

**A COMPARATIVE STUDY OF THE CRIMINALISATION OF THE
VIOLATION OF A CORPSE IN CONTEXT OF TRADITIONAL
MEDICINE IN SUBEQUATORIAL AFRICA, INCLUDING
CONSIDERATION OF CUSTOMARY LAW**

by

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ABSTRACT

This discourse is a comparative study of the criminalisation of the violation of a corpse in context of traditional medicine in subequatorial Africa, including consideration of customary law and seeks specifically to examine whether the use of body parts for medicine falls within the paradigm of traditional medicine as opposed to professed any use in witchcraft. The question of any possible cultural defence for the violation of a corpse in traditional medicine is also examined.

Regard has been given to relevant legislative precepts in subequatorial Africa including any common-law position, any statutory legislative precepts, including constitutional law, for the Democratic Republic of the Congo, the Gabonese Republic, the Kingdoms of Lesotho and Swaziland, the Republic of the Congo, the Republics of Angola, Botswana, Burundi, Kenya, Madagascar, Malawi, Mozambique, Namibia, Rwanda, South Africa, Uganda, Zambia, Zimbabwe, and the United Republic of Tanzania.

In the Republic of South Africa, the violation of a corpse is a common-law crime, which sees its origins historically in Roman law and Roman-Dutch law. It has been found that the penal codes of the Democratic Republic of the Congo, the Gabonese Republic, the Republics of Angola, Botswana, Burundi, Kenya, Malawi, Rwanda, Uganda and the United Republic of Tanzania criminalise acts of violation on any corpse, but are applicable only to perpetrators and not to end-users, except for the Republic of Rwanda and the possessors of body parts for the Republic of Burundi. In the Republic of South Africa any removal of or trade in any body part in contravention of any law is also a criminal offence.

Research has not found any specific reference to the violation of a corpse for the Kingdoms of Lesotho and Swaziland, the Republic of the Congo, the Republics of Madagascar, Mozambique, Namibia, Zambia and Zimbabwe in extant legislative precepts, but all subequatorial African constitutions provide for the right to life.

Case law relating to the violation of a corpse for traditional medicine purposes has been found only for the Republic of South Africa, for the then-Rhodesia and the Republic of Botswana.

In most of the subequatorial African countries, customary law is valid only insofar as it does not conflict with the constitutions of the majority of countries, with the exceptions of the constitutions of the Gabonese Republic, the Republic of Congo and the United Republic of Tanzania for which no provision for customary law in the constitutions of these countries has been found.

In the Republic of South Africa, customary law, or a cultural defence is not condoned in instances of murder for body parts according to case law. Since research has discovered only a paucity of case law relating to the crime of violating a corpse in traditional medicine circumstances, it has not been possible to ascertain whether such use is widespread within traditional medicine, or confined to specific instances only.

This discourse concludes that the legal position of the crime of violating a corpse for the use of body parts in traditional medicine in the Republic of South Africa should not be reviewed to accommodate such use, but that all relevant legal precepts should be reviewed and changed purposefully to provide for clarification for the specificity of this crime and to oppose any perception of such practices and beliefs in traditional medicine as being justified in any manner.

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CHAPTER 1

INTRODUCTION AND RESEARCH FRAMEWORK

1.1 INTRODUCTION

A distinction is drawn between traditional medicine and witchcraft by Ashforth¹ in a discussion around the legal position of witchcraft violence in South Africa:

The distinction between healing and its antithesis, witchcraft, is an essentially moral one, based on interpretations of the motives of persons deploying muthi and the ends to which these forces are directed. Witches seeking to cause harm work with muthi as poison; healers seeking well-being work with muthi as medicine. Though directed towards health and well-being – a general condition of bodily health, spiritual ease and social harmony ... – the muthi of healers also brings death. When the healer sets out to cure a person afflicted by witchcraft, he or she will typically promise that their muthi will return the evil forces deployed by the witch to their source, thereby killing the witch. Such violence, however, is legitimate for it is executed in the name of defense. Witches, by definition, are engaged in illegitimate use of the powers of muthi.

For the purpose of this discourse ‘traditional healing’ will be referred to as ‘traditional medicine’.

