilities be

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63 Burchell and Milton *Principles of Criminal Law* 358; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 145; *S v Laubscher* 1988 1 SA 163 (A)166F-166G; *S v Nursingh* 1995 2 SACR 331 (D) 334A-334B.

64 *S v Laubscher* 1988 1 SA 163 (A)166F-166G; *S v Nursingh* 1995 2 SACR 331 (D) 339A-339B; *S v Eadie* 2002 3 SA 719 (SCA) 734F; Burchell and Milton *Principles of Criminal Law* 358; Carstens *De Jure* 19.

65 This part can also be referred to as the "cognitive" part of the enquiry into a person´s capacity. This part of the test is aimed at determining a person´s capacity for insight; in other words, whether a person has the ability to realize that his conduct is unlawful. See *S v Laubscher* 1988 1 SA 163 (A) 166H-166I, *S v Nursingh* 1995 2 SACR 331 (D) 339B-339C, *S v Eadie* 2001 1 SACR 172 (C) 177C-177D, *S v Eadie* 2002 3 SA 719 (SCA) 720A-720B, 734F-734G, Snyman *Criminal Law* 159-160, Burchell and Milton *Principles of Criminal Law* 183, 358, 458, Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 145; Louw *SACJ* 201, Carstens *De Jure* 19, Rautenbach and Matthee *JLP* 117 and Matthee *Mishandelde Vrou-Sindroom* 61.

66 This part of the test can be referred to as the "conative" part of the enquiry into a person´s capacity. This part aims to determine a person´s capacity for self-control. A person must have the ability to resist the temptation of performing some or other unlawful act. In other words, a person must have the ability to make a decision whether to act lawfully or unlawfully subject to his own free will. See *S v Laubscher* 1988 1 SA 163 (A) 166I-166J, *S v Nursingh* 1995 2 SACR 331 (D) 339B-339C, *S v Eadie* 2001 1 SACR 172 (C) 177C-177D, *S v Eadie* 2002 3 SA 719 (SCA) 720B, 734G-734H, Snyman *Criminal Law* 159-160, Burchell and Milton *Principles of Criminal Law* 183, 358, 458, Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 145; Louw *SACJ* 201, Carstens *De Jure* 19, Rautenbach and Matthee *JLP* 117 and Matthee *Mishandelde Vrou-Sindroom* 61.

absent, a person will not have the requisite capacity to be held criminally liable.[67]

The cultural background of a particular accused may have an impact on the criminal capacity of that accused.[68] In fact, Carstens[69] and Phelps[70] point out that a truly held belief in witchcraft[71] or the medicinal power of *muti*[72] can result in the accused lacking the requisite criminal capacity in respect of either part of the test above. A perusal of South African case law has also revealed that an accused may lack the necessary capacity in cases involving the indigenous belief in the *tokoloshe*[73] or the indigenous custom of *ukuthwala*.[74] Once it has been established that a particular accused had the requisite criminal capacity, it should be determined whether the accused had the requisite fault to be held criminally liable for his unlawful conduct.[75]

6.3.2 Fault (mens rea)

An accused cannot be held criminally liable if he did not have the necessary fault when he committed the unlawful act.[76] Fault can take on one of two forms, namely intention[77] or negligence.[78] From the discussion earli-

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67 *S v Laubscher* 1988 1 SA 163 (A) 166J-167A; *S v Nursingh* 1995 2 SACR 331 (D) 339B-339C; *S v Eadie* 2002 3 SA 719 (SCA) 734H-734I; Burchell and Milton *Principles of Criminal Law* 358; Matthee *Mishandelde Vrou-Sindroom* 61.

68 Carstens *De Jure* 19.

69 Carstens *De Jure* 19.

70 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 145.

71 Revisit par 3.2 where the indigenous belief in witchcraft is discussed in detail.

72 Revisit par 3.5 where the indigenous belief in *muti* is discussed in detail.

73 See par 3.3.3 as well as the cases of *S v Ngema* 1992 2 All SA 436 (D) and *R v Mbombela* 1933 AD 269 in this regard.

74 See par 3.6.3 as well as the cases of *R v Njova* 1906 EDC 71, *Ncedani v R* 1908 22 EDC 243, *R v Swartbooi* 1916 EDL 170 and *R v Sita* 1954 4 SA 20 (E) in this regard.

75 Rautenbach and Matthee *JLP* 117.

76 Burchell and Milton *Principles of Criminal Law* 455; Matthee *Mishandelde Vrou-Sindroom* 72.

77 Also referred to as "*dolus*". See Snyman *Criminal Law* 95-160, Burchell and Milton *Principles of Criminal Law* 455 and Rautenbach and Matthee *JLP* 117.

er,[79] it is clear that an individual has the requisite culpability in the form of intent if that individual, knowing that his conduct is unlawful,[80] kills a suspected witch,[81] kills a person to acquire body parts for *muti*[82] or carries off a girl and/or has sexual intercourse with her.[83]

The test for intention is subjective in nature in that a court needs to determine what went on in the mind of the accused during the commission of a particular offence.[84] Such a determination is done by the court putting it in the shoes of the accused during the commission of the crime and taking all relevant facts into account.[85]

Intention consists of two elements: a cognitive (intellectual) element and a conative (voluntative) element.[86] The conative element consists of aiming a person´s will at performing certain conduct or achieving a certain result.[87] The cognitive element requires the accused to be aware that his conduct meets the definitional elements of a particular crime and that his conduct is

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78 Referred to as "*culpa*". See Snyman *Criminal Law* 95-160, Burchell and Milton *Principles of Criminal Law* 455, Rautenbach and Matthee *JLP* 117 and Matthee *Mishandelde Vrou-Sindroom* 73.

79 See paras 3.2, 3.5 and 3.6.

80 See Burchell and Milton *Principles of Criminal Law* 459, *S v Bean* 2001 JOL 7925 (NK) 8-9 and Matthee *Mishandelde Vrou-Sindroom* 73 in this regard.

81 See par 3.2.

82 See par 3.5.

83 See par 3.6.

84 See Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 148, *S v Sigwahla* 1967 4 SA 566 (A) 570B-570D, *S v Sephuti* 1985 1 SA 9 (A) 12I, *S v Lungile* 2000 1 All SA 179 (A) 180, 184, *S v Bean* 2001 JOL 7925 (NK) 8, *S v Van Aardt* 2007 JOL 20868 26 and *S v Swaartbooi* 2008 JOL 21692 (OK) 3.

85 Bonthuys *et al* "Gender" 351; *S v Sigwahla* 1967 4 SA 566 (A) 570E; *S v Ngubane* 1985 3 SA 677 (A) 685F-685G; *S v Stigling* 1989 3 SA 720 (A) 723C-723D; *S v Lungile* 2000 1 All SA 179 (A) 180, 184; *S v Ferreira* 2004 2 SACR 454 (SCA) 467H.

86 Burchell and Milton *Principles of Criminal Law* 461; Rautenbach and Matthee *JLP* 117; Matthee *Mishandelde Vrou-Sindroom* 73.

87 Burchell and Milton *Principles of Criminal Law* 461; Rautenbach and Matthee *JLP* 117; Matthee *Mishandelde Vrou-Sindroom* 73; *S v Bean* 2001 JOL 7925 (NK) 8.

unlawful.[88] In short, intention refers to the fact that an accused should realise that his conduct is not justified[89] and that his conduct boils down to a crime.[90]

If the cognitive element above is lacking, in other words, an accused is oblivious to the definitional elements of a particular crime or the fact that his conduct is unlawful, then mistake (or *error)* is present and consequently the accused lacks the necessary intention.[91] An accused´s mistaken belief does not need to be reasonable.[92] Put differently, the question is not whether a reasonable person in the position of the accused would have made a mistake.[93] Instead, as Snyman[94] points out, the test to determine whether there was a mistaken belief or not is subjective in that the accused's:

> … individual characteristics, his level of superstition, degree of intelligence, background and psychological disposition may be taken into account in determining whether he had the required intention.

Whether there was a mistaken belief sufficient to exclude intent is therefore a factual question based on the accused´s view of the events prevalent during the commission of the act in question.[95]

In order to exclude an accused's intention, a mistaken belief must also be material.[96] A mistaken belief is only material if it relates to an accused´s

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88 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 148; Rautenbach and Matthee *JLP* 117; Matthee *Mishandelde Vrou-Sindroom* 73; *S v Bean* 2001 JOL 7925 (NK) 9.

89 This is a question of fact. See Snyman *Criminal Law* 182-202 and Rautenbach and Matthee *JLP* 117.

90 This is a question of law.

91 Snyman *Criminal law* 191; Matthee *Mishandelde Vrou-Sindroom* 73.

92 *S v De Blom* 1977 2 SA 513 (A) 530E-530F; Snyman *Criminal law* 192; Burchell and Milton *Principles of Criminal Law* 502-503; Matthee *Mishandelde Vrou-Sindroom* 73.

93 Snyman *Criminal law* 192.

94 Snyman *Criminal law* 192, 204; Matthee *Mishandelde Vrou-Sindroom* 73.

95 Snyman *Criminal law* 192; Burchell and Milton *Principles of Criminal Law* 503; Matthee *Mishandelde Vrou-Sindroom* 73 footnote 509.

96 Snyman *Criminal law* 192; Burchell and Milton *Principles of Criminal Law* 502-503.

conduct, the unlawfulness thereof or the definitional elements of a particular crime.[97]

An accused´s knowledge of the unlawfulness of his conduct means that he must at least be aware that his conduct is not covered by any ground of justification.[98] In this case, an accused's knowledge of unlawfulness does not consist of his knowledge of certain legal rules, but rather his knowledge of certain facts.[99] Putative defences serve as examples of scenarios where an accused´s knowledge of unlawfulness consists of his knowledge of certain facts rather than his knowledge of certain legal rules and are therefore considered to be an extension of the rule regarding knowledge of unlawfulness.[100]

Earlier it was shown that the grounds of justification negating unlawfulness are assessed objectively.[101] If, however, an accused has a genuine, yet mistaken belief that his conduct is justified under a particular defence, the element of intention will be absent.[102] This could very well be the case where cultural or religious convictions resulted in a genuine, yet mistaken belief.[103] Examples of such a situation can be found in the cases of *R v Ngang*[104] and *R v Mbombela*[105] discussed earlier[106] and below.

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97 Snyman *Criminal law* 192; Matthee *Mishandelde Vrou-Sindroom* 73 footnote 509.

98 Snyman *Criminal Law* 202; Matthee *Mishandelde Vrou-Sindroom* 74. See par 3.1.1 for an indication of the various grounds of justification available in the South African criminal law.

99 Matthee *Mishandelde Vrou-Sindroom* 74.

100 See in this regard Matthee *Mishandelde Vrou-Sindroom* 74 where the author refers to the defence of putative private defence. Also see Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 149.

101 See par 5.2.1 as well as Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 149.

102 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 149.

103 This is based on the argument of Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 149.

104 1960 3 SA 363 (T).

105 1933 AD 269.

106 See par 3.6.3.

At present the South African law regarding the intention of an accused therefore already takes cultural factors into account and therefore arguments of an accused's cultural background can neatly fit into the existing rules of fault in the form of intention.[107] This is especially true when it comes to an accused's knowledge of unlawfulness.[108] This, however, is not the situation when it comes to fault in the form of negligence.[109]

In South Africa there are common law crimes that require fault in the form of negligence, which is a lesser form of fault than intent.[110] Whereas intention is determined using a subjective test,[111] negligence is determined by way of an objective test which is aimed at determining whether a fictional reasonable person in the same circumstances as the accused would have foreseen the possibility that his conduct could result in the commission of a crime and would have taken steps to guard against such a consequence.[112] It would also be sufficient if the reasonable person in the circumstances of the accused would have foreseen that the definitional elements of a particular crime are present or that his conduct would not be justified under any ground of justification.[113]

However, in a country such as South Africa with a diverse society and where the right to cultural freedom[114] is enshrined in the Constitution, the

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107 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 149-150.

108 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 150.

109 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 150.

110 Rautenbach and Matthee *JLP* 117. In fact, the only crimes that require culpability in the form of negligence, namely culpable homicide and contempt of court. See Snyman *Criminal Law* 209 in this regard.

111 See par 6.3.2.1.

112 Snyman *Criminal Law* 209-210, 214-215; Burchell and Milton *Principles of Criminal Law* 154, 523, 525, 527-529; *S v Ngema* 1992 2 All SA 436 (D); Rautenbach and Matthee *JLP* 117, 128; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 151; Matthee *Mishandelde Vrou-Sindroom* 77.

113 Snyman *Criminal Law* 220; Matthee *Mishandelde Vrou-Sindroom* 77.

114 These rights are dealt with in more detail in Chapter 7.

notion of a "fictional reasonable person" is particularly difficult to define.[115] Burchell[116] explains this definitional difficulty by referring to the:

> … potential injustice of applying a completely objective criterion of negligence in a diverse, multi-cultural community with varying degrees of education, literacy and backgrounds.

The courts in South Africa have also grappled with the issue of accurately defining the fictional reasonable person.[117] In the case of *S v Melk*,[118] for example, Hefer JA observed that:

> If the so-called objective test of negligence is applied, as it generally is … the unsophisticated and uneducated shepherd will be treated no differently from the professor and no heed will be taken of the 'widely differing standards of culture, education and social awareness of … various groups of persons …' .

In making his observation, Hefer JA relied on the case of *S v Naidoo*[119] where Fannin J was also mindful:

> … of the widely differing standards of culture, education and social awareness of the various groups of persons … as citizens of South Africa … and of the fact that the application of an objective standard to many of such persons may well result in a hardship … .

Another case which illustrates the potential injustice of the objective, reasonable person standard of negligence is *R v Mbombela*.[120] In this case the accused relied on his truly held belief in the *tokoloshe* as a defence in an attempt to persuade the court that, when he struck his nephew with a hatchet, he genuinely believed that he was not killing a human being, but

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115 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 151.

116 Burchell and Milton *Principles of Criminal Law* 531-532.

117 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 151. Revisit par 5.2 for a discussion of the reasonable person test.

118 1988 4 SA 561 (A) 578E-578G. Also see Burchell and Milton *Principles of Criminal Law* 531-532 and Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 151.

119 1974 4 SA 574 (N) 576G-576H.

120 1933 AD 269. For a brief outline of the facts of this case see par 3.4.3, Carstens *De Jure* 10 or Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 151.

an evil spirit (*tokoloshe*).[121] Mbombela´s defence was dismissed by both the court *a quo*, as well as the Appellate Division, on the basis that, to succeed with the defence of mistake regarding the object, the mistake must have been reasonable under the circumstances.[122]

After testing the accused actions against that of a reasonable person under the same circumstances, the Appellate Division found that, although Mbombela´s belief in the *tokoloshe* was genuine and he therefore lacked the intention to commit murder, his actions were still unreasonable and he was subsequently convicted of culpable homicide.[123] Mbombela was therefore judged according to a standard of reasonableness that ignored the "race or the idiosyncrasies, or the superstitions, or the intelligence of the person accused".[124]

Carstens,[125] however, is of the opinion that the court erred in its decision. According to Carstens,[126] the accused was unaware of the unlawfulness of his conduct and a cultural defence should therefore have succeeded. Carstens[127] based his argument on the fact that, in South African law, the defence of mistake will only succeed if the mistake was material and not reasonable.

The case of *S v Ngema*[128] also serves as an example of the judiciary's attempt to soften the blow when applying the objective, reasonable person standard of negligence in a culturally diverse society such as South Afri-

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121 1933 AD 269; par 3.4.3; Carstens *De Jure* 10; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 151.
122 1933 AD 269; par 3.4.3; Carstens *De Jure* 10; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 151-152.
123 1933 AD 269. Also see Carstens *De Jure* 9.
124 1933 AD 269 273-274; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152.
125 Carstens *De Jure* 10.
126 Carstens *De Jure* 10.
127 Carstens *De Jure* 10.
128 1992 2 All SA 436 (D). For a brief outline of the facts see par 3.4.3.

ca.[129] In *S v Ngema*,[130] the accused also attempted to persuade the court that his belief in the *tokoloshe* had either caused him not to have the "necessary blameworthy state of mind to murder the deceased" or that he was acting involuntarily. By relying on psychiatric evidence of the accused's memory and actions of the event, Hugo J[131] dismissed the accused's contention that he acted involuntarily. Hugo J[132] was, however, willing to accept the accused's contention that his belief in the *tokoloshe* reduced his blameworthiness to such an extent that he could not be found guilty of murder. This is evident from the following statements made by Hugo J:[133]

> We must find therefore, albeit somewhat reluctantly, on the basis that it was at least reasonably possibly true, that the accused dreamt that he was being throttled by some unknown but non-human being.
>
> The findings we have made as to the dreams and understanding of the accused leads us to find as a fact that the accused could not have had the subjective intention to kill a human being. There can, therefore, be no conviction of murder or assault.

