



UNIVERSITEIT VAN PRETORIA  
UNIVERSITY OF PRETORIA  
YUNIBESITHI YA PRETORIA

**AN ANALYSIS OF THE CULTURAL DEFENCE IN SOUTH  
AFRICAN CRIMINAL LAW**

by

**CHAZANNE GROBLER**

**(04357884)**

submitted in partial fulfilment of the requirements for the degree

***MAGISTER LEGUM***

Prepared under the supervision of

**PROF PA CARSTENS**

**FACULTY OF LAW  
UNIVERSITY OF PRETORIA**

**OCTOBER 2014**



**I, CHAZANNE GROBLER**

Student number: 04357884

Module: PUR LLM dissertation

**DECLARE AS FOLLOWS:**

1. I understand what plagiarism entails and am aware of the University's policy in this regard.
2. I declare that this dissertation is my own, original work. Where someone else's work was used (whether from printed source, the internet or any other source) due acknowledgment was given and reference was made according to the requirements of the Faculty.
3. I did not make use of another student's previous work and submitted it as my own.
4. I did not allow and will not allow anyone to copy my work with the intention of presenting it as his or her own work.

Signature: \_\_\_\_\_



## ABSTRACT

South Africa is a multi-cultural country priding itself on the fact that its Constitution protects the vulnerable, minorities, and all those who do not have a voice to speak for themselves. The right to participate in, and enjoy, the culture of one's choice is specifically protected in sections 30 and 31 of the Constitution, and the law of the land has a duty to fulfil this obligation.

The protection of cultural rights stems from the fact that the cultural identity of a person plays an integral part in every person's life. Culture shapes the way a person thinks and acts. Certain crimes can be committed as a result of the cultural beliefs of a person. One of the most prominent, culturally-motivated crimes that take place in South Africa is witchcraft-related killing. The belief in witchcraft is used throughout this study to illustrate the need for, and use of, the cultural defence.

The legal culture that currently dominates criminal law was shaped by colonialism and Apartheid. During the analysis of the legal responses in criminal cases, and, specifically, witchcraft-related crimes, society did not deal with the cases in the light of the Constitutional duty to protect the right to culture. Cultural rights within criminal law need still to be explored.

In order to bridge the gap in criminal law between the right to participate in, and enjoy, the cultural life of one's choice, and the fact that culture influences the way an individual thinks and acts, it is submitted that the cultural defence should be formalised. The cultural defence can be defined simply as a legal strategy that will enable a court to consider how the cultural background of an accused person has affected his or her behaviour.

The cultural defence, if formalised, will be a multiple defence, striking at the elements of capacity and fault. When a person is confronted with a dangerous or threatening situation, he or she will act instinctively. The roots of the unconscious behaviour in dangerous situations are culturally shaped. Culture can, therefore, be a great driving force, and, as a result, influence the capacity of a person to act.

With regard to intention, the court will need to take cognisance of the cultural beliefs of the person and how they influenced the state of mind of the accused at the time



the crime was committed. This study takes an in-depth look at the elements of capacity and fault and how cultural beliefs should be incorporated within these elements.

The cultural defence does not, however, cater for any common and garden variety of criminal and, therefore, specific guidelines need to be set in place to prevent any abuse. This study will illuminate all the possible problems and solutions relative to the defence to determine whether the formalisation of the defence will be the best manner to develop criminal law in line with the Constitution. It is submitted that the cultural defence, if properly applied within the parameters set out in the study, should be formalised as its advantages will outweigh its disadvantages.



## TABLE OF CONTENTS

### CHAPTER 1: INTRODUCTION- CONTEXTUALIZING THE CULTURAL DEFENCE IN THE SOUTH AFRICAN CRIMINAL LAW

1.1 Introduction .....	1
1.2 Problem Statement .....	3
1.3 Methodology .....	3
1.4 Structure of the dissertation .....	4
1.5 Conclusion .....	5

### CHAPTER 2: THE LEGAL CULTURE OF SOUTH AFRICAN CRIMINAL LAW

2.1 Introduction .....	7
2.2 The status of customary law in the South African legal system .....	9
2.2.1 Customary law before the enactment of the interim Constitution .....	9
2.2.2 Status of customary law after the enactment of the interim Constitution and the final Constitution .....	12
2.3 The influence of the Constitution on criminal law .....	13
2.4 Responses toward witchcraft-related crimes .....	17
2.4.1 Witchcraft Suppression Act 3 of 1957 .....	18
2.4.2 Witchcraft-related crimes and case law .....	22
2.4.2.1 Pre-constitutional case law .....	23
2.4.2.2 Case law after the enactment of the interim and final Constitution .....	31
2.4.3 Other legal responses towards witchcraft-related crimes .....	34
2.5 Conclusion .....	37



## CHAPTER 3: AFRICAN WITCHCRAFT AND ASSOCIATED PRACTICES IN SOUTH AFRICA

3.1 Introduction .....	39
3.2 The concept of culture .....	41
3.2.1 Defining culture .....	41
3.2.2 Defining religion .....	45
3.2.3 Religion and culture in context of Traditional African Religion .....	47
3.2.4 Minority and majority cultures .....	49
3.3 Witchcraft and associated practices in South Africa .....	50
3.3.1 Introduction .....	50
3.3.2 Nature and practice of witchcraft in South Africa .....	52
3.3.3 Distinguishing witchcraft-related killings and <i>muti</i> -murders .....	57
3.4 Medico-legal aspects of witchcraft-related crimes .....	61
3.4.1 Legal aspects and criminal investigations .....	61
3.4.2 Medical forensic aspects of witchcraft-related killings .....	62
3.5 Conclusion .....	63

## CHAPTER 4: THE AMBIT OF THE CULTURAL DEFENCE

4.1 Introduction .....	66
4.2. The rationale for the cultural defence .....	67
4.3 Definition of the cultural defence .....	69
4.3.1 Demarcation of cultural offences and the cultural defence .....	69
4.3.2 Different forms of the cultural defence .....	72
4.4 The ambit of the cultural defence as a separate defence within South African criminal law .....	73
4.4.1 Conduct .....	74
4.4.2 Causation .....	76



4.4.3 Lawfulness.....	78
4.4.4 Capacity and fault .....	82
4.4.5 Diminished responsibility and mitigation of sentencing.....	83
4.5 Conclusion.....	83

## **CHAPTER 5: THE ROLE OF CRIMINAL CAPACITY IN THE CULTURAL DEFENCE**

5.1 Introduction.....	86
5.2 Definition of, and test for, criminal capacity .....	88
5.3 Pathological incapacity .....	91
5.3.1 Defence of pathological incapacity in the context of cultural beliefs .....	94
5.3.1.1 Culture-bound syndromes.....	94
5.3.1.2 The insanity defence compared to the cultural defence.....	96
5.4 Non-pathological incapacity.....	98
5.4.1 Introduction.....	98
5.4.2 Non-pathological incapacity and the defence of sane automatism .....	100
5.4.3 Non-pathological incapacity as a result of provocation or emotional stress.....	101
5.4.3.1 The position before <i>Eadie</i> .....	103
5.4.3.2 The position after <i>Eadie</i> .....	107
5.4.5 Non-pathological incapacity defence in the context of cultural beliefs .....	111
5.4.5.1 Introduction .....	111
5.4.5.2.1 Non-pathological incapacity defence in context of cultural beliefs .....	115
5.4.6 Application of non-pathological incapacity within a defence .....	118
5.4.6.1 The Battered Woman Syndrome .....	118
5.4.6.2 Battered Woman Syndrome in comparison to the cultural defence .....	123
5.5 Diminished responsibility .....	125
5.6 Conclusion.....	126



## CHAPTER 6: CULPABILITY

6.1 Introduction .....	130
6.2 Intention .....	131
6.2.1 Different forms of intention .....	132
6.2.2 Defences excluding intention in context of cultural beliefs .....	134
6.2.2.1 Mistake .....	134
6.2.2.2 Provocation and emotional stress .....	136
6.2.2.3 Putative defences .....	136
6.3 Negligence .....	138
6.3.1 Introduction .....	138
6.3.2 The cultural beliefs of the reasonable person .....	140
6.4 Conclusion .....	142

## CHAPTER 7: THE USE AND ABUSE OF THE CULTURAL DEFENCE

7.1 Introduction .....	144
7.2. Difficulties with, and problems arising from, the cultural defence .....	144
7.2.1 Definitional problems .....	144
7.2.2 Assimilation and acculturation .....	146
7.2.3 Misuse of the cultural defence .....	147
7.2.4 Expert evidence .....	148
7.2.5 Essentializing culture .....	148
7.2.6 Equal protection before the law .....	149
7.2.7 Violation of human rights .....	149
7.2.8 Criminal law objectives .....	150
7.2.9 Other sufficient grounds .....	151
7.3 Counter-arguments against the difficulties arising from the cultural defence .....	152





7.3.1 Definitional problems .....	152
7.3.2 Assimilation and acculturation .....	153
7.3.3 Expert evidence .....	155
7.3.4 Misuse of the cultural defence .....	156
7.3.5 Essentializing culture .....	157
7.3.6 Equal protection before the law .....	157
7.3.7. Violations of human rights .....	158
7.3.8 Criminal law objectives .....	159
7.3.9 Other sufficient grounds.....	160
7.4 Conclusion.....	160

## **CHAPTER 8: CONCLUSION AND RECOMMENDATIONS**

8.1 Introduction.....	163
8.2 Strategies ensuring the proper application of the cultural defence .....	164
8.3 Other strategies that could ensure the protection of right to culture.....	167
8.4 Conclusion.....	169

<b>BIBLIOGRAPHY.....</b>	<b>171</b>
--------------------------	------------



# Chapter 1: Introduction- contextualizing the cultural defence in the South African criminal law

## 1.1 Introduction

“The display of religion and culture in public is not a 'parade of horrors' but a pageant of diversity which will enrich our schools and in turn our country.”<sup>1</sup>

In the well-known case of *MEC KwaZulu Natal v Pillay*,<sup>2</sup> Durban Girls' High School refused to allow a girl from a South Indian family to wear a nose stud as it contravened the code of conduct of the school. The Honourable (previous) Chief Justice Langa expressed in no uncertain terms the importance of culture in a person's life. The judgment embraced culture and paved the way forward to ensuring that every citizen's right to participate and enjoy any culture of his or her choice<sup>3</sup> as well as the right to freedom of belief is protected.<sup>4</sup> Langa CJ specifically emphasised that the protection extends to “all those for whom culture gives meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation.”<sup>5</sup>

Case law in South Africa concerning cultural diversity, the right to participate and enjoy any culture, and the right to freedom of religion deals mainly with civil law disputes or human rights disputes. Culture, as Justice Langa stated, is an important part of a person's identity,<sup>6</sup> and it cuts across all areas of the law. Explorations into the role that cultural rights and the associated cultural diversity play in criminal law are, however, lacking in depth and number.<sup>7</sup>

The criminal justice system is still largely based on the standards set by the colonial powers with very few considerations of the influence of the new, democratic Constitution.<sup>8</sup> To echo the words of Justice Langa, only the “powerful voices” have a

---

<sup>1</sup> *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) at para 107.

<sup>2</sup> *Pillay case* (n1).

<sup>3</sup> Sections 30 and 31, Constitution of the Republic of South Africa 1996.

<sup>4</sup> Section 15, Constitution 1996.

<sup>5</sup> *Pillay case* (n1) at para 53-54.

<sup>6</sup> *Ibid.*

<sup>7</sup> Bennett “The cultural defence and the custom of *Thwala* in South African law” 2010 *University of Botswana Law Journal* 4.

<sup>8</sup> Bennett *Traditional African Religions in South African Law* (2011) 27.



say in criminal law. Not only the colonial authorities but Apartheid itself influenced the development of cultural rights in the field of criminal law.<sup>9</sup> Apartheid hinged on the aspect of separate identity, cultural as well as racial, cultivating the idea that differences lead to inequality. A mind shift occurred and, as a result, equality and uniformity are often equated.<sup>10</sup>

What is often forgotten, as Renteln has argued, is that the law can be “common without being uniform”.<sup>11</sup> The main purpose of this study is to develop criminal law in light of the Constitution, specifically with reference to cultural rights, by creating and formalising a cultural defence.<sup>12</sup>

Currently, there is no jurisdiction which has formalised the cultural defence<sup>13</sup> but nothing prohibits an accused in the South African legal system from using cultural evidence to support a recognised defence<sup>14</sup> or use the evidence as mitigating circumstances.<sup>15</sup> The question raised is whether a new distinct defence is necessary or whether other strategies will suffice in protecting the cultural rights of individuals.

This study will illustrate that there is undeniably a need for the formalisation of a cultural defence. Criminal law, comprising of the common law, statutes, and precedents, needs to be developed in the light of the spirit of the Bill of Rights and tested against the principles of justice and fairness. By recognising and formalising the cultural defence, criminal law can be developed and harmonised with constitutional values. Not only will this promote and fulfil the rights referred to in sections 15, 30, and 31, but justice and the right to a fair trial<sup>16</sup> requires that all relevant information be considered when judging the parties.<sup>17</sup>

---

<sup>9</sup> Bennett (n8) 35.

<sup>10</sup> *Ibid.*

<sup>11</sup> Renteln in Foblets *et al* (eds.) *Cultural diversity and the law: State responses from around the world* (2010) 517. Renteln borrowed this expression from Carbonnier “Parenthèse philosophique sur la législation de la famille” in Carbonnier *Flexible droit. Pour un sociologie du droit sans riguer*, Paris LGDJ, 1995, 260.

<sup>12</sup> The Anglo-American jurisdictions (common law countries) use the term ‘cultural defence’ compared to ‘cultural offence’ in civil jurisdictions see Van Broeck “Cultural defence and culturally motivated crimes (cultural offence)” 2001 *European Journal of Crime, Criminal Law and Criminal Justice* 1.

<sup>13</sup> Bennett (n8) 4.

<sup>14</sup> Carstens “The cultural defence in criminal law: South African perspectives” 2004 *De Jure* 329.

<sup>15</sup> Harnischfeger in Hund (ed.) *Witchcraft, violence and the law in South Africa* (2003) 44. See also *S v Netshivhu* 1990 2 SACR 331 (A).

<sup>16</sup> Section 35(3), Constitution 1996.

<sup>17</sup> Renteln (n11) 792.



## 1.2 Problem Statement

As stated above,<sup>18</sup> the aim of this study is to determine whether the formalisation of the cultural defence will help courts in criminal law cases to exercise their constitutional duty of taking into consideration the fundamental rights of the accused, specifically the right to participate in and enjoy the culture of his or her choice.

## 1.3 Methodology

The methodological approach used during the research is logical-analytical, delineating the elements in criminal law by taking an in-depth look at the existing legal principles as configured in case law and statutes and exploring how it can be developed in line with the Constitutional right to enjoy and participate in a culture of one's choice. In addition to the Constitution, case law, and statutes, various secondary sources will be used to during the literary study.

South Africa is a multi-cultural society, and within many of the different cultures and ethnic groups there exists a widespread belief in witchcraft.<sup>19</sup> The belief in witchcraft has, over the past decade, led to an escalation in witchcraft-related violence, killings, and witchcraft accusations.<sup>20</sup> As witchcraft-related violence is such a prominent phenomenon in the context of South Africa, it will be used throughout the research to illustrate the use and application of the cultural defence. Accordingly, this study will be a multi-disciplinary study engaging different academic fields, including anthropology and psychology, along with an analysis of criminal law in the South African context.

The methodology used during the study will, however, not include a comparative study with foreign law. Woodman, in his article on the cultural defence in English law, stated that it may seem insular to look only at one jurisdiction as common law countries can share many similarities, but sometimes it is necessary and beneficial.<sup>21</sup> It is submitted that it will be more beneficial to concentrate on the South African law system, which, in turn, could then facilitate and enable comparative studies at a later

---

<sup>18</sup> See 1.1 above.

<sup>19</sup> Labuschagne "Geloof in toorkuns: 'n Morele dilemma vir die strafreg?" 1990 *South African Journal of Criminal Justice* 246.

<sup>20</sup> Ralushai *et al Report of the commission of inquiry into witchcraft violence and ritual murders in the Northern Province of South Africa* (1996) 5.

<sup>21</sup> Woodman in Foblets and Renteln (eds.) *Multicultural jurisprudence: Comparative perspectives on the cultural defense* (2009) 14.



stage more effectively.<sup>22</sup> Secondly, similar to an argument put forward by Woodman, South Africa has a unique, hybrid legal system and is a unique society where the 'minority' culture is ironically associated with the indigenous African heritage. Consequently, the developments in cultural defence in another jurisdiction cannot be assumed to be applicable to the South African legal system.<sup>23</sup>

#### 1.4 Structure of the dissertation

The structure of the dissertation follows the methodology mentioned above, and the work is divided into eight chapters. The first chapter aims at orientating the reader and explaining the significance of this particular research subject. The second chapter approaches the subject by illuminating the historical background and contextualising the cultural defence. Chapter two further explains how history has shaped the legal culture and how the criminal justice system has dealt with witchcraft-related violence and killings during the course of time. A comparison is drawn between the way courts and the legislator dealt with witchcraft-related violence and killings before the enactment of the 1996 Constitution, and the question is asked whether or not this changed after South Africa entered into the era of a democratic constitution.

As stated above,<sup>24</sup> during the course of the study the belief in witchcraft will be used to illustrate the need for, and the use of, the cultural defence in the South African context. Chapter three helps the reader to gain a basic knowledge about the workings of African witchcraft and associated practices in South Africa. The *raison d'être* of the cultural defence is, of course, *culture*, and chapter three deals not only with the specific cultural practices but also with an understanding of what the concept of culture entails as compared to religion.

Chapter four will, firstly, explore the rationale behind the cultural defence, and, secondly, deal with the different forms the defence can take. The defence, as with any other criminal defence, will strike at different elements of criminal liability. Each of these elements will be deconstructed, and the effect of cultural beliefs within these elements will be explored. It is submitted that the cultural defence, if constructed as a

---

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> See 1.2 above.



separate defence, will strike at criminal capacity as well as fault. Both of these elements will be dealt with extensively in the subsequent chapters.

Chapter five deals with the element of capacity, and it endeavours to illustrate that cultural beliefs, and specifically the belief in African witchcraft, could negate the element of criminal capacity. Chapter five approaches the subject with an in-depth analysis of the defences of pathological and non-pathological incapacity. The way cultural beliefs influence human actions is examined and subsequently incorporated in the defences of non-pathological pathological incapacity.

Chapter six deals with the element of fault and includes both intent and negligence. The way in which the belief in African witchcraft can influence whether a person had the necessary intent to act will be explored within the subjective test of intent. Consideration will be given to the objective test of negligence and whether the test allows for taking cultural beliefs into account.

The cultural defence, as with all other defences, can be open to misuse, and, in the penultimate chapter, the possible ways in which the defence can be misused will be considered. The counter-arguments, if there are any, are discussed in relation to each problem which has been identified.

The dissertation will conclude with certain recommendations or guidelines as to how the cultural defence can be properly applied. Consideration will be given to other ways in which criminal law can be developed in the light of the principles of the Constitution, specifically the right to culture. Bearing in mind all of the previous chapters, in particular the problems that can arise and the other strategies available, the final chapter will conclude by stating why it is submitted that the cultural defence should still be formalised.

## 1.5 Conclusion

Moseneke DCJ in *Gumede v President of the Republic of South Africa*<sup>25</sup> states that an important Constitutional objective is to be “united by diversity”.<sup>26</sup> The Constitution promotes social cohesion by protecting and celebrating difference, and it does this

---

<sup>25</sup> *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).

<sup>26</sup> *Id* at 163.



by guaranteeing the right to freedom of religion, belief, and opinion,<sup>27</sup> the right to participate in the cultural life of their choice,<sup>28</sup> and the right to enjoy cultural and religious practices.<sup>29</sup> These rights must be exercised, respected and protected in a way that is not inconsistent with other fundamental rights in the Bill of Rights.

Against the backdrop of the Constitution, the supreme law of the land, the cultural defence must be considered whilst bearing in mind that it should be both justifiable and essential in a constitutional democracy.

The dissertation, throughout the eight chapters, will explore, firstly, how the cultural defence will be defined and explain the working of the defence, and, secondly, what guidelines need to be implemented to ensure that the cultural defence remains justifiable and essential. Admitting cultural evidence, in the form of a cultural defence, is an attempt to bridge a (perceived) gap in the criminal law between moral and legal responsibility and the promoting of justice and fairness, as required by the Constitution, in the criminal justice system.<sup>30</sup>

---

<sup>27</sup> Section 15, Constitution 1996.

<sup>28</sup> Section 30, Constitution 1996.

<sup>29</sup> Section 31, Constitution 1996.

<sup>30</sup> Claes and Vrielink in Foblets and Renteln (eds.) *Multicultural jurisprudence: Comparative perspectives on the cultural defense* (2009) 304.



## Chapter 2: The legal culture of South African criminal law

### 2.1 Introduction

“...[J]udges do not enter public office as ideological virgins. They ascend the Bench with built in and often strongly held sets of values, preconceptions, opinions and prejudices. These are invariably expressed in the decisions they give, constituting ‘inarticulate premises’ in the process of judicial reasoning.”<sup>1</sup>

Criminal law as a whole does not consist only of the common law and statutes but also how these are interpreted and applied by our courts.<sup>2</sup> The interpretation and application, as Cameron stated, is influenced not only by a set of values, preconceptions, or beliefs held by judges personally, but also by the legal culture in which the judge finds himself.<sup>3</sup> A legal culture can have a “powerful steering or filtering effect”<sup>4</sup> on the interpretative task of a judge.

Every society has its own legal culture, and during the Apartheid-era the legal culture was associated with conservatism and positivism.<sup>5</sup> Parliamentary sovereignty was the order of the day, but it is now a thing of the past, and the introduction of the Constitution<sup>6</sup> has called for significant social change. The Constitution, as the supreme law of the Republic,<sup>7</sup> places a duty on judges to develop a new legal culture, a constitutional culture.<sup>8</sup>

Klare defines legal culture as being composed of certain professional sensibilities, habits of mind, and intellectual reflexes.<sup>9</sup> Klare’s description has been summarised as habits which are uncritically accepted and form a legal tradition.<sup>10</sup> Chanock expands on the definition of Klare, and he describes a legal culture as “a set of assumptions, a way

---

<sup>1</sup> Cameron “Judicial Accountability in South Africa” 1990 *South African Journal on Human Rights* 258.

<sup>2</sup> Chanock *The making of South African legal culture 1902-1936: Fear, favour and prejudice* (2001) 115.

<sup>3</sup> Cameron (n1) 258.

<sup>4</sup> Klare “Legal culture and transformative constitutionalism” 1998 *South African Journal on Human Rights* 168.

<sup>5</sup> Keep & Midgley in Bruinsma & Nelken (eds.) *Explorations in legal culture* (2007) 29.

<sup>6</sup> Constitution of the Republic of South Africa, 1996.

<sup>7</sup> Section 2 of the Constitution, 1996.

<sup>8</sup> Section 39 of the Constitution, 1996. Keep & Midgley (n5) 29.

<sup>9</sup> Klare (n4) 166.

<sup>10</sup> Van Der Walt “Legal history, legal culture and transformation in a constitutional democracy” 2006 *Fundamina* 18.





of doing things, a repertoire of language, of legal forms and institutional practices.”<sup>11</sup> Culture, including a legal culture, changes over time. It changes as new situations call for it, but often the way of doing things reproduces only itself.<sup>12</sup>

The legal culture that presently dominates criminal law was shaped and changed by colonialism and Apartheid.<sup>13</sup> When analysing the legal responses in criminal cases, and specifically witchcraft-related crimes, how society dealt with these cases historically has shaped current legal thinking. Ignoring this, as Van der Walt states, will be assuming that history had no lasting or intrinsic effect on the law.<sup>14</sup>

The primary objective of this chapter is to describe the particular legal setting that has become evident over the years when witchcraft-related crimes are dealt with. The status of customary law in the South African legal system before the enactment of the interim Constitution will be described below.<sup>15</sup> This will be followed by a discussion about the influence the Constitution has had on the status of customary law. The Constitution, and specifically the Bill of Rights, has placed a duty on the courts to develop the law and promote the spirit, purport, and objects of the Bill of Rights.<sup>16</sup> This has influenced criminal law, including its function and objectives, and this will be discussed in 2.3 below. The question remains of whether the Constitutional change, taking cognisance of the right to participate and enjoy culture of your choice,<sup>17</sup> has influenced the way in which witchcraft-related crimes are dealt with.

This chapter explores the different approaches and responses toward witchcraft-related crimes which include the Witchcraft Suppression Act 3 of 1957,<sup>18</sup> case law,<sup>19</sup> and other legal responses<sup>20</sup>, such as the Ralushai Commission Report and the Thohoyandou Declaration on Ending Witchcraft Violence. These responses will each be discussed

---

<sup>11</sup> Chanock (n2) 23.

<sup>12</sup> *Ibid.*

<sup>13</sup> Van Der Walt (n10) 19.

<sup>14</sup> *Id* at 15.

<sup>15</sup> See 2.2.1 below.

<sup>16</sup> Section 39 of the Constitution, 1996.

<sup>17</sup> Section 30 and 31 of the Constitution, 1996.

<sup>18</sup> See 2.4.1 below.

<sup>19</sup> See 2.4.2 below.

<sup>20</sup> See 2.4.3 below.



separately and in the light of any changes which may have occurred as a result of the influence of the Constitution. The chapter will be concluded by establishing, in light of the above, whether the responses reflect a constitutional culture or whether the legal setting with regard to witchcraft-related crimes has merely reproduced itself.

## 2.2 The status of customary law in the South African legal system

### 2.2.1 Customary law before the enactment of the interim Constitution

South Africa is a multi-cultural society. As a result, this cultural pluralism has led to a system of legal pluralism.<sup>21</sup> In 1652, with the arrival of the Dutch East India Company, Roman-Dutch law was introduced into South Africa and treated as the common law of the land.<sup>22</sup> During this early period there is no record of customary laws being recognised by, or that the Western legal system was imposed on, the 'natives' or indigenous people of the area.<sup>23</sup> Local customary law<sup>24</sup> differs for each ethnic group or tribe and, unlike the Western legal system, it was at that stage not written down but passed on from one generation to the next by word of mouth.<sup>25</sup> Customary law and its recognition came under discussion only when the Netherlands ceded its rights to the Cape to Britain in 1806.<sup>26</sup>

During the middle of the nineteenth century, the administrators of the various territories in South Africa aimed at 'civilising' the indigenous people. The 'civilisation' was considered necessary as the laws and customs of the indigenous people were deemed

---

<sup>21</sup> Bekker *et al* *Introduction to legal pluralism in South Africa* (2006) 5.

<sup>22</sup> Bennett *Customary law in South Africa* (2004) 35.

<sup>23</sup> Bekker *et al* (n21) 6.

<sup>24</sup> Customary law was referred to by the colonial authorities as native law. For a general discussion see Bekker *et al* (n21) 6-7.

<sup>25</sup> Hahlo and Kahn *The Union of South Africa: The development of its laws and Constitution* (1960) 317. Bekker and Coertze describes customary law as follows:

"[C]ustomary law was an established system of immemorial rules which had evolved from the way of life and natural wants of people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counsellors, their sons and their sons' sons, until forgotten, or until they become part of the immemorial rules." Bekker and Coertze *Seymour's customary law in southern Africa* (1982) 10-11.

<sup>26</sup> Bekker *et al* (n21) 7; Bennett (n22) 35.



to be 'barbarous'.<sup>27</sup> The ultimate goal of the colonizers was the assimilation of the 'natives'.<sup>28</sup> The Cape Commission reported on the African system of law and described it as containing "a number of pernicious and degrading usages and superstitious beliefs", referring especially to sorcery and the belief in witchcraft.<sup>29</sup> Customary law was now recognised and regulated but subject to the repugnancy clause.<sup>30</sup> The repugnancy clause entailed that customary law could be applied "except so far as the same may be repugnant to the general principles of humanity recognised throughout the whole civilised world."<sup>31</sup> In the 1883 report, witchcraft was specifically mentioned as being 'subversive of justice' and, therefore, repugnant.<sup>32</sup>

In 1903 a commission of inquiry was established to report on the 'native affairs' again and propose a policy to be applied in South Africa.<sup>33</sup> The Native Affairs Commission reported in 1905, but, in essence, it repeated the Cape Commission by stating that customary law should remain in place because it was so interwoven into the lives of the 'natives', yet the ultimate goal should still remain assimilation.<sup>34</sup> Bennett describes the inquiry into the status of native affairs as being merely a hunt for the most effective mechanism to control (or extend control over) the indigenous people by the authorities.<sup>35</sup>

By 1910, South Africa had become the Union of South Africa, and customary law was recognised to a certain extent in all the provinces of the Union.<sup>36</sup> The Union government was less concerned with the idea of assimilation and more focused on securing white control by racial segregation.<sup>37</sup> The first legislative instrument entrenching state-law pluralism for the whole country was the Black Administration Act 38 of 1927.<sup>38</sup> This Act

---

<sup>27</sup> Bekker *et al* (n21) 7.

<sup>28</sup> Bennett (n22) 37.

<sup>29</sup> Chanock (n2) 253.

<sup>30</sup> Bekker *et al* (n21) 7.

<sup>31</sup> Chanock (n2) 319. This was laid down in the Natal Ordinance 5 of 1849. See also Bennett (n22) 36.

<sup>32</sup> Chanock (n2) 254.

<sup>33</sup> Bennett (n22) 40.

<sup>34</sup> Report of the Native Affairs Commission (1905) vol 1 para 233. See also Chanock (n2) 257-261 and Bennett (n22) 40-41.

<sup>35</sup> Chanock (n2) 245.

<sup>36</sup> Bekker *et al* (n2) 7.

<sup>37</sup> Bennett (n22) 41.

<sup>38</sup> Bekker *et al* (n21) 7. The act was first known as the Native Administration Act. See Bennett (n22) 41.



enabled customary law to be applied in a separate system of courts, courts responsible for most of African civil litigation.<sup>39</sup> In this dual system of courts, the special system of courts applying customary law consisted of traditional leaders and native commissioners.<sup>40</sup> The magistrate courts and the Supreme Court could apply customary law only where it had been proven in the particular case in front of the court.<sup>41</sup>

In 1948, with the introduction of Apartheid, there was no significant effect on the status of customary law.<sup>42</sup> This situation changed with the commencement of the Law of Evidence Amendment Act 45 of 1988. This act tried to remove the stigma of race and made it possible for customary law to be applicable in any court.<sup>43</sup> Despite this change, customary law remained in an inferior position when compared with the Western legal system.

Throughout the emergence of legal pluralism in South Africa, there remained a clear distinction between private and public law, where public law was the domain of the common law.<sup>44</sup> In principle, criminal offences were not dealt with by customary law, especially crimes related to witchcraft.<sup>45</sup> The general principles of criminal liability were applied to all, and no distinction was made between race, class, or creed.<sup>46</sup>

---

<sup>39</sup> Bennett (n22) 41.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Id* at 42.

<sup>42</sup> Bennett in Foblets *et al* (eds.) *Cultural diversity and the law: State responses from around the world* (2010) 22.

<sup>43</sup> Section 1(1) of Act 45 of 1988 reads as follows:

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.

See further Bennett (n22) 42.

<sup>44</sup> Bennett (n22) 26.

<sup>45</sup> Chanock (n2) 246. Within customary law the distinction between criminal law and the law of delict was not as clear as it is in the South African common law. See Bekker and Coertze (n25) 10-11. For a general discussion on customary criminal law see Myburgh *Indigenous criminal law in Bophutatswana* (1980) and Schapera *The Bantu-speaking tribes of South Africa: An ethnological survey* (1959).

<sup>46</sup> Hahlo and Kahn (n25) 294.



## 2.2.2 Status of customary law after the enactment of the interim Constitution and the final Constitution

Apartheid left a legacy where both ethnicity and culture were manipulated and were thus seen in a negative light.<sup>47</sup> The gross inequalities of Apartheid resulted in a desire for equality and uniformity and an eschewing of anything that accented difference.<sup>48</sup> The 1993 interim Constitution was seen as bringing about change in the status of customary law. At the Multi-Party Negotiating Process in 1993, constituencies of the traditional leaders were represented to protect customary law.<sup>49</sup> During the drafting of the Constitution, an ambivalent attitude towards culture became evident.<sup>50</sup> Culture was mentioned only in passing during the process, and the interim Constitution did not give any clear indication about the future of customary law.<sup>51</sup>

The final Constitution has, however, improved the position and status of customary law. Customary law rests first and foremost on the right to culture. The Constitution of the Republic of South Africa of 1996 guarantees the right to language and culture,<sup>52</sup> the right to freedom of religion, belief, and opinion,<sup>53</sup> and the right to cultural, religious, and linguistic communities.<sup>54</sup> This should be read alongside the provision in section 9 of the Constitution which provides everyone with the right to equality which, in turn, entails protection against unfair discrimination on grounds of such as culture and religion. The right to culture imposes certain obligations or duties on the state. In the *Christian Education*<sup>55</sup> case, one of these duties is primarily to tolerate different cultural practices even if they seem very unusual. Unlike the aim of the colonial government, the state may not compel anyone to be assimilated by another culture.<sup>56</sup> The state must,

---

<sup>47</sup> Bennett in Foblets *et al* (eds.) (n42) 24.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> South African Law Commission, *Interim Report on Group and Human Rights*, Project 58, Pretoria, Government Printer 1991, 679-680 as quoted by Bennett in Foblets *et al* (eds.) (n42) 24; Bennett (n22) 77.

<sup>52</sup> Section 30 of the Constitution, 1996.

<sup>53</sup> Section 15 of the Constitution, 1996.

<sup>54</sup> Section 31 of the Constitution, 1996.

<sup>55</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) at para 25.

<sup>56</sup> Bennett (n22) 88.



furthermore, allow a group to foster its own cultural identity by, amongst other things, respecting institutions such as customary law.<sup>57</sup>

The position of customary law, although protected through the abovementioned provisions, is stated very clearly in section 211(3) of the Constitution. Section 211(3) of the Constitution reads as follows:

The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

This section obliges courts constitutionally to apply customary law<sup>58</sup> and places customary law on the same level as our national common law which consists of Roman-Dutch law as influenced by English law. The Constitution, therefore, ended the assumption that common law is the general law of the land.<sup>59</sup> The improved status of customary law implies the recognition and acceptance of cultural practices within society. Customary law has been recognised in areas of private law such as family law with regards to customary marriage,<sup>60</sup> but the criminal justice system is still seen as the domain of the Western legal system.<sup>61</sup>

### 2.3 The influence of the Constitution on criminal law

The basic system of criminal law is founded on Roman-Dutch law,<sup>62</sup> but it also has roots in English law as is evidenced by the Transkeian Penal Code of 1886.<sup>63</sup> This Act influenced criminal law by, for example, defining the limits of provocation.<sup>64</sup> The influence of English law is, however, less noticeable in general principles of criminal law which remain based mainly on Roman-Dutch law.<sup>65</sup> The approach in South African

---

<sup>57</sup> *Ibid.*

<sup>58</sup> This obligation is subject to three qualifications. For further reading on the qualifications see Bennett (n22) 43-44 and 76-98.

<sup>59</sup> Bennett (n22) 26. This has been confirmed and applied in Constitutional Court cases such as *S v Makwanyane and another* 1995 (3) SA 391 (CC) para [365]-[383] where Sachs J explains the importance of African law and uses it to discern in which situations under African law the death penalty would be imposed.

<sup>60</sup> Bekker *et al* (n21) 18.

<sup>61</sup> *Ibid.*

<sup>62</sup> Roman-Dutch law was introduced by Dutch settlers in 1652. See 2.2.1 above.

<sup>63</sup> Act 24 of 1886 is also known as the Native Territories' Penal Code. Burchell *Principles of criminal law* (2006) 34. See also Snyman *Criminal law* (2008) 8.

<sup>64</sup> Snyman (n63) 8.

<sup>65</sup> Snyman (n63) 8; Burchell (n63) 137.



criminal law theory entails deductive reasoning where we begin with the general prerequisites of criminal liability (the abovementioned general principles) and move towards the particular set of facts.<sup>66</sup> This approach was influenced by German criminal-law theory or *Strafrechtswissenschaft*.<sup>67</sup>

The function of criminal law in our society, as Burchell explains, is to act as a social mechanism which compels members of society to refrain from committing harmful acts; this is done by using the threat of punishment or forms of sanction.<sup>68</sup> Punishment, therefore, plays a pivotal role in our criminal justice system.<sup>69</sup> The generally-recognised purposes of punishment include deterrence, retribution, prevention, and rehabilitation, of which deterrence<sup>70</sup> is considered to be the most important.<sup>71</sup>

Theories of punishment are often expressed in the same terms as the purposes mentioned above.<sup>72</sup> These theories can broadly be divided into the retributive theory,<sup>73</sup> utilitarian theory,<sup>74</sup> and a combination theory.<sup>75</sup>

These theories and purposes of punishment help to explain why courts impose punishments on offenders.<sup>76</sup> Punishing a person in terms of any theory will not serve any purpose if careful consideration is not taken of the fact that criminal law was built on

---

<sup>66</sup> Snyman (n63) 9.

<sup>67</sup> *Ibid.*

<sup>68</sup> Burchell (n63) 9.

<sup>69</sup> Terblanche *A guide to sentencing in South Africa* (2007) 155.

<sup>70</sup> Deterrence includes individual deterrence and general deterrence. The aim of deterrence, whether it be aimed at a specific person or the public in general, is that people will abstain from or avoid committing crimes because they are rational and will want to avoid the punishment. See Snyman (n63) 15-18; Burchell (n63) 74-77.

<sup>71</sup> Terblanche (n69) 155.

<sup>72</sup> *Id* at 171.

<sup>73</sup> Also known as the absolute theory. This theory aims to restore balance, and the punishment received by the perpetrator is considered to be deserved. This deserved punishment is known as 'just deserts.' In order to restore balance, the laws should, however, be equal and fair. Burchell (n63) 69-72; Terblanche (n69) 171-172 and Snyman (n63) 11-15.

<sup>74</sup> Also known as the relative theory. The utilitarian theory purports to benefit society by punishing offenders and by so doing benefiting the greatest number of people possible. The benefits of punishment include prevention of further crimes by incapacitation, deterrence of crimes, reinforcement, and reformation and rehabilitation. Burchell (n63) 73-80; Terblanche (n69) 171; 173-174 and Snyman (n63) 15-19.

<sup>75</sup> The utilitarian and retributive theories have both been criticized and, as a result, the combination theory was developed. The weight afforded to either the utilitarian or the retributive theory depends on the three factors of the *Zinn*-triad: the crime; the criminal; and the interests of society. Terblanche (n69) 171 and Snyman (n63) 19-20.

<sup>76</sup> Terblanche (n69) 172.



the notion of individual responsibility. Criminal law rests on the maxim *actus non facit reum nisi mens sit rea* (an act is not unlawful unless there is a guilty mind).<sup>77</sup> If a person who committed a crime does not have a guilty mind, punishment will serve no purpose.

The object of criminal law, as Burchell states, is “to promote individual autonomy, the welfare of society and its members by establishing and maintaining peace and order and furthering fundamental rights.”<sup>78</sup> This object differs from the previous objectives, and it has changed over time as the political environment has changed. During the eighteenth and nineteenth centuries, when commissions were established to investigate “native affairs”,<sup>79</sup> crimes committed by ‘natives’ were treated differently to crimes committed by Europeans.<sup>80</sup> The reason for this was that barbarian free will was considered to be different from civilised free will.<sup>81</sup> The natives committed barbaric crimes which arose only from the nature of the savage and could not be explained otherwise.<sup>82</sup> The ‘ordinary functioning’ of criminal law during that time echoed the political climate of control.<sup>83</sup> For example, because of the ‘barbarian free will’, sentences imposed on blacks were lesser, especially in black-on-black crimes.<sup>84</sup> In *R v Xulu* Wessels CJ stated that:

“In punishing them we must remember that they are not civilised Europeans but kaffirs living more or less in a state of nature and when they act according to their natural and inherited impulses they do not deserve to be punished too severely as if they were civilised Europeans dwelling in a city or a village.”<sup>85</sup>

Criminal law functioned as a control-mechanism over natives who were considered to be lesser beings.<sup>86</sup> During the Apartheid-era, the situation remained more or less the same. Criminal law (as well as the legal system in general) was used to aid segregation

---

<sup>77</sup> Burchell (n63) 138; Chanock (n2) 117.

<sup>78</sup> Burchell (n63) 9.

<sup>79</sup> See the discussion at 2.2.1 above.

<sup>80</sup> Chanock (n2) 114.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Id* at 129.

<sup>84</sup> *Ibid.*

<sup>85</sup> *R v Xulu* 1933 AD 197 at 200.

<sup>86</sup> Chanock (n2) 129.





policies<sup>87</sup> and again placed an emphasis on the race of the alleged criminal. Hahlo and Kahn argue that there was no evidence that non-Europeans were prone to commit crimes more than Europeans, and criminal law was applied to all equally.<sup>88</sup> The courts had no choice but to apply the Apartheid laws as they were constrained by the doctrine of the supremacy of Parliament.<sup>89</sup> Political reform, in the form of a constitutional democracy, brought an end to this situation.

The object of criminal law today, as stated above, encapsulates that values enshrined in the Constitution should resonate within criminal law. Criminal law has to be tested against the principles of justice and fairness, and this situation has created a new human rights culture.<sup>90</sup> The duty is expressed in section 39(2) of the Constitution which states:

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.

None of the rights entrenched in the Bill of Rights is absolute, and all are subject to the limitation clause.<sup>91</sup> Many cases dealing with the effect of the Bill of Rights on statutory crimes, common law crimes, and principles have come before the Constitutional Court.<sup>92</sup> The right to participate and enjoy any culture of your choice,<sup>93</sup> and the impact that that can have in criminal law cases, has yet to be explored.<sup>94</sup> The question arises about whether the approach adopted by criminal law towards cultural beliefs has changed in view of the object of criminal law in the 1996 Constitution. This question will be addressed below by considering the legal responses towards witchcraft-related crimes.

---

<sup>87</sup> Burchell (n63) 137.

<sup>88</sup> Hahlo and Kahn (n25) 294.

<sup>89</sup> Burchell (n63) 36.

<sup>90</sup> Snyman (n63) 9.

<sup>91</sup> Section 36 of the Constitution, 1996.

<sup>92</sup> Some of these cases include *Christian Lawyers Association of South Africa v Minister of Health* 1998 4 SA 1113 (T) (abortion); *S v Makwanyane* 1995 3 SA 391 (CC) (death penalty); *S v Williams* 1995 3 SA 632 (CC) (corporeal punishment); *NDPP v Mohamed* 2003 4 SA 1 (CC) (organised crime); *S v Jordan* 2002 6 SA 642 (CC) (prostitution); *S v M* 2004 3 SA 680 (O) (bestiality). For a further discussion on human rights and criminal law see Burchell (n63) 117-132.

<sup>93</sup> Section 30 and 31 of the Constitution, 1996.

<sup>94</sup> Burchell (n63) 535-537; Bennett "The cultural defence and the custom of *Thwala* in South African law" 2010 *University of Botswana Law Journal* 4.



## 2.4 Responses toward witchcraft-related crimes

There are two schools of thought when dealing with witchcraft. The first school contends that witchcraft exists, and it deals with it accordingly.<sup>95</sup> The second school, which aims to suppress beliefs, does not accept the belief in witchcraft or the existence of witches. Traditional courts belonged to the former, whereas formal courts and national legislators belong to the latter.<sup>96</sup>

Previously, parties involved in witchcraft-related crimes, such as witch-killings or witch accusations, approached the tribal authorities and reported the case to the ruler.<sup>97</sup> Although criminal law was considered to be the domain of common law, public accusations of witchcraft were very rare, and the parties easily solved the dispute within their tribal courts using customary criminal law.<sup>98</sup> The tribes dealt with these accusations by calling together a tribal meeting. If a misfortune occurred they would decide at the meetings whether or not a *sangoma* (diviner)<sup>99</sup> would be called to throw the bones (*dolosse*) in order to determine who or what had caused the misfortune that had befallen someone.<sup>100</sup> If the process of “smelling out” is used, the person who allegedly caused the misfortune (the witch) is pointed out or “smelt out”.<sup>101</sup> Divination is not always considered sufficient evidence, and other evidence such as threats made by the alleged witch is also used.<sup>102</sup> The leaders at the tribal meetings will then decide how they will deal with the witch.<sup>103</sup> Practising witchcraft is considered a very serious crime, and witches were either banished from the community and their property confiscated<sup>104</sup> or they received the death penalty.<sup>105</sup> In some cases, a traditional healer was used to ‘cure’ the witch by exorcising the evil spirit which possessed the witch.<sup>106</sup>

---

<sup>95</sup> Ralushai in Hund (ed.) *Witchcraft violence and the law in South Africa* (2003) 127.

<sup>96</sup> *Ibid.*

<sup>97</sup> Hund (ed.) *Witchcraft violence and the law in South Africa* (2003) 9 and Myburgh (n45) 18.

<sup>98</sup> Hund (ed.) (n97) 9. See also Van Den Heever *Regsetnologiese aspekte van toordoktery: Intreerede as professor in Publiek Reg by die Universiteit van die Noorde* (1979) 8.

<sup>99</sup> See 3.2.3 below.

<sup>100</sup> Van Den Heever (n98) 10; Myburgh (n45) 99.

<sup>101</sup> Van Den Heever (n98) 10.

<sup>102</sup> Myburgh (n45) 99.

<sup>103</sup> Van Den Heever (n98) 10; Myburgh (n45) 99.

<sup>104</sup> Schapera (n45) 212.

<sup>105</sup> Myburgh (n45) 49; 51 and 99; Minnaar “Witchpurging and *muthi* murder in South Africa: The legislative and legal challenges to combating these practices with specific reference to the *Witchcraft*



Niehaus, during his research in Bushbuckridge, discovered that, under the 1913 Land Act<sup>107</sup> in the area of Moholoholo mountains, Tsonga and Northern Sotho speakers were guaranteed the rights of residence.<sup>108</sup> This enabled the chiefs of those villagers to try, as well as to mediate, witchcraft cases in that area. In essence they tried to manage the misfortune caused by witches by condoning the ritual humiliation of witches and compensation in cattle to the bewitched.<sup>109</sup> Despite the colonial legislation that was already in place at the time, commissioners ignored these infringements.<sup>110</sup>

In certain areas, families or tribes still deal with cases of witchcraft on their own, although they are legally not permitted to do so.<sup>111</sup> As stated harshly by a traditional healer, “Now that they have these human rights, you can’t just kill them.”<sup>112</sup>

All witchcraft cases have to be referred to the formal courts, to be tried either under the Witchcraft Suppression Act<sup>113</sup> and/or under common law, depending on the case.<sup>114</sup> The effectiveness of, the attitudes toward, and the influence of the Constitution on the responses by authorities towards witchcraft-related crimes is discussed below.

#### 2.4.1 Witchcraft Suppression Act 3 of 1957

From the late nineteenth century, the British colonial administrators started to systemize the legal control of witchcraft throughout their colonies.<sup>115</sup> Within the Transkeian Penal Code of 1886,<sup>116</sup> Chapter XI on ‘Pretended Witchcraft’ specifically dealt with the criminalisation of witchcraft.<sup>117</sup> Anyone who was proved to be a witch-finder could

---

*Suppression Act (No. 3 of 1957, amended by Act No. 50 of 1970)*” 2001 *African Legal Studies* 1. See 3.3.2 below for a discussion on the methods of killing witches.

<sup>106</sup> Ralushai *et al* *Report of the commission of inquiry into witchcraft violence and ritual murders in the Northern Province of South Africa* (1996) 51.

<sup>107</sup> Black Land Act 27 of 1913.

<sup>108</sup> Niehaus in Hund (ed.) *Witchcraft violence and the law in South Africa* (2003) 97.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> Ralushai *et al* (n106) 51.

<sup>112</sup> Ashforth *Witchcraft, violence and democracy in South Africa* (2005) 260.

<sup>113</sup> Witchcraft Suppression Act 3 of 1957, as amended by Act 50 of 1970.

<sup>114</sup> Ralushai in Hund (ed.) (n95) 127.

<sup>115</sup> Niehaus in Hund (ed.) (n108) 95.

<sup>116</sup> The Native Territories’ Penal Code 24 of 1886.

<sup>117</sup> See sections 171-175 of the Native Territories’ Penal Code 24 of 1886. See further Chanock (n2) 254.



receive imprisonment of up to five years.<sup>118</sup> The accusation of witchcraft,<sup>119</sup> employment of a witch-finder,<sup>120</sup> and the use and supply of medicines<sup>121</sup> were all criminalised by this Act.<sup>122</sup> The first Witchcraft Suppression Act was passed in the Cape of Good Hope in 1895.<sup>123</sup> After 1886, the British Witchcraft Ordinances of 1928 and 1958 empowered district officers to deport alleged witches to specific localities.<sup>124</sup>

The Witchcraft Suppression Act 3 of 1957, as amended in 1970 (hereinafter ‘the Act’), consolidated the abovementioned colonial laws into only one piece of legislation.<sup>125</sup> This Act identifies six different categories of offenders. These categories are:

- any person who names or indicates another person as a witch or wizard;<sup>126</sup>
- a witch-doctor who for gain, in other words a fee, indicates a person as a witch;<sup>127</sup>
- any person who approaches a witch-doctor and hires him or her for the process of ‘smelling-out’ of a witch;<sup>128</sup>
- any person who attempts to practise witchcraft;<sup>129</sup>
- any person who claims to have knowledge of witchcraft, the use of charms, or advises others on their use, or sells magic potions or medicines for witchcraft purposes;<sup>130</sup> and
- persons who for gain claim that they have the skills to divine or conjure.<sup>131</sup>

This Act is regarded by many Africans as being “white man’s law”<sup>132</sup> as it is based on previous colonial legislation. The Act is built on the assumption that witchcraft does not

---

<sup>118</sup> Section 172 of the Natives Territories’ Penal Code 24 of 1886 provides that:

Whoever having named or indicated any person as wizard or witch, shall be proved to be by habit and repute a witch-doctor or witch-finder (*isanusi*) shall be punished with imprisonment, with or without hard labour, for a term which may extend to two years, or with fine, or flogging, or any two or more of such punishments.

<sup>119</sup> Section 171 of the Natives Territories’ Penal Code 24 of 1886 deals with “imputations of witchcraft.”

<sup>120</sup> Section 173 of the Natives Territories’ Penal Code 24 of 1886 deals with “employing a witch-doctor.”

<sup>121</sup> Section 174 of the Natives Territories’ Penal Code 24 of 1886 deals with “witch-doctors supplying advice or witchcraft materials with intent to injure” and section 175 deals with “persons using witch medicine with intent to injure.”

<sup>122</sup> Chanock (n2) 254.

<sup>123</sup> Ralushai *et al* (n106) 54.

<sup>124</sup> Niehaus in Hund (ed.) (n108) 98.

<sup>125</sup> *Id* at 96.

<sup>126</sup> Section 1(a) of Act 3 of 1957.

<sup>127</sup> Section 1(f) of Act 3 of 1957.

<sup>128</sup> Section 1(c) of Act 3 of 1957.

<sup>129</sup> Section 1(b) of Act 3 of 1957.

<sup>130</sup> Section 1(d) of Act 3 of 1957.