Traditional medicine is practised by both a *sangoma*, a diviner, and an *iNyanga*, herbalist, to use the isiZulu linguistic terms, with equivalents in other vernacular languages extant in subequatorial Africa. These persons are:

... practitioners of traditional African medicine in Southern (sic) Africa. They fulfill (sic) different social and political roles in the community, including divination, healing physical, emotional and spiritual illnesses, directing birth or death rituals, finding lost cattle, protecting warriors, counteracting witches, and narrating the history, cosmology, and myths of their tradition. ... These healers are effectively South African shamans who are highly revered and respected in a society where illness is thought to be caused by witchcraft, pollution (contact with impure objects or occurrences) or through neglect of the ancestors. It is

¹ A Ashforth *Witchcraft violence and democracy in South Africa* (2005) 134.

*estimated that there are as many as 200,000 indigenous traditional healers in South Africa compared to 25,000 Western-trained doctors. Traditional healers are consulted by approximately 60% of the South African population, usually in conjunction with modern biomedical services.*²

IsiZulu is the language of the Zulu people, the vast majority of whom live in the Republic of South Africa and, for the purposes of this discourse, only these terms will be used to encompass all those other such extant linguistic terms in subequatorial Africa, for the same persons or concepts.

This discourse seeks to examine whether the use of body parts for medicine or for other purposes, commonly termed *muthi* as defined below, also falls within the paradigm of traditional medicine, as opposed to the professed use in witchcraft.

Traditional medicine may be defined as:

*The sum total of the knowledge, skills, and practices based on the theories, beliefs, and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness.*³

Witchcraft, by contrast, is termed *ubuthakati*, with a witch, a gender-neutral noun in isiZulu, being termed *umthakati*.⁴

Muthi is defined by Ashforth as:

The term muthi (is) ... Usually translated into English as either “medicine” or “poison”, with the anodyne “herbs” used in ambiguous instances, muthi refers to substances fabricated by an expert hand, substances designed by persons possessing secret knowledge to achieve either positive ends of healing, involving cleansing, strengthening, and protecting persons

² Babylon (online dictionary) <https://translation.babylon-software.com/english/sangoma/> (accessed 25 December 2016).

³ World Health Organisation: *General Guidelines for Methodologies on Research and Evaluation of Traditional Medicine* Geneva 2015.

⁴ isiZulu Oxford *Living Dictionaries* <https://zu.oxforddictionaries.com> (accessed 25 December 2016).

*from evil forces, or negative ends of witchcraft, bringing illness, misfortune, and death to others, or illicit wealth and power to the witch.*⁵

In a discussion around witch-purging and *muthi* murder in South Africa, Minnaar refers to the latter as being described by some authors as ritual murders or medicine murders, which he discounts, contending that there is no ritual involved in the murder. He contends that *muthi* murder involves the murder of innocent persons in order to obtain certain body parts for metaphysical purposes, so-called “magic potions”, generally for malign purposes.⁶

Minnaar indicates that *muthi* murders should be differentiated from witch-purging actions and should be viewed, legally, in a different light and be prosecuted differently given that these occur in specific circumstances from that of a witch execution which invariably takes place by way of members of the community, acting as a group, in public.⁷

This discourse is limited to a discussion as to whether the violation of a corpse for the use of body parts for *muthi*, whether for physical ailments, mental, emotional or metaphysical purposes, is also a practice within traditional medicine, since it appears not to have enjoyed full consideration generally, nor from a legal perspective, but only within national law of countries in subequatorial Africa. This discourse will not consider the specific crime of murder in order to obtain the *muthi*, nor other practices such as female genital mutilation or ritual circumcision, nor will this discourse consider the spoliation of a grave or grave-site, nor will this discourse address the mutilation of corpses in cases of warfare, occupation, hostilities, force or armed conflict.⁸

⁵ Ashforth (n 1 above) 133.

⁶ A Minnaar ‘Legislative and legal challenges to combating witch purging and *muti* murder in South Africa’ in J Hund (ed) *Witchcraft violence and law in South Africa* (2003) 86.

⁷ Minnaar (n 6 above) 86.