Hugo J[134] further pointed out that, despite the fact that the test for negligence is an objective one which already takes into account the particular circumstances of an accused, there is still room for individualising the test. Although Hugo J was not willing to do away completely with the traditional reasonable person test he was, however, willing to accept that, in cases such as *Ngema*, the accused's negligence should be tested according to the:

> … touchstone of the reasonable person of the same background and educational level, culture, sex and … race of the accused.[135]

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129 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152.
130 *S v Ngema* 1992 2 All SA 436 (D).
131 *S v Ngema* 1992 2 All SA 436 (D).
132 *S v Ngema* 1992 2 All SA 436 (D).
133 *S v Ngema* 1992 2 All SA 436 (D).
134 This is referred to as the "subjectivising of the test". See *S v Ngema* 1992 2 All SA 436 (D); Rautenbach and Matthee *JLP* 128.
135 *S v Ngema* 1992 2 All SA 436 (D); Rautenbach and Matthee *JLP* 128.

In this regard, and contrary to the decision in *R v Mbombela*, Hugo J[136] found that the accused's belief in the *tokoloshe* "is not uncommon amongst people of his ilk" and could therefore be taken into account when determining his (accused's) negligence according to the objective, reasonable person standard.

Despite the findings above, Hugo J[137] still found that the accused had acted unreasonably by striking nine blows at the "thing" he saw in his dreams and subsequently found him guilty of culpable homicide. Hugo J's finding was based on the fact that nightmares are not peculiar to any particular race or class.[138] Nightmares are something that everyone has from time to time and can therefore never make the killing of another human being in the same circumstances of the accused reasonable.[139]

According to Phelps,[140] the approach of Hugo J above was intended to "reflect the changing standards in South Africa during its transition out of apartheid". Such an approach, as Phelps[141] points out, was already "ahead of the times", because although the Constitution had not yet existed by the time *Ngema* was decided, Hugo J's approach was already in line with the constitutional right to cultural freedom.

Phelps,[142] however, also criticizes Hugo J's approach for the possible adverse effects it can have on the general principles of criminal liability in South Africa. According to Phelps,[143] Hugo J's approach has the potential

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136 *S v Ngema* 1992 2 All SA 436 (D); Rautenbach and Matthee *JLP* 128; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152.

137 *S v Ngema* 1992 2 All SA 436 (D); Rautenbach and Matthee *JLP* 128.

138 *S v Ngema* 1992 2 All SA 436 (D); Rautenbach and Matthee *JLP* 128.

139 *S v Ngema* 1992 2 All SA 436 (D); Rautenbach and Matthee *JLP* 128.

140 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152.

141 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152.

142 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152.

143 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152.

of making the test for negligence vaguer. In this regard, Phelps[144] refers to Hugo J's statement that the accused's negligence should be determined with reference to his (accused's) level of education, culture, sex and race, while any "further individual peculiarities of the accused alone must … be disregarded".[145] The biggest concern by Phelps[146] is that Hugo J does not elaborate on what is included in the accused's "further individual peculiarities" nor does Hugo J indicate the principle on which he distinguishes these characteristics from the other characteristics he considers to be part of the test for negligence.

Since *Ngema*, other decisions of the High Court have also favoured the process of individualising the objective test for negligence without developing an all-encompassing theory on how courts should conduct such a process.[147] Therefore, according to Phelps,[148] individualising the objective, reasonable person test to determine a person's negligence is still a moot point in the South African criminal law. This is especially due to the fact that case law seems to draw a line between the internal characteristics of a particular accused and the external circumstances he finds himself in.[149]

Although it is only the external characteristics, according to Phelps,[150] that should be attributed to the reasonable person, the courts have, however, not applied this rule strictly. As a result, the courts have also considered

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144 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152.

145 *S v Ngema* 1992 2 All SA 436 (D).

146 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152.

147 See, for example, the cases of *S v Robshon; S v Hattingh* 1991 3 SA 322 (W), *S v Shivute* 1991 1 SACR 656 (Nm) and *S v Ngubane* 1985 3 SA 677 (A).

148 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152. See, for example, *S v Robson; S v Hattingh* 1991 3 SA 322 (W) 323J, 333D-333G, 333I-333J as well as *S v Ngubane* 1985 3 SA 677 (A) 686-687.

149 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 152-153.

150 Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 153.

internal factors such as the accused´s age, gender, level of education and race.[151]

Burchell and Milton,[152] however, express the view that, by accommodating cultural beliefs in the test for criminal capacity, the harsh effect of the objective, reasonable person test in a culturally diverse society such as South Africa, would be mediated. In fact, Burchell and Milton[153] argue that, if the modern rules of capacity had been applied in the case of *R v Mbombela* the injustice to the accused could have been avoided. In this regard, the authors hold the view that, in light of the court´s willingness to accept that the accused genuinely believed that he was killing a *tokoloshe*, as well as its willingness to accept that a belief in the *tokoloshe* was prevalent in the accused´s community, the court could easily have concluded that the accused did not have the subjective capacity to realise that his conduct was unlawful.[154] In fact, Burchell and Milton[155] are of the opinion that:

> The need for the "individualisation" of the standard of the reasonable person is unquestionable. However, if this "individualisation" can already be achieved within the already partially subjective, preliminary inquiry into capacity then justice and logic will coincide and an unnecessary duplication of inquiries will be avoided.

Phelps[156] agrees with the view of Burchell and Milton with her submission that, if it were to be accepted that arguments of cultural beliefs should be taken into account when determining the element of capacity, then there would be no need to reconcile the objective nature of the test for negli-

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151 Phelps "Superstition and Religious Belief: A ‘Cultural’ Defence in South African Criminal Law?" 153.

152 Phelps "Superstition and Religious Belief: A ‘Cultural’ Defence in South African Criminal Law?" 153.

153 Burchell and Milton *Principles of Criminal Law* 535-536; Phelps "Superstition and Religious Belief: A ‘Cultural’ Defence in South African Criminal Law?" 153.

154 Burchell and Milton *Principles of Criminal Law* 536; Phelps "Superstition and Religious Belief: A ‘Cultural’ Defence in South African Criminal Law?" 153.

155 Burchell and Milton *Principles of Criminal Law* 537; Phelps "Superstition and Religious Belief: A ‘Cultural’ Defence in South African Criminal Law?" 153.

156 Phelps "Superstition and Religious Belief: A ‘Cultural’ Defence in South African Criminal Law?" 153.

gence with the subjective features of cultural beliefs. It therefore seems as though the principles for criminal liability in South Africa can be developed in such a way that it reflects the diversity of the South African society.[157]

According to Snyman,[158] the test for negligence is normative in character and usually entails a value judgment by somebody other than the accused himself. Generally, in cases involving culturally motivated crimes, it is the learned judge, who adheres to a different value system than that of the accused, who has to decide what the reasonable person in the same circumstances as the accused would or should have done.[159] In other words, in cases involving culturally motivated crimes, an accused adhering to an African value system can be brought before a Western court with a learned judge who adheres to a Western value system. Of course, this disparity compounds the conflict between South African common law and African customary law in criminal cases.

What is more, due to urbanisation, it is not uncommon to find people in South Africa who only partly subscribe to an African value system.[160] This has important implications for the criminal law, for it raises the question as to how a court should test the strength of an accused's cultural affiliation.[161] To illustrate this problem, the following example by Rautenbach and Matthee[162] can be observed:

> A young man of Zulu extraction may have gone to a university and obtained a degree in accounting. He may be domiciled in a rural area in the province of KwaZulu-Natal, have a falling out with his neighbour, an elderly woman, and set her house on fire, killing her in the process. When his day in court comes he claims that his act was culturally motivated, because he truly believed that she was a witch. In this scenario it is im-

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157 Phelps "Superstition and Religious Belief: A ‘Cultural’ Defence in South African Criminal Law?" 153.
158 Snyman *Criminal Law* 209-210, 213-215. Also see Rautenbach and Matthee *JLP* 117.
159 Rautenbach and Matthee *JLP* 117.
160 Rautenbach and Matthee *JLP* 117.
161 Rautenbach and Matthee *JLP* 117-118.
162 Rautenbach and Matthee *JLP* 118.

portant to consider whether a court will react to him in the same way as it would to a peasant farmer with no schooling.

The cases of *Mbombela and Ngema* discussed above illustrate the South African criminal courts' interesting approaches when dealing with the phenomenon of indigenous customs and beliefs resulting in the commission of crimes.[163] It seems as though the courts in these cases have been willing to accept that certain things in life are beyond comprehension and, therefore, cannot be questioned.[164] Consequently, these courts have accepted arguments of indigenous beliefs and customs serving as the motivating forces behind the commission of common law crimes, without necessarily having a sound basis for such a viewpoint.[165]

What is therefore evident from the discussion above is that the South African criminal law has the flexibility to allow for an evaluation of cultural claims. The reality, however, is that the courts are sometimes reluctant to admit evidence of an accused's cultural background and values as a justification for his criminal conduct and thereby excluding his criminal liability.[166] In this regard, Renteln[167] argues that even if it is, therefore, theoretically possible to raise a cultural defence during trial, this will not happen if judges view culture as irrelevant. The importance of cultural considerations during a criminal trial cannot be ignored, because as is shown in the next Chapter,[168] the Constitution now places a duty on the the courts to give due consideration to African customary law if and when that law is applicable.[169] Clearly when an accused advances the argument that the indigenous beliefs and customs referred to in Chapter 4 resulted in his commission of a common law or statutory crime, African customary law will be applicable and must be considered by the court. Apart from the duty imposed on the

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163 Rautenbach and Matthee *JLP* 128.
164 Rautenbach and Matthee *JLP* 128.
165 Rautenbach and Matthee *JLP* 128.
166 Renteln *Cultural Defense* 200.
167 Renteln *Cultural Defense* 200.
168 See par 7.2.1.
169 See section 211(3) of the Constitution as well as par 7.2.1.

courts, Rautenbach and Matthee[170] also contend that, in cases involving culturally motivated crimes, it is the duty of the state prosecutor to ensure that he is fully equipped to deal with such cases and even to question the existence of a particular indigenous belief or custom, should the need arise. The question therefore arises as to how the courts can ensure that they give due consideration to these indigenous beliefs and customs so as to fulfil their constitutional duty referred to above. In this regard, the author of this thesis suggests a practical approach and accompanying considerations in Chapter 8 which may provide some guidance to judicial officers in dealing with cases involving culturally motivated crimes.[171]

Although the courts seem unwilling to accept that indigenous beliefs and customs can serve as grounds of justification excluding criminal liability, the accused is not entirely deprived of a legal avenue. In the discussion that follows it is shown that a criminal court may view a truly held belief[172] in witchcraft as a mitigating factor when considering an appropriate sentence for the accused.[173]

6.4 Mitigation of sentence

Indigenous beliefs and customs have received attention by the South African criminal courts not only in the context of the elements of criminal liabil-

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170 Rautenbach and Matthee *JLP* 128-129. The authors refer to the following example: if it were true that a *tokoloshe* is only visible to children then the accused's account of the events in both *Ngang* and *Ngema* are erroneous as they would not have been able to see it. As the authors point out, it does not seem as though the courts even considered this fact.

171 See par 8.7.

172 This is a very important requirement. As Jonck *JJS* 202 points out, the mere existence of a belief in witchcraft is insufficient for relying on witchcraft as a mitigating factor. The belief in witchcraft must be profound and true and a vague or dissembler belief will not lead to a reduction in the accused sentence. Also see Labuschagne *SACJ* 264 and *S v Motsepa* 1991 2 SACR 462 (A) 470F-470I.

173 Carstens *De Jure* 268; Dhlodhlo *De Rebus* 409. Also see *S v Phokela A* 1995 1 PH H22 and add. Jonck *JJS* 202 points out that it is important to remember that a belief in witchcraft does not lead to an automatic reduction in sentence. The specific circumstances of each case as well as any and all relevant considerations should be kept in mind.

ity,[174] but also in the mitigation of sentences.[175] It is especially the indigenous belief in witchcraft as an extenuating circumstance in a case of murder that has received the attention of the South African criminal courts in the past.[176] In fact, the South African courts have accepted that, although a reasonable person does not believe in the existence of witches, wizards or witchcraft, a subjective belief therein may be a factor which, depending on the circumstances, can have a material bearing on the fault of the accused.[177] This is especially the case where the indigenous belief in witchcraft is the only explanation advanced by the accused for the killing of the deceased.[178]

A subjective test is used to determine whether or not an accused´s belief in witchcraft could have diminished his moral blameworthiness as his belief in witchcraft has a direct bearing on his state of mind.[179] This is clearly evidenced in the case of *R v Biyana*[180] where the court held that:

> A mind, which though not diseased so as to provide evidence of insanity in the legal sense, may be subject to a delusion, or to some erroneous belief or some defect, in circumstances which would make a crime committed under its influence less reprehensible or diabolical than it would be in the case of a mind of normal condition.

Similarly, in the case of *R v Mkize*,[181] Fagan JA expressed the view that an indigenous belief in witchcraft held by an accused:

> … must be determined with reference to the superstitious mind of the ingenuous Native and not according to moral standards accepted in a civilised community. Judged by normal standards-witchcraft is a phantom, but in the minds of the primitive class of people to which the appellant be-

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174 See paras 5.2, 6.3.1 and 6.3.2 as well as Rautenbach and Matthee *JLP* 116 and Carstens *De Jure* 18.
175 Rautenbach and Matthee *JLP* 129; Carstens *De Jure* 20.
176 Rautenbach and Matthee *JLP* 130.
177 Carstens *De Jure* 8.
178 Carstens *De Jure* 6.
179 Rautenbach and Matthee *JLP* 130.
180 1938 EDL 310 311.
181 1953 2 SA 324 (A) 334A. This case involved an appeal on a conviction of murder in the Natal Native High Court. The appellant was found guilty of murder and was sentenced to death without the court considering any extenuating circumstances.

longs this phantom is a reality and they accept it without question whenever there are occurrences beyond their conception.

In the case of *R v Fundakabi*,[182] Schreiner JA also held that:

[I]n considering whether extenuating circumstances are present … no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration. That a belief in witchcraft is a factor which does materially bear upon the accused's blameworthiness I have no doubt.

In the case of *S v Nxele*,[183] Thompson CJ also pointed out that:

[A] belief in witchcraft, if genuinely held by an accused and directly associated with the crime which he has committed, remains a factor to be taken into account in assessing an appropriate sentence.

Also, in *S v Mokonto*,[184] Holmes JA held that:

In considering the moral blameworthiness of the conduct of an accused's conduct, as distinct from his legal culpability, his subjective belief in witchcraft may, depending on the circumstances, be regarded as an extenuating circumstance.

A similar view was held in *S v Modisadife*[185] where Rumpff JP held that:

Although a real belief in witchcraft can be taken into consideration in deciding whether there are extenuating circumstances in a murder case, it

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182 1948 3 SA 810 (A) 818. Also see *S v Dikgale* 1965 1 SA 209 (A) 209A-209C, 214B, 214D-214E. In this case the court had to consider whether a belief in witchcraft, which resulted in the accused committing murder, constitutes an extenuating circumstance so as to exclude the imposition of the death sentence.

183 1973 3 SA 753 (A) 757C-757D.

184 1971 2 SA 319 (A) 324D-32E. Also see *S v Dikgale* 1965 1 SA 209 (A) 209A-209C, 214B, 214D-214E. In this case the accused murdered the deceased because of his belief that she caused the death of his two brothers through the use of witchcraft.