<sup>131</sup> Section 1(f) of Act 3 of 1957.



exist and that these beliefs are mere superstitions of Africans.<sup>133</sup> In essence, it punishes people who are trying to defend themselves against witches, and, as a result, many people take the law into their own hands.<sup>134</sup>

This legislation has been reviewed on numerous occasions,<sup>135</sup> and the problems surrounding the Act indicated. Firstly, the Act denies the existence of witchcraft, but, at the same time, it forbids the practice of something which does not exist.<sup>136</sup> The main problem with this Act is that it was perceived that the only way to deal with superstitions was to try to suppress them completely.<sup>137</sup> The beliefs were thought to be repugnant, diabolical, and deeply ingrained, and in order to effect their disappearance, it was decided that they should be infiltrated by Western civilization, education, and Christianity.<sup>138</sup>

The terminology used throughout the Act is rooted in a Western framework.<sup>139</sup> Certain terminology, such as ‘witchdoctor’, is used incorrectly, as ‘witchdoctors’ are, in fact, traditional healers who are capable not only of smelling out and curing witches but also helping with healing in other areas.<sup>140</sup> Words such as ‘wizard’ and ‘sorcery’ do not even exist in most of the African languages.<sup>141</sup> Furthermore key concepts, such as witchcraft and witch, are not defined in the Act.<sup>142</sup>

Professor Mawila commented, during a conference on the ending of witchcraft violence, that the Act regulates only the beliefs of a specific group of people and their associated

---

<sup>132</sup> Minnaar (n105) 6.

<sup>133</sup> *Id* at 3;6.

<sup>134</sup> Harnischfeger in Hund (ed.) *Witchcraft violence and the law in South Africa* (2003) 42.

<sup>135</sup> The Act was reviewed by the Ralushai Commission headed by Professor Victor Ralushai in 1995. See Ralushai *et al* (n106) 51-57. It was further reviewed by the Commission for Gender Equality at the National Conference on witchcraft violence in 1998 which was held in Thohoyandou. See Commission on Gender Equality *Conference on legislative reform for the Witchcraft Suppression Act 3 of 1957, Pietersburg* (1999).

<sup>136</sup> Ralushai *et al* (n106) 57.

<sup>137</sup> Minnaar (n105) 14.

<sup>138</sup> Niehaus “Witchcraft as subtext: deep knowledge and the South African public sphere” 2010 *Social Dynamics: A Journal of African Studies* 67.

<sup>139</sup> Minnaar (n105) 3.

<sup>140</sup> Minnaar (n105) 3; Commission on Gender Equality (n135) 19.

<sup>141</sup> Commission on Gender Equality (n135) 19.

<sup>142</sup> *Id* at 18.



practices and not others.<sup>143</sup> This was reiterated by Advocate Kollape who stated that this Act could be considered unconstitutional as it violates the constitutional right to freedom of religion and beliefs.<sup>144</sup> Although the aim of the Act is to suppress witchcraft, Labuschagne points out that acts within other religions, such as the Christian religion, could easily resonate within the descriptions given in the Act.<sup>145</sup> He offers the example of a person praying to the Christian God that misfortune should befall his or her enemy. When such a misfortune (coincidentally) takes place, this said person would be able to profess that he used a supernatural power in the form of the Holy Spirit to cause the misfortune. His actions would fall within the ambit of section 1(b) of the Act and would be punishable with a fine or imprisonment.<sup>146</sup> The South African Pagan Rights Alliance stated that pagans proudly identify themselves as witches. The Act infringes on their freedom of religion by criminalising the imputation of someone as a witch in section 1(a) of the Act.<sup>147</sup> The Act, therefore, not only infringes on the beliefs and practices of a particular group but can potentially infringe on the beliefs of other religions.

Another problem that arises from this Act is the fact that it has not been consistently applied by the police or the courts.<sup>148</sup> The Ralushai Commission compiled a study of 211 cases from police dockets and court records.<sup>149</sup> This showed that relatively few people had been prosecuted in terms of the Witchcraft Suppression Act. Even in the cases where they were convicted, the sentencing was not strictly applied.<sup>150</sup> The Act has not insisted on strict application when compared with the murder of an alleged witch where courts were more willing to prosecute.<sup>151</sup> In cases reported after the Ralushai Commission's study, the judges have emphasised the fact that offences listed in the Act are very serious in nature as they can lead to the suicide of imputed persons, or the

---

<sup>143</sup> *Id* at 17.

<sup>144</sup> *Id* at 19.

<sup>145</sup> Labuschagne "Geloof in toorkuns: 'n Morele dilemma vir die strafreg?" 1990 *SAJC* 258.

<sup>146</sup> *Ibid.*

<sup>147</sup> Niehaus (n138) 70.

<sup>148</sup> Harnischfeger in Hund (ed.) (n134) 44; Niehaus in Hund (ed.) (n108) 99.

<sup>149</sup> Ralushai *et al* (n106) 268-274.

<sup>150</sup> Ralushai *et al* (n106) 270. See also Niehaus (n138) 67.

<sup>151</sup> Harnischfeger in Hund (ed.) (n134) 44.



possibility of communities taking the law into their own hands and killing the alleged witches.<sup>152</sup>

Before these complaints of threats of bewitchment reach the courts many are simply ignored by the police even though they constitute statutory crimes.<sup>153</sup> Many of the Africans who believe in witchcraft see this attitude of the police as siding with witches. This has been described by one of the affected people as follows:

“We blacks have witches, but when we go to the police to complain that the witches are eating us in the night, the police want to see the pots which they have cooked us in. The witches are happy because the police support them.”<sup>154</sup>

During the conference held at Thohoyandou in 1998 on the reform of the Witchcraft Suppression Act, the resolutions for legislative reform were set out.<sup>155</sup> The Act has, however, not been repealed or amended and remains in force.

#### 2.4.2 Witchcraft-related crimes and case law

Witchcraft-related crimes dealt with by our courts, in most cases, constitute common law crimes, such as murder or assault, but they also include the statutory crime of contravening the Witchcraft Suppression Act.<sup>156</sup> Cases involving witchcraft are often some of the most difficult cases to deal with.<sup>157</sup> Firstly, it can prove to be very difficult to find witnesses or victims who are willing to testify or even acknowledge that they believe in witchcraft;<sup>158</sup> it can be difficult to build up a strong case against the accused;<sup>159</sup> and judicial officials are often not well acquainted with cases of this nature.<sup>160</sup> Lastly, these

---

<sup>152</sup> *S v Chauke* 2001 JDR 0543 (T) at 2; *S v Sibuyi* 2003 JDR 0440 (T) at 2; *S v Maluleka* 2006 1 SACR 402 (T) at 403 and *S v Latha* 2012 2 SACR 30 (ECG) at 36.

<sup>153</sup> Harnischfeger in Hund (ed.) (n134) 44-45.

<sup>154</sup> Stadler “Witches and witch-hunters: witchcraft, generational relations and the life cycle in a lowveld village” 1996 *African Studies* 106.

<sup>155</sup> The specific resolution, the Thohoyandou declaration, will be discussed below in 2.4.3. See further Commission on Gender Equality (n135). For a critique on the resolutions see Niehaus (n138) 65-77.

<sup>156</sup> Act 3 of 1957. See above at 2.4.1 for cases dealing with the contravention of this Act.

<sup>157</sup> Niehaus in Hund (ed.) (n108) 106.

<sup>158</sup> Niehaus in Hund (ed.) (n108) 106; Ralushai *et al* (n106) 30. See also Van Den Heever & Wildenboer “Geloof in toorkuns as versagende omstandigheid in die Suid-Afrikaanse reg” 1985 *De Jure* 106. *S v Mokonto* 1971 2 SA 319 (A) at 322H; *S v Modisadife* 1980 3 SA 860 (A) at 862C.

<sup>159</sup> Ralushai *et al* (n106) 30.

<sup>160</sup> *Ibid.*



crimes create problems relative to the identification and arrest of the perpetrators<sup>161</sup> as the crimes are often committed in a group or within a community which considers the crime to be an act of service.<sup>162</sup>

The colonialists, and later the Apartheid government, were proponents of eliminating witchcraft beliefs,<sup>163</sup> and, in order to achieve this, they had a “civilising mission”.<sup>164</sup> This is evident in the way the colonial courts (and the courts during the Apartheid-era) dealt with witchcraft-related crimes.<sup>165</sup> This approach by the courts before the enactment of the Constitution will be demonstrated below by a discussion of court cases. The cases after the enactment of the Constitution will be delineated in order to demonstrate whether or not the approach has remained the same and still reveals an underlying ‘civilising mission.’

#### 2.4.2.1 Pre-constitutional case law

Cases dealing with witchcraft had a significant influence on the perceptions of the colonial and Apartheid authorities about Africans. Africans were characterized as superstitious and primitive.<sup>166</sup> As early as 1911, Buchanan J in the *Zillah* case stated that “no reasonable person of education”<sup>167</sup> will believe in something such as witchcraft. Buchanan J held that witchcraft is common belief among the natives but he insisted that belief in witchcraft will not be upheld as a defence because it is contrary to “knowledge and common sense.”<sup>168</sup> From the outset it was clear that, in court cases dealing with the belief in witchcraft, there was an insistence on rationality and the need to try to civilise the ‘primitive’ people who held these superstitious beliefs.<sup>169</sup> The belief in witchcraft has found its place in defences in criminal law, but, because of the insistence on rationality

---

<sup>161</sup> Minnaar (n105) 8.

<sup>162</sup> *Id* at 6;10.

<sup>163</sup> Niehaus (n138) 66.

<sup>164</sup> *Ibid.* See 2.2.1 above.

<sup>165</sup> See 2.4.2.1 below.

<sup>166</sup> Chanock (n2) 321.

<sup>167</sup> *R v Zillah* 1911 CPD 644.

<sup>168</sup> *Ibid.*

<sup>169</sup> Hoctor “Belief in witchcraft as a mitigating factor in sentencing: *S v Latha* 2012 2 SACR 30 (ECG)” 2012 *Obiter* 382.





and Western thinking, it never succeeded as a defence to exclude liability in any pre-constitutional cases.<sup>170</sup>

The Natal Native High Court heard a series of cases concerning witchcraft, including *R v Magabeni*.<sup>171</sup> In this case, the accused had stabbed and burnt a man because he was suspected of having caused death and sickness at the kraal of Magabeni. Boshoff J held that the belief in witchcraft could not be considered to be a defence against murder,<sup>172</sup> and he specifically stated, “When is it to come that these Natives are to learn that consulting diviners and committing murders will not be tolerated by the British Government?”<sup>173</sup>

This attitude also informed many cases, such as *R v Usiyeka*<sup>174</sup> where a diviner was used to ‘smell out’ the person or persons causing the alleged illness of some of the children of the kraal. The deceased had been ‘smelt out’ as one of the alleged witches and was later beaten with hoes and stones by the accused women. One of the judges in the case considered the fact that the accused might have thought that they could “resort to their old customs of smelling out and wiping out.”<sup>175</sup> This was, however, not used as a defence or as mitigation, and it was held that the women accused were guilty of murder.<sup>176</sup>

In *R v Ngang*<sup>177</sup> the accused was charged with the intent to do grievous bodily harm after he had stabbed the complainant. Ngang had been in a state of somnambulism and thought the complainant was a *tokoloshe*.<sup>178</sup> In this case Ngang succeeded but not because of his “mistaken belief in magic or witchcraft”<sup>179</sup> but because he could not be

---

<sup>170</sup> Bennett and Scholtz “Witchcraft: a problem of fault and causation” 1979 *CILSA* 299. See also Hctor (n169) 382.

<sup>171</sup> *R v Magabeni and others* 1911 NHC 107.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> *R v Usiyeka and others* 1912 NHC 98.

<sup>175</sup> *Ibid.*

<sup>176</sup> In this case Boshoff however recommended that Governor-General would be merciful and commute the sentences of the women as they acted under authority. See *Usiyeka* case (n174) at 103.

<sup>177</sup> *R v Ngang* 1960 3 SA 363 (T).

<sup>178</sup> See 3.2.2 above.

<sup>179</sup> *Ngang* case (n177) at 366.



held liable for an act which was a “purely a physical reflex”,<sup>180</sup> in other words, he acted in a state of automatism.<sup>181</sup>

In the case of *R v Radebe*<sup>182</sup> Judge Innes commented that the belief in witchcraft could be seen as being “equivalent to insanity”, but in both the *Molehane*-case<sup>183</sup> and *Radebe*-case<sup>184</sup> the defence of insanity was dismissed. The defence of self-defence (private defence) was raised in *S v Mokonto*<sup>185</sup> where the appellant had killed the deceased because he believed that she was going to kill him. Mokonto went to face the alleged witch in order to divine and prove that she had killed his brothers. During the confrontation she told him that, “you will not see the setting of the sun today.”<sup>186</sup> The appellant then killed the alleged witch as he believed it was in self-defence or, alternatively, that he was provoked. The court in this case clearly stated that common law reflects the thinking of Western civilization, and, as a result, the belief in witchcraft could not be regarded as reasonable.<sup>187</sup> The appellant’s belief that his life was in danger would, therefore, not be held by a reasonable person in his position. Holmes JA commented that “[t]o hold otherwise would be to plunge backward into the Dark Ages.”<sup>188</sup>

In the much-debated case, *R v Mbombela*,<sup>189</sup> the defendant’s defence was a *bona fide* mistake. In this case, the accused, who was described as being “rather below the normal”<sup>190</sup> intelligence, killed a nine-year-old child as he believed he was killing a “*tokolotši* .” Some small children had called the accused as they thought there was a *tokolotši* inside their hut. The accused saw the small feet, and, because a human being who looks a *tokolotši* in the face is “doomed to death”,<sup>191</sup> he struck the ‘object’ with a hatchet. In his culture it is, firstly, believed that children are able to see the

---

<sup>180</sup> *Ibid.*

<sup>181</sup> See 4.2 below.

<sup>182</sup> *R v Radebe* 1915 AD 97.

<sup>183</sup> *R v Molehane* 1942 GWL 64.

<sup>184</sup> *Radebe* case (182).

<sup>185</sup> *Mokonto* case (n158).

<sup>186</sup> *Id* at 321.

<sup>187</sup> *Id* at 324.

<sup>188</sup> *Ibid.*

<sup>189</sup> *R v Mbombela* 1933 AD 269.

<sup>190</sup> *Id* at 270.

<sup>191</sup> *Ibid.*



*tokolotši* and, secondly, that the *tokolotši* takes the form of a little old man with small feet.<sup>192</sup> A jury found him guilty of murder, but on appeal he was found guilty of culpable homicide. De Villiers JA stated that in order for the mistake of fact to be a defence the belief should be *bona fide* but also reasonable.<sup>193</sup> When applying the test of a reasonable man the court stated that neither the “race, idiosyncrasies or the superstitions, nor the intelligence of the person accused”<sup>194</sup> should be taken into account.<sup>195</sup> The court refused to “indigenise” the reasonable person test.<sup>196</sup>

The belief in witchcraft was allowed to be taken into account in the essentially objective test of negligence in *S v Ngema*.<sup>197</sup> In this case, the accused had hacked to death a two-year-old child and claimed that he thought a *tokolotši* was throttling him because of the nightmare he had had. Hugo J stated that it is difficult to individualise the test for negligence as this could open the door for vagueness and that the “full-blown objectivism” shown in *R v Mbombela*<sup>198</sup> was something of the past.<sup>199</sup> Although the court accepted that his negligence should be assessed based on his beliefs in the supernatural, the court held that nightmares are not specific to races or classes of people.<sup>200</sup> Ngema was found guilty of culpable homicide because he had acted unreasonably in warding off the perceived danger.<sup>201</sup>

Courts have put forward various reasons why the belief in witchcraft could not be considered as a defence excusing an accused person of the crime.<sup>202</sup> Firstly, the courts have stated that the punishment encourages deterrence<sup>203</sup> and that imposing harsh sentences expresses the fact that killing others will not be tolerated.<sup>204</sup> Secondly, hand

---

<sup>192</sup> *Ibid.*

<sup>193</sup> *Id* at 272.

<sup>194</sup> *Id* at 273-274.

<sup>195</sup> For a further discussion on the *Mbombela* case (n189) see Burchell (n63) 535-536.

<sup>196</sup> Motshekga “The ideology behind witchcraft and the principle of fault in criminal law” 1984 *Codicillus* 10.

<sup>197</sup> *S v Ngema* 1992 2 SACR 651 (D).

<sup>198</sup> *Mbombela* case (n189).

<sup>199</sup> *Ngema* case (n197) at 655.

<sup>200</sup> *Ibid.*

<sup>201</sup> For a further discussion on *Ngema* case (n197) see Burchell (n63) 536-537.

<sup>202</sup> Labuschagne (n145) 265; Hoctor (n169) 385.

<sup>203</sup> *R v Fundakubi* and others 1948 AD 810 at 819; *R v Zanhibe* 1954 3 SA 597 at 601. See footnote 70 on deterrence.

<sup>204</sup> *S v Mojabelo* 1991 1 SACR 257 (T) at 260.



in hand with this, courts have also been influenced by the cruelty of witchcraft-killings.<sup>205</sup> During the 1990s there was an upsurge in witchcraft-killings, especially in Limpopo (then Northern Province region).<sup>206</sup> In order to try to reduce this, courts were often harsher in their punishments with regard to this specific crime of witchcraft-killings.<sup>207</sup> Lastly, courts emphasised that these beliefs could have dire consequences such as a person accused of being a witch committing suicide.<sup>208</sup> The beliefs, therefore, need to be eradicated.<sup>209</sup>

Although the belief in witchcraft has not been upheld as a defence, the courts have treated the belief as a mitigating factor or extenuating circumstance during the sentencing phase.<sup>210</sup> Witchcraft beliefs were also treated as a suitable ground for appeal which often resulted in lighter sentencing.<sup>211</sup> Most witchcraft-related cases before the enactment of the Constitution were appeals against the death sentence, because, before 1991, the death penalty was mandatory for murder unless extenuating circumstances were present.<sup>212</sup>

In *R v Biyana*<sup>213</sup> the court acknowledged the widespread belief in witchcraft and was very doubtful as to whether the Europeans (at that stage the colonial powers) were entitled “to give unqualified condemnation for clinging to such beliefs.”<sup>214</sup> Lansdown JP expressed the hope that this belief would eventually be eradicated by education and religion, but whilst it exists and the belief is genuine it can provide a measure of mitigation and become an extenuating circumstance.<sup>215</sup> The court in *Biyana* described

---

<sup>205</sup> *R v Myeni* 1955 4 SA 196 (A) at 199; *Fundakubi* case (n203) at 819.

<sup>206</sup> *Ralushai et al* (n106) 7.

<sup>207</sup> *Terblanche* (n69) 192.

<sup>208</sup> *R v Kukubula* 1959 1 SA 286 (FC) at 287; *S v Ncube* 1975 (2) SA 390 (RA) at 391; *S v Bhumu* 1981 2 A 839 (ZA) at 841.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Hoctor* (n169) 382. See also *Minnaar* (n105) 6.

<sup>211</sup> *Niehaus* (n108) 100.

<sup>212</sup> *Terblanche* (n69) 185. During this period, extenuating circumstances were distinguished from mitigating factors. Since the death penalty was abolished, extenuating and aggravating circumstances are used interchangeably with mitigating and aggravating factors. See further *Terblanche* (n69) 185-186.

<sup>213</sup> *R v Biyana* 1938 EDL 310.

<sup>214</sup> *Id* at 311.

<sup>215</sup> *Id* at 312.



extenuating circumstances as a fact associated with the crime that morally diminishes the guilt of an accused.<sup>216</sup> In other words, his moral blameworthiness was lessened.

The cases decided after *Biyana* have consistently regarded the belief in witchcraft as a mitigating factor.<sup>217</sup> In *R v Fundakubi*<sup>218</sup> the position of the *Biyana*-case was confirmed, but the belief in witchcraft as a mitigation was qualified when Schreiner J stated that it cannot be assumed that the belief will always be an effective extenuating circumstance, for example, in cases where excessive cruelty was used the cruelty could outweigh the mitigating effect of the belief.<sup>219</sup> In *Fundakubi* the court reiterated the importance of the deterrence factor when passing sentence on those found guilty, and courts suggested that excessive leniency should consequently be avoided.<sup>220</sup> The court was also weary of the fact that the belief in witchcraft could be misused since it is liable to be abused.<sup>221</sup> In this case the court did not further expand on the belief as a mitigating factor, but it did, however, as Hoctor points out, raise the question of whether the belief in witchcraft will extend to mitigation in an instance where the accused harmed or killed a victim who allegedly (as believed by the accused) had threatened or killed another person who was not a near relative of the accused.<sup>222</sup>

Cases after *Biyana* and *Fundakubi* confirmed the belief in witchcraft as a mitigating factor but emphasized that each case had to be decided on the specific facts of that case. Through the cases, the courts developed a list of factors which could influence whether the belief in witchcraft would be mitigating.<sup>223</sup>

The first factor requires that the belief held by the accused must be genuine and deeply-rooted.<sup>224</sup> The more genuine and sincere the belief is, the more likely it will have a mitigating effect. What constitutes a genuine belief has been described as a condition

---

<sup>216</sup> *Biyana* case (n213) at 311; Hoctor (n169) 383.

<sup>217</sup> Hoctor (n169) 383.

<sup>218</sup> *Fundakubi* case (n203).

<sup>219</sup> *Id* at 819.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> Hoctor (n169) 384.

<sup>223</sup> Hoctor (n169) 385-386; Labuschagne (n145) 264-265.

<sup>224</sup> *Biyana* case (n213) at 311; *Fundakubi* case (n203) at 819; *S v Nxele* 1973 3 SA 753 at 757; *S v Ngubane* 1980 2 SA 741 (A) at 745; *S v Motsepa* 1991 2 SACR 462 (A) at 470.



precedent,<sup>225</sup> and, if the belief is intense, it induces a greater “fear or apprehension”<sup>226</sup> in the accused. The belief is also reflected through the way the person acts as he or she usually tries to prevent “some great evil that would either befall himself or befall his family or his community.”<sup>227</sup> The actions of the accused, such as consulting a diviner in order to establish who caused the misfortune, as in the *Ndhlovu*<sup>228</sup> case, is indicative of the genuineness of the belief. Hoctor lists two other factors that have been used in cases to establish whether the belief in witchcraft is genuine.<sup>229</sup> Firstly, the education level of the accused<sup>230</sup>, and, secondly, if the crime was committed as part of a group, the impact of de-individuation on the accused’s state of mind.<sup>231</sup> Often, if the accused comes from a primitive and rural society, the belief is considered to be more deeply-rooted as in *Mathoka* where the accused had only recently become part of a western-type community.<sup>232</sup>

The second factor to be taken into consideration in relation to the belief of witchcraft is whether the crime was committed with excessive cruelty or brutality which could negate the mitigating effect.<sup>233</sup> This is problematic since these crimes are usually cruel or brutal in nature.<sup>234</sup> In *Ndhlovu*, Macdonald JP expressed the opinion that caution should be used when considering this factor because, if the crime was committed in a “frenzied state of mind”, it could lead to brutality.<sup>235</sup> The cruelty could be indicative of the fear of

---

<sup>225</sup> *Nxele* case (n224) 757.

<sup>226</sup> *Ngubane* case (n224) at 745.

<sup>227</sup> *S v Sibanda* 1975 1 SA 966 (RA) at 967.

<sup>228</sup> *S v Ndhlovu and another* 1971 2 SA 27 (RA). In this case the appellant had consulted four different diviners (incorrectly referred to as witchdoctors in the case) in order to establish who had caused the paralysis of the second appellant’s wife, the miscarriages, and the stillborn baby and other misfortunes, such as the destruction of the first appellant’s hut.

<sup>229</sup> Hoctor (n169) 385.

<sup>230</sup> *S v Mavhungu* 1981 1 SA 56 (A); *S v Mathoka* 1992 2 SACR 443 (NC).

<sup>231</sup> *S v Matala* 1993 1 SACR 531 (A) at 538.

<sup>232</sup> *Mathoka* case (n230) at 450. The court describes it as “*hul het letterlik 15 jaar gelede uit die bosse uitgekome*.” (Translation: they came from the bush 15 years ago). This fact is why the court differentiated this case from other cases. The accused would not understand concepts such as imprisonment and suspended sentences. Their belief was mitigating to the extent that their sentences were totally suspended and community service was imposed. For a general discussion on this case see Prinsloo “Boesman-geloof in towery as strafversagende faktor” (1993) *J.S.Afr.L* 334.

<sup>233</sup> *Fundakubi* case (n203) at 819; *Motsepa* case (n224) at 470; *Matala* case (n232) at 539.

<sup>234</sup> See 3.3.2 below.

<sup>235</sup> *Ndhlovu* case (n228) at 30.



the phenomenon of witchcraft and could confirm the genuineness of the belief as stated above.<sup>236</sup>

In addition, the motive of the crime is another factor that could be taken into consideration, for example in cases such as *Sibanda*,<sup>237</sup> where the accused had killed the victim in order to obtain body parts for *muti*.<sup>238</sup> This crime was committed under the influence of the belief of witchcraft but with the motive of personal gain.<sup>239</sup> In cases like *Sibanda* the belief will not act as a mitigating factor.

Courts are also less likely to consider a belief in witchcraft to be an extenuating circumstance in cases where the crime committed results in the death or injury of an innocent bystander who was not a threat to the accused.<sup>240</sup> In *R v Myeni*<sup>241</sup> the accused set alight a hut with two women and two children inside it. He believed that one of the women inside was a witch who was responsible for the deaths of some of his family members. The alleged witch had escaped the fire, but the other three occupants had died as a result of it. The court held that his belief in witchcraft did not diminish his blameworthiness. His knowledge that the three other innocent victims were inside the hut overshadowed the belief in witchcraft.<sup>242</sup>

Courts also consider whether the fear or threat was immediate or whether there might have been another way to avert the threat.<sup>243</sup> Using the *Malaza*<sup>244</sup> case as an example, the accused killed the victim for *muti*. The victim in that case, as with other *muti*-killings, cannot be considered to have been a threat or responsible for the accused's misfortune in any way.<sup>245</sup> In *Ncana*<sup>246</sup>, the accused stated that he had killed the deceased because he believed the alleged witch was responsible for the death of his parents and uncle,

---

<sup>236</sup> *S v Lukwha* 1994 1 SACR 53 (A) at 59; *Ndhlovu* case (n228) at 30.

<sup>237</sup> *Sibanda* case (n227).

<sup>238</sup> See 3.2.3 below.

<sup>239</sup> *Sibanda* case (n227) at 967D-E; *Fundakubi* case (n203) at 820.

<sup>240</sup> *Myeni* case (n205) at 199; *Modisadife* case (n158) at 863; *S v Malaza* 1990 1 SACR 357 (A) at 359. See Hoctor (n169) 385; Labuschagne (n145) 265.

<sup>241</sup> *Myeni* case (n205).

<sup>242</sup> *Id* at 199.

<sup>243</sup> *R v Ncanana* 1948 4 SA 399 (A) at 407; *Modisadife* case (n158) at 863; *Malaza* case (n240) at 359; *Motsepa* case (n224) at 470. See Hoctor (n169) 385.

<sup>244</sup> *Malaza* case (240).

<sup>245</sup> *Id* at 359.

<sup>246</sup> *Ncanana* case (n243).



the last of whom to die had died seven years previously. In this case the court was not convinced that the accused had been motivated by any fear or threat given the time span that had elapsed.<sup>247</sup>

The last factor, mentioned by Kriegler in *Motsepa*,<sup>248</sup> was the relationship between the accused and the perceived threat.<sup>249</sup> In *Dikgale* the court had held that belief in witchcraft can act as a mitigating factor even if the witchcraft did not influence someone who is closely related to the accused.<sup>250</sup> This approach is in line with the belief that killing a witch can be an act or service to the community.<sup>251</sup>

In conclusion, these judgments all convey a utilitarian motive, that of the courts trying to effect social change through their judgments.<sup>252</sup> Although the main aim was to ‘civilise’ and eradicate the beliefs, the belief in witchcraft can still act as a mitigating factor. This was once again approved by Harms AJA in *S v Lukhwa* in one of the last pre-constitutional cases of this nature.<sup>253</sup> If the factors listed above negatively influence the accused, the belief alone can still be mitigating even if only to a limited degree.<sup>254</sup> Each case should always be judged on its own merits<sup>255</sup>, and often in these cases the court merely determines whether the belief in witchcraft had any effect on the offender’s blameworthiness.<sup>256</sup>

#### 2.4.2.2 Case law after the enactment of the interim and final Constitution

Cases decided after the adoption and commencement of the Constitution repeat the approach and reasoning of the courts in the pre-constitutional cases. None of the cases has referred to the Constitution, specifically the defendants’ right to culture. Cases such as *S v Magoro*<sup>257</sup> confirmed yet again that the belief in witchcraft can be a mitigating

---

<sup>247</sup> *Id* at 407.

<sup>248</sup> *Motsepa* case (n224).

<sup>249</sup> This was also raised obiter in the *Fundakubi* case (n203) at 820.

<sup>250</sup> *S v Dikgale* 1965 1 SA 209 (A) at 214.

<sup>251</sup> See 3.2.2 below.

<sup>252</sup> *Motshekga* (n196) 11; *Niehaus* (n108) 102.

<sup>253</sup> *Lukhwa* case (n236) at 57.

<sup>254</sup> *Motsepa* case (n224) at 470; *Lukhwa* case (n236) at 59.

<sup>255</sup> *Nxele* case (n224) at 757.

<sup>256</sup> *Fundakubi* case (n203) at 818; *Mojapelo* case (n204) at 260.

<sup>257</sup> *S v Magoro and others* 1996 2 SACR 359 (A).





circumstance, but it also expanded on the factors that could negatively influence the mitigating effect. In *Magoro*, the accused decided to go on a ‘witch-hunt’ and burn suspected witches in the village. The appeal court stated that the belief in witchcraft had been taken into account but certain factors, such as the defendant knowing the victim, made the acts more reprehensible.<sup>258</sup>

The factors were also confirmed in *S v Phokela*, where Smalberger JA stated that the moral blameworthiness of the accused can be reduced by a genuine belief in witchcraft.<sup>259</sup> But, as with the pre-constitutional cases, the judge in the *Phokela* case explicitly stated that these acts will not be tolerated in this civilised community.<sup>260</sup>

In *S v Phama* the accused had committed a double murder because he believed the deceased were responsible for the death of his cousin. The accused had consulted a diviner (witchdoctor) in order to find out who had caused the death of his cousin. The diviner indicated his neighbours as the culprits. When he subsequently confronted the neighbours he told them to bring back his cousin. When they could not do so, he shot and killed them.<sup>261</sup> The court held that he did so in frustration, anger, and a genuine belief in witchcraft.<sup>262</sup>

In this case, the court stressed the deterrent and preventive elements of the criminal justice system and, to some extent, the retributive element stating that:

“[M]y sentence should reflect the revulsion of the society,...., 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.”<sup>263</sup>

The judge distinguished this case from one where the accused is a tribesman from a remote district.<sup>264</sup> This indicated the judge’s disregard of cultural beliefs and the indication that he assumed that this belief is held only by primitive and uneducated

---

<sup>258</sup> *Id* at 367.

<sup>259</sup> *S v Phokela and another* 1995 PH H22 (A) 67 at 68.

<sup>260</sup> *Id* at 69.

<sup>261</sup> *S v Phama* 1997 1 SACR 485 (E) at 486.

<sup>262</sup> *Ibid.* In this case the court held that there could be no mitigation as the accused had not acted because of an imminent fear but, rather, out of vengeance.

<sup>263</sup> *Id* at 487.

<sup>264</sup> *Ibid.*



communities. The judgment is a reiteration of the abovementioned pre-constitutional cases where the courts considered the belief in witchcraft to be mere superstition and not part of a civilised community.

*Phama*<sup>265</sup> was used as an authority in the recent case of *S v Mbofi*<sup>266</sup> where the accused had genuinely believed, after he consulted a diviner, that his co-workers were the cause of his tuberculosis. The court stated that the *Phama* case must be applied with equal force in this case, because, although Mbofi was a farmworker and relatively uneducated, the court relied on his sophistication. He was not a tribesman from a remote district as was the case in *Phama*.<sup>267</sup> Although the court considered his belief in witchcraft “might be genuine”, he was expected to control his belief and to regulate his conduct accordingly.<sup>268</sup>

In the latest reported case on witchcraft, *S v Latha*, the court dealt with the mitigating effect of the belief in witchcraft.<sup>269</sup> In *Latha* the accused both pleaded guilty to the murder of their grandmother. The accused believed that the grandmother was a witch and that she had caused the death of the mother of the second accused and was bewitching them. The first accused had confronted the grandmother in her house and asked her why she was bewitching her family after which he started assaulting her. Kemp AJ admitted that he had no doubt that both the accused strongly believed that the deceased was a witch and possessed “extraordinary and evil powers”.<sup>270</sup> The court did not consider that the minimum sentence was appropriate, but was convinced that the accused had laboured “under a delusion”.<sup>271</sup> This case confirmed the mitigating effect of the belief in witchcraft.

It is evident from the above mentioned cases that courts are sceptical and not prepared to mitigate sentences because of the same belief about witchcraft as was the case in

---

<sup>265</sup> *Phama* case (n261).

<sup>266</sup> *S v Mbofi* 2005 JDR 0016 (C).

<sup>267</sup> *Id* at 12.

<sup>268</sup> *Ibid.*

<sup>269</sup> *Latha* case (n152).

<sup>270</sup> *Id* at para 15.

<sup>271</sup> *Id* at para 34.



the pre-constitutional cases of this nature.<sup>272</sup> Courts are placing a larger emphasis on aspects such as acculturation, the level of sophistication, and social standards when dealing with witchcraft-related killings.<sup>273</sup> Hoctor argues that this approach of scrutiny and less tolerance is a reflection of the amendments of section 51 of the Criminal Law Amendment Act 105 of 1997.<sup>274</sup> Although courts still assess and use the belief in witchcraft as a mitigating factor, witchcraft is viewed with more circumspection than it was in the pre-constitutional era. The utilitarian motive has remained, and, in light of the emphasised factors, courts are still heeding a ‘civilising mission’ in order to effect social change.

#### 2.4.3 Other legal responses towards witchcraft-related crimes

The Ralushai Commission Report has proposed the repeal of the Witchcraft Suppression Act and its replacement with new legislation known as the Witchcraft Control Act.<sup>275</sup> Comparing accusations of witchcraft in the current legislation where any person who names or indicates another person as a witch or wizard is committing an offence,<sup>276</sup> the new legislation changes the situation by stating that the accusations of witchcraft will be an offence only if the condition that the accusations are “without any reasonable or justifiable cause”<sup>277</sup> has been met. The approach is built on the premise that witchcraft does exist, and it is not merely an imaginary and superstitious belief.<sup>278</sup>

Except for the suggested Witchcraft Control Act, the Ralushai Commission made other recommendations including that, in terms of the existing legislation, the forced collection of money to consult a diviner to ‘sniff out’ witches should be discouraged and made a

---

<sup>272</sup> See discussion of cases in Hoctor (n106).

<sup>273</sup> *Id* at 388.

<sup>274</sup> Hoctor (n106) 389. See 2.4.3 below for the amendments of section 51 of the Criminal Law Amendment Act 105 of 1997.

<sup>275</sup> Ralushai *et al* (n106) 66.

<sup>276</sup> See 2.4.1 above.

<sup>277</sup> Ralushai *et al* (n169) 66; Harnischfeger (n134) 45.

<sup>278</sup> Ralushai *et al* (n169) 54-56. This proposed Act has been heavily criticized but this will not be discussed in this dissertation. For further reading on the criticisms, see Dederen *Killing is easier than paperwork: A critique of the commission of inquiry into witchcraft, violence and ritual murder in the Northern Province of the Republic of South Africa* (1996) PAA/AASA Conference: Pretoria, University of South Africa; Niehaus (n138) 67-74 and Harnischfeger (n134) 47-68.



criminal offence.<sup>279</sup> Furthermore, it recommended that the forced money collection to consult a lawyer in order to represent people charged with killing alleged witches be discouraged by the imposition of heavy sentences.<sup>280</sup> None of these recommendations has been implemented.

In 1998, the Commission on Gender Equality hosted a national conference on ending witchcraft violence in Limpopo (Northern Province).<sup>281</sup> At the end of the conference the *Thohoyandou Declaration on Ending Witchcraft Violence* was adopted.<sup>282</sup> This declaration is one of the first attempts to place the issue of witchcraft and witchcraft-related violence on the national political agenda without considering the beliefs as being absurd.<sup>283</sup> This declaration condemns witchcraft violence, and it focuses specifically on the effects on women and older people.<sup>284</sup> To prevent the violence, the Declaration proposes changes in policing, improving education, counselling for victims, the development of community mediation procedures, and other methods.<sup>285</sup> The *Thohoyandou Declaration* specifically states that there should be legislative reform as the Witchcraft Suppression Act may, in fact, be “fuelling witchcraft violence.”<sup>286</sup> It proposes a new act that still punishes imputations of witchcraft but protects those who are “falsely accused.”<sup>287</sup> In 2000 the Commission in response to this declaration introduced a draft Regulation of Baloyi (Witchcraft) Practices Act in Parliament, but until now this bill has not been enacted into law.<sup>288</sup>

In 2007, the Province of Mpumalanga introduced a new Witchcraft Suppression Bill in the provincial legislature. This Bill, similar to the current legislation, criminalizes the

---

<sup>279</sup> Ralushai *et al* (n106) 61.

<sup>280</sup> *Ibid.* Other recommendations, including the role of education and church, the role of chiefs, the role of traditional healers in combating witchcraft violence, will not be discussed as they do not fall within the ambit of legal responses but, rather, suggested social changes. For further readings on the recommendations see Ralushai *et al* (n106) 60-63.

<sup>281</sup> Ashforth (n112) 264 and Tebbe in Bennett *Traditional African religions in South African law* (2011) 169.

<sup>282</sup> Commission on Gender Equality *The Thohoyandou Declaration on Ending Witchcraft Violence* (1998) 2-4.

<sup>283</sup> Ashforth (n112) 264.

<sup>284</sup> Commission on Gender Equality (n282) 1-2.

<sup>285</sup> Commission on Gender Equality (n282) 2-5; Ashforth (n112) 264-265.

<sup>286</sup> Commission on Gender Equality (n282) 3.

<sup>287</sup> *Id* at 4.

<sup>288</sup> Tebbe (n281) 170; Niehaus (n138) 70.



accusations or imputations of witchcraft.<sup>289</sup> This Bill has not been adopted because of the heavy criticism drawn from the Traditional Healers Organization as well as the South African Pagan Council.<sup>290</sup>

The Minister approved the inclusion of Project 135, Review of Witchcraft Legislation, in the South African Law Reform Commission's (SALRC) programme on 23 March 2010.<sup>291</sup> To date, the Witchcraft Suppression Act has not been reviewed or amended since the amendment act 50 of 1970. All of the above recommendations have remained stagnant.

The only legal response (apart from the current Witchcraft Suppression Act and the case law) that has had an impact on witchcraft-related killings is the Criminal Law Amendment Act 105 of 1997 as amended by the Criminal Law Amendment Act 38 of 2007. Section 51, read with Part 1 of Schedule 2 of this act, prescribes the discretionary minimum sentence of life imprisonment for murders related to violations of sections 1(a)-(e) of the Witchcraft Suppression Act.

---

<sup>289</sup> Offences in the Witchcraft Suppression Bill of 2007 are listed section 2 and section 6. Section 2(1) provides that:

No person shall point, imply or direct that anybody practices witchcraft or has been bewitched by anybody.

Section 6(1) reads as follows:

Any person who conducts himself in the manner below shall be guilty of an offence:

(a) Imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;

(b) In circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or disappointment of any person or thing to any other person;

(c) Employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard;

(d) Professes a knowledge of witchcraft, or the use of charms, advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft;

(e) On the advice of any inyanga, witch-finder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operational any means or process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing; and

(f) For gain pretends to exercise or use any supernatural powers, witchcraft, sorcery or enchantment.

<sup>290</sup> Tebbe (n281) 171; Niehaus (n138) 70-71. For the criticism raised by the Pagan Council see <http://www.pagancouncil.co.za/node/66> (accessed on 7 February 2012).

<sup>291</sup> South African Law Reform Commission *Thirty eight annual report 2010/2011* 43-44.



## 2.5 Conclusion

Criminal law is more than statutes and the common law. It involves the interpretation of those statutes and common law. The interpreters face a considerable task, and they will inevitably be influenced by the legal culture that dominates at the current time. Legal culture, as explained above, changes and responds to new situations, but, in the case of witchcraft-related crimes, the way of doing things has simply been reproduced.

This chapter has examined customary law before the enactment of the Constitution where it was never fully recognised by the authorities and held an inferior position in comparison to common law and the Western legal system. At first, the authorities simply wished to civilise the indigenous people, but, later, customary law was used as a way of controlling the indigenous people and aiding segregation policies. The position of customary law has changed, and it is now considered to be equal to common law.

The Constitution not only improved the position of customary law but placed duties on other areas of the law. This chapter has demonstrated that, as a result, the Constitution has imposed the duty or goal of achieving a constitutionally legal culture. In the case of criminal law, the object has changed from merely maintaining peace and order by preventing crimes to doing so by furthering fundamental rights.

Taking into consideration the discussions on the legal responses towards witchcraft-related crimes, this object has not been reached. Firstly, the Witchcraft Suppression Act, which is simply a consolidation of colonial legislation, infringes on the right to culture and the freedom of religion of people. Despite the fact that many critics are of opinion that the Witchcraft Suppression Act fuelled witchcraft-related crimes, it has not been repealed or amended. This chapter has highlighted the problems associated with the Act and referred to the proposed changes. None of these changes has, however, been enforced and courts are still imposing severe sentences on the accused who contravene this Act.

During the analysis and delineation of cases dealing with witchcraft, furthermore, it became evident that the belief in witchcraft has never succeeded as a defence. The courts have, however, consistently applied the practice of using the belief as a



mitigating factor. The courts in pre-constitutional cases placed emphasis on rationality, and they wished to effect social change through the sentencing. The belief was considered to have a mitigating effect only because of the subjective determination of what constitutes a factor that can reduce the moral blameworthiness of the accused. The ultimate goal in the pre-constitutional cases remained the civilising of the natives and eradication of the belief.

In the cases decided after the enactment of the Constitution, the courts continued to consider the belief in witchcraft to be a mitigating factor, taking into consideration the factors developed throughout other cases. It became clear, in the analysis of the post-constitutional cases, that courts now treat the belief as less substantial, and they are even more wary of considering the belief as mitigating. The approach of post-constitutional cases suggests that the time span since the classic case of *Biyana*,<sup>292</sup> where the belief was first considered mitigating, was considered enough for its assimilation and acculturation into a more civilised and rational culture. The court still views the belief as part of a primitive, barbaric culture that belongs to tribesmen from a remote area.

The courts have not investigated the influence of the Constitution with respect to the right to culture, and they have failed to comply with their Constitutional duty. The duty does not necessarily imply that the accused will be excused, but rather that the fundamental rights of the accused and their effects should nonetheless be considered. In order to fulfil constitutional duty and change the legal culture of criminal law, it is submitted that a cultural defence needs to be formalised.

---

<sup>292</sup> *Biyana* case (n213).



## Chapter 3: African witchcraft and associated practices in South Africa

### 3.1 Introduction

“*Muthu ndi muthu nga munwe* (a person is a person only through other people).”<sup>1</sup>

This well-known TshiVenda saying illustrates that life, as is the case in most African communities, concentrates on the group. The philosophy underlying African culture differs from Western culture, as the African *Weltanschauung* recognizes that whatever happens to an individual happens to the whole group.<sup>2</sup> This way of life, or *Weltanschauung*, influences the way members of a specific community think and act.<sup>3</sup> The authorities, during the colonial and apartheid era, did not, however, embrace this difference and wanted the indigenous people to be assimilated into the dominant culture.<sup>4</sup>

The right to participate in, and enjoy the cultural life of your choice,<sup>5</sup> and the right to freedom of opinion, belief, and religion<sup>6</sup> are now protected by the Constitution, and forced assimilation can longer take place. It was submitted above<sup>7</sup> that in order to bridge the gap in criminal law between the right to participate in, and enjoy, the cultural life of one’s choice, and the fact that culture influences the way an individual thinks and acts, the cultural defence should be formalised. The cultural defence, however, hinges

---

<sup>1</sup> This is a well-known saying in the TshiVenda society. Pelgrim *Witchcraft and policing: South Africa Police Service attitudes towards witchcraft and witchcraft-related crime in the Northern Province* (2003) 26.

<sup>2</sup> Gathogo “The challenge and reconstructive impact of African Religion in South Africa today” 2008 *Journal of Ecumenical Studies* 581.

<sup>3</sup> Renteln *The cultural defense* (2004) 11; Shweder in Stigler *et al* (eds.) *Cultural psychology: Essays on comparative human development* (1990) 1.

<sup>4</sup> Tlhagale “Inculturation: Bringing the African culture into the church” 2000 *Emory International Law Review* 1249.

<sup>5</sup> Section 30 and 31 of the Constitution, 1996.

<sup>6</sup> Sections 15 and 31 of the Constitution, 1996.

<sup>7</sup> See 2.5 above.



on the fact that culture influences and changes the human psyche.<sup>8</sup> As a result, culture needs to be defined in order to apply the cultural defence properly.

A working definition of culture will be developed in this chapter by analysing the definitions of culture that have been developed by cultural anthropologists, the national legislator, academics, court cases, as well as by examining the different ways that the Constitution has used the term 'culture.' Culture still remains a notoriously difficult concept to define, and it is often conflated with the term religion.<sup>9</sup> In order to distinguish between culture and religion, the definitions of the term religion will, as in the case of culture, be analysed in order to develop a working definition of religion.

During the course of this research, the belief in witchcraft will be used to illustrate the need for, and the use of, the cultural defence in the South African context. Whether the belief in witchcraft falls within the purview of culture or religion will be determined by using the definition of culture and religion developed in this chapter. This will be done specifically in relation to African Traditional Religion.

The requirements for the cultural defence are not limited only to the knowledge of how culture can influence an individual.<sup>10</sup> The cultural defence also requires there to be a clash between two cultural groups, the minority and majority (or dominant) culture. This chapter will distinguish between minority and majority culture by defining the concepts, and, based on the definitions, it will further be argued that the cultural belief in African witchcraft forms an intrinsic part of the minority culture.

Witchcraft is a belief that is found across South Africa, with the most prominent region where it is practised being Limpopo.<sup>11</sup> Differences within the belief of witchcraft exist among the different cultural groups. The nature and practice of witchcraft will be examined in general and will not be limited to any particular ethnic group. Witchcraft-killings are often confused with *muti*-murders as both emanate from the same belief in the supernatural realm. Witchcraft-killings and *muti*-murders, however, differ

---

<sup>8</sup> Shweder (n3) 1.

<sup>9</sup> Amoah in Bennett (ed.) *Traditional African Religions in South African Law* (2011) 37.

<sup>10</sup> See 4.3.1 below.

<sup>11</sup> Ralushai *et al Report of the Commission of inquiry into witchcraft violence and ritual murders in the Northern Province of South Africa* (1996) 5.

considerably with respect to their motives. The differences between these two crimes will be highlighted, and, as a result of this analysis, it will be argued that the two crimes should be approached differently.

The chapter will conclude by assessing the current position regarding legal aspects and criminal investigations, as well as the medical forensic aspects surrounding witchcraft-related killings. It will be submitted that medical forensic aspects of the witchcraft-killings will be able to assist the courts in the proper application of the cultural defence.

## 3.2 The concept of culture

### 3.2.1 Defining culture

The meaning of culture and the extent of its parameters have been debated primarily by anthropologists over the years.<sup>12</sup> Attempts at the definition of the concept of culture, however, no longer fall exclusively in the domain of anthropologists, but have increasingly become part of the legal field. The founder of cultural anthropology, Tylor, defined culture as follows:

“Culture or civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and other capabilities and habits acquired by man as a member of society.”<sup>13</sup>

Capotorti’s definition of culture in the UNESCO’s *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* is similar to that of Tylor.<sup>14</sup> Both

---

<sup>12</sup> Du Plessis & Rautenbach state that there are very divergent views of what constitutes culture as illustrated by the fact that, in the research conducted in the 1950s, 164 definitions for culture were listed. Du Plessis & Rautenbach “Legal perspectives on the role of culture in sustainable development” 2010 *PELJ* 31.

<sup>13</sup> Tylor *Primitive Culture* (Vol 1) (1924) 1.

<sup>14</sup> According to Capotorti in UNESCO’s publication of the *Study of the rights on persons belonging to ethnic, religious and linguistic minorities* (1977) 79-80 culture is defined as follows:

“Whereas race is strictly a question of heredity, culture is essentially one of tradition in the broadest sense, which includes the formal training of the young in a body of knowledge or a creed, the inheriting of customs or attitudes from previous generations, the borrowing of techniques or fashions from other countries, the spread of opinions through propaganda or conversation, the ‘adoption - or ‘selling’ - of new products or devices, or even the circulation of legends or jests by word of mouth. In other words, tradition in this sense covers provinces clearly unconnected with biological heredity and all alike consisting in the transmission, by word of mouth, image or mere example, of characteristics which, taken together, differentiate



definitions place an emphasis on the fact that culture is not the result of biological heredity but is acquired.<sup>15</sup> Capotorti expands on Tylor's definition by describing the different ways this 'complex whole' is transferred, or acquired, which includes, amongst other things, word of mouth, gestures, and images.<sup>16</sup> The transfer of culture happens through a reasonable length of time.<sup>17</sup>

As this 'complex whole' is carried over from one generation to the next it forms part of the heritage of a specific culture, and it provides certain "required signposts and meanings for behaviours and social relations in everyday life."<sup>18</sup> Culture can, therefore, be seen as providing distinctions among different groups of people based on such characteristics as their beliefs, language, and knowledge. Van Broeck uses a definition, as proposed by Roosens, where culture is described as a structure that enables human beings to orientate themselves towards their surroundings. This system forms part of the heritage of a specific group, and it is handed down from generation to generation.<sup>19</sup> In other words, these signposts are used not only to distinguish between members within a society, but also to guide individuals within a society.<sup>20</sup>

In accordance with the above-mentioned definitions of culture, culture, at its core, is a communal feature, as a community is needed to sustain a particular culture.<sup>21</sup> Although it is communal, individual people within the community assert and express culture in

---

a milieu, society or group of societies throughout a period of reasonable length and thus constitute its culture.

As culture, then, comprehends all that is inherited or transmitted through society, it follows that its individual elements are proportionately diverse. They include not only beliefs, knowledge, sentiments and literature (and illiterate peoples often have an immensely rich oral literature), but the language or other systems of symbols which are their vehicles. Other elements are the rules of kinship, methods of education, forms of government and all the fashions followed in social relations. Gestures, bodily attitudes and even facial expressions are also included, since they are in large measure acquired by the community through education or imitation; and so, among the material elements, are fashions, housing and clothing and ranges of tools, manufactures and artistic production, all of which are to some extent traditional."

<sup>15</sup> Capotorti (n14) 79.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Iya "Culture as a tool of division and oppression: Towards a meaningful role for culture and customary law in a united South Africa" 2008 *Comparative and International Law Journal of South Africa* 231.

<sup>19</sup> Roosens *Sociale en culturele antropologie: Een kritische belichting van enkele hoogtepunten* (1997) 32-33.

<sup>20</sup> Currie and De Waal *The Bill of Rights handbook* (2005) 629; Iya (n18) 231.

