

# PART 2

## COMMON LAW CRIMES AND INDIGENOUS CUSTOMS: DEALING WITH THE ISSUES IN SOUTH AFRICAN LAW

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### Introduction

South Africa is not the only country faced with challenges resulting from a pluralistic legal system. For instance, controversy concerning the relationship between crime and custom was generated in the Australian media in 2002,<sup>2</sup> sparked by a case involving a 50-year-old Aboriginal man, Jackie Pascoe Jamilmira, who was sentenced to 13 months imprisonment on a charge of statutory

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<sup>2</sup> See, for example, the interview conducted by Melanie Christiansen on 27 June 2006 (ABC Online 'PM - States resist move to exclude Indigenous customary law from sentencing'). The interview can be accessed at <http://www.abc.net.au/pm/content/2006/s1673275.htm> (date of use 9 September 2007). For a more detailed discussion of the situation in Australia, see Bronitt 2009 Bronitt 2009: 121-144.

rape<sup>3</sup> by a magistrate in Maningrida in the Northern Territory of Australia. (See further on the case: Bryant 2003: 20; Douglas 2005: 181-182.) Jamilmira appealed his sentence to the Northern Territory Supreme Court and contended, amongst other arguments, that the magistrate had failed to give due consideration to the relevant customary law allowing him to have sexual intercourse with his 'promised wife' (*Pascoe v Hales*<sup>4</sup>). The court accepted that the magistrate had failed to give due consideration to the customary law practice of promised wives and reduced Jamilmira's sentence to 24 hours imprisonment for statutory rape. It also reduced his sentence for the discharging of the firearm to 14 days imprisonment. Widespread criticism in the media led the prosecution to appeal (*Hales v Jamilmira*<sup>5</sup>) and Jamilmira's sentence was increased to 12 months imprisonment. Ultimately, Jamilmira sought leave to appeal the increased sentence, but leave was refused.<sup>6</sup>

The *Jamilmira* case is a perfect illustration of the controversies that arise when culture is the motivation for conduct that may ultimately be defined as a criminal act in terms of Western laws.<sup>7</sup> In *Ngatayi v R*<sup>8</sup> the High Court of Australia observed:

The existence of two systems of law side by side, the prevailing one and aboriginal customary law, with their very different attitudes to guilt and responsibility, creates serious problems and the question how far our laws should apply to aboriginals and

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<sup>3</sup> Statutory rape is defined as sexual intercourse with a female under the age of 16 years. See section 127 of the Criminal Code of the Northern Territory, Australia. At the time of the case, the girl was 15 years old. The accused was also guilty of discharging a firearm and received a concurrent sentence of imprisonment of two months.

<sup>4</sup> Unreported decision of the Supreme Court of the Northern Territory, JA 49 of 2002 delivered on 8 October 2002.

<sup>5</sup> (2003) 13 NTLR 14.

<sup>6</sup> *Jamilmira v Hales* [2004] HCA Transcript 18 (13 February 2004).

<sup>7</sup> 'Western' in the context of this contribution refers to legal systems belonging to the Romano-Germanic and Common Law families.

<sup>8</sup> (1979) 30 ALR 27: 36-37.

how far their law should be allowed to apply to them is controversial.

The South African legal system regularly has to deal with the question of culture in the legal sphere. (Both South Africa and Australia have a colonial past and both countries have an indigenous population.) The official legal system is dual in nature and generally comprised of two components, which can best be described as a Western and an African component. The Western component comprises Roman-Dutch law as influenced by English law and adapted and developed through judicial decisions and legislation, and is referred to as the common law of South Africa.<sup>9</sup> Common law is traditionally divided into private and public law,<sup>10</sup> and since criminal law primarily deals with the relationship between the state (as prosecuting organ) and the criminal (a private individual), it forms part of public law.

The African component consists of the written and unwritten laws of the indigenous communities, and is referred to as customary law.<sup>11</sup> It can safely be

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<sup>9</sup> One of the features of the South African legal system is the fact that it is largely uncodified. Every lawyer knows that he or she has to consult various sources to find the law. These sources include legislation, precedent, Roman-Dutch law, custom, customary law, modern legal textbooks and the Constitution. According to Girvin the mixed legal system in South Africa owes a great deal to the earlier judges of South Africa (Girvin 1996: 95). The South African legal system has also been referred to as a 'potjiekos' mix – see Rautenbach 2008: 130.

<sup>10</sup> Private law regulates relationships between private individuals or groups and is therefore horizontal in nature. When the law is concerned with a relationship between the state (acting with authority) and its subjects, the relationship is part of public law and is referred to as a vertical relationship.

<sup>11</sup> In terms of the Recognition of Customary Marriages Act 120 of 1988, 'customary law' is defined as the "customs and usages traditionally observed among the indigenous African people" and in terms of the Black Administration Act 38 of 1927 the term 'Black' includes "any person who is a member of any aboriginal race or tribe of Africa". The Law of Evidence Amendment Act 45 of 1988 defines 'indigenous law' as "Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic" and the South African Law Reform Commission defines customary law as the "various laws observed by communities indigenous to the country". Although

accepted that the South African Constitutions<sup>12</sup> 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).<sup>13</sup> In the context of customary law, limited criminal jurisdiction is conferred on traditional leaders (chiefs or headmen), and although this system is not free from criticism, it is generally accepted that customary courts play an important role in the adjudication of customary law issues between individuals living in indigenous communities (Rautenbach 2005: 334-335; Koyana et al. 2006: 137, 146).<sup>14</sup>

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customary law and indigenous law are used as synonyms in South African law, the first term is preferred, since it is also the expression used in the Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution'). Also the term 'Black' is regarded as offensive and the term 'African' is preferred instead.

<sup>12</sup> The interim Constitution (Constitution of the Republic of South Africa 200 of 1993) made provision for the indirect recognition of customary law by recognising 'traditional authority which observes a system of indigenous law' (section 181(1)) and by providing for the application of customary law in the courts in terms of Principle XIII. The final Constitution (Constitution of the Republic of South Africa, 1996) is more explicit and provides for the application of customary law by the courts when applicable. It is, however, subject to the Constitution and other legislation – see section 211(3). For a general discussion, see Rautenbach 2003: 107-114.

<sup>13</sup> *Bhe v 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 and 148. See also the similar view of Bennet 2004: 43. In *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) para 51 it was stated:

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..

<sup>14</sup> In general, these courts may adjudicate only on customary law issues between Africans.

Both the common and customary systems of law recognise and define crimes<sup>15</sup> and both systems prescribe punishment for crimes committed.<sup>16</sup> The value systems of these two systems differ considerably, however, and it is inevitable that conflict situations will arise.<sup>17</sup> It is especially the Western courts that from time to time have to deal with the situation where indigenous custom motivates the commission of a crime. (See e.g: Labuschagne 1988: 472-477; Labuschagne and Schoeman 1988: 33-45; Labuschagne 1990: 246-266; Dhlodhlo 1984: 409-410; Van den Heever and Wildenboer 1985: 105-112; Jonck 1997: 202-206. Although the common law certainly influenced the customary law in various ways, we do not explore this aspect in this contribution.) Some legal scholars have referred to this situation as 'the cultural defence in criminal law' (Torry 1999: 127-161; Carstens 2004: 1-25; Renteln 2004<sup>18</sup>).

As pointed out by Woodman, the expression 'cultural defence' has a variety of meanings depending on the nature of the process it denotes (Woodman (2009: 1-2). The term 'culture' is, of course, equally difficult to pin down and the quest to find the exact meaning of culture has given rise to hot debates in numerous scholarly publications.<sup>19</sup> The purpose here is not to engage ourselves in this debate and for this discussion we accept the definition of culture as advanced by Bennett:

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<sup>15</sup> The word 'crime' is an umbrella term used to refer to crimes, offences, violations and contraventions (Snyman 2008: 4, 6-7, 12; Burchell 2005: 55-58).