⁸ The International Criminal Law Statute, for example, in articles 8(2)(b)(xxi) and 8(2)(c)(ii), in relation to international armed conflict and non-international armed conflict, proscribe outrages on personal dignity and according to the elements of crimes, it is not necessary for the victim to be aware of the violation of his or her dignity and the dignity of a deceased person is thus also protected and various other international do likewise in such situations.

The Allied Health Professions Council of South Africa is a statutory health body established in terms of the Allied Health Professions Act⁹ in order to control all allied health professions, which includes Ayurveda, Chinese Medicine and Acupuncture, Chiropractic, Homeopathy, Naturopathy, Osteopathy, Phytotherapy, Therapeutic Aromatherapy, Therapeutic Massage Therapy, Therapeutic Reflexology and Unani-Tibb. In my capacity as Registrar of this statutory health council, my actual experience is that much misinformation exists around complementary health professions, their origins and healing paradigms to the extent that these are dismissed, in some cases, as also resorting within the occult. Similarly, traditional medicine in Africa is dismissed and no proper distinction is made between it and witchcraft.

The question then arises as to whether contemporary scholarship should expand the focus of *muthi* murders to harvest body parts, or where body parts are harvested post-mortem, and examine such in cases of both traditional medicine and witchcraft, given that there is seemingly then no distinction made, or recognition granted, that the use of body parts for medicine might also fall within the paradigm of traditional healing, in the understanding of such practices and beliefs within African society.

The crime of violating a corpse or violating the respect of the dead in South Africa sees its origins historically in Roman law and Roman-Dutch law, and is a common-law crime.¹⁰ The legal position in other countries in subequatorial Africa will be examined.

It is therefore appropriate that this topic be considered in both the context of African culture and against the South African common-law crime of violating a corpse, or against any other legal precept in subequatorial Africa making such a crime.

⁹ Act 63 of 1982.

¹⁰ A Christison and S Hoxter 'Criminalisation of the violation of a grave and the violation of a dead body' (2007) 28(1) *Obiter* 23.

1.2 BACKGROUND

Pearson¹¹, in an historical review of witchcraft in the early twentieth century then-Transvaal, notes that the subject of witchcraft has attracted a great deal of contemporary scholarship and cites Niehaus as stating that debate in South Africa “has focused almost exclusively on witchcraft and the law”.¹²

The practice of witchcraft, which is not the primary focus of this discourse, is governed legislatively by the Witchcraft Suppression Act¹³, based on various legal precepts¹⁴ prior to the apartheid¹⁵ era.

This legislative instrument, according to Tebbe, is:

*... an apartheid-era statute based on earlier colonial models that remains on the books today, outlaws a wide variety of occult-related practices, including accusing someone of witchcraft and practising traditional medicine.*¹⁶

Legislation, since enacted, however, provides for the regulation of the practising of traditional medicine in terms of the Traditional Health Practitioners Act¹⁷ and the Interim Traditional Health Practitioners Council has been established.¹⁸

¹¹ J Pearson ‘Witchcraft Management in the Early Twentieth Century Transvaal’ published Masters in History thesis, University of the Witwatersrand, 2015 6.

¹² I Niehaus ‘Witchcraft as Subtext: Deep Knowledge and the South African Public Sphere’ (2010) 36(1) *Social Dynamics* 66.

¹³ Act 3 of 1957, as amended by the Witchcraft Suppression Amendment Act, 50 of 1970 and the Abolition of Corporal Punishment Act, 33 of 1997; the operation of this act was also made uniform across the former homelands by the Justice Laws Rationalisation Act, 18 of 1996.

¹⁴ The Native Territories’ Penal Code 24 of 1886; Act 2 of 1895 (Cape of Good Hope); Act 24 of 1896 (Cape of Good Hope); Law 19 of 1891 (Natal); Ordinance 26 of 1904 (Transvaal); Proclamation II of 1887 (Zululand).

¹⁵ Wikipedia *A system of institutionalised racial segregation and discrimination in South Africa between 1948 and 1991* <https://en.wikipedia.org/wiki/Apartheid> (accessed 23 December 2016).

¹⁶ Tebbe, N ‘Witchcraft and Statecraft: Liberal Democracy in Africa’ (2007) 96 *Georgetown Law Journal* 187.