<sup>21</sup> Currie and De Waal (n20) 624.



various ways.<sup>22</sup> Capotorti describes it in this way, “[a]s culture, then, comprehends all that is inherited or transmitted through society, it follows that its individual elements are proportionately diverse.”<sup>23</sup> Diversity, therefore, exists across cultures as well as within them, because communities are comprised of individuals.<sup>24</sup>

The national legislature has been faced with the task of defining the concept of culture on several occasions.<sup>25</sup> Culture was defined in the *White Paper on Arts, Culture and Heritage* 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.”<sup>26</sup>

The Culture Promotion Act<sup>27</sup> and the National Heritage Resources Act<sup>28</sup> each offer a very wide definition of culture which focuses primarily on culture as an artistic creation. This does not, however, assist in an understanding of the concept of culture in the context of a cultural defence. The 1996 Constitution uses the term ‘culture’ in various sections,<sup>29</sup> but it does not define culture. Rautenbach *et al* submit that the term ‘culture’ is used in three different ways in the Constitution.<sup>30</sup> The first is where culture refers to “a specific tradition based on ethics.”<sup>31</sup> This means that a situation could be developed or improved by adhering to a specific culture, for example a culture of respect or a culture founded on human rights.<sup>32</sup>

---

<sup>22</sup> Amoah (n9) 52, 53; *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) at para 54; Renteln (n3) 11.

<sup>23</sup> Capotorti (n14) 79.

<sup>24</sup> Renteln (n3) 11; Sunder “Cultural Dissent” 2001 *Stanford Law Review* 500.

<sup>25</sup> Du Plessis and Rautenbach (n12) 32-33.

<sup>26</sup> White Paper on Arts, Culture and Heritage, 4 June 1996.

<sup>27</sup> The Culture Promotion Act 35 of 1983

<sup>28</sup> The National Heritage Resources Act 25 of 1999

<sup>29</sup> Sections 9, 30, 31, 181, 184-186, and 235 of the Constitution, 1996.

<sup>30</sup> Rautenbach *et al* *Culture (and religion) in constitutional adjudication* Paper delivered at the 5<sup>th</sup> Colloquium on Constitution and Law, Johannesburg 16 November 2002, 3-7.

<sup>31</sup> *Id* at 3.

<sup>32</sup> Rautenbach *et al* (n30) illustrate the use of the concept of ‘culture’ as adhering to a specific culture with examples from Constitutional Court cases. Examples listed include the *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) case where the court deals in paragraph 27 with, “[A] society based on constitutionally protected culture of openness.” Other cases include *Khumalo*



The second way that the concept of culture has been used is by describing artistic creations or “aesthetical expressions.”<sup>33</sup> This is the ‘art’ that Tylor<sup>34</sup> refers to and it includes, but is not limited to, performing arts, literature, and music. The last way in which the concept ‘culture’ is used is the anthropological way, and here it is used to distinguish one particular group of people from another.<sup>35</sup> This definition reiterates the definitions of Tylor and Capotorti that certain characteristics are used to draw a distinction and provide signposts for individuals.<sup>36</sup> Currie and De Waal state that section 30 and 31 in the Constitution<sup>37</sup> refer to culture as a source of identity.<sup>38</sup> It is these two sections that provide an impetus for the formalisation of the cultural defence.

The concept of culture, specifically in context of section 30 and 31, was defined in the Constitutional Court case *MEC for Education: KwaZulu Natal v Pillay*.<sup>39</sup> O’Regan J firstly describes culture as a very broad concept, but ascribes three meanings to culture.<sup>40</sup> Culture, firstly, includes artistic creations and, secondly, culture involves television, film, radio, and handicraft.<sup>41</sup> O’Regan emphasises that the third meaning ascribed to culture is the anthropological understanding, the way of life of a particular community, and this is what is referred to in sections 30 and 31 in the Constitution.<sup>42</sup> These three meanings resonate with the meanings that Rautenbach *et al* have given except for the use of culture based on specific ethics.

Drawing on all the definitions above, it can be argued that, essentially, for legal purposes there are two sets of cultural aspects (or values) that define culture.<sup>43</sup> Firstly, culture can be seen as part of the process of creating artistic, intellectual, or scientific

---

*v Holomisa* 2002 5 SA 401 (CC) at par 24; *S v Walters* 2002 4 SA 613 (CC) at par 6; *S v Williams* 1995 3 SA 632 (CC) at par 8.

<sup>33</sup> Rautenbach *et al* (n30) 4.

<sup>34</sup> See 3.2.1 above.

<sup>35</sup> Rautenbach *et al* (n30) 4.

<sup>36</sup> *Id* at 4-5.

<sup>37</sup> Constitution, 1996.

<sup>38</sup> Currie and De Waal (n20) 629.

<sup>39</sup> *Pillay* case (22).

<sup>40</sup> *Id* at para 149.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Iya (n18) 231; Bennett *Customary Law in South Africa* (2004) 78.



works,<sup>44</sup> and, secondly, culture can include the values or the store of knowledge, morals, and beliefs that humans acquire as part of their heritage.<sup>45</sup>

Van Broeck argues that, in order to have a real ‘working definition’ which allows for the right to culture to be applied properly, the concept of culture needs to be vague and broad.<sup>46</sup> Evaluating the definitions of culture given by Tylor, Capotorti, legislation, and case law, it is clear that culture is a very wide concept and denotes the “collective term describing the human condition.”<sup>47</sup> As such, for the purposes of this research the definition of Van Broeck which describes culture as “an all-encompassing system of thinking, doing, and evaluating”<sup>48</sup> will be used.

### 3.2.2 Defining religion

The Constitution, in section 15(1), protects the right to freedom of religion, conscience, thought, belief, and opinion, and section 30 protects the right to participation in the cultural life of choice. The fact that the right to religious freedom and the right to participate and enjoy a culture of your choice are protected in different sections indicates that the Constitution differentiates between culture and religion. A distinction should, therefore, be drawn between religion and culture. Religion, as with culture, is, however, a difficult concept to define, and many definitions have been given to it.

Religion has been described as containing a element of mystery and considered to be concerned with a divinity.<sup>49</sup> Müller described religion as “a struggle to conceive the inconceivable, to utter the unutterable, a longing after the Infinite.”<sup>50</sup> Although this rings true for certain religions, it is not always the case, and, as a result, Durkheim, the father of sociology, defines religion in a wider sense.<sup>51</sup>

---

<sup>44</sup> *Ibid.*

<sup>45</sup> Iya (n18) 231; Bennett (n43) 79.

<sup>46</sup> Van Broeck “Cultural defence and culturally motivated crimes (cultural offences)” 2001 *European Journal of Crime, Criminal Law and Criminal Justice* 9-10. See 7.2.1 below for a discussion on the possible problems arising from a vague definition of culture.

<sup>47</sup> Rautenbach *et al* (n30) 7.

<sup>48</sup> Van Broeck (n46) 9.

<sup>49</sup> Tylor (n13) 424 described religion as “...the belief in Spiritual Beings.” See also Durkheim *The elementary forms of the religious life* (1971) 24-29.

<sup>50</sup> Müller *Introduction to the science of religion* (1882) 18.

<sup>51</sup> See in general Durkheim (n49).



Durkheim defines religion as combining four elements, beliefs,<sup>52</sup> practices,<sup>53</sup> sacred objects,<sup>54</sup> and the church.<sup>55</sup> Using the four elements, Durkheim arrived at the following the definition for religion:

“A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden - beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.”<sup>56</sup>

Religion and the freedom to practise religion, as protected by the Constitution,<sup>57</sup> have not been defined in any legislation, but have been dealt with in many Constitutional Court cases.<sup>58</sup> In *S v Lawrence*, *S v Negal*, *S v Solberg*<sup>59</sup> Chaskalson P referred to the definition of freedom of religion in the case *Big M Drug Mart*,<sup>60</sup> which reads as follows:

“The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”<sup>61</sup>

Although this definition assists in understanding section 15(1), it does not explain what constitutes religious belief but it does indicate that the manifestation of religious belief can be of an associative nature. In *Christian Education South Africa v Minister of Education* Sachs J, held that, although religious practice often involves fellow believers,

---

<sup>52</sup> Durkheim explains that beliefs are used to give expression to the sacred things or objects. Durkheim (n49) 41.

<sup>53</sup> Practices or rites are, according to Durkheim, rules of how individuals should conduct themselves when in the presence of sacred objects. Durkheim (n49) 41.

<sup>54</sup> According to Durkheim, religions are characterised by the distinction between sacred things and profane things. He describes sacred things as objects which the “interdictions protect and isolate.” Durkheim (n49) 41.

<sup>55</sup> A church is seen by Durkheim as communal aspect of the religion, the members of which are united by a common belief. Durkheim (n49) 43-44.

<sup>56</sup> Durkheim (n49) 47.

<sup>57</sup> Section 15 of the Constitution, 1996, and section 14 of the interim Constitution, 1993.

<sup>58</sup> See for example *S v Lawrence*, *S v Negal*, *S v Solberg* 1997 (4) SA 1176 (CC); *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC); *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC); *Pillay* case (n22).

<sup>59</sup> *Lawrence* case (58). The case dealt with the constitutionality, in terms of the 1993 Constitution, of certain provisions (or a certain provision) in the Liquor Act 27 of 1989. The court had to determine whether the provisions infringed on the right to religious freedom in section 14 of the interim Constitution.

<sup>60</sup> *R v Big M Drug Mart* (1985) 13 CRR 64.

<sup>61</sup> *Lawrence* case (n58) at para 92 quoting *Big M Drug Mart* case (n60) at 97.



religious belief has both “an individual and a collective dimension.”<sup>62</sup> Considering case law, religious beliefs are personal beliefs, treated in an individualistic sense, and are not necessarily associative,<sup>63</sup> unlike culture which involves associative practices and not individual beliefs.<sup>64</sup> This differs from the definition of Durkheim which views religion as collective.<sup>65</sup>

Non-believers view religious beliefs as illogical or bizarre, however, as Ngcobo J in *Prince v President of the Law Society of the Cape of Good Hope* stated “[this] does not detract from the fact that these are religious beliefs.”<sup>66</sup> Religion is, therefore, something which is spiritual, irrational, demands faith, obedience to a higher power (in certain religions),<sup>67</sup> and it is also considered to be comprised of personal beliefs. The explanation of what constitutes religion links with the definition of Durkheim above, yet religion, as Sachs J in *Christian Education*-case stated, is much more than a mere belief or doctrine.<sup>68</sup> Religion is, in fact, “part of a way of life, of people’s temper and culture.”<sup>69</sup>

### 3.2.3 Religion and culture in context of Traditional African Religion

African Traditional Religion is considered to be the indigenous religion of African people.<sup>70</sup> The description Sachs J gave of the concept of religion in *Christian Education*,<sup>71</sup> reminds one of Mbiti’s explanation of African Traditional Religion as just

---

<sup>62</sup> *Christian Education* case (n58) at para 19.

<sup>63</sup> *Pillay* case (n22) at para 146; *Prince* case (n58) at 143.

<sup>64</sup> *Pillay* case (n22) at 144.

<sup>65</sup> Durkheim (n49) 147.

<sup>66</sup> *Prince* case (n58) at para 42.

<sup>67</sup> Amoah (n9) 45.

<sup>68</sup> *Christian Education* case (n58) at para 33.

<sup>69</sup> *Id.* This is emphasized further on in the case where Sachs states at para 36:

“For many believers. their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. ... 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.”

<sup>70</sup> Awolalu in Olupona (ed.) *African Traditional Religions in Contemporary Society* (1991) 111. Debates exist about whether or not it is correct to refer to African Religion as traditional, i.e. African Traditional Religions. For purposes of this dissertation this debate will not be addressed. See, in general, Mbiti *Introduction to African Religion* (1975); Chidester *Religions of South Africa* (1992); Olupona (ed.) *African Traditional Religions in Contemporary Society* (1991); Bourdillon *Religion and society: A text for Africa* (1990).

<sup>71</sup> *Christian Education* case (n58) at para 33.





being a 'normal way' of looking at, and experiencing, the world for those who believe in it.<sup>72</sup> African Traditional Religion is based on different elements that together form and constitute the meaning of this particular religion.<sup>73</sup> These elements are a belief in a god, divinities, and nature spirits, rituals and beliefs focussed around ancestral spirits, a belief in magic, and the fear of witchcraft.<sup>74</sup>

Mulago describes the 'African way of life', or the underlying philosophy of African Traditional Religion, as being understood in two ways. Firstly, there exists a community in blood, and, secondly, a community in possessions.<sup>75</sup> An individual, therefore, is never seen as a mere individual but always as part of a community, sharing in the community of blood and the community in possession.<sup>76</sup> All the acts committed by a person are considered to bind a person as a communal being to the other members of his or her society.<sup>77</sup> The quintessence of the *Weltanschauung* of African Traditional Religion is, therefore, built on the concept of *ubuntu*.<sup>78</sup>

African Traditional Religion, unlike many other religions, is not recorded in books or in any other material way, but is, however, carried over from one generation to the next by way of oral tradition. Accordingly, African Traditional Religion has been described as being found inscribed in the hearts of people and, therefore, embedded in their culture.<sup>79</sup> As a result, Mutua describes the difference between African religion and African culture as imperceptible, because, for Africans, this difference does not exist.<sup>80</sup> The concepts 'culture' and 'religion' are interwoven in African culture and form an

---

<sup>72</sup> Mbiti (n70) 12.

<sup>73</sup> Mbiti (n70) 10-11; Morris *Religion and anthropology: A critical introduction* (2006) 149; Mulago in Olupona (ed.) *African Traditional Religions in contemporary society* (1991) 119-120.

<sup>74</sup> Idowu *African Traditional Religion: A definition* (1973) 139; Morris (n73) 149.

<sup>75</sup> Mulago (n73) 121.

<sup>76</sup> Oosthuizen in Olupona (ed.) *African Traditional Religions in Contemporary Society* (1991) 41.

<sup>77</sup> *Ibid.*

<sup>78</sup> Oosthuizen (n76) 41. Mokgoro in Cornell and Muvangua (eds.) *Ubuntu and the law: African ideals and post-Apartheid jurisprudence* (2012) 318. *Ubuntu* is a Nguni word that has been described as a philosophy of life and, in its fundamental sense, refers to humanity or humanness. The saying *ubuntu ngumuntu ngabantu, motho ke motho lo batho ba bangwe* is translated as 'a human being is a human being because of other human beings.' *Ubuntu* cannot be categorized or defined, but Mokgoro states that some of the key social values that underlie this concept include, "group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity." See in general on *ubuntu* Cornell and Muvhangua (eds.) *Ubuntu and the law: African ideals and post-Apartheid jurisprudence* (2012).

<sup>79</sup> Feris and Moitui in Bennett (ed.) *Traditional African Religions in South African Law* (2011) 204.

<sup>80</sup> Mutua as quoted by Amoah (n9) 51.



integral part of the African ethos.<sup>81</sup> The specific term ‘religion’ does not even exist in many African languages.<sup>82</sup>

The distinction between culture and religion is considered to be rooted in a Western framework,<sup>83</sup> because the separation of the concepts of religion and culture is, as explained above, contrary to the way they are practised in Africa. The belief in witchcraft forms part of the components of African Traditional Religion.<sup>84</sup> Witchcraft can, however, be seen to be a constituent part of African culture. Witchcraft is a way of life and looking at the world<sup>85</sup> and it falls in the purview of the community and not the individual.<sup>86</sup> The belief in (African) witchcraft can, therefore, be used to illustrate the need for the formalisation of the cultural defence.

### 3.2.4 Minority and majority cultures

The imperative behind advocating the employment of the cultural defence in other jurisdictions started as a result of trying to protect the right to culture of minority groups.<sup>87</sup> As a result, one of the requirements of the cultural defence is that the individual who commits a crime should form part of the minority culture before he or she can invoke the defence.<sup>88</sup> In jurisdictions, such as the United States of America, the application of the cultural defence would be centred around cultural beliefs held by immigrants.<sup>89</sup> The cultural minority, in other words the immigrants, correspond with the numerical minority in that country, for example the United States of America.<sup>90</sup> In South Africa, the belief in African witchcraft is held by cultural groups who belong to the indigenous African heritage and form part of the numerical majority.<sup>91</sup> This appears to

---

<sup>81</sup> Amoah (n9) 37, 55; Gathogo (n2) 577.

<sup>82</sup> Bennett in Bennett (ed.) *Traditional African Religions in South African Law* (2011) 10.

<sup>83</sup> Rautenbach (n30) 80; Amoah (n9) 37.

<sup>84</sup> Morris (n73) 149; Chidester (n70) 4.

<sup>85</sup> Ashforth *Witchcraft, violence, and democracy in South Africa* (2005) 236. See also Mbiti (n70) 12.

<sup>86</sup> *Pillay case* (n22) at para 154.

<sup>87</sup> Renteln (n3) 1; Bennett “The cultural defence and the custom of *Thwala* in South Africa” 2010 *University of Botswana Law Review* 4.

<sup>88</sup> See 4.3.1 below.

<sup>89</sup> Renteln (n3) 185.

<sup>90</sup> *Ibid.*

<sup>91</sup> Bennett (n87) 14.



create a conundrum as to whether the belief in African witchcraft can be used when invoking the cultural defence.

The 'minority' culture in the context of the cultural defence does, however, not refer to quantity; in other words, whether the group forms part of the numerical minority.<sup>92</sup> Van Broeck describes 'minority' culture as relating to the 'legal culture'.<sup>93</sup> The dominant or 'majority' culture provides the foundation on which the legal system has been built.<sup>94</sup> In South Africa, the ideological basis of the legal culture is based on a Western framework and is drawn from Roman-Dutch and English law.<sup>95</sup> Currie and De Waal state that minority culture is simply a reflection that a community is at odds with the rest of society.<sup>96</sup> In the case of African Traditional Religion, specifically the belief in witchcraft, it forms part of the minority culture despite the fact that the cultural groups constitute a numerical majority.<sup>97</sup>

### 3.3 Witchcraft and associated practices in South Africa

#### 3.3.1 Introduction

Lord Hailey wrote that "the subject of witchcraft is an outstanding problem of the law giver in Africa."<sup>98</sup> Although written in 1938,<sup>99</sup> witchcraft-related crimes still remain a problem today. In Limpopo<sup>100</sup>, for example, more than 389 witchcraft-related killings occurred between 1985 and 1995.<sup>101</sup> The escalation in the killings, during 1985 and 1995, led to the appointment of a commission during March 1995 by the Executive Council of the then Northern Province. This commission was headed by Professor

---

<sup>92</sup> Van Broeck (n46) 5; Bennett (n87) 14.

<sup>93</sup> Van Broeck (n46) 5. See 2.1 above on the 'legal culture' in South Africa.

<sup>94</sup> Van Broeck (n46) 5.

<sup>95</sup> *Ibid.*

<sup>96</sup> Currie and De Waal (n20) 629.

<sup>97</sup> Chanock *The Making of the South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001) 114.

<sup>98</sup> Hailey *African survey* (1938) 293 as quoted by Chanock (n97) 321.

<sup>99</sup> Hailey (n98).

<sup>100</sup> Previously known as the Northern Province.

<sup>101</sup> Niehaus in Hund (ed.) *Witchcraft, violence and the law in South Africa* (2003) 93.



Victor Ralushai, and its aim was to investigate the witchcraft-related violence and ritual murders within that province and provide possible solutions.<sup>102</sup>

As explained above, the colonial authorities, as well as the Apartheid government, wanted to ‘civilize’ the indigenous people through education and eradicate the belief in witchcraft.<sup>103</sup> Throughout the years, more and more members of society were educated in a system that mirrors the Western framework.<sup>104</sup> As a result, many people believe that African Traditional Religion, and by implication the belief in witchcraft, does not exist anymore, and especially not in urban areas.<sup>105</sup> Ellis and Ter Haar argue that the evidence suggests the opposite.<sup>106</sup> Even people who live in cities or work in the modern economic sector still draw from these beliefs in their everyday activities, if (of course) they form part of their cultural heritage.<sup>107</sup> Even within a changing society, the belief in witchcraft still has a firm grip on many because of the deeply-embedded cultural beliefs.<sup>108</sup>

The belief in witchcraft stretches across South Africa with the most prominent region being Limpopo.<sup>109</sup> There are differences in the manifestation of the belief in witchcraft in each of the different cultural groups. The discussion below will, however, examine the salient features of the belief in witchcraft, and indicate differences only where it is considered necessary. Specific manifestations of the belief that have emerged in case

---

<sup>102</sup> Niehaus *et al* *Witchcraft, power and politics: Exploring the occult in the South African Lowveld* (2001) 183.

<sup>103</sup> See 2.2 above.

<sup>104</sup> See 2.2.1 above.

<sup>105</sup> Ralushai *et al* (n11) 5.

<sup>106</sup> Ellis and Ter Haar “Religion and Politics in Sub-Saharan Africa” 1998 *Journal of Modern African Studies* 177.

<sup>107</sup> Ellis and Ter Haar (n106) 177. The argument by Ellis and Ter Haar has been put forward by other academics as well. Peltzer conducted a study in order to determine the perceptions on the Witchcraft Suppression Act 3 of 1957. During his research, the sample of 200 adults in the research group consisted of 100 adults from an urban area and 100 from a rural area. The results indicated that one quarter of the participants in total witnessed witchcraft among friends, work mates, and strangers. Of this quarter, almost half was from the urban areas. See Peltzer “Community perceptions on the Witchcraft Suppression Act in South Africa” 2000 *SACJ* 312 for further information on how this study was conducted. See also Niehaus in Moore and Sanders (eds.) *Magical interpretations, material realities: Modernity, witchcraft and the occult in postcolonial Africa* (2001) 199; Bähre in Hunt (ed.) *Indigenous religions* (2010) 152 -153.

<sup>108</sup> Tlhagale (n4) 1258.

<sup>109</sup> Peltzer (n107) 312.



law<sup>110</sup> will also be examined below. It is necessary to comprehend the nature and practice of witchcraft in order to grasp the motivation of the actions of the accused in witchcraft-related crimes.<sup>111</sup>

### 3.3.2 Nature and practice of witchcraft in South Africa

Understanding the belief in witchcraft, as Masondo states, provides a window into the reality of *ubuntu*.<sup>112</sup> The description of witchcraft by Ashforth resonates in the statement made by Masondo. Ashforth, after living for many years in Soweto and conducting research into witchcraft, described the belief in witchcraft as the negative corollary to *ubuntu*, “I am because we are”, adding the words “because we can destroy you.”<sup>113</sup>

The definition of witchcraft can vary, depending on the person describing it, or the place or the time in which it is experienced,<sup>114</sup> but for most African societies the above mentioned rings true. The evil or misfortune caused by witchcraft disturbs the harmony of the group as a whole, because whatever happens to the individual happens to the whole group.<sup>115</sup> Misfortune and losses that occur in the community are attributed to witchcraft.<sup>116</sup> The VhaVenda saying illustrates this, “*A huna tshi no da nga tshothe*” (Nothing simply happens by itself).<sup>117</sup>

---

<sup>110</sup> See 2.4.2 above.

<sup>111</sup> Pelgrim (n1) 30.

<sup>112</sup> Masondo in Bennett (ed.) *Traditional African Religions in South African Law* (2011) 27.

<sup>113</sup> Ashforth (n85) 84-87.

<sup>114</sup> Tebbe in Bennett (ed.) *Traditional African Religions in South African Law* (2011) 160.

<sup>115</sup> Pelgrim (n1) 26; Gathogo (n2) 577.

<sup>116</sup> Labuschagne “Geloof in toorkuns: ‘n Morele dilemma vir die strafreg?” (1990) 3 *SACJ* 248; Ganis “Political and social implications of witchcraft and legitimacy in South Africa” 2005 *Africa, LX* 362; Bourdillon (n70) 187; Chidester (70) 14; Niehaus in Hunt (ed.) *Indigenous religions* (2010) 123. Many cases of witchcraft-related crimes illustrate the fact that witches have been killed after specific misfortunes and/or losses that occurred in the defendant’s life were attributed to the deceased (i.e. the alleged witch). In *S v Mokonto* 1971 2 SA 319 A the accused believed that the death of his brother, who had died in a motor vehicle accident, was caused by the deceased, an alleged witch. In both *R v Magebeni* 1911 NHC 107 and *R v Usiyeka* 1912 NHC 98 the defendants believed that the sickness at their kraals was a result of witchcraft. In *S v Ndhlovu* 1971 1 SA 30 (RA) the defendant believed that the stillborn child and miscarriages his wife suffered were because his father, a witch (wizard), bewitched them. See 2.4.2 above for a further discussion on case law related to witchcraft-related killings.

<sup>117</sup> Pelgrim (n1) 38.



Junod explains that magic, which includes the supernatural powers used by witches, means,

“all the rites, practices, and conceptions which aim at dealing with hostile, neutral, or favourable influences, either impersonal forces of the Nature, or living men acting as wizards, or personal spirits whether ancestor-gods of the hostile ghosts which are supposed to take possession of their victims.”<sup>118</sup>

Witchcraft is a human action considered to be driven by the emotion of hate, particularly hate that emerges from envy and jealousy.<sup>119</sup> Witches when practising witchcraft use magic, or supernatural powers, as explained by Junod, but use it to benefit only themselves and harm others.<sup>120</sup> As a result witches are considered to be the embodiment of evil.<sup>121</sup>

In determining who constitutes a witch, the English word can create confusion as a ‘witch’ is gender specific and confined to women only.<sup>122</sup> The male equivalent is ‘wizard’. In Sesotho the word *moloi* (pl. *baloi*) is derived from the verb *u loya*, which means to bewitch.<sup>123</sup> African terminology referring to witches or wizards is gender neutral<sup>124</sup> and witches, or people accused of being witches, can be young or old and male or female, but are usually older women.<sup>125</sup> A *moloi* is believed to be a characteristic which a person was born with, but it can also be acquired.<sup>126</sup> Some people acquire witchcraft by means of using medicine bought from a traditional healer.<sup>127</sup> According to common belief, witchcraft is hereditary on the maternal side.<sup>128</sup>

---

<sup>118</sup> Junod *The life of a South African tribe, vol II* (1927) 45.

<sup>119</sup> Ashforth (n85) 69; 86; Geschiere *The Modernity of Witchcraft: Politics and the Occult in Post-Colonial Africa* (1997) 22.

<sup>120</sup> Tebbe (n114) 162; Van den Heever *Regsetnologiese aspekte van toordoktery: Intreerede as professor in Publiek Reg by die Universiteit van die Noorde* (1979) 5; Masondo (n112) 28; Mbiti (n70) 167.

<sup>121</sup> Van den Heever (n120) 5; Masondo (n112) 28; Bourdillon (n70) 189,213-215; Mulago (n73) 123; Morris (n73) 15.

<sup>122</sup> Pearsall (ed.) *South African concise Oxford dictionary* (2006).

<sup>123</sup> Tshivenda word for witchcraft is *muloi* (pl. *vhuloi*).

<sup>124</sup> Ralushai *et al* (n11) 5; Carstens “The cultural defence in criminal law: South African perspectives” 2004 *De Jure* 315

<sup>125</sup> Tebbe (n114) 163.

<sup>126</sup> Mbiti (n70) 165

<sup>127</sup> Ralushai *et al* (n11) 15. According to the report traditional healers usually give a person *sekanama* (SeSotho) which is a deadly poison prepared from crocodile or liver.

<sup>128</sup> Harnischfeger “Witchcraft and the State in South Africa” 2000 *Anthropos* 103.



This does not mean that all children of witches will inherit their mothers' characteristics. In order to determine whether or not the baby of the *moloji* has indeed inherited the power, many cultures believe that the new-born baby should be thrown against the wall. If the baby then clings to the wall like a bat (in other words without falling) the baby will grow up to become a witch.<sup>129</sup> A person can also become a *moloji* on a subconscious level if this person possesses enough hatred or pure jealousy, but this occurs in rare cases only.<sup>130</sup>

Witchcraft is built around a lot of secrecy, resulting in the fact that witches usually act covertly at night.<sup>131</sup> One of the informants of Ashforth, during his research in Soweto, was quoted as saying, "a witch is a witch and only a witch knows how witchcraft works."<sup>132</sup> Certain workings of witches are, however, known, and witches are believed to use various methods to inflict harm on others. These methods include, amongst others: incantations; words; rituals; the use of witch-familiars; poisoning using *muthi*; and the use of lightning.<sup>133</sup> Alongside these methods, witches are believed to possess other supernatural abilities. The methods employed by witches, and their supernatural abilities, will be discussed later.

One of the most feared abilities of witches is the ability to transcend the ordinary physical limitations of the human body by being in two places at the same time. Witches are believed to do this by leaving their body behind sleeping peacefully, while their spirit performs evil deeds somewhere else.<sup>134</sup> Another ability some witches are believed to

---

<sup>129</sup> Ralushai *et al* (n11) 14; Pelgrim (n1) 30.

<sup>130</sup> Pelgrim (n1) 31. A description is given by Pelgrim on this type of *moloji* and how one person believed that their "bad thinking" had killed a man.

<sup>131</sup> Ashforth (n85) 65, 238; Tebbe (n114) 161-162; Bourdillon (n70) 189.

<sup>132</sup> Ashforth (n85) 69.

<sup>133</sup> Mbiti (n70) 166; Niehaus (n116) 123; Motshekga "The ideology behind witchcraft and the principle of fault in criminal law" 1984 *Codicillus* 7; Tebbe (n114) 162. Evans-Pritchard explained, during his research of the Zande, that a witch is feared in that tribe because the act of bewitchment is not one where spells are used or medicines, but is in fact a psychic act. Evans-Pritchard *Witchcraft Oracles and Magic Among the Azande* (1937) 21.

<sup>134</sup> Ashforth (n85) 238.



possess is the ability to fly. Witches are believed to fly on the back of a pig, a hyena, plates, or even a loaf of bread.<sup>135</sup>

Witches are believed to use lightning for their malicious deeds.<sup>136</sup> According to the belief, there are two types of lightning. Lightning can either be controlled by witches, or lightning that is not controlled by a human being is believed to be caused by the lightning bird. The lightning controlled by the lightning bird does not usually strike human beings, properties, or domestic animals.<sup>137</sup> How witches are able to control lightning is unsure, but, according to Pelgrim, witches sometimes keep a *ndadzi* (TshiVenda for lightning bird).<sup>138</sup> In this way they are able to control the lightning. Witches also use what are called 'witch familiars'<sup>139</sup> to do their evil deeds.<sup>140</sup> A witch can use the witch-familiar in various ways, for example, sending a familiar out at night in order to steal food or money and even to kill people.<sup>141</sup> Animals can be used as witch familiars. Specific types of witch familiars will be discussed below. These specific familiars include zombies, *tokolotši*, *mamlambo*, and *chanti*.

Zombies<sup>142</sup> are usually victims of a witch that have been killed, and then resurrected afterwards, by the supernatural powers of a witch.<sup>143</sup> Zombies are used by witches as servants and they assist witches by doing domestic work, herding cattle, and also

---

<sup>135</sup> Pelgrim (n1) 34; Ralushai *et al* (n11) 23 describes that specifically brown bread is used as a means of transport and a spoon is used as the steering wheel of the bread. Pelgrim describes a situation in 2001 where the residents of the Lowveld refused to eat brown bread, as it was believed that witches were using it as transport. See Pelgrim (n1) 34.

<sup>136</sup> Ralushai *et al* (n11) 21. In the case of *S v Motsepa* 1991 2 SACR 462 (A) the deceased was killed after being doused with petrol and set alight by the two appellants. A woman in the community was killed by lightning and the deceased was identified by a 'witchdoctor' as the guilty party who had sent the lightning. In the *Ndhlovu* case (n116) at 28-29 both the defendants stated that one of the threats that the deceased uttered was that he would kill by sending lightning.

<sup>137</sup> Ralushai *et al* (n11) 21.

<sup>138</sup> Pelgrim (n1) 35.

<sup>139</sup> A 'witch familiar' is a term used to refer to a creature that assists witches with their acts of enrichment or when harming others. Animals which are often used as witch familiars include snakes, wild cats, baboons, crocodiles, owls, polecats, skunks, and all types of bugs. Familiars are also believed to be able to metamorphose into humans in order to carry out their duties. See Bähre (n107) 152.

<sup>140</sup> Ashforth (n85) 238.

<sup>141</sup> Pelgrim (n1) 32.

<sup>142</sup> Zombie in SeSotho is *setlotlwana*, *xidadjani* in Tsonga, and *matukwane* in Tshivenda.

<sup>143</sup> Niehaus (n116) 123; Pelgrim (n1) 32; Ralushai *et al* (n11) 5.





working in the fields.<sup>144</sup> In order to protect themselves, witches cut off the front part of the zombies tongue to prevent them (the zombies) from communicating with other people.<sup>145</sup> Some people believe that zombies, because of the occult powers involved, are invisible only to the people who would recognise the individuals that have been turned into zombies.<sup>146</sup>

A commonly spoken of witch familiar is the mystical snake *Mamlambo*.<sup>147</sup> Witches acquire the *mamlambo* in the form of a root or twig.<sup>148</sup> This root eventually transforms itself into a snake known as the *mamlambo*, which has been described as having eyes that resemble diamonds and large fangs. The purpose of the *mamlambo* is to bring great riches to the person who possesses her.<sup>149</sup> This, however, comes with the price of sacrifice usually in the form of human blood.<sup>150</sup> Another snake familiar is the *chanti*. The *chanti* is a snake that is believed to be kept in the womb or vagina of the witch. As with the *mamlambo*, the purpose of the *chanti* is to help the witch to become wealthy and powerful.<sup>151</sup>

One of the witch familiars that has been cited in case law is the widely-known *tokolotši*.<sup>152</sup> The *tokolotši* is described as an extremely ugly creature that is only as high as a

---

<sup>144</sup> Ashforth (n85) 41-42; Niehaus (n116) 123.

<sup>145</sup> Ralushai *et al* (n11) 5.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Mamlambo* is said to at times resemble a mermaid, snake, a root or a beautiful woman. See Bähre (107) 173.

<sup>148</sup> Niehaus (n116) 134-135.

<sup>149</sup> Niehaus (n116) 134-135; Ashforth (n85) 41; Ganis (n116) 362-363.

<sup>150</sup> *Ibid.*

<sup>151</sup> Bähre (n107) 170-171.

<sup>152</sup> *Tokolotši* is also referred to as the *thikolosh*, *tokolosh*, *tokoloshi*, and *tikoloshe*. There are many versions of the *tokolotši* that exist, and writers, such as Rautenbach and Matthee, have commented that only children are capable of seeing the *tokolotši*. Rautenbach and Matthee “Common law crimes and indigenous customs: Dealing with the issues in South African law” 2010 *Journal of Legal Pluralism* 129. For a further general discussion on the folklore of the *tokolotši* see Lillejord and Mkabela “Indigenous and popular narratives: The educational use of myths in a comparative perspective” 2004 *South African Journal of Higher Education* 257. The *tokolotši*, or *tokkelossie*, has also been described as stemming from Afrikaner folklore. See Coetzee *Die Afrikaanse volksgeloof* (1938). In the well-known case of *R v Mbombela* 1933 AD 269 the defendant believed that there was a *tikoloshe* in the hut and hacked this “creature” to death. The defendant had in fact killed his nine-year old nephew. In *R v Ngang* 1960 3 SA 363 (T) the defendant stabbed the complainant after dreaming of the *tokoloshe*. Similarly in *S v Ngema* 1992 2 SACR 651 (D) the appellant killed a two-year-old toddler after he claimed that he dreamt a *tikoloshe* was throttling him.



child but covered in hair and has almost baboon-like features.<sup>153</sup> The *tokolotši* has only one buttock, horrible teeth, pronounced sexual features, and has been described as speaking with a lisp.<sup>154</sup> The court has described the *tokolotši* as a “creature or demon much dreaded by most natives.”<sup>155</sup> Witches use the *tokolotši* to rape and abuse individuals that they sexually desire and so cause infertility in the victim.<sup>156</sup> In some studies it seems that the identity of the *tokolotši* and the witch is not completely separate, as the witch, by smearing animal fat on her body, could transform herself into the *tokolotši*.<sup>157</sup>

In conclusion, it is evident from the above that witches are regarded as anti-social, selfish, and immoral beings filled with malice.<sup>158</sup> Living a life in the world of witches is, therefore, with good reason a life filled with fear.<sup>159</sup> This fear permeates the culture of the believers and influences the way they think and act.

### 3.2.3 Distinguishing witchcraft-related killings and *muti*-murders

The concepts ‘witch’ and ‘traditional healers’ are often confused and have sometimes become inter-changeable, and traditional healers are often incorrectly referred to as ‘witchdoctors.’<sup>160</sup> With regards to ‘traditional healers’, there are two main types, herbalists (*inyanga*) and diviners (*isangoma* or *sangoma*).<sup>161</sup> Traditional healers, as is

---

<sup>153</sup> Rautenbach and Matthee (n152) 126-127; Ganis (n116) 362; Niehaus (n116) 132.

<sup>154</sup> Niehaus (n116) 132; Pelgrim (n1) 32.

<sup>155</sup> *Ngang* case (n152) at 364B-C. In the *Ngema* case (n152) at 653 the *tokolotši* was described as “a leprechaun-like being, but more malevolent in nature.”

<sup>156</sup> Niehaus (n116) 132, 134-135. The belief that the *tokolotši* rapes his victim and is only knee-high has resulted in many people placing their beds on bricks in order to prevent the *tokolotši* from climbing onto their beds and raping them.

<sup>157</sup> Niehaus (n116) 283.

<sup>158</sup> Masondo (n112) 28.

<sup>159</sup> *Id* at 27.

<sup>160</sup> The term ‘witchdoctor’ does not exist, but is used colloquially to refer to traditional healers. This adds to the confusion that exists between witches and traditional healers. Minnaar “Witchpurging and *muti* murder in South Africa: The legislative and legal challenges to combating these practices with specific reference to the *Witchcraft Suppression Act* (No. 3 of 1957, amended by Act No. 50 of 1970)” 2001 *African Legal Studies* 3; Commission on Gender Equality *Conference on the legislative reform in the Witchcraft Suppression Act no 3 of 1957, November 1999*, 19. See 2.4.1 above.

<sup>161</sup> Labuschagne (n116) 248-249; Ashforth (n85) 52-61; Chidester (n70) 17; Dhlodhlo “Some views on belief in witchcraft as a mitigating factor” 1984 *De Rebus* 409; Motshekga (n133) 7; Pelgrim (n1) 38. Most literature uses the Zulu terms for herbalists and diviners, as are used above, because the Zulu usage is the more commonly encountered. See Ashforth (n85) 52.



the case with witches, can be either male or female, but are generally women.<sup>162</sup> The two types of traditional healers will be discussed below and compared to the description of witches above.<sup>163</sup> The similarities between witches and traditional healers will be examined in order to explain the confusion between witchcraft-killings and *muti*-murders.

An *inyanga* can be described as a doctor who identifies and treats diseases. An *inyanga* treats diseases based on his or her knowledge of roots and herbs, although some herbalists, in rare cases, do combine the treatment with divination.<sup>164</sup> A *sangoma*, on the other hand, is a receptor of the ancestral spirits, and is considered to be a religious practitioner.<sup>165</sup> South African social anthropologist, Hammond-Tooke, describes *sangomas* as skilled diviners.<sup>166</sup> Sangomas are usually consulted in order to smell out witches.<sup>167</sup> Divination by *sangomas* is practised by throwing divination bones, known as *dolosse*. *Amathambo* are animal bones, usually goat knuckles, and they are considered to be the mouth pieces of ancestors.<sup>168</sup> Before these bones are thrown, the person seeking an answer blows on the divining dice. The blowing symbolically indicates the imbuing of the spirit of the person asking for an answer.<sup>169</sup> The way the divination bones then fall is interpreted by the *sangoma* to reveal the answer. The interpretation is a skill, and, as Junod states, “the art of bone-throwing is by no means child’s play...”<sup>170</sup>

Traditional healers are regarded as having the same powers as witches, as they are able to use roots and herbs but also are able to divine. Traditional healers, however, use the powers, as their name suggests, to heal people.<sup>171</sup> A true *sangoma* shuns all

---

<sup>162</sup> Ralushai *et al* (n11) 5.

<sup>163</sup> See 3.2.2 above.

<sup>164</sup> Labuschagne (n116) 248-249; Ashforth (n85) 52-61; Chidester (n70) 17; Dhlodhlo (n161) 409; Motshekga (n133) 7; Pelgrim (n1) 38.

<sup>165</sup> *Ibid.*

<sup>166</sup> Hund (ed.) *Witchcraft Violence and the Law in South Africa* (2003) 14.

<sup>167</sup> Ralushai *et al* (n11) 27; Ashforth (n85) 53.

<sup>168</sup> Van Den Heever (n120) 14.

<sup>169</sup> Tlhagale (n4) 1260.

<sup>170</sup> Junod (n118) 568

<sup>171</sup> Pelgrim (n1) 38.



forms of witchcraft.<sup>172</sup> The confusion between witchcraft-related killings arises because traditional healers and witches both use *muthi* or *muti*, terms in Zulu and Xhosa which generally mean a tree or a plant but are translated as medicine.<sup>173</sup> *Muthi* can be used for good, to heal and protect people, or it can be used to harm other individuals.<sup>174</sup> The word has been assimilated into South African English and is very familiar in the context of *muti*-murders.<sup>175</sup>

*Muti* murders in essence are where “*muti* (medicine) is made from human flesh.”<sup>176</sup> *Muti* murders are, therefore, a crime where a victim is killed for specific body parts, such as the eyes or genitalia.<sup>177</sup> The victims usually have to meet certain requirements which include either being a child or a virgin. The specific body parts needed are removed while the victim is still alive to ensure the magical power of the medicine.<sup>178</sup> When corpses are found missing specific body parts, *muti*-murders are often suspected. The motive behind *muti*-murders is for personal gain, including financial gain.<sup>179</sup> In *S v Malaza*, for example, the defendant had killed a man and mutilated his body for body

---

<sup>172</sup> Ralushai *et al* (n11) 27.

<sup>173</sup> Mbiti (n70) 169-174; Tebbe (n114) 165; Minnaar (n160) 16-19.

<sup>174</sup> *Ibid.*

<sup>175</sup> Carstens (n124) 322.

<sup>176</sup> Evans and Singh “*Muthi* murders: ritual responses to stress” 1991 *Indicator South Africa* 46. *Muthi* murders are sometimes referred to as ritual killings. The Ralushai Commission Report (Ralushai *et al* (n11)) refers to *muthi* murders as ritual murders, and it uses the terms interchangeably. Prinsloo and Du Plessis explain that this is not correct as there is a difference between *muthi* murders (medicine murders in their article “medisyne moorde”) and ritual murders (“rituele doding”). Ritual murders contain a ritual, as the name suggests, and a victim is offered to the ancestors for the greater good of the community. This can be, for example, to give an offering to ensure a good harvest. *Muthi*-murders are usually motivated by greed in order to have financial gain or to bring luck. No ritual is involved in the specific killing of the victim to obtain the body parts. See Prinsloo and Du Plessis “Towermoorde, rituele doding en medisyne moorde” 1989 *Journal of South African Law* 621-624. See further on the difference between ritual- and *muthi* murders, Minnaar (n160) 16.

<sup>177</sup> Evans and Singh (n176) 46-48; Ralushai *et al* (n11) 24-25. The different body parts serve different purposes, for example, the eyes are important to ensure that a business venture will succeed as it gives farsightedness. Another example is that of hands being cut off as they will attract clients. The genitalia is usually used to mix love potions. For further readings on the beliefs of the purposes of body parts see Prinsloo and Du Plessis (n176); Ralushai *et al* (n11) 24-25

<sup>178</sup> Carstens (n124) 323-324.

<sup>179</sup> Minnaar in Hund (ed.) *Witchcraft Violence and the Law in South Africa* (2003) 82; Carstens (n124) 322-323; Ralushai (n11) 25.



parts in order to make *muti*. He was advised by a ‘witchdoctor’ to drink the *muti* in order to find a wife and permanent employment.<sup>180</sup>

Belief in witchcraft does play a role in *muti* murders, as the belief in the power of *muti* originates from the same belief in the supernatural realm and the power of magic.<sup>181</sup> The two crimes are similar, furthermore, in that in both cases the accused will be charged with the common law crime of murder.<sup>182</sup> Killing the victims during a *muti* murder is, however, vastly different from killing a witch. The methods used to kill witches<sup>183</sup> differ from the methods used in *muti*-murders, and the killings are usually done in public and often in a group, in contrast to *muti* murders, which take place covertly, and are usually executed by one person.<sup>184</sup>

The motives behind these two crimes also differ. The difference between the motives was explained by Beadle CJ, in *S v Sibanda*, where he stated that, in the case of witchcraft killings, the defendant killed an alleged witch because, “he believed that by killing the deceased he was averting some great evil that will either befall himself or his family or his community.” This is in contrast to *muti* murders where the motive is personal gain.<sup>185</sup> The cultural defence will, therefore, not aid or encourage *muti*-murders, as *muti*-murders are not committed because they are based on or motivated by a cultural belief.

---

<sup>180</sup> *S v Malaza* 1990 1 SACR 357 (A) at 358. See also *S v Sibanda* 1975 1 SA 966 (RA); *S v Modisadife* 1980 3 SA 860 (A) for examples on *muthi* murder cases.

<sup>181</sup> Ralushai *et al* (n11) 28. A discussion on the uses of *muthi* and other related questions are discussed on pages 24-27 in the Ralushai Commission Report (Ralushai *et al* (n11)). See also Carstens (n124) 323-327.

<sup>182</sup> Murder is defined by Burchell as the “unlawful and intentional killing of another person.” Burchell *Principles of criminal law* (2006) 667. For a general discussion on the crime of murder see Burchell (n182) 667-673; Snyman *Criminal law* (2006) 447- 451. There is no specific crime called “*muthi*-murder” and the accused will be charged with the crime called murder. If the court, however, finds that, based on the particular set of facts, a *muthi* murder has been committed, this will influence the sentencing. The Criminal Law Amendment Act 105 of 1997 as amended by the Criminal Law Amendment Act 38 of 2007, section 51, read with Part 1 of Schedule 2 of this act, prescribes the discretionary minimum sentence of life imprisonment for murders where the victim was killed in order to remove any body part of the victim unlawfully, or when, as a result of such unlawful removal of a body part, the victim died.

<sup>183</sup> See 3.4.2 below.

<sup>184</sup> Minnaar (n179) 82. During *muthi* murders the body is normally not buried but left either at the spot or thrown into a river.

<sup>185</sup> *Sibanda* case (n180) at 967. See 2.4.2.1 above.



### 3.4 Medico-legal aspects of witchcraft-related crimes

#### 3.4.1 Legal aspects and criminal investigations

As explained above, witchcraft-related crimes can constitute either a statutory crime (contravention of the Witchcraft Suppression Act 3 of 1957) or a common law crime.<sup>186</sup>

In the South African criminal system, witchcraft-related crimes are investigated in the same manner as any other offence, and perpetrators are prosecuted depending on the situation.<sup>187</sup> The belief in witchcraft, if the perpetrators are prosecuted, does not act as a defence to exclude liability. Courts, however, assess and use the belief in witchcraft as a mitigating factor.<sup>188</sup>

The criminal investigation into witchcraft-related crimes can, however, create problems for the police investigating the crimes.<sup>189</sup> Firstly, crimes are often not reported because people either fear the police or the witch, or they are simply not reported because the complainants do not believe that reporting the crime will amount to anything.<sup>190</sup> The situation was aggravated by the fact that, for a long period of time, the national government did not officially acknowledge that witchcraft-related violence was a social issue.<sup>191</sup> Legislation in the form of the Witchcraft Suppression Act 3 of 1957 was later introduced in order to deal with the violence, but the legislation, as many authors have argued, only worsened the situation.<sup>192</sup> As a result, it became increasingly difficult to investigate witchcraft-related violence.<sup>193</sup> Another similar problem is the finding of witnesses to testify to have enough evidence to build up a strong case against the

---

<sup>186</sup> See 2.4.2 above. The difference between common-law crimes and statutory crimes is explained in Burchell (n182) 54-55; Snyman (n182) 5-6.

<sup>187</sup> Ralushai (n11) 51. For general discussion on the prosecution of a person involved in a criminal case see Joubert (ed.) *Criminal procedure handbook* (2009) 43-76.

<sup>188</sup> See 2.4.2 above.

<sup>189</sup> For a general discussion on the problems facing the criminal justice system see Snyman (n182) 21-25; Burchell (n182) 45-46.

<sup>190</sup> Niehaus (n101) 106; Ralushai *et al* (n11) 30-31. See also Van Den Heever and Wildenboer "Geloof in toorkuns as versagende omstandigheid in die Suid-Afrikaanse reg" 1985 *De Jure* 106. *Mokonto* case (n116) at 322H; *Modisadife* case (n180) at 862C.

<sup>191</sup> Pelgrim (n1) 87.

<sup>192</sup> See 2.4.1 above.

<sup>193</sup> *Ibid.*



accused.<sup>194</sup> Other problems with witchcraft-related cases have been discussed above in 2.4.2.

### 3.4.2 Medical forensic aspects of witchcraft-related killings

The method of killing an alleged witch plays an important part when determining whether the belief in witchcraft was genuine and sincere.<sup>195</sup> In *S v Moela* the victims were stoned to death by various members of the community and burnt afterwards.<sup>196</sup> Some of the accused were asked why they had burnt the victims to which they responded by stating that that was the only way to ensure that the witch would not practise magic again.<sup>197</sup> As was evident from this case and others,<sup>198</sup> in order to deal with a witch her body needs to be destroyed completely for her soul to be destroyed.<sup>199</sup> According to Minnaar, witch purging is usually carried out either by “necklacing”<sup>200</sup> or burning the victim.<sup>201</sup> If methods other than burning are used the body is usually still set alight.<sup>202</sup> Burning the witches is often done by mobs where they roast the victim to death while they are held spread-eagled over an open fire.<sup>203</sup>

Death arising from burning, in other words exposure to heat, is considered to be an unnatural death.<sup>204</sup> The appearance and the distribution of the burns may indicate what the cause of the burns was, for example whether they were caused by a fire, and also the circumstances under which the person was set alight.<sup>205</sup> Any unnatural death, as is

---

<sup>194</sup> Niehaus (n101) 106; Ralushai *et al* (n11) 30; Van Den Heever and Wildenboer (n190) 106; *Mokonto* case (n116) at 322H; *Modisadife* (n180).

<sup>195</sup> See 7.4 below on the strategies which could help to properly apply the cultural defence.

<sup>196</sup> Unreported case, case nr 215/77 in the Circuit Court held at Lydenburg on 18 May 1977.

<sup>197</sup> *Ibid.*

<sup>198</sup> See for example *S v Motlapema*, unreported case, case number 363/78 held in a Circuit Court in Pietersburg, on 6 Oktober 1978; *Magebeni* case (n116) 1911 NHC 107; *Motsepa* (n136).

<sup>199</sup> It is also believed that not only should her body be destroyed but her house should be set on fire and all her magic paraphernalia should be burnt. Harnischfeger (n128) 104; Carstens (n124) 317; Minnaar (n106) 10.

<sup>200</sup> During ‘necklacing’ a rubber tyre filled with petrol or paraffin is placed around the victim’s neck and then set alight. The hands of victims are usually tied behind their back or severed to prevent them from removing the tyre. Mihalik and Cassim “Ritual murder and witchcraft: A political weapon” 1992 *SALJ* 138.

<sup>201</sup> Minnaar (n160) 10.

<sup>202</sup> Carstens (n124) 318.

<sup>203</sup> *Ibid.*

<sup>204</sup> Schwär *et al* *The forensic ABC in medical practice: A practical guide* (1988) 214.

<sup>205</sup> *Id* at 209.

the case with burn victims, is required to be examined by a medical practitioner under the Inquest Act 58 of 1959, as amended by the Inquests Amendment Act 8 of 1991.<sup>206</sup>

### 3.5 Conclusion

The essence of determining the nature of the cultural defence lies in the clash between the majority culture and minority culture.<sup>207</sup> The starting point, therefore, is, firstly, to understand what is meant by culture, and, secondly, what is meant by majority and minority culture. Culture has been defined as a dynamic concept, a communal matter, as stated by both Tylor and Capotorti, acquired by being handed down from one generation to the next.