<sup>16</sup> Punishment in customary law, however, usually entails the payment (in cash or in kind) of compensation (Rautenbach 2005: 330, 332).

<sup>17</sup> For a discussion of the difference in the value systems see Van der Walt 1999: 111-112. Although it is possible for Western values to play a role in the commission of a customary law crime, this will not be dealt with in this context. Of relevance here is the situation where custom played a role in the commission of a Western crime.

<sup>18</sup> A considerable amount of work has been done in recent years on the so-called 'cultural defence' (also called the 'cultural defense'). It is impossible to provide a list of all the writings and the reader is referred to the bibliographical references referred to in two leading publications in this regard: Renteln 2004; Foblets and Renteln 2009.

<sup>19</sup> Du Plessis and Rautenbach 2009: 30-37 gives an overview of some of the most important writings on the definition of culture.

Culture [is] ... 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 a society (Bennett 2004: 78-79<sup>20</sup>).

The term 'defence', used in criminal law, refers to the situation where an accused advances some or other form of justification for committing a crime. (See also Woodman 2009: 9-10.) In South African law there are different categories of defences, for example, those pertaining to procedure or evidence,<sup>21</sup> some pertaining to the definitional requirements,<sup>22</sup> and others pertaining to the general requirements of a crime. It is especially the latter category of defences that is relevant for this discussion. Depending on its influence on a particular requirement (or element) of a crime, a defence may lead to a different outcome. For example, if an accused succeeds with the defence of automatism in the case of murder, he did not act and cannot be liable. If, however, an accused successfully raises the defence of provocation in the case of murder, his intent might be influenced and he could be liable for a less serious crime such as culpable homicide. (See also Amirthalingam 2009: 35-60, on the defence of provocation in the USA.)

Currently South African criminal law does not provide for a distinct or separate defence based on culture. However, in assessing the available literature and case law, it becomes evident that culture always plays a role in, at least, two stages of a criminal case: first, during the process of inquiry to ascertain if the general requirements for a particular crime have been met, and second when a suitable punishment for a convicted accused must be determined. This contribution deals with sample case law pertaining to these two stages.

We are intrigued by the fact that the debates pertaining to the cultural defence are particularly rife in countries with uniform legal systems, especially where global

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<sup>20</sup> Bennett (2004: 78-80) is of the opinion that culture has at least two meanings for legal purposes. First, it may denote intellectual or artistic endeavor and second, it refers to a way of life. His definition above refers to the second meaning of culture which is relevant for this discussion.

<sup>21</sup> For example, the inadmissibility of evidence resulting from an assault on the accused.

<sup>22</sup> For example, if the alleged crime is housebreaking and the accused denies that the structure that he broke into qualifies as a premise.

migration patterns resulted in the emergence of pluralistic societies with conflicting value systems.<sup>23</sup> On the other hand, South Africa's colonial past and the unique influence colonialism had on its legal system, probably ensured that culture, knowingly or unknowingly, always played a role in all areas of law.<sup>24</sup> The only question that remains is if the South African Constitution brought about a new approach or direction to be taken in matters where culture played a role in the commission of a common law crime.

This contribution discusses South African case law examples where culture played a role in criminal cases. In doing so, we try to illustrate what the issues are and how South African law has been coping with the challenges of cultural diversity in the area of criminal law, especially before 1994 when racial discrimination was rife. In the second part of this contribution, we deal with the question whether the provisions of the Constitution can be read to call for the formulation of a cultural defence in South Africa. It should be made clear that it is not our intention to provide a theoretical discussion of, or to advance arguments in favour of or against, the so-called 'cultural defence'. In fact, we conclude that the flexibility of the requirements of common law crimes in South Africa negates the need for such formalisation. South African criminal law regularly took and still takes cognisance of cultural diversity challenges and it is unlikely that the cultural defence will soon obtain a special place in the legal system.<sup>25</sup>

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<sup>23</sup> For example, the UK and the Netherlands. See Siesling and Ten Voorde 2009: 145-173, for a discussion of the defence in the Netherlands.

<sup>24</sup> Claes and Vrielink argue that law itself is a “dynamic cultural phenomenon constantly interacting with other cultural practices and trends” (Claes and Vrielink 2009: 302). Lawyers do not consciously think about the interaction or link between law and society, and this could be the reason why countries have diverse perceptions of the role and nature of the cultural defence. It is our contention that we cannot ignore the fact that South Africa has a cultural diverse society which will inevitably influence scholarly discussions of the cultural defence.

<sup>25</sup> Even Renteln argues against unqualified application of the cultural defence (Renteln 2009: 61-82). She is fully aware of the dangers of abuse of the defence and proposes certain safeguards which are aimed at preventing its misuse.

## The (Possible) Influence of Culture on the Requirements of a Common Law Crime

### *General Remarks*

Common law is the primary source for South African criminal law, but as a result of modern needs statutory offences have been introduced by means of legislation.<sup>26</sup> Although culture comes into play in both common and statutory criminal law, this contribution focuses mostly on common law crimes. In general, there are five requirements for criminal liability in terms of common law, namely: legality,<sup>27</sup> conduct,<sup>28</sup> fulfilment of definitional elements,<sup>29</sup> unlawfulness<sup>30</sup> and culpability.<sup>31</sup> To be convicted of a common law offence in South Africa, the state has to prove all these elements beyond a reasonable doubt. Situations can arise when a particular conduct can be classified as a crime by looking at it through a common law lens, but classified as indigenous custom by looking at it through a customary law lens.

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<sup>26</sup> An example is the National Road Traffic Act 93 of 1996, which provides for road traffic offences such as driving under the influence of alcohol. See Burchell 2005: 54-55 for a detailed discussion of the difference between common law and statutory offences in the South African legal system.

<sup>27</sup> Legality means that the law must regard a particular conduct as a crime: Snyman 2008: 36; Burchell 2005: 94.

<sup>28</sup> Conduct includes an act or omission: Snyman 2008: 51; Burchell 2005: 178, 185.

<sup>29</sup> Each crime has its own description distinguishing it from other crimes, and in order to commit a particular crime, one has to comply with the definition of that crime (Snyman 2008: 71).

<sup>30</sup> If there is no justification for the particular crime, the conduct will be unlawful (Snyman 2008: 97; Burchell 2005: 226).

<sup>31</sup> Culpability has two forms, namely intent and negligence, but before a person can be said to have acted with culpability he must have had criminal capacity. The legally endorsed test for criminal capacity is two-fold, namely (a) is the person able to appreciate the wrongfulness of his conduct and (b) is the person able to conduct himself in accordance with such appreciation (Snyman 2008: 159-160; Burchell 2005: 358).