185 1980 3 SA 860 (A) 860, 863C-863D. In this case the appellant killed his brother's stepdaughter for purposes of acquiring body parts for the making of *muti*. In *R v Fundakabi* 1948 3 SA 810 (A) 819 Schreiner JA also emphasized that the question whether a belief in witchcraft will serve as a mitigating factor will depend on the facts of the case. Schreiner JA even went further by warning that, to recognise a belief in witchcraft as a mitigating factor in all cases could result in this mitigating factor being abused. A similar view was also held in *S v Nxele* 1973 3 SA 753 (A) 757D, *S v Mavhungu* 1981 1 SA 56 (A) 63C-63D and *S v Sibanda* 1975 1 SA 966 (RA) 966, 967.

must be emphasised that witchcraft as an extenuating circumstance depends on the particular facts of each case.

In *S v Mavhungu*,[186] Trollip JA also held that a "belief in witchcraft can in certain circumstances constitute extenuation of murder".[187]

The main question deliberated in *S v Phokela*[188] was whether the magistrate properly considered all relevant considerations during sentencing, especially the appellants' personal circumstances and their belief in witchcraft.[189] The court reached the conclusion that these factors were indeed properly considered.[190] From the decision it seems as though it could not be determined from the trial records whether the appellant had a profound belief in witchcraft.[191] This was further complicated by the fact that the appellants preferred not to testify and a profound belief in witchcraft could therefore not be merely assumed in their favour.[192] Furthermore, the court found that, because of a lack of evidence, it was not possible to determine the scope of the appellants' fear in the belief of witchcraft.[193]

When determining an accused's subjective belief in witchcraft, a court mostly relies on his (the accused's) testimony.[194] In *S v Phokela* this raised the question whether the court could indeed make a finding that the appellants' belief in witchcraft was properly taken into account.[195] It is important to remember that indigenous African people do not openly testify to their

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186 1981 1 SA 56 (A). In this case the appellant and his two co-perpetrators murdered the deceased for purposes of acquiring body parts for the making of *muti*.

187 1981 1 SA 56 (A) 63C-63D. Trollip JA, however, also warns that an indigenous belief in witchcraft does not always constitute an extenuating circumstance. In this case, for example, no extenuating circumstances could be found for the appellant as he participated in the murder "purely for his own personal benefit".

188 1995 1 PH H22.

189 Also see Jonck *JJS* 203.

190 Jonck *JJS* 203.

191 Jonck *JJS* 203.

192 Jonck *JJS* 203.

193 Jonck *JJS* 203.

194 *S v Lukwa* 1994 2 SACR 53 (A) 58A; Jonck *JJS* 203.

195 Jonck *JJS* 203.

belief in witchcraft in a court of law.[196] The reason for their hesitation may lie in the ethical code of the traditionally orientated Black people.[197] In terms of this ethical code, it is a bigger scandal to admit to or be caught committing a wrong deed, than the commission of the crime itself.[198]

When an African person presents no evidence to the court from which the belief in witchcraft seems clear, it does not necessarily mean that the court can ignore the possibility that the belief exists entirely.[199] In fact, Hoctor[200] points out that:

> It is necessary for the courts to take account of such belief as a fact of the South African society. Belief in witchcraft is an ongoing and widespread phenomenon, giving rise to the question whether such belief can play a role in … mitigating the punishment of those who engage in criminal conduct as a consequence of such belief.

Therefore, value should even be give to a denial.[201] Jonck[202] is of the opinion that courts should keep in mind that an accused's neglect to testify cannot be held against him where that neglect forms part of the belief in witchcraft.[203] According to Jonck,[204] in cases where there is deficient evidence which can be attributed to the belief in witchcraft, there should be an attempt to remedy such a deficiency by making use of expert witnesses to provide a better understanding of the factors that fuel a belief in witchcraft.

In cases involving an indigenous belief in witchcraft, an accused's subjective disposition should, however, not only be evaluated in light of his own

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196 Jonck *JJS* 203; Nel *et al S Afr J Ethn* 92. For example, in *S v Malaza* 1990 2 SACR 357 (A) the appellant denied that he ever heard of a *kragdokter* despite the fact that *kragdokters* are commonly known in the black communities.

197 Jonck *JJS* 203; Nel *et al S Afr J Ethn* 92.

198 Jonck *JJS* 203; Nel *et al S Afr J Ethn* 92.

199 Jonck *JJS* 204.

200 Hoctor *Obiter* 380.

201 For example, in *S v Motsepa* 1991 2 SACR 462 (A) the first appellant denied any belief in witchcraft. The second appellant, however, hesitantly admitted that, as a black man, he indeed believes in witchcraft. The trial court accepted both versions on face value, but the court of appeal, however, was of the opinion that is was an erroneous approach. Also see Jonck *JJS* 204.

202 Jonck *JJS* 205.

203 Jonck *JJS* 205.

204 Jonck *JJS* 205. Also see Nel *et al S Afr J Ethn* 91.

testimony.[205] His probable belief and fears should also be determined by consi-dering other testimony and evidence.[206] A determination of the accused's culpability necessitates a meaningful understanding and knowledge of the accused's traditional religion, his values and the nature of his worldview.[207]

From the decision in *S v Phokela*[208] it seems as though a court should consider various factors when considering whether mitigating circumstances exist for an accused who commits murder due to a belief in witchcraft.[209] These factors include the depth and sincerity of the accused's belief,[210] the scope of the fear it instilled in him, the imminence of the threat it posed to the accused, the relation between the accused and the observed menace, as well as the degree of cruelty involved in the killing of the witch or wizard.[211] These factors must be apparent from evidence presented to the court.[212]

Hoctor[213] points out that the mitigating effect of a belief in witchcraft can be negated by the following factors:

> Where the motivation for the killing was primarily personal gain; where the victim was innocent and was not a threat to the accused; where the killing is not motivated by any immediate threat and where the killing was committed with excessive cruelty.[214]

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205 Jonck *JJS* 204.
206 Jonck *JJS* 204.
207 Jonck *JJS* 204. Also see Bührmann *S Afr Med J* 818.
208 1995 1 PH H22.
209 Jonck *JJS* 205.
210 According to Hoctor *Obiter* 385-386 the genuineness of an accused's belief in witchcraft should be assessed by considering, *inter alia*, the accused's level of sophistication as well as "the possible impact of deindividuation on the accused's state of mind". Also see *S v Nxele* 1973 3 SA 753 (A) 757 where Ogilvie Thompson CJ held that "the genuineness of the belief in witchcraft must of course always be a condition precedent".
211 Jonck *JJS* 205.
212 Jonck *JJS* 205.
213 Hoctor *Obiter* 380.
214 Also see the cases of *S v Sibanda* 1975 1 SA 966 (RA) 967, *S v Ngubane* 1980 2 SA 741 (A) 746, *S v Mavhungu* 1981 1 SA 56 (A) 69, *S v Munyai* 1993 1 SACR 252 (A), *R v Myeni* 1955 4 SA 196 (A) 199, *S v Modisadife*

Various reasons for considering a truly held belief in witchcraft as a mitigating factor can be advanced. First of all, from the *Witchcraft Suppression Act*[215] it is clear that certain offences related to witchcraft are subject to severe pu-nishment under the act. For example, if a person is killed as a result of being accused of practising witchcraft or being pointed out as a witch or wizard, the accused can, upon conviction, receive a sentence of up to 20 years imprisonment.[216] If, however, the victim is only injured, the accused can either receive a fine or a sentence of five to 10 years imprisonment.[217] A second reason is that, in criminal cases involving witchcraft, the cultural aspects which motivated the actions of the accused should be evaluated according to ethnological guidelines and the social context in which they took place.[218]

Prior to the enactment of the Constitution, Kriegler AJA,[219] in the case of *S v Motsepa,* summarised the legal position pertaining to a belief in witchcraft as an extenuating circumstance within the context of murder as follows:

> 'n Opregte en gevestigde geloof in die toorkuns wat in 'n beskuldigde se gemoed gedien het as dryfveer vir die pleging van 'n moord, was feitlik altyd 'n oorweging by die bepaling van die aanwesigheid al dan nie van versagtende omstandighede. By sodanige ondersoek … het verskeie faktore 'n rol gespeel. Daaronder was die opregtheid en diepte van die beskuldigde se bygeloof, die omvang van die vrees wat dit by hom ingeboesem het, die onmiddellikheid van die aangevoelde bedreiging, die verwantskap tussen die beskuldigde en die waargenome bedreigde, asook die wreedheidsgraad waarmee die vermeende towenaar om die lewe gebring is.

Today, however, it can be argued that a consideration of a truly held belief in witchcraft as a mitigating factor can also be justified in terms of the Con-

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1980 3 SA 860 (A) 863, *S v Malaza* 1990 1 SACR 357 (A) 359, *R v Ncanana* 1948 4 SA 399 (A) 407 and *S v Matala* 1993 1 SACR 531 (A) 539.

215 The various punishments provided for can be found in section 1(f)(i)-(iv) of the *Witchcraft Suppression Act* 3 of 1957.

216 S 1(f)(i) of the *Witchcraft Suppression Act* 3 of 1957.

217 See sections 1(f)(ii) and (iii) of the *Witchcraf Suppression Act* 3 of 1957 in this regard.

218 Carstens *De Jure* 8. Also see Van den Heever 1979 and Minnaar 2001 (see Carstens *De Jure* 8).

219 *S v Motsepa* 1991 2 SACR 462 (A) 470. Also see Hoctor *Obiter* 386

stitution which guarantees each person the right to freedom of conscience, religion, thought, belief and opinion.[220] It is, however, important to remember that these freedoms are not absolute and can be limited in terms of the limitation clause contained in the Constitution.[221] It can, therefore, be argued that the suppression of witchcraft is a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom.[222] Support for this contention can be found in recent case law where the question whether a belief in witchcraft can still serve as a mitigating factor in a post-constitutional South Africa. For example, in *S v Phama* Jones J[223] stated that:

> Nothing can undo the dreadful wrong that has been done to them. Society demands that other people like them should not suffer the same fate. The deterrent and preventive elements of criminal justice, and also, but not to the same extent, the retributive element, require that my sentence should reflect the revulsion of society at the readiness to resort to criminal violence; the horror of society that human life should be made so cheap; and the need to show the accused and other potential offenders that the price they must pay for resorting to murder in order to eliminate an alleged witch or wizard from their midst is not worth it

Although Jones J acknowledged the fact that a belief as witchcraft has served as a mitigating circumstance in the past, the learned judge held that the sophistication of the accused did not justify attaching too much weight to his belief.[224] Jones J[225] advanced the following reasoning for his decision:

> The accused … is not a tribesman from some remote district completely cut off from the influences of modern civilization … While he may not have escaped entirely from the beliefs and superstitions of his forebears, he is expected to control those beliefs and superstitions instead of allowing them to regulate his behaviour towards his fellow human beings. The accused, the victims, and their families do not come from a primitive soci-

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220 S 15 of the Constitution; Carstens *De Jure* 8. This matter is further dealt with in par 7.2.2.1.
221 The limitation clause can be found in section 36 of the Constitution.
222 Carstens *De Jure* 8-9.
223 *S v Phama* 1997 1 SACR 485 (E) 487. Also see Hoctor *Obiter* 387.
224 *S v Phama* 1997 1 SACR 485 (E) 487. Also see Hoctor *Obiter* 387.
225 *S v Phama* 1997 1 SACR 485 (E) 487-488. Also see Hoctor *Obiter* 387.

> ety, and the message which my sentence must send out is not a message for a primitive society.

Similarly, in the case of *S v Ngwane* the court also held that a belief in witchcraft could not serve as a mititgating factor for the accused.[226] In *S v Alam* the accused stabbed the deceased in order to obtain blood, which he (accused) intended to sell to a traditional leader for ritual purposes.[227] In considering an appropriate sentence Dhlodhlo ADJP[228] held that the accused's belief in witchcraft could not mitigate the punishment to be imposed on him for the following reason:

> The offences committed by the accused are serious. Insofar as the murder is concerned, there is no evidence that he believed in witchcraft when he stabbed the deceased in order to obtain his blood. He committed the offence for his personal gain. Poverty may have played a role. It seems that he was driven by lust to rape the deceased's wife.

What is evident from the discussion above is that the question whether a belief in witchcraft can serve as a mitigating factor for an accused who commits a culturally motivated crime will ultimately depend on the facts and circumstances of the particular case. An accused therefore has no guarantee that his cultural background and values will play any role during his criminal trial.

6.5 Conclusion

In terms of the South African law, criminal liability can only be conferred upon an accused if he performed a voluntary[229] unlawful[230] act with the necessary culpability.[231] What became evident from the discussion in this Chapter is that, with both the elements of voluntary conduct and culpability, it must be established that the accused had the ability to control his bodily

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226 *S v Ngwane* 2000 JOL 7052 (N).
227 *S v Alam* 2006 2 SACR 613 (Ck).
228 *S v Alam* 2006 2 SACR 613 (Ck).
229 See par 6.2.
230 See paras 1.1.6 and 5.2.
231 See paras 1.1.6 and 6.3.

movements.[232] If it is found that he cannot, the accused cannot be held criminally liable for his conduct.[233]

A perusal of case law in this Chapter has revealed that the South African criminal courts have entertained arguments of an accused's indigenous beliefs and customs as a justification for him not being held criminally liable due to a lack of voluntary conduct or a lack of culpability.[234] However, the discussion also revealed that the South African courts have up till now been unwilling to accept that an accused can escape criminal liability purely based on the fact that his commission of a common law or statutory crime was the result of an indigenous belief and custom.[235] Instead, the courts evaluated the accused's claims within the common law principles applicable to the exclusion of voluntary conduct and culpability.[236] The most an accused can hope for is that evidence of his cultural background and values can serve as mitigating factor for purposes of sentencing.[237] Of course, as the case law discussed in this Chapter reveals, this will depend entirely on the facts and circumstances of the particular case and an accused therefore has no gua-rantee that his cultural background and values will play any role during his criminal trial.[238] It is therefore concluded that a cultural defence excluding voluntary conduct and culpability has yet to be formalised in the South African criminal law.

However, as was the case with the element of unlawfulness discussed in the previous Chapter,[239] the case law dealing with arguments of an accused's cultural background excluding the elements of voluntary conduct and culpability were all decided before the enactment of the Constitution. The question therefore remains whether the right to cultural freedom in the

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232 See paras 6.2 and 6.3.
233 See paras 6.2 and 6.3.
234 See paras 6.2 and 6.3.
235 See paras 6.2 and 6.3.
236 See paras 6.2 and 6.3.
237 See par 6.4.
238 See par 6.4.
239 See paras 5.1 and 5.2.

new constitutional dispensation necessitates the formal recognition of a cultural defence excluding the elements of voluntary conduct and culpability. This matter is explored in the following Chapter.[240]

240 See par 7.4.

CHAPTER 7

CASTING A CONSTITUTIONAL LIGHT ON THE CULTURAL DEFENCE

7.1 Introduction

The discussion thus far has revealed that culture plays a significant role in the South African criminal law in two ways. Firstly, in determining whether or not a crime has been committed[1] and secondly, as a mitigating factor during sentencing.[2] To date, however, South African criminal courts have never considered whether a formal "cultural defence" should be adopted in the criminal law.[3] Since 2004, however, South African scholars[4] have start-

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1 See Chapters 4, 5 and 6 as well as Rautenbach and Matthee *JLP* 133.

2 See Chapters 5 and 6 as well as Rautenbach and Matthee *JLP* 133.

3 Rautenbach and Matthee *JLP* 114, 133; Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 142; Carstens *De Jure* 1-24. Bennett *U Botswana LJ* 23, however, points out that, the case of *S v Zuma* 2006 2 SACR 191 (W), had the potential of opening the floor for such a consideration by the South African criminal courts. In *Zuma* the current pres-

ed debating whether a cultural defence should be formally recognised in the South African Criminal law, especially due to the various provisions in the final Constitution that afford and protect cultural freedom in South Africa.[5] This is not a novel debate in a country with a pluralistic society such as South Africa considering that:

> ... since the advent of the global impetus to respect and protect the rights of the individual, legal systems in culture, plural societies have continuously been confronted with the problem of the rational and legitimate ac-

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ident of South Africa was charged with raping a family friend's daughter. Long before reaching a courtroom, the matter was already draped in all kinds of cultural associations. Zuma supporters, for example, ridiculed the complainant for betraying both the Zulu culture as well as their Zulu leader. This apparent betrayal was rooted in the view that "… in our culture, rape is not a crime". It was, however, Zuma himself that gave the matter a "cultural defence flavour" by frequently referring to his Zulu culture as a justification for his conduct. Zuma, for example, explained to the court that the complainant openly invited him to sex by wearing a kanga without underwear. According to Zuma, Zulu culture dictates that "... you cannot just leave a woman if she is ready", because denying her sex would boil down to rape. Also see Wines 2006 http://www.nytimes.com/2006/04/10/world /africa/10africa.html?pagewanted=all and Bevan 2006 http://www.newstatesman.com/200603 270011 in this regard.