The cultural defence hinges on the concept of culture as it is used in section 30 and 31 of the Constitution.<sup>208</sup> Section 30 and 31 refer to culture as a source of identity, or, as stated in *Pillay*,<sup>209</sup> as a way of life of a particular community. Drawing from the different definitions from culture expressed by anthropologists, legal academics, legislators, and case law, the definition by Van Broeck provides a working definition wide enough to include the features stated in their definitions. As a result, the concept of culture, for purposes of this research, will be defined as an all-encompassing system of thinking, doing, and evaluating.

The concept of religion is often used interchangeably with the concept of culture, but, unlike culture, religion is a personal belief, and does not necessarily have to be an associative practice. Understandably, religion and culture are often confused, because, as an example, culture and religion are interwoven in African culture. The African *Weltanschauung* is built on the notion of *ubuntu*, “a human being is a human being because of other human beings.” As a result of this, community plays a very important role, and African Traditional Religion is embedded in African culture. As explained above,<sup>210</sup> the belief in witchcraft will be used throughout in order to illustrate the use of

---

<sup>206</sup> Section 3 of the Inquest Act 58 of 1959 as amended by Act 8 of 1991.

<sup>207</sup> See 4.3 below.

<sup>208</sup> Constitution, 1996.

<sup>209</sup> *Pillay* case (n22).

<sup>210</sup> See 2.1 above.



the cultural defence. The belief in witchcraft, therefore, although it is a component of African Traditional Religion, falls within in the purview of African culture.

The cultural defence, if formalised, will protect the minority culture. African Traditional Religion, which includes the belief in witchcraft, is adhered to by the majority of people in South Africa. Minority culture does, however, not refer to the numerical majority cultural group. Minority culture refers to the cultural group that is at odds with the dominant legal culture. In this case it is the believers in African witchcraft.

Belief in African witchcraft, as evidenced by the Ralushai Commission Report and other research, is still alive and well today. Witchcraft is believed to be the cause of misfortune and evil in communities. Witches practise witchcraft by employing different methods which include, amongst others: incantations or spells; using witch-familiars such as the *tokolotši*; poisoning using *muthi*; and the use of lightning. These supernatural powers, combined with the fact that witches are believed to be filled with malice, create fear in those who believe in them. The fear created by the belief in witchcraft influences the actions of the believers.

Witchcraft-related crimes have occurred as a result of the fear of witches. These crimes are often confused with *muthi*-killings, where individuals are killed in order to use their body parts to make medicine. Although witches use *muthi*, witchcraft killings and *muthi*-killings differ very greatly. Witchcraft killings are motivated by fear and the desire to restore harmony to the community in comparison to *muthi* murders where the victim is killed out of pure greed or for personal gain. Witchcraft killings are usually committed by groups and in the open, compared to *muthi*-killings which are usually committed by individuals covertly. The cultural defence is not intended to be used in *muthi*-murders, and, if applied properly, no person committing a *muthi*-murder would be able to use the cultural defence.

Witchcraft related crimes could be seen to be either a common law crime, such as murder, or a statutory crime if the Witchcraft Suppression Act is contravened. These crimes are investigated in the same manner as any other, but the fear and secrecy surrounding the belief in witchcraft might give rise to specific obstacles during the



investigation into the crimes. When dealing with witchcraft-related killings, the manner in which the victim died plays an important part in the investigation. The reason for this is the fact that the alleged witches are usually burned as that is believed to be the only method which will destroy the soul of the witch. If the victim in a particular case has been burned, it could be an indication that the belief was sincere and genuine, compared to, for example, shooting the victim. If the victim has been burned, the burn wounds would be able to help establish the circumstances under which the person had died.

Adam Smith wrote that, "As we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation."<sup>211</sup> One could only fully understand the effect that the belief in witchcraft could have on an individual if one could become part of that culture. By taking cognisance of the nature and practise of witchcraft as explained above, one can, however, begin to conceive what it would feel like to be in the same situation. This is necessary for an understanding of both the need for the cultural defence and the nature of its application.

---

<sup>211</sup> Smith *The Theory of Moral Sentiments* (1795).



## Chapter 4: The ambit of the cultural defence

### 4.1 Introduction

“If I were having a philosophical talk with a man I was going to have hanged or electrocuted I should say, ‘I don’t doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for his country if you like. But the law must keep its promises.’”<sup>1</sup>

Throughout the judgments of witchcraft-related crimes a utilitarian motive has determined the matter. The courts, stressing the deterrent and preventative elements of the criminal justice system, have tried to effect social change just as the law promises.<sup>2</sup> Judges themselves have, however, recognised that the criminal law is a poor instrument to use for radical social change.<sup>3</sup> Focussing on deterrence, courts have lost sight of the object of criminal law, and they have not fulfilled their constitutional duty to develop the criminal law in the light of the Bill of Rights, specifically the right to culture. In order that the legal culture be changed to a constitutional culture it was submitted in chapter 2 that the matter of cultural defence needs to be formalised.<sup>4</sup>

This chapter will explore the rationale behind the cultural defence. It will focus on why it is imperative to include cultural evidence in certain criminal law cases. Structurally, this defence can take various forms and it has been defined accordingly. The various structures will be discussed, and a substantial definition will be given for the cultural defence. It will be submitted that the cultural defence should act as a new and separate defence in South African criminal law. The cultural defence, if it is recognised, can exclude various elements required for criminal liability creating a multiple defence. In order to establish how the defence will be applied each of the elements of criminal liability will be discussed with reference to examples from case law.

---

<sup>1</sup> Holmes-Laski *Letters* (1953) 806 as quoted in Seidman “Witchmurder and *mens rea*: A problem of society under radical social change” 1965 *Modern Law Review* 57.

<sup>2</sup> See 2.4.2 above.

<sup>3</sup> Seidman (n1) 60.

<sup>4</sup> See 2.5 above.



## 4.2. The rationale for the cultural defence

First and foremost, the impetus for the formal recognition of the cultural defence is the Constitution.<sup>5</sup> By recognising and formalising the cultural defence we are developing and harmonising the criminal law with constitutional values. The right to the freedom of religion, belief, and opinion,<sup>6</sup> the right to participate and enjoy any culture,<sup>7</sup> the right to equality<sup>8</sup> and the right to a fair trial<sup>9</sup> all support the use of the cultural defence. The question arises as to how they support the use of the cultural defence?

In essence, the philosophical basis of the cultural defence can be taken back to the principles of proportionality and equal treatment.<sup>10</sup> Considering the principle of equal treatment, equality has often been equated with uniformity.<sup>11</sup> Equal treatment, however, does not mean that everyone should be treated in the same way but often requires that people be treated differently.<sup>12</sup> Renteln has stated the law can be “common without being uniform”<sup>13</sup> and different treatment does not violate equal protection. The flaw in the objection against treating individuals differently lies in the fact that the law itself is not neutral.<sup>14</sup> In order to afford defendants with substantive equality in accordance with section 9(3) of the Constitution, the objectivity of the legal constructs used in criminal law needs to be examined.<sup>15</sup> These constructs, such as that of the reasonable person for example, are based on the values of the dominant culture, namely the Western legal system.<sup>16</sup> The defendants whose acts are motivated culturally but are not assessed in the light of the cultural background will, as a result, not receive equal treatment.

<sup>5</sup> The Constitution of the Republic of South Africa, 1996. See Phelps in Bennett (ed.) *Traditional African Religion in South African law* (2011) 140.

<sup>6</sup> Section 15 of the Constitution, 1996.

<sup>7</sup> Sections 30 and 31 of the Constitution, 1996.

<sup>8</sup> Section 9 of the Constitution, 1996.

<sup>9</sup> Section 35(3) of the Constitution, 1996.

<sup>10</sup> Bennett “The cultural defence and the custom of *Thwala* in South African law” 2010 *University of Botswana Law Journal* 12.

<sup>11</sup> Bennett in Foblets *et al* (eds.) *Cultural diversity and the law: State responses from around the world* (2010) 35.

<sup>12</sup> Renteln *The cultural defense* (2004) 47.

<sup>13</sup> Renteln in Foblets *et al* (eds.) *Cultural diversity and the law: State responses from around the world* (2010) 517. Renteln borrowed this expression from Carbonnier “Parenthèse philosophique sur la législation de la famille” in Carbonnier *Flexible droit. Pour une sociologie du droit sans rigueur*, Paris LGDJ, 1995, 260.

<sup>14</sup> Renteln (n12) 47.

<sup>15</sup> Bennett (n10) 13.

<sup>16</sup> *Ibid.*



Equality also resonates within the right to receive a fair trial.<sup>17</sup> In order to receive a fair trial, and for justice to prevail, every relevant aspect of a criminal case should be put before a judge.<sup>18</sup> A considered judgment is one in which the judge can refer to a “plurality of visions.”<sup>19</sup> The cases involving witchcraft, for example, should be evaluated according to ethnological guidelines and in the context of the social background in which they occurred.<sup>20</sup>

As mentioned above, punishing a person will serve no purpose if the accused does not have a guilty mind, nor will it serve any purpose if the punishment is not proportional to the severity of the crime.<sup>21</sup> Proportionality takes into account that individuals should suffer only as much punishment as they legally and morally deserve.<sup>22</sup> In order to establish the blameworthiness of the accused and determine the correct punishment, criminal law must take cultural imperatives into account. Ignoring this would be biasing the result from the start.<sup>23</sup>

Enculturation means that culture shapes persons in such a way that they direct their actions and thoughts in accordance with the culture.<sup>24</sup> The entire premise of the cultural defence rests on the relationship between culture and the psyche. Although this relationship is complex, and enculturation mostly takes place on a subconscious level, there is no doubt that culture influences our behaviour.<sup>25</sup> The identity of an individual, the reasoning process followed, and his/her perceptions are all influenced by culture even if the individual is not aware of it.<sup>26</sup> Enculturation does not, however, entail that people lack the free will to make choices because their culture predetermines their behaviour.<sup>27</sup> This reasoning would negate the notion of guilt and innocence.<sup>28</sup> Culture simply predisposes individuals to act in a certain way.<sup>29</sup>

---

<sup>17</sup> Section 35(3) of the Constitution, 1996.

<sup>18</sup> Siesling and Ten Voorde in Foblets *et al* (eds.) *Multicultural jurisprudence: Comparative perspectives on the cultural defence* (2009) 173.

<sup>19</sup> *Ibid.*

<sup>20</sup> Carstens “The cultural defence in criminal law: South African perspectives” 2004 *De Jure* 313.

<sup>21</sup> See 2.3.

<sup>22</sup> Bennett (n10) 12.

<sup>23</sup> Renteln (n12) 15.

<sup>24</sup> *Id* at 6.

<sup>25</sup> *Id* at 12.

<sup>26</sup> *Id* at 10.

<sup>27</sup> *Id* at 12.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id* at 13.



Torry describes this predisposition as a cultural compulsion or cultural dictation.<sup>30</sup> Where, under certain instances, individuals are faced with a choice of complying with the law or breaking a cultural dictate, they act unlawfully because of the irresistible sway of the cultural dictate.<sup>31</sup> It could be that the defendant involved either does not believe he or she is violating the state law, a matter of cognition, or that he/she felt compelled to act in the way he/she did, a matter of volition.<sup>32</sup>

The cultural defence must be considered against the backdrop of the Constitution, bearing in mind that it should, as alluded to above, be justifiable and essential in a constitutional democracy. Taking the view that cultural evidence should be considered in all cases does not mean that it will necessarily affect the disposition of the case.<sup>33</sup> Denying the cultural defence will, however, as Carstens states, “erode the notion of justice in the African cultural context.”<sup>34</sup>

### 4.3 Definition of the cultural defence

#### 4.3.1 Demarcation of cultural offences and the cultural defence

Currently there is no jurisdiction which has formalised the cultural defence<sup>35</sup>, but the argument for the cultural defence has been steadily developed since the 1980s.<sup>36</sup> Civil- and common-law countries have approached the subject differently, with continental writers focusing on the act itself and referring to a cultural offence, as opposed to the Anglo-American jurisdictions who follow the viewpoint from the defence of the accused.<sup>37</sup>

Van Broeck defines a cultural offence as an act by a member of a minority culture which is approved or accepted as normal within his/her own cultural group.<sup>38</sup> This act

---

<sup>30</sup> Torry “Multicultural jurisprudence and the cultural defence” 1999 *Journal of Legal Pluralism and Unofficial Law* 128.

<sup>31</sup> *Ibid.*

<sup>32</sup> Bennett (n10) 12.

<sup>33</sup> Renteln (n13) 795.

<sup>34</sup> Carstens (n20) 332.

<sup>35</sup> This refers to cultural defence in the form of a separate defence. See 4.3.2 below on the other structural forms of the cultural defence. Phelps (n5) 137.

<sup>36</sup> Bennett (n10) 4.

<sup>37</sup> Van Broeck “Cultural defence and culturally motivated crimes (Cultural offence)” 2001 *European Journal of Crime, Criminal Law and Criminal Justice* 1. See also Phelps (n5) 135.

<sup>38</sup> Van Broeck (n37) 5.



is, however, considered a crime or an offence by the dominant culture.<sup>39</sup> The essence of the problem lies in the clash between the values of the majority and minority cultures.<sup>40</sup> The values of the majority culture are embodied in the criminal law, whereas the members of the minority culture have to choose between violating their own cultural values or the criminal law.<sup>41</sup> This clash does not have to be absolute but it can be gradual as long as the behaviour is a direct result of the offender's cultural group using a different set of moral norms when dealing with a situation.<sup>42</sup>

The cultural defence is substantially defined by Van Broeck as follows:

“[A] cultural defense (*sic*) 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.”<sup>43</sup>

The cultural defence has also been referred to as a specific doctrine or legal strategy where the cultural background of the defendant is used as an excuse or mitigating circumstance in criminal cases.<sup>44</sup> This second definition, as opposed to the first, is a formal definition which aims at establishing a new doctrine.<sup>45</sup> The first definition illustrates instances where cultural arguments are put forward within the framework of existing criminal defences, for example provocation.<sup>46</sup>

Cultural offences and the cultural defence are inherently linked. Usually, cases involving cultural offences will invoke a cultural defence.<sup>47</sup> In other words, only where there is a relevant link between the offence and the cultural background of the offender will the cultural defence come into play. Renteln, in short, describes the

---

<sup>39</sup> Van Broeck (n37) 5. Van Broeck gives the example of female circumcision or burning of alleged witches as examples of cultural offences.

<sup>40</sup> See 3.1.4 above on the definition of minority and majority cultures.

<sup>41</sup> X “The cultural defense in the criminal law” 1986 *Harvard Law Review* 1293 (Author unknown).

<sup>42</sup> Van Broeck (n37) 16.

<sup>43</sup> *Id* at 29.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Id* at 31.

<sup>47</sup> *Id* at 29.



cultural defence simply as a legal strategy that will enable a court to consider how the cultural background of an accused person affected his/her behaviour.<sup>48</sup>

Van Broeck established a three-step process that can be followed in order to identify whether or not the crime was indeed a cultural offence.<sup>49</sup> This is necessary in order to determine whether the cultural defence will be applicable. The first step is to establish the subjective motive of the defendant. If the defendant claims that he or she acted in accordance to a specific cultural background, this claim needs to be compared with the cultural traditions of that particular cultural group. The comparison will establish whether or not the action taken was appropriate and in accordance with the cultural basis. This ensures that subjective reasoning is objectified and the *ipse dixit* of the defendant is not merely followed. The last step is to compare the culture of the defendant with the norms of the dominant culture.<sup>50</sup> If a clash is established, this will indicate that a cultural offence has been committed.<sup>51</sup>

Bennett has expanded on this three-step process and created a list of requirements which need to be met before the cultural defence can be invoked. These requirements are as follows: there should be a distinction between the dominant and minority culture,<sup>52</sup> culture should be clearly defined,<sup>53</sup> the problem of acculturation or assimilation should be taken into account,<sup>54</sup> the inquiry should determine whether the act is required, approved, or obligatory in the minority culture,<sup>55</sup> the specific act must meet the requirements of the minority culture,<sup>56</sup> and the act must be directly related

---

<sup>48</sup> Renteln (n13) 793. The cultural defence, as proposed by Renteln, is not limited to the field of criminal law but can be employed in civil cases as well. This study is, however, limited to the cultural defence within criminal law. For a general discussion on the cultural defence in civil law matter see Renteln (n12). Woodman describes the cultural defence as “a rule of law which takes effect where the defendant would not have committed the criminal act had they not belonged to a particular culture.” See Woodman in Foblets *et al* (eds.) *Multicultural jurisprudence: Comparative perspectives on the cultural defence* (2009) 34.

<sup>49</sup> Van Broeck (n37) 23. This three-step approach links to what Torry describes as the “premises that underline cultural dictation.” The three premises explain the subjective motive of the person involved. The first premise states that the specific act has its origins within a specific cultural dictate. This dictate then, in turn, triggers the person involved to act accordingly and commit an offence. The extent to which the individual is influenced by the dictate is to such a degree that no alternative was available. Torry (n30) 129.

<sup>50</sup> Van Broeck (n37) 23.

<sup>51</sup> *Id* at 23-24.

<sup>52</sup> Bennett (n10) 14. See 3.1.4 above on the definition of dominant culture as compared to minority culture.

<sup>53</sup> Bennett (n10) 14-16. See 3.1 above on the definition of culture.

<sup>54</sup> Bennett (n10) 16-18. See 7.2.2 and 7.3.2 below.

<sup>55</sup> Bennett (n10) 18. See 7.2.4 and 7.3.3. below.

<sup>56</sup> Bennett (n10) 18-19.





to the minority culture.<sup>57</sup> The abovementioned requirements and three-step process indicate when the cultural defence will be relevant, but the defence can take various forms structurally. These forms will be discussed below.<sup>58</sup>

#### 4.3.2 Different forms of the cultural defence

The criminal justice system consists of different stages: the decision to prosecute an offender; the trial (if prosecution is continued); and the sentencing stage (if the accused is found guilty of the crime). During all of these stages cultural motivations can influence the outcome.<sup>59</sup> Structurally, the cultural defence can take the form of a new and separate defence, or, alternatively, cultural evidence can be included in, and act as a basis for, existing defences or be used as evidence in the mitigation of a sentence.<sup>60</sup> Currently, nothing prohibits an accused person in the South African legal system to use cultural evidence to support a recognised defence<sup>61</sup> or to use the evidence as a mitigating or extenuating circumstance.<sup>62</sup>

Using cultural evidence as a basis for other defences, such as provocation, insanity, private defence, duress, or necessity can be demeaning, for example, where the belief in witchcraft is equated with being insane.<sup>63</sup> Another problem with using existing defences is the fact that the legal constructs are drawn from the dominant culture.<sup>64</sup> This makes it very difficult for the member of the minority culture to succeed by using those defences. As discussed above, the belief in witchcraft used in conjunction with existing defences such as insanity, provocation, and self-defence has never succeeded in South African law.<sup>65</sup>

---

<sup>57</sup> This entails that the act should be linked to the culture of the accused and not simply be a result of the socio-economic circumstances of other subgroups. Bennett (n10) 19.

<sup>58</sup> See 4.3.2 below.

<sup>59</sup> Renteln (n12) 7; Bennett (n10) 19.

<sup>60</sup> Phelps (n5) 137.

<sup>61</sup> Carstens (n20) 329.

<sup>62</sup> See 2.4.2.2 above for a discussion on case law in which these defences were raised in the context of the belief of witchcraft. As seen in 2.4.2.2. above, and 4.4.3 below, self-defence has been raised as a defence in cases where the accused killed an alleged witch. In those cases the defendants were in a dilemma because the reasonable person did not believe in witchcraft but the belief was not unreasonable enough to succeed with the insanity defence. For a further discussion on the use of existing defences see also Renteln (n12) 39.

<sup>63</sup> Bennett (n10) 20.

<sup>64</sup> *Ibid.*

<sup>65</sup> See 2.4.2 above.



Courts have been willing to accept cultural beliefs, such as the belief in witchcraft, as a mitigating circumstance.<sup>66</sup> From the latest case law, which includes amongst others *S v Latha*,<sup>67</sup> it has, however, become evident that the courts are becoming more sceptical about mitigating sentences in witchcraft-related crimes.<sup>68</sup> Dealing with cultural beliefs at the sentencing stage only is also problematic as the courts are outsourcing the justification of punishment to the sentencing discretion, instead of dealing with it within the criminal law itself.<sup>69</sup> The criminal justice system will be more true to itself if cultural evidence is considered during the trial.<sup>70</sup>

It is evident from the above that the only structure of the cultural defence that will ensure the proper consideration of cultural evidence will be to formalise a separate defence.<sup>71</sup> The formalisation will not necessarily entail that the defendants who invoke the defence will be acquitted of criminal charges, or that it will affect the disposition of their case in any way. The weight given to the cultural evidence will always be assessed on a case-by-case basis.<sup>72</sup> The cultural defence will simply ensure that the accused's right to culture, equality, and a fair trial has been considered because all the relevant aspects are before the court.

The real difficulty defendants have is in linking culture to the legal categories of crimes, each of which has its own particular elements.<sup>73</sup> The ambit of the cultural defence as a separate defence will be discussed below.<sup>74</sup> That discussion will focus on how and where culture can link to the particular elements of criminal liability.

#### **4.4 The ambit of the cultural defence as a separate defence within South African criminal law**

It is important to note that the purpose of this research is not to change the framework of the positive South African criminal law. The purpose is to preserve the

---

<sup>66</sup> See 2.4.2 above.

<sup>67</sup> *S v Latha* 2012 2 SACR 30 (ECG).

<sup>68</sup> See 2.4.2.2 above.

<sup>69</sup> Amirthalingham in Foblets *et al* (eds.) *Multicultural Jurisprudence: Comparative perspectives on the cultural defence* (2009) 47.

<sup>70</sup> *Ibid.*

<sup>71</sup> Renteln (n13) 63.

<sup>72</sup> Renteln (n12) 15.

<sup>73</sup> Renteln (n12) 23.

<sup>74</sup> See 4.4 below.



existing framework whilst taking culture into account.<sup>75</sup> If the cultural defence is recognised, it will strike at various elements required for criminal liability and, as such, act as a multiple defence.

For criminal liability to result, the prosecution (State) must prove, beyond reasonable doubt, that the accused has committed an unlawful voluntary act and that the accused, during this act, possessed the necessary criminal capacity and fault (sometimes referred to as *mens rea*).<sup>76</sup> Each of these elements will be discussed briefly below<sup>77</sup> in order to analyse at which elements the cultural evidence will strike.

#### 4.4.1 Conduct

Conduct can consist of a positive act, a *commissio*, or it can, alternatively, consist of not doing something, in other words an omission.<sup>78</sup> This omission or commission should be that of a human being and voluntary.<sup>79</sup> Voluntary conduct entails that the bodily movements of the accused are controlled by his or her conscious will or intellect.<sup>80</sup> Conduct can, therefore, be excluded if it is considered involuntary, as in the case where the accused acted in a state of automatism,<sup>81</sup> absolute force,<sup>82</sup> or if it was an impossible act.<sup>83</sup>

The acts of an accused during a state of automatism, such as conduct during sleep,<sup>84</sup> or because of a concussion,<sup>85</sup> heavy intoxication,<sup>86</sup> provocation,<sup>87</sup> or epilepsy,<sup>88</sup> amongst others, are considered to be involuntary 'conduct'.<sup>89</sup> A distinction should be drawn between automatism that resulted from, or can be attributed to, mental illness (sometimes referred to as insane automatism) and automatism due to

<sup>75</sup> Siesling and Ten Voorde (n18) 146.

<sup>76</sup> Burchell *Principles of criminal law* (2006) 138.

<sup>77</sup> See 4.4.1-4.4.4 below.

<sup>78</sup> Burchell (n76) 140; 178 and Snyman *Criminal Law* (2006) 54.

<sup>79</sup> Burchell (n76) 178 and Snyman (n78) 53.

<sup>80</sup> Burchell (n76) 139 and Snyman (n78) 54.

<sup>81</sup> Snyman (n77) 55-58.

<sup>82</sup> Snyman (n78) 55.

<sup>83</sup> Burchell (n76) 139 and Snyman (n78) 61-63.

<sup>84</sup> *S v Johnson* 1969 3 SA 201 (A); *S v Naidoo* 1971 3 SA 605 (N).

<sup>85</sup> *R v Smit* 1950 4 SA 165 (O); *R v Ngema* 1960 1 SA 145 (D).

<sup>86</sup> *S v Chretien* 1981 1 SA 1097 (A).

<sup>87</sup> *S v Van Vuuren* 1983 1 SA 163 (A); *S v Arnold* 1985 3 SA 256 (C).

<sup>88</sup> *R v Mkize* 1959 2 SA 260 (N); *R v Schoonwinkel* 1953 3 SA 136 (C).

<sup>89</sup> Burchell (n76) 149. It should be noted that if there was prior voluntary conduct, combined with antecedent fault, which is causally linked to the unlawful consequence committed in a state of automatism, the accused can still be held liable even if he or she acted in a state of automatism. See Burchell (n76) 139.



involuntary conduct (sometimes referred to as sane automatism).<sup>90</sup> In the case of automatism, which is a result of a pathological mental condition, the accused needs to prove this pathological condition on a balance of probabilities. If proven, it will usually result in committal to a mental institution.<sup>91</sup>

In the case of *S v Shivuri*<sup>92</sup>, the accused had dreamt of a fight with wild animals, and, when he woke up, he found the bodies of a woman and a child dead in his hut. He was charged with two counts of murder. Before these events happened, he claimed that he had been possessed by ancestral spirits as he felt them in his stomach and they talked to him. This had caused him to dream of fighting wild animals. These claims were corroborated by credible witnesses.<sup>93</sup> The court found that he acted in a state of automatism attributed to mental illness.<sup>94</sup> The court held that he could not be held criminally responsible and that the cultural background, tribal customs, and beliefs of the accused, coupled with his hysterical condition, had resulted in the involuntary conduct. Shivuri was referred to a mental hospital. According to common African beliefs the accused would, however, not be considered to be mentally ill but merely possessed by an ancestral spirit.<sup>95</sup> Being detained in a mental hospital can, therefore, be seen as similar to a sentence to life imprisonment as it cannot “cure” the spirit-possessed persons.<sup>96</sup> Although the cultural background was considered, it still creates tension between the minority and majority culture.

Automatism due to involuntary conduct is not a result of a pathological mental condition, and it is accompanied by a complete acquittal rather than committal to an institution.<sup>97</sup> There is a presumption that, in normal circumstances, persons act voluntarily, and it can, as a result thereof, be difficult to succeed with this defence (especially considering that evidence of automatism is severely scrutinised).<sup>98</sup> Recent case law on the defence of non-pathological automatism questions whether

---

<sup>90</sup> Snyman (n78) 56.

<sup>91</sup> Snyman (n78) 56-57 and Burchell (n76) 139.

<sup>92</sup> *S v Shivuri* 1978 SA Northern Region Circuit Court case no cc 325/78.

<sup>93</sup> The case is discussed in Motshekga “The ideology behind witchcraft and the principle of fault in criminal law” 1984 *Codicillus* 12-13.

<sup>94</sup> *Id* at 12.

<sup>95</sup> *Id* at 13.

<sup>96</sup> *Ibid.*

<sup>97</sup> Snyman (n78) 55-56 and Burchell (n75) 139.

<sup>98</sup> Burchell (n76) 139.



there is a distinction between non-pathological automatism and non-pathological incapacity.<sup>99</sup> This issue will be dealt with later.<sup>100</sup>

The list of factors that can influence the voluntariness and lead to the defence of automatism is open. As a result, there is no reason in principle why cultural practices or beliefs cannot be included.<sup>101</sup> Informing the court of the cultural context of the events which are central to the case will add to the understanding.<sup>102</sup> The test, however, remains objective, and cultural beliefs in themselves will not influence the control over your bodily movements.

In the *Ngang*<sup>103</sup> case, the accused, whilst sleep-walking, stabbed the complainant as he thought the complainant was a *tokoloshe*.<sup>104</sup> *Ngang* was not held criminally liable since his conduct was not voluntary but was a “purely physical reflex.”<sup>105</sup> In *Ngang*<sup>106</sup> the cultural context explains why he would have dreamt of a *tokoloshe*, but it is still the state of somnambulism that influenced whether or not his bodily movements were consciously controlled.<sup>107</sup> In the light of the above, no legal innovation is required into the inquiry of voluntary conduct.<sup>108</sup> The cultural defence will, therefore, not influence the first element, that of conduct.

#### 4.4.2 Causation

Certain crimes (known as formally-defined crimes) require, by definition, an unlawful circumstance compared to crimes (known as consequential crimes) where the conduct has to result in an unlawful consequence.<sup>109</sup> If the crime is one of unlawful consequence, there must be a causal connection between the initial voluntary conduct and the unlawful consequence.<sup>110</sup> Murder, for example, requires a causal link between the act or omission and the death of the person (the unlawful

---

<sup>99</sup> *Id* at 140.

<sup>100</sup> See chapter 5.

<sup>101</sup> Phelps (n5) 142-143.

<sup>102</sup> Renteln (n12) 27.

<sup>103</sup> *R v Ngang* 1960 3 SA 363 (T).

<sup>104</sup> See 2.4.2.1 above.

<sup>105</sup> *Ngang* case (n103) at 336.

<sup>106</sup> *Ibid.*

<sup>107</sup> *S v Ngema* 1992 2 SACR 651 (D) is another example where the defendant raised the defence of automatism. In this case he did not succeed because he could not prove that the acts were automatic or involuntary.

<sup>108</sup> Phelps (n5) 144.

<sup>109</sup> Burchell (n76) 178.

<sup>110</sup> Burchell (n76) 178.



consequence).<sup>111</sup> The accused must have been the factual, as well as the legal, cause of the unlawful consequence.<sup>112</sup> Courts prefer using the *conditio sine quo non* test to determine the factual causation<sup>113</sup>, and a number of policy factors are used to determine the legal causation which limits the scope of the factual causation.<sup>114</sup>

In all of the witchcraft-related cases mentioned above<sup>115</sup>, determining whether there was a causal connection provided no problems. In all of the cases, it was very clear that the unlawful consequence, such as the death of an alleged witch, was the result of the action of the accused. The belief in a religion, or the practising of certain cultural traditions, (or “a certain tradition”), does not influence the causal link as it is a morally-neutral concept, and cause and effect must be empirically linked.<sup>116</sup> It can, however, be mentioned that the establishment of causation in African tribunals does differ from the common law concept of causation.<sup>117</sup>

Consider, for example, the following scenario: Y, an alleged witch, states that she will kill X, and X is subsequently struck by lightning. According to our courts no crime will have been committed as there was no human action, and Y is not the factual cause of the death of X. This will, however, differ in an African tribunal where the act need not be that of human beings as witches have, considering the abovementioned scenario, magical powers such as the power to send a lightning bird.<sup>118</sup> The practice of witchcraft is considered to be a “morally blameworthy state or act,” and, as a result, thought to be sufficient to cause the misfortune.<sup>119</sup> The African tribunals are not bound by explanations within the terms of natural law.<sup>120</sup>

---

<sup>111</sup> Snyman (n78) 448.

<sup>112</sup> Burchell (n76) 141.

<sup>113</sup> Snyman (n78) 81-83 and Burchell (n75) 212-213. According to this test to determine whether X was the factual cause of the unlawful consequence, one must ask what would have happened if X's conduct had not taken place? If the result would still have followed, then X is not the factual cause.

<sup>114</sup> Snyman (n78) 83- 88 and Burchell (n76) 141. In the case of *S v Mokgethi* 1990 1 SA 32 (A), the court held that, when determining legal causation, the court can take into account the absence of a *novus actus interveniens*, direct cause, adequate cause, proximate cause or foreseeability. See further Burchell (n76) 218-224 on each of these factors.

<sup>115</sup> See 2.4.2 above.

<sup>116</sup> The empirical link is determined objectively. Bennett and Scholtz “Witchcraft: A problem of fault and causation” 1979 *Comparative and International Law Journal of Southern Africa* 298.

<sup>117</sup> *Id* at 296.

<sup>118</sup> See 3.3 above.

<sup>119</sup> Bennett and Scholtz (n116) 297.

<sup>120</sup> *Ibid*.



The existing neutral concept of causation, which is explained within natural-law terms, is used in our formal court system. For the purposes of this research, the common law conception of causation will be used. As stated above, cultural beliefs do not influence causation.

#### 4.4.3 Lawfulness

The accused's voluntary conduct must be unlawful in order to lead to criminal liability. This means that the act conflicts with the legal order as a whole.<sup>121</sup> Unlawfulness can be excluded because of certain grounds of justification or defence.<sup>122</sup> There is no *numerus clausus* of grounds of justification but some of the well-known grounds include: private (or self) defence; necessity; impossibility; obedience to superior orders; consent; public authority; disciplinary chastisement; *de minimis non curat lex*; and *negotiorum gestio*.<sup>123</sup> A selection of the grounds will be discussed below in order to establish whether cultural beliefs can justify an act.<sup>124</sup>

Firstly, private defence (also known as self-defence) can be raised where it was necessary for a person faced with an imminent or commenced unlawful attack to take the law into his or her own hands by using reasonable force to repel the unlawful attack.<sup>125</sup> This unlawful attack can be directed either towards the legal interests of the specific party or a third party.<sup>126</sup> Reasonable force entails that proportionality is required, as one cannot inflict more harm than the harm threatened by the attack.<sup>127</sup> The requirements that need to be met for the private defence to succeed are evaluated objectively, in other words from an outside perspective.<sup>128</sup>

If, for example, an accused, X, believes he killed an alleged witch during an act of self-defence after she had uttered the words, "You will not see the setting of the

---

<sup>121</sup> Snyman (n78) 96.

<sup>122</sup> Snyman (n78) 97; Burchell (n76) 141.

<sup>123</sup> *Ibid.*

<sup>124</sup> The grounds of justification that are discussed are based on the facts of cases that have taken place and are considered, therefore, to be the most relevant. See 2.4.2 above for the case law discussion. See the following pages in Burchell (n76) on the general defences not discussed in 4.4.3: 280-283 (impossibility); 284-290 (superior orders); 303-323 (public authority); 291-301 (disciplinary chastisement); 355 (*de minimis non curat lex*); and 357 (*negotiorum gestio*).

<sup>125</sup> Burchell (n76) 142; Snyman (n78) 103.

<sup>126</sup> Burchell (n76) 142; Snyman (n78) 106. Protected or legal interests include life, property, human dignity, sexual integrity, and freedom of movement amongst others.

<sup>127</sup> Burchell (n76) 231; Snyman (n78) 114-115.

<sup>128</sup> Burchell (n76) 242.



sun”<sup>129</sup>, and he responded towards the threat by killing the alleged witch because for X the fear and danger of witchcraft is real, this perception of the accused will not be considered. Whether the attack was necessary and reasonable will be judged externally. In this scenario the alleged witch is an unarmed old woman who merely uttered threats to X. An attack in those instances will not be considered reasonable, as fear alone is not enough to justify an attack.<sup>130</sup> The reasonable person in the position of X would not believe in witchcraft and kill someone in response to those words.<sup>131</sup> As has been illustrated, the objective nature of the test suggests that there is no scope for cultural beliefs.

The erroneous belief that his life was in danger can, however, under certain circumstances, exclude the intent of X. Fear can, therefore, be sufficient for a putative defence.<sup>132</sup> Putative defences and the exclusion of intent will be dealt with below.<sup>133</sup>

The second ground of justification is that of necessity, specifically necessity that is brought on by human agency in the form of compulsion, duress, or coercion. In the case of necessity, the legal interest of the accused must have been endangered through no fault of the accused.<sup>134</sup> In order to protect the legal interest the accused must have used reasonable means.<sup>135</sup> In the context of killing an innocent person because of compulsion, Rumpff J held, in the well-known case of *S v Goliath*<sup>136</sup>, that compulsion can constitute a complete defence.<sup>137</sup> He, however, did not answer the question of whether or not compulsion excludes the element of fault or the element of unlawfulness. The defence requires that any reasonable person would not be able to withstand the pressure and could not be expected to have resisted it.<sup>138</sup>

---

<sup>129</sup> This example is based on the facts of *S v Mokonto* 1971 2 SA 319 (A). See 2.4.2.1 above.

<sup>130</sup> Burchell (n76) 234.

<sup>131</sup> See Snyman (n78) 113-114 on the test for private defence. Using the criterion of the reasonable person is merely an aid when determining whether the act was reasonable and should not be confused with the reasonable person test used during the test of negligence.

<sup>132</sup> Burchell (n76) 234.

<sup>133</sup> See chapter 6.

<sup>134</sup> Burchell (n76) 259. Legal interests include death and serious bodily injury, threat of damage to property or lesser injury.

<sup>135</sup> Burchell (n76) 259.

<sup>136</sup> *S v Goliath* 1972 3 SA 1 (A).

<sup>137</sup> *Id* at 11D.

<sup>138</sup> *Id* at 11D and 25G.





In the context of the cultural belief in witchcraft it can occur that members of the cultural group are ordered by the headmen of that particular tribe to kill an innocent party. It can either be in order to obtain *muti*<sup>139</sup> or it can even be a case of an alleged witch being pointed out. Depending on the set of facts, it can lead to serious consequences for the accused if he or she does not obey the orders, either being killed themselves or ostracized from their tribe.<sup>140</sup> Taking into consideration the importance placed on community by Africans, this is a serious consequence.<sup>141</sup> In this example the existing defence of compulsion can be employed. The ordinary rules of compulsion will still be able to assist the person despite the fact that the scenario has a distinct cultural context.<sup>142</sup> Consequently no innovation is necessary.

In the case of there being no direct order from the headmen, the defendant can claim that the external power that forced him or her to act was a group, or, more abstractly, a culture.<sup>143</sup> A defendant can claim that he was under a cultural imperative to act, and the failure to act would result in punishment from his community.<sup>144</sup> As explained above, community shapes the identity of the individuals as they are not seen as separate but as existing through others.<sup>145</sup> The defence will most likely fail given the background of the reasonable person which is founded on a Western legal system.<sup>146</sup> The courts will not readily accept that there was no other option for these individuals.

Lastly, consent, as a justification ground, has been employed in cases concerning witchcraft. The principle of *volenti non fit injuria* (an injury is not done to one who consents) applies to a very limited extent in criminal law.<sup>147</sup> Consent given in the course of normal therapeutic medical operations or treatment can, however, be a

---

<sup>139</sup> See 3.2.3 above.

<sup>140</sup> The defence of superior orders is known to arise only in the case of a lawful order from a superior officer, and has been confined to cases of military or police commands. This defence is not available if the order is manifestly unlawful. See Burchell (n75) 284-286. In the case of killing an innocent party because he or she is believed to be a witch, or in order to acquire certain body parts, the act will be manifestly unlawful. Furthermore, the order is not within the military or police context. In the case where the accused genuinely believed he was required to follow orders, the defence of 'putative superior orders' (or defence of mistake) is available. This will be discussed below in chapter 6.

<sup>141</sup> See 3.1.3 above.

<sup>142</sup> See also the discussion of Phelps (n5) 144-145.

<sup>143</sup> Siesling and Ten Voorde in Foblets (n18) 155.

<sup>144</sup> Renteln (n12) 30-31.

<sup>145</sup> See 3.1.3 above.

<sup>146</sup> Siesling and Ten Voorde (n18) 155.

<sup>147</sup> Burchell (n76) 143.



defence if bodily harm, or even death, results from this treatment.<sup>148</sup> If the risk involved is serious, the accused has to be professionally qualified or licensed.<sup>149</sup> In the context of the belief in African witchcraft, serious bodily harm, and even death, has occurred in instances where 'witchdoctors' (traditional healers)<sup>150</sup> have tried to exorcise evil spirits from people. In the case of *R v Zanhibe*<sup>151</sup> a death resulted after the victim suffered third degree burns. The victim was held down under a blanket over a steaming bath, into which medicine had been poured, by three of his relatives during the exorcism. When he started to struggle it was merely considered to be the evil spirits trying to escape.<sup>152</sup> Bresler J held that the "somewhat credulous native population should be protected against this dangerous form of practice indulged in by their totally unqualified countrymen."<sup>153</sup> As a result, consent by the victim did not justify the conduct of Zanhibe.

In cases such as *Zanhibe*<sup>154</sup> and *Sikunyana*,<sup>155</sup> it was made clear that the consent of the victim does not provide a defence as the practices of the traditional healers are not considered to be recognised "by modern usage as normal and accepted practice."<sup>156</sup> The acceptance of the use of traditional medicine will, however, be changed by the commencement of the Traditional Health Practitioners Act 22 of

---

<sup>148</sup> Burchell (n76) 326. According to the National Health Act 61 of 2003 section 7 states that health services can be provided only to a person who has given informed consent. Section 7(3) states:

For the purposes of this section '**informed consent**' means consent for the provision of specified health service given by a person with legal capacity to do so and who has been informed as contemplated in section 6.

Section 6 provides the following:

- (1) Every health care provider must inform a user of-
  - a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
  - b) the range of diagnostic procedures and treatment options generally available to the user;
  - c) the benefits, risks, costs and consequences generally associated with each option; and
  - d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.
- (2) The health care provider concerned must, where possible, inform the user as contemplated in subsection (1) in a language that the user understands and in a manner which takes into account the user's level of literacy.

<sup>149</sup> Burchell (n76) 334.

<sup>150</sup> See 3.3 above.

<sup>151</sup> *R v Zanhibe* 1954 3 SA 597 (T).

<sup>152</sup> *Id* at 598.

<sup>153</sup> *Id* at 599.

<sup>154</sup> *Zanhibe* case (n151).

<sup>155</sup> *S v Sikunyana and Others* 1961 (3) ECD 549.

<sup>156</sup> *Id* at 552.



2007<sup>157</sup> which recognises the customs and uses of the traditional medicines. This Act, with the help of the Interim Traditional Health Practitioners Council of South Africa,<sup>158</sup> will provide a regulatory framework<sup>158</sup> for traditional health care services. This recognition will possibly have an effect on the recognition of the defence of consent in the case of traditional healers that have registered themselves with the Council.

Until such time, the current precedent is that consent in the context of traditional healers is generally not considered to be a defence. Consent in the case of religious, customary, or superstitious purposes can be considered to be a defence only if the injury suffered is minor, but it will not be considered a defence where the practice will seriously offend public policy.<sup>159</sup> O'Hagan J in *Sikunyana* specifically stated that “a highly dangerous practice superstitiously designed to secure the exorcism of an evil spirit cannot be rendered lawful by the consent of the afflicted person.”<sup>160</sup> The putative defence, where the traditional healer believed that the consent of the victim was enough, will be discussed below.<sup>161</sup>

The problem with a purely objective test used in the case of unlawfulness is that it does not include the personal traits of the accused. If this objective test is individualized we risk diluting the test to the point that it becomes subjective.<sup>162</sup> As illustrated above, and considering the effect of individualizing the test, there is no scope for considering cultural beliefs within the element of unlawfulness.

#### 4.4.4 Capacity and fault

The accused must have the requisite criminal capacity and the *mens rea* in order to be convicted.<sup>163</sup> Capacity is briefly defined as the ability to appreciate the wrongfulness of your conduct (cognitive aspect) and the capacity to act in

---

<sup>157</sup> Signed by the President and assented on 7 January 2008. Date of commencement is still to be proclaimed.

<sup>158</sup> The Interim Traditional Health Practitioners council of South Africa was inaugurated on 12 February 2013. See Speech by Deputy Minister Gwen Ramokgopa at the inauguration of the interim Traditional Health Practitioners Council of South Africa <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=34235&tid=98563> (accessed on 11 September 2013).

<sup>159</sup> *Sikunyana* case (n155). See also Burchell (n75) 339.

<sup>160</sup> *Sikunyana* case (n155) at 552.

<sup>161</sup> See chapter 6.

<sup>162</sup> Amirthalingham (n69) 50.

<sup>163</sup> Burchell (n76) 138.



accordance with that appreciation (conative function).<sup>164</sup> Fault can take the form either of intention or negligence.<sup>165</sup> In order for the accused to be held liable, there has to be a guilty mind.<sup>166</sup>

Both fault and capacity address the mental qualities of the accused. In South African criminal law, the concepts of fault and capacity are two distinct and different concepts.<sup>167</sup> The investigation into whether or not the accused has the necessary capacity takes place before it is determined whether the accused had *mens rea*, in the form of either intention or negligence.<sup>168</sup>

The subjective nature of the tests into capacity and fault in the form of intention appears to be ripe and promising for the inclusion of cultural beliefs. As such it is submitted that, if the cultural defence is formally recognised and accepted, it will strike at the elements of capacity and fault in the form of intention. Capacity and fault will each be discussed in detail in the subsequent chapters below.<sup>169</sup>

#### **4.4.5 Diminished responsibility and mitigation of sentencing**

In the positive South African law cultural factors, such as the belief in witchcraft, have been accepted, and this acceptance has led to the recognition of diminished responsibility of an accused and the consequent mitigation of the sentence imposed.<sup>170</sup> The problem, as illustrated above, is that courts are approaching the belief in witchcraft with more scrutiny and circumvention.<sup>171</sup> Subsequently, it will be becoming harder to invoke the belief in witchcraft in order to mitigate a sentence.

#### **4.5 Conclusion**

The Constitution has placed a duty on the courts to develop criminal law and harmonise the constitutional values with the criminal law principles. This duty is, first and foremost, the reason behind the need to formalise a new distinct defence. The cultural defence will ensure that the rights of people from minority cultures are

---

<sup>164</sup> *Id* at 147.

<sup>165</sup> Burchell (n76) 455.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> See chapter 5 below on criminal capacity and chapter 6 below on fault.

<sup>170</sup> See 2.4.2 above.

<sup>171</sup> *Ibid.*



protected and reflected in criminal law by ensuring the proper consideration of cultural factors. The right to freedom of religion, belief and opinion,<sup>172</sup> the right to participate and enjoy any culture,<sup>173</sup> the right to equality,<sup>174</sup> and the right to a fair trial<sup>175</sup> are all rights that specifically support the formalisation of the cultural defence.

Cultural is relevant in criminal law because an individual's behaviour can be influenced by his or her cultural background. The cultural defence is, therefore, in essence a legal strategy which illustrates how his/her cultural background influenced the behaviour of an individual. This behaviour should have clashed with the norms of the majority culture for this to be taken into account. A list of requirements has, however, been created in order to help establish whether the cultural defence can be invoked by the defendant.

Although the cultural defence can take various forms, it is submitted that a new distinct defence should be formalised. The reason for this is that the use of cultural evidence as part of an existing defence, or during the sentencing phase, has proved to be insufficient or demeaning and does not, as a result, ensure the proper consideration of cultural evidence.

It becomes evident, when considering the cultural defence in the context of the positive South African criminal law, that the defence will not provide any innovation nor find any expression within the elements of conduct, causation, and unlawfulness. Within the objective nature of the tests involved in these elements, there is no room for the cultural background of an accused. The objective nature, for example the concept of the reasonable person, is based on the Western legal system, and the belief in witchcraft will not reach this benchmark. Furthermore, taking for example the element of voluntary conduct, the defence of automatism, as illustrated above, has dealt with the situation justly and considering the cultural background of the accused will not aid him or her. In all probability the cultural defence will find application in the elements of capacity or fault in the form of intention. The cultural defence can, therefore, be regarded as a multiple defence.

---

<sup>172</sup> Section 15 of the Constitution, 1996.

<sup>173</sup> Section 30 and 31 of the Constitution, 1996.

<sup>174</sup> Section 9 of the Constitution, 1996.

<sup>175</sup> Section 35(3) of the Constitution, 1996.



Cultural pluralism can no longer be equated with being primitive and/or uncivilised. The constitutional legal culture demands that the law be developed and justice and cultural pluralism be balanced. As Evan-Pritchard states, “New situations demand new magic.”<sup>176</sup> In favour of equality and individualized justice, the cultural defence needs to be formalised to provide this “new magic”.

---

<sup>176</sup> Evans-Pritchard *Witchcraft, oracles and the magic among the Azande* (1937) 1.

## Chapter 5: The role of criminal capacity in the cultural defence

### 5.1 Introduction

“There is a separate little man in the top of one’s head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse the way he should go”<sup>1</sup>

In Roman law an inquiry had to be made, before fault became relevant, to determine whether a person had the capacity to act and could be held criminally liable. This was specifically in the context of young children and the mentally ill (previously referred to as the insane person).<sup>2</sup> The presumption existed that everyone, except the young and the mentally ill, had the capacity (or reason) to control their emotions or impulses and should, therefore, be held accountable for their actions.

The presumption that a person has the necessary capacity remains, but, after the well-known *Chretien*<sup>3</sup> case, there was no longer a closed list of factors that could influence the capacity of a person. In order to determine whether a person has the capacity to control his or her actions, a clear understanding of what ‘capacity’ entails will be set out below before the test for capacity is explained.

This chapter endeavours to illustrate that cultural beliefs, specifically the belief in African witchcraft, could negate the element of criminal capacity. This will be accomplished, firstly, by orientating the reader as to the difference between pathological and non-pathological capacity. This difference is important as the burden of proof, and also the consequence of raising the defences successfully, differs in relation to the type of capacity. The defence of pathological incapacity also differs from the defence of non-pathological incapacity in the context of cultural beliefs.

Secondly, pathological incapacity emanates from a disease, and the role that cultural beliefs could play in mental diseases will be explored. An extension of this exploration is to address the question of whether the cultural defence will negate the element of capacity if the incapacity is of a pathological nature. This will entail

---

<sup>1</sup> *Holloway v United States*, 148 F. (2.d) 688; certiorari denied, 334 U.S. 852 (1948).

<sup>2</sup> Burchell *Principles of criminal law* (2006) 359.

<sup>3</sup> *S v Chretien* 1981 1 SA 1097 (A).



comparing the “insanity” defence and the “cultural” defence, clearly distinguishing between normality and abnormality.

The key to establishing that cultural beliefs could negate the element of capacity lies, thirdly, in the understanding of the defence of non-pathological incapacity. The defence of non-pathological incapacity is not codified and is founded exclusively on case law. This chapter will explore the history and the development of the defence until it reached the stage where non-pathological incapacity was a complete defence. The situation surrounding the defence became murky after the Supreme Court of Appeal decision in *S v Eadie*.<sup>4</sup> In order to grasp the effect (and potential effect) of the decision in *Eadie*<sup>5</sup> fully, the case law, before and after the case, will be deconstructed. The academic opinions of Snyman and Burchell on the effect of the *Eadie*<sup>6</sup> decision will be dealt with in order to determine the future of the defence of non-pathological incapacity. For some, the death knell to the defence of non-pathological incapacity was given by Navsa JA in *Eadie*.<sup>7</sup> It will, however, be submitted that the face of the defence of non-pathological incapacity has changed, but the defence itself still exists.

The last part needed in order to establish the fact that cultural beliefs can negate capacity will be to examine how culture can influence the way individuals think and act. The work of Dr D’Andrade,<sup>8</sup> one of the founders of cognitive anthropology, will be used to explain the complex relationship between culture and the human psyche. The concept of schemas will help to explain the psychological effect that culture could have on a person.

Taking into consideration all the pieces of the puzzle, cultural beliefs in context of witchcraft killings will be applied to the defence of non-pathological incapacity in order to establish whether it could negate the element of capacity. To iterate certain principles that can be elucidated from the application of cultural beliefs below, a comparison will be struck between the “Battered Woman Syndrome” and the “Cultural Defence”. It is submitted that the comparison will not only iterate certain

---

<sup>4</sup> *S v Eadie* 2002 3 SA 719 (SCA).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> D’Andrade in Stigler *et al* (eds.) *Cultural psychology: Essays on comparative human development* (1990) 65.





principles but will also act as a guideline in the application of the cultural defence in the context of criminal capacity.