The relationship between the requirement of culpability and the practising of an indigenous custom is particularly important. The mere fact that a person has committed an unlawful act that corresponds with the definitional elements of the crime does not mean that s/he is guilty of such a crime; his conduct must also be culpable. (Culpability is also referred to as *mens rea*.) A prerequisite for culpability is criminal capacity. This means that the offender must be able to distinguish between right and wrong and must be able to act in accordance with this appreciation. Once it is clear that the offender acted with criminal capacity, the test for culpability must continue. Two forms of culpability can be distinguished, namely intention (*dolus*) and negligence (*culpa*) (Snyman 2008: 95-160; Burchell 2005: 455). Intention consists of two elements. The first has a cognitive (intellectual) dimension and requires knowledge of the definitional elements of the crime and of the unlawfulness of the act. The second element has a conative (voluntative) element and consists in directing the will towards a certain act or result. In other words, to have intent means, first that the offender must be aware that his actions are not justified and, second, that his actions constitute a crime in terms of the law (Snyman 2008: 182-202. Whether his actions are justified or not is a question of fact. Whether his actions constitute a crime or not is a question of law.<sup>32</sup>)

Some common law crimes require a lesser form of culpability than intent, namely negligence.<sup>33</sup> The test to determine negligence is based on the question whether a reasonable person in the same circumstances would have foreseen the possibility that his actions might be criminal. (Snyman 2008: 209-210, and Burchell 2005: 527-529, give a description of the complete test usually applied by the courts.) Snyman points out that this test is normative in character; it requires a value judgment by someone other than the offender himself (Snyman (2008: 209-210, 213-215). In the case of a culturally motivated act that constitutes a common law crime, it is normally the judge who decides what the reasonable person in the same circumstances would or should have done. There may, however, be many people in South Africa who only partly subscribe to African beliefs and customs. This raises the question as to how the courts would test the strength of an accused's

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<sup>32</sup> Since the judgment of the Appellate Division in *S v De Blom* 1977 3 SA 52 (A), it is trite law that ignorance or mistake of the law is indeed a valid excuse in certain circumstances. See Snyman 2008: 202 for criticism of this judgment.

<sup>33</sup> The only two crimes requiring negligence are culpable homicide and contempt of court. See Snyman 2008: 209.

cultural affiliation. For example, 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 important to consider whether a court will react to him in the same way as it would to a peasant farmer with no schooling.

Against this background, it should be clear that problems might arise when someone's actions might be seen as lawful in terms of customary law, but unlawful in terms of the common law. Can it be said that such a person has acted with the necessary culpability? A general assessment of the South African case law reveals two situations (although there are many more in reality) where the defence of indigenous custom has come under the magnifying glass. One situation relates to an indigenous custom called *twala*, and the other to an indigenous belief in the *tokoloshe*.

#### *The Twala Custom*

In the *Pascoe v Hales* case,<sup>34</sup> the Australian Appeal Court commented that it was surprising that Jamilmira was charged at all since “the incident occurred within the context of tribal law”. The court was of the opinion that aboriginal custom meant that the accused could have sexual intercourse with his 'promised wife' even though she was only 15 years old. Another source reported that the judge observed that the girl knew what custom expected of her and for that reason she did not need legal protection (Douglas 2005: 187). The fact that the court paid insufficient attention to the rights of minor women in this indigenous culture may be thought to reflect cultural relativism, which is not a point of view unique to Australia.

In South Africa the custom of *twala* practised by some indigenous communities resembles the Australian custom of having a 'promised wife'. (The custom is also referred to as the *baleka*, *ukuthwala* or *ukutheleka* custom: Bennett 2004: 212; Olivier et al 1989: 17-19, 352-358. See also for a detailed discussion of this particular custom Labuschagne and Schoeman 1988: 33, and the sources they refer to. For a recent discussion see McQuoid-Mason 2009: 716-723.) According to the

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<sup>34</sup> Unreported case JA 49 of 2002 delivered on 8 October 2002.

custom of *twala*, a girl is 'carried away'<sup>35</sup> by a man, his family or his friends with a view to marriage.<sup>36</sup> The requirements of *twala* and its consequences differ from community to community. Among the Xhosa, for example, three forms of *twala* can be distinguished (Van Tromp 1948: 63-75). In the first form, *ukuthwala onkungenamvumelano* or *ukugcagca*, the man and the girl come to an agreement that the man will carry her off to his father's or guardian's homestead.<sup>37</sup> In this case the carrying off normally takes place with the man's father's or guardian's permission, while the permission of the girl's father or guardian is lacking. In the second form, *ukuthwala kobulawu*, the girl is forcibly carried away without her permission, but with the permission of her parents and the parents of the man.<sup>38</sup> The last form is where the girl is carried off with violence, against her will and without her father or guardian's permission.<sup>39</sup>

Although *twala* is quite common among some indigenous communities, and indeed, the practice of *ukuthwala* is gaining popularity with every decade that passes (Koyana and Bekker 2007: 139, 143), Western courts have been suspicious

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<sup>35</sup> The terms 'abduct', 'kidnap' or 'seize' are sometimes used to describe the custom *twala*.

<sup>36</sup> This was the situation in *R v Swartbooi* 1916 EDL 170.

<sup>37</sup> This is a form of elopement and the 'resistance' of the girl is a mere sham. She wants to elope with the man. If there is no marriage and if they had sexual intercourse or she became pregnant, the man will have to pay compensation to the girl's father.

<sup>38</sup> The girl is usually ignorant of the pre-arranged plans between the two families and, if she refuses to marry the man after her seizure, there are certain remedies she can apply. Under this form of *twala* the man has tacit permission from the father of the girl to seduce her to sexual intercourse and, therefore, the customary crime of rape has not been committed. If there is no marriage and they had sexual intercourse or she became pregnant, the man will have to pay compensation to the girl's father.

<sup>39</sup> The man has to pay compensation for his actions before he can enter into marriage negotiations with the girl's father. Marriage will ensue only upon the consent of the girl's father and the girl herself. If the man has sexual intercourse with the girl without the necessary consent, this action will be regarded as customary law rape, for which the punishment is quite severe.

of it since colonial times (*R v Njova* 1906 20 EDC 71; *R v Sita* 1954 4 SA 20 (E) 22; Koyana and Bekker 2007: 142).<sup>40</sup> This is because *twala*, regardless of the specific form it takes, can give rise to various common law crimes, the first of which is abduction. Snyman defines the common law crime of 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 she or somebody else may marry or have sexual intercourse with the minor (Snyman 2008: 402-404).

From this definition it is clear that *twala* can infringe the twofold legal interests that are protected in the case of abduction, and which simultaneously serve as the two most important requirements for the crime, that is, the parents' or guardian's factual exercise of control over the minor and their right to consent to the minor's marriage.<sup>41</sup> The consent of the minor to the acts of the wrongdoer is no defence against a charge of abduction. In the case of *twala*, the carrying away of the girl without her parent's permission would satisfy the requirements for abduction.

In *R v Njova* the South African court held that the removal by a 'native man of a native girl' for the purposes of marriage or sexual intercourse constitutes the crime of abduction.<sup>42</sup> In another case, *Ncedani v R* it was confirmed that the forcible

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<sup>40</sup> From the case law it is evident that an unmarried girl would have no cause of action under customary law if she is carried away under the *twala* custom, but she will still have one under common law. In *Mkupeni v Nomungunya* 1936 NAC (C & O) 77 78 the court declared: "While it is recognized that the custom of 'twala' is still largely practiced among the natives, this Court is not prepared to countenance its use as a cloak for forcing unwelcome attentions on a patently unwilling girl."

<sup>41</sup> In terms of section 3(3) of the *Recognition of Customary Marriages Act* 120 of 1998 that reads: "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."

<sup>42</sup> *R v Njova*, 1906 EDC 71. The accused was a labourer who removed the minor girl from her father's house without the latter's consent and with the purpose of

removal of a minor girl without her or her guardian's consent constitutes the crime of abduction.<sup>43</sup> Both courts refused to accept the *twala* custom as a defence against the crime of abduction. A similar view was taken in *R v Sita* where it was argued that the parents' lack of consent in the taking away of their daughter was overcome by the custom of *twala*.<sup>44</sup> In other words, it was contended that because of the custom of *twala* the accused could disregard the parents' objection and the custom stood in place of their consent. The court, however, disagreed, because it failed to see how a custom (irrespective of whether the custom was legal or illegal) could override a common law crime and held:

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.<sup>45</sup>

Another important factor that might influence the common law crime of abduction is that the consent of the girl's parents is usually obtained after she has been *twala'd*. Their consent is not always obtained without some form of social pressure, especially in light of the fact that the man usually pays some form of compensation, or that their daughter has consented to her being *twala'd*. If, however, they do give their consent after the abduction, the whole incident might still be regarded as a crime (Van Tromp 1948: 73-74). This was pointed out in *R v Sita*, where the court observed that:

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having sexual intercourse with the girl. He was sentenced to a fine of £20, alternatively to six months imprisonment.