4 See, for example, Carstens *De Jure* 1-25, Rautenbach and Matthee *JLP* 109-144 and Bennett *U Botswana LJ* 3-26.

5 Rautenbach and Matthee *JLP* 133; Carstens De Jure 1-2. Also see Momoti Law and Culture 79. It is worthwhile to note that cultural freedom did not enjoy any protection during the pre-constitutional era in South Africa, because it was not particularly problematic. In fact, the restructuring of the South African apartheid regime was founded on the notion of culture. Religion also did not pose any problems during a pre-1994 South Africa for it was considered to be a matter of personal conscience which the state was not particularly interested in regulating. Even on the rare occasion that religious beliefs came to the surface guised as "practices offensive to the common weal" the courts' attitude towards these beliefs was a dismissive one and often individual freedom had to take a back seat to broader public interests. See *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC) 1207-1210. What's more, traditional African beliefs received even less attention than culture. A perusal of pre-1994 case law as well as the discussion earlier (paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3) reveal that these beliefs only received attention in criminal trials where it was invoked by an accused in a daring attempt to escape criminal charges or receive a lighter sentence. Here the courts also dismissed the idea that traditional African beliefs form part of any religion and viewed them as mere superstitions (*R v Mbombela* 1933 AD 269) or aberrations. See Amoah and Bennett *Afr Hum Rts LJ* 368-369 with regard to the recognition of cultural and religious freedom before 1994.

commodation of conflicting cultural practices within the confines of a human rights dispensation.[6]

A multicultural society like South Africa, however, poses an enormous challenge to the implementation of a successful human rights dispensation.[7] While on the one hand the state has a constitutional duty to enforce and apply the rights and values in the Constitution equally to all citizens, there are also cultural laws and traditions that are based upon values that, according to cultural communities, are beyond condemnation and reprisal.[8]

In the previous Chapters it was shown that no cultural defence exists in the South African criminal law as the courts have always refused to accept that an indigenous belief or custom can serve as a defence for the commission of a common law crime.[9] However, as was also pointed out in these Chapters,[10] all the case law dealing with the question whether an indigenous belief or custom can justify the commission of a common law crime were decided before the enactment of the final Constitution. The question which therefore arises is whether the constitutional provisions related to cultural and religious[11] freedom can justify or even require the formal recognition of a cultural defence in the South African criminal law.[12] Put differently, the

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6 See Momoti Law and Culture 79 where the author refers to the observations of Labuschagne and De Villiers *SAPL* 288.

7 Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 18.

8 See Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 18 where the authors point out that: "The fact that culturally and especially religiously determined values are regarded by … traditional communities as sacred, unbeatable and not subject to censure, appears to be an extremely complicating factor in reconciling constitutional values with "traditional values"".

9 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3, 4.6.3, 5.2.2, 5.2.3, 6.2 and 6.3.

10 See paras 4.2.6, 4.3.4, 4.4.4, 4.5.4, 4.6.3, 5.2.2, 5.2.3, 6.2 and 6.3.

11 For purposes of the discussion in this Chapter reference is made to both cultural and religious freedom, because as was pointed out in par 3.3.2 the definition of culture is broad enough to include religion. It must, however, be pointed that not all scholars agree with viewing culture and religion as being two sides to the same coin, especially in so far as human rights are concerned. Amoah and Bennett, for example, favour a separation of culture and religion for purposes of human rights litigation. According to the authors culture and religion not only depict different rights, but religion also has a more privileged status than culture. See Amoah and Bennett *Afr Hum Rts LJ* 368 in this regard.

12 Rautenbach and Matthee *JLP* 133-134.

question arises whether an accused charged with committing a culturally motivated crime can rely on the constitutional provisions pertaining to cultural and religious freedom to justify his behaviour and ultimately escape criminal liability or, at least, receive a lighter sentence.[13]

The considerations above are important in the debate on the recognition of a cultural defence, because although many sound arguments can be advanced in favour of the cultural defence,[14] the defence must still be "tempered by fundamental considerations of human rights".[15] The importance of human rights in this context is highlighted by Fischer[16] who states that:

> Human rights ... presents the claim that certain rights are inherent to us as people through no other reason than merely being born ... These rights are not subject to governmental regulation; they are above all political or so-cietal manipulations.

Against this background the focus of this Chapter is to consider the question posed above and ultimately reach a conclusion regarding the formal recognition of a cultural defence in the South African criminal law. In doing so, the indigenous beliefs and customs discussed in Chapter 4 will be tested against the constitutional provisions related to cultural and religious freedom to determine whether these beliefs and customs are in line with the values of the Constitution, in general, and the relevant constitutional provisions, in particular.[17] However, in order to facilitate such a discussion it is, of course, first necessary to provide a brief overview of all the provisions in the Constitution, particularly the Bill of Rights, that are relevant to the notion of cultural and religious freedom in South Africa.[18]

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13 See paras 7.2–7.3.
14 See par 4.6.
15 Fischer *S Cal Interdisc L J* 666.
16 Fischer *S Cal Interdisc L J* 666.
17 See par 7.3.
18 See par 7.2.

7.2 Cultural defence and the Constitution

The Constitution contains various sections, discussed below, that use the terms "culture",[19] "tradition"[20] and "religion"[21] to denote the notion of cultural diversity in South Africa.[22] It is especially Chapter 2 of the Constitution, called the Bill of Rights, which contains various provisions relevant to the notion of culture.[23] In the discussion that follows it is shown that these provisions serve an important function in the possible recognition of a cultural defence in the South African criminal law. In fact, the authors Carstens[24] and Rautenbach and Matthee[25] argue that these provisions serve as the "motivating force for the formal recognition of a cultural defence in the South African criminal law". What is more, as Rautenbach and Matthee[26] point out, these provisions may be used to support the argument that, when an accused committed a culturally motivated crime, he was merely exercising his constitutional right to cultural freedom. In light of these arguments it is therefore necessary to consider the content of each constitutional provision and the manner in which they can be used to support the formal recognition of a cultural defence in the South African criminal law.

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19 See ss 9, 30, 31, 181, 184-186, 235 and Schedules 4 and 5 of the Constitution. Also see Rautenbach "Umkhosi Ukweshwama: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage" 64 footnote 9 and Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 4 footnote 8. For a definition of the term "culture" revisit par 3.3.2.

20 See ss 15, 143, 211-212, 219 as well as schedules 4 and 5 of the *Constition* where the terms "tradition" and "traditional healers" are used. Also see Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 2 4 footnote 8.

21 See ss 9, 15-16, 31 and 37 of the Constitution. Also see Rautenbach "Umkhosi Ukweshwama: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage" 65 footnote 10 and Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 4 footnote 8. Revisit par 4.3.2 where it is argued that the notion of culture is broad enough to include religion.

22 Rautenbach "Umkhosi Ukweshwama: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage" 64-65. Although the Constitution makes use of these terms it does not provide a definition for any of these terms. See Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 4, 8.

23 Rautenbach and Matthee *JLP* 134.

24 Carstens *De Jure* 21.

25 Rautenbach and Matthee *JLP* 135.

26 Rautenbach and Matthee *JLP* 135.

7.2.1 Cultural and religious freedom and the Constitution

The first constitutional provision that denotes the notion of cultural diversity and which can support the formal recognition of a cultural defence is section 7(1). This section provides that the Bill of Rights in the Constitution serves as:

> [A] cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[27]

Next is section 7(2) which places a duty on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".[28] Based on sections 7(1) and 7(2) it can be argued that, in order for the state to respect, protect and promote the constitutional right to cultural freedom of the indigenous communities' in South Africa, a cultural defence should be formally recognised in the South African criminal law. By doing so, these communities can exercise their indigenous beliefs and customs freely without fear of appraisal by the South African criminal courts. In support of these arguments reference is made to the case of *Christian Education SA v Minister of Education*[29] where Sachs J held that:

> There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity.

The next sections that are important to the notion of cultural diversity and the cultural defence are sections 8(1) to 8(3). Section 8(1) ensures that all law as well as the judiciary, legislature, executive and other organs of state

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27 S 7(1) of the Constitution. Also see Rautenbach and Matthee *JLP* 134 where the authors discuss this section in the context of cultural defence, as well as Du Plessis *PELJ* 13 where the author discusses this section in the context of religious freedom.

28 S 7(2) of the Constitution. Also see Rautenbach and Matthee *JLP* 134 where the authors discuss this section in the context of cultural defence, as well as Du Plessis *PELJ* 13 where the author discusses this section in the context of religious freedom.

29 200 4 SA 757 (CC) 779F.

are subject to the Bill of Rights.[30] Similarly section 8(2) provides that individuals are also subject to the binding power of the Bill of Rights.[31] Sections 8(1) and 8(2) are complemented by section 8(3) which makes provision for a court to, if necessary, develop the common law to give effect to a right in the Bill of Rights "to the extent that legislation does not give effect to that right".[32] Based on the content of sections 8(1) to 8(3) it can be argued that, in order to give effect to the right to cultural freedom in the Bill of Rights, the judiciary should develop the common law by recognising a cultural defence which would negate the criminal liability of an accused who commits a common law or statutory crime in the name of culture.

Apart from the provisions above, the Constitution also contains a number of provisions, classified as human rights provisions, important to the notion of culture, for they "qualify, strengthen and contextualise cultural diversity"[33] in South Africa.[34] The first of these provisions is the preamble to the Constitution which affirms the cultural diversity present in South African society by declaring that "the people of South Africa ... believe that South Africa belongs to all who live in it, united in our diversity".[35] Next is section 15 which embodies at least three freedoms.[36] Firstly, section 15(1) affords every individual "the right to freedom of conscience, religion, thought, belief and

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30 S 8(1) of the Constitution provides that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." Also see Rautenbach and Matthee *JLP* 134, Rautenbach *Stell LR* 108 and Coertzen *Verbum Et Ecclesia* 359 for a discussion of this right.

31 S 8(2) of the Constitution reads as follows: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

32 S 8(3) of the Constitution. Also see Rautenbach and Matthee *JLP* 134 for a discussion of this right in the context of the cultural defence.

33 Rautenbach and Matthee *JLP* 134.

34 Rautenbach and Matthee *JLP* 134; Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 8.

35 Preamble to the Constitution. Also see Rautenbach and Matthee *JLP* 134 and Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 8.

36 Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 9; Amoah and Bennett *Afr Hum Rts LJ* 369-370, *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) 812D-812F, *S v Lawrence, S v Negal, S v Solberg* 1997 4 SA 1176 (CC) 1208F-1208G and *Christian Education South Africa v Minister Of Education* 2000 4 SA 757 (CC) 770E-770G.

opinion".[37] Secondly, section 15(2) affords the right to freedom of religious observances at state institutions subject to certain conditions being met.[38] Lastly, section 15(3) provides for the recognition of cultural or religious legal systems based on personal or family law.[39] Section 15(3) reads as follows:

> This section does not prevent legislation recognising-
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

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37 Also see Rautenbach and Matthee *JLP* 135; Du Plessis *PELJ* 11-12, Coertzen *Verbum Et Ecclesia* 345, 359, Amoah and Bennett *Afr Hum Rts LJ* 369-370, *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) 812D-812E, *S v Lawrence, S v Negal, S v Solberg* 1997 4 SA 1176 (CC) 1208F-1208G and *Christian Education South Africa v Minister Of Education* 2000 4 SA 757 (CC) 770F. According to Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 9-10 the scope of this section is twofold: first, an individual has the freedom to practice a religion without interference from the state and second, an individual has the right to equality in terms of religion. Section 15(1) also has an individual and collective dimension as the right to freedom of religion is available to individuals as well as groups or communities. Religious freedom can, therefore, serve as both a liberty right and/or an equality right. For a discussion on the content of the right to freedom of religion see *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC). In this regard see also Coertzen *Verbum Et Ecclesia* 361-363 where the author distinguishes between freedom of religion as a quality of life and freedom of religion as a right guaranteed by the Constitution.

38 These conditions include that the observances must adhere to the rules of the appropriate public authorities, be conducted on an equitable basis and an individual's attendance thereof must be free and voluntary. Also see Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 13, Du Plessis *PELJ* 12, Coertzen *Verbum Et Ecclesia* 359, Amoah and Bennett *Afr Hum Rts LJ* 369-370, *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) 812E, *S v Lawrence, S v Negal, S v Solberg* 1997 4 SA 1176 (CC) 1208F-1208G and *Christian Education South Africa v Minister Of Education* 2000 4 SA 757 (CC) 770F-770G.

39 According to Rautenbach, Jansen van Rensburg and Pienaar section 15(3) "paves the way for future recognition of religious and cultural legal systems, such as Hindu law, Islamic law and Jewish law". The authors envision such recognition within the context of private law, particularly with regard to marriages concluded in terms of these religions. As the topic of this thesis falls within the scope of public law, the authors´ contention is not further explored. However, for a complete discussion of the authors´ arguments in this regard see Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 14-18. Also see Du Plessis *PELJ* 12 in this regard.

When considered as a whole, section 15 therefore "protects an individual's freedom to hold whatever faith or belief he or she has chosen".[40] From the discussion above it therefore seems as though section 15 also supports the formal recognition of a cultural defence in that an accused who is charged with the commission of a culturally motivated crime can argue that, at the time he committed the crime in question, he was merely exercising his right to freedom of religion or belief embodied in section 15.

Section 30 also supports the notion of cultural diversity by protecting an individual's interest in his culture, religion and language. This section provides that:

> Everyone has the right to use the language and to participate in the cultural life of their choice.[41]

Section 31 builds on section 30 by providing that:

> Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
> *(a)* to enjoy their culture, practise their religion and use their language; and
> *(b)* to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. [42]

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40 Amoah and Bennett *Afr Hum Rts LJ* 369.

41 S 30 of the Constitution. Also see Momoti Law and Culture 84, Rautenbach and Matthee *JLP* 134 and Schoeman-Malan *PELJ* 109.

42 See section 31(1) of the Constitution as well as Rautenbach and Matthee *JLP* 134, Coertzen *Verbum Et Ecclesia* 359, Schoeman-Malan *PELJ* 109 and *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) 772A-772B. Du Plessis *PELJ* 12 expresses the view that section 31 exacerbates the section 15(1) right to religious freedom and the section 9(1) and 9(3) right to religious equality. Furthermore, it should also be noted that, although the content of the rights in section 15(1) and 31 are similar, they differ quite significantly: While section 15(1) suggests an inward manifestation of a belief, *vis-à-vis* the freedom to hold whatever faith or belief an individual has chosen, section 31 suggests an outward manifestation of that inner belief by embracing a community's freedom to practice a religion. The difference between section 15(1) and 31 can also be explained in terms of absolute and relative rights. Section 15(1) offers individuals an absolute right to religious freedom which has become the hallmark of Western human rights culture. Section 31 offers individuals a relative right through a representation of physical practices that are indicative of a particular group's character. In other words, the section 15(1) absolute right protect the concept of belief in general

Section 31 therefore "embraces a community's freedom to practice a religion of choice".[43] The right to cultural freedom in sections 30 and 31 was recently highlighted in the case of *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Aughtority*[44] where Van Zyl J emphasised that these sections acknowledge the right of every person in South Africa to choose and "pursue their own culture and beliefs". What should be clear from the content of these sections is that, as is the case with section 15, an accused who is charged with the commission of a culturally motivated crime can argue that he should not be held criminally liable because he was merely exercising his constitutional right to freely participate in a cultural life of his choosing in terms of sections 30 and 31.