¹⁷ Act 22 of 2007.

¹⁸ E-Mail from FB Mbedzi, National Department of Health on 14 November 2016: *Kindly note that the Interim Traditional Health Practitioners Council established in terms of the Traditional Health Practitioners Act 2007(Act No. 22 of 2007) is currently not fully operational. The process of registering Traditional Health Practitioners has not yet started. The office of the Registrar is still to be established*

...

The report “The Review of the Witchcraft Suppression Act 3 of 1957”¹⁹ issued by the South Law Reform Commission (SALRC) refers to the unreferenced views by Dr Dale Wallace, a scholar of Comparative Religions, with regard to this legislation as having:

*... its origins in colonial administration and administrators who were concerned about beliefs and superstition. Emphasis is made that the aim of the Act was to suppress the belief in witchcraft.*²⁰

Grobler holds the view that:

*The legal culture that presently dominates criminal law was shaped by colonialism and apartheid. 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.*²¹

Carstens²², in examining the question of the role of cultural factors in South Africa against possible defences in criminal law, also avers that a distinction should be made between witchcraft murders and *muthi* murders, or the killing of innocent victims in order to obtain certain body parts, and that South African criminal law makes no distinction in either case with perpetrators being prosecuted for the common-law crime of murder. Further, according to this author, the procedure which is followed in any *muthi* murder, where a body part or a body with missing parts is found, is the performance of a medico-legal autopsy in terms of The Inquests Act²³, the concept of other than a natural death being defined in the Regulations Regarding the Rendering of Forensic Pathology Services.²⁴

¹⁹ South African Law Commission ‘The review of the Witchcraft Suppression Act 3 of 1957’ Project 135 South Africa 2014.

²⁰ SALRC (n 19 above) 4.

²¹ C Grobler ‘An analysis of the cultural defence in South African Criminal Law’ published LL.M thesis, University of Pretoria, 2014 8.

²² PA Carstens ‘The Cultural Defence in Criminal Law: South African Perspectives’ (2003) *National Criminal Justice Reference Service* 1.

²³ Act 58 of 1959.

²⁴ Government Gazette, R341 (15 April 2005), promulgated in terms of the National Health Act, Act 61 of 2003.

The SALRC²⁵ suggested inclusion of the following terms of reference for the investigation:

...

c) Should the practice of witchcraft be criminalised or should ordinary criminal procedure deal with proven illegal practices such as murder, assault, defamation and possession of body parts.

...

g) Would the acknowledgement of the existence of witchcraft lead to the possibility of creating a so-called “cultural defence” in criminal law, and should this be encouraged.

...

i) Has the Human Tissue Act 65 of 1983²⁶ been successful in curbing muthi murders and dealing with the offence of illegal possession of human body parts.

...

Legal consideration of the common-law crime of violating a corpse is further required to be evaluated in the context of its role in modern society, particularly against the background of the introduction of constitutional values and principles into criminal law jurisprudence.²⁷

The question of the crime of violating a corpse from a medico-criminal law perspective thus then deserves consideration within the context of traditional medicine, contrasted against such use within the context of witchcraft, leading to a distinction between the two paradigms, if appropriate.

In addition, and from a traditional medicine perspective of the possible use of any body parts for medicine, regard will be given briefly to various legislative instruments or reports, other than those mentioned above, as may be applicable to the research circumstance, including, but not limited to, the National Health Act²⁸, customary law, as well as any legislative instruments in subequatorial Africa. The proposed

²⁵ SALRC (n 19 above) 6-7.

²⁶ Since repealed and regulated by promulgation of Regulations in terms of Chapter 8 of the National Health Act, Act 61 of 2003.

²⁷ Christison and Hooctor (note 10 above) 23.

²⁸ Act 61 of 2003.

Mpumalanga Witchcraft Suppression Bill²⁹, as well as the Ralushai Commission³⁰, whose terms of reference were to investigate the causes of witchcraft violence; ritual murders in the Northern Province; review all criminal cases related to witchcraft and ritual murder in the decade preceding 1996; to recommend legislative measures to combat witchcraft violence and killings; and to recommend educational measures to combat the commission of criminal acts related to witchcraft, will receive brief consideration.