<sup>43</sup> *Ncedani v R*, 1908 EDC 243. In this case, three Pondo men abducted a minor girl against her will and the will of her guardian for the purpose of marrying her off to another man. The court found that they were accomplices to the crime of abduction and as a result they were each sentenced to pay a fine of £5, alternatively to undergo three months imprisonment with hard labour.

<sup>44</sup> *R v Sita*, 1954 4 SA 20 (E). The accused took the girl to his homestead with her consent, but without the consent of her parents. He was then charged with the crime of abduction, but pleaded the custom of *twala* as defence.

<sup>45</sup> *R v Sita*: 22.

[I]t 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.<sup>46</sup>

The second crime for which the man and/or his accomplices can be prosecuted is kidnapping. Snyman defines kidnapping as follows:

Kidnapping consists in 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 (Snyman 2008: 476).

Unlike abduction, *twala* infringes the protected legal interest of freedom of movement in the case of kidnapping. Snyman however, points out that kidnapping in South Africa can also be committed in cases where a person consented to his or her own removal (Snyman 2008: 481). The abductor can, therefore, be charged with kidnapping even when the minor girl consents to her own removal.

If the man has sexual intercourse with the girl without permission he can, of course, also be prosecuted for the statutory crime of rape (and will also be acting contrary to customary law: Koyana and Bekker 2007: 141). This crime is regulated by section 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, which stipulates that:

Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.

This was the case in *R v Mane*, where a girl's guardian gave permission to the accused's brother to *twala* her for the purpose of marrying him (accused) without her knowing it.<sup>47</sup> When she realised what was happening, she refused to marry the

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<sup>46</sup> *R v Sita*: 24.

<sup>47</sup> *R v Mane*, 1947 EDLD 196. The case was decided before the coming into

accused and tried to escape several times. She was, however, unable to do so because she was being watched by the accused and his family members. Her guardian even told her not to 'act foolishly but to obey' the orders of the accused and to stay with him. During this time, the accused had sexual intercourse with her on two occasions, both times without her consent. When she finally escaped, she immediately reported the incident to the police. The court made it clear that an essential element of the *twala* custom is that the girl must be a consenting party and held:

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.<sup>48</sup>

The forcible removal of a girl also led to a conviction of common assault<sup>49</sup> in *R v Swartbooi*.<sup>50</sup> The court referred to the *twala* custom as 'barbarous' and commented:

[T]his Court will not recognise the barbarous custom of *twalaing* as a defence to a charge of assault which may be committed upon a girl whom it is desired to *twala*, or upon any of her friends and relations who wish to resist the efforts made by the bridegroom or any member of his party.<sup>51</sup>

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operation of the Act but the common law definition of rape was similar to the statutory definition. The facts of the case also show a remarkable likeness to the Australian *Jackie Pascoe* case discussed in the first paragraph.

<sup>48</sup> *R v Mane*: 199.

<sup>49</sup> Common assault can be described as the unlawful and intentional application of force to the person of another or "inspiring a belief in that other person that force is immediately to be applied to him or her" (Burchell 2005: 161; Snyman 2008: 455).

<sup>50</sup> *R v Swartbooi* 1916 EDL 170. Twelve accused were charged with the crime of common assault. All of them united forces to forcibly remove the complainant without her and her guardian's permission.

<sup>51</sup> *R v Swartbooi*: 171-172.

It is especially the last two forms of *twala*, as described above, that may give rise to the crime of assault, since the slightest use of 'force' to remove a girl without her permission can be seen as an act of assault. (Snyman 2008: 431-433, discusses examples of the various forms of assault.)

Writers such as Van Tromp have condemned the Western court's treatment of *twala*. He is of the opinion that the object of *twala*, namely the eventual marriage, is lawful and that it is only the means employed during *twala* that are irregular. Although he admits that the methods applied in obtaining the permission of the parents and/or the girl are crooked, he refuses to conceive that the *twala* custom might constitute a crime, thus expressing a world view that is comparable to the view of cultural relativism (Van Tromp 1948: 74-75. For a detailed discussion of the meaning of cultural relativism, see Tilley 2000: 501-547). He points out that the attitude of the Western courts towards the custom of *twala* has blurred the true character of the custom, which blurring has led not only to resentment by the indigenous community but also to the use of blackmail tactics by threatening the man and his family with criminal proceedings. Although his argument is essentially true, it does not allow for the potential reform of *twala* by challenging the moral values or norms on which the custom is based. The mere fact that a particular act is indigenous does not necessarily mean that the act is always right. It should always be possible to challenge the moral basis of any indigenous practice. In the same breath, it needs to be acknowledged and accepted that right and wrong can vary fundamentally among cultures, but that in the end protecting the dignity of everybody is the main factor to be considered.

Labuschagne was also conscious of the problems that can develop when a particular act is regarded as unlawful in terms of the common law but as lawful in terms of customary law. He was of the opinion that an accused should not be guilty of a common law crime if he had no knowledge that the exercise of his indigenous custom constituted such a crime (Labuschagne 1988: 476-477).<sup>52</sup> In case of doubt, he argued, the law must always be interpreted in favour of personal freedom. In other words, the girl's freedom of movement and the parents' freedom to participate in the upbringing of their daughter should always prevail over the right of someone to exercise his indigenous custom (Labuschagne 1988: 477). It is

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<sup>52</sup> This is said against the background of the decision in *S v De Blom* 1977 3 SA 52 (A) where the court held that it is a cliché that 'every person is presumed to know the law' and that the opinion 'ignorance of the law is no excuse' cannot prevail in law (Labuschagne 1988: 476).

difficult to defend his argument. If it is true that an accused must go free if he had no knowledge that his custom constitutes a crime, how can he then be guilty just because the girl's freedom is more important? It seems thus that Labuschagne's contention contains a contradiction.

Dukada also favours the viewpoint that the exercise of an indigenous custom should not lead to the conviction of an accused in terms of a common law crime, and is of the opinion that an accused should go free on an abduction charge if he had an 'honest and *bona fide* belief that his act' was lawful in the context of the *twala* custom. His argument is based on the fact that the subjective belief of the accused should be the determining factor, since the test for intent (the form of culpability needed for a conviction of the crime of abduction, rape and assault) is a subjective one. (See also Snyman 2008: 188-189, for a discussion of the test for intent.) If the accused subjectively believed that his actions were lawful, the required element of intent is absent and, as a result, he should not be guilty of a crime (Dukada 1984: 387).

From a rights-sensitive or feminist perspective it can be argued that the custom of *twala* is not just at all. A parent is coerced into giving permission for his daughter's marriage or a girl is under pressure to conclude a marriage she might not want. Moreover, when there are customary sanctions, it is the daughter's father who receives compensation for his abducted daughter and not the abducted daughter herself. The end result may be acceptable to the families (and the community), but is it also acceptable to the daughter (the individual)? One can also make a case for the fact that the girl ought to know what the *twala* custom entails and, therefore, should suffer the consequences when it happens to her. Such a viewpoint would fail to show respect for children's rights and the concept of 'a child's best interest' as expressed in section 28(2) of the South African Constitution and the *Children's Act* 38 of 2005.<sup>53</sup> (Similar issues have been raised by other scholars. See for example, Deckha 2009: 261-284.)