The chapter will end with a discussion on diminished responsibility. A person's capacity will not always be affected to the extent that he or she lacked capacity completely, and, under those circumstances, the issue of diminished responsibility should be raised.

## 5.2 Definition of, and test for, criminal capacity

In order for an individual to be held responsible and liable for his or her unlawful conduct, the person needs to have the necessary criminal capacity, or mental abilities required by law, at the time the act was committed.<sup>9</sup> A rebuttable presumption exists that all individuals have the necessary criminal capacity to act,<sup>10</sup> except in the case of children under the age of ten (10) years. The Rumpff Commission of Inquiry<sup>11</sup> stated that the normal human personality is made up of three mental functions, cognitive, conative, and affective.<sup>12</sup>

Firstly, the cognitive function is the capacity by which a person is able to think, perceive, learn, and reason.<sup>13</sup> The conative function is the ability to control behaviour, in other words self-control, and the ability to exercise free will. Snyman describes the conative function as differentiating people from animals as this function allows individuals to resist impulses or desires if they are contrary to his or her insights into right and wrong.<sup>14</sup> The last mental function of the human personality is the affective which relates to an individual's emotional feeling such as anger, hatred, mercy, and jealousy.<sup>15</sup>

---

<sup>9</sup> Snyman *Criminal law* (2006) 160; Burchell (n2) 147; *S v Mahlinza* 1967 1 SA 408 (A) at 414G-H; *S v Johnson* 1969 1 SA 201 (A) at 204E; *S v Lesch* 1983 1 SA 814 (O) at 823A-B; *S v Campher* 1987 1 SA 940 (A) at 965D-E; *S v Laubscher* 1988 1 SA 163 (A) at 166F-G; *S v Calitz* 1990 1 SACR 119 (A) at 126d.

<sup>10</sup> *Mahlinza* case (n9) at 419A.

<sup>11</sup> The Commission was headed under the Chairmanship of Mr Justice FLH Rumpff in 1967.

<sup>12</sup> *S v Van der Merwe* 1989 2 PH H 51 (A); Burchell (n2) 358; Louw in Kaliski (ed.) *Psycholegal assessment* (2006) 40-41.

<sup>13</sup> Snyman (n9) 161.

<sup>14</sup> Snyman (n9) 162

<sup>15</sup> Burchell (n2) 358 from the Rumpff report RP 69/1967.



Criminal capacity (also expressed simply as capacity, or *toerekeningsvatbaarheid* in Afrikaans<sup>16</sup>) in South African criminal law relates only to the cognitive and conative functions of the human personality. Considering the definition above, with respect to the cognitive function, capacity in criminal cases entails that the accused must be able to appreciate the wrongfulness of his or her conduct or have insight into his or her actions.<sup>17</sup> The conative function relates to the accused's being able to act in accordance with appreciation or insight; in other words, he or she can exercise the necessary self-control.<sup>18</sup>

The test for capacity has been codified in the Criminal Procedure Act 51 of 1977. Section 78(1) of the Criminal Procedure Act<sup>19</sup> states the following:

(1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable-

(a) of appreciating the wrongfulness of his or her act or omission; or

(b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.

Both subsection (a), the cognitive function, and subsection (b), the conative function, need to be present when a person commits a crime. If either subsection (a) or subsection (b) is absent the individual is seen to have lacked the necessary criminal capacity to act.<sup>20</sup> The test for determining capacity is a subjective test,<sup>21</sup> but the submission will be made below that the test for capacity in the case of non-pathological incapacity requires both a subjective and objective evaluation.<sup>22</sup>

As mentioned above<sup>23</sup> the inquiry into criminal capacity was limited to certain categories of people. The Appellate decision in *S v Chretien*<sup>24</sup> broadened the scope

---

<sup>16</sup> Snyman (n9) 160.

<sup>17</sup> Burchell (n2) 358; Snyman (n9) 161-162

<sup>18</sup> Burchell (n2) 147, 358; Snyman (n9) 160-162. This must be proved by the prosecution beyond reasonable doubt. See *S v Makete* 1971 4 All SA 176.

<sup>19</sup> Criminal Procedure Act 51 of 1977.

<sup>20</sup> Snyman (n9) 162.

<sup>21</sup> *Chretien* case (n3) at 1099; *S v Van Vuuren* 1983 1 SA 12 (A); *Campher* case (n9); *Calitz* case (n9); *S v Wiid* 1990 1 SACR 561 (A); *S v Potgieter* 1994 1 SACR 631 (A); *Eadie* case (n4).

<sup>22</sup> See 5.4.3.2 below.

<sup>23</sup> See 5.1 above.

<sup>24</sup> In the *Chretien* case (n3) at 1106, Rumpff J defined capacity as follows:



of inquiry into capacity, in that case specifically pertaining to persons who are intoxicated.<sup>25</sup> In principle, the case opened the door to an inquiry into any other factor that could lead to incapacity.<sup>26</sup>

The courts have drawn a broad distinction between pathological and non-pathological incapacity.<sup>27</sup> The term non-pathological incapacity was first coined by Joubert JA in *S v Laubscher*.<sup>28</sup> The difference between pathological and non-pathological incapacity is important, as the burden of proof in each case differs<sup>29</sup>, and, furthermore, the result in the cases will differ. If an accused succeeds with the defence of pathological incapacity, he or she will be found not guilty but, in accordance with section 78(6) of the Criminal Procedure Act, he or she could be detained in a psychiatric hospital or institution depending on the case.<sup>30</sup> An accused

---

*“Eers dan wanneer 'n persoon, wat 'n gevolghandeling pleeg, so besope is dat hy nie besef nie dat wat hy doen ongeoorloof is, of dat sy inhibisies weselik verkrummel het, kan hy as ontoerekeningsvatbaar beskou word.”*

Burchell criticizes this definition, as the first part of the definition (appreciation of what he was doing was wrongful) is rather a test for fault. See Burchell (n2) 360.

<sup>25</sup> In the *Chretien* case (n3) the accused whilst intoxicated killed one person and injured five after he drove into a crowd standing in the street near the party he had attended.

<sup>26</sup> Factors which the courts have considered to result in the absence of criminal capacity are youthfulness, insanity, heavy intoxication, provocation, and/or emotional stress.

<sup>27</sup> Burchell (n2) 362.

<sup>28</sup> *S v Laubscher* (n9) at 167 states,

*“Afgesien van statutêre ontoerekeningsvatbaarheid kan 'n mens ook nie-patologiese ontoerekeningsvatbaarheid van 'n tydelike aard ten tyde van die pleeg van die misdaad kry wat aan 'n nie-patologiese toestand, dws nie aan 'n geestesongesteldheid of geestesgebrek in die vorm van 'n patologiese versteuring van sy geestesvermoëns toe te skryf is nie, te wyte sodat hy nie die onderskeidingsvermoë óf die weerstandskrag (wilsbeheervermoë) gehad het nie.”*

<sup>29</sup> Section 78 (1B) of Act 51 of 1977 states that,

Whenever the criminal responsibility of an accused with reference to the commission or omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party that raises the issue.

As a result of section 78 (1B) the burden of proof, on a balance of probabilities, will rest on the person who claims that he or she is mentally ill. The general principle that the onus of proof rests on the prosecution remains the same in the case of non-pathological capacity. The defendant who raises the defence of non-pathological incapacity has to lay a basis for the defence which will create reasonable doubt in the mind of the court. For a discussion on the constitutionality of the shifting of the onus of proof see Burchell (n2) 390-395 and Snyman (n9) 174-175. See also Meintjies-Van der Walt “Making a muddle into a mess? The amendment of s78 of the Criminal Procedure Act” 2002 SACJ 244-246.

<sup>30</sup> Section 78(6) of Act 51 of 1977 reads as follows,

If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act-

(a) the court shall find the accused not guilty; or

(b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,

by reason of mental illness or intellectual disability, as the case may be, and direct-

who succeeds with the defence of non-pathological incapacity will, however, be acquitted.

Both the defence of pathological incapacity and that of non-pathological incapacity will be discussed below.<sup>31</sup> The defence of criminal incapacity, whether pathological or non-pathological, will be analysed in the context of cultural factors in order to determine whether the cultural defence could negate the element of capacity.

### 5.3 Pathological incapacity

The test to determine whether criminal liability has been negated as a result of pathological incapacity, sometimes referred to as the “insanity test”,<sup>32</sup> is found in section 78(1) of the Criminal Procedure Act, as set out above.<sup>33</sup> This test requires three elements. Firstly, the accused must have suffered from a *mental illness or defect*.<sup>34</sup> Secondly, he or she must have suffered from a mental illness or defect *at the time of the offence*.<sup>35</sup> Not all mental illnesses or defects will give rise to excluding criminal liability, and, in order to determine which will exclude criminal liability, the last requirement of the insanity test is very important.<sup>36</sup> The test for insanity, lastly,

- 
- (i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be-
    - (aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;
    - (bb) admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental care health [sic] user contemplated in section 37 of the Mental Health Care Act, 2002;
    - (cc).....
    - (dd) released subject to such conditions as the court considers appropriate; or
    - (ee) released unconditionally;
  - (ii) in any other case than a case contemplated in subparagraph (i), that the accused-
    - (aa) be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;
    - (bb).....
    - (cc) be released subject to such conditions as the court considers appropriate; or
    - (dd) be released unconditionally.

<sup>31</sup> See 5.3 and 5.4 respectively.

<sup>32</sup> Burchell (n2) 377.

<sup>33</sup> See 5.2 above.

<sup>34</sup> Snyman (n9) 173.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Id* at 172-173.



entails that the mental illness or defect should have *deprived the individual of the capacity for insight and control*.<sup>37</sup>

The first requirement of mental illness is a legal concept, and not a question of medicine.<sup>38</sup> The term 'pathological' means "emanating from disease".<sup>39</sup> Pathological incapacity, therefore, entails that the defence can exclude liability only when the defect or illness is a function of mental disease and not merely of training.<sup>40</sup> If mental abnormality occurs as a result of an external stimulus, such as alcohol, the abnormality is not a disease, and can, therefore, not fulfil the first requirement.<sup>41</sup>

The Criminal Procedure Act does not give a formal definition of what precisely constitutes a mental 'illness' or 'defect'.<sup>42</sup> Mental defect occurs where an individual's intellect is abnormally low, and, as a result, the person has significant limitations in several functions which can include, amongst others, communication, social, and interpersonal skills.<sup>43</sup> A mental defect is usually evident from an early age, whereas mental illnesses or diseases, in most cases, develop only later in life.<sup>44</sup>

The Mental Health Care Act 17 of 2002 defines mental illness in section 1 as follows:

[M]ental illness means a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis.

This definition is, however, not binding in a criminal trial.<sup>45</sup> In *S v Mahlinza*<sup>46</sup>, Friedman J held that it is undesirable to define mental illness by laying down any general symptom by which a mental illness or defect could be recognised.<sup>47</sup> In

<sup>37</sup> Burchell (n2) 377; Snyman (n9) 173.

<sup>38</sup> Burchell (n2) 373; Louw (n12) 46.

<sup>39</sup> Snyman (n9) 163.

<sup>40</sup> Seidman "Witchmurder and mens rea: A problem of society under radical social change" 1965 *Modern Law Review* 51.

<sup>41</sup> Burchell (n2) 375; Snyman (n9) 171-172. Internal origin means that the cause of the illness must not be due to external stimuli or substances that are ingested. Examples such as the use of alcohol and drugs, and a blow on the head, are not endogenous in nature.

<sup>42</sup> Burchell (n2) 375.

<sup>43</sup> Burchell (n2) 377; Snyman (n9) 177; Africa in Tredoux *et al* (eds.) *Psychology and law* (2006) 392. Africa states that mental defect is similar to the psychological concept 'mental retardation.'

<sup>44</sup> Burchell (n2) 377; Snyman (n9) 177; Africa (n43) 392

<sup>45</sup> Louw (n12) 46.

<sup>46</sup> *Mahlinza* case (n9) at 418.

<sup>47</sup> In the *Mahlinza* case (n9) Friedman stated at 418D-E that,

*"[h]oewel dit onwenslik is om te probeer die begrip geesteskrankheid te omskryf, is dit wel moontlik om te konstateer dat by 'n benadering van die vraag of daar geesteskrankheid is of nie, die oorsaak van geesteskrankheid nie van belang is nie solank die versteuring van die geestesvermoëns 'n sieklike versteuring is."* (although it



*Stellmacher*, Mouton J held that a mental illness or defect must at least be a result of a disease and of internal origin.<sup>48</sup> Although it can be difficult to determine whether the condition is indeed a mental illness, it does not, however, matter what the cause of the disease was.<sup>49</sup>

As there is no formal definition of mental illness in terms of criminal law, there is no closed list of mental illnesses or defects that could result in excluding criminal liability.<sup>50</sup> The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5)<sup>51</sup> of the American Psychiatric Association and/or the *Classification of Mental and Behavioural Disorders of the World* (ICD-10)<sup>52</sup> can, however, help in determining whether a person suffers from a disorder.<sup>53</sup> Suffering from a mental illness does not, however, exclude criminal liability on its own. The other two requirements, discussed below, need to be fulfilled as well.

The second requirement of the insanity test is that a person must be suffering from the mental illness or defect at the time that the crime was committed.<sup>54</sup> Even if a

---

is undesirable to try and define the concept mental illness, it is, however, possible to state that, in determining the question of whether there was a mental illness or not, the cause of the mental illness is not of importance, as long as the disturbance of the mental abilities is a sickly disturbance." [own translation])

See also Louw (n12) 47.

<sup>48</sup> *S v Stellmacher* 1983 2 SA 181 (SWA) at 187,

*"naamlik dat dit dui op 'n patologiese versteuring van die beskuldigde se geestesvermoëns en nie 'n bloot tydelike verstandelike beneweling wat nie aan 'n geestesabnormaliteit toe te skryf is nie, maar te wyte is aan uitwendige prikkels soos alkohol, verdowingsmiddels of provokasie."* ("a pathological disturbance of the accused's mental capacity and not a mere temporary mental confusion which is not attributable to a mental abnormality but rather attributable to external stimuli such as alcohol, drugs or provocation.")

See Burchell (n2) 375; Louw (n12) 47.

<sup>49</sup> *Stellmacher* case (n48) at 187; Burchell (n2) 376.

<sup>50</sup> Louw (n12) 47; Snyman (n9) 171.

<sup>51</sup> DSM 5, 2013. In the DSM the mental disorders are classified into different categories namely: organic disorders; substance-related disorders; schizophrenia and other psychotic disorders; mood and anxiety disorders; and personality disorders. See Burchell (n2) 383-387.

<sup>52</sup> ICD-10, 1992.

<sup>53</sup> According to the DSM 5, APA, 2000. Allan in Tredoux *et al* (eds.) *Psychology and the law* (2006) 299-300; Africa (n42) 388-389. Mental illness refers to a psychological or behavioural pattern that causes distress or impairment in the person's functioning.

<sup>54</sup> Before an inquiry into the capacity can be made, the court must first ensure that the person is fit to stand trial. Section 77 of Act 51 of 1977 deals with the enquiry of whether the defendant is capable of understanding the nature of the trial proceedings. Section 77(1) of Act 51 of 1977 reads as follows,

(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

Section 77(5) of Act 51 of 1977 states that,



person has been diagnosed with a mental illness, a person may, for a reasonably short period of time, be perfectly normal mentally. During this *lucidum intervallum* the person could have the necessary capacity to act, but, thereafter, lapse again into a state of mental abnormality.<sup>55</sup>

Lastly, a mental disease, to act as a defence, should either deprive someone from understanding, or, having insight, into the wrongfulness of his or her actions; or it should deprive him or her of his or her judgment to act in accordance with his or her awareness of right and wrong.<sup>56</sup> The second leg, the conative function, if impaired, does not require that the urge to be physically irresistible or based on sudden unplanned action.<sup>57</sup> The defendant who raises the defence of pathological incapacity needs to prove all three of the requirements above before he or she can succeed.

### 5.3.1 Defence of pathological incapacity in the context of cultural beliefs

#### 5.3.1.1 Culture-bound syndromes

When diagnosing a patient with a mental disorder or illness it can become problematic when the patient is from a cultural background which is vastly different from that of the person evaluating the patient.<sup>58</sup> The major types of mental disorders or diseases listed in the DSM are found in different cultures, but the DSM remains a Western classification system of mental illnesses.<sup>59</sup> This can result either in abnormal behaviour that does not fit into the classification system<sup>60</sup> or major types of mental disorders being called “by a different name.” Schizophrenia, for example,

---

(5) If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way.

See Burchell (n2) 372-373 on the fitness to stand trial; *Hiemstra's Criminal Procedure*, Issue 7 (2014) 13-1 – 13-11; Du Toit *et al Commentary on the Criminal Procedure Act*, Service 52, 2014, 13-1-13-40.

<sup>55</sup> Snyman (n9)161.

<sup>56</sup> Burchell (n2) 37, 370, 378-383; Snyman (n9) 172; Africa (n42) 394-395.

<sup>57</sup> Burchell (n2) 382. In *S v Kavin* 1978 2 SA 731 (W) at 737-738 the defendant was acquitted and his action could not be said to be the result of an irresistible impulse. “it was a slow and deliberate course of conduct.”

<sup>58</sup> Sadock and Sadock *Kaplan & Sadock's synopsis of psychiatry: Behavioural sciences/clinical psychiatry* (2007) 523.

<sup>59</sup> Al-Issa *Handbook of culture and mental illness: An international perspective* (1995) 27.

<sup>60</sup> *Ibid.*



may be considered by different cultures as mere mental exhaustion, or even as a bewitched state.<sup>61</sup> This does not, however, change the nature of the illness.<sup>62</sup>

Abnormal behaviour that does not fit into the general classification system is often influenced by cultural factors.<sup>63</sup> These disorders are known as culture-bound syndromes<sup>64</sup>, and, in some cases, the defence of pathological incapacity depends on the recognition of a culture-bound syndrome.<sup>65</sup> Sadock and Sadock define culture-bound syndromes as,<sup>66</sup>

“specific arrays of behavioural and experiential phenomena that tend to present themselves preferentially in particular sociocultural contexts and that are readily recognized as illness behaviour by most participants in that culture.”

The DSM-IV-TR<sup>67</sup> has listed a few of the known culture-bound syndromes.<sup>68</sup> *Rootwork* is one of the listed syndromes in the DSM-IV-TR where illness is ascribed to hexing, witchcraft, sorcery, or evil influence of another person.<sup>69</sup> An example of an indigenous illness that occurs in South Africa is *Amafufunyane*, which is a form of negative spirit possession caused either by bewitchment, or a negative relationship with ancestors.<sup>70</sup> *Ukuthwasa* (or *Thwasa*), furthermore, occurs when one is “called” through illness to become a traditional healer.<sup>71</sup> *Bewitchment* is where the patient

---

<sup>61</sup> Al-Issa (n59) 27. For general reading on the interactions between religious or cultural beliefs and mental disorders, such as depression, anxiety, posttraumatic stress disorder, personality disorders amongst others see Peteet *et al* (eds.) *Religious and Spiritual issues in psychiatric diagnosis: A research agenda for DSM-V* (2011).

<sup>62</sup> Al-Issa (n59) 27.

<sup>63</sup> Heine *Cultural Psychology* (2008) 481.

<sup>64</sup> Heine (n63) 481; Sadock and Sadock (n58) 523.

<sup>65</sup> Renteln *The cultural defence* (2004) 29.

<sup>66</sup> Sadock and Sadock (n58) 523-524.

<sup>67</sup> DSM-IV-TR, 2000.

<sup>68</sup> Examples of the listed culture-bound syndromes in the DSM-IV-TR include, amongst others, *Spell*, a trance state which persons “communicate” with deceased relatives or spirits; *Zar* is a term which describes the experience of a spirit possessing a person in certain cultures; and voodoo death is a condition where the afflicted person is convinced that a curse has been put on them and this results in severe fear reactions.

<sup>69</sup> The symptoms associated with *Rootwork* may include generalized anxiety and gastrointestinal complaints, weakness, dizziness, the fear of being poisoned, and sometimes the fear of being killed. A variety of emotional or psychological problems can occur. See also Sadock and Sadock (n58) 523.

<sup>70</sup> Al-Issa (n59) 74-75.

<sup>71</sup> Al-Issa (n59) 74-75; Bührmann “Thwasa and bewitchment” 1982 *South African Medical Journal* 877. For other examples of indigenous culture-bound syndromes see Al-Issa (n59) 74-75. *Ukuthwasa* has not featured in any known criminal cases, but has recently received recognition in the labour case *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and others* 2014 (1) SA 585 (SCA).





believes a witch is “working on one.”<sup>72</sup> *Bewitchment*’s symptoms appear to be similar to those of a patient with catatonic schizophrenia, which includes immobility, maintenance of the same posture for prolonged periods, dribbling of saliva, and a mask-like facial expression.<sup>73</sup> The two disorders do differ, and, a closer observation of a *Bewitchment* patient will show signs of fear, anxiety, suspicion, and a strange watchfulness.<sup>74</sup>

In the DSM-5 the construct of culture-bound syndromes has been replaced with three concepts namely, cultural syndrome, cultural idiom of distress and the cultural explanation or perceived cause.<sup>75</sup> Firstly, cultural syndrome is defined as a “cluster or group of co-occurring, relatively invariant symptoms found in a specific cultural group”; secondly a cultural idiom of distress is the specific way in which a cultural group talks about suffering and lastly cultural explanations or perceived cause is cultural explanation of the cause of certain symptoms.<sup>76</sup>

### 5.3.1.2 The insanity defence compared to the cultural defence

Culture-bound syndromes flow from the cultural beliefs of the patient in question.<sup>77</sup> *Bewitchment* is, for example, a culture-bound syndrome that develops in the light of the belief in witchcraft. The fear of being bewitched can also result in a somatoform disorder<sup>78</sup> such as conversion disorder.<sup>79</sup> In most instances, the belief in witchcraft, however, does not lead to mental illnesses.

The believers in witchcraft blame witches (or the practice of witchcraft) for the misfortunes that befall them.<sup>80</sup> A person who believes in witchcraft will, for example,

---

<sup>72</sup> Bührmann (n70) 877.

<sup>73</sup> *Id* at 878.

<sup>74</sup> *Id* at 878. Other symptoms may include neglect of personal hygiene, refusal of food, sleeping poorly, wandering aimlessly, mood swings, hearing of voices, withdrawal, silence and non-communication.

<sup>75</sup> DSM-5 (2013) 14.

<sup>76</sup> *Id*.

<sup>77</sup> See 5.3.1.1.

<sup>78</sup> Barker as referred to in Labuschagne “Geloof in toorkuns: ‘n Morele dilemma vir die strafreg?” 1990 SACJ 254. In this instance, Barker refers to ‘hysteria’ but this terminology is no longer correct or in use. It should be referred to as a somatoform disorder.

<sup>79</sup> Barlow and Durand *Abnormal psychology: An integrative approach* (2009) 179. The psychosomatic symptoms that were manifest, along with the fear of being bewitched, include prolonged tension, shock, a fall in blood pressure, and the refusal to eat. See further Niehaus in Hund (ed.) *Witchcraft, violence and the law in South Africa* (2003) 102.

<sup>80</sup> See 3.3.2 above.



blame a witch in an instance where his wife suffers a miscarriage.<sup>81</sup> This action could be construed as a paranoid or persecution complex, or, in other words, a mental illness.<sup>82</sup> In fact, in most instances, the opposite is true. By blaming witchcraft, the person in question would be acting in accordance with his cultural beliefs, and he/she is considered to be completely sane according to the standards of his/her own culture.<sup>83</sup> Belief in witchcraft could also appear similar to symptoms of other mental illnesses such as in the case of a compulsive neurotic patient. Sagan uses the illustration of a schizophrenic who believed that it was his duty to make the sun rise every morning. In certain tribes or (cultural groups) it is believed that it is the job of the tribal head to make the sun rise.<sup>84</sup> Again, this is considered completely sane and in accordance with the cultural beliefs.

Comparing the cultural beliefs of a person with the logic of the insane is, at the very least, insulting.<sup>85</sup> The belief in witchcraft is a cultural belief, and not a mental illness or mental defect.<sup>86</sup> The raising of the insanity defence in cases where the belief has not resulted in a mental illness such as bewitchment would as a result be insulting, and will in no way aid the defendant. As mentioned above, the defence of pathological incapacity in the context of the belief in witchcraft has not been successful, in any event, in South African courts.<sup>87</sup>

Normality and abnormality can be confused, as seen above, in cases where there is a culture clash.<sup>88</sup> To avoid confusion it is, therefore, very important to understand the beliefs and norms of the cultural group to which the patient belongs.<sup>89</sup> The American Psychiatric Association has recognised that culture plays an important part in the diagnosis of mental disorders, and the DSM-5 contains guidelines to assist in the systematic evolution and treatment of patients.<sup>90</sup> Bührmann also lists a few

---

<sup>81</sup> For example *S v Ndhlovu* 1971 1 SA 30 (RA).

<sup>82</sup> Al-Issa (n59) 36.

<sup>83</sup> Renteln (n64) 28.

<sup>84</sup> Labuschagne (n75) 259-260.

<sup>85</sup> Renteln (n64) 28; Bennett "The cultural defence and the custom of *Thwala* in South Africa" 2010 *University of Botswana Law Review* 20.

<sup>86</sup> *R v Hugo* 1940 WLD 285 at 289; *R v Biyana* 1938 EDL 310 at 311-312; *R v Molehane* 1942 GWL 64 at 69.

<sup>87</sup> See 2.4.2.1 above. *R v Radebe* 1915 AD 97; *Molehane case* (n93).

<sup>88</sup> Al-Issa (n59) 36.

<sup>89</sup> *Ibid.*

<sup>90</sup> DSM-5 (2013) 749-759. According to the DSM the formulation for the systematic evolution and treatment of patients calls for data on: 1) the cultural identity of the patients; 2) the cultural explanations and idioms of distress used by patients and their community concerning their illness

considerations that should be kept in mind when assessing someone from a different culture.<sup>91</sup> These considerations include, amongst others, language barriers, as well as examining the different ideas of morality that the different cultures entertain.<sup>92</sup> In certain cultures, for example, the killing of an alleged witch is not seen as morally wrong, but rather “as a service rendered to the community by cleaning the land of evil.”<sup>93</sup>

It is of the utmost importance to be able to distinguish whether or not an accused is mentally ill or merely expressing a cultural belief. If the accused is suffering from a mental illness, the defence of pathological incapacity remains intact irrespective of whether the mental illness has roots in the belief of witchcraft or any other cultural belief.<sup>94</sup>

## 5.4 Non-pathological incapacity

### 5.4.1 Introduction

Non-pathological incapacity has not always been recognised as a complete defence that could lead to the acquittal of the accused. The inquiry into the capacity of young children and the insane was readily accepted, but, as the understanding of criminal law developed, the question arose as to whether other factors could also influence

---

or situation; 3) the cultural factors impacting on patients’ social situations, including work, religion, and kin networks (psychosocial environment); (4) the cultural elements of the relationship between the patient and the clinician that may affect assessment and treatment; (5) the formulation of an overall cultural assessment for diagnosis and care. See also a discussion in Sadock and Sadock (n58) 167; Peteet *et al* (eds.) (n60) 207-218. A guide to conduct a culturally sensitive forensic evaluation is discussed in Kaliski (ed.) *Psycholegal assessment in South Africa* (2006) 5-7.

<sup>91</sup> Bührmann “The inner reality of the black man and his criminal responsibility”, 1980 *South African Medical Journal* 818.

<sup>92</sup> According to Bührmann (n91) 818-819, the following should be kept in mind when dealing with a patient with a vastly different cultural background:

- i. The language barrier should be kept in mind as some words are not translatable and the symbolic meaning could be lost when translated;
- ii. The evaluator, for example the psychologist, should not simply brush off certain beliefs as superstitions. He or she should try rather to understand the origins and meanings;
- iii. Diagnostic categories are culture bound. It is not always easy to differentiate between normal African beliefs and paranoid delusions;
- iv. Western scientific methods are not always the appropriate tool; and
- v. Concepts of morality might differ.

<sup>93</sup> *Ibid.*

<sup>94</sup> Burchell (n2) 376.



the capacity of a person.<sup>95</sup> The distinction between groups of individuals, such as those who could not control their tempers when provoked, was considered to be unjustified, and, therefore, could not act as a complete defence.<sup>96</sup>

This position changed in *S v Chretien*<sup>97</sup> when Rumpff J opened the door for the defence of non-pathological incapacity. In *Chretien*, Rumpff J held that intoxication could lead to an accused's lacking criminal capacity and so being acquitted.<sup>98</sup> Soon after the *Chretien* case, courts consider many other factors that could influence the criminal capacity of the accused. Non-pathological incapacity is tested subjectively, and as a result there is no closed list of conditions or external stimuli that could influence capacity.<sup>99</sup> The courts have, however, identified youth,<sup>100</sup> intoxication,<sup>101</sup> provocation, or emotional stress<sup>102</sup> as relevant factors when dealing with the criminal capacity of a defendant.

In the case of non-pathological incapacity, the defendant needs to lay a foundation for his or her defence that would provide reasonable doubt in the minds of the court.<sup>103</sup> The defence of non-pathological incapacity is largely uncodified and founded almost exclusively on case law.<sup>104</sup> It is, therefore, unclear as to whether the courts consider expert evidence as indispensable for the defence.<sup>105</sup> It is submitted that expert evidence is necessary to provide the foundation of the case and that it would be prejudicial to the case if such evidence is not heard.<sup>106</sup> In line with this submission, it will be submitted below<sup>107</sup> that expert evidence, such as that of an anthropologist and psychologist, is pertinent to prevent the abuse, as well as to promote the successful use, of the cultural defence.

---

<sup>95</sup> Burchell (n2) 359-360; Snyman (n9) 163; Van Oosten "Non-pathological criminal incapacity versus pathological incapacity" 1993 SACJ 127; Louw "S v Eadie: Road Rage, Incapacity and Legal Confusion" 2001 SACJ 206-207.

<sup>96</sup> Snyman (n9) 163. See *S v Kensley* 1995 1 SACR 646 (A) at 658.

<sup>97</sup> *Chretien* case (n3).

<sup>98</sup> *Id* at 1106.

<sup>99</sup> Burchell (n2) 362; Snyman (n9) 164.

<sup>100</sup> See in general Burchell (n2) 364-369.

<sup>101</sup> See in general Burchell (n2) 403-423.

<sup>102</sup> See in general Burchell (n2) 424-454.

<sup>103</sup> Burchell (n2) 362; Snyman (n9) 165.

<sup>104</sup> Stevens *The role of expert evidence in support of the defence of criminal incapacity* (LLD thesis, University of Pretoria, 2011) 85.

<sup>105</sup> Africa (n42) 403; Meintjies-Van der Walt (n29) 247-249.

<sup>106</sup> Stevens (n104); Africa (n28) 403.

<sup>107</sup> See 7.3 below.



In order to assess the defence of non-pathological incapacity adequately in the context of cultural beliefs the defence will be compared to the defence of sane automatism.<sup>108</sup> The comparison will illustrate, however, that these are two separate defences, and they should not be equated to each other.

#### 5.4.2 Non-pathological incapacity and the defence of sane automatism

The defence of automatism was discussed above<sup>109</sup> in the context of the first element of criminal liability, that of conduct. Conduct can be excluded if it is considered involuntary, as in the case of automatism,<sup>110</sup> whether it be automatism that resulted from, or can be attributed to, mental illness, or automatism due to involuntary conduct (sane automatism).<sup>111</sup> The actions during a state of automatism can be complex, coordinated, and appear goal-directed, but they are in reality not goal-directed, as they have not been subjected to an individual's conscious will.<sup>112</sup>

When a person acts in a state of automatism, awareness of the surroundings is impaired and, therefore, the person always suffers from amnesia<sup>113</sup> afterwards.<sup>114</sup> The test for automatism is objective, and expert medical opinion is necessary to lay the factual foundation of the defence.<sup>115</sup> Considering that there is a presumption that a person normally acts voluntarily, and the evidence of automatism is severely scrutinised, it is difficult to succeed with the defence of automatism.<sup>116</sup>

The defence of automatism has been confused with the second leg of the capacity inquiry.<sup>117</sup> The second leg of the capacity inquiry deals with the conative function, the ability to act in accordance with the appreciation of wrongfulness of the act, in other

---

<sup>108</sup> See 5.4.2 below.

<sup>109</sup> See 4.4.1 above.

<sup>110</sup> Snyman (n9) 55-58.

<sup>111</sup> *Id* at 56.

<sup>112</sup> Kaliski in Kaliski (ed.), *Psycholegal assessment in South Africa* (2006) 107; Louw (n95) 207.

<sup>113</sup> The forensic literature has basically offered four causes of crime-related amnesia:

1. Dissociation caused by stress of the crime;
2. A neuropsychiatric cause related to the circumstances of the offence. Intoxication with alcohol or other substances is perhaps the most commonly claimed;
3. Disorder such as dementia or amnesic disorder; and
4. Malingering.

See Kaliski (n112) 109.

<sup>114</sup> *Id* at 107.

<sup>115</sup> *S v Cunningham* 1996 1 SACR 631 (A); *Potgieter* case (n21); *S v Henry* 1999 1 SACR 13 (SCA).

<sup>116</sup> Burchell (n2) 139; Snyman (n9) 166.

<sup>117</sup> Snyman (n9) 162; Louw (n95) 207.



words self-control.<sup>118</sup> Louw describes the source of confusion as a case of the courts, or the law, not knowing or defining precisely when self-control is absent.<sup>119</sup> Automatism, as has been explained, is the inability of a person to subject, or *control*, his or her bodily movements to his or her will or intellect.<sup>120</sup> If he or she was not able to control his or her bodily movements there was no act or conduct. This inability to control is a *physical* ability. The conative function, on the other hand, is a *mental power* of resistance which is absent.<sup>121</sup> When this mental power of resistance is absent, the person can longer act in appreciation of wrongfulness of the act or omission.

### 5.4.3 Non-pathological incapacity as a result of provocation or emotional stress

The terms 'emotional stress' and 'provocation' are often used synonymously. The two concepts differ, as emotional stress suggests a build-up of stressful circumstances over a period of time, compared to provocation<sup>122</sup> which is a once-off incident that triggers the accused into action.<sup>123</sup> The distinction is, however, not critical, although it could be considered valuable from an evidential perspective.

Provocation or emotional stress may lead to different results,<sup>124</sup> but for the purposes of this chapter the discussion will focus on the circumstances where provocation or emotional stress lead to a finding of criminal non-responsibility on the basis of non-pathological incapacity. As explained above, it was only in 1985 that the first person was acquitted after raising the defence of non-pathological incapacity owing to

---

<sup>118</sup> See 5.2 above.

<sup>119</sup> Louw (n95) 207

<sup>120</sup> Snyman (n9) 162.

<sup>121</sup> *Ibid.*

<sup>122</sup> It is also notable that in *S v Mokonto* 1971 2 SA 319 (A) at 342 the court held that provocation may cause anger, but it is not the same as anger.

<sup>123</sup> Louw (n12) 51; Louw "S v Eadie: The end of the road for the defence of provocation?" SACJ 2003 200-201.

<sup>124</sup> Hoctor *LAWSA* (ed. Joubert) 6 (2010) par 85; Burchell (n2) 424-425.

The four results that can occur in the case of provocation are:

- a) It may in exceptional circumstances lead to a finding of criminal non-responsibility on the basis of non-pathological incapacity;
- b) It may exclude intention. See *R v Krull* 1959 3 SA 393 (A).
- c) It may confirm the presence of intention. This was the case in *Mokonto* (n119).
- d) It may mitigate a sentence. This is a result when provocation does not act as a defence to criminal liability or when the provocation results in diminished responsibility. *R v Van Vuuren* 1961 3 SA 305 (A); *Mokonto* case (n122) at 362.



provocation or emotional stress.<sup>125</sup> Since this decision was made, many controversial decisions, such as *S v Moses*<sup>126</sup> and *S v Nursingh*<sup>127</sup>, have been criticized, and the new attitude towards provocation and emotional stress has not been embraced by all of the courts.<sup>128</sup> The influential *Eadie* decision<sup>129</sup> then came along, and it sparked a much debated question on whether or not the defence of non-pathological incapacity has been abolished following the decision.

In the *Eadie* case, the defendant, Eadie, was driving home from an evening out in the early hours of Saturday morning on 12 June 1999. As he was driving, the deceased, Kevin Duncan, was driving with his headlights on bright behind Eadie, and, at times, overtook the defendant, and then slowed down. When both cars finally stopped at the traffic lights, Eadie emerged from his car carrying a hockey stick planning to smash the headlights of Duncan's car. Eadie then changed plan and wanted to hit the windscreen. The deceased, at that moment, opened his car door. Eadie was distracted and started hitting the vehicle, which resulted in the hockey stick's breaking. Eadie became more enraged, and he tried to pull open the door. Eventually he pulled the deceased from the car and continued assaulting him by beating him and repeatedly stamping on the head of the deceased with the heel of his shoe. The deceased died as a result of the assault.

Eadie, after being charged, claimed that he did not have the capacity to act because of the provocation, severe emotional distress, and a measure of intoxication during the road rage act. Eadie specifically relied on the second leg of the capacity inquiry, and he stated he could not control his actions, despite his ability to understand what he was doing was wrong. Eadie stated, that during the assault, he was merely, "going, going, going."<sup>130</sup>

The court *a quo*, as per Griesel J, convicted Eadie of murder and sentenced him to 15 years imprisonment.<sup>131</sup> Eadie appealed the conviction of murder, but the appeal was dismissed. Navsa concluded by stating in the *Eadie* case that,<sup>132</sup>

---

<sup>125</sup> *S v Arnold* 1985 3 SA 256 (C).

<sup>126</sup> *S v Moses* 1996 1 SACR 701 (C).

<sup>127</sup> *S v Nursingh* 1995 2 SACR 331 (D).

<sup>128</sup> Burchell (n2) 429.

<sup>129</sup> *Eadie* case (n4).

<sup>130</sup> *Id* at para 6.

<sup>131</sup> *S v Eadie* 2001 1 SACR 172 (C).



“It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism. It is by its very nature a state that will be rarely encountered. In future, courts must be careful to rely on sound evidence and to apply the principles set out in the decisions of this Court. The message that must reach society is that consciously giving in to one's anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law.”

In order to grasp the full extent of Navsa's decision above, the interpretation and understanding of the defence of non-pathological incapacity before the *Eadie* decision will be discussed below, followed by the interpretation of decision by academics, and the approach the courts have taken following the decision.

#### 5.4.3.1 The position before *Eadie*

After the *Chretien* case, the courts heard many cases where defendants claimed that, as a result of provocation or emotional stress, they lacked the necessary capacity to act.<sup>133</sup> In the reported cases of *S v Arnold*,<sup>134</sup> *S v Nursingh*,<sup>135</sup> *S v Moses*,<sup>136</sup> *S v Wiid*<sup>137</sup> and *S v Gesualdo*,<sup>138</sup> the defendants successfully raised the defence of non-pathological incapacity and were acquitted. These cases showed a willingness by the courts to accept that provocation or emotional stress could act as a complete defence.

In all of the cases dealing with the defence of non-pathological incapacity because of provocation or emotional stress, the deciding factor was whether the accused had the necessary cognitive function to control his or her actions. In the *Arnold* case, the accused had fatally shot his second wife after a fight had occurred between them centring on the fact that she wished to go back to strip dancing.<sup>139</sup> The confrontation was only one part that led to the breakdown of the accused. The relationship between Arnold and his wife was an unhealthy relationship riddled with verbal and psychological abuse from the deceased. Arnold was infatuated with his wife, and,

---

<sup>132</sup> *Eadie* (n4) at para 70.

<sup>133</sup> *Arnold* case (n125); *Campher* case (n9); *Calitz* case (n9); *S v Smith* 1990 1 SACR 130 (A); *Kensley* case (n96); *Nursingh* case (n127); *Moses* case (n126); *Wiid* case (n21); *S v Kalogoropoulos* 1993 (1) SACR 12 (A); *S v Leaner* 1996 2 SACR 347(C); *S v Gesualdo* 1997 2 SACR 68 (W); *S v Francis* 1999 1 SACR 650 (SCA).

<sup>134</sup> *Arnold* case (n125).

<sup>135</sup> *Nursingh* case (n127)

<sup>136</sup> *Moses* case (n126).

<sup>137</sup> *Wiid* case (n21).

<sup>138</sup> *Gesualdo* case (n133).

<sup>139</sup> *Arnold* case (n125) at 261.





furthermore, he was described as someone who “is highly emotional and clearly experiences the most intense feelings, far more intense than is normal.”<sup>140</sup>

During the case the psychologist, Dr Gittelson, gave a description of the state of mind of Arnold. He stated that:<sup>141</sup>

“His conscious mind was so “flooded” by emotions that it interfered with his capacity to appreciate what was right or wrong and, because of his emotional state, he may have lost the capacity to exercise control over his actions.”

The court accepted the evidence of Dr Gittelson, and it clearly distinguished between automatism and non-pathological incapacity. Arnold was acquitted, based on the fact that he could not act according to the appreciation of wrongfulness.

The *Campher* case,<sup>142</sup> although the accused was found guilty, also dealt with the defence of non-pathological incapacity.<sup>143</sup> Viljoen AJ in *Campher* referred to the second leg of the capacity inquiry as “weerstandskrag,” and described the question at hand as,<sup>144</sup>

“of sy onder die geweldige emosionele druk wat sy op daardie oomblik beleef het die vermoë gehad het om weerstand te bied teen die drang om hierdie ‘monster’ te vernietig.”

Jacobs AJ differed from Viljoen in stating that the inability to act in accordance with his or her appreciation of wrongfulness of an act in terms of the Criminal Procedure Act stems from mental illness or defect and not from other factors.<sup>145</sup> In the light of

---

<sup>140</sup> *Id* at 259B-C.

<sup>141</sup> *Id* at 263C.

<sup>142</sup> *Campher* case (n9).

<sup>143</sup> The *Campher* case (n9) deals with a wife who fatally shot her husband. Campher was in an unhappy relationship with an abusive husband who regularly assaulted her. On the day of the shooting, the deceased had commanded the accused to assist him in fixing the dove cage. She had to hold the lock while he drilled the holes. After drilling the holes he saw that they were skew and blamed her, stating that he would lock her in the dove cage and she must sit and pray for the holes to become straight. She ran away and shot him, and she was found guilty of murder in the court *a quo*, which verdict was upheld in the appeal case.

<sup>144</sup> *Campher* case (n9) at 956. Own translation, “if she at the time of experiencing the immense emotional stress had the ability to resist the urge against destroying this ‘monster’.”

<sup>145</sup> *Campher* case (n9) at 961 as per Jacobs AJ,

“*Ek is in elk geval van mening dat die sogenaamde onweerstandbare drang maatstaf wat in ons reg voor 1977 erken en toegepas is, heeltemal deur art 78(1)(b) van die Strafproseswet 51 van 1977 (die Wet) vervang is en dat, net soos voor die inwerkingtreding van die voormelde artikel van die Wet, 'n persoon wat oor die vermoë beskik om die ongeoorlooftheid van sy handeling te besef maar nie oor die vermoë beskik om ooreenkomstig 'n besef van die ongeoorlooftheid van sy handeling op te tree nie, slegs dan strafregtelik nie toerekenbaar is vir so 'n handeling nie indien sy onvermoë om sy handeling ooreenkomstig sy besef in te rig die gevolg is van geestesongesteldheid of -gebrek.*”



the *Chretien* case<sup>146</sup> the inability to act in accordance with the appreciation of wrongfulness is not limited to mental illness or defect but can be the result of any factor that could possibly influence the capacity of a person.

The cases of *Nursingh* and *Moses* resulted in the debated acquittals.<sup>147</sup> In *Nursingh* the accused was found not guilty after shooting and killing his mother and maternal grandparents. In the *Nursingh* case, the defence argued that Nursingh had very “peculiar family circumstances”, referring to the physiological, physical, and sexual abuse by, mainly, his mother, which predisposed the accused to violent emotional reactions.<sup>148</sup> In the *Nursingh* case, the court, relying heavily on the expert evidence of a psychologist and psychiatrist, led to the finding that Nursingh did not have the capacity to act. This case has been criticised for various reasons, amongst others that the test of capacity and the test for intention were conflated.<sup>149</sup> It is important to note that capacity is a separate element in criminal law, and it is tested before the inquiry into intent can take place.<sup>150</sup>

In *S v Moses*, the accused had a history of sexual abuse by his father, and he came from a dysfunctional family.<sup>151</sup> Moses and the deceased were homosexual lovers, and, after having unprotected penetrative intercourse for the first time, the deceased informed Moses that he had AIDS. Moses went into a fit of rage and starting beating the deceased with an ornament and then stabbed him with a knife which he fetched from the kitchen. The defence relied on the expert evidence of a clinical psychologist and a psychiatrist, whereas the State relied on the expert evidence of Dr Jedaar, a psychiatrist. The court rejected the evidence given by Dr Jedaar and summarised the main argument of his testimony as follows,<sup>152</sup>

“A person can never lose control except in a state of automatism, or other pathological states. Even in a state of rage or extreme anger 'I am still of the same belief that you still have the cognitive ability to weigh the expression of that rage'. He told the Court that the ability to appreciate the wrongfulness of an act is a cognitive function.”

---

<sup>146</sup> *Chretien* case (n3).

<sup>147</sup> Louw (n12) 52. For discussions on the cases see in general De Vos “*S v Moses* 1996 (1) SACR 701 (C): Criminal capacity, provocation and HIV” 1996 SACJ 354.

<sup>148</sup> *Nursingh* case (n124) at 332.

<sup>149</sup> Louw (n95).

<sup>150</sup> See 4.4.4 above.

<sup>151</sup> *Moses* case (n126).

<sup>152</sup> *Id* at 711.

The court rejected the evidence as the main problem, Hlophe J stated, was that it “...flies in the face of South African law”.<sup>153</sup> Hlophe J specifically stated that the test for capacity was a subjective test and clearly distinguished between the objective test for automatism and the subjective test for capacity. In *Moses*, Judge Hlophe held that,

“Thus the law is clearly to the effect that where provocation and emotional stress are raised as defence, it is a subjective test of capacity without any normative evaluation of how a reasonable person would have acted under the same strain and stress. What matters is what was going through the accused's mind at the relevant time.”

In *S v Gesualdo*<sup>154</sup> the accused was charged with murder after shooting his friend and business partner. He raised the defence of non-pathological incapacity because of extreme emotional factors. As with the *Moses* decision, the psychiatrist, Dr Vorster, testified that a person who is not suffering from a mental illness or physical defect (for example hypoglycaemia) will be able to act in accordance with the appreciation of right and wrong.<sup>155</sup> The court rejected the evidence of Dr Vorster, as Borchers J stated,<sup>156</sup>

“If it is possible that a person who can distinguish between right and wrong may by virtue of mental illness not be capable of acting in accordance therewith, it seems to us that psychological factors may have the same results.”

In the cases discussed above, the courts applied only subjective criteria in testing the capacity of the accused, distinguishing between automatism, where the objective criterion is used, and capacity. The insanity defence was the basis from which the non-pathological incapacity defence developed, but, unlike pathological incapacity, non-pathological incapacity does not contain a biological, but rather a psychological element.<sup>157</sup> As such, the psychological element should be, and was, tested subjectively, and, although not obligatory when raising the defence, it is evident from the discussion above that expert evidence plays a pivotal role in proving the defence.

The application of the defence of non-pathological incapacity in the cases before *Eadie* was, however, not free of uncertainties. The *Moses* and *Nursingh* acquittals,

---

<sup>153</sup> *Id* at 712.

<sup>154</sup> *Gesualdo* case (n133).

<sup>155</sup> *Id* at 71.

<sup>156</sup> *Ibid.*

<sup>157</sup> Van Oosten (n95) 144-145.



for example, were surrounded by controversy and considered to be a misuse of the defence.<sup>158</sup> According to Louw, the problem with these two cases was the fact that “self-control” was never properly defined.<sup>159</sup> The problem, as per Louw, with the concept “self-control” is that it is not a psychological concept, but rather a legal one, and as a result uncertainties exist.<sup>160</sup>

Another ‘uncertainty’, or, rather, matter of confusion, that reared its head was the lack of differentiating properly between the different building blocks of criminal liability. In the *Nursingh*-case, as mentioned above, the elements of ‘intention’ and ‘capacity’ were conflated. Furthermore, as was evident from the testimonies of the different expert witnesses, it is clear that, amongst specialists in the field of psychology and psychiatry, different opinions exist as to the validity of the defence of non-pathological incapacity. Capacity does, however, remain a legal concept, and it is for the courts to decide whether the evidence will be accepted or not. It is, however, submitted that, without proper guidelines for the assessment of expert evidence, unclear definitions of key concepts, and the conflation of the building blocks of criminal liability, a breeding ground for the misuse of the defence is created. The misuse can either be to the detriment of society or to the detriment of the accused.

According to Louw, the *Eadie* case has now clarified the position relating to “self-control” by stating that there is no distinction between sane automatism and the lack of self-control owing to emotional stress or provocation.<sup>161</sup> Whether the *Eadie* case, in fact, clarified the position on non-pathological incapacity (as a result of provocation or emotional stress) in order to prevent misuse will be discussed below.

#### 5.4.3.2 The position after *Eadie*

Academics, such as Burchell,<sup>162</sup> Snyman,<sup>163</sup> Louw,<sup>164</sup> and Hoorc,<sup>165</sup> all agree that, on the one hand, the guilty-finding in the *Eadie* case was correct, but that the

---

<sup>158</sup> Louw (n12) 52.

<sup>159</sup> *Id* at 52-53.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Eadie* case (n4) at para 57; Louw (n12) 52-53.

<sup>162</sup> Burchell (n2) 429.

<sup>163</sup> Snyman (n9) 165.

<sup>164</sup> Louw (n123) 200.

<sup>165</sup> Hoorc “Road rage and reasoning about responsibility” 2001 SACJ 195.



reasoning on which it was based, on the other hand, has resulted in many different interpretations of the case. In the appeal case, Navsa JA held the following:<sup>166</sup>

“I agree with *Ronald Louw* that there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation. Decisions of this Court make that clear. ... It appears logical that when it has been shown that an accused has the ability to appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence.”

Navsa JA stated further, in paragraph 58:

“In my view the insistence that one should see an involuntary act unconnected to the mental element, in order to maintain a more scientific approach to the law, is, with respect, an over-refinement.”

Navsa JA in *Eadie* regards the conative inquiry of the test for capacity as equivalent to the voluntariness inquiry, or the first element of criminal liability, voluntary bodily movements.<sup>167</sup> In light of the judgment of *Eadie*, it appears as if a defendant would have to establish that he or she was acting involuntarily in order for the defence of non-pathological incapacity (the lack of conative capacity) to prevail.<sup>168</sup> This would replace a subjective test with an objective one, and, as explained above, it is a well-known fact that the defence of sane automatism is not easily upheld.<sup>169</sup> As a result, the *Eadie* case has been interpreted as a death-knell for the defence of non-pathological incapacity.<sup>170</sup>

Louw regards the *Eadie* judgment as merely bringing the defence of non-pathological incapacity into line with a psychiatric (and neurological) understanding of automatism.<sup>171</sup> He supports his argument with the evidence given by Dr Jedaar in the *Moses* case.<sup>172</sup> Dr Jedaar also testified in the *Eadie* case. Dr Jedaar's evidence, as mentioned above, explained that a person could lose control only in a state of automatism<sup>173</sup> and, if an accused is, therefore, able to appreciate the wrongfulness of his or her conduct, it will not be possible to hold that he (or she) was unable to

<sup>166</sup> *Eadie* case (n4) at para 57.