1.3 PROBLEM STATEMENT

The aim of the research is to examine the crime of violating a corpse against the common-law and other relevant legislative instruments with a view to considering this crime within the context of traditional medicine. The research will also consider the apparent lack of distinction between the use of body parts for medicine within traditional medicine and the use of such in witchcraft.

1.4 OBJECTIVES

The main objective of this research is to reach a conclusion as to whether the legal position of the crime of violating a corpse should be reviewed to accommodate, in any manner, the use of body parts for medicine within traditional medicine taking into consideration the understanding of such practices and beliefs in subequatorial African.

Any conclusion will see consideration against the provisions of the Constitution of the Republic of South Africa³¹ ('the Constitution') as the supreme instrument of law in South Africa. This research will also examine relevant legal instruments,

²⁹ 2007.

³⁰ NV Ralushai 'Report of the Commission of Inquiry into witchcraft violence and ritual murder in the Northern Province of the Republic of South Africa: To His Excellency the Honourable Member of the Executive Council for Safety and Security, Northern Province, Advocate Seth Nthai' South Africa 1996.

³¹ Act 108 of 1996.

constitutional or otherwise, in foreign jurisdictions in subequatorial Africa for the purposes of understanding the legal positions in these foreign jurisdictions.

The secondary objective of the research is to make appropriate recommendations for future consideration for clarification or changes to any provisions of the regulatory framework of the crime of violating a corpse in the context of traditional medicine, with particular reference to the distinction between such and use in witchcraft.

Further, another secondary objective is to consider whether the use of body parts for medicine post-violation of a corpse by so-called end-users should be reviewed, from a legal perspective.

1.5 METHODOLOGY

An understanding of the crime of violating a corpse within the context of traditional medicine, more particularly the use of body parts for medicine will form the theoretical and conceptual framework of this research.

Due regard will be given to legislative precepts applicable to this matter. In addition, various open source information by different authors, including any views expressed in books, publications and legal journals applicable to the research circumstance will be examined.

A similar approach will be followed for foreign jurisdictions in subequatorial Africa, namely a review of any crime of violating a corpse and due consideration of the incorporation of this crime into the legal systems of those countries in the context of traditional medicine will be given, if applicable.

Due regard will be given to the primary sources applicable to this matter, namely the origins of the crime of violating a corpse as conceived in Roman law, received into Roman-Dutch law and thereafter into South African common-law, with particular

regard to relevant case law. Other applicable legislative instruments will be examined. Any conclusions drawn will require consideration against the provisions of the Constitution as the supreme instrument of law in South Africa.

In a similar fashion, for countries in subequatorial Africa, the crime of violating a corpse will be examined against legislative instruments. In all cases, customary law will receive consideration.

Secondary sources include, but are not limited to, various views expressed by authors, critics, commissions of inquiry, and other relevant stakeholders to this research.

1.6 CONCLUSION

This research is limited to the context of the use of body parts for medicine within the context of traditional medicine only, but contrasted and compared with such use for witchcraft purposes for clarification, within the paradigm of the crime of violating a corpse.

Given the occult nature of the practice of using body parts for medicine, generally perceived to be widespread in subequatorial Africa, it is expected that the gaining of first-hand accounts from persons employing these practices, will prove problematic and further the general occult nature of the practices and beliefs in both spheres also militates against a complete understanding of these practices, both from sociological and legal perspectives.

Research will thus essentially be literature-based. In addition, the sourcing of applicable material in the case of foreign jurisdictions in subequatorial Africa is expected to be problematic.