Most of the academic publications pertaining to custom and crime emanated in the 1980s and '90's before the enactment of the South African Constitution with its

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<sup>53</sup> Section 28(2) of the Constitution reads: "A child's best interests are of paramount importance in every matter concerning the child". The preamble to the *Children's Act* declares *inter alia* that "the State must respect, protect, promote and fulfill" the rights of children as set out in section 28 of the Constitution. See also para 4 for a constitutional analysis.

Bill of Rights in Chapter 2. In the Bill of Rights there are, as it were, two opposing forces that may well be irreconcilable within the context of the Bill of Rights as such. For example, cultural rights that include the right to practise one's culture are protected but in similar vein one's dignity, freedom and equality demands equal protection. These seemingly conflicting rights can inevitably cause a constitutional tug-of-war between the selfsame constitutional rights and values provided for in the Bill of Rights. Courts may, for that reason, be faced with a whole new dimension after 1994 when dealing with criminal cases flowing from an individual's exercise of his cultural rights. More attention will be given to this aspect below.

### *Belief in tokoloshe*

Not only indigenous customs can create conflict between the common and customary laws of South Africa, but also indigenous beliefs in supernatural beings such as the *tokoloshe*, also referred to as *tikoloshe*, *tokolosh*, *tokoloshi*, and *tikaloshe*. The *tokoloshe* is a creature from African folklore which can be described in many different ways.<sup>54</sup> It has been characterised as a dwarf, a gremlin, or a hairy creature resembling a monkey; it is invisible to adults and can be seen only by children; it can transform itself into animals; it can sometimes be helpful, but under certain circumstances it can be extremely evil. (Lillejord and Mkabela 2004: 259-261, give a detailed exposé of the various perceptions pertaining to the *tokoloshe* in South Africa.)

Before 1994 the South African courts had to deal with an accused's belief in the *tokoloshe* as a defence in the commission of a crime. In *R v Ngang*,<sup>55</sup> for example, the accused dreamt that a *tokoloshe* wanted to attack him. He got up and stabbed the 'thing,' which turned out to be the deceased. He was charged with the crime of assault with the intent to do grievous bodily harm. The question before the court was whether or not the accused acted at all; in other words whether the first requirement for the crime had been proved. If his actions were involuntary, it would constitute a case of 'automatism' and he could not be guilty (Snyman 2008:

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<sup>54</sup> The descriptions of what a *tokoloshe* looks like vary. One description of it is as a “fabulous, short and hairy-looking elf said to be mischievous and fond of women and sour milk” (Mkhize 1996).

<sup>55</sup> *R v Ngang*, 1960 3 SA 363 (T).

55-58, 173-174; Burchell 2005: 179-182). The court defined a *tokoloshe* as a 'creature or demon much dreaded by most natives'<sup>56</sup> and held that the facts showed that this was not merely a case of mistaken belief in magic or witchcraft, which could affect the finding of culpability, but rather a case of automatism (involuntary or automatic action), which meant that the accused did not *act* at all. It was especially the absence of an apparent motive for the accused's actions that led the court to its decision.<sup>57</sup>

In another case, the issue was not whether the accused's action was involuntary or not, but whether or not the accused's actions were performed with the necessary culpability. The definition of a *tokoloshe* in *S v Ngema*<sup>58</sup> was much more extreme and stemmed from the written admissions of the accused. They suggested that a *tokoloshe* was "a leprechaun-like being, but more malevolent in nature".<sup>59</sup> In this case the accused dreamt that he was being attacked by a *tokoloshe*. He woke up, picked up the knife lying next to him, and fatally struck three blows to the 'thing' he believed to be the *tokoloshe*. The 'thing' turned out to be a two-year-old toddler and the accused was charged with murder. Based on psychiatric evidence as to the accused's actions and memory of the events, the court found that his actions were voluntary.<sup>60</sup> The court could not find that the accused had the subjective intention to kill a human being and as a result he could not be guilty of murder. What remained to be dealt with was the question of whether the accused was guilty of culpable homicide, in other words, whether or not he was negligent in killing the deceased. The test for negligence is generally the actions of a reasonable person in

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<sup>56</sup> *R v Ngang*: (364B-C).

<sup>57</sup> *R v Ngang*: 366A-B, E-F. The court found that his action "was no more than a purely physical reflex." The occurrence of crimes committed while 'sleepwalking' is not unknown in South African law. In *R v Dhlamini* 1955 1 SA 120 (T) the accused was acquitted on a charge of murder where it was proved that he stabbed the deceased mechanically (without a motive) when he was half awake after a nightmare. It seems as if the fact that there is no motive present for the attack is one of the reasons why the courts are swayed to reach a conclusion of automatism. See also *S v Ncube* 1978 1 SA 1178 (R).

<sup>58</sup> *S v Ngema* 1992 2 SASV 650 (D).

<sup>59</sup> *S v Ngema*: 653A-B.

<sup>60</sup> *S v Ngema*: 652-655.

the same circumstances as the accused. (Snyman 2008: 209-210; Burchell 2005: 527-529, give an explanation of the complete test.) The court indicated that the reasonable person test was basically an objective test, which did not take the particular circumstances of each accused into account in determining whether he acted negligently or not, but admitted that that approach did allow for some individualisation of the test of negligence (referred to as the subjectivising of the test).<sup>61</sup> Although the court refused to depart completely from the traditional meaning of the reasonable person test, it did accept that one must “test negligence by the touchstone of the reasonable [person] of the same background and educational level, culture, sex and ... race of the accused”.<sup>62</sup> It was prepared to find in favour of the accused that a belief in supernatural things, such as the *tokoloshe*, was not uncommon amongst 'people of his ilk' and that that factor must be taken into consideration in determining the negligence of his actions.<sup>63</sup> However, despite these findings, the court could not believe that the accused acted reasonably in the circumstances, namely waking up after a nightmare and striking nine blows to the “perceived object” of his dream. These actions were, to the court's mind, unreasonable (or “monstrous” as the court called it) under the circumstances and as a result the accused was found guilty of culpable homicide.<sup>64</sup> The court took the view that nightmares are not peculiar to any particular race or class; that everyone has them from time to time, and that they could, consequently, not render the killing of the child reasonable under the circumstances. The viewpoint of the court could not be labelled as ethnocentric. It was not the accused's belief that was being judged, but rather his action (the killing of a human being); this kind of action was condemned by most cultures, and it was condemned by customary law too.

The approach of some of the courts in dealing with the phenomenon of indigenous customs and beliefs is interesting. They give the impression that they accept the fact that there are things in life that they do not always understand and therefore cannot question. As a result, they have at times accepted that an indigenous custom or belief indeed has played a role in the commission of a common law crime without the courts always having a sound basis for such a viewpoint. Be that as it

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<sup>61</sup> *S v Ngema*: 655-657.

<sup>62</sup> *S v Ngema*: 657E-F.

<sup>63</sup> *S v Ngema*: 657G-H.

<sup>64</sup> *S v Ngema*: 657G-H.

may, in such a case the prosecutor is responsible for ensuring that he is fully equipped to deal with these kinds of issues and, if necessary, to question the existence of a particular indigenous custom or belief. For example, if it is true that a *tokoloshe* can be seen only by children and not by adults, as many readings suggest (Lillejord and Mkabela 2004: 260; Van Hunks 2002), the versions of the two accused in *R v Ngang*<sup>65</sup> and *S v Ngema*<sup>66</sup> could not have been true, because as adults it would have been impossible for them to see a *tokoloshe*, as they claimed they had. However, a perusal of the cases does not indicate whether this fact was ever given any noteworthy attention.