<sup>167</sup> Burchell (n2) 151; Snyman (n9) 165. See 4.4.1 above.

<sup>168</sup> LAWSA 6 par 85.

<sup>169</sup> See 4.4.1 above.

<sup>170</sup> Snyman (n9) 164; 169.

<sup>171</sup> Louw (n12) 53.

<sup>172</sup> *Moses* case (n126).

<sup>173</sup> *Id* at 711.



control himself (or herself).<sup>174</sup> The evidence of Dr Vorster in *S v Gesualdo* correlates with that of Dr Jedaar.

Snyman submits that, instead of equating the defence with that of sane automatism, Navsa JA should rather have stated that the defence is incompatible with legal policy.<sup>175</sup> As the decision stands, Snyman argues that, for the decision to make sense, it should be accepted that the defence of non-pathological criminal incapacity due to provocation has been abolished. The defence of non-pathological incapacity should, however, theoretically be permitted where criminal capacity is lacking because of other factors, such as stress, shock, concussion, panic, or fear. Snyman submits that the *Eadie* case indicates a shift from the extreme subjective approach to capacity to one where there is a need for some or other objective factor.<sup>176</sup>

Burchell submits that there are three possible interpretations of the *Eadie* case.<sup>177</sup> Firstly, the decision could be interpreted not as a revision of the test of capacity, but rather as applying the test correctly, using permissible inferences from objective facts and circumstances.<sup>178</sup> The first interpretation is, therefore, that of inferential reasoning.<sup>179</sup> The process of inferential reasoning allows the court to establish what the accused's mental process *ought* to have been without changing the test to an objective one.

The second interpretation mentioned by Burchell is the objective test of capacity.<sup>180</sup> This interpretation is the most radical, as it would mean the non-pathological incapacity test no longer exists. The last interpretation is an intermediate approach between the first and the last interpretation, and is favoured by Burchell.<sup>181</sup> This approach holds that Navsa JA identified an objective aspect in the subjective test of

---

<sup>174</sup> Louw (n12) 54.

<sup>175</sup> Snyman (n9) 169. For a detailed discussion on the criticism on the *Eadie* case (n4) see Snyman (n9) 166-169.

<sup>176</sup> *Ibid.*

<sup>177</sup> Burchell (n2) 430-444.

<sup>178</sup> *Eadie* case (n4) at para 23.

<sup>179</sup> According to Burchell the first interpretation is most likely to find resonance in future courts. See Burchell (n2) 430-433. The support for the interpretation is found in the *Eadie* case (n4) at para 45, "In the *Henry, Kensley* and *Kok* cases, this Court warned against confusing loss of temper with loss of control. In the *Henry* and *Kensley* cases, as can be seen from the *dicta* referred to earlier in this judgment, this Court, in assessing an accused person's evidence about his state of mind, weighed it against his actions and the surrounding circumstances and considered it against human experience, societal interaction and societal norms."

See also the *Eadie* case (n4) at para 66.

<sup>180</sup> Burchell (n2) 436-439.

<sup>181</sup> *Id* at 440.



capacity. The third interpretation states that the subjective test has a normative dimension to it. Burchell submits that the question is then asked as to whether the accused could *reasonably be expected* to have acted differently, even taking into account factors such as provocation.<sup>182</sup> This interpretation supports the argument of Snyman that the wholly subjective approach has shifted to one which incorporates an objective factor.

The argument put forward by Burchell is based on the Tadros explanation of criminal capacity. According to Tadros, criminal law is concerned with “punishing those with one of a narrow range of vices.”<sup>183</sup> If the inability of a person to act in a certain way is as a result of some reprehensible characteristic, but a characteristic that does not fall within this narrow range of vices, the acts is not one “worthy of the kind of blame that is particular to criminal liability.”<sup>184</sup> Violently losing one’s temper and battering someone to death as in the *Eadie* case, for example, is a reprehensible characteristic.<sup>185</sup>

The *Eadie* decision created a murky situation surrounding the future of the defence of non-pathological incapacity. As seen from the above, some academics consider the decision to be one which brings an end to the defence of non-pathological incapacity, whereas others state that the success of the defence will depend on the conclusion drawn after taking into consideration the normative dimension of the subjective factors.

Setting academic opinions aside, the court in *Eadie*, without the over-ruling of all the previous provocation cases, cannot introduce non-existent objective elements into the defence of non-pathological incapacity.<sup>186</sup> The case has, however, added to the confusion surrounding the basic building blocks of criminal liability, i.e. the difference between an act of automatism and the conative function which forms part of the test of capacity. Cases decided after *Eadie*,<sup>187</sup> including cases such as *S v Mate*,<sup>188</sup> *S v*

---

<sup>182</sup> *Id* at 443.

<sup>183</sup> Tadros “The character of excuse” 2001 *Oxford Journal of Legal Studies* 516.

<sup>184</sup> Burchell (n2) 441.

<sup>185</sup> *Id* at 445.

<sup>186</sup> *Id* at 444.

<sup>187</sup> *Eadie* case (n4).

<sup>188</sup> *S v Mate* 2005 JDR 0151 (T) 3 as per Ismail AJ,

“The appellant's defence was that of sane automatism or, what is commonly referred to as non-pathological criminal incapacity.”



*Raath*,<sup>189</sup> *S v Humphreys*,<sup>190</sup> and *S v Lotter*,<sup>191</sup> can all be quoted as equating sane automatism and non-pathological incapacity.

Reviewing case law decided after *Eadie*, Snyman's submission rings true that the defence of non-pathological incapacity as a result of provocation is no longer available to be used as a complete defence. Provocation influencing the capacity of a person is now merely being used as a mitigating factor during the sentencing phase. This can be illustrated by looking at *S v Rasengani*<sup>192</sup> and *S v Mngoma*.<sup>193</sup> The result of the *Eadie*-decision is that it has become almost impossible for an accused to use the defence with success.

It is respectfully submitted that the *Eadie* case did not clarify the position surrounding the defence of non-pathological incapacity or bring any clarity to any of the uncertainties that had arisen during the development of the defence in previous cases. Apart from steering the courts in the wrong direction by confusing automatism and capacity, in line with Navsa JA's judgment, it is clear that courts are becoming more unyielding based on normative policy considerations.<sup>194</sup> Although a policy consideration is a factor to be considered it should not overshadow the basic principles in criminal law when determining the guilt of the accused.

## 5.4.5 Non-pathological incapacity defence in the context of cultural beliefs

### 5.4.5.1 Introduction

The entire argument of the cultural defence, as explained above,<sup>195</sup> hinges on the idea that culture shapes the identity of individuals, influencing their reasoning, behaviour, and the way they perceive themselves.<sup>196</sup> Psychologists (in particular depth psychologists) generally accept that the roots of the behaviour of a person are

<sup>189</sup> *S v Raath* 2009 2 SACR 46 (C).

<sup>190</sup> *S v Humphreys* 2013 2 SACR 1 SCA 7.

<sup>191</sup> *S v Lotter* 2012 JDR 1652 (KZD) 16 as per Giyanda J,

“[T]he defence of non-pathological mental deficiency or incapacity which is often referred to as sane automatism to distinguish it from pathological incapacity which is usually regarded as insanity in some form.”

<sup>192</sup> *S v Rasengani* 2006 2 SACR 431 (SCA).

<sup>193</sup> *Director of Public Prosecutions v Mngoma* 2010 1 SACR 427 (SCA).

<sup>194</sup> Botha and Van Der Merwe “Die tergende toekoms van provokasie as verweer in die Suid-Afrikaanse strafreg” 2013 *LitnetAkademies* 98.

<sup>195</sup> See 4.1 above.

<sup>196</sup> Renteln (n65) 10; Heine (n63) 138.





largely unconscious. The unconscious roots of behaviour are influenced and shaped by, amongst other things, environmental factors such as the cultural milieu of a person. When a person is, then, confronted by an emotional situation or a crisis these unconscious roots are activated.<sup>197</sup> Individuals then respond to these situations in unconscious emotional and instinctual modes.<sup>198</sup> It is, therefore, important to understand how culture can act as an unconscious root.

The relationship between culture and psyche is complex and not fully understood. There is, however, no question that culture strongly influences human thought processes and behaviour. Culture, as defined above,<sup>199</sup> is an all-encompassing system of thinking, doing, and evaluating. Cultural psychology, one of the branches of psychology, explains that, because humans use culture as a system of evaluation, no socio-cultural environment can exist or have an identity independent of the way humans use culture to give meaning. At the same time, a socio-cultural environment alters the “mental life” of the person seizing meanings.<sup>200</sup> This means simply that a great deal of what people think and do is culturally shaped.<sup>201</sup>

Doctor Roy D’Andrade, one of the founders of cognitive anthropology, established a well-known theory using schemas as a way to explain how culture can influence the way we act. Schemas are hypothetical cognitive structures that aid people in perceiving, organizing, processing, and using information.<sup>202</sup> According to D’Andrade, there is a relatively direct relationship between schemas and action.<sup>203</sup> Some of the cognitive schemas are connected to behaviour through what is known as activation goals. Not all of the cognitive schemas are strongly connected to goals. D’Andrade explains this by using the following example: a person will have a schema for dirt, with the goal of cleaning; this goal will be activated only if cleaning is the responsibility of the individual.<sup>204</sup> This scenario will differ completely if the schema is one of physical danger. The goal will then be to remove oneself from

---

<sup>197</sup> Bührmann (n98) 817.

<sup>198</sup> *Ibid.*

<sup>199</sup> See 3.2.1 above.

<sup>200</sup> Shweder in Stigler et al (eds.) *Cultural psychology: Essays on comparative human development* (1990) 2.

<sup>201</sup> D’Andrade (n8) 65.

<sup>202</sup> Sternberg *Cognitive psychology* (2009) 304. The term schema was first coined by Jean Piaget. Piaget referred to schemas as the building blocks of intelligence. See Piaget *Judgment and Reasoning* (1928).

<sup>203</sup> D’Andrade (n8) 116.

<sup>204</sup> *Ibid.*



danger, and this goal will be activated autonomously regardless of concurrent interpretations.<sup>205</sup>

The question arises as to how schemas and their goals relate to culture. Individuals use culture in order to give meaning to their socio-cultural worlds, and, as a result, many of the general schemas of individuals are culturally learned, shared, and transmitted.<sup>206</sup> Schemas, such as achievement, love, and security, are all cultural models through which events are interpreted and responded to.<sup>207</sup>

Accepting that the cultural belief in witchcraft is a schema, the goal could be construed as avoiding the evil and misfortune that witches cause by protecting yourself. The avoidance should be seen in the context of preventing the community's being troubled with disharmony.<sup>208</sup> In day-to-day activities this schema will configure in actions such as placing the bed on bricks in order to prevent the *tokolotši* from raping the person who is sleeping. The schema is, however, dependant on other interpretations; for example, if the person finds himself or herself in someone else's house, he or she might not feel the need to place the bed on bricks as he or she feels safe from the *tokolotši* as that house has been blessed by a *sangoma*. This explanation is similar to that of the dirt as schema.

The scenario changes where the cultural belief in witchcraft as schema is activated in circumstances where the person believes he or she is in danger. The individual, X, approaches Y, a woman he believes is a witch, because he wants to confront her about the death of his brother. The alleged witch then threatens X by stating that she will kill him just as she did his brother. The avoidance goal is now coupled with the goal of removing oneself from the danger as it is perceived. The action will be activated autonomously. The witch is, of course, believed to be very dangerous, and the only way X can (according to his belief) remove himself from the dangerous situation is to kill the witch. In this way X is also avoiding the evil and misfortune and preventing the community from experiencing disharmony.

This a very simplistic view of the way the belief in witchcraft could influence the actions of a person, but it helps to explain the influence culture can have on the

---

<sup>205</sup> *Ibid.*

<sup>206</sup> *Id* at 118.

<sup>207</sup> *Ibid.*

<sup>208</sup> See 3.3.2 above.



human psyche. The belief in witchcraft is considered to be a 'mere superstition' by many. Superstition is, however, defined as a 'deep-rooted but unfounded general belief.' The fact that it is 'general' and 'deep-rooted' confirms that it is part of the human psyche.<sup>209</sup>

Other branches of psychology, such as social psychology can also provide insights into the actions that occur as a result of cultural beliefs. Psychological phenomena such as conformity,<sup>210</sup> (blind) obedience to authority<sup>211</sup> group polarisation,<sup>212</sup> de-individuation<sup>213</sup> frustration-aggression<sup>214</sup> and bystander apathy<sup>215</sup> can all provide these insights.

It is, however, important to note that this does by no means indicate that individuals are programmed by their culture in such a way that their behaviour is predetermined.<sup>216</sup> Culture is only one set of variables that influence human behaviour; social and environmental conditions, personality characteristics, and genetic constitutions, amongst other things, also influence what people do and think.<sup>217</sup> Culture can, however, be a great driving force during crisis situations. To determine whether culture influenced a person more than, for example, social conditions is an evidentiary burden, and the circumstances and facts need to be used to determine the extent of the influence.

---

<sup>209</sup> Bührmann "Witchcraft, witchcraft beliefs and the black people of South Africa" 1985 *South African Medical Journal* 670.

<sup>210</sup> Conformity is defined as a "type of social influence in which individuals change their attitudes or behaviour to adhere to existing social norms." Baron *et al Social Psychology* (2008) 274. See in general Baron *et al* (n210) 274-287.

<sup>211</sup> Obedience to authority is defined as a "form of social influence in which one person orders one or more to do something, and they do so." Baron *et al* (n210) 302. See, in general, on obedience Baron *et al* (n210) 298-302.

<sup>212</sup> Group polarization is defined as "the tendency of a group member to shift toward more extreme positions than those they initially held by the individual member as a result of group discussions." Baron *et al* (n210) 408. See, in general, Baron *et al* (n210) 408-411.

<sup>213</sup> De-individuation occurs when a person is part of a large crowd, and that person loses his/her individuality as he/she feels anonymous in the group. It is a psychological state where a person has a reduced sense of awareness. Baron *et al* (n210) 399. This can occur, for example, when mobs decide to go on witch-hunts and individuals become carried away in the large crowds where they feel anonymous.

<sup>214</sup> The frustration-aggression hypothesis suggests that frustration is a very strong determinant of aggression. Baron *et al* (n210) 340. See, in general, Baron *et al* (n210) 340-341.

<sup>215</sup> Tredoux and Foster in Tredoux *et al* (eds.) *Psychology and the law* (2005) 7; Phelps in Bennett (ed.) *Traditional African Religion in South African law* (2011) 146.

<sup>216</sup> Renteln (n65) 12.

<sup>217</sup> D'Andrade (n8) 65.



Considering the definition of non-pathological incapacity as seen in terms of the above, the conative capacity of a person is usually in question. In the cases discussed that relate to the belief in African witchcraft<sup>218</sup> the defendants could distinguish between right and wrong, and they knew that killing someone, for example, was wrong. The dispute arose when determining whether the accused was able to act in accordance with this knowledge. The defence of non-pathological incapacity, specifically conative incapacity, in the context of cultural beliefs will be discussed below to determine the viability of the defence for individuals who commit a crime based on their belief in witchcraft.

#### 5.4.5.2.1 Non-pathological incapacity defence in context of cultural beliefs

Accepting the interpretation that only non-pathological incapacity defence owing to provocation has been abolished after the *Eadie*-decision, this change will not influence the cases dealing with witchcraft-related killings. Even before the decision in *Eadie*, courts were unwilling to accept provocation as a defence where the accused killed an alleged witch.<sup>219</sup> Courts held in many cases that there was usually time for the passion to cool considering the fact that the accused first consulted a diviner and did not immediately confront the alleged witch.<sup>220</sup>

This line of reasoning can be debated as the belief in witchcraft is by nature peculiar, and it presents an overarching, omnipresent threat. Time, therefore, inflames the passion or rage and does not subdue it.<sup>221</sup> Be that as it may, the defence of non-pathological incapacity owing to provocation is no longer available to the accused. According to Burchell and Snyman, the defence of non-pathological incapacity can still be raised where other factors have resulted in the incapacity.

Deconstructing the case law on witchcraft-related killings it becomes clear that the cases all share the common denominator and that is that the accused believed in witchcraft and found himself or herself in a situation which was perceived by the accused as dangerous or threatening.<sup>222</sup> The driving force behind the confrontation

---

<sup>218</sup> See 2.4.2 above.

<sup>219</sup> *S v Mokonto* (n122).

<sup>220</sup> *Mokonto* case (n122) at 324; *S v Phama* 1997 1 SACR 485 (E).

<sup>221</sup> Seidman (n40) 52.

<sup>222</sup> See 2.4.2 above.



and eventual act is the fear of witchcraft by the accused. As stated by Miller JA in *Ngubane*,<sup>223</sup>

“..the degree of the intensity of the belief is, I think, a highly important factor, for the more intense such belief is, the greater the sense of fear or apprehension it induces.”

In the *Mokonto* case,<sup>224</sup> the accused genuinely believed in witchcraft and found himself in a situation of confronting an alleged witch about a series of misfortunes. The witch then threatened him, causing Mokonto to fear for his life and placing Mokonto in a (perceived) dangerous situation. This set of facts will be used below to apply the defence of non-pathological incapacity in the context of cultural beliefs to determine whether the cultural belief can negate capacity.

Firstly, reviewing the case law before the *Eadie* decision where the defence of non-pathological incapacity was raised it is clear that the emotions of the accused at the moment the crime was committed engulfed the mind of the person.<sup>225</sup> In the cases where the defence was raised successfully, the accused was able to differentiate between right and wrong, but, because of the immense emotional pressure, the person was not able to act in accordance with the knowledge.<sup>226</sup> In order to determine whether a person was so engulfed with emotions, the courts entered into the minds of the accused, reviewing the situation and all the factors that led to the commission of the crime.<sup>227</sup>

When the alleged witch threatened Mokonto, he found himself in an emotional or crisis situation. Fear, and what is perceived to be a dangerous situation, is culturally shaped.<sup>228</sup> As has been stated before, the belief in witchcraft creates an omnipresent fear<sup>229</sup> but, in most scenarios, a believer will avoid the direct confrontation of the practice of witchcraft.<sup>230</sup> In the scenario of Mokonto, he found himself in a dangerous situation and was engulfed by fear which stemmed from his belief in witchcraft and his personal experiences with misfortunes caused by witches. As a result, Mokonto

---

<sup>223</sup> *S v Ngubane* 1980 2 SA 741 (AD) at 745.

<sup>224</sup> *Mokonto* case (n122).

<sup>225</sup> See 5.4.3.1 above.

<sup>226</sup> *Arnold* case (n125); *Nursingh* case (n127); *Moses* case (n126); *Wiid* case (n21); *Gesualdo* case (n133).

<sup>227</sup> See 5.4.3.1 above.

<sup>228</sup> *D'Andrade* (n8) 118.

<sup>229</sup> *Seidman* (n40) 52. See 3.2.2 above.

<sup>230</sup> See 3.3 above.



could raise the defence of non-pathological incapacity because, as a result of his intense fear coupled with the goal of removing himself from the dangerous situation, he was not able to act in accordance with his appreciation of wrongfulness.

The subjective test applied in Mokonto's situation, given the foundation of expert evidence and supported by the facts of the case, will, however, not suffice for the successful raising of the defence of non-pathological incapacity. The *Eadie* decision also requires an objective aspect in the subjective test. A motorist subjectively viewed could be completely enraged, but, at the same time, cannot simply give into his anger and batter someone to death.<sup>231</sup> Could Mokonto, a believer in witchcraft, have been reasonably expected to have acted differently, taking into account the fear and the threat of the alleged witch?

It is submitted that the belief in witchcraft could, taking into consideration the specific facts in each case, negate the conative capacity of an individual. The *Eadie* decision has, however, made it nearly impossible for the accused in the context of a cultural belief to raise this defence successfully. If an individual lacks capacity, he or she should be acquitted, as punishing this person who does not have a guilty mind will serve no purpose.<sup>232</sup> In order to overcome the hurdle placed by the *Eadie* decision, the concept of cultural defence needs to be formalised.

By raising the concept of cultural defence the element of capacity, as explained above, could be negated, but, at the same time, the defence will aid the accused by providing the objective aspect in the subjective test. At present no cultural defence exists, and it is submitted that the courts will not readily accept that Mokonto, for example, could not reasonably have been expected to have acted differently. Just as a motorist cannot give in to road rage, a person being threatened, and in a frightening situation, may not simply kill the person to remove himself or herself from the situation.

The concept of cultural defence, if formalised, will force the courts, within specific guidelines, to consider the cultural background of the accused.<sup>233</sup> Mokonto was a young Zulu man, and in the Zulu culture a witch is feared for her supernatural

---

<sup>231</sup> Burchell (n2) 445.

<sup>232</sup> See 4.2 above.

<sup>233</sup> See 4.3 above.



powers, and she is believed to be evil.<sup>234</sup> Witchcraft also forms part of the purview of the community<sup>235</sup> and the situation when dealing with a witch affects the community as a whole. As such, Mokonto could not reasonably have been expected to have acted differently from the way he did.

The concept of cultural defence will by no means give people who believe in witchcraft a so-called “licence to kill.” Strict guidelines in the application of the defence will ensure its proper application and will prevent misuse. The strategies to ensure this will be discussed below.<sup>236</sup>

#### 5.4.6 Application of non-pathological incapacity within a defence

##### 5.4.6.1 The Battered Woman Syndrome

Our case law is interspersed with cases where women have killed their partners or husbands after years of abuse.<sup>237</sup> A pattern of signs and behavioural symptoms have been found to occur after a woman has been physically, sexually, and/or psychologically abused in an intimate relationship,<sup>238</sup> and has aided in the understanding of why they kill their partners. This pattern was termed Battered Woman Syndrome and first used by Dr Lenore Walker in 1977.<sup>239</sup>

Battered Woman Syndrome is not a legal defence in its own right<sup>240</sup>, but the syndrome has been used as evidence in criminal cases where women have killed their abusive partners.<sup>241</sup> The evidence of this syndrome has been used in relation to

---

<sup>234</sup> See 3.3.2 above.

<sup>235</sup> See 3.2.3 above.

<sup>236</sup> See 7.4 below.

<sup>237</sup> Although this section refers to Battered Woman Syndrome and case law where abused women have killed their husbands or partners, the abuse suffered in intimate relationships is not gender specific and does not only occur in heterosexual relationships. This section should be read to be applicable to battered (or abused) spouses, although the original terminology will be used.

<sup>238</sup> Walker *The battered woman syndrome* (2009) 42; Reddi “Battered Woman Syndrome: Some reflections on the utility of this ‘syndrome’ to South African women who kill their abusers” 2005 SACJ 260.

<sup>239</sup> Walker (n238) 44.

<sup>240</sup> Reddi (n238) 260.

<sup>241</sup> The terminology *Battered Woman Syndrome* has never been used in the cases, but the facts indicate the manifestation of the syndrome. See Stevens (n104) 301. For further readings on the Battered Women Syndrome see Ludsin and Vetten *Spiral entrapment: Abused women in conflict with the law* (2005); Reddi (n238) 259; Wolhuter “Excuse them though they do know what they do—the distinction between justification and excuse in the context of battered women who kill” 1996 SACJ 150; Carstens and Le Roux “The defence of non-pathological incapacity with reference to the battered wife who kills her abusive husband” 2000 SACJ 180; Ludsin “*Ferreira v State: A victory for women who kill their abusers in non-confrontational situations*” 2004 SAJHR 642;



private defence,<sup>242</sup> defence of non-pathological incapacity<sup>243</sup>, as well as in support of mitigation of sentence.<sup>244</sup> Interestingly, the South African courts have not referred to the Battered Woman Syndrome by name and have preferred to use terms such as abusive partnerships or to refer to the ‘cycle of violence’.<sup>245</sup>

Abused women who want to use the evidence of their abuse to negate their criminal liability are faced with many substantive and formal difficulties when raising their defence.<sup>246</sup> One of the difficulties facing them is the fact that outsiders often find it difficult to understand the position in which battered women find themselves. For example, it is difficult to comprehend why the abused woman does not simply leave her abuser. Myths of battered spouses, such as the belief that battered women enjoy the abuse,<sup>247</sup> also provide a hurdle when raising a defence. In considering the formal difficulties when raising a defence such as private defence in the context of domestic abuse, it has been held to be inappropriate if there was no imminent assault.<sup>248</sup> This creates a difficult situation as it often happens that battered women kill their abusers in non-confrontational situations where there was no imminent assault.

As a result, the viable option for battered women seemed to be the defence of non-pathological incapacity. Considering the effect of the *Eadie*-decision, the use of the defence of non-pathological incapacity in the context of provocation and/or emotional stress has been curtailed.<sup>249</sup> Seemingly, the defence of non-pathological incapacity does not offer an effective defence for abused spouses as many situations where the battered women find themselves would be construed as acts of emotional stress or provocation.

---

Carstens “Private defence in context of the battered wife who kills her abusive husband/partner: *Ann Elizabeth Steyn v The State* (reported as *S v Steyn* 2010 1 SACR 411 (SCA))” 2010 *Obiter* 478.

<sup>242</sup> *S v Steyn* 2010 1 SACR 411 (SCA); *S v Engelbrecht* 2005 2 SACR 41 (W). See also Burchell (n2) 452-453; Carstens (n238).

<sup>243</sup> *Campher* case (n9); *Smith* case (n130); *Wiid* case (n21); *Potgieter* case (n20).

<sup>244</sup> *S v Ferreira* 2004 2 SACR 454 (SCA). See also the discussion Ludsin (n238).

<sup>245</sup> See *Ferreira* case (n241) at 467 where Howie J refers to the “cycle of violence” as used by Walker. See further footnote 238 above.

<sup>246</sup> Carstens (n241) 485; Ludsin and Vetten (n238) 189-190.

<sup>247</sup> Walker (n238) 172. See Stevens (n104) 310-314.

<sup>248</sup> *Campher* case (n9) at 949.

<sup>249</sup> See 5.4.3.2 above.





Despite the precarious position illustrated above, the courts have started developing the law into a direction that considers all the circumstances,<sup>250</sup> including the psychological effect of abuse<sup>251</sup> aiding the accused who wishes to raise the Battered Women Syndrome evidence in support of a defence.

Many theories, such as the theory of learned helplessness,<sup>252</sup> the theory of coercive control,<sup>253</sup> and Stockholm Syndrome<sup>254</sup> have been used to assist in understanding the psychological impact of the abuse on battered women. This can, for example, help to explain why an abused wife does not leave her husband. Expert testimony is needed to explain this, and, therefore, it plays a pivotal role in any case where the accused relies on the evidence of Battered Woman Syndrome.<sup>255</sup>

A factual foundation needs to be laid by an expert witness explaining the psychological effects of abuse on women in general and also specifically referring to the factual situation of the defendant in question.<sup>256</sup> Not only should the effect of domestic violence be put before the court, but the history of the abusive relationship should also be provided.<sup>257</sup> Expert evidence can, therefore, help explain the cumulative effect of fear, stress, and/or provocation. The consideration of this evidence is important in order to provide the accused with a fair trial, as Moas stated,

“A woman’s actions can be fairly judged only if understood in the light of the experiences with the deceased and how these experiences shaped her perspectives.”<sup>258</sup>

In *S v Engelbrecht*<sup>259</sup>, the accused killed her husband after years of physical, emotional, verbal, and psychological abuse. On the evening in question the deceased had struck their daughter and locked her in the bedroom, after which he threatened to kill the accused. This appears to have been the turning point for the

<sup>250</sup> *Engelbrecht* case (n239); *Ferreira* case (n241).

<sup>251</sup> *Steyn* case (n239). See discussion in Carstens (n241) 485;

<sup>252</sup> The theory of learned helplessness was developed by Martin Seligman. Walker (n238) at 69 defines the theory as, “having lost the ability to predict that what you do will make a particular outcome occur.” See the discussion on the theory of learned helplessness in Walker (n238) 69-83.

<sup>253</sup> Walker (n238) 172, 360-361; Ludsin and Vetten (n238) 667.

<sup>254</sup> Ludsin and Vetten (n238) 674. The term Stockholm Syndrome was coined by Nils Bejerot after a robbery occurred in Norrmalmstrong in Stockholm, Sweden where the hostages expressed empathy towards the capturers.

<sup>255</sup> Ludsin and Vetten (n238) 189.

<sup>256</sup> *Id* at 122, 189-190.

<sup>257</sup> *Id* at 12.

<sup>258</sup> Moas “Domestic violence: Competing conceptions of equality in the law of evidence” 2001 *Loyola Law Review* at 127.

<sup>259</sup> *Engelbrecht* case (n239).



accused, and, when the deceased fell asleep, she tied his hands behind his back with thumb cuffs and suffocated him by tying a plastic bag over his head. In this case the defence did not rely on the defence of non-pathological incapacity but rather argued that it would not be reasonable for the court to have expected her to act differently.<sup>260</sup>

Although the defence of non-pathological incapacity was not raised, important principles were configured in this case, applicable equally to raising the defence of non-pathological incapacity. Firstly, Satchwell J stated that not only evidence on the specific effects of abuse on the accused is relevant, but also the social context of domestic violence.<sup>261</sup> Secondly, certain myths and misconceptions exist regarding battered women. Expert evidence is needed in order to refute these myths and misconceptions, or stereotypes, which could interfere with a fair assessment of the women's actions.<sup>262</sup> Satchwell J stated that all the factors should be taken into account,<sup>263</sup> which would also include the "effectiveness of the law of the land."<sup>264</sup>

The position of using the evidence of Battered Woman Syndrome was further developed in *Ferreira v S*.<sup>265</sup> In the *Ferreira* case, the accused was abused mentally, physically, sexually, and financially by her partner whom she had been living with for more than seven years. The abuse eventually cumulated in her arranging for her partner to be killed by two men. She pleaded guilty, but appealed the sentencing after being sentenced to life imprisonment.

The first important development of this case, with reference to the contract killing, was the fact that there was no confrontational situation at the time of the murder. The court made it clear that the mode of killing and the time span that elapsed do not increase the moral blameworthiness of an accused.<sup>266</sup> Howie J stated that "the true question to be answered is whether the threat from which each sought to escape was still, subjectively, perceived to be a real and present danger..."<sup>267</sup> Taking into account the fact that a threat is subjectively perceived to be a real and present

---

<sup>260</sup> *Id* at para 29.

<sup>261</sup> *Id* at para 26.

<sup>262</sup> *Id* at paras 28-29.

<sup>263</sup> *Id* at para 356.

<sup>264</sup> *Id* at para 399.

<sup>265</sup> *Ferreira* case (n244).

<sup>266</sup> *Ferreira* case (n244) at paras 45-46; Ludsin (n238) 648.

<sup>267</sup> *Ferreira* case (n244) at para 45.



danger a person could, therefore, as a result of fear, lack the capacity to act in accordance with the appreciation of the wrongfulness of his or her actions.

Ludsin stated that the elements of defence in South African law largely reflect the male response to a “single and sudden violent attack or provocation.”<sup>268</sup> Take, for example, the facts in *Eadie*, where the defendant reacted violently after a single act of provocation during the fateful evening. The response women have towards domestic violence does not easily fit within the parameters which have been set by the defence.<sup>269</sup> As such, Ludsin submits that the legal system needs to account for the difference between men and women.<sup>270</sup> In the Supreme Court of Appeal case of *Ferreira*, Howie J did exactly that. Howie J stated,

“Her decision to kill and to hire others for that purpose is explained by the expert witnesses as fully in keeping with what experience and research has shown that abused women do. It is something which has to be judicially evaluated not from a male perspective or an objective perspective but by the Court's placing itself as far as it can in the position of the woman concerned, with a fully detailed account of the abusive relationship and the assistance of expert evidence such as that given here. Only by judging the case on that basis can the offender's equality right under s 9(1) of the Constitution of the Republic of South Africa Act 108 of 1996 be given proper effect. It means treating an abused woman accused with due regard for gender difference in order to achieve equality of judicial treatment.”

The *Ferreira* decision and the *Engelbrecht* decision both clearly indicate that *all* factors should be taken into account. The *Ferreira* decision, as stated above, supports the argument of Ludsin that the legal system should account for gender difference in order to achieve equality. This case clearly leans towards protecting the rights of the accused<sup>271</sup> in accordance with a Constitutional legal culture.<sup>272</sup> The *Engelbrecht*<sup>273</sup> case, and later the *Steyn*<sup>274</sup> case, both also emphasised the importance of the protection of the rights afforded by the Constitution.

---

<sup>268</sup> Ludsin (n238) 643.

<sup>269</sup> *Ibid.*

<sup>270</sup> *Id* at 646.

<sup>271</sup> Madikizela and Foster in Tredoux *et al* (eds.) *Psychology and the law* (2005) 367-368.

<sup>272</sup> See 2.1 above.

<sup>273</sup> *Engelbrecht* case (n239) at para 345 as per Satchwell J,

“It seems to me beyond question that all those rights which are enshrined in the Constitution constitute the interests which are deserving of protection in this defence of justification. It follows that the interests which are attacked and which an abused woman may protect, include her life, bodily integrity, dignity, quality of life, her home, her emotional and psychological wellbeing, her freedom as well as those interests of her child(ren). In short, she defends her status as a human being and/or mother.”



The Battered Woman Syndrome, as discussed above, is used as evidence when raising a defence, whether a private defence or non-pathological incapacity, whereas this chapter specifically deals with the cultural defence as a separate defence which could negate the element of capacity. By striking a comparison with the Battered Woman Syndrome and the cultural defence below, it is submitted that the comparison will illustrate how the principles developed in the case law concerning abused woman (irrespective of the defence raised) can guide the use of the cultural defence in the context of criminal capacity.

#### 5.4.6.2 Battered Woman Syndrome in comparison to the cultural defence

Comparing an abused woman who kills her husband with, for example, a Zulu man who believes in witchcraft and, subsequently, kills a witch can seem ludicrous and/or offensive. The cultural defence and the Battered Woman Syndrome (in the context of criminal cases) do, however, share certain similarities. In some instances Battered Woman Syndrome has been construed as a cultural defence, although not called by that name.<sup>275</sup> Rosen defines the battered woman as,

“a victim of her social reality, responding to circumstances in accordance with the values of femininity and life-long marriage to which she was acculturated.”<sup>276</sup>

Torry goes further and quotes Crocker who stated that,

“[t]hose gender differences stemming from cultural expectations about women and those pertaining specifically to battered women create and inform battered women’s perceptions.”<sup>277</sup>

Whether Battered Woman Syndrome is a form of a cultural defence can be debated, but the syndrome and cultural defence still share the fact that both involve complex issues such as difference as well as human motivation.<sup>278</sup> Using the case law concerning Battered Woman Syndrome mentioned above, the following principles have been elucidated:

---

<sup>274</sup> Steyn case (n239) at para 24 as per Leach AJA.

<sup>275</sup> Torry “Multicultural jurisprudence and the cultural defense” 1999 *Legal Pluralism and Unofficial Law* 141.

<sup>276</sup> Rosen “The excuse of self-defense: Correcting a historical accident on behalf of battered women who kill” 1986 *The American University Law Review* 41 as quoted by Torry (n272) 142.

<sup>277</sup> Crocker “The meaning of equality for battered women who kill men in self-defense” 1985 *Harvard Women’s Law Journal* 128 as quoted by Torry (n275) 142.

<sup>278</sup> Murray “The battered woman syndrome and the cultural defense” 1995 *Federal Sentencing Reporter* 200.



1. All factors need to be taken into account when considering the case beforehand, including, amongst others, the history of the accused and psychological effect of the abuse;
2. Expert evidence is pivotal in laying the foundation of the defence;
3. Expert evidence will also aid in refuting any myths or misconceptions that exist;
4. Whether a threat was perceived to be a real and present danger should be considered subjectively;
5. The legal system should account for the differences between men and women;
6. When an enquiry is done it should be done in light of the values and norms that underpin the Constitution. This includes considering the rights of the accused, as well as the rights of the society and victim, so as not to give the accused a “license to kill.”

As with the evidence of Battered Woman Syndrome, if an accused raises the cultural defence, all the factors need to be put before the court. Expert evidence needs to lay the foundation, explaining in general how culture influences the behaviour of a person, but also explaining specifically, in the context of the facts of the case, how the cultural beliefs of the accused influenced his psyche and, therefore, the way he acted. The history of the accused, especially his/her upbringing plays a pivotal role in understanding the way culture has influenced that specific individual. All of the factors need to be put before the court in order that the court can be satisfied that the accused lacked (or did not lack) the necessary criminal capacity at the time the offence was committed. This iterates the fact mentioned above when the defence of non-pathological incapacity was applied, and that is that the psychological effect and all others factors need to be taken into consideration.

Certain myths, misconceptions, and stereotypes of different cultural groups, similar to the situation of women who suffer from Battered Woman Syndrome, can influence the judgment and the fairness of the trial. It is, therefore, important that expert witnesses refute any myths and/or try to prevent stereotypes or misconceptions from influencing the court. The myth that only uneducated people believe in witchcraft, for example, needs to be refuted. When the court understands the true effect of cultural

beliefs, without being tainted by myths or misconceptions, only then can the court properly determine the capacity of the accused.

During many of the witchcraft-related killings, the scenarios could be construed as being non-confrontational situations. X, for example, has suffered many misfortunes. His wife had a miscarriage, his father died in a car accident, and his brother has recently lost his job. After consulting a diviner, X was told that Y is the alleged witch responsible for these misfortunes. Y, two weeks prior to her death, told X that he is “next.” On the fateful evening X’s hut is struck by lightning. X, fortunately, was not inside but, fearing for his life, runs to Y’s house and kills the alleged witch by setting her house alight. X was not in a typical confrontational situation where there was an imminent assault from Y or a threat received during a confrontation. X, however, still subjectively perceived that there was a threat and present danger based on the words of Y and the misfortunes that had befallen him. Applying the principle, the threat should be considered subjectively, and could, therefore, have influenced the capacity of X to act with the necessary appreciation of the wrongfulness of the act. This, of course, should be considered in the light of all the surrounding evidence and circumstances.

Howie J explained that due regard to the differences between men and women should be given. It is submitted that the perspective Howie J mentioned is not only a male perspective, but also orientated within a specific culture, a Western culture. As in the case of abused women, the court should place itself in the position of the member of a specific culture (where the cultural defence is raised) in order to achieve judicial equality. Not only will the right in section 9(1) of the Constitution be given effect, but the right to enjoy and participate in the culture of your choice<sup>279</sup> will also be effected if due regard is given to the cultural differences.

### **5.5 Diminished responsibility**

A person who commits a crime can have the necessary criminal capacity, but his or her capacity could be diminished because of mental illness or defect.<sup>280</sup> The doctrine of diminished responsibility is recognised in section 78(7) of the Criminal Procedure Act which states that,

---

<sup>279</sup> Ss 15 and 31 of the Constitution, 1996.

<sup>280</sup> *S v Lehnberg* 1975 4 SA 553 (A); *S v Mnyanda* 1976 2 SA 751 (A).



If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.

A successful defence of diminished responsibility acts as an extenuating circumstance, and can, therefore, result in reduced punishment.<sup>281</sup> The moral blameworthiness of the accused is reduced because there is only a partial disintegration of the personality of the accused.<sup>282</sup>

The accused in a witchcraft-related killing, or any other cultural offence, can aver that his or her criminal responsibility has been reduced. Diminished responsibility can be raised without the need for a formal cultural defence, and, if raised successfully, reduces the sentence of the accused.

## 5.6 Conclusion

The reason why the law has previously not considered factors other than mental illness or youth when determining whether a person had the necessary capacity to act can be accorded to very healthy logic, viz. the law could not differentiate between people who, for example, controlled their anger and those who did not.<sup>283</sup> Everyone was equal before the law. As the law has developed, though, it has become clear that similar treatment does not necessarily entail equality, and punishing someone who does not have a guilty mind does not serve a purpose.

This chapter has dealt with the element of capacity, which consists of the cognitive function and the conative function. If either the cognitive function, the ability to differentiate between right and wrong, or the conative function, the ability to act according to the appreciation of right and wrong, is lacking, the person will not have the necessary capacity to act. Capacity is further divided into a pathological and non-pathological incapacity, which terms describe, in essence, the origin of the incapacity.

---

<sup>281</sup> *S v Sibiyi* 1984 1 SA 91 (A). See also *Africa* (n42) 399; *Snyman* (n9)176.

<sup>282</sup> *Ibid.*

<sup>283</sup> *Snyman* (n9) 163.



Pathological incapacity is a result of a mental illness or defect. Mental illnesses, although not caused by cultural beliefs, can be influenced by the cultural upbringing of a person. As a result, certain syndromes are culture specific. Cultural clashes can, therefore, influence the diagnosis of a patient if the cultural bound syndrome is unknown or if the mental illness is known by another name in the culture. A *caveat* is, as such, appropriate, as the cultural belief of a person should not be equated with the logic of the insane simply because the beliefs are unknown or seem preposterous. A clear distinction should be made between normality within a culture and abnormality as a result of mental illness. The defence of pathological incapacity is still available to anyone, irrespective of whether culture has influenced the mental illness. The cultural defence will, therefore, not aid any accused who commits a crime as a result of pathological incapacity.

The cultural defence will specifically strike at capacity in the instance where the incapacity is not due to a mental disease or defect. Since the first successful case, *S v Arnold*,<sup>284</sup> where non-pathological incapacity as a result of provocation was raised, the approach in the defence has been developing. Certain controversial decisions, such as *Nursingh*<sup>285</sup> and *Moses*,<sup>286</sup> led to uncertainties and a questioning of whether the defence of non-pathological incapacity was not being misused or open to misuse. The *Eadie* decision was supposed to clarify the position and remove any uncertainties that had arisen from previous case law. Instead, Navsa JA, respectfully, worsened the situation. In the *Eadie* case, sane automatism and the second leg of the test of capacity was equated, making it nearly impossible for anyone to succeed with the defence of non-pathological incapacity as a result of provocation or emotional stress.

Snyman and Burchell have given explanations as to the effect that this decision will have on the future of the defence of non-pathological incapacity. Snyman and Burchell both stated that the *Eadie* case clearly shows a shift from a subjective approach to capacity to an approach which remains subjective but contains an objective factor. Cases decided after *Eadie* clearly indicate the confusion in the

---

<sup>284</sup> *Arnold* case (n125).

<sup>285</sup> *Nursingh* case (n127).

<sup>286</sup> *Moses* case (n126).



building blocks of criminal liability, and provocation and/or emotional stress have/has only been considered as mitigating factors.

It was submitted that the defence, considering subsequent case law and academic opinions, is no longer available in the case of provocation or emotional stress. The defence, however, remains intact for other factors, such as fear. In the case of witchcraft-killings, the driving force behind the action is the fear that is instilled by the cultural belief in witchcraft. When a person is confronted with a dangerous or threatening situation, he or she will act instinctively. The roots of the unconscious behaviour in dangerous situations are culturally shaped. This is explained by the use of schemas which indicates why we act in certain ways.

Culture influences the way a person thinks and acts, but, as stated above, this does not mean that a person is programmed to act in certain ways. Culture can, however, be a great driving force, and, as a result, influence the capacity of a person to act. By invoking the cultural defence, the objective factor of the subjective test of capacity will be satisfied. The expert evidence explaining how culture can influence a person will provide the objective factor to measure whether the actions of the person in question could not have been reasonably expected of him or her.

By providing a comparison with the Battered Woman Syndrome and the cultural defence, it was illustrated how the six principles elucidated in case law concerning abused woman can guide the use of the cultural defence in context of criminal capacity. This includes the fact that, for a fair trial to ensue, all the factors should be considered. The psychological effect that culture can have, the history which includes the cultural upbringing of the accused, and the effectiveness of the police to protect the people against witchcraft are all relevant. The enquiry should be done in the light of the norms of the Constitution, taking cognisance of the fact that there are differences among cultures and that the legal culture has been premised on a Western culture. In order to achieve judicial equality, all the factors and the rights afforded by the Constitution need to be weighed before a judgment can be made.

With the proper application and within the parameters set by the Constitution, the cultural defence can provide an effective defence for those, who, as a result of a genuine belief in witchcraft, commit a crime. The cultural defence negates the



element of capacity, and it is submitted that, if properly applied, no further enquiry into fault will be necessary.

The facts of each case do not necessarily lend themselves to the complete lack of capacity, but capacity can be diminished as a result of mental illness. In those instances, diminished responsibility should be raised. A further enquiry into the element of fault is necessary if the accused cannot prove that he or she lacked the necessary criminal capacity. The effect of cultural beliefs on fault will be discussed in the next chapter.



## Chapter 6: Culpability

### 6.1 Introduction

The maxim *actus non facit reum nisi mens sit rea* (an act is not unlawful unless there is guilty mind) is the principle on which our criminal law rests.<sup>1</sup> As stated above<sup>2</sup>, criminal law will serve no purpose if a person who committed a crime does not have a guilty mind.

*Mens rea*, a guilty mind, refers to either *dolus* (intention) or *culpa* (negligence).<sup>3</sup> All common-law crimes, with the exception of culpable homicide, require intention for the purposes of criminal liability. Fault is not a new concept, and it is also one of the elements constituting a crime in traditional African law.<sup>4</sup> According to Bennett and Scholtz, the notion of fault in our common law coincides in certain ways with the African conception of causation, which in traditional African law is linked to fault.<sup>5</sup>

The concept of fault in common law is connected to “expressions of social and moral values.”<sup>6</sup> This correlates, for example, with traditional African law where practising witchcraft is a morally blameworthy state, and that state is sufficient to cause harm or misfortune.<sup>7</sup> Bennett and Scholtz explain this by describing a situation where a boulder rolls from a cliff and kills a person. In common law no person will be held liable for the natural disaster, but in traditional African law the accident would be seen to have been caused by the practice of witchcraft (the negative state) and the fault lies with a witch.

Applying traditional African law to a particular set of facts, or series of events, is easier as the action is either morally blameworthy or not. If a person kills a witch, it is considered to be a laudable act, and the social and moral values will prevent the accused from being convicted of a crime. In common law, the determination of

---

<sup>1</sup> Burchell *The principles of criminal law* (2006) 138; Chanock *The making of South African legal culture 1902-1936: Fear, favour and prejudice* (2001) 117.

<sup>2</sup> See 2.3 above.

<sup>3</sup> Joubert and Faris (ed.) *LAWSA* (2004) 79 par 87.

<sup>4</sup> Motshekga “The ideology behind witchcraft and the principle of fault in criminal law” 1984 *Codicillus* 9.

<sup>5</sup> Bennett and Scholtz “Witchcraft: A problem of fault and causation” 1979 *Comparative and International Law Journal of Southern Africa* 293.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

whether a person had a guilty mind is more complex, as a person's motives and whether society considers them laudable are irrelevant when considering criminal intent.<sup>8</sup>

This chapter explores the common law principles of intention and negligence and, by using the cultural defence, allows those cultural beliefs to inform those common law principles. This will enable the courts to steer away from a purely Western legal system towards a legal system built for the South African context.

The different forms of intention will be discussed, and the possible defences, excluding intention, will be explained. The defences mentioned are limited to the defences that can play a role in culturally-motivated crimes, specifically witchcraft-related crimes. Negligence and the objective test used to determine whether an act was negligent will be discussed. The chapter will conclude with the question of whether the objective test could and/or should include the cultural background of the accused. Ultimately, the question remains as to whether the cultural defence will aid an accused in the light of the objective test of negligence.

## 6.2 Intention

Unlike in traditional African law, intention is separate from a person's motive, although the concepts are at times confused or can even become intertwined.<sup>9</sup> The motive of an accused is the reason behind the act committed.<sup>10</sup> Snyman defines intention as follows,<sup>11</sup>

“intention in the technical sense of the term can therefore be defined as the will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful.”

X, for example, kills Y who is a witch. X killed her because he (according to his testimony) was ridding society of evil. X at the time of committing the crime was aware that causing the death of another living person is a crime and that by decapitating Y he would cause her death. In the simple example given, the motive of X is ridding society of evil, but it is clear that the killing of Y was his intention.

---

<sup>8</sup> Burchell (n1) 463.

<sup>9</sup> Burchell (n1) 463; Snyman *Criminal law* (2008) 190; Bennett and Scholtz (n5) 293.

<sup>10</sup> Burchell (n1) 463; Snyman (n9) 190.

<sup>11</sup> Snyman (n9) 181.



The motive, even in the instance where it is praiseworthy, for example if you are ridding society of evil, will not negate intention.<sup>12</sup> Motive is considered to be irrelevant to the intention of the accused, and it is usually ignored.<sup>13</sup> The reasons behind ignoring the motive of the accused are the complexity of human mind and the fact that motives can be a very unreliable basis.<sup>14</sup>

Whether an accused entertained a particular intention, especially whether the person had the necessary knowledge of unlawfulness, can, in certain instances, be determined with the help of the motive of a person.<sup>15</sup> In the case of the cultural defence being formalised, the motive will play an important role in the proper application of the defence, as the motive will help to indicate whether the accused held a genuine and sincere belief that prompted his/her action. The guidelines for the proper application of the cultural defence are discussed later in the chapter.<sup>16</sup>

Intention as a form of fault contains two main elements, viz. intention and the knowledge of the unlawfulness of the conduct.<sup>17</sup> Intention, as the first element, refers to directing your will towards the specific conduct which causes the result and, at the same time, knowing of the existence of the circumstances mentioned in the definitional elements of the relevant crime.<sup>18</sup>

Intention can take on various forms which will be discussed in 6.2.1 below.

### 6.2.1 Different forms of intention

Different forms of intention have been distinguished, namely *dolus directus*<sup>19</sup>, *dolus indirectus*<sup>20</sup>, *dolus eventualis*<sup>21</sup>, and *dolus indeterminatus*.<sup>22</sup>

<sup>12</sup> *R v Kinsella* 1961 3 SA 519 (C) at 526; *S v Hartmann* 1975 3 SA 532 (C) at 536.

<sup>13</sup> *R v Gani* 1957 2 SA 212 (A) at 221; *S v Van Biljon* 1965 3 SA 314 (T) 318.

<sup>14</sup> Burchell (n1) 463.

<sup>15</sup> Burchell (n1) 464-465.

<sup>16</sup> See 8.2 below.

<sup>17</sup> Burchell (n1) 461.

<sup>18</sup> *Snyman* (n9) 181. *S v Ntuli* 1975 1 SA 429 (A); *S v Adams* 1986 4 SA 882 (A); *S v Campher* 1987 1 SA 940 (A); *S v Collett* 1991 2 SA 854 (A); *S v Mostert* 2006 1 SACR 560 (N).

<sup>19</sup> *Dolus directus* is actual intention. Actual intention is present when a person wilfully acts to accomplish the prohibited act or consequence. *S v Sigwahla* 1967 4 SA 566 (A) at 569G-H; *S v De Bruyn* 1968 4 SA 498 (A) at 510F; *S v Dube* 1972 4 SA 515 (W) at 520F-G. See also Burchell (n1) 461; *Snyman* (n9) 183.

<sup>20</sup> This form intention exists where a person foresees that a certain consequence will follow but still acts. *S v De Bruyn* (n19); *R v Kewelram* 1922 AD 213. See Burchell (n1) 461-462; *Snyman* (n9) 183.



Taking into consideration the case law as discussed in the chapter above<sup>23</sup>, the cases concerning witchcraft-related crimes are almost exclusively instances where the accused had *dolus directus*. *Dolus directus* is defined as actual intention where a person wilfully aims at causing a certain result or consequence.<sup>24</sup> In the case of *Mbombela*,<sup>25</sup> for example, the accused struck the 'object' he thought to be a *tokolotši* with a hatchet. He wilfully intended that his action should result in the death of the *tikoloshe*, and therefore had the actual intention to kill.