CHAPTER 2

HISTORICAL OVERVIEW OF THE CRIMINALISATION OF THE VIOLATION OF A CORPSE IN SOUTH AFRICA, LEGISLATIVE INSTRUMENTS AND CASE LAW IN SUBEQUATORIAL AFRICA

2.1 ROMAN LAW

The historical Roman Law context and the reception into law of crimes violating the dead into South African law, via Roman-Dutch law, are discussed by Christison and Hooctor.³² According to these authors, such crimes see origins historically in Roman law Praetorian edicts, or annual declarations of principles made by any incoming *praetor urbanus*, the elected magistrate charged with administering justice within the city of Rome, or in various imperial *constitutiones*³³, in which the Roman head of state issued precepts of legislation, administration or jurisdiction, indicating that it appeared that the violation of a corpse was classified as part of the *sepulchri violatio*, which criminalised the destruction or damage to a tomb, the burial of persons in that tomb other than those permitted by the owner or the use of a tomb as a dwelling.³⁴

These same authors indicate that there were other related *injuriae*, or delicts, which applied to the violation of corpses and tombs in cases where conduct did not constitute damage to sacred things, concluding that:

*Although the primary justification for criminalisation of such conduct was the desecration of sacred objects, it is clear that the crime embraced sentiments of public decency and order, as well as respect for the dead.*³⁵

³² Christison and Hooctor (n 10 above) 23-29.

³³ Christison and Hooctor (n 10 above) 23.

³⁴ Christison and Hooctor (n 10 above) 27.

³⁵ Christison and Hooctor (n 10 above) 27.

2.2 ROMAN-DUTCH LAW

In a discussion surrounding the reception of Roman law into Roman-Dutch law of the violation of a grave or a corpse as a crime, Christison and Hocter cite various jurists, such as Grotius, Voet, Matthaeus, Van Leeuwen, Moorman and Damhouder as concluding that the violation of a grave was retained as a crime in Roman-Dutch law³⁶, the latter three persons being referenced by Milton.³⁷

Christison and Hocter refer to De Vos³⁸ and Labuschagne³⁹ as attributing the retention of the crime due to the strong and continuing influence of Roman law, together with the piety of the upright Dutch citizenry viewing the violation of graves and corpses as an atrocity and conclude:

It is distinctly possible that the Roman crime was simply subsumed into an existing prohibition in Dutch law, or at least was readily accepted to punish violations of an existing mos. Milton cites the writers Carpzovius, Moorman, Matthaeus and Pothier as authority for the crime forming part of Roman-Dutch law⁴⁰. Furthermore, together with the violation of tomb, Voet considered (the) violation of a corpse to be a form of injuria and hence contrary to the good morals of the community.⁴¹

2.3 RECEPTION INTO SOUTH AFRICAN LAW

The definition of the violation of a corpse provided by Milton⁴² is the “unlawful and intentional physical violation of a dead human body” and that of Snyman⁴³ is “unlawfully and intentionally violating a corpse”. Milton also states that “the sanctity of human life and the respect for the dignity and integrity of the person compound

³⁶ Christison and Hocter (n 10 above) 28.

³⁷ JRL Milton *South African Criminal Law and Procedure, Volume 2: Common-law Crimes* 3ed (1996) South Africa 283-284 and 286.

³⁸ W le R De Vos ‘Grafskending’ (1952) *South African Law Journal* 303: ‘[O]mdat die piëteitsgevoel van fatsoenlike mense dit as ‘n gruweldaad beskou het dat grafte of lyke vestoor word’.

³⁹ JMT Labuschagne ‘Menseregte na die dood? Opmerkinge oor Lyk- en Grafskending’ (1991) *De Iure* 144.

⁴⁰ Milton (n 37 above) 283.

⁴¹ M De Villiers *The Roman and Roman-Dutch law of Injuries* (1899) 63 (discussing Voet 47.10.5).

⁴² Milton (n 37 above) 286.

⁴³ CR Snyman *Criminal Law* 4ed (2008) 367.

to create a sense of respect for the bodily remains of dead persons”.⁴⁴ Labuschagne⁴⁵ advocates that it is implicit in the *boni mores* of a community that recognition, with respect for those rights associated with individual autonomy, survives death.

According to McQuoid-Mason, in terms of the common-law, the legal personality of any person terminates on death and such dead person has neither rights nor obligations, but that the common-law protects corpses and disposal is regulated; further, according to McQuoid-Mason, there is no civil claim for interference with personality rights, such as applicable to the body of a living person, for a dead person and the unlawful and intentional violation of a corpse is a crime.⁴⁶

This discourse has not focussed on a discussion of the specific elements of the crimes in the burden of proof such as *injuria*, *crimen injuria*, or *dolus directus*, such having been discussed as may be relevant in Roman or Roman-Dutch law, or in South African law, by Christison and Hooctor⁴⁷, but bear examination in any future fuller discourse on this particular facet of the crime of the violation of a corpse.