### Mitigation of Sentence

As we have already stated, another area of criminal law where indigenous customs and beliefs have played a visible role in the courts is in the mitigation of sentences. The much-cited Australian case, *R v Neal*,<sup>67</sup> sets out the viewpoint as follows:

[I]n imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group.<sup>68</sup>

However, cases such as *Hales v Jamilmira*,<sup>69</sup> create the impression (as reported by the Australian media) that customary law can be used in mitigation of sexual offences, particularly those committed against women and children. In *R v Burt Lane, Ronald Hunt & Reggie Smith*,<sup>70</sup> for instance, the court declared that rape was “not considered as seriously in Aboriginal communities as it is in the white community”, and that the “violation of an Aboriginal woman's integrity is not

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<sup>65</sup> *R v Ngang* 1960 3 SA 363 (T).

<sup>66</sup> *S v Ngema* 1992 2 SASV 650 (D).

<sup>67</sup> *R v Neal* (1982) 42 ALR 609.

<sup>68</sup> *R v Neal*: 626.

<sup>69</sup> *Hales v Jamilmira* (2003) 13 NTLR 14.

<sup>70</sup> *R v Burt Lane, Ronald Hunt & Reggie Smith*. Unreported, Northern Territory Supreme Court, 29 May 1980.

nearly as significant as it is in a white community”. (For similar examples, see Davis and McGlade 2005: 403-406.)

In South African law, the question of whether or not an accused's belief in witchcraft constitutes an extenuating circumstance in the case of murder has especially received the attention of South African courts in the past. Since an accused's belief in witchcraft has a direct bearing on his state of mind, it should be clear that the test to determine whether this belief was important enough to diminish his moral blameworthiness or not is subjective in nature.<sup>71</sup>

In 1938 Lansdowne JP in *R v Biyana*<sup>72</sup> showed some form of cultural relativism by acknowledging that there is a universal belief in witchcraft among the traditional communities in South Africa and by doubting that Europeans (referring to the colonial powers of the time) were entitled “to give them unqualified condemnation for clinging to such a belief”. However, he also demonstrated a modicum of ethnocentrism by expressing the hope that influences such as education, religion and science would gradually wear down this profound belief in the “minds of the natives”.<sup>73</sup> The court defined an extenuating circumstance as “a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt”, and held that the erroneous belief or the delusion of the accused *in casu* was indeed a mitigating factor.<sup>74</sup> A similar view was reached 10 years later by the Appellate Division in *R v*

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<sup>71</sup> In *R v Biyana* 1938 EDL 310 at 311 the court said:

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.

See also: *R v Molehane* 1942 GWLD 71; *R v Mkize* 1953 2 324 (A).

<sup>72</sup> *R v Biyana* 1938 EDL 310.

<sup>73</sup> *R v Biyana*: 311.

<sup>74</sup> *R v Biyana*: 311. See also: *S v Badeba* 1964 1 SA 26 (A); *S v Letsolo* 1970 3 SA 476 (A); *S v Masina* 1993 2 SACR 234 (T) 235.

*Fundakabi*,<sup>75</sup> where the court held that “a belief in witchcraft is a factor which does materially bear upon the accused's blameworthiness”, and again 17 years later in *S v Dikgale*.<sup>76</sup> However, in the 1970's the Appellate Division in *S v Nxele*<sup>77</sup> pointed out that a belief in witchcraft often leads to terrible crimes and that the courts must be careful not to create the impression that a belief in witchcraft serves as an excuse for criminal conduct.

To qualify as an extenuating circumstance, an accused's belief in witchcraft must have an influence on “the accused's mental faculties or mind to such an extent that he, in so far as his crime is concerned, can be treated with less blame”.<sup>78</sup> In order to qualify as an extenuating circumstance, three requirements must be met: (a) the accused's belief in witchcraft must have a bearing on his mental faculties or mind;<sup>79</sup> (b) the belief must have influenced the accused's mental faculties or mind; and (c) the influence must have been of such an extent that the actions of the accused can be treated with less blame (Van den Heever and Wildenboer 1985: 106).<sup>80</sup>

Whether a belief in witchcraft is an extenuating circumstance or not depends on

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<sup>75</sup> *R v Fundakabi* 1948 3 SA 810 (A).

<sup>76</sup> *S v Dikgale* 1965 1 SA 209 (A) 214. In this case the accused believed that the deceased was a dangerous and bad witchdoctor who could manipulate the weather. The court held that this belief was an extenuating circumstance, even if the witchcraft did not affect the accused or their near relations.

<sup>77</sup> *S v Nxele* 1973 3 SA 753 (A).

<sup>78</sup> *S v Babada* 1964 1 SA 26 (A), from the headnote. Although this case deals with the influence of liquor on the mental faculties of an accused, the principles are equally applicable to an accused's belief in witchcraft.

<sup>79</sup> It must be an honest, real, unshakeable or genuine belief in witchcraft: *R v Molehane* 1942 GWLD 64 69; *R v Fundakabi* 1948 3 SA 810 (A); *S v Sibanda* 1975 1 SA 966 (RAD) 967; *S v Mathoka* 1992 2 SACR 443 (NC) 444.

<sup>80</sup> See also *S v Mojapelo* 1991 1 SACR 257 (T) where the court took the accused's belief in witchcraft into account as a mitigating factor in a case in which she was accused of killing someone who she believed was responsible for making lightning strike her house.

the facts of each case. In *S v Modisadife*<sup>81</sup> the court confirmed that a genuine belief in witchcraft could be an extenuating circumstance in a murder case, but refused to apply the principle where the accused killed an 11-year-old-girl to make *muti* (medicine made from body parts to be used as supposedly potent traditional cures: Holland 2001: 12) on the advice of a witchdoctor. The reasons for the court's decision included the “times in which we live” and the fact that the accused's fear of witchcraft had no link with the deceased and the witchcraft was not an immediate threat against which he had to defend himself. A similar view was taken in *S v Malaza*<sup>82</sup> where the accused murdered a successful businessman on the advice of a witchdoctor in the belief that the killing would better his (the accused's) own life. The court held that the deceased was not a threat to the accused nor responsible for the misfortune of the accused so, as a result, the belief of the accused did not constitute an extenuating circumstance. Caution is needed so as not to confuse the principles of sentencing with the requirements of necessity or private defence, which are indeed grounds for justification and which have nothing to do with sentencing.

On the other hand, in *S v Motsepa*,<sup>83</sup> the accused denied having a deep belief in witchcraft, did not feel threatened by the deceased, was in no immediate danger, and had no personal relationship with the deceased. In spite of these facts, the Appellate Division held that the accused saw themselves as witch hunters who wanted to protect the interests of the community, “however distorted such belief might be”, and found their 'distorted belief' to be a mitigating factor.<sup>84</sup> The court not only deviated from the tendency to treat the existence of the belief with suspicion, but even extended its application to instances where the accused denied any such beliefs. The only explanation for this is the fact that the death sentence in the 1990s used to be a compulsory sentence, unless extenuating circumstances existed. The only way to prevent an accused from being executed, therefore, was to find a mitigating factor.

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<sup>81</sup> *S v Modisadife* 1980 3 SA (A).

<sup>82</sup> *S v Malaza* 1990 1 SACR 357 (A).

<sup>83</sup> *S v Motsepa* 1991 2 SACR 462 (A). The accused set an elderly man alight after drenching him in petrol. The man was pointed out to the accused as a wizard by a witchdoctor.

<sup>84</sup> *S v Motsepa*: 463.