The test to be applied in determining whether a person had the necessary intent to commit the crime is a purely subjective test.<sup>26</sup> The court must consider all of the circumstances of the case and then determine the state of mind of the accused at the time the crime was committed.<sup>27</sup> This includes taking into consideration the individual characteristics of the accused which might have influenced his or her state of mind when committing the crime. The circumstance or characteristics that can be considered include, amongst other things, age, degree of intoxication, possible lack of education, or low degree of intelligence.<sup>28</sup>

Within these characteristics, cultural and religious beliefs can, in the case of culturally-motivated crimes, play an important role in the state of mind of the accused. The court has a duty to place itself in the shoes of the accused at the time of the commission and only then ascertain the state of mind of the accused at that moment.<sup>29</sup>

Phelps argues that, because of the subjective nature of the test for intention, there is subsequently no need to formalise the cultural defence for a person who claims that

---

<sup>21</sup> *Dolus eventualis* is the instance where the accused can foresee the possibility of the unlawful circumstances and still proceeds with his or her conduct. *S v Ngubane* 1985 3 SA 677 (A); *S v Beukes* 1988 1 SA 511 (A); *S v Erasmus* 2005 2 SACR 658 (SCA); *S v Van Aardt* 2009 1 SACR 648 (SCA). See Burchell (n1) 462-463; Snyman (n9) 184-187.

<sup>22</sup> *Dolus indeterminatus* is also known as *dolus generalis*. This is where the person's intention is not directed to a specific or known victim but the person does not care who is hurt or may be present. For example placing a bomb in a building. *S v Harris* 1965 2 SA 340 (A); *S v Nkombani* 1963 4 SA 877 (A). Burchell (n1) 463.

<sup>23</sup> See 2.4.2 above.

<sup>24</sup> Burchell (n1) 461.

<sup>25</sup> *R v Mbombela* 1933 AD 269.

<sup>26</sup> Snyman (n9) 188; Burchell (n1) 461.

<sup>27</sup> Snyman (n9) 188.

<sup>28</sup> *Id* at 189.

<sup>29</sup> *Id* at 189-190.

cultural beliefs influenced his or her actions.<sup>30</sup> It is submitted that, despite the subjective nature of the test for intent, the cultural defence still needs to be formalised. As stated in the previous chapter, if the cultural defence is formalised and properly applied, the defence will strike at the capacity of the accused.<sup>31</sup> It will not be necessary to determine whether the accused had a guilty mind, since he or she lacked the capacity to act. If he or she, however, fails in proving that he or she lacked capacity, the cultural defence will provide the necessary certainty that the cultural evidence will be taken into account when the subjective test of intention is applied.<sup>32</sup>

The law has crystallised certain defences that exclude intention. The particular defences of mistake, provocation, and emotional stress, as well as putative defences, are discussed below as they can potentially be relevant in the context of culturally-motivated crimes, such as witchcraft-killings.

## 6.2.2 Defences excluding intention in context of cultural beliefs

### 6.2.2.1 Mistake

Mistake refers either to a mistake of fact or mistake (or ignorance) of law.<sup>33</sup> Before the landmark decision in *S v De Blom*<sup>34</sup>, mistake of law was not recognised as a defence in our law.<sup>35</sup> The courts strictly adhered to the *ignorantia juris neminem excusat* rule, ignorance of law is not an excuse.<sup>36</sup> Rumpff CJ changed the position and stated in *S v De Blom*,<sup>37</sup>

“At this stage of our legal development it must be accepted that the cliché that ‘every person is presumed to know the law’ has no ground for its existence and that the view that ‘ignorance of the law is no excuse’ is not legally applicable in the light of the present-day concept of *mens-rea* in our law.”

<sup>30</sup> Phelps in Bennett (ed.) *African Traditional Religion in South African law* (2011) 148.

<sup>31</sup> See 5.6 above.

<sup>32</sup> See 4.3.2 above.

<sup>33</sup> LAWSA (n3) 91 par 95. For a discussion on ignorance or mistake in law see Snyman (n9) 203—208.

<sup>34</sup> *S v De Blom* 1977 3 SA 513 (A).

<sup>35</sup> *De Blom* case (n34) at 127. See Burchell (n1) 493.

<sup>36</sup> *Ibid.*

<sup>37</sup> *De Blom* case (n34) at 127.



Mistake relates to the knowledge component (knowledge of unlawfulness) of intention as described above.<sup>38</sup> Knowledge of unlawfulness, for example, can relate to the circumstances of all the elements of a specific crime. Snyman uses the example of a hunter, who, during a hunt, kills a fellow hunter.<sup>39</sup> The hunter, thinking he is shooting a buck, in actual fact shot another person. Murder is defined as the unlawful and intentional causing of the death of another human being.<sup>40</sup> The hunter, in Snyman's example, did not have the knowledge of one of the definitional elements of the crime, namely death of another human being. He mistakenly shot a person, whilst believing it to be a buck. The hunter would not have had the necessary intent to be found guilty of the crime of murder, provided that his belief was genuine and sincere. The mistake must be a *bona fide* mistake, but it need not be reasonable as the test for intention remains subjective.<sup>41</sup>

Similar to the scenario sketched by Snyman, in the case of *Mbombela*,<sup>42</sup> the accused killed a young boy, his nephew, after he mistakenly believed that the boy was a *tokolotši*. The mistake in that case was essential to the act, and, given the surrounding circumstances, for example the fact that children told him that it was a *tokolotši*, indicates that the belief was genuine. Mbombela clearly did not have the necessary intent to kill his nephew.

The concern raised when using the defence of mistake as it is, and not formalising a cultural defence, is that the evaluation of the mistake is determined by the dominant culture.<sup>43</sup> The dominant culture, or stated differently, the legal culture, is based on a Western legal system. To place oneself in the shoes of a person who believes in witches, zombies, and the *tokolotši* could prove to be difficult and could make the task of the court in determining the *bona fides* of the mistake harder. It would be easier to relate to the example given by Snyman than to the reality of Mbombela who thought he had killed a *tokolotši*.

---

<sup>38</sup> See 6.2 above. Snyman (n9) 191; Burchell (n1) 494-495.

<sup>39</sup> Snyman (n9) 191-192.

<sup>40</sup> Snyman (n9) 447; Burchell (n1) 667.

<sup>41</sup> Snyman (n9) 192.

<sup>42</sup> *Mbombela* case (n25).

<sup>43</sup> Bennett "The cultural defence and the custom of *Thwala* in South African law" 2010 *University of Botswana Law Journal* 20.





Cultural evidence, and all the surrounding circumstances, needs to be placed before the court if a person wants to raise the cultural defence.<sup>44</sup> Although the test is subjective, it will ease the task of the court in determining the state of mind of the accused if the cultural evidence is at its disposal. In context of the cultural evidence, the courts will be in a better position to determine whether the mistake is indeed genuine and sincere.

### 6.2.2.2 Provocation and emotional stress

The possibility exists that an accused could escape liability as result of provocation or emotional stress.<sup>45</sup> Using provocation or emotional stress as a defence to exclude intention can, however, be risky as provocation can, instead of negating intent, confirm the intention to commit a certain crime.<sup>46</sup>

In *S v Mokonto* the accused stated that the witch had told him that, “you will not see the setting of the sun today.”<sup>47</sup> He was provoked by the witch when she uttered those words. In that case, the provocation was not considered to have influenced Mokonto in such a way that he no longer possessed the knowledge of unlawfulness, but the provocation inflamed his anger to harm the alleged witch intentionally.

It is submitted that, given the court’s decision in *Eadie* surrounding provocation<sup>48</sup> and capacity, the court takes a negative stance in most instances in relation to provocation and expects a person to be able to control his/her anger. In the case of witchcraft-related cases the defence of provocation will not be likely to succeed.

### 6.2.2.3 Putative defences

Unlawfulness is one of the elements to determine criminal liability, and numerous grounds for justification exist that exclude lawfulness.<sup>49</sup> Given the circumstances where an accused genuinely believes that he or she is acting in such a manner that a defence excluding unlawfulness exists and, it does not, then he or she lacks the necessary knowledge of unlawfulness.<sup>50</sup> In those instances, the accused lacks intent

---

<sup>44</sup> See 8.2 below.

<sup>45</sup> Burchell (n1) 513.

<sup>46</sup> *Ibid.*

<sup>47</sup> *S v Mokonto* 1971 2 SA 319 (A).

<sup>48</sup> *S v Eadie* 2002 3 SA 719 (SCA). See 5.4.3.2 above.

<sup>49</sup> See 4.4.3 above.

<sup>50</sup> Burchell (n1) 514.



as a result of a putative defence, although he or she can still possibly be found to have acted negligently. If a person acts within the parameters of a defence that excludes unlawfulness, but later exceeds the boundaries of the defence, the same principle applies as he or she will lack the necessary knowledge of unlawfulness.<sup>51</sup>

Practically this can be illustrated by imagining a person who is trying to avert attack which he/she believes is placing his/her life in danger.<sup>52</sup> X believes that his life is in danger as a witch that told him that, “he will not see the setting of the sun”. According to X he was acting in self-defence (private defence) when he attacked the witch.

In order to distinguish between private defence (self-defence) and putative private defence, Smalberger JA clearly, in *S v De Oliveira*<sup>53</sup>, explains it as follows,

“If an accused honestly believes his life or property is in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. In those circumstances if he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending on the precise circumstances) exclude *dolus* in which case liability for the person’s death based on intention will be excluded; at worst for him he can then be convicted of culpable homicide.”

Using the example of X, we can see that objectively X’s action cannot constitute acting in private defence. There was no imminent or commenced unlawful attack on X’s life; the old lady had simply uttered a threat. For an outsider, the threat would seem absurd as it came from an old lady who did not seem capable of defending herself against any attack from the young man. X, however, held the ‘erroneous’ belief (according to our law), that his life was in danger. Under those circumstances, because of his cultural belief of the supernatural powers of witches, he did not have the necessary knowledge of unlawfulness of his act which would constitute a putative private defence.

Certain cultural practices, such as the belief in witchcraft, may influence the state of mind of an accused to the extent that there is no knowledge of unlawfulness (as seen from the example above).<sup>54</sup> As has been mentioned above,<sup>55</sup> putative

---

<sup>51</sup> *Ibid.*

<sup>52</sup> The case of *S v Ngomane* 1979 (3) SA 859 (A) illustrates an instance of putative private defence.

<sup>53</sup> *S v De Oliveira* 1993 2 SACR 59 (A) at 63-64.

<sup>54</sup> Carstens “The cultural defence in criminal law: South African perspectives” 2004 *De Jure* 329; Labuschagne “Geloof in toorkuns: ‘n Morele dilemma vir die strafreg?” 1990 SACJ 261.

defences, because of their subjective nature, are ripe to include cultural beliefs but, to ensure that all the evidence is properly placed before the courts, the cultural defence should be formalised.

## 6.3 Negligence

### 6.3.1 Introduction

Burchell defines negligence as a term which indicates that the conduct of a person has not conformed to a prescribed standard, that of a reasonable person.<sup>56</sup> The reasonable person test is an objective test, and it is comprised of three parts or legs.<sup>57</sup>

The first leg of the test is the reasonable foreseeability.<sup>58</sup> Would the reasonable person in the position of the accused foresee the consequence(s) of his or her conduct? If an accused is charged with culpable homicide, he or she must have foreseen the possibility of the death of a person before the second test of the leg can be applied. If, for example, the reasonable person was placed in X's shoes he or she would have foreseen that, when X stabbed an alleged witch during an act of putative self-defence, the action of stabbing could result in the death of the witch.

The second leg of the test entails the duty to take reasonable steps in order to prevent the occurrence.<sup>59</sup> Would the reasonable person have taken the necessary steps to prevent the unlawful consequence? This is determined with reference to whether the action was laudable and/or urgent, or, in the case where the precautionary steps may have been so difficult, inconvenient or costly that a reasonable person would not have taken them.<sup>60</sup> Take the example of X who believes he is in danger and, in a putative self-defence act, sets the hut of the alleged witch alight. The reasonable person will foresee that the fire will result in the death of any person inside the hut. The reasonable person would have taken steps

---

<sup>55</sup> See 6.2.1 above.

<sup>56</sup> Burchell (n1) 522.

<sup>57</sup> *Id* at 525.

<sup>58</sup> Burchell (n1) 525; *S v Van Der Mescht* 1962 (1) SA 512 (A); *S v Bernardus* 1965 (3) SA 287 (A); *S v Van As* 1976 (2) SA 921 (A).

<sup>59</sup> Burchell (n1) 530.

<sup>60</sup> *Ibid*.

to prevent the death of innocent bystanders and would have used another method to try to ward off the dangerous situation.

The last leg is the failure to take the steps as contemplated above.<sup>61</sup> South African criminal law does not recognise varying degrees of negligence, and, as Burchell states, “the slightest deviation can incur liability.”<sup>62</sup>

When applying the three legs of the reasonable person test, the fictitious reasonable person is placed in the same external circumstances as the accused.<sup>63</sup> The only exception to the objective test is where the accused is a person possessing, or professing, certain skill and proficiency in a particular field of activity. For example, if the accused is a doctor, he or she will be judged by the standard of the reasonable doctor.<sup>64</sup>

In *S v Burger* the reasonable person was defined by Holmes JA as follows,<sup>65</sup>

“One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life’s pathway with moderation and prudent common sense.”

This definition can be supplemented with the word of De Villiers JA in the *Mbombela* case where he stated that, “The reasonable man is the man of ordinary intelligence, knowledge and prudence.”<sup>66</sup>

The objective reasonableness criterion has been endorsed by the courts<sup>67</sup>, but none of the definitions gives a clear-cut indication as to whether, and to what extent, the individual characteristics of an accused can be attributed to a reasonable person.<sup>68</sup>

The definitions suggest that the reasonable person is someone who does not belong to a specific cultural group but is neutral and ordinary in each and every way. The

---

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Id* at 531.

<sup>64</sup> *Id* at 531.

<sup>65</sup> *S v Burger* 1975 4 SA 877 (A) at 879.

<sup>66</sup> *Mbombela* (n25) 272.

<sup>67</sup> *S v Ngubane* (n21); *S v Hattingh* 1991 (3) SA 322 (W); *S v Ngema* 1992 (2) SACR 651 (D).

<sup>68</sup> Burchell (n1) 531-537.



current objective reasonable person test in the context of cultural beliefs will be discussed below.<sup>69</sup>

### 6.3.2 The cultural beliefs of the reasonable person

“To strike a mean between the Batonka fisherman, living his primitive life in some remote spot on the Zambesi, and the professor at the University College of Rhodesia, is to set a task even an arch-exponent of the ‘reasonable man test’ would shrink from attempting.”<sup>70</sup>

De Wet and Swanepoel,<sup>71</sup> as well as Burchell<sup>72</sup>, are of the opinion that the reasonable person test is unreasonable and can result in injustices. As a result of the vast difference between people in our multi-cultural society, the effect of the test can be to punish a person because he or she is unintelligent, ignorant, or inexperienced.<sup>73</sup> A perfect example is that of Mbombela where he was found guilty of culpable homicide and was punished because of his cultural beliefs.<sup>74</sup>

The concept of ‘the reasonable person’, as defined above, is considered to be a neutral legal standard, but what is seen as ‘ordinary’ is in fact determined by cultural filters.<sup>75</sup> The cultural filters, in turn, are determined by the dominant legal culture.<sup>76</sup> The objective reasonable person is, therefore, merely the personification of the majority culture.<sup>77</sup> Renteln specifically states that the objective test of what an ordinary person believes “masks the subjective biases of the culture of the dominant group.”<sup>78</sup> Using the *Mbombela* case, a white male from a Western background who is biased against indigenous cultural beliefs was used as the yard-stick of the reasonable person.<sup>79</sup> De Wet and Swanepoel expressly state that a young tribesman

---

<sup>69</sup> See 6.3.2 below.

<sup>70</sup> *R v Nkomo* 1964 3 SA 128 (SR) 131 per Beadle CJ.

<sup>71</sup> De Wet and Swanepoel *Die Suid-Afrikaanse Strafreg* (1960) 141.

<sup>72</sup> Burchell (n9) 531.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Mbombela* case (n25). See the discussion in De Wet and Swanepoel *Die Suid-Afrikaanse strafreg* (1985) 159.

<sup>75</sup> Amirthalingham in Foblets *et al* (eds.) *Multicultural Jurisprudence: Comparative perspectives on the cultural defence* (2009) 46.

<sup>76</sup> Bronitt in Foblets *et al* (eds.) *Multicultural Jurisprudence: Comparative perspectives on the cultural defence* (2009) 122-123. See chapter 2 above.

<sup>77</sup> Renteln and Foblets in Foblets *et al* (eds.) *Multicultural Jurisprudence: Comparative perspectives on the cultural defence* (2009) 337; Renteln *The cultural defence* (2004) 15.

<sup>78</sup> Renteln and Foblets (n77) 36.

<sup>79</sup> *Mbombela* (n25).

such as Mbombela should not have been blamed for believing in the existence of the *tokolotši*.<sup>80</sup>

In the *Ngema* case, Hugo J departed from the Eurocentric decision in the *Mbombela* case, and stated that,<sup>81</sup>

“One must, it seems to me, test negligence by the touchstone of the reasonable person of the same background and educational level, culture, sex and - dare I say it - race of the accused. The further the individual peculiarities of the accused alone must, it seems to me, be disregarded.”

One of the main reasons the courts do not take the personal traits of an accused into account with the objective test of the reasonable person is that the objective test can eventually become so diluted that it is no longer an objective but a subjective test.<sup>82</sup>

The test for negligence will become vaguer, and this, in turn, can result in the law being uncertain.<sup>83</sup>

The question remains whether the harsh effect of the reasonable person test should be tempered by imbuing the test with individual characteristics as suggested in the *Ngema* case.

According to Burchell, because of the injustices that could occur in a multi-cultural society the individualisation of the test is unquestionable.<sup>84</sup> Burchell, however, states that, if the inquiry into capacity is properly done, in other words the cultural and religious beliefs are accommodated in the capacity inquiry, there will be no need to individualise the test as no determination into the negligence of the act will be necessary.<sup>85</sup>

It is submitted that Burchell’s argument is correct in that, if the cultural defence is formalised and properly applied, the individualisation of the reasonable person test will not be needed. Mbombela, a young tribesman, was not able to act in accordance with his appreciation of wrongfulness because of his intense fear of the *tokolotši* coupled with the goal of ridding the community of the dangerous creature. He did not

---

<sup>80</sup> De Wet and Swanepoel (n74) 161.

<sup>81</sup> *Ngema* case (n67) at 656-657.

<sup>82</sup> Amirthalingham (n75) 50.

<sup>83</sup> Burchell (n1) 536; Phelps (n30) 152.

<sup>84</sup> Burchell (n1) 536.

<sup>85</sup> *Ibid.*

have the necessary capacity to act, and no inquiry into the negligence of the act was necessary.<sup>86</sup>

#### 6.4 Conclusion

Oliver Wendell Holmes was quoted as saying, “Even a dog knows the difference between being kicked and being stumbled over.”<sup>87</sup> The difference in the act lies in the intent with which it was committed. This chapter has dealt with the last element, the culpability of a person, which can then be divided into intent and negligence.

It is important to draw a clear distinction between motive and intention, as these two concepts are often confused. The motive of committing a certain crime does not excuse a person from the liability, but, in the case of cultural offences, it plays an important role in illustrating that the belief held is genuine. Most cases of witchcraft-related crimes deal with *dolus directus* as form of intention, which comprises of the intent and knowledge of unlawfulness.

The defences that exclude intent, namely mistake, provocation, and putative defences have been discussed in the context of cultural beliefs. The subjective test of intention is ripe to include cultural and religious beliefs, but it has been submitted that, in order to ensure that cultural evidence is used and that the evidence is properly placed before the court, the cultural defence needs to be formalised. Provocation as defence in the context of cultural beliefs, although available, is not likely to yield positive results for the accused.

Although it is easy to incorporate cultural beliefs within the subjective test of intention, the same cannot be said of the test for negligence. The objective test, namely the reasonable person test, is used to determine whether a person acted negligently. This test comprises of three parts, the foreseeability, steps available to prevent the action, and the failure to take the reasonable steps. Placing the reasonable person in the shoes of a person who committed a culturally-motivated crime has, in the past, resulted in unfair and unjust outcomes. The problem with the reasonable person test is that, although it is considered to be a neutral test, it is a personification of the dominant legal culture, in other words a Western culture.

---

<sup>86</sup> See 5.4.5.2.1 above.

<sup>87</sup> Holmes *The Common law* (1909) 3.

The courts have refused, in most cases, to indigenise the test because the individualisation of the test could lead to the test becoming vague and create uncertainties in our law. In the *Ngema* case, the court did move away from the purely objective test and took certain individual factors into account. It is, however, submitted that the argument by Burchell should be followed. This entails that the inquiry into capacity should be done properly, and the determination into the negligence of the act will subsequently not be necessary.

Although the cultural defence will strike at the element of fault, the main playing field of the cultural defence will remain capacity. It is not the role or the aim of this study to change the existing the legal framework, but rather to develop the legal framework as it is. The individualisation of the objective test will aid in preventing the harsh effect of the test, especially in culturally motivated crimes, but it is not the purpose of the cultural defence to do so. The individualisation extends to a much wider aspect than the cultural background of an individual which needs to be dealt with in a separate study.

As explained above,<sup>88</sup> culture influences the way that people act and think. The cultural defence will properly place the cultural evidence before the court, aiding the court in understanding the state of mind as it is influenced by culture. The cultural defence will, therefore, if formalised, help the court to apply the subjective test of intention properly. With respect to the test for negligence, it is submitted that it would create uncertainties if cultural factors are included. The individualisation of the reasonable person test should be considered but not under the auspices of the cultural defence.

---

<sup>88</sup> See 5.4.5 above.



## Chapter 7: The use and abuse of the cultural defence

### 7.1 Introduction

“For formerly the tribes of men on earth lived remote from ills, without harsh toil and the grievous sicknesses that are deadly to men. But the woman unstopped the jar and let it all out, and brought grim cares upon mankind.”<sup>1</sup>

There are many arguments that either support or contest the recognition of the formal cultural defence. Formalising the cultural defence has been described as a “slippery slope” or as opening the metaphorical Pandora’s Box.<sup>2</sup> In the first section of this chapter the possible difficulties with, and problems that could arise from, formalising the cultural defence will be examined. These problems will be divided into seven broad categories namely: definitional problems; assimilation and acculturation; misuse of the cultural defence; essentializing culture; equal protection before the law; criminal law objectives; and other sufficient remedies. Each of these categories will be discussed and the counter-arguments of each, if there are any, will be discussed in the second section of the chapter.

### 7.2. Difficulties with, and problems arising from, the cultural defence

#### 7.2.1 Definitional problems

A myriad of definitional problems in relation to the term cultural defence exists. One of the biggest problems is defining the *raison d’être* of the defence-culture. The concept of ‘culture’ has been described as being very vague, and, as a result of this vagueness, its proper scope could be almost impossible to define.<sup>3</sup> The vagueness can also lead to misinterpretations in the court.<sup>4</sup> Renteln gives the example of where a mere social practice is misinterpreted as being part of a normal cultural tradition.<sup>5</sup>

---

<sup>1</sup> Hesiod *Theogony and Works and Days: Translated with an introduction and notes by M.L. West* (1999) lines 90-105 of *Works and Days* 39.

<sup>2</sup> Goldstein “Cultural conflicts in court: Should the American criminal justice system formally recognize a ‘cultural defense?’” 1994 *Dickinson Law Review* 158.

<sup>3</sup> Van Broeck “Cultural defence and culturally motivated crimes (Cultural offence)” 2001 *European Journal of Crime, Criminal Law and Criminal Justice* 10. See also X “The cultural defense in criminal law” 1986 *Harvard Law Review* 1308.

<sup>4</sup> Renteln in Foblets *et al* (ed) *Multicultural Jurisprudence: Comparative perspectives on the cultural defence* (2009) 74.

<sup>5</sup> *Id* at 74-75.



An example of this is the selling of “untouchables”, a social group that historically undertook work deemed to be beneath Hindus, as prostitutes.<sup>6</sup> This practice was interpreted as a cultural tradition, but it is not an example of a cultural tradition of Indians, but is rather a social practice that resulted because of the economic hardships that the individuals faced.<sup>7</sup>

Another problem with defining culture is the fact that culture, as explained above,<sup>8</sup> is dynamic, constantly changing, and not monolithic.<sup>9</sup> As it changes over time, specific traditions can become extinct, or their existence can be questioned by members within the group.<sup>10</sup> Culture can also transcend geographical, national, or ethnic boundaries, resulting in individuals belonging to more than one cultural group simultaneously.<sup>11</sup> The specific cultural constructs and definitions are developed socially and subject to different meanings according to the political and economic needs of that society.<sup>12</sup>

The nature of culture, as explained above, creates the problem that cultures and cultural groups might be impossible to identify.<sup>13</sup> It would, therefore, be difficult to identify for whom the defence is available and when it will be available.<sup>14</sup> Social construction of the definitions results in the “values” of a culture not being readily quantifiable or easily studied.<sup>15</sup> Too broad a definition of culture could result in creating too broad a defendant group claiming cultural defence.<sup>16</sup> In order to apply any defence properly, including a cultural defence, the group to whom the defence will pertain needs to be discernible and cannot be too broad.<sup>17</sup>

Determining for whom the defence is available can create another vexing problem if the group included is too broad, since the defence can then be used by subcultures,

---

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> See 3.2.1.

<sup>9</sup> Tomer-Fishman “ ‘Cultural defense’, ‘cultural offense’, or no culture at all?: An empirical examination of Israeli cases and of the factors affecting them” 2010 *Journal of Criminal Law and Criminology* 490. See also Renteln (n4) 79-80.

<sup>10</sup> Renteln (n4) 79-80.

<sup>11</sup> Tomer-Fishman (n9) 490.

<sup>12</sup> Tomer-Fishman (n9) 490.

<sup>13</sup> Van Broeck (n3) 10 quotes Sams “The availability of the “cultural defense” as an excuse for criminal behaviour” 1986 *Georgia Journal of International and Comparative Law* 345-348.

<sup>14</sup> Claes and Vrieland in Foblets and Renteln (eds.) *Multicultural jurisprudence: Comparative perspectives on the cultural defense* (2009) 308.

<sup>15</sup> Goldstein (n2) 166.

<sup>16</sup> *Id* at 158.

<sup>17</sup> *Id* at 167.

such as gangs or people who come from extremely impoverished backgrounds.<sup>18</sup> The misuse of the cultural defence that could occur owing to the definitional problems will be discussed below.<sup>19</sup>

## 7.2.2 Assimilation and acculturation

Within a growing global community, cultures are now more than ever characterized by cultural dissent.<sup>20</sup> Cultural groups are faced by individuals challenging the community to modernize, or broaden, the traditional terms of cultural membership.<sup>21</sup> The communities are also faced with many more surrounding cultural groups.<sup>22</sup> As a result, one of the problems critics have identified with the cultural defence is the processes of assimilation and acculturation.<sup>23</sup>

As explained above,<sup>24</sup> culture has an ambivalent nature resulting in different cultures constantly overlapping and absorbing elements from one another.<sup>25</sup> Assimilation is the process by which individuals adopt the value system of the new culture and conform to this new culture.<sup>26</sup> Acculturation and assimilation are used by some interchangeably, but, according to Renteln, they are not synonymous.<sup>27</sup> Acculturation is difficult to define, but it can be seen as the adoption of, or adaptation, to a different culture when an individual is confronted with another culture.<sup>28</sup> Acculturation leads to some degree of assimilation, but rarely is the process complete.<sup>29</sup>

---

<sup>18</sup> Renteln *The cultural defense* (2004) 207. Individuals who commit crimes because of impoverished backgrounds do not fall within the ambit of the cultural defence, but rather the so-called “rotten social background defence”. See Delgado “Rotten social background: Should criminal law recognize a defence of severe environmental deprivation?” 1985 *Law and Inequality* 9.

<sup>19</sup> See 7.2.3 below.

<sup>20</sup> Sunder “Cultural dissent” 2002 *Stanford Law Review* 498.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Renteln (n18) 13; Tomer-Fishman (n9) 487; Van Broeck (n3) 11; Bennett “The cultural defence and the custom of *Thwala* in South African law” 2010 *University of Botswana Law Journal* 16; Chiu “The cultural defense: Beyond exclusion, assimilation and guilty liberalism” 1994 *California Law Review* 1102; Siesling and Ten Voorde in Foblets *et al* (ed) *Multicultural Jurisprudence: Comparative perspectives on the cultural defence* (2009) 153.

<sup>24</sup> See 3.1.2 and 7.2.1 above.

<sup>25</sup> Bennett (n23) 16.

<sup>26</sup> Renteln (n18) 13. The *Oxford English Dictionary* defines assimilation as being the action of making or becoming like.

<sup>27</sup> Renteln (n18) 13.

<sup>28</sup> Van Broeck (n3) 11.

<sup>29</sup> *Ibid.*



During the processes of assimilation and/or acculturation, cultural values are rearranged and changed (in acculturation only to some extent).<sup>30</sup> In assimilation the traditional culture is abandoned and replaced with the cultural values of the dominant group.<sup>31</sup> The assimilation of a new culture can result in a new “melting pot” of cultures negating the possible use of the cultural defence, as individuals are no longer part of a minority culture.<sup>32</sup>

### 7.2.3 Misuse of the cultural defence

With the formalization of a cultural defence lies the possibility of fraud and manipulation.<sup>33</sup> Practically, the implementation of cultural defence can be difficult because not all the difficulties and possible ways in which this defence could be manipulated can be anticipated.<sup>34</sup> For example, it is difficult to prove the existence of certain customs, and, as a result, it will be impossible to distinguish between legitimate and illegitimate uses.<sup>35</sup> Another possible way in which the cultural defence can be misused is by the false claim that a person belongs to a certain cultural group or that a certain practice is traditional when it is not.<sup>36</sup> Culture, as discussed above,<sup>37</sup> is difficult to define, and because it is a social construction there could be self-serving constructions of culture.<sup>38</sup>

An individual belonging to a certain cultural group with specific traditions could, furthermore, claim that he or she acted and was motivated by his or her culture, when in fact this was not the motivation. Say an individual, X for example, is part of a cultural group that believes in witchcraft. X kills Y who is known to be an alleged witch in the community and claims that he killed Y because he feared that she would kill him. X was, however, not motivated by the fear of witchcraft but in fact killed her (Y) because she was a political rival. As a result of potential abuse, many authors oppose the formalisation of the cultural defence.

---

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Renteln (n18) 13.

<sup>33</sup> Claes and Vrielink (n14) 304.

<sup>34</sup> Renteln (n18) 193.

<sup>35</sup> *Ibid.*

<sup>36</sup> Renteln (n18) 194. Ramirez “The virtues of the cultural defense” 2009 *Judicatere* 210.

<sup>37</sup> See 7.2.1 above.

<sup>38</sup> Bennett (n23) 24.



#### 7.2.4 Expert evidence

In order to establish whether or not the defendant is part of a specific cultural group, proponents of cultural defence argue that expert witnesses should be used in order to prevent the misuse of the cultural defence.<sup>39</sup> Critics have, however, raised certain problems that can arise from the expert witnesses. The first difficulty is to decide whether or not an anthropologist will be used or whether a member of the specific cultural group should be used.<sup>40</sup> Both of these witnesses could present problems. The member, as well as the anthropologist, might be reluctant to divulge any information pertaining to the specific cultural group.<sup>41</sup> Another problem could occur if the anthropologist is a so-called “hired-gun” and gives evidence that will aid the defendant in his case only.<sup>42</sup> The expert witnesses, especially anthropologists since they are not members of the specific cultural group, can give inaccurate information about the cultural group and its traditions and beliefs.<sup>43</sup> A judge, furthermore, could rely too excessively on the expert witness, who could be seen as the only “messenger of truth”.<sup>44</sup> Other problems surrounding the use of anthropologists as expert witnesses include the choosing of the anthropologist, the remuneration of the said expert, and the evidentiary rules surrounding expert witnesses.<sup>45</sup>

#### 7.2.5 Essentializing culture

Another common criticism with regards to the cultural defence is the essentializing of culture.<sup>46</sup> The statements made by judges when trying to define culture, or the culture of a specific group, can give way to very dangerous generalizations of a cultural group, in other words they essentialize culture.<sup>47</sup> The problem with the cultural defence is that only a number of specific characteristics of a cultural group will be embodied in the defence (or highlighted during the defence), giving the

---

<sup>39</sup> See 7.4 below.

<sup>40</sup> Renteln in Foblets *et al* (eds.) *Cultural diversity and the law: State responses from around the world* (2010) 804-805.

<sup>41</sup> *Ibid.*

<sup>42</sup> Goldstein (n2) 166.

<sup>43</sup> *Ibid.*

<sup>44</sup> Siesling and Ten Voorde (n23) 153.

<sup>45</sup> Renteln (n40) 804-805.

<sup>46</sup> Renteln (n18) 11; Van Broeck (n3) 10; Chiu (n23) 1100; Bronitt in Foblets *et al* (ed) *Multicultural Jurisprudence: Comparative perspectives on the cultural defence* (2009) 125; Greenawalt “The cultural defense: Reflections in light of the Mode Penal Code and the Religious Freedom Restoration Act” 2008 *Ohio State Journal of Criminal Law* 317.

<sup>47</sup> Chiu (n23) 1100.



impression that those specific characteristics encapsulate the entire culture.<sup>48</sup> This can give rise to racism and it borders on stereotyping.<sup>49</sup> A cultural defence, therefore, has the capacity to reinforce or enforce false and anachronistic stereotypes, and also runs the risk of having people think that everyone in that cultural group acts in the same manner.<sup>50</sup> This is especially problematic in criminal law cases where a certain cultural group could be associated with criminal behaviour.

### 7.2.6 Equal protection before the law

The cultural defence violates the principle of equal protection, as all people should be held to the same, single standard.<sup>51</sup> This argument has been referred to by authors as the “When in Rome” argument, where everyone should be treated equally before the law.<sup>52</sup> A cultural defence will, therefore, result in discrimination since only certain groups will be able to utilise this defence.<sup>53</sup> Goldstein argues that cultural defence does not provide justice for individuals because the victims are often from the same cultural group as the accused. This results in the defence not protecting the entire cultural group as the victims are not, according to Goldstein, deemed to be worthy of protection if the cultural defence succeeds.<sup>54</sup>

The argument of Goldstein links with the violation of human rights that is considered to be condoned or perpetuated by a cultural defence.<sup>55</sup> This issue is discussed in 7.2.7 below.

### 7.2.7 Violation of human rights

The victims of the cultural defence are often from vulnerable groups, such as women or children.<sup>56</sup> The cultural defence is, therefore, seen as undermining the rights of those groups as it perpetuates and condones values such as sexism and the

---

<sup>48</sup> *Ibid.*

<sup>49</sup> Renteln (n18) 11; Bronitt (n46) 125.

<sup>50</sup> Renteln (n4) 80; Renteln (n18) 193; Ramirez (n36) 208; Chiu (n23) 1103; Greenawalt (n44) 317.

<sup>51</sup> Renteln (n18) 194.

<sup>52</sup> Renteln (n18) 194; Tomer-Fishman (n9) 479.

<sup>53</sup> Claes and Vrielink (n14) 307; Tomer-Fishman (n9) 479.

<sup>54</sup> Goldstein (n2) 163.

<sup>55</sup> Renteln (n18) 192; Chiu (n23) 1057; Tomer-Fishman (n9) 479; Greenawalt (n44) 321; Claes and Vrielink (n14) 309; Ramirez (n36) 208; Bennett (n23) 21-24; Goldstein (n2) 162; Dumin “Superstition-based injustice in Africa and the United States: The use of provocation as a defense for killing witches and homosexuals” 2006 *Wisconsin Women’s Law Journal* 148.

<sup>56</sup> Claes and Vrielink (n14) 309.



subordination of women.<sup>57</sup> If, for example, the cultural defence is allowed in cases where women were abused, it reinforces the idea that women are property and disposable.<sup>58</sup> By formalising the cultural defence, the sanctity of life is lessened, the victimization of women and children is condoned, and cultural traditions are regarded as being more important than human rights.<sup>59</sup>

Dumin argues that witchcraft-killings produce a systemic nature of violence, and this violence will be ignored if the cultural defence is formalised.<sup>60</sup> Witchcraft-killings, according to Dumin, are specifically against the powerless, such as old women, and the violence used by the accused is not based on fear. The “witch” is merely a scapegoat for misfortune suffered by him or her.<sup>61</sup> Dumin raises the point that witchcraft-killings are nothing more than hate crimes known by another name.<sup>62</sup> As with hate crimes, witchcraft-killings are based on widespread unfounded beliefs about certain members of the community.<sup>63</sup> If the cultural defence is formalised in a society, that community is simply empathizing with the perpetrator, forgetting the victim, and is running the risk that violence could become institutionalized.<sup>64</sup>

### 7.2.8 Criminal law objectives

Opponents of the cultural defence argue that the objectives of criminal law will not be attained if the cultural defence is formalised.<sup>65</sup> The most prominent argument is the fact that the cultural defence will go against the purposes of punishment, which includes deterrence and rehabilitation.<sup>66</sup> If an individual can use his or her cultural background either to excuse or to mitigate criminal behaviour, other members who are part of the same cultural group might be less deterred by the law.<sup>67</sup> If the perpetrators are not convicted of their crimes, it has further been argued, the positive

---

<sup>57</sup> Chiu (n23) 1057; Renteln (n18) 192; Tomer-Fishman (n9) 479; Greenawalt (n44) 321. Goldstein states that the recognition would demonstrate that the United States of America tacitly consents to violence towards women. See Goldstein (n2) 162.

<sup>58</sup> Ajayi “Violence against women: The ethics of incorporating the cultural defense in legal narrative” 2012 *Georgetown Journal of Legal Ethics* 408.

<sup>59</sup> Ramirez (n36) 208.

<sup>60</sup> Dumin (n55) 149.

<sup>61</sup> *Id* at 174.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> Chiu (n23) 1057; Renteln (n18) 192; Claes and Vrielink (n14) 305; X (n3) 1304.

<sup>66</sup> See 2.3 above for a discussion on the purposes and theories of punishment.

<sup>67</sup> Claes and Vrielink (n14) 305; X (n3) 1304; Renteln (n18) 192; Chiu (n23) 1057.



effect of rehabilitation can not take place. Through rehabilitation, the criminal will come to the realization that he or she deserved the punishment.<sup>68</sup>

Cultural defence could also create the problem of setting a precedent.<sup>69</sup> Members of the cultural group will believe that they could use the cultural defence to their benefit, and this could, in turn, invoke fear in potential victims.<sup>70</sup> In the context of communities where the belief of witchcraft is held, older women who live on their own and who may have been earmarked as witches might live in fear of being killed if the cultural defence is formalised.

A major concern is that the cultural defence will lead to anarchy.<sup>71</sup> The cultural defence will have the effect that the legal code will no longer be uniform, and individuals and groups will decide which laws they want to obey.<sup>72</sup> This would, in turn, create uncertainty and unpredictability in the legal system.<sup>73</sup> Complying only with the laws which are consistent with the values of a certain individual or group would tend towards anarchy.<sup>74</sup>

Chiu argues that not only will the cultural defence influence the purposes of punishment but it strikes at the tenet of criminal law which is based on individual responsibility. The cultural defence would entail that criminal responsibility derives from cultural conflicts instead of individual responsibility.<sup>75</sup>

### 7.2.9 Other sufficient grounds

Many authors argue that the formalisation of the cultural defence is unnecessary since there is sufficient provision in the current law for cultural evidence to be heard.<sup>76</sup> Cultural evidence can be used as part of existing defences as well as during the sentencing stage.<sup>77</sup> Rautenbach and Matthee submit that the flexibility of the

---

<sup>68</sup> Renteln (n18) 193.

<sup>69</sup> Torry "Multicultural jurisprudence and the cultural defence" 1999 *Journal of Legal Pluralism and Unofficial Law* 129; Goldstein (n2) 161.

<sup>70</sup> Goldstein (n2) 161.

<sup>71</sup> Renteln (n18) 192; X (n3) 1302.

<sup>72</sup> Renteln (n18) 192.

<sup>73</sup> *Ibid.*

<sup>74</sup> X (n3) 1302.

<sup>75</sup> Chiu (n23) 1057.

<sup>76</sup> Phelps in Bennett (ed.) *Traditional African Religion in South Africa* (2011) 140; Rautenbach and Matthee "Common law crimes and indigenous customs: Dealing with the issues in South African law" 2010 *Journal of Legal Pluralism* 115; Chiu (n23) 1103.

<sup>77</sup> *Ibid.*





requirements of the common law crimes, such as murder, in the South African criminal law negates the need for a separate cultural defence.<sup>78</sup> By using the existing defences, the courts will not be faced with all the other problems illustrated above.<sup>79</sup>

### 7.3 Counter-arguments against the difficulties arising from the cultural defence

#### 7.3.1 Definitional problems

Culture, as with any other concept, will give rise to cases where cultural influence is not clear, and where it is difficult to determine whether the specific instance is a cultural belief.<sup>80</sup> These boundary cases are found in any (scientific) category, but this does not in any way undermine the validity of the concept.<sup>81</sup> Determining whether, in borderline cases, the accused will be able to invoke the cultural defence, by determining the existence of specific customs and traditions, lies in the proof (the evidence presented). Expert witnesses, such as members of the relevant cultural community and cultural anthropologists, could help to establish the existence or non-existence of such beliefs/customs.<sup>82</sup>

Culture is not static, but what the opponents of the cultural defence tend to forget is that many of the core aspects of a specific culture endure over time.<sup>83</sup> These core aspects play a role in influencing the behaviour of people. The mere fact that culture is not monolithic, furthermore, does not detract from the fact that all individuals are subject to cultural imperatives.<sup>84</sup> The problem that could, however, arise is determining to what extent the cultural imperatives may have influenced the individual.<sup>85</sup> This could, however, be addressed by the implementation of certain strategies mentioned below.<sup>86</sup>

The difficulty of identifying for whom the defence is available and when it will be available, as alluded to above,<sup>87</sup> can be addressed with the three-step process of

---

<sup>78</sup> Rautenbach and Matthee (n76) 115.

<sup>79</sup> *Id* at 115-116. See 7.2 above.

<sup>80</sup> Van Broeck (n3) 10.

<sup>81</sup> Van Broeck (n3) 10.

<sup>82</sup> Ramirez (n36) 211.

<sup>83</sup> Renteln (n18) 11.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> See 7.4 below.

<sup>87</sup> See 7.2.1 above.



Van Broeck.<sup>88</sup> If the evidence given by the accused is compared to the arguments and approaches of the cultural group (of which the accused can be considered a member) one can discern, firstly whether there is a distinctive cultural group (with specific cultural traditions and behaviours) and, secondly, whether the accused followed those patterns. This three step enquiry will eliminate fake arguments, prevent the abuse of a cultural defence, and help to identify to whom and when the cultural defence is available.<sup>89</sup>

With reference to the argument that the defence will include too broad a group, such as subcultures, it is important to note that cases of economic hardship and certain subcultures should not be confused with cultural conflicts.<sup>90</sup> Cases where social practice is described as a cultural tradition do not have a cultural aspect but could, for example, be instances of economic hardship.<sup>91</sup> Furthermore, the subcultural defence, as in the case of gangs, has more to do with class difference than with cultural differences.<sup>92</sup> In order to prevent this confusion, the strategies listed below should be properly employed.<sup>93</sup>

### 7.3.2 Assimilation and acculturation

Even in a global community where different groups are confronted by one another on a daily basis, assimilation and acculturation cannot be assumed.<sup>94</sup> The reality is that many individuals in a cross-cultural world are bi- or multi-cultural.<sup>95</sup> Depending on the context of the situation, individuals can be assimilated or unassimilated.<sup>96</sup>

As explained above, acculturation is not synonymous with assimilation.<sup>97</sup> Individuals can appear to be assimilated or 'westernised', especially in the domain of material culture such as by the car they drive or the clothes they wear. These individuals have been acculturated only, and this does not mean that they are completely

---

<sup>88</sup> This is discussed in detail in 7.4 below.

<sup>89</sup> Van Broeck (n3) 25.

<sup>90</sup> Renteln (n18) 11.

<sup>91</sup> *Ibid.* See the example given in 7.2.1 above.

<sup>92</sup> *Id* at 208.

<sup>93</sup> See 7.4 below.

<sup>94</sup> Bennett (n22) 17.

<sup>95</sup> Renteln (n18) 13; Torry (n69) 139.

<sup>96</sup> Torry (n69) 139.

<sup>97</sup> See 7.2.2 above.



assimilated into the dominant culture<sup>98</sup> or have forgotten their original way of life.<sup>99</sup> Minority cultures, when confronted with the majority culture, do not always lose their traditional values.<sup>100</sup> These specific values or traditions can, however, be adapted. It could also happen that, through a process of ethnicity-creation and reinforcement, certain values of the specific minority culture might become more important when compared to the importance attached to them in the so-called 'traditional-culture'.<sup>101</sup>

Labuschagne states that Western influences, or the effect of acculturation, have changed certain traditions or customs relating to witchcraft.<sup>102</sup> The traditions or customs might have changed, but the influences have, however, not extinguished the belief in witchcraft.<sup>103</sup> Niehaus states that the belief in witchcraft is not simply a "survival from primordial times."<sup>104</sup> The discourse about witchcraft is able to incorporate many new themes, and, as a result, Niehaus speaks about the "modernity of contemporary witchcraft."<sup>105</sup> Witchcraft beliefs in many individuals have not disappeared because of assimilation into the dominant culture.

The problem the courts are faced with, as mentioned above,<sup>106</sup> is to determine the degree of adherence to cultural norms for purposes of arguing the cultural defence.<sup>107</sup> Factors that can be taken into account in order to determine the adherence are: the education level; language proficiency (including languages spoken); form of marriage (for example whether it is a customary marriage); type of work; place of upbringing; and place of residence.<sup>108</sup>

Another problem the courts are faced with is whether subsequent generations will be able to use this defence because of processes such as assimilation. The same rule will apply to any generation that wishes to invoke the cultural defence, and that is

---

<sup>98</sup> Renteln (n18) 13.

<sup>99</sup> Van Broeck (n3) 14.

<sup>100</sup> *Id* at 12.

<sup>101</sup> *Ibid.* Van Broeck describes the Barth theory on ethnicity and the whole process of ethnicity-creation.

<sup>102</sup> Labuschagne "Geloof in toorkuns: 'n Morele dilemma vir die strafreg?" 1990 *SACJ* 256.

<sup>103</sup> *Ibid.*

<sup>104</sup> Niehaus "Witchcraft as subtext: Deep knowledge and the South African public sphere" 2010 *Social Dynamics: A Journal of African Studies* 74.

<sup>105</sup> *Ibid.*

<sup>106</sup> See 7.2.2 and 7.3.1.

<sup>107</sup> Bennett (n22) 17.

<sup>108</sup> *Id* at 17-18.



simply that they must be able to prove they still follow those traditions.<sup>109</sup> This entails that, in order to invoke the cultural defence, it simply boils down to the matter of a sufficiency of proof.<sup>110</sup>

Previously, the ultimate goal of courts, with reference to witchcraft-related cases, was a “civilising mission”.<sup>111</sup> In other words, the courts aimed at assimilation or total acculturation of the minority culture (i.e. the group of individuals that believe in witchcraft) into the dominant culture. If the law is used as an instrument to achieve this, it could lead to a form of ethnocide or cultural genocide.<sup>112</sup> The concept of a ‘melting pot’ of different cultures is described by Renteln as fictitious and simply a means of forced assimilation.<sup>113</sup> There exists the possibility that, by denying the formalisation of the cultural defence, it may indicate that, in order to be accepted as equal, individuals from minority groups should trade in their cultural values for that of the mainstream.<sup>114</sup> Forced assimilation goes against the very values and rights protected in the Constitution.<sup>115</sup>

### 7.3.3 Expert evidence

To help ensure that the problems that could arise from the evidence given by expert witnesses are addressed, certain safeguards and general rules have been used in our courts.<sup>116</sup> Firstly, to determine the scientific trustworthiness of the evidence of expert witnesses, it has been suggested that a series of questions should be used.<sup>117</sup> These questions, for example asking whether the information has gained general acceptance within the scientific community, greatly aid the court in evaluating trustworthiness.<sup>118</sup> Secondly, the expert witnesses, such as an

---

<sup>109</sup> Ramirez (n36) 211.

<sup>110</sup> *Ibid.*

<sup>111</sup> See 2.4.2 above.

<sup>112</sup> Van Broeck (n3) 12; Renteln (n18) 29.

<sup>113</sup> Renteln (n18) 9.

<sup>114</sup> X (n3) 302.

<sup>115</sup> The Constitution of the Republic of South Africa, 1996. The rights that will be infringed by the forced assimilation include: the right to freedom of religion, belief and opinion (section 15); the right to participate and enjoy any culture (sections 30 and 31); and the right to equality (section 9).

<sup>116</sup> See 7.2.3 above for the problems.

<sup>117</sup> Allan and Meintjies-Van Der Walt in Kaliski (ed.) *Psycholegal assessment in South Africa* (2006) 344.

<sup>118</sup> Allan and Meintjies-Van Der Walt (n117) 344. The questions listed by Allan and Meintjies-Van Der Walt are based on the mental health field but could equally apply to the anthropological field of study. The authors have taken the questions asked by the courts in an American case *Daubert v Merrel Dow Pharmaceuticals* 113 St Ct, 2786 (1993) as the suggested guidelines. The other questions listed are:



anthropologist, must be able to explain and defend their statements during cross-examination.<sup>119</sup> Cross-examination is the key to helping to assess the objectivity and credibility of the witness.<sup>120</sup>

In addition, there are a number of factors that the court could take into consideration when determining the weight that should be given to the opinion of the expert witness.<sup>121</sup> Amongst others, the factors include that the court must be satisfied that the opinion of the witness is linked to the facts before the court and is probable.<sup>122</sup>

The expert opinion of an anthropologist or a member of the community will be very valuable to the case of the accused, but courts are not bound by these opinions.<sup>123</sup> Courts must still make an independent decision which should not be based solely on the expert evidence but should take the facts and evidence as a whole into account, as well as the credibility of the statement made by the expert witness.<sup>124</sup> Lastly, although there are, as in any field of expertise, individuals who are willing to express an opinion as per request from a lawyer, most professionals try to be impartial because their reputation is at stake.<sup>125</sup> Courts should use their discretion in determining whether the witness appears impartial.

Renteln suggests that professional associations should, furthermore, be established with lists of members who have specialized in the study of particular ethnic and religious communities if the cultural defence is formalised.<sup>126</sup>

### 7.3.4 Misuse of the cultural defence

The cultural defence will not be different from any other defence that exists in our law, as they are all open to abuse. During cases, the courts have enunciated, for

- 
1. Can, or has, the theory, technique or test been empirically tested?
  2. Has it been subjected to peer review and publication?
  3. Does it have reliability and validity data?

<sup>119</sup> Allan and Meintjies-Van Der Walt (n117) 350-351.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Id* at 352.

<sup>122</sup> See Allan and Meintjies-Van Der Walt (n117) 352 for a discussion on all of the factors. The factors include: the competency of the witness; the method used to collect data; impartiality and honesty of the presentation of the evidence; whether the evidence is linked to the facts; credibility of the facts the opinion is based on; and the opinion should be reliable and probable.

<sup>123</sup> Allan and Meintjies-Van Der Walt (n117) 351. See *S v Mnyanda* 1976 (2) SA 751 (A).