2.4 SUBEQUATORIAL LEGISLATIVE INSTRUMENTS RELATING TO THE VIOLATION OF A CORPSE AND THE RIGHT TO LIFE

As has been discussed above, the violation of a corpse is a common-law crime in South Africa.⁴⁸

Certain other subequatorial African countries, have criminalised such acts in their respective penal codes. The ‘Police and Human Rights Resources’ report issued by

⁴⁴ Milton (n 37 above) 283.

⁴⁵ Labuschagne (n 39 above) 150.

⁴⁶ DJ McQuoid-Mason ‘Overturning refusal of a hospital to terminate life support for a brain-dead mother until the fetus was born: what is the law in South Africa?’ (2014) 104(8) *South African Medical Journal* 553- 554.

⁴⁷ Christison and Hooctor (n 10 above) 24.

⁴⁸ Christison and Hooctor (n 10 above) 23.

Amnesty International⁴⁹ indicates the legal position in the following subequatorial African countries:

2.4.1 DEMOCRATIC REPUBLIC OF CONGO

Articles 61 and 62 of the 1940 Penal Code that relate to superstitious events and barbaric practices, criminalise assault and any barbaric acts against a corpse.

Article 16 of the 2005 Constitution of this country provides that the individual is sacred and that the state has an obligation to respect such individual, with all persons having the “right to life, physical integrity and to the free development of their personality, while respecting the law, public order, the rights of others and public morality”.

2.4.2 GABONESE REPUBLIC

Article 291 of the 1963 Penal Code that relates to crimes against persons, criminalises any violation of graves or burial sites and the profaning of a cadaver.

Article 1 of the 1991 Constitution of this country provides for the “inviolable and imprescriptible” rights of persons and to the “free development of the person”, disallowing any humiliation, mistreatment or torture while in arrest or imprisonment.

2.4.3 KINGDOM OF LESOTHO

No reference to the crime of violating a corpse is to be found in the 2010 Penal Code of this country and further research is required in this regard.

Article 5 of the 1993 Constitution of this country provides that “Every human being has an inherent right to life” and that “no one shall be arbitrarily deprived of his life”.

⁴⁹ Amnesty International ‘Police and Human Rights Resources (undated) <http://policehumanrightsresources.org> (accessed 8 December 2016).

2.4.4 KINGDOM OF SWAZILAND

No reference to the crime of violating a corpse has been found and further research is required in this regard.

Article 14 of the 2005 Constitution of this country provides for “Respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law”.

2.4.5 REPUBLIC OF ANGOLA

Article 206 of the undated Penal Code that relates to any attempt on the integrity of mortal remains, provides for the following behaviour to be a criminal offence:

Whoever, by subtraction, concealment, destruction, desecration, or any other offensive mean to the respect of the deceased, undermining the integrity of a corpse or ashes of the deceased person shall be punished with imprisonment ...

In article 207, “Profanation of a funeral location” the following behaviour is criminalised:

Whoever, by any mean, profanes or violates the tomb or grave of a deceased person shall be punished with imprisonment ...

Article 30 of the 2010 Constitution of this country provides that the state is obliged to respect and protect human life, which is considered inviolable.

2.4.6 REPUBLIC OF BOTSWANA

Article 138 of the 1964 Penal Code that relates to “Offences Injurious to the Public in General”, criminalises trespassing on burial places, including “... or offers any indignity to any human corpse ...” and article 139 also criminalises the hindering of

a burial of a dead body, including “... or without lawful authority in that behalf disinters, dissects, or harms the dead body of any person...”.

Article 4(1) of the 1966 Constitution of this country provides that “No person shall be deprived of his life intentionally...”.

2.4.7 REPUBLIC OF BURUNDI

Articles 242 to 249 of the 2009 Penal Code that relate to barbaric practices, criminalise the mutilation of a cadaver, the profaning of any cemetery, any act of cannibalism, whether by provocation to commit such, engage in such or the possession of any human tissue.