The fact that a belief in witchcraft may be both undesirable and objectively unreasonable does not mean that it can be ignored for the purpose of mitigation.<sup>85</sup> Labuschagne and Schoeman state that the customs of an indigenous community should be taken into consideration in mitigation of sentence (Labuschagne and Schoeman 1988: 44). It would be unfair, for example, to impose imprisonment as a sentence in a case where the sentence in customary law would entail only the payment of compensation. The South African courts have been less inclined to accept that a belief in witchcraft can form an extenuating circumstance where the actions of an accused lead to the deaths of small children. In *R v Bungweni*<sup>86</sup> the court rejected the belief of the accused as a mitigating factor, because the accused knew that if he burned down the house of a woman whom he believed to be a witch he would also cause the death of the woman's children.

Although culture is a factor that can reduce the severity of an accused's sentence quite markedly, it should still be borne in mind that punishment exists to serve the important purpose of inflicting some type of harm on the offender in response to an offence committed. Undergoing punishment is a way in which the offender can redeem himself of his wrongdoing. Therefore, it is not desirable to impose a sentence on the accused that is either too lenient or too excessive. Ideally, the accused should receive a sentence that is reasonable and proportional in the circumstances (Burchell 2005: 68-69). To assist the courts in determining such reasonableness and proportionality, the nature of the offence and the accused's cultural background are important factors that should be taken into account.

### Constitutional Analysis

From the foregoing discussion, it is clear that culture plays a significant role in South African criminal law, both in determining whether or not a crime has been committed and as a mitigating factor. To date, however, the question of whether or not South Africa should have a formalised 'cultural defence' has never come to the fore in case law. It was only in 2004 that South African scholars debating the significance of the cultural defence in South Africa (e.g. Carstens 2004: 1-25). The question that now arises is whether the constitutional provisions recognising and protecting culture and cultural diversity provide a compelling argument in

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<sup>85</sup> *S v Masina*: 237.

<sup>86</sup> *R v Bungweni* 1959 3 SA 142 (E).

favour of the formal recognition of a cultural defence.

It is trite to say that the South African Constitution of 1996 brought about considerable changes in South African law, in the areas of both common law and customary law. The supremacy of the South African Constitution is proclaimed in section 2, which reads:

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.

The other 'operational' constitutional provisions include section 7(1), which characterises the Bill of Rights as a cornerstone of democracy, enshrining the rights of all people in South Africa and affirming the values of dignity, equality and freedom; and section 7(2), which commands the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”. Section 8(1) applies the Bill of Rights to all law and binds the judiciary, legislature, executive and other organs of state, and section 8(3) enjoins the development of legislation or the common law to give effect to a right in the Bill of Rights. Equally important is the interpretation clause (section 39), which describes a value-based approach that deviates quite considerably from the literal approach traditionally followed by the courts.<sup>87</sup>

In the context of culture, a number of constitutional provisions, mostly classified as human rights provisions, are important in that they qualify, strengthen and contextualise cultural diversity. These provisions include, for example, the preamble to the Constitution that recognises the diverse character of 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”. Furthermore, section 30 provides that everyone has the right to participate in the cultural life of his or her choice, and section 31 states that all persons have a right to enjoy and practise their religion together with other members of that community. Other human rights provisions, although not directly in the service of culture, also impact indirectly on the protection of cultural diversity. For example, section 9(1), the equality clause, guarantees that everyone is equal before the law and must receive equal protection and benefit from the law. This provision must be read with section 9(3), which prohibits direct or indirect unfair discrimination in the public or private sphere on the grounds *inter alia* of ethnic or social origin, colour, belief or culture. In

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<sup>87</sup> *Commissioner, SARS v Executor, Frith's Estate* 2001 2 SA 261 (SCA) 273: 471.

addition, section 10 emphasises that everyone has inherent dignity, which must be respected and protected, and section 15 protects freedom of religion, which includes belief and conscience.

When assessing the various constitutional provisions relating to culture, one can easily be convinced that the Constitution is the motivating force for the formal recognition of a cultural defence in the South African criminal law (Carstens 2004: 21). The constitutional provisions seem to support the contention that a person who commits a culturally motivated crime can argue that, when he committed the crime in question, he was only exercising his constitutional cultural rights. This argument can be supported by relying on the provisions of section 211(3) of the Constitution. In terms of this section, the courts are compelled to apply customary law when it is applicable while keeping in mind the spirit and purport of the Constitution and other legislation that may regulate this law. Carstens indicates that constitutional interpretation by the Constitutional Court also dictates the courts have a duty in general to develop the South African common law with reference to the constitutional values (Carstens 2004: 21). This principle is clearly evidenced in the case of *Carmichele v Minister of Safety and Security*, where the court held that:

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.<sup>88</sup>

The Constitution, however, serves as a double-edged sword with regard to the recognition of a formal cultural defence. A case in point is where a young girl has been *twala'd*. Here there is a clear contravention of various human rights in terms of the Constitution. For example, section 12(1)(a) of the Constitution affords every

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<sup>88</sup> *Carmichele v Minister of Safety and Security* 2002 1 SACR 79 (CC): paras 33-34.

person the right to freedom and security of the person. A girl who is *twala'd* is almost certainly deprived of the right to freedom and security of her person, especially if she was *twala'd* against her will. Further, section 12(1)(c) includes the fundamental right to be free of all forms of violence. A girl who is subjected to the third form of *twala* described above will also be deprived of this fundamental right. Section 12(1)(e) provides that the right to freedom and security of the person also includes the right not to be treated in a cruel, inhuman or degrading way. It is the authors' submission that the practice of *twala* can also infringe this right, as a girl who is *twala'd* is subjected to violence, humiliation and unpleasant living conditions and treatment while in the custody of her captor.<sup>89</sup> In a situation where *twala* leads to the commission of statutory rape, there is also a contravention of section 12(2), which states that every person has the right to bodily and physical integrity. Section 12(2) also includes the right to make a decision regarding procreation. A girl who is forced to have intercourse with a man has no choice in the matter and, therefore, once again, suffers an infringement of her fundamental rights. Another right afforded by section 12(2) is the right to security of and control over one's own body. Once again, when a girl is forced to have sexual intercourse with a man, she is obviously stripped of any security over and control of her own body.

Section 7(2) of the Constitution stipulates that the state should honour, protect and promote the rights contained in the Bill of Rights. The word "rights" obviously refers to all rights contained in the Bill of Rights. However, in the light of the foregoing discussion it is tempting to wonder if certain rights in the Constitution should carry more weight than others. Differently put, can the constitutional rights that allow a person to participate in his cultural practices outweigh those fundamental rights infringed by practising these customs? This question can be given further context by considering section 9 of the Constitution, which clearly states that every person is equal before the law and enjoys the right to the equal protection and benefit of the law. Section 9 also affords a person the right to full and equal enjoyment of all the rights and freedoms contained in the Constitution. Therefore, a situation could arise where there is a clash between a person's constitutional right to exercise his culture and someone else's right to enjoy other freedoms afforded in the Constitution. The question, then, is how this conflict should be resolved. The solution can be found within the constitutional provisions permitting the practice of an indigenous custom. Both sections 30 and 31 contain

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<sup>89</sup> See the facts of: *R v Swartbooi* 1916 EDL 170; *R v Mane* 1948 1 All SA 128 (E).

the important *proviso*, that the right to culture may not be exercised “in a manner inconsistent with any provision of the Bill of Rights”.<sup>90</sup> From this one can deduce that the internal limitation clause contained in these two sections was intended as a reminder that the protection of culture does not grant cultural groups the licence to violate the rights of individuals at will.<sup>91</sup> Renteln would also accept this type of limitation test by her concession that a cultural practice should not be accepted if it were to result in “irreparable harm to others” (Renteln (2004: 217). Such harm would clearly include cases of death or permanent disfigurement.