The notion of cultural diversity in South Africa is further supported by section 211(3) of the Constitution which provides that the courts are compelled to "apply customary law when that law is applicable".[45] The principle in section 211(3) applies equally to the common law, because as constitutional interpretation by the Constitutional Court dictates, the courts have a general duty to develop the South African common law within the context of the values in the Constitution.[46] The case of *Carmichele v Minister of Safety and Security*[47] clearly evidences this development principle where the court held that:

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while the section 31 relative right makes the belief manifest through human behaviour. See Amoah and Bennett *Afr Hum Rts LJ* 369-371 in this regard.

43 Amoah and Bennett *Afr Hum Rts LJ* 369.

44 2001 1 SA 574 (Tk) 629H.

45 See Rautenbach and Matthee *JLP* 135 where the authors discuss the relevance of this section to the recognition of a cultural defence in the South African criminal law. Also see Momoti Law and Culture 85 where the author discusses this section in the context of the custom of circumcision in African customary law.

46 Carstens *De Jure* 21. Also see Rautenbach and Matthee *JLP* 135 and *Carmichele v Minister of Safety and Security* 2002 1 SACR 79 (CC).

47 2002 1 SACR 79 (CC) paras 33-34. Also see Rautenbach and Matthee *JLP* 135.

> Section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights. It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation. Under the IC [interim Constitution] the circumstances in which the common law could be developed by this Court was a complex issue. However, under the Constitution there can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts including this Court.

With regard to the formal recognition of a cultural defence in the South African criminal law, it can therefore be argued that, when an accused advances arguments of his cultural background and values in an attempt to justify his commission of a crime, African customary law will be applicable. In terms of section 211(3) a criminal court will then have to consider arguments of an accused's cultural background and values when deciding whether or not to hold the accused criminally liable for the commission of a culturally motivated crime.

Apart from section 15, 30, 31 and 211(3) there are also other human rights provisions in the Bill of Rights that have an indirect bearing on the protection of cultural diversity, although they do not directly relate to the notion of culture.[48] Section 10, for example, emphasises that everyone has inherent dignity, which must be respected and protected.[49] In considering whether or not to recognise a formal cultural defence in the South African law the right to dignity should not be left out of the equation, because as Sachs J points out in *Christian Education South Africa v Minister of Education*:[50]

> Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.

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48 Rautenbach and Matthee *JLP* 134.
49 S 10 of the Constitution. Also see Rautenbach and Matthee *JLP* 135.
50 2000 4 SA 757 (CC) 779H-790B.

Also, in the case of *Prince v President, Cape Law Society*[51] Ngcobo J poined out that:

> Human dignity is an important constitutional value that not only informs the interpretation of most, if not all, other constitutional rights.

The value of human dignity in South Africa's constitutional framework was also emphasised in the case of *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*[52] where O'Regan stated that:

> The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.

In light of the case law above, it can therefore be assumed that, when considering the formal recognition of a cultural defence, the right to human dignity in section 10 will play a pivotral role as it informs the rights to cultural and religious freedom in the Constitution.

Section 9 of the Constitution, commonly referred to as the "equality clause", also promotes the notion of cultural diversity in South Africa. Section 9(1) entitles each individual to equal treatment before the law, as well as equal protection and benefit from the law.[53] According to Du Plessis[54] the term "equality" in section 9(1) "doubtlessly includes the equality and equal treatment of dissimilar religions and their adherents". Section 9(2) continues the notion of equality by affording every individual the right to enjoy, in full and on equal footing with other individuals, all the rights and freedoms in the Constitution. These two sections are further qualified by section 9(3)

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51 2002 2 SA 794 (CC) 816C-816D.
52 2000 3 SA 936 (CC) 961F-962A.
53 S 9(1) of the Constitution. Also see Rautenbach and Matthee *JLP* 134 and Du Plessis *PELJ* 12.
54 Du Plessis *PELJ* 12. A similar view was held by O'Regan J in the case of *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC)

which prohibits direct or indirect unfair discrimination on the grounds of, *inter alia,* culture.[55] Phakola[56] argues that, essentially, section 9(3) means that:

> No one should take a decision unfavourable to the other person on the basis of that other person's culture.

Undoubtedly, an accused charged with the commission of a culturally motivated crime can argue that his constitutional right to equality is infringed if he were to be denied the opportunity to put forth arguments of his cultural background and values in order to justify his criminal conduct. It therefore seems as though section 9 can also be used to support the formal recognition of a cultural defence in the South African criminal law.

It therefore seems as though the Constitution can be used to motivate and support the formal recognition of a cultural defence in the South African criminal law.[57] However, in the discussion that follows it is shown that an individual who exercises his constitutional right to cultural freedom can violate the fundamental human rights of other individuals.[58] In fact, what is shown is that the indigenous beliefs and customs discussed in Chapter 4 all have the potential of violating the fundamental human rights contained in the Bill of Rights.[59] What is, therefore, ultimately shown is that the Constitution simultaneously supports and counteracts the formal recognition of a cultural defence in the South African criminal law.[60]

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55 The other grounds in section 9(3) of the Constitution include "… race, gender, sex, pregnancy, marital status … sexual orientation, age, disability, religion, conscience … language and birth". Also see Rautenbach and Matthee *JLP* 134 and Du Plessis *PELJ* 12.

56 Phakola *Justice Today* 24.

57 A similar view is held by Carstens *De Jure* 21 and Rautenbach and Matthee *JLP* 135.

58 See par 7.2.2. Also see Rautenbach and Matthee *JLP* 135 who hold a similar view.

59 Revisit paras 4.2 to 4.6 for a detailed discussion of these indigenous beliefs and customs.

60 A similar view is held by Rautenbach and Matthee *JLP* 135.

However, an interesting question arises in this regard, namely whether certain rights in the Constitution can outweigh others.[61] Put differently, can it be said that the right to cultural and religious freedom in the Constitution carries more weight than the fundamental human rights violated by the exercising of an indigenous belief and custom?[62] The discussion below is aimed at answering this question by providing an overview of the various fundamental human rights that can be violated when an individual exercises his right to freedom of culture.

7.2.2 Indigenous beliefs and customs and the infringement of fundamental human rights in the Bill of Rights

In Chapter 4 it was shown that the South African common law and African customary law do not see eye to eye in a criminal trial resulting from the indigenous belief in witchcraft[63] (including witch-killings),[64] the *tokoloshe*,[65] and *muti*-medicine[66] (including *muti*-murders[67]), the phenomenon of necklacing,[68] and the indigenous custom of *ukuthwala*.[69] Apart from the fact that these indigenous beliefs and customs can result in the commission of common law or statutory crimes in the South African law, it is submitted here that these indigenous beliefs and customs also result in a gross violation of the fundamental human rights afforded to each and every individual in terms of the Constitution. The discussion that follows aims to elucidate this submission by a) identifying the various fundamental human rights that can be infringed by and b) explain how these rights can be infringed upon by the indigenous beliefs and customs above. The discussion below also aims to show that the formal recognition of a cultural defence cannot be

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61 Rautenbach and Matthee *JLP* 136.
62 Rautenbach and Matthee *JLP* 136. Also see Poulter *Int'l & Comp LQ* 609, 611.
63 See par 4.2.4.
64 See par 4.2.4.
65 See par 4.3.3.
66 See par 4.4.3.
67 See par 4.4.3.
68 See par 4.5.3
69 See par 4.6.3.

justified on the basis that an accused's right to cultural freedom outweighs the fundamental human rights of another individual.

7.2.2.1 Witchcraft and witch-killing and the infringement of fundamental human rights

Apart from the constitutional rights discussed above,[70] each and every individual also has the right to life in terms of the Constitution.[71] The right to life is "an unqualified right vested in all persons"[72] and can therefore not be limited in any way.[73] It therefore goes without saying that the perpetrator of a witch-killing will infringe this fundamental human right as the victim of the witch-killing will be deprived of his right to life.

The Constitution also affords each and every individual the right to freedom and security of the person.[74] This right is sub-divided into two basic rights: the right to freedom and security of the person[75] and the right to bodily and psychological integrity.[76] The right to freedom and security includes various other rights, namely the right:

(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.[77]

Of these rights there are three that are particularly important in the case of a witch-killing: the right to be free from all forms of violence,[78] the right not to be tortured in any way[79] and the right not to be treated or punished in a

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70 See par 7.2.1.
71 S 11 of the Constitution.
72 *S v Makwanyane* 1995 3 SA 391 (CC) 394G-394H.
73 Fischer *S Cal Interdisc L J* 667.
74 S 12 of the Constitution.
75 S 12(1) of the Constitution.
76 S 12(2) of the Constitution.
77 Ss 12(1)(a)-12(1)(e) of the Constitution.
78 Be it from a public or private source. See section 12(1)(c) of the Constitution.
79 S 12(1)(d) of the Constitution.

cruel, inhuman or degrading way.[80] Considering the various cruel methods for killing witches and wizards discussed in Chapter 4,[81] it goes without saying that the victim of a witch-killing will undoubtedly be deprived of these three rights.

The right to bodily and psychological integrity also includes various other rights, namely the right:

(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.

The right to security in and control over one's body is here especially important in the context of witch-killings. Once again, considering the cruel ways in which the practitioners of witchcraft are killed,[82] it is submitted that the victim of a witch-killing will clearly be deprived of his constitutional right to bodily and psychological integrity as a result of the perpetrator's conduct.

In Chapter 4[83] it was also shown that it is a statutory crime in South Africa to profess of pretend to use witchcraft. An alleged witch or wizard should therefore be put on trial before a competent court and punished by that court, if found guilty, instead of being put "on trial" and punished by a particular community.[84] As the last-mentioned is what happens in the case of witch-killings, it is asserted that the victim of a witch-killing is also denied the right to a fair trial in terms of section 35(3) of the Constitution.

Like the right to freedom and security of the person, the right to a fair trial includes various rights of which only a certain few are relevant in the case

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80 S 12(1)(e) of the Constitution.
81 See par 4.2.3.
82 See par 4.2.3.
83 See par 4.2.5 as well as sections 1(b), (d) and (f) of the *Witchcraft Suppression Act* 3 of 1957.
84 See par 4.2.3.

of witch-killing.[85] The rights referred to here include the accused's right to be informed, in sufficient detail, of the charge(s) against him,[86] the right to prepare a proper defence,[87] the right to a public trial before an ordinary court,[88] the right to be present during the trial[89] and, most importantly, the right to be presumed innocent until proven guilty.[90] Considering the procedure leading up to a witch-killing discussed in Chapter 4[91] it should be clear that those accused of practising witchraft are clearly not afforded the right to a fair trial as envisaged by the Constitution.

In light of the above, it is therefore doubtful whether the perpetrators of a witch-killing can rely on their indigenous belief in witchcraft to justify a gross violation of the victim's constitutional rights as discussed above. Put differently, it is doubtful whether perpetrators of a witch-killing will be able to justify the killing of another human being as part of their constitutional right to cultural freedom. It can also be argued that all the rights in the Constitution enjoy equal status and are equally important and therefore the right to culture can never outweigh the right to life.[92] This is a view held by various scholars on the cultural defence. Renteln,[93] for example, is of the opinion that "if a tradition involves the loss of life of a person who does not wish to

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85 See section 35(3) of the Constitution for a complete list of all the rights included in the right to a fair trial.

86 S 35(3)(a) of the Constitution.

87 S 35(3)(b) of the Constitution.

88 S 35(3)(c) of the Constitution. The author submits that the words "ordinary court" refers to either a common law court or a traditional court as discussed in par 4.2.5.

89 S 35(3)(e) of the Constitution. The discussion earlier on the "smelling out" of witches and wizards makes it clear that this is not the case as the victim of a witch-killing is never present when being identified as a witch or wizard. Revisit par 4.2.3 in this regard.

90 S 35(3)(h) of the Constitution. From the general discussion earlier on the "smelling out" and killing of witches and wizards it is clear that the victims of witch-killings are never regarded as being innocent until proven guilty. See par 4.2.3.

91 See par 4.2.3.

92 See the argument of Poulter *Int'l & Comp LQ* 609 as well as Fischer *S Cal Interdisc L J* 667 in this regard.

93 Renteln *Cultural Defense* 217.

die, it should be prohibited".[94] Poulter[95] also favours this argument by expressing the view that:

> … claims based on religious or cultural freedom which violate other fundamental rights and freedoms must clearly fail. Any custom which denies another person the right to life … is bound to be denied recognition or enforcement for this reason.

What should, however, be kept in mind is that an accused may still, as a result of his truly held belief in witchcraft, lack the requisite criminal capacity or fault to be held criminally liable. This matter has already been dealt with in a previous chapter.[96] Therefore, although arguments pertaining to an accused's rights to cultural and religious freedom alone may not be enough to exhonerate him for the commission of a culturally motivated crime, arguments pertaining to his cultural and religious background may still play an important role in determining his criminal liability.

7.2.2.2 *Muti* and *muti*-murders and the infringement of fundamental human rights

In Chapter 4 it was shown that the conflict between the indigenous belief in *muti*[97] and the South African criminal law starts when the *muti* contains human body parts.[98] In that chapter it was also shown that the human body parts needed for the making of *muti* are obtained through the commission of *muti*-murders.[99] In the case of *muti*-murders there are various human rights that come into play, especially considering the methods used to perform these *muti*-murders.[100] First and foremost, killing an individual to acquire body parts for *muti* clearly infringes the right to life discussed

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94 This is typically the situation in a case of witch-killing, *muti*-murder and necklacing. See paras 3.2.3, 3.3.1 and 3.5.2.
95 Poulter *Int'l & Comp LQ* 609.
96 Revisit paras 6.3.1 and 6.3.2.
97 Revisit par 4.4.1 for a general discussion on the indigenous belief in *muti*.
98 See par 4.4.3.
99 See par 4.4.2.
100 See par 4.4.2 for a general discussion of the methods used to obtain body parts for the making of *muti.*

above.[101] Also, considering the fact that the body parts are removed from a victim who is still alive,[102] the victim is also deprived of his right to freedom and security of the person as discussed above.[103] Therefore, as is the case with witch-killings,[104] it is submitted that the perpetrator of a *muti*-murder may also experience considerable difficulty in convincing a court that the killing of another human being for the sole purpose of making *muti* can be justified by solely relying on the accused's constitutional right to cultural and religious freedom. This, of course, does not mean that an accused cannot raise arguments pertaining to his indigenous belief in *muti* to try and convince a court that he lacked the requisite criminal capacity or fault and should, therefore, be acquitted.[105]

7.2.2.3 Necklacing and the infringement of fundamental human rights

In light of the discussion on witch-killing and *muti*-murder above, as well as the method used for carrying out a necklacing discussed in Chapter 4,[106] it goes without saying that this phenomenon also infringes upon the right to life and the right to freedom and security of the person in the Constitution. It is therefore submitted that the perpetrator of necklacing will also not be able to advance arguments pertaining to his constitutional right to cultural freedom to justify the killing of another human being. Again, this does not mean that an accused will be barred from raising arguments pertaining to his cultural background to try and convince the court that his criminal capacity or fault was excluded as a result of his cultural background and beliefs.[107]

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101 See par 7.2.2.1.
102 See par 4.4.2.
103 See par 7.2.2.1.
104 See par 7.2.2.1.
105 Revisit paras 6.3.1 and 6.3.2 where this matter was dealt with.
106 See par 4.5.2.
107 Revisit paras 6.3.1 and 6.3.2 where this matter was dealt with.

7.2.2.4 *Ukuthwala* and the infringement of fundamental human rights

It is not only the indigenous belief in witchcraft and *muti* and the phenomenon of necklacing that result in the infringement of various fundamental human rights. The indigenous custom of *ukutwhala* also clearly violates an array of fundamental human rights contained in the Constitution.[108] In fact, McQuoid-Mason[109] argue that:

> Nearly all of the most important rights and freedom of young girls under the Bill of Rights are being systematically violated by some of the reported practices under the *ukuthwalwa* custom.