<sup>124</sup> *Ibid.*

<sup>125</sup> *Id* at 353.

<sup>126</sup> Renteln in Foblets *et al* (ed) *Multicultural Jurisprudence: Comparative perspectives on the cultural defence* (2009) 81.



example, certain requirements for the defence of non-pathological incapacity in order to limit any abuse of the defence. The same could apply to the cultural defence.<sup>127</sup> Proper methods and strategies should be outlined and implemented, such as a test for the cultural defence.<sup>128</sup> These formal requirements will limit the number of cases where the cultural defence is fraudulently used.<sup>129</sup>

### 7.3.5 Essentializing culture

In order to avoid a negative public perception of a specific culture, or negative stereotyping, it is important that the cultural defence is properly presented.<sup>130</sup> Firstly, during the presentation, proper scientific methodology should be adopted and expert evidence should be used.<sup>131</sup> Using expert evidence prevents using stereotypical “common knowledge” about cultural groups that could add to the prejudice.<sup>132</sup> During cultural cases, Renteln argues that it should be made clear that not all of the members of a specific cultural group follow the tradition in the same way.<sup>133</sup>

It is important to note that stereotypes exist whether the defence is used or not, and that in some stereotypes there exists a “kernel of truth”.<sup>134</sup> Stating facts about certain cultural beliefs or traditions is not the same as racist stereotyping.<sup>135</sup> If stereotyping does, however, occur, the right the accused has to a fair trial<sup>136</sup> and protection of his or her right to enjoy and participate in cultural group<sup>137</sup> outweighs a more abstract concern of a negative public perception of his or her culture.<sup>138</sup>

### 7.3.6 Equal protection before the law

As mentioned above, the philosophical basis of the cultural defence is considered to be the equal treatment of individuals.<sup>139</sup> The formal recognition of the cultural

---

<sup>127</sup> Carstens “The cultural defence in criminal law: South African perspectives” 2004 *De Jure* 320; Ramirez (n36) 210.

<sup>128</sup> See 7.4 below.

<sup>129</sup> Carstens (n127) 320; Ramirez (n36) 210.

<sup>130</sup> Ramirez (n36) 211.

<sup>131</sup> Van Broeck (n3) 10.

<sup>132</sup> *Ibid.*

<sup>133</sup> Renteln (n4) 80-81.

<sup>134</sup> Renteln (n18) 198; Ramirez (n36) 211.

<sup>135</sup> *Ibid.*

<sup>136</sup> Section 35(3) of the Constitution, 1996.

<sup>137</sup> Sections 30 and 31 of the Constitution, 1996.

<sup>138</sup> Ramirez (n36) 211.

<sup>139</sup> See 4.2 above.



defence will not inhibit equal protection before the law, but will, instead, promote the equal application of the law.<sup>140</sup> Equal treatment does not mean that the treatment is uniform or identical, but it can require that people are treated differently.<sup>141</sup>

Proponents of the cultural defence argue that denying the formalisation and recognition of the defence will lead to discrimination, as the law is not neutral but already embodies the values of the dominant culture.<sup>142</sup> As a result, true equal protection and treatment before the law calls for the recognition of the cultural defence.

### 7.3.7. Violations of human rights

General statements have been made that older women are almost always the victims in witchcraft-killings.<sup>143</sup> According to Professor Ralushai, who headed the investigation into witchcraft-related violence in the (then) Northern Province, the general perception that victims of this type of violence are always, or mostly, old women is incorrect.<sup>144</sup> Irrespective of whether a crime has a specific demographic content, if a defence, such as the cultural defence, is properly employed, it would not indicate that courts condone human-rights violations. Each case should be dealt with on its own merits and on a case-by-case basis. The rights of the accused and the rights of the victim need to be weighed against each other and balanced with the limitation clause<sup>145</sup> in the Constitution.<sup>146</sup> This will ensure that none of the rights of either the perpetrator or the victim is undermined.

For individuals who believe in witches, and witchcraft in general, these beliefs are very real.<sup>147</sup> Equating the belief of witchcraft with hate crimes<sup>148</sup> could be considered to be demeaning to those who participate in that culture. Dumin's argument that the witchcraft-killings are based on unfounded beliefs<sup>149</sup> conflicts with the right afforded

---

<sup>140</sup> Renteln (n18) 47; Ramirez (n36) 209; Bennett (n22) 13.

<sup>141</sup> *Ibid.*

<sup>142</sup> Renteln (n18) 47; Tomer-Fishman (n9) 479; Bennett (n22) 13; Ramirez (n36) 210.

<sup>143</sup> See 7.2.7 above.

<sup>144</sup> Commission on Gender Equality *Conference on the legislative reform in the Witchcraft Suppression Act no 3 of 1957* (November 1999) 7.

<sup>145</sup> Section 36 of the Constitution, 1996.

<sup>146</sup> Carstens (n127) 320.

<sup>147</sup> See 3.2 above.

<sup>148</sup> See 7.2.7 above.

<sup>149</sup> See 7.2.7 above.



to everyone to enjoy and participate in the culture of their choice.<sup>150</sup> As a result this right, the right to enjoy and participate in the culture of one's choice, needs be included in the weighing up process and treated with the necessary respect and tolerance.

### 7.3.8 Criminal law objectives

As expressed above during the discussion on theories of punishment<sup>151</sup>, deterrence will serve no purpose if someone is not deserving of the punishment as criminal law is built on the notion of individual responsibility.<sup>152</sup> Currently, the refusal to allow a cultural defence has failed to deter other members of the group in any event, and, as such, there seems to be no principled reason for rejecting the cultural defence on the basis of deterrence.<sup>153</sup> If there is any loss in deterrence as a result of the cultural defence being formalised, that loss would be minimal.<sup>154</sup> The deterrence argument, if it were to be levelled against any other existing defence, such as the defence of non-pathological incapacity, would indicate that defences do not necessarily encourage people to commit crimes.<sup>155</sup> The argument that a perpetrator will not be able to be rehabilitated is also invalid. "Rehabilitating" the perpetrator would merely entail forcing him or her to assimilate with the dominant culture, which is simply a form of cultural genocide.<sup>156</sup>

In the law there have always been exceptions for certain groups of people, for example children or the criminally insane. As a result of this, the argument that the cultural defence could lead to anarchy is considered to be highly speculative.<sup>157</sup> Instead of leading to anarchy, the cultural defence could further the goal of maintaining social order by protecting cultural beliefs.<sup>158</sup> If the necessary recognition is given to the cultural defence it could help to preserve a nucleus of values in a culture which could be conducive to law-abiding conduct.<sup>159</sup>

---

<sup>150</sup> Sections 30 and 31 of the Constitution, 1996.

<sup>151</sup> See 2.3 above.

<sup>152</sup> Burchell *The principles of criminal law* (2006) 138.

<sup>153</sup> Renteln (n18) 195.

<sup>154</sup> X (n3) 1304.

<sup>155</sup> *Ibid.*

<sup>156</sup> Renteln (n18) 197.

<sup>157</sup> *Id* at 196.

<sup>158</sup> X (n3) 1305.

<sup>159</sup> *Ibid.*





### 7.3.9 Other sufficient grounds

Firstly, it is unclear why the admittance of cultural evidence should be shoe-horned into other existing defences. Ramirez aptly explains this by illustrating the refusal of the recognition of the cultural defence as being the same as closing the door to the cultural factors on the one hand and at the same time opening a window for cultural factors by allowing it under another rubric such as another form of defence.<sup>160</sup> It serves no purpose to close the door on the one hand and open a window with the other. Formal recognition of the cultural defence would bring greater clarity and coherence to the existing law because it would ensure the right to introduce evidence of a person's culture and its relevance to the totality of circumstances.<sup>161</sup>

As explained above<sup>162</sup>, using cultural evidence as a basis for other defences could also be demeaning or inadequate as the existing legal constructs are drawn from the dominant culture. Remitting the consideration of cultural factors to the sentencing phase only can also be problematic as it will not reflect the proper response if the defendant should not have been held criminally liable based on cultural considerations.<sup>163</sup>

### 7.4 Conclusion

The current law is not an adequate vehicle for dealing with cultural factors and fulfilling the constitutional duty of developing the common law.<sup>164</sup> It has been submitted that the cultural defence will be able to fulfil this need, but, for many opponents of the cultural defence, this defence will create more problems than it will solve. The cultural defence does not cater for your common and garden variety of criminal, and, as such, this defence is perceived as being a Pandora's Box filled with unknown problems and difficulties.

Many problems with this defence have been put forward and argued, but these problems are, firstly, not all unique to this defence, and, secondly, almost all of them

---

<sup>160</sup> Ramirez (n36) 210.

<sup>161</sup> Ramirez (n36) 209.

<sup>162</sup> See 4.3.2 above.

<sup>163</sup> Greenawalt (n44) 302; Amirthalingham in Foblets *et al* (eds.) *Multicultural Jurisprudence; Comparative perspectives on the cultural defence* (2009) 47.

<sup>164</sup> Section 39 of the Constitution, 1996.

can be avoided or reduced by employing the strategies or safeguards which will be discussed in the chapter below.<sup>165</sup>

One of the most prominent problems mentioned is the definitional problem associated with the cultural defence. This includes, amongst other things, the vagueness of the concept of “culture” which directly influences being able to know to whom and when this defence applies. Although, as illustrated above,<sup>166</sup> culture is a difficult concept to define, this does not affect its validity. By using the safeguards or strategies mentioned above, for example posing the list of questions including whether the defendant forms part of a group and whether the tradition is part of that culture, will immediately reduce the possible problems of definition. This can, however, be the case only when it is based on the expert evidence used, as with the defence of non-pathological incapacity. Expert evidence, as with any other defence, does in itself present problems, but these can be overcome by the normal evidentiary rules and mechanisms such as cross-examination, and they need not pose a threat to the integrity of the case.

Particular to the cultural defence is establishing whether the defendant truly adheres to the traditions of a specific cultural group, or whether the defendant has been influenced by the process of assimilation and/or acculturation where different cultures overlap and absorb elements from one another. As with the problems of definition this can be determined by applying the questions properly and taking into account all the factors surrounding the case, including, but not limited to, the social milieu, education level, the type of marriage, and languages spoken by the defendant. Again expert evidence will aid the court in determining whether the defendant has been assimilated into a new culture or merely acculturated.

The cultural defence has also been associated with very negative consequences that could possibly arise if this defence is formulated. These negative consequences include essentializing culture, violating human rights, and creating the impression that everyone is not equal before the law as certain groups might receive preferential treatment. These problems essentially boil down to the rights of one group, the defendants, being weighed against the rights of another group, the victims and

---

<sup>165</sup> See 7.4 above.

<sup>166</sup> See 7.2.1 above.



society in general. It can also be seen as balancing justice against cultural pluralism.<sup>167</sup> The cultural defence will, in fact, give the courts the opportunity to strike the necessary balance between these competing interests. In this respect the limitation clause of the Constitution provides the court with the necessary mechanism to facilitate the balancing-process.

Some opponents of the cultural defence argue that the existing defences and the sentencing phase already contain ample space for cultural factors to be taken into account. Approaches or strategies, other than the cultural defence or using existing defences, can also be implemented in order to develop the criminal law in light of the Bill of Rights, specifically the right to culture. These approaches will be discussed in the chapter below.<sup>168</sup>

The question remains whether the advantages will outweigh the disadvantages of the cultural defence. It is submitted that none of these options can provide for the inclusion of cultural evidence in various cultural cases as effectively as the cultural defence could and that if properly applied the advantages will outweigh the disadvantages.

---

<sup>167</sup> Carstens (n127) 329.

<sup>168</sup> See chapter 8.

## Chapter 8: Conclusion and Recommendations

### 8.1 Introduction

“But as precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten, the result of following them must often be failure and confusion from the merely logical point of view.”<sup>1</sup>

The approaches and responses toward witchcraft-related crimes from before the enactment of the interim and final Constitution in South Africa are mirrored in the responses after the enactment. The courts have failed to exercise their constitutional duty of taking into consideration the fundamental rights of the accused and the effects thereof.

The ultimate goals of civilising the “natives” and eradicating the belief in witchcraft have been replaced by the protection of the right of each and every individual to participate in the culture of his or her choice. Merely adopting a cultural defence on the premise that criminal law will be developed in light of the Constitution is, however, not sound in law. Quintessentially what the defence entails, why the defence is needed, and how the defence will be implemented must be determined before it can be submitted that a cultural defence needs to be formalised.

The preceding chapters have covered the “why” and the “what” extensively, but in considering the “how”, in order to prevent the abuse of the cultural defence, certain strategies would need to be implemented. The working of the suggested strategies, including a test for the cultural defence, will be evaluated against the possible problems mentioned in chapter 7 above.

The cultural defence does, however, have significant practical implications which could remain problematic, even with the implementation of these strategies. If the negative practical implications outweigh the positive implications, other strategies need to be employed in order to ensure that criminal law still fulfils the constitutional duty of protecting the right to culture. Possible methods, other than the formalisation

---

<sup>1</sup> Holmes “Common carriers and the Common law” 1897 *American Law Review* 608, 630

of the cultural defence, which can protect the right to culture will be discussed in this chapter.

The chapter will conclude by summarizing the main aspects of the previous chapters to support the submission that the cultural defence, after a critical analysis, should be formalised in South African criminal law.

## 8.2 Strategies ensuring the proper application of the cultural defence

The cultural defence as illustrated above is open to abuse<sup>2</sup>, and safeguards need to be put in place to ensure the proper use of this defence. The first step is to ascertain whether this defence could or should be invoked in a particular instance. This can be done by posing a list of questions which could guide the court in establishing whether the cultural defence is applicable. The questions below have been formulated, using the questions of Renteln<sup>3</sup> as the basis and combining them with the questions of Bennett<sup>4</sup> and Ramirez<sup>5</sup> along with the inquiry process of Van Broeck.<sup>6</sup> The questions are as follows:

1. Is the defendant a member of a specific cultural or ethnic group?
2. Does the act committed by the defendant form part of, and meet the requirements of, a tradition/practice that is required, approved, or obligatory in the abovementioned culture?
3. Was the subjective motive of the defendant for committing the crime in question based on the abovementioned tradition?
4. Does the abovementioned tradition differ from the dominant culture, so creating a clash between the majority and minority culture?
5. Did the defendant know, or have a good reason to know, the relevant law?  
(This last question is relevant only in cases where the defendant states that

---

<sup>2</sup> See 7.2 above.

<sup>3</sup> Renteln *The cultural defense* (2004) 207.

<sup>4</sup> Bennett "The cultural defence and the custom of Thwala in South African law" 2010 *University of Botswana Law Journal* 14-19

<sup>5</sup> Ramirez "The virtues of the cultural defense" 2009 *Judicatara* 209.

<sup>6</sup> Van Broeck "Cultural defence and culturally motivated crimes (Cultural offence)" 2001 *European Journal of Crime, Criminal Law and Criminal Justice* 23.



he or she, being part of the minority culture, was not aware of the law as compared to other cases where the cultural defence is invoked because the defendant was culturally compelled to act.)

If questions one (1) to four (4) are answered positively, the cultural defence can be invoked. In the specific case where question five (5) is raised, it should be answered in the negative in order for the cultural defence to be applicable. The answering of these questions 'correctly' does, however, not mean that the cultural defence will be raised successfully.

The abovementioned questions are general questions and cannot be considered *in abstracto*. Take, for example, an individual, X, who believes in witchcraft and raises the cultural defence after killing an alleged witch. X belongs to an ethnic group that believes in witchcraft, and, according to the belief, witches are feared, and the community approves the killing of witches. X states that he killed the witch out of fear, and he claims that this practice is laudable in his community. The dominant culture, furthermore, is a Western culture which does not believe in witchcraft but aims to eradicate the superstitious beliefs. The enquiry does not end here, as certain factors surrounding these general questions still need to be established. This will occur on a case-by-case basis, and it will depend on the certain cultural belief involved.

Considering the example of X, although X belongs to a particular cultural group that believes in witchcraft and he states that this belief compelled him to act, the court needs to discern whether X's belief in witchcraft is genuine and sincere.<sup>7</sup> This can be done by taking into account:<sup>8</sup>

- a. The social milieu of the accused. Whether X still lives in a rural area or whether X lives in a urban area;
- b. The level of education of the accused. This entails whether X is, for example, illiterate or has any qualifications;
- c. The membership or affiliation to any church. This does not necessarily indicate that the belief is not genuine and sincere as, for example, the Zionist

---

<sup>7</sup> Van den Heever and Wildenboer "Geloof in toorkuns as versagende omstandigheid in die Suid-Afrikaanse reg" 1985 *De Jure* 109-110.

<sup>8</sup> *Ibid.*



Churches embrace the Christian religion alongside the Traditional African Religion;<sup>9</sup> and

- d. Whether a traditional method was used to kill the witch. Witches are considered to be the embodiment of evil, and, as a result, their bodies need to be destroyed to restore the values of the community symbolically.<sup>10</sup> The killings are, therefore, usually brutal, and most often the body of the witch is burned.<sup>11</sup>

Taking into consideration factors such as the social milieu and education level of the accused aids the court further in determining the level of assimilation of the accused into the dominant culture. The other factors mentioned above in 7.3.2 should also be considered when establishing the genuineness of the belief and how it relates directly to the level of assimilation.

As clearly stated above<sup>12</sup>, expert evidence will play a pivotal role in the cultural defence if it is formalised. The courts cannot rely on the *ipse dixit* of the accused, and they will need to call upon an anthropologist, and/or social psychologist, and/or a member of the cultural group.<sup>13</sup> The use of expert evidence, in order to prove that the belief influenced the defendant to act, will aid in curtailing the abuse of the defence.

If the court establishes that the cultural defence should be invoked and, furthermore, that the belief is genuine and sincere, the courts are still faced with the task of balancing the rights at hand in order to apply the defence effectively.<sup>14</sup> In this respect, the limitation clause of the Constitution<sup>15</sup> plays an important role in

---

<sup>9</sup> For a general discussion on the Zionist Churches see Morris *Religion and anthropology: A critical introduction* (2006) 182-187.

<sup>10</sup> See 3.3.2 above.

<sup>11</sup> See 3.3.2 above.

<sup>12</sup> See 7.3.3 above.

<sup>13</sup> Carstens "The cultural defence in criminal law: South African perspectives" 2004 *De Jure* 330.

<sup>14</sup> Carstens (n13) 329. X "The cultural defense in criminal law" 1986 *Harvard Law Review* 1308.

<sup>15</sup> Section 36 of the Constitution, 1996. The limitation clause reads as follows:

(1) 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, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.



determining what weight is given to the respective rights.<sup>16</sup> The importance of the limitation clause was highlighted in the case of *Coetzee v Government of the Republic of South Africa*<sup>17</sup> where Sachs J stated that, “[F]aithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based and case-oriented framework.”<sup>18</sup> With regard to determining whether the limitation of rights is reasonable and justifiable, there exists “no legal yardstick...for this process, and courts will not be able to escape making difficult value judgments.”<sup>19</sup>

To assist the courts in this two-stage balancing process, certain factors can be taken into account to determine the weight given to the cultural evidence. These include: the interest of the society in self-protection; the probability of the recurrence of the specific crime and the seriousness thereof; the degree of self-containment; and the size of the defendant’s cultural group.<sup>20</sup>

The formalisation of the cultural defence should, therefore, be done alongside the requirements set out above, which include: the set of general questions; more specific questions pertaining to the culture at hand; the use expert evidence; and, of course, the fact that this should take place within the parameters of the limitation clause.

### **8.3 Other strategies that could ensure the protection of right to culture**

Although it is submitted that the formalisation of the cultural defence is the best way to ensure that the right to culture<sup>21</sup> is protected and developed within the criminal law, other strategies exist that could fulfil the Constitutional duty.

The most prominent strategy that has been mentioned in the literature is the accommodation of minority cultures in the legal system by granting them jurisdiction

---

<sup>16</sup> The rights of the accused are weighed up against the rights of the victim and the society.

<sup>17</sup> *Coetzee v Government of the Republic of South Africa; Matiso and others v Commanding Officer, Port Elizabeth Prison and others* 1995 4 SA 631 (CC). In this case the interim Constitution was still in use and the limitation clause was section 33 of the interim Constitution.

<sup>18</sup> *Coetzee* case (n17) at para 46.

<sup>19</sup> *Ibid.*

<sup>20</sup> X (n14)1309.

<sup>21</sup> Sections 30 and 31 of the Constitution, 1996.





to regulate their own affairs in certain respects.<sup>22</sup> Applying this to the belief in witchcraft, Labuschagne stated that using Western criminal sanctions has not curbed the witchcraft-related killings, and people still take the law into their own hands.<sup>23</sup> The *Ndhlovu* case illustrated the need for a separate adjudication (in order to curb the witchcraft-related violence) when the court held that the Western sanction “is likely to be regarded as an extension of the evil wrought by supernatural means rather than just retribution.”<sup>24</sup>

Traditional courts<sup>25</sup> could be the right forum where a new approach to witchcraft beliefs could be developed and where the beliefs would not merely be seen as superstitions or uncivilised beliefs.<sup>26</sup> It has, however, been suggested that having witchcraft courts operating alongside the formal courts is not a viable option and could place a great financial burden on the state.<sup>27</sup>

Specifically, with reference to the belief in witchcraft, it has been suggested that the legislation related to witchcraft, the Witchcraft Suppression Act 3 of 1957, should be repealed.<sup>28</sup> Many problems associated with the Witchcraft Suppression Act have been raised, and it is clear from the myriad problems that, amongst other things, the Act does not fulfil the Constitutional duty of protecting the right to culture.<sup>29</sup>

In the light of the suggested repeal of the Witchcraft Suppression Act, Advocate Seth Nthai stated that any new witchcraft related legislation which is drafted should also

---

<sup>22</sup> Greenawalt “The cultural defense: Reflections in light of the Mode Penal Code in the Religious Freedom Restoration Act” 2008 *Ohio State Journal of Criminal Law* 301; Motshekga “The ideology behind witchcraft and the principle of fault in criminal law” 1984 *Codicillus* 14. At the Conference on the legislative reform in the Witchcraft Suppression Act no 3 of 1957 held in Pietersburg in November 1999, Advocate Nthai, Professor Hund, and Professor Chavunduka all proposed special witchcraft courts alongside the present general courts. See Commission on Gender Equality *Conference on the legislative reform in the Witchcraft Suppression Act no 3 of 1957* (November 1999) 4;17-18.

<sup>23</sup> Labuschagne “Geloof in toorkuns: ‘n Morele dilemma vir die straffreg?” 1990 *SACJ* 257.

<sup>24</sup> *S v Ndhlovu* 1971 1 SA 30 (RA) at 30.

<sup>25</sup> Traditional courts are recognised in section 211 of the Constitution, 1996 but criminal law is still the domain of the Western legal system. See 2.2.2 above.

<sup>26</sup> Motshekga (n22) 14. Commission on Gender Equality (n22) 4;17-18.

<sup>27</sup> Commission on Gender Equality (n22) 22. The validity of this argument, and whether the establishment of witchcraft courts will be a truly viable option, is beyond the scope of this dissertation. See in general Commission on Gender Equality (n22).

<sup>28</sup> Niehaus in Moore and Sanders (eds.) *Magical interpretations, material realities: Modernity, witchcraft and the occult in postcolonial Africa* (2001) 200; Commission on Gender Equality (n22) 17; Dhlohlhlo “Some views on belief in witchcraft as a mitigating factor” 1984 *De Rebus* 410.

<sup>29</sup> See 2.4.1 above.

contain mediation as a form of settling disputes related to witchcraft.<sup>30</sup> This will ensure that the legislation mirrors the constitutional right to culture by respecting and tolerating the belief in witchcraft.

## 8.4 Conclusion

The main purpose of this dissertation has been to develop South African criminal law in the light of the right to enjoy and participate in a culture of choice specifically using the example of the belief in witchcraft.

Chapter two dealt with the current legal culture based on a Western legal system that exists in South African criminal law. The legal culture has influenced the way that courts and legislators deal with witchcraft-related crimes, still holding on to the previous notion that the superstitious beliefs are barbaric and should be eradicated.

Taking into consideration the Western perception of witchcraft-beliefs, chapter three dealt with what it actually entails to believe in African witchcraft and the associated practices. Cultural defence hinges on the concept of culture which is defined in chapter three as an all-encompassing system of thinking, doing, and evaluating.

Chapter four dealt with the heart of the dissertation, the ambit of the cultural defence. The cultural defence was defined, and the rationale behind the defence was explained. The three different forms of the cultural defence were discussed, and it was submitted that the cultural defence should take the form of a separate defence. The different elements which constitute a crime were discussed briefly in order to determine at which element the cultural defence will strike.

The main playing field of the cultural defence was identified as capacity and fault, as these are the only elements that are tested subjectively (excluding the test for negligence in the case of fault). Chapter five dealt with how culture, using the work of Dr D'Andrandé, influences the way a person acts. This, in turn, can influence the ability of a person to distinguish between right and wrong, and to act in accordance with that appreciation. Chapter five concluded by stating that the cultural defence negates the element of capacity, and, if it is properly applied, no further enquiry into fault will be necessary.

---

<sup>30</sup> Commission on Gender Equality (n22) 5.

Chapter six dealt with the element of fault, and it illustrated that in many instances where the belief in witchcraft is concerned a putative defence, such as putative private defence, is usually relevant. In those instances, the accused will not satisfy the requirement of knowledge of unlawfulness. The problem, as pointed out in chapter six, is that, if the capacity enquiry does not succeed in proving that the accused lacked the criminal liability, the accused will most likely be faced with the objective test of negligence. The test of negligence does not consider the cultural background of an accused person, but, as has been argued in chapter six, the cultural background should in fact be considered taking into consideration the principles of statutory interpretation. The current legal position is, however, still an objective test in the case of negligence.

The cultural defence has, however, been equated with being a Pandora's Box of sorts and is open to considerable misuse. In chapter seven the possible misuse of the defence is discussed in order to ascertain, firstly, whether the claim is valid, and, secondly, in what ways the misuse can be prevented. It is clear from chapter seven that not all of the problems are unique to the cultural defence and can be avoided or reduced by employing certain strategies or safeguards.

This chapter has specifically dealt with the necessary strategies and safeguards that need to be employed. The cultural defence, if properly applied within the parameters set out above,<sup>31</sup> should be formalised as the advantages will outweigh the disadvantages. The formalisation of the cultural defence will certainly bring about new challenges with which the courts will be faced. Refusal to formalise the cultural defence will, however, as Carstens states, "erode the notion of justice in an African cultural context."<sup>32</sup>

---

<sup>31</sup> See 8.2 above.

<sup>32</sup> Carstens (n13) 329.



## BIBLIOGRAPHY

### BOOKS

Al-Issa (1995) *Handbook of culture and mental illness: An international perspective* Connecticut: International University Press

Ashforth (2005) *Witchcraft, violence and democracy in South Africa* Chicago: University of Chicago Press

Barlow and Durand (2009) *Abnormal psychology: An integrative approach* Boston: Wadsworth Cengage Learning

Baron *et al* (2008) *Social Psychology* Boston: Wadsworth Cengage Learning

Bekker and Coertze (1982) *Seymour's customary law in southern Africa* Cape Town: Juta

Bekker *et al* (2006) *Introduction to legal pluralism in South Africa* Durban: Lexis Nexis

Bennett (2004) *Customary law in South Africa* Lansdowne: Juta

Bennett (ed.) (2011) *Traditional African Religion in South African law* Claremont: UCT Press

Bourdillon (1990) *Religion and society: A text for Africa* Zimbabwe: Mambo Press

Bruinsma and Nelken (eds.) (2007) *Explorations in legal culture* Gravenhage: Reeds Business

Burchell (2006) *Principles of criminal law* Claremont: Juta

Chanock (2001) *The making of South African legal culture 1902-1936: Fear, favour and prejudice* Cambridge: Cambridge University Press

Chidester (1992) *Religions of South Africa* New York: Routledge

Coetzee (1938) *Die Afrikaanse volksgeloof* Amsterdam: Sweets and Zeitlinger

Cornell and Muvhangua (eds.) (2012) *Ubuntu and the law: African ideals and post-Apartheid jurisprudence* New York: Fordham University Press



Currie and De Waal (2005) *The Bill of Rights handbook* Lansdowne: Juta

Dederen (1996) *Killing is easier than paperwork: A critique of the commission of inquiry into witchcraft, violence and ritual murder in the Northern Province of the Republic of South Africa PAA/AASA Conference* Pretoria: University of South Africa

Du Toit *et al* (2014) *Commentary on the Criminal Procedure Act*, Service 52 Cape Town: Juta

De Wet and Swanepoel (1960) *Die Suid-Afrikaanse strafreg* Durban: Butterworth

De Wet and Swanepoel (1985) *Die Suid-Afrikaanse strafreg* Durban: Butterworth

Durkheim (1971) *The elementary forms of the religious life* London: George Allen and Unwin Ltd

Evans-Pritchard (1937) *Witchcraft, oracles and magic among the Azande* Oxford: Clarendon Press

Foblets *et al* (eds.) (2009) *Multicultural jurisprudence: Comparative perspectives on the cultural defence* Oxford & Portland Oregon: Hart Publishing

Foblets *et al* (eds.) (2010) *Cultural diversity and the law: State responses from around the world* Brussels: Yvon Blais Bruylant

Geschiere (1997) *The modernity of witchcraft: Politics and the occult in post-colonial Africa* Charlottesville: University of Virginia

Hahlo and Kahn (1960) *The Union of South Africa: The development of its laws and Constitution* London: Stevens & Sons Limited

Heine (2008) *Cultural psychology* New York: WW Norton

Hesiod (1999) *Theogony and works and days: Translated with an introduction and notes by M.L West* Oxford: Oxford University Press

Hiemstra (2014) *Hiemstra's Criminal Procedure*, Issue 7 Durban: Lexis Nexis

Holmes (1909) *The Common law* Boston: Little Brown

Hector (2010) *Law of South Africa* (ed. Joubert) Volume 6 Lexis Nexis



- Hund (ed.) (2003) *Witchcraft violence and the law in South Africa* Pretoria: Protea Book House
- Hunt (ed.) (2010) *Indigenous Religions* Farnham, England: Ashgate
- Idowu (1973) *African Traditional Religion: A definition* London: SCM Press
- Joubert and Faris (2004) *Law of South Africa*, volume 6 Durban: Lexis Nexis
- Joubert (ed.) (2009) *Criminal procedure handbook* Claremont: Juta
- Junod (1927) *The life of a South African tribe, vol II* London: Macmillan
- Kaliski (ed.) (2006) *Psycholegal assessment in South Africa* Cape Town: Oxford University Press
- Ludsin and Vetten (2005) *Spiral entrapment: Abused women in conflict with the law* Johannesburg: Jacana Media
- Mbiti (1975) *Introduction to African Religion* London: Heinemann Educational Books
- Moore and Sanders (eds.) (2001) *Magical interpretations, material realities: Modernity, witchcraft and the occult in postcolonial Africa* New York: Routledge
- Morris (2006) *Religion and anthropology: A critical introduction* New York: Cambridge University Press
- Müller (1882) *Introduction to the science of religion* London: Longmans Green and Co
- Myburgh (1980) *Indigenous criminal law in Bophutatswana* Pretoria: Van Schaik
- Niehaus *et al* (2001) *Witchcraft, Power and Politics: Exploring the Occult in the South African Lowveld* Cape Town: David Phillip Publishers
- Olupona (ed.) (1991) *African Traditional Religions in Contemporary Society* United States: Paragon House
- Pelgrim (2003) *Witchcraft and Policing: South Africa Police Service attitudes towards witchcraft and witchcraft-related crime in the Northern Province* Leiden: African Studies Centre



Peteet *et al* (eds.) (2011) *Religious and spiritual issues in psychiatric diagnosis: A research agenda for DSM-V* Arlington: American Psychiatric Publishing Inc.

Piaget (1928) *Judgment and Reasoning* London: Routledge

Renteln (2004) *The cultural defense* New York: Oxford University Press

Roosens (1989) *Creating ethnicity: The process of ethnogenesis* California: Sage Publications

Roosens (1997) *Sociale en culturele antropologie. Een kritische belichting van enkele hoogte punten* United States: Acco

Sadock and Sadock (2007) *Kaplan & Sadock's synopsis of psychiatry: Behavioural sciences/clinical psychiatry* Philadelphia: Lippincot Williams & Wilkens

Schapera (1959) *The Bantu-speaking tribes of South Africa: An ethnological survey* Cape Town: Maskew Miller

Schwär *et al* (1988) *The forensic ABC in medical practice: A practical guide* Pretoria: Kagiso Publishers

Smith (1795) *The Theory of Moral Sentiments* Edinburgh: Kincaid and Bell

Snyman (2008) *Criminal Law* Johannesburg: Lexis Nexis

Soanes and Stevenson (eds.) (2006) *Concise Oxford English Dictionary* Oxford: Oxford University Press

Sternberg (2009) *Cognitive psychology* Belmont: Wadsworth/Cengage Learning

Stigler *et al* (eds.) (1990) *Cultural psychology: Essays on comparative human development* Cambridge: Cambridge University Press

Terblanche (2007) *A guide to sentencing in South Africa* Durban: Lexis Nexis

The Diagnostic and Statistical Manual of Mental Disorders (DSM 5) of the American Psychiatric Association (2013) Arlington: American Psychiatric Association

Tredoux *et al* (eds.) (2005) *Psychology and law* Lansdowne: Juta

Tylor (1924) *Primitive Culture (Vol 1)* New York: Brentano's Publisher



Walker (2009) *The Battered Woman Syndrome* New York: Springer Publishing Company

## **CASE LAW**

*Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC)

*Christian Lawyers Association of South Africa v Minister of Health* 1998 4 SA 1113 (T)

*Coetzee v Government of the Republic of South Africa; Matiso and others v Commanding Officer, Port Elizabeth Prison and others* 1995 4 SA 631 (CC)

*Director of Public Prosecutions v Mngama* 2010 1 SACR 427 (SCA)

*Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC)

*Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC)

*Khumalo v Holomisa* 2002 5 SA 401 (CC)

*Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and others* 2014 (1) SA 585 (SCA)

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

*NDPP v Mohamed* 2003 4 SA 1 (CC)

*Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC)

*R v Biyana* 1938 EDL 310

*R v Fundakubi and others* 1948 AD 810

*R v Gani* 1957 2 SA 212 (A)

*R v Hugo* 1940 WLD 285

*R v Kewelram* 1922 AD 213

*R v Kinsella* 1961 3 SA 519 (C)





*R v Krull* 1959 3 SA 393 (A)  
*R v Kukubula* 1959 1 SA 286 (FC)  
*R v Magabeni and others* 1911 NHC 107  
*R v Mbombela* 1933 AD 269  
*R v Mkize* 1959 2 SA 260 (N)  
*R v Molehane* 1942 GWL 64  
*R v Myeni* 1955 4 SA 196 (A)  
*R v Ncanana* 1948 4 SA 399 (A)  
*R v Ngang* 1960 3 SA 363 (T)  
*R v Ngema* 1960 1 SA 145 (D)  
*R v Radebe* 1915 AD 97  
*R v Schoonwinkel* 1953 3 SA 136 (C)  
*R v Smit* 1950 4 SA 165 (O)  
*R v Usiyeka and others* 1912 NHC 98  
*R v Van Vuuren* 1961 3 SA 305 (A)  
*R v Xulu* 1933 AD 197  
*R v Zanhibe* 1954 3 SA 597 (T)  
*R v Zillah* 1911 CPD 644  
*S v Adams* 1986 (4) SA 882 (A)  
*S v Arnold* 1985 3 SA 256 (C)  
*S v Bernardus* 1965 3 SA 287 (A)  
*S v Beukes* 1988 1 SA 511 (A)  
*S v Bhumu* 1981 2 A 839 (ZA)



- S v Burger* 1975 4 SA 877 (A)
- S v Campher* 1987 1 SA 940 (A)
- S v Calitz* 1990 1 SACR 119 (A)
- S v Chauke* 2001 JDR 0543 (T)
- S v Chretien* 1981 1 SA 1097 (A)
- S v Collett* 1991 2 SA 854 (A)
- S v Cunningham* 1996 1 SACR 631 (A)
- S v De Blom* 1977 3 SA 513 (A)
- S v De Bruyn* 1968 4 SA 498 (A)
- S v De Oliveira* 1993 2 SACR 59 (A)
- S v Dikgale* 1965 1 SA 209 (A)
- S v Dube* 1972 4 SA 515 (W)
- S v Eadie* 2001 1 SACR 172 (C)
- S v Eadie* 2002 3 SA 719 (SCA)
- S v Engelbrecht* 2005 2 SACR 41 (W)
- S v Erasmus* 2005 2 SACR 658 (SCA)
- S v Ferreira* 2004 2 SACR 454 (SCA)
- S v Francis* 1999 1 SACR 650 (SCA)
- S v Gesualdo* 1997 2 SACR 68 (W)
- S v Goliath* 1972 3 SA 1 (A)
- S v Harris* 1965 2 SA 340 (A)
- S v Hartmann* 1975 3 SA 532 (C)
- S v Hattingh* 1991 3 SA 322 (W)



- S v Henry* 1999 1 SACR 13 (SCA)
- S v Humphreys* 2013 2 SACR 1 (SCA)
- S v Johnson* 1969 3 SA 201 (A)
- S v Jordan* 2002 6 SA 642 (CC)
- S v Kalogoropoulos* 1993 (1) SACR 12 (A)
- S v Kavin* 1978 2 SA 731 (W)
- S v Kensley* 1995 1 SACR 646 (A)
- S v Latha* 2012 2 SACR 30 (ECG)
- S v Laubscher* 1988 1 SA 163 (A)
- S v Lawrence, S v Negal, S v Solberg* 1997 (4) SA 1176 (CC)
- S v Leaner* 1996 2 SACR 347(C)
- S v Lehnberg* 1975 4 SA 553 (A)
- S v Lesch* 1983 1 SA 814 (O)
- S v Lotter* 2012 JDR 1652 (KZD)
- S v Lukwha* 1994 1 SACR 53 (A)
- S v M* 2004 3 SA 680 (O)
- S v Magoro and others* 1996 2 SACR 359 (A)
- S v Mahlinza* 1967 1 SA 408 (A)
- S v Makete* 1971 4 All SA 176 (A)
- S v Makwanyane and another* 1995 (3) SA 391 (CC)
- S v Malaza* 1990 1 SACR 357 (A)
- S v Maluleka* 2006 1 SACR 402 (T)
- S v Matala* 1993 1 SACR 531 (A)



*S v Mate* 2005 JDR 0151 (T)

*S v Mathoka* 1992 2 SACR 443 (NC)

*S v Mavhungu* 1981 1 SA 56 (A)

*S v Mbobi* 2005 JDR 0016 (C)

*S v Mnyanda* 1976 (2) SA 751 (A)

*S v Modisadife* 1980 3 SA 860 (A)

*S v Moela*, case nr 215/77 in the Circuit Court held at Lydenburg on 18 May 1977

*S v Mojapelo* 1991 1 SACR 257 (T)

*S v Mokgethi* 1990 1 SA 32 (A)

*S v Mokonto* 1971 2 SA 319 (A)

*S v Moses* 1996 1 SACR 701 (C)

*S v Mostert* 2006 (1) SACR 560 (N)

*S v Motlapema*, case number 363/78 held in a Circuit Court in Pietersburg, on 6 October 1978

*S v Motsepa* 1991 2 SACR 462 (A)

*S v Naidoo* 1971 3 SA 605 (N)

*S v Ncube* 1975 2 SA 390 (RA)

*S v Ndhlovu and another* 1971 1 SA 27 (RA)

*S v Ngema* 1992 2 SACR 651 (D)

*S v Ngomane* 1979 3 SA 859 (A)

*S v Ngubane* 1980 2 SA 741 (A)

*S v Ngubane* 1985 3 SA 677 (A)

*S v Nkombani* 1963 4 SA 877 (A)



- S v Ntuli* 1975 (1) SA 429 (A)
- S v Nursingh* 1995 2 SACR 331 (D)
- S v Nxele* 1973 3 SA 753 (A)
- S v Phama* 1997 1 SACR 485 (E)
- S v Phokela and another* 1995 PH H22 (A)
- S v Potgieter* 1994 1 SACR 61 (A)
- S v Raath* 2009 2 SACR 46 (C)
- S v Rasengani* 2006 2 SACR 431 (SCA)
- S v Shivuri* 1978 SA Northern Region Circuit Court case no cc 325/78
- S v Sibanda* 1975 1 SA 966 (RA)
- S v Sibiya* 1984 1 SA 91 (A)
- S v Sibuyi* 2003 JDR 0440 (T)
- S v Sigwahla* 1967 4 SA 566 (A)
- S v Sikunyana and Others* 1961 3 SA 549 (ECD)
- S v Smith* 1990 1 SACR 130 (A)
- S v Stellmacher* 1983 2 SA 181 (SWA)
- S v Steyn* 2010 1 SACR 411 (SCA)
- S v Van Aardt* 2009 1 SACR 648 (SCA)
- S v Van As* 1976 2 SA 921 (A)
- S v Van Biljon* 1965 3 SA 314 (T)
- S v Van der Merwe* 1989 2 PH H 51 (A)
- S v Van der Mescht* 1962 1 SA 512 (A)
- S v Van Vuuren* 1983 1 SA 163 (A)



*S v Walters* 2002 4 SA 613 (CC)

*S v Wiid* 1990 1 SACR 561 (A)

*S v Williams* 1995 3 SA 632 (CC)

## FOREIGN CASE LAW

*R v Big M Drug Mart* (1985) 13 CRR 64

*Holloway v United States*, 148 F. (2.d) 688; certiorari denied, 334 U.S. 852 (1948)

## INTERNET

Deputy Minister Gwen Ramokgopa (2012) Speech at the Inauguration of the interim Traditional Health Practitioners Council of South Africa  
<<http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=34235&tid=98563>

> (accessed 11 September 2013)

<http://www.pagancouncil.co.za/node/66> (accessed on 7 February 2012)

## JOURNAL ARTICLES

Ajayi "Violence against women: The ethics of incorporating the cultural defense in legal narrative" (2012) 25 *George Town Journal of Legal Ethics* 401

Bennett "The cultural defence and the custom of *Thwala* in South African law" (2010) 10 *University of Botswana Law Journal* 3

Bennett and Scholtz "Witchcraft: A problem of fault and causation" (1979) 12 *Comparative and International Law Journal of Southern Africa* 288

Botha and Van Der Merwe "Die tergende toekoms van provokasie as verweer in die Suid-Afrikaanse strafreg" (2013) *LitnetAkademies* 98



Bührmann “The inner reality of the black man and his criminal responsibility” (1980)  
*South African Medical Journal* 818

Bührmann “Witchcraft, witchcraft beliefs and the black people of South Africa” (1985)  
*South African Medical Journal* 670

Cameron “Judicial Accountability in South Africa” (1990) 6 *South African Journal on Human Rights* 251

Carstens “The cultural defence in criminal law: South African perspectives” (2004) 2  
*De Jure* 312

Carstens and Le Roux “The defence of non-pathological incapacity with reference to the battered wife who kills her abusive husband” (2000) 13 *SACJ* 180

Carstens “Private defence in context of the battered wife who kills her abusive husband/partner: *Ann Elizabeth Steyn v The State* (reported as *S v Steyn* 2010 1 *SACR* 411 (SCA))” (2010) 1 *Obiter* 411

Chiu “The cultural defense: Beyond exclusion, assimilation and guilty liberalism” (1994) 82 *California Law Review* 1053

Crocker “The meaning of equality for battered women who kill men in self-defense” (1985) *Harvard Women’s Law Journal* 128

Delgado “Rotten social background: Should criminal law recognize a defence of severe environmental deprivation?” (1985) 3 *Law and Inequality* 9

Dhlodhlo “Some views on belief in witchcraft as a mitigating factor” (1984) September *De Rebus* 409

De Vos “*S v Moses* 1996 (1) *SACR* 701 (C): Criminal capacity, provocation and HIV” (1996) 9 *SACJ* 354

Du Plessis and Rautenbach “Legal perspectives on the role of culture in sustainable development” (2010) 13 *PELJ* 27

Dumin “Superstition-based injustice in Africa and the United States: The use of provocation as a defense for killing witches and homosexuals” (2006) 21 *Wisconsin Women’s Law Journal* 145



Ellis and Ter Haar "Religion and Politics in Sub-Saharan Africa" (1998) 36 *Journal of Modern African Studies* 175

Evans and Singh "Muti murders: ritual responses to stress" (1991) *Indicator South Africa* 46

Ganis "Political and social implications of witchcraft and legitimacy in South Africa" (2005) 3-4 *Africa, LX* 362

Gathogo "The Challenge and Reconstructive Impact of African Religion in South Africa Today" (2008) 43 *Journal of Ecumenical Studies* 577

Goldstein "Cultural conflicts in court: Should the American criminal justice system formally recognize a 'cultural defense'?" (1994) 99 *Dickinson Law Review* 141

Greenawalt "The cultural defense: Reflections in light of the Model Penal Code and the Religious Freedom Restoration Act" (2008) 6 *Ohio State Journal of Criminal Law* 299

Harnischfeger "Witchcraft and the State in South Africa" (2000) 95 *Anthropos* 99

Hocor "Road rage and reasoning about responsibility" (2001) 14 *SACJ* 195

Hocor "Belief in witchcraft as a mitigating factor in sentencing: *S v Latha* 2012 2 SACR 30 (ECG)" (2012) 33 *Obiter* 380

Holmes "Common carriers and the common law" (1897) *American Law Review* 608

Iya "Culture as a tool of division and oppression: towards a meaningful role for culture and customary law in a united South Africa" (1998) 31 *Comparative and International Law Journal of South Africa* 228

Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146

Labuschagne "Geloof in toorkuns: 'n Morele dilemma vir die strafreg?" (1990) 3 *SACJ* 246





Lillejord and Mkabela “Indigenous and Popular Narratives: The Educational Use of Myths in a Comparative Perspective” (2004) 18 *South African Journal of Higher Education* 257

Louw “S v Eadie: Road Rage, Incapacity and Legal Confusion” (2001) 14 SACJ 206

Louw “S v Eadie: The end of the road for the defence of provocation?” (2003) 16 SACJ 200

Ludsin “*Ferreira v State*: A victory for women who kill their abusers in non-confrontational situations” (2004) 20 SAJHR 642

Meintjies-Van der Walt “Making a muddle into a mess?: The Amendment of s78 of the Criminal Procedure Act” (2002) 15 SACJ 242

Mihalik and Cassim “Ritual murder and witchcraft: A political weapon” (1992) 110 SALJ 127

Minnaar “Witchpurging and *muti* murder in South Africa: The legislative and legal challenges to combating these practices with specific reference to the *Witchcraft Suppression Act* (No. 3 of 1957, amended by Act No. 50 of 1970)” (2001) 2 *African Legal Studies* 1

Moas “Domestic violence: Competing conceptions of equality in the law of evidence” (2001) *Loyola Law Review* 127

Motshekga “The ideology behind witchcraft and the principle of fault in criminal law” (1984) 2 *Codicillus* 4

Niehaus “Witchcraft as subtext: deep knowledge and the South African public sphere” (2010) 36 *Social Dynamics: A Journal of African Studies* 65

Peltzer “Community perceptions on the Witchcraft Suppression Act in South Africa” (2000) 13 SACJ 312

Petrus “A Proposal Towards a theory on Witchcraft-Related Crime in Post-Colonial South Africa” (2006) 19(2) *Acta Criminologica* 142

Prinsloo “Boesman-geloof in towery as strafversagende faktor” (1993) 2 *Journal of South African Law* 334



Prinsloo and Du Plessis “Towermoorde, rituele doding en medisyne moorde” (1989) 4 *Journal of South African Law* 617

Ramirez “The virtues of the cultural defense” (2009) 92 *Judicature* 207.

Rautenbach and Matthee “Common law crimes and indigenous customs: Dealing with the issues in South African law” (2010) 61 *Journal of Legal Pluralism* 109

Reddi “Battered Woman Syndrome: Some reflections on the utility of this ‘syndrome’ to South African women who kill their abusers” (2005) 18 *SACJ* 259

Seidman “Witchmurder and *mens rea*: A problem of society under radical social change” (1965) 28 *Modern Law Review* 46

Stadler “Witches and witch-hunters: witchcraft, generational relations and the life cycle in a Lowveld village” (1996) 55 *African Studies* 87

Sunder “Cultural Dissent” (2001) 54 *Stanford Law Review* 500

Tadros “The character of excuse” (2001) *Oxford Journal of Legal Studies* 516

Thlagale “Inculturation: Bringing the African culture into the church” (2000) 14 *Emory International Law Review* 1249

Tomer-Fishman ” ‘Cultural defense’, ‘cultural offense’, or no culture at all?: An empirical examination of Israeli cases and of the factors affecting them” (2010) 100 *Journal of Criminal Law and Criminology* 475

Torry “Multicultural jurisprudence and the cultural defence” (1999) 4 *Journal of Legal Pluralism and Unofficial Law* 127

Van Broeck “Cultural defence and culturally motivated crimes (Cultural offence)” (2001) 9 *European Journal of Crime, Criminal Law and Criminal Justice* 1

Van Den Heever & Wildenboer “Geloof in toorkuns as versagterende omstandigheid in die Suid-Afrikaanse reg” (1985) 18 *De Jure* 105

Van Der Walt “Legal history, legal culture and transformation in a constitutional democracy” (2006) 12-1 *Fundamina* 5



Van Oosten “Non-pathological criminal incapacity versus pathological incapacity”  
1993 SACJ 127

Wolhuter “Excuse them though they do know what they do- the distinction between  
justification and excuse in the context of battered women who kill” (1996) 9 SACJ  
150

X “The cultural defense in the criminal law” (1986) 99 *Harvard Law Review* 1293  
(Author of the article unknown)

## **LEGISLATION**

Black Land Act 27 of 1913

Constitution of the Republic of South Africa, 1996

Criminal Law Amendment Act 105 of 1997

Criminal Procedure Act 51 of 1977

Culture Promotion Act 35 of 1983

Inquest Act 58 of 1959 as amended by Act 75 of 1996

Law of Evidence Amendment Act 45 of 1988

Mental Health Care Act 17 of 2002

Natal Ordinance 5 of 1849

National Heritage Resources Act 25 of 1999

National Health Act 61 of 2003

Native Territories’ Penal Code 24 of 1886

Traditional Health Practitioners Act 22 of 2007

Witchcraft Suppression Act 3 of 1957, as amended by Act 50 of 1970

Witchcraft Suppression Bill of 2007



## OTHER SOURCES

Stevens *The role of expert evidence in support of the defence of criminal incapacity* (LLD thesis, University of Pretoria, 2011)

Capotorti '*UNESCO publication on the study of the rights of persons belonging to ethnic, religious and Linguistic minorities*' (1977)

Commission on Gender Equality *Conference on the legislative reform in the Witchcraft Suppression Act 3 of 1957* (November 1999)

Ralushai *et al Report of the commission of inquiry into witchcraft violence and ritual murders in the Northern Province of South Africa* (1996)

Rautenbach *et al* (2002) *Culture (and religion) in constitutional adjudication* Paper delivered at the 5<sup>th</sup> Colloquium on Constitution and Law, Johannesburg 16 November 2002

Report of the Native Affairs Commission Volume 1 (1905)

South African Law Reform Commission *Thirty eight annual report 2010/2011*

The Commission on Gender Equality *The Thohoyandou Declaration on Ending Witchcraft Violence* (1998)

Van Den Heever (1979) *Regsetnologiese aspekte van toordoktery: Intreerede as professor in Publiek Reg by die Universiteit van die Noorde Pietersburg*: University of the North

White Paper on Arts, Culture, and Heritage, 4 June 1996