Further, the internal limitation clauses present in sections 30 and 31 and other sections of the Constitution can serve as a counterargument for the formal recognition of a cultural defence. Probably the most important is the limitation clause contained in section 36, which states that no right is absolute and may be limited if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (Carstens 2004: 21). The importance of the section 36 limitation clause was highlighted in the case of *Coetzee v Government of the Republic of South Africa* where Sachs J stated that the best way to remain faithful to the Constitution was by balancing the rights contained in it within a “holistic, value-based and case-oriented framework”.<sup>92</sup> According to Sachs J the values which should underlie the entire process are those derived from an open and democratic society based on freedom and equality, in view of the argument that:

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<sup>90</sup> *Gumede v President of the RSA* 2009 3 SA 152 (CC) para 22. 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) para 52, Sachs J explained that this clause was designed to encourage the courts to interpret the Bill of Rights in a way that would promote the values of a democratic society based on freedom and equality.

<sup>91</sup> This is, in essence, the argument put forward by Poulter, without the (somewhat obvious) converse argument that, if not allowing a cultural practice would violate a human right, the practice must be allowed (Poulter 1987: 589). Labuschagne, dealing with the abduction of a wife under the custom of *ukuthleka*, offers the same argument (Labuschagne 1988: 476-477). For a reconciliation of cultural and individual rights, see: Currie and De Waal 2005: 634; *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC): paras. 156-157,

<sup>92</sup> *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 (CC): para. 46.

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.<sup>93</sup>

Sachs J, however, warns against falling in the pit of a purely formal or academic analysis. It is more important to focus on the relation between the values underlying the guarantees of a fundamental right and the particular facts of a case. No legal yardstick exists for this process and courts will not be able to escape making difficult value judgments.<sup>94</sup>

The same idea as in section 36 can be found in section 39, which compels courts to take international and foreign law into account, but in the interpretation of indigenous law or common law, for example, the spirit and purport of the Constitution must always be kept in mind. Therefore, from these two sections it can be concluded that practising an indigenous custom is allowed only in so far as it does not infringe another right contained in the Constitution. This is not a new notion emanating from the constitutional dispensation in South Africa. As early as the 1980s Labuschagne recognised the value of human dignity in the context of culture and crime by stating that human dignity should always prevail in matters of conflict between the exercise of a custom and the infringement of human freedoms (Labuschagne 1988: 477). Since the enactment of the interim, followed by the final Constitution, human dignity is a constitutionally entrenched right and democratic value and this statement of Labuschagne is truer than ever before.<sup>95</sup>

This brings us to another point in question, that is, whether the formalisation of a so-called 'cultural defence' is unavoidable in South Africa. Considering the flexible nature of common law crimes and the variable factors (including custom) to be taken into account in determining whether the elements of a crime have been proven or not, it is perhaps unnecessary to conclude that the constitutional

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<sup>93</sup> *Coetzee v Government of the Republic of South Africa*: para. 46.

<sup>94</sup> *Coetzee v Government of the Republic of South Africa*: para. 46..

<sup>95</sup> Section 7(1) of the Constitution affirms that human dignity is a democratic value and section 10 reads: "Everyone has inherent dignity and the right to have their dignity respected and protected".

protection of cultural customs can be achieved only when culture is formalised as a defence in criminal law. The Constitution deals indirectly with the legal conflict between common law crimes and indigenous customs by providing a foundational framework in which the role of cultural customs in the context of common law must be evaluated. As pointed out in the general discussion, the test of whether one is guilty or not is normative in character and requires a value judgment. Before 1994, this value judgment was made in the cadre of common law principles and values, thus reflecting the superiority of common law to customary law. In the light of the equal status afforded to common and customary law by the 1996 Constitution, the situation has changed considerably. It is no longer possible to evaluate customary law through the 'common law lens, it must now be seen as an integral part' of South African law, subject to the Constitution only.

In other words, the constitutional values of equality, human dignity and freedom should guide the judiciary in evaluating the role of culture in the commission of a particular crime, in the same way that the guiding principles of common law (as the supreme law of the country) were previously used to evaluate custom in the context of crimes. It is the contention of the authors that the development of a formal cultural defence would not necessarily lead to greater protection of cultural diversity in South Africa. The challenge for the judiciary will always be to find an acceptable middle course between protecting the rights of an individual or a community affected by criminal activities and having regard for the *bona fide* exercise of an offender's cultural rights. The existing definitional elements of a crime and the available defences against the commission of a crime could be supplemented by the new dimension brought about by the Constitution; there is no need, therefore to develop a 'special' cultural defence in South African criminal law.

## Conclusion

Since the advent of the new constitutional dispensation in South Africa in 1994, the equal status of common law and customary law in the South African legal system is not debatable. A great deal has also been done to promote the cultural rights of indigenous peoples in the country. However, despite the progress made, much is still to be done to achieve the comfortable coexistence of common and customary law. It is Western criminal law in particular that still comes into conflict with customary law. What is apparent from the case law and literature studied is that an individual living under a system of customary law might end up in a Western court

for committing a common law crime that he thought to be the legitimate exercise of an indigenous custom. There seem to be two viable solutions for resolving these types of conflict. The first solution requires that acts committed in accordance with indigenous customs should be construed as not meeting the requirements for a specific crime. As illustrated by the relevant case law, the use of culture in this sense has been part and parcel of South African criminal law since before 1994. Here the notion of culture has found application with regard to the element of culpability in the form of intention, more specifically the accused's lack of intention as the result of an ignorance of the fact that his conduct was unlawful. If this is truly the case then the accused should be acquitted of all criminal liability, because he lacks the necessary capacity and therefore the necessary culpability. However, should the accused indeed be fully aware that he is committing an unlawful act, he should face full criminal liability for his actions regardless of the fact that his actions amount to the exercise of a particular custom.

However, all is not lost, since the accused can then turn to the second solution. This is to permit the use of indigenous customs as a mitigating factor when considering a suitable punishment for an offender. In sentencing, it is clear that custom has always been a factor taken into account by the courts when considering a suitable punishment for an offender. However, this is not a task which the courts take on lightly. A court will consider permitting the use of indigenous custom as an extenuating circumstance only once it is entirely convinced that the accused's belief in his custom not only had a bearing on his mental faculties or mind, but also influenced his mental faculties or mind. Furthermore, the court must also be convinced that the accused's belief in his culture must have influenced him to such an extent as to render his actions less blameworthy.

It seems as though the South African legal system, by virtue of the Constitution, advances a strong argument in favour of using indigenous customs when determining an accused's criminal liability or punishment for a crime committed. However, indigenous customs should not just be blindly accepted as a defence or mitigating factor for any and all culturally motivated crimes. The use of indigenous customs for such purposes should rather be formalised along the accepted parameters of the limitation clause contained in the Constitution. Such a step could also lead to universal justice superseding individualised justice.

As a last thought, it should be pointed out that it would be insufficient merely to assume that indigenous customs can be raised as a defence or mitigating factor whenever an African accused stands trial in South Africa. Indeed, the use of culture as a defence or mitigating factor should be viewed with great caution.

South African criminal courts will, without a doubt, be confronted with the challenge of balancing justice and cultural pluralism when confronted with justifications based on culture in criminal cases. However, at the end of the day, the effective application of such a defence will be the task of the judiciary and the judiciary will need to perform this task objectively, in a state of mind free from any prejudice and preconceptions, and in the framework of constitutional values requiring respect for human dignity, freedom and equality.

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