To support his argument, McQuoid-Mason[110] points out that the indigenous custom of *ukuthwala* violates girls' constitutional right to equality as it unfairly discriminates against them by not being applicable to boys.[111] In terms of African customary law, boys cannot be *twala'*d and can therefore not be forced to enter into a marriage through this custom.[112]

Furthermore, girls who are *twala'd* are most definitely deprived of their constitutional right to freedom and security of the person as discussed above,[113] especially if they did not consent to them being *twala*'d[114] or are "kept in locked and guarded huts and forced to have unprotected sex with their "husbands"".[115] What is more, if the *ukuthwala* results in the statutory rape and possible impregnation of a young girl, she will not only also be stripped of the right to security over and control of her own body, but also from the right to bodily and psychological integrity discussed earlier.[116]

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108 Rautenbach and Matthee *JLP* 135.
109 McQuoid-Mason *Obiter* 718.
110 McQuoid-Mason *Obiter* 718.
111 McQuoid-Mason *Obiter* 718.
112 McQuoid-Mason *Obiter* 718. Also revisit par 3.6.2 for an overview of the indigenous custom of *ukuthwala*.
113 See par 7.2.2.1.
114 A similar argument is put forth by Rautenbach and Matthee *JLP* 136.
115 McQuoid-Mason *Obiter* 718.
116 See par 7.2.2.1. A similar view is held by Rautenbach and Matthee *JLP* 136 and McQuoid-Mason *Obiter* 718.

McQuoid-Mason[117] also argues that, if a girl is forced to have uprotected intercourse with her HIV-infected "husband", the custom will result in a violation of her constitutional right to live in "an environment that is not harmful to [her] health or well-being".[118]

If a girl is subjected to the third form of *twala* discussed earlier,[119] she will also be deprived of the fundamental right to be free of all forms of violence as part of the right to freedom and security of the person.[120] The custom of *ukuthwala* can also infringe upon the right not to be treated in a cruel, inhuman or degrading way,[121] because as Rautenbach and Matthee[122] point out:

> ... a girl who is *twala'*d is subjected to violence, humiliation and unpleasant living conditions and treatment while in the custody of her captor.

McQuoid-Mason[123] points out that the indigenous custom of *ukuthwala* can further violate a girl's constitutional right not to be "be subjected to slavery, servitude or forced labour" in terms of section 13 of the Constitution. According to the author, this right is violated when a *twala'*d girl is "forced at an early age, against her will, to become [a wife] and to carry out the duties of [a wife] according to custom".[124]

Another fundamental human right that can be violated by the indigenous custom of *ukuthwala* is the right to basic education entrenched in section 29 of the Constitution.[125] A violation of section 29 occurs when a young girl

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117 McQuoid-Mason *Obiter* 718.
118 This right is guaranteed in S 24(a) of the Constitution.
119 See par 3.6.2.
120 S 12(1)(c) of the Constitution. Also see Rautenbach and Matthee *JLP* 136.
121 S 12(1)(e) of the Constitution; Rautenbach and Matthee *JLP* 136.
122 As the authors point out, the facts of *R v Swartbooi* 1916 EDL 170 and *R v Mane* 1948 1 All SA 128 (E) clearly attest to this. See Rautenbach and Matthee *JLP* 136 as well as par 3.6.3 for a discussion of these cases.
123 McQuoid-Mason *Obiter* 718.
124 McQuoid-Mason *Obiter* 718.
125 McQuoid-Mason *Obiter* 718.

is forced to leave school at an early age for the purposes of getting married and becoming a woman.[126]

Apart from the general fundamental human rights referred to above, McQuoid-Mason[127] argues that the indigenous custom of *ukuthwala* also violates particular constitutional safeguards aimed at protecting children. These constitutional safeguards can be found in section 28 of the Constitution which defines a "child" as "a person under the age of 18 years".[128] The first constitutional safeguard according to McQuoid-Mason[129] is section 28(1)(b) which provides that every child has the right to "family care or parental care, or to appropriate alternative care when removed from the family environment". Next is section 28(1)(d) of the Bill of Rights which provides that every child has the right "to be protected from maltreatment, neglect, abuse or degradation".[130] Lastly, McQuoid-Mason[131] refers to section 28(2) of the Bill of Rights which provides that "[a] child's best interests are of paramount importance in every matter concerning the child". As the author points out, all these constitutional safeguards are violated when the parents of a *twala*'d girl and her prospective husband "connive … to allow the girls to be abducted and forced into 'marriage'".[132]

At this point it should be clear that an accused charged with the commission of any one of the crimes discussed in Chapter 4[133] can experience considerable hardship in convincing a criminal court that his conduct is justified under the indigenous custom of *ukuthwala*. Put differently, it is doubtful whether the perpetrator of a common law or statutory crime under the guise of *ukuthwala* will be able to convince the court that his constitu-

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126 McQuoid-Mason *Obiter* 718-719.
127 McQuoid-Mason *Obiter* 718.
128 S 28(3) of the Constitution.
129 McQuoid-Mason *Obiter* 719.
130 McQuoid-Mason *Obiter* 719.
131 McQuoid-Mason *Obiter* 719.
132 McQuoid-Mason *Obiter* 719.
133 Revisit par 4.6.3 for an overview of the common law and statutory crimes which the perpetrator of *ukuthwala* can be charged with.

tional right to cultural freedom justifies the abduction,[134] kidnapping,[135] common assault[136] and/or rape[137] of a young girl. At most, the accused can attempt to convince the court that his indigenous belief in the custom of *ukuthwala* resulted in him lacking the requisite criminal capacity or fault in respect of the offences above.[138]

7.3 Cultural defence and the Bill of Rights revisited

In the discussion above it was shown that the formal recognition of a cultural defence in the South African law cannot be justified on the basis that, the constitutional right to cultural freedom of an accused who is charged with the commission of a common law or statutory crime due to an indigenous belief or custom, outweighs the fundamental human rights of another individual. Fischer[139] holds a similar view by stating that a cultural defence:

> ... must be restrained from allowing violations of human rights to serve as legal aids to those who commit them.

What should also be kept in mind is that the right to equality entrenched in the Constitution "includes the full and equal enjoyment of all rights and freedoms" in the Constitution.[140] Furthermore, the state's constitutional duty in terms of section 7(2) of the Constitution should also be kept in mind because, as Rautenbach and Matthee[141] point out, the word "rights" in this section not only refers to some rights, but to all the rights contained in the Bill of Rights. It can, therefore, be said that one right in the Constitution does not enjoy preference over another. More specifically, it can be said

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134 See par 4.6.3.
135 See par 4.6.3.
136 See par 4.6.3.
137 See par 4.6.3.
138 Revisit paras 6.3.1 and 6.3.2 where this matter was dealt with.
139 Fischer *S Cal Interdisc L J* 667.
140 S 9(2) of the Constitution.
141 Rautenbach and Matthee *JLP* 136.

that the right to "culture is not an absolute right but is subject to the laws of the land".[142]

However, what also became clear from the earlier discussion on indigenous beliefs and customs and the fundamental human rights contained in the Constitution is that a clash between the exercise of an individual's right to cultural freedom and another person's right to enjoy other freedoms in the Constitution are inevitable.[143] Considering that the right to cultural and religious freedom enjoys "eminence among the rights entrenched in the Bill of Rights in the Constitution",[144] the question that now arises is how this conflict should be resolved.

Rautenbach and Matthee[145] argue that, in order to resolve the conflict above, one need not go further than the constitutional provisions permitting cultural and religious freedom to find the answer. These authors base their argument on the fact that sections 15, 30, 31 and 211(3), discussed earlier,[146] all contain an internal limitation clause which, in essence, provides that an individual can be prohibited from exercising his right to cultural and religious freedom afforded to him by these sections.[147] Section 15(3)(b) provides that the recognition afforded to cultural and religious legal systems

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142 Rautenbach "Umkhosi Ukweshwama: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage" 64; Phakola *Justice Today* 24.

143 See par 7.2.2. Also see Rautenbach and Matthee *JLP* 136 in this regard. Poulter *Int'l & Comp LQ* 609 holds the same view by stating that there are instances where "ethnic minority claims based on religious or cultural freedom are liable to come into conflict with the interests or values of the majority community".

144 This is the view held by Du Plessis *PELJ* 10-11.

145 Rautenbach and Matthee *JLP* 136. A similar argument is put forth by Poulter *Int'l & Comp LQ* 609.

146 See par 7.2.1.

147 Rautenbach and Matthee *JLP* 136-137. Also see *Gumede v President of the RSA* 2009 3 SA 152 (CC) par 22 and Momoti Law and Culture 89. Poulter *Int'l & Comp LQ* 611 essentially offers the same argument although the author refers to the limitation clauses contained in international human rights documents. The purpose of an internal limitation clause, according to Sachs J in *Gauteng Provincial Legislature, Ex parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill* of 1995 1996 3 SA 165 (CC) par 52, is to encourage the courts to interpret the Bill of Rights in such a way that it promotes the values of a democratic society based on freedom and equality.

based on personal or family law "must be consistent with this section and the other provisions of the Constitution". Both sections 30 and 31 provide that no individual exercising the rights in terms of these sections may do so "in a manner inconsistent with any provision of the Bill of Rights".[148] Section 211(3) also limits the right to cultural freedom by providing that a court's application of African customary law must always be "subject to the Constitution and any legislation that specifically deals with customary law".[149]

The limitation clause in sections 30 and 31 were recently highlighted in the case of *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Aughtority*[150] where Van Zyl J held that the rights contained in these sections are not unqualified in that every "person should have the freedom to choose to be part of a culture and its practices and customs that form part thereof". The learned judge therefore highlighted the fact that the internal limitation clause in sections 30 and 31 makes the right to culture one which is qualified by other rights in the Constitution.[151]

Van Zyl J[152] also expressed the view that the "choice" an individual has in terms of section 30 goes further than a mere choice of a culture. An individual´s choice also includes his right to:

> ... choose whether or not he or she wishes to forfeit any of his or her entrenched rights in the Bill of Rights if the only reason for his or her forfeiting an entrenched right is the pursuit of the right to culture.[153]

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148 Rautenbach "Umkhosi Ukweshwama: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage" 79.
149 S 211(2) of the Constitution.
150 2001 1 SA 574 (Tk) 629I.
151 *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority* 2001 1 SA 574 (Tk) 630C.
152 *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority* 2001 1 SA 574 (Tk) 629I-629J.
153 *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority* 2001 1 SA 574 (Tk) 629I-629J.

Van Zyl J[154] believes that this choice "qualifies the right to culture and acknowledges freedom as a fundamental value of the Constitution". Van Zyl J[155] therefore emphasises the fact that no individual should be forced to be part of a particular cultural group, be subjected to the customs of that group against his will and/or be forced to unwillingly forego an entrenched constitutional right. A similar approach to that of Van Zyl can be found in the case of *Christian Education South Africa v Minister of Education*[156] where Sachs J voiced the opinion that the Constitution gives people the right:

> … to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'.

What should also be kept in mind is that, although section 31 grants an individual the right to choose a cultural identity and to protest once his expression of that identity is suppressed, the individual also has the right to protest if cultural beliefs and customs that violate the principles of equality and non-discrimination are imposed on him against his wishes.[157]

Rautenbach and Matthee[158] hold a similar view to that of Van Zyl J and Sachs J above, by stating that the internal limitation clause in sections 30 and 31 serves as a reminder that the protection of cultural and religious

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154 *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority* 2001 1 SA 574 (Tk) 629J-630A.

155 *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority* 2001 1 SA 574 (Tk) 630A.

156 4 SA 757 (CC) 773A-773B. Also see Amoah and Bennett *Afr Hum Rts LJ* 360.

157 Momoti Law and Culture 89; Van der Meide *SALJ* 100.

158 Rautenbach and Matthee *JLP* 137. This is, in essence, the argument put forward by Poulter *Int'l & Comp LQ* 589, without the (somewhat obvious) converse argument that, if not allowing a cultural practice would violate a human right, the practice must be allowed. The same argument is offered by Labuschagne *JJS* 476-477 and Rautenbach and Matthee *JLP* 137. See Currie and De Waal *Bill of Rights Handbook* 634 and *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) at paras 156-157, for a discussion on how to reconciliate cultural and individual rights.

freedom does not give minority cultural groups *carte blanche* to violate the fundamental rights of individuals. Renteln[159] also seems to support a limitation of cultural and religious freedom in the manner done in sections 30 and 31 by referring to a "no harm principle" which renders unacceptable those cultural beliefs and customs that result in "irreparable physical harm" to others.[160]

Apart from the limitation clause present in sections 15, 30, 31 and 211(3), the Constitution also contains a general limitation clause in section 36, which is considered to be the most important section counteracting the formal recognition of a cultural defence in the South African criminal law.[161] Section 36(1) provides that:

> … the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[162]

What section 36 essentially provides is that no right contained in the Constitution is absolute and they may therefore all be limited.

The importance of section 36 was recently highlighted in the case of *Coetzee v Government of the Republic of South Africa*[163] where Sachs J stated that the best way to remain true to the Constitution was by balancing the rights in the Bill of Rights within a "holistic, value-based and case-oriented framework".[164] According to Sachs J,[165] the values derived from an open

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159 Renteln *Cultural Defense* 217; Rautenbach and Matthee *JLP* 137.
160 Such harm clearly includes death or permanent disfigurement.
161 Rautenbach and Matthee *JLP* 137.
162 See Carstens *De Jure* 21; Du Plessis *PELJ* 14, Rautenbach and Matthee *JLP* 137 and Coertzen *Verbum Et Ecclesia* 359 for a discussion of section 36(1) in the context of the cultural defence.
163 *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* (CCT19/94, CCT22/94) [1995] ZACC 7 par 46.
164 Rautenbach and Matthee *JLP* 137.
165 *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* (CCT19/94, CCT22/94) [1995] ZACC 7 par 46; Rautenbach and Matthee *JLP* 137-138.

and democratic society based on freedom and equality should underlie the entire process, because:

> The notion of an open and democratic society is … not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct.

Sachs J[166] further warns that one should be careful not to engage in a purely formal or academic analysis, but rather focus on the underlying values of the guarantees of a fundamental right and the particular facts of a case. There is no legal yardstick for this process and courts will therefore not be able to avoid making difficult value judgments in cases where logic and precedent do not provide a lot of guidance.[167]

A similar provision to the one contained in the limitation clauses of sections 30, 31, 36 and 211(3), can also be found in the interpretation clause, section 39, of the Constitution. Sections 39(1) and (2) read as follows:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum-
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> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.
>
> (2) 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.

This section therefore also serves as a reminder that, whenever a court has to interpret or develop the South African law, whether it be the South Afri-

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166 *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* (CCT19/94, CCT22/94) [1995] ZACC 7 par 46; Rautenbach and Matthee *JLP* 138.

167 *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* (CCT19/94 , CCT22/94) [1995] ZACC 7 par 46; Rautenbach and Matthee *JLP* 138.

can common law or African customary law, the spirit, purport and objects of the Constitution must never be forgotten.[168]

Against this background it is therefore argued that the internal limitation clauses present in sections 15, 30, 31 and 211(3) also serve as a counter-argument against the formal recognition of a cultural defence in the South African criminal law.[169] In fact, as Rautenbach and Matthee[170] point out:

> The Constitution … serves as a double-edged sword with regard to the recognition of a formal cultural defence.

What should be clear is that the various indigenous beliefs and customs in the African customary law are only allowed in so far as they do not lead to a violation of other fundamental human rights in the Constitution.[171] This is not a novel idea emanating from the constitutional dispensation in South Africa.[172] In fact, as early as the 1980s scholars such as Labuschagne[173] have already held the view that the value of human dignity should always prevail in situations where indigenous beliefs and customs collide with other human freedoms.[174] In this regard, Rautenbach and Matthee[175] point out that, since the advent of South Africa's new constitutional dispensation, where human dignity is both a constitutionally entrenched right as well as a democratic value, this view of Labuschagne now rings more true than ever before.

In light of the discussion above it should now be considered whether the formal recognition of a so-called 'cultural defence' in the South African

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168 Also see Rautenbach and Matthee *JLP* 138, Du Plessis *PELJ* 13 and Rautenbach *Stell LR* 110 in this regard.
169 A similar view is held by Rautenbach and Matthee *JLP* 137.
170 Rautenbach and Matthee *JLP* 135.
171 Rautenbach and Matthee *JLP* 138; Phakola *Justice Today* 25.
172 Rautenbach and Matthee *JLP* 137.
173 Labuschagne and Schoeman *JJS* 477.
174 Rautenbach and Matthee *JLP* 138.
175 Rautenbach and Matthee *JLP* 138. While section 7(1) of the Constitution affirms that human dignity is a democratic value, section 10 affords every individual the right to inherent dignity and to have their dignity respected and protected.

Criminal law can be put off any longer.[176] As was shown earlier,[177] common law crimes in South Africa are quite flexible in nature. Also, various factors, of which custom is one, are taken into account when determining whether or not the elements of a crime have been proven or not.[178] It therefore seems unnecessary to conclude that cultural and religious freedom as envisaged in the Constitution can only exist once the notion of culture is formally recognised as a defence in the criminal law.[179] The legal conflict between common law crimes and indigenous beliefs and customs are dealt with indirectly by the Constitution which provides a foundational framework for evaluating the role of cultural customs in the context of the common law.[180]

Earlier in the discussion it was shown that one's guilt is determined by using a normative test.[181] The normative test requires a value judgment which, during the pre-constitutional dispensation, was made within the context of common law principles and values.[182] This clearly reflected the fact that customary law was inferior to common law.[183] Of course, this situation changed after the final Constitution put the common and customary law on equal footing.[184] Customary law can, therefore, no longer be evaluated within the cadre of the common law for it is now an integral part of South African law and subject to the Constitution only.[185]

The judiciary should, therefore, look toward the constitutional values of equality, human dignity and freedom when evaluating the role of an accused's cultural background and values in the commission of a particular crime; in the same way the principles of common law were used before

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176 Rautenbach and Matthee *JLP* 138.
177 See Chapters 5 and 6 as well as Rautenbach and Matthee *JLP* 138.
178 See Chapters 5 and 6 as well as Rautenbach and Matthee *JLP* 138.
179 Rautenbach and Matthee *JLP* 138-139.
180 Rautenbach and Matthee *JLP* 139.
181 See par 6.3; Rautenbach and Matthee *JLP* 139.
182 Rautenbach and Matthee *JLP* 139.
183 Rautenbach and Matthee *JLP* 139.
184 Rautenbach and Matthee *JLP* 139.
185 Rautenbach and Matthee *JLP* 139.

1994 to guide the judiciary in evaluating indigenous beliefs and customs in the context of crimes.[186] In other words, the judiciary will have to find common ground between protecting an accused's *bona fide* exercise of his cultural rights and the protection of fundamental human rights affected by criminal activities of an individual or community.[187] This should not be a difficult task for the judiciary considering the fact that it is the task of the judiciary, especially the Constitutional Court, to:

> '… vindicate the fundamental rights of those litigants who come before them. It will be their task to interpret the provisions, give them meaning and context, and to set the bounds of constitutionally permissible limitations on them. This will require adapting to and developing new ways of thinking. Judicial officers and legal practitioners will, in a sense, have to make a new start. … In this journey, some will of necessity be in the advance guard, setting up the guideposts for those to follow'.[188]

Therefore, by finding the common ground described above, the judiciary would be fulfilling the important role envisaged for it with the advent of the new constitutional dispensation in South Africa, *viz* that of transformative constitutionalism. In this regard Davis and Klare[189] point out that:

> The Constitution confers significant powers and responsibilities upon South African courts to interrogate and renovate the common and customary law so as to promote the values expressed in the Bill of Rights.

In the case of *S v Makwanyane*[190] Mahomed J held that "the South African Constitution is different". The Constitution, as Davis and Klare[191] point out, is a transformative constitution in that the "Constitution is a document committed to social transformation".[192] The Constitutional Court has

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186 Rautenbach and Matthee *JLP* 139.
187 Rautenbach and Matthee *JLP* 139.
188 Rautenbach, Jansen van Rensburg and Pienaar *PELJ* 2.
189 Davis and Klare *SAJHR* 409-410. According to the authors the power and obligation of the South African courts to develop the common in the spirit described here is rooted in ss 8(3) and 39(2) of the Constitution.
190 1995 6 BCLR 665 487H-487I.
191 Davis and Klare *SAJHR* 404.
192 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) 565F-565H.

emphasised this fact on a number of occasions.[193] For example, in *Soobramoney v Minister of Health, KwaZulu-Natal*[194] Chaskalson P held that:

> [T]he commitment ... to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.

Chaskalson P[195] further held that the constitutional commitment above is expressed in the preamble to the Constitution which, after giving recognition to the injustices of the past, provides that:

> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-
>
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

Also, in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO*[196] Langa DP held that:

> The process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

Langa DP[197] also highlighted the fact that:

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193 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) 565F-565H; Davis and Klare *SAJHR* 404.

194 1998 (1) SA 765 (CC) 771B. Also see Davis and Klare *SAJHR* 404 footnote 3.

195 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) 771B. Similarly, Pieterse *SAPL* 158 also points out that the constitutional commitment to transformative constitutionalism is also evident in the postscript of the Interim Constitution which provided as follows: "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."

196 2001 1 SA 545 (CC) 558. Also see Davis and Klare *SAJHR* 404 footnote 3.

> The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values.

According to Davis and Klare[198] the inference drawn from the above is that the Constitution is aimed at transforming the South Africa society both in the public and private spheres. In the words of these authors,[199] the Constitution:

> … embraces an aspiration and an intention to realise in South Africa a democratic, egalitarian society committed to social justice and self-realisation opportunities for all.

The author of this thesis has also made a similar observation to that of Davis and Klare by stating that:

> The Constitution is … regarded as a transformative document intended to not only transform the legal system into one which recognises equality and respect for all, but also to transform society in South Africa.[200]

On another occasion the author of this thesis also observed that:

> The Constitution is ... considered to be a transformative document intended to not only transform the legal system into one which puts democracy and respect for human rights above all else, but also to transform society in South Africa and establish a culture of respect for human rights among all citizens.[201]

Davis and Klare[202] point out that the transformative nature of the Constitution is also visible in the text thereof which acknowledges that the new dispensation brought about by it:

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197 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 1 SA 545 (CC) 559G-559H.

198 Davis and Klare *SAJHR* 404.

199 Davis and Klare *SAJHR* 404. Also see ss 1 and 7 of the Constitution.

200 Matthee 2012 http://www.fwdeklerk.org/cgi-bin/giga.cgi?cat=1586&limit=10&page=0&sort=D&cause_ id=2137&cmd=cause_dir_news.

201 Matthee 2013 http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=116814&cat_id=1586#.UT8vFBz7CS.

202 Davis and Klare *SAJHR* 404. A similar point was made my Pieterse *SAPL* 159.

> … arose in a particular historical context and that the democracy it inaugurates and celebrates is permanently a work-in-progress, always looking forward, always subject to revision and improvement.

Against the background above, it is therefore submitted that, while inequalities in the recognition of indigenous beliefs and customs may have existed in the past,[203] it should be borne in mind that there has never been a standard against which such indigenous beliefs and customs could have been tested.[204] This is not true anymore. Today South Africa has the Constitution and any law or conduct which does not pass constitutional scrutiny is regarded as invalid and subject to transformation in order to be brought in line with the Constitution.[205] During this process it is essential that the South African society adapts to the Constitution, "otherwise it will just be another piece of legislation without any real effect".[206] However, considering that the process of transformation is a slow one, it is up to the South African courts to do their best in the meantime to ensure that the conflict between the South African common law and African customary law is ameliorated the best they can.[207] This, however, does not mean that the South African courts should condone conduct based on an indigenous belief and custom that violate the fundamental human rights entrenched in the Constitution.[208]

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203 See in this regard *S v Makwanyane* 1995 3 SA 391 (CC) 488B-488D where Mahomed J held that: "The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone. The past accepted, permitted, perpetuated and institutionalised pervasive and manifestly unfair discrimination against women and persons of colour. The past arbitrarily repressed the freedoms of expression, assembly, association and movement."

204 See Matthee 2012 http://www.fwdeklerk.org/cgi-bin/giga.cgi?cat=1586&limit=10&page=0&sort=D&cause_ id=2137&cmd=cause_dir_news where the author puts forth a similar argument, albeit within the context of proceedings before traditional courts.

205 Matthee 2012 http://www.fwdeklerk.org/cgi-bin/giga.cgi?cat=1586&limit=10&page=0&sort=D&cause_ id=2137&cmd=cause_dir_news.

206 Matthee 2013 http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=116814&cat_id=1586#.UT8vFBz7CS.

207 Matthee 2013 http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=116814&cat_id=1586#.UT8vFBz7CS.

208 See Matthee 2013 http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=116814&cat_id=1586#.UT8vFBz7CS

Against this background it is concluded that the notion of cultural diversity in South Africa would not necessarily enjoy greater protection through the development and formal recognition of a cultural defence in the South African criminal law.[209] Instead, it is submitted that the conflict between the South African criminal law and the indigenous beliefs and customs in the African customary law can be resolved by bringing the indigenous beliefs and customs in line with the values underpinning the Constitution as the supreme law in the country. In short, therefore, it is the author's submission that there is no need to develop and recognise a separate or distinct cultural defence to deal with the conflict between the South African common law and African customary law within the context of the criminal law.

7.4 Conclusion

The Constitution guarantees equal protection, respect and concern for the constitutional rights of all cultural communities in South Africa in a number of ways.[210] Firstly, the Constitution recognises customary law as a unique and non-governmental source of law.[211] Next, the Bill of Rights affords and guarantees every individual's right to culture and religion.[212] Lastly, in terms of the Constitution the Constitutional Court is appointed as the ultimate arbiter on constitutional rights, including cultural rights.[213]

It seems as though the a strong argument in favour of using indigenous beliefs and customs to negate an accused's criminal liability or mitigate punishment for a crime committed can be advanced by relying on the rights to cultural and religious freedom entrenched in the Constitution.[214] It is, however, also evident that, although cultural groups are free to practise

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where the author raises a similar argument in the context of forced marriages resulting the practice of *ukuthwala*.

209 Rautenbach and Matthee *JLP* 139.
210 Momoti Law and Culture 84.
211 Momoti Law and Culture 84.
212 Momoti Law and Culture 84.
213 SS 166, 167(3) of the Constitution; Momoti Law and Culture 84.
214 Rautenbach and Matthee *JLP* 140.

their culture, such cultural practices cannot take place at the expense or in violation of the Bill of Rights.[215] Considering that indigenous customs can never override individual human rights, these customs should not simply be accepted as a valid defence or mitigating factor for the commission of culturally motivated crimes.[216] Moreover, the regulation of indigenous customs by way of the law does not suggest custom should be relinquished, *per se*, but rather encourages the proper application thereof.[217] The use of arguments pertaining to an accused's indigenous beliefs and customs during a criminal trial should therefore be delineated within the context of the limitation clause(s) in the Constitution.[218] Such a step would not only ensure that customary law has the same power that is accorded common law, but could also lead to universal justice superseding individualised justice.[219] What is more, not only would this ensure that indigenous beliefs and customs would be brought in line with the values of the Constitution, but it would also fall within the scope of the courts' duty towards transformative constitutionalism. Therefore, in light of the discussion in this Chapter, it is concluded that the conflict between the South African common law and African customary law in the context of the criminal law can be resolved through the South African judiciary's task of harmonising the protection of an individual or community's rights affected by criminal activity, on the one hand, and the *bona fide* exercise of an individual's constitutional right to cultural and religious freedom.[220] Ultimately, it is concluded that the formal recognition of a cultural defence in the South African criminal law would not further the notion of cultural diversity in South Africa.

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215 Momoti Law and Culture 89.
216 See par 7.4, Momoti Law and Culture 89 and Rautenbach and Matthee *JLP* 140.
217 Momoti Law and Culture 88.
218 Rautenbach and Matthee *JLP* 140.
219 Momoti Law and Culture 88; Rautenbach and Matthee *JLP* 140.
220 See par 7.4.

CHAPTER 8
CONCLUSION AND RECOMMENDATIONS

8.1 Background

In Chapter 1 the scene was set for positing a central research question for this study, *viz* whether a so-called “cultural defence” exists in the South African law, and if so, what the influence of such a defence is on the South African criminal law.[1] This question emanates from the fact that the South African common law and African customary law come into conflict with each other within the context of the South African criminal law.[2] In fact, a perusal of South African case law revealed that, in cases where an accused's conduct is viewed as lawful in terms of African customary law, but unlawful in terms of the South African common law, an accused attempted to raise a cultural defence by putting forth evidence of his cultural background or values to justify his *prima facie* unlawful conduct and ultimately escape criminal liability or, at the very least, receive a lighter sentence.[3]

In answering the central research question above,[4] this study was constructed around certain aims identified in Chapter 1.[5] The first aim of this study was to provide an overview of the composition of the South African law before and after the advent of the new constitutional dispensation in South Africa in 1994.[6] The purpose of this aim was to provide the necessary context for an understanding as to why conflict situations arise between the South African common law and African customary law in the context of the criminal law.[7] The second aim[8] of this study was to show that the conflict between the South African common law and African customary law becomes especially visible in cases where a criminal court has to deal with common law or statutory crimes committed under the guise of the

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1 See par 1.2.1.
2 See par 1.1.5.
3 See paras 1.1.6, 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.
4 See par 1.2.1.
5 See par 1.2.2.
6 See par 1.2.2.
7 See par 1.2.2.
8 See par 1.2.2.

indigenous beliefs in witchcraft[9] (including witch-killings),[10] the *tokoloshe*[11] and *muti*-medicine[12] (including *muti*-murders[13]), as well as the phenomenon of necklacing[14] and the custom of *ukuthwala*.[15] In light of this, the third aim of this study was to show that, up till now, the South African criminal courts have been unwilling to accept that a cultural defence exists for accused persons who commit common law or statutory crimes under the guise of the indigenous belief and customs above.[16]

The fourth aim of this study was to show that, up till now, the South African criminal law has yet to recognise a formal cultural defence that negates the element of unlawfulness necessary to hold an accused criminally liable.[17] In Chapter 5 it was shown that the South African courts have entertained arguments of an accused's cultural background and values within the context of the existing defences of private defence and necessity.

As indicated earlier,[18] the fourth aim of this study was to show that, up till now, the South African criminal courts have been unwilling to recognise a formal cultural defence that could negate the elements of conduct and culpability necessary to hold an accused criminally liable. In Chapter 6 it was shown that, in the past, accused persons have attempted to put forth arguments of their indigenous beliefs and customs in an attempt to persuade the South African criminal courts that, due to their cultural background and values, they a) did not act voluntarily during the commission of a crime or b) lacked the necessary culpability to be held criminally liable.[19]

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9 See par 4.2.
10 See par 4.2.
11 See par 4.3.
12 See par 4.4.
13 See par 4.4.
14 See par 4.5.
15 See par 4.6.
16 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.
17 See par 1.2.2.
18 See par 1.2.2.
19 See paras 6.2 and 6.3.

8.2 Main findings

8.2.1 Dual nature of the South African law: Two sides to the coin

Since the enactment of South Africa's final Constitution, African customary law enjoys an equal status to that of the common law.[20] African customary law is, therefore, no longer subordinate to or subject to regulation by the South African common law. Instead, both these legal systems are now subordinate to and subject to regulation by the Constitution as the supreme law of South Africa.

Despite their equal status, the South African common law and African customary law are founded on different value systems.[21] As a result of this difference in their value systems, the South African common law and African customary law ultimately come into conflict in the context of the criminal law due to the competing claims and values that underpin them.[22]

8.2.2 Common law crimes and indigenous beliefs and customs: Identifying the issues

8.2.2.1 Indigenous belief in witchcraft and witch-killings

In the South African criminal law the perpetrator of a witch-killing can be prosecuted for the common law crimes of murder,[23] or, if the victim survives, attempted murder,[24] common assault[25] or assault with the intent to commit grievous bodily harm.[26] In terms of the *Witchcraft Suppression Act*,[27] the accused can also be charged with the statutory crimes of accusing someone of witchcraft, pointing someone out as being a witch or wizard

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20 See paras 2.2.2 and 7.2.1.
21 See par 2.4.
22 See paras 4.2.4, 4.3.3, 4.4.3, 4.5.3 and 4.6.3.
23 See par 4.2.4.
24 See par 4.2.4.
25 See par 4.2.4.
26 See par 4.2.4.
27 3 of 1957. See par 4.2.5.

or injuring a person based on information received from a traditional healer or similar person.

Up till now, an accused who has been charged with one or more of the common law or statutory crimes above has attempted to escape criminal liability by putting forth evidence of his indigenous belief in witchcraft.[28] However, up till now, the South African criminal courts have been unwilling to allow an indigenous belief in witchcraft to serve as a defence for the commission of a common law or statutory crime.[29] At the very least, and depending on the circumstances, an accused's indigenous belief in witchcraft has only served as a mitigating factor during sentencing.[30]

8.2.2.2 Indigenous belief in *tokoloshe*

The indigenous belief in the *tokoloshe* can lead to the commission of common law crimes such as murder[31] or, if the victim survives, common assault[32] or assault with the intent to do grievous bodily harm.[33] An accused who has been charged with one or more of these crimes attempted to escape criminal liability by putting forth evidence of his indigenous belief in the *tokoloshe* to try and justify his conduct and escape criminal liability.[34] However, as is the case with the indigenous belief in witchcraft and witch-killings, the South African criminal courts have so far been unwilling to accept the argument that the indigenous belief in the *tokoloshe* can serve as a valid defence in the South African criminal law.[35] The South African criminal courts have, however, been willing to consider an accused's indigenous belief in the *tokoloshe* during sentencing.[36]

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28 See par 4.2.6.
29 See par 4.2.4.
30 See par 6.4.
31 See par 4.3.3.
32 See par 4.3.3.
33 See par 4.3.3.
34 See par 4.3.3.
35 See par 4.3.3.
36 See par 6.4.

8.2.2.3 Indigenous belief in *muti* and *muti*-murders

Muti-murderers normally face charges of murder or attempted murder, if the victim survives.[37] In these instances, accused offenders have attempted to persuade the South African criminal courts that they should escape criminal liability for the killing of another human being due to their indigenous belief in *muti*.[38] However, up till now the South African criminal courts have refused to accept the indigenous belief in *muti* as a valid defence for the killing of another human being.[39] The indigenous belief in *muti* can, however, serve as a mitigating factor during sentencing.[40]

8.2.2.4 Phenomenon of necklacing

The phenomenon of necklacing, used as a method for killing witches, leads to the commission of the common law crimes of murder,[41] or, if the victim survives, attempted murder,[42] common assault[43] or assault with intent to do grievous bodily harm.[44] In the past, accused offenders have attempted to escape criminal liability for the crimes above by putting forth evidence of their belief in witchcraft in order to justify the killing of the deceased.[45] However, as stated earlier,[46] the South African criminal courts have been reluctant in accepting that the indigenous belief in witchcraft can serve as a defence in the South African criminal law. However, as indicated earlier,[47] the indigenous belief in witchcraft can serve as a mitigating factor during sentencing.

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37 See par 4.4.3.
38 See par 4.4.3.
39 See par 4.4.3.
40 See par 6.4.
41 See par 4.5.3.
42 See par 4.5.3.
43 See par 4.5.3.
44 See par 4.5.3.
45 See par 4.5.3.
46 See par 4.5.3.
47 See par 6.4.

8.2.2.5 Indigenous custom of *ukuthwala*

In the case of *ukuthwala*, an accused can be charged with the commission of the common law crimes of abduction,[48] kidnapping[49] and common assault,[50] as well as the statutory crime of rape.[51] In such an instance, a South African criminal court has to consider whether the accused can rely on a cultural defence in that the indigenous custom of *ukutwhala* is an acceptable custom in terms of his particular culture.[52] However, as is the case with the indigenous customs and beliefs referred to earlier, the South African criminal courts have always rejected arguments of the indigenous custom of *ukuthwala* as a valid defence for escaping criminal liability based on the crimes above.[53]

8.3 Indigenous beliefs and customs and the infringement of fundamental human rights in the Bill of Rights

Apart from the commission of a common law or statutory crime, the indigenous beliefs and customs above also result in the infringement of various fundamental human rights in the Constitution.[54]

8.3.1 Witchcraft and witch-killing and the infringement of fundamental human rights

In the event of a witch-killing the unfortunate victim is deprived of his right to life and the right to freedom and security of the person.[55] It is not only the victims of witch-killings who are deprived of their fundamental human

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48 See par 4.6.3.
49 See par 4.6.3.
50 See par 4.6.3.
51 See par 4.6.3.
52 See par 4.6.4.
53 See par 4.6.3.
54 Revisit par 7.2.2 for a comprehensive discussion on the various fundamental rights infringed by these indigenous beliefs and customs.
55 See par 7.2.2.1.

rights, as witches and wizards who are persecuted by a particular community are denied the right to a fair trial entrenched in the Constitution.[56]

8.3.2 *Muti* and *muti*-murders and the infringement of fundamental human rights

When a *muti*-murder is committed, it goes without saying that the victim is denied his right to life entrenched in the Constitution.[57] A *muti*-murder also results in the infringement of the victim's right to freedom and security of the person.[58]

8.3.3 Necklacing and the infringement of fundamental human rights

As a method used for killing witches, the phenomenon of necklacing results in the infringement of a victim's right to life and his right to freedom and security of the person.[59]

8.3.4 *Ukuthwala* and the infringement of fundamental human rights

The indigenous custom of *ukuthwala* results in the infringement of the following fundamental human rights: the right to equality, the right to freedom and security of the person, the right to live in an environment that is not harmful to health or well-being, the right not to be subjected to slavery, servitude or forced labour, the right to basic education and other constitutional safeguards aimed at protecting children.[60]

8.3.5 Customs, crimes and human rights at a glance

The interplay between indigenous customs and beliefs, the resulting crimes and the conflict with fundamental human rights can be tabularised as follows:

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56 See par 7.2.2.1.
57 See par 7.2.2.2.
58 See par 7.2.2.2.
59 See par 7.2.2.3.
60 See par 7.2.2.4.

Indigenous belief in witchcraft and witch-killing	
Resulting crime	• Murder • Attempted murder • Common assault • Assault with intent to do grievous bodily harm • Offences in terms of the *Witchcraft Suppression Act* 3 of 1957
Defence up till now?	No
Considered during sentencing up till now?	Yes
Fundamental human rights infringed	• Right to life • Right to freedom and security of the person • Right to a fair trail
Indigenous belief in *tokoloshe*	
Resulting crime	• Murder • Common assault • Assault with intent to do grievous bodily harm
Defence up till now?	No
Considered during sentencing up till now?	Yes (as an indigenous belief in witchcraft)
Fundamental human rights infringed	• Right to life • Right to freedom and security of the person
Indigenous belief in *muti*-medicine (including *muti*-murders)	
Resulting crime	• Murder • Attempted murder • Common assault • Assault with intent to do grievous bodily harm
Defence up till now?	No
Considered during sentencing up till now?	Yes (as an indigenous belief in witchcraft)
Fundamental human rights infringed	• Right to life • Right to freedom and security of the person

Phenomenon of necklacing	
Resulting crime	• Murder • Attempted murder • Common assault • Assault with intent to do grievous bodily harm
Defence up till now?	No
Considered during sentencing up till now?	Yes
Fundamental human rights infringed	• Right to life • Right to freedom and security of the person
Custom of *ukuthwala*	
Resulting crime	• Abduction • Kidnapping • Common assault • Rape
Defence up till now?	No
Considered during sentencing up till now?	Yes
Fundamental human rights infringed	• Right to equality • Right to freedom and security of the person • Right to live in an environment that is not harmful to health or well-being • Right not to be subjected to slavery, servitude or forced labour • Right to basic education • Other constitutional safeguards aimed at protecting children

8.4 Influence of the cultural defence on the element of unlawfulness

A perusal of South African case law dealing with the indigenous belief in witchcraft revealed that the South African courts have been unwilling to accept that a truly held belief in witchcraft can justify an accused's conduct in private defence.[61] What became especially clear from the discussion in Chapter 5, is that the accused's belief in witchcraft does not satisfy the

61 See par 5.2.2.

imminence-requirement needed for a successful reliance on the defence of private defence.[62] In Chapter 6 it was also pointed out that the South African criminal law already accommodates an accused's views and perspectives during the sentencing stage,[63] and it is therefore unnecessary to develop the South African criminal law principles applicable to unlawfulness in order to accommodate the views and perspectives of an accused who commits a culturally motivated crime.[64]

8.5 Influence of the cultural defence on the elements of conduct and culpability

The South African criminal courts have always evaluated the accused's claims of his cultural background and values within the context of the common law principles applicable to the exclusion of voluntary conduct and culpability.[65] However, the South African criminal courts have so far refused to accept that an accused can escape criminal liability solely on the basis that an indigenous belief and custom was the driving force behind his commission of a common law or statutory crime.[66]

Despite the courts' unwillingness to accept arguments of an indigenous belief and custom to exclude an accused's criminal liability, it became evident from the discussion in Chapter 6 that the South African courts have always been willing to accept arguments of an accused's cultural background and values when considering an appropriate sentence for the accused.[67] Unfortunately, though, the extent to which the South African courts will consider arguments of an accused's cultural background and values in mitigation of punishment, depends entirely on the facts and circumstances

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62 See par 5.2.2.
63 See par 6.4.
64 See par 5.2.2.
65 See paras 6.2 and 6.3.
66 See paras 6.2 and 6.3.
67 See par 6.4.

of the accused's particular case.[68] Consequently, an accused who faces charges for the commission of a common law or statutory crime before a South African criminal court has no guarantee that his cultural background and values will be taken into account during his criminal trial. It was, therefore, concluded in Chapter 6 that the South African criminal law knows no cultural defence excluding voluntary conduct and culpability.

8.6 Casting a constitutional light on the cultural defence

Today, the Constitution serves as the supreme law in South Africa and any "law or conduct inconsistent with it is invalid".[69] The inevitable consequence of the equal status afforded to the South African common law and African customary law and the supremacy of the Constitution is that the validity of the rules in both these systems must now be tested against the values of the Constitution and not against each other. In light of this argument and considering the fact that the Constitution now affords each and every individual in South Africa the right to freedom of culture and to freely participate in a cultural life of his choosing, the second question that arises is whether these constitutional rights warrant the formal recognition of a cultural defence in the South African criminal law. As with the first question, this study shows that the answer to the second question is also in the negative.[70] As pointed out in Chapter 7, although the Constitution affords individuals the right to cultural freedom, the exercise of that right can be limited under certain circumstances.[71] Ultimately, as was pointed out in this study, the conflict between the South African common law and African customary law can be resolved by bringing the indigenous beliefs and customs present in the African customary law in line with the values underpinning the Constitution as the supreme law in the country.[72]

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68 See par 6.4.
69 S 2 of the Constitution.
70 See par 7.4.
71 See par 7.3.
72 See par 7.4.

8.7 Practical approach to adjudicating criminal cases involving culturally motivated crimes

Although it has been indicated that the South African criminal law would not benefit by the introduction of a formal cultural defence, the importance of cultural considerations during a criminal trial cannot be ignored. As stated earlier,[73] in the new constitutional dispensation the courts are obliged to give due consideration to African customary law if and when that law is applicable. However, since the advent of the new constitutional dispensation, there have not been many cases involving conflicts between the South African common law and African customary law within the field of criminal law. The question therefore arises as to how the criminal courts can ensure that they give enough consideration to the possibility that an accused's criminal conduct was culturally motivated so as to comply with their constitutional mandate referred to above.

It would be nearly impossible to formulate a perfect or flawless approach according to which a judicial officer can adjudicate criminal matters involving culturally motivated crimes. What's more, it can be argued that the South African criminal process already provides the accused with ample opportunity to put arguments of his cultural and religious background before the court, whether it be as a defence excluding criminal liability or in an attempt to receive a lighter sentence. Nonetheless, the author suggests the following practical approach and accompanying considerations may provide some guidance to judicial officers in dealing with cases involving culturally motivated crimes:

Step 1:	**Considerations:**
The first step is to consider whether the commission of	The first indication of whether or not there is talk of a culturally motivated crime is

73 See par 7.2.2.1.

the crime was culturally motivated or not. If it seems as though the accused did not commit a culturally motivated crime, the trial can continue on that basis. If, however, it is evident that the accused indeed committed a culturally motivated crime, step 2 follows.	when the accused pleads not guilty and he elects to provide a plea explanation in terms of section 115(1) of the *Criminal Procedure Act* 51 of 1977. If, however, the accused exercises his right to silence and elects not to make a plea explanation, a judicial officer can question the accused in terms of section 115(2)(a) of the *Criminal Procedure Act* 51 of 1977 in order to determine which allegations in the charge are placed in dispute. Either way, it is here where the judicial officer may get the first indication that the commission of the crime was culturally motivated or not. In determining whether the case involves a culturally motivated crime, a judicial officer will have to consider the definition of culture as well as the elements of a culturally motivated crime as discussed in Chapter 3.[74] It should, of course, be kept in mind that an accused is not obliged to give a plea explanation or answer any of the questions put by the court. If that is the case, the judicial officer will only get his first indication of whether or not he is dealing with a culturally motivated crime, when the accused starts to present his evidence at the close of the State's case.

74 See paras 3.3.1-3.3.6.

Step 2:	**Considerations:**
Once it has been determined that the commission of the crime was culturally motivated, the next step is to determine which indigenous belief or custom led to the commission of the crime. Once the relevant indigenous belief or custom has been identified, step 3 follows.	In other words, it must be ascertained whether or not the commission of the crime resulted from the indigenous belief in witchcraft[75] (including witch-killings),[76] the indigenous belief in the *tokoloshe*,[77] the use of *muti*-medicine[78] (including *muti*-murders[79]), the phenomenon of necklacing[80] and/or the custom of *ukuthwala*[81] discussed earlier. This will become clear to the judicial officer once the accused starts leading evidence to try and convince the court that his commission of the crime was culturally motivated.
Step 3:	**Considerations:**
When it is clear which indigenous belief or custom led to the accused's commission of the crime, the next step is to determine whether arguments pertaining to that particular indigenous belief or custom may be raised within the context of the existing	This step can only commence once the accused starts leading evidence pertaining to his cultural background to try and convince the court that his commission of the crime was culturally motivated. It is then up to the judicial officer to consider whether these arguments can in fact be raised within the context of the defences such as private defence,[82] necessity,[83] automa-

75 See par 4.2.
76 See par 4.2.
77 See par 4.3.
78 See par 4.4.
79 See par 4.4.
80 See par 4.5.
81 See par 4.6.
82 See par 5.2.2.

defences in the South African Criminal law in order to exclude the accused's criminal liability. If a judicial officer upholds an accused's defence, the accused is acquitted. However, if the judicial officer rejects an accused's defence, the accused must be convicted and step 4 follows.	tism,[84] a lack of criminal capacity[85] or mistake (*error*),[86] discussed earlier so as to exclude the accused's criminal liability. The distinction between the onus of proof and the evidential burden in criminal cases is an important consideration in this regard. The state always carries the onus of proving the elements of criminal liability beyond reasonable doubt.[87] Therefore, the State initially has the evidentiary burden to put enough evidence before the court to build a *prima facie* case against the accused.[88] Once the State has shown that a *prima facie* case exists against the accused, the evidentiary burden shifts to the accused. In order to explain and justify his conduct the accused will then have to lay a proper evidential foundation for his defence before the court.[89] Put simply, the accused will have to prove the existence of the defence while the State will have to prove the absence of such a defence.[90] Furthermore, when an accused raises one of the defences above, a judicial officer

83 See par 5.2.3.
84 See par 6.2.
85 See par 6.3.1.
86 See par 6.3.2.
87 Kemp *et al Criminal law* 86; Bellengère *et al* Law of Evidence 37.
88 Bellengère *et al* Law of Evidence 37.
89 Kemp *et al Criminal law* 86.
90 Kemp *et al Criminal law* 86.

	should also consider the judgment and reasoning in previous cases dealing with similar issues when deciding whether or not the defence should succeed or fail. A judicial officer should also consider the constitutional values discussed in Chapter 7[91] to ascertain whether these values support or counteract the accused's reliance on the relevant defence.
Step 4: Once an accused has been convicted, a court should consider whether arguments of his cultural background can serve as an extenuating circumstance, mitigating the punishment to be imposed on him.	

It should, however, be emphasised that the practical approach above merely serves as a suggestion to judicial officers in dealing with culturally motivated crimes. Therefore, the final word on how to deal with culturally motivated crimes has not yet been spoken. Ultimately, as cases involving culturally motivated crimes are brought before the criminal courts in the South African constitutional dispensation, it will be up to the judiciary to develop both the Western common law and African customary law to resolve the criminal law conflicts between these two legal systems.

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91 See paras 7.2.1 and 7.2.2.

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