Article 26(1) of the 2005 Constitution of this country provides that human life, as well as the physical and moral integrity of the human person are inviolable.

2.4.8 REPUBLIC OF THE CONGO

No reference has been found to the crime of violating a corpse and further research is required in this regard.

Article 7 of the 2002 Constitution of this country provides that the “human person is sacred” and has the “right to life”.

2.4.9 REPUBLIC OF KENYA

Sections 136 and 137 of the 2009 Penal Code that provide for offences relating to religion, criminalise trespassing on burial places, the offering of any indignity to any human corpse and the hindering of the burial of a dead body.

Article 26 of the 2010 Constitution of this country provides that “Every person has the right to life”.

2.4.10 REPUBLIC OF MADAGASCAR

No reference to the crime of violating a corpse has yet been found and further research is required in this regard.

Article 8 of the 2010 Constitution of this country provides that “The right of all persons to life is protected by the Law”.

2.4.11 REPUBLIC OF MALAWI

Articles 129 and 131 of the 1930 Penal Code that provide for offences relating to religion, criminalise trespassing on burial places including the offering of “any indignity to any human corpse” and the hindering of the burial of a dead body.

Article 16 of the 1994 Constitution of this country provides that “Every person has the right to life and no person shall be arbitrarily deprived of his or her life”.

2.4.12 REPUBLIC OF MOZAMBIQUE

No reference to the crime of violating a corpse has been found and further research is required in this regard.

Article 40 of the 1990 Constitution of this country provides that “All citizens shall have the right to life and to physical and moral integrity, and they shall not be subjected to torture or to cruel or inhuman treatment”.

2.4.13 REPUBLIC OF NAMIBIA

No reference to the crime of violating a corpse has been found and further research is required in this regard.

Article 6 of the 1990 Constitution of this country provides for respect and protection of the right to life.

2.4.14 REPUBLIC OF RWANDA

Article 146 of the 2012 Organic Law Instituting the Penal Code that provides for offences of homicide, assault and battery, bodily injuries and abortion, criminalises degrading acts on the dead body. Article 180 of this law, that provides for other prohibited practices, criminalises the hiding, exhuming, mutilating or inflicting dehumanising treatment on a dead human body.

Article 271 of this law, that provides for offences in human trafficking, the illegal removal, sale and use of human body parts, criminalises the removal of an organ or some of the body products from a dead person, without proper consent during that person's lifetime, or if the removal prevents the determination of the cause of death.

Article 12 of the 2003 Constitution of this country provides for the right to life for every person and that there shall be no arbitrary deprivation of life.

2.4.15 REPUBLIC OF UGANDA

Articles 120 and 121 of the 1950 Penal Code that provide for offences relating to religion, criminalise trespassing on burial places, including the offering of "any indignity to any human corpse", the hindering of the burial of a dead body of any person and where any person, without authority "... disinters, dissects or harms the dead body of any person...".

Article 22 of the 1995 Constitution of this country provides that no person's life shall be deprived intentionally.

2.4.16 REPUBLIC OF ZAMBIA

No reference to the crime of violating a corpse has been found and further research is required in this regard.

Article 12 of the 1996 Constitution of this country provides that no person's life shall be deprived intentionally.

2.4.17 REPUBLIC OF ZIMBABWE

No reference to the crime of violating a corpse has been found and further research is required in this regard.

Article 48 of the 1979 Constitution of this country provides for the right to life for every person.

2.4.18 UNITED REPUBLIC OF TANZANIA

Articles 125 to 128 of the 1945 Penal Code that provide for offences relating to religion and burial, criminalise trespassing on burial or other places, including the offering of "any indignity to any human corpse", the hindering of the burial of the dead body of any person and where any person, without authority "...disinters, dissects or causes damage to the dead body of any person...".

Article 14 of the 1998 Constitution of this country provides for the right to live and the protection of that right for every person by society and in accordance with law.

2.4.19 OTHER LEGAL INSTRUMENTS: SOUTH AFRICA, THE REPUBLICS OF BURUNDI AND RWANDA

Apart from the South African legal position expounded above, further consideration will be given below to the use of human tissue in the National Health Act⁵⁰ and the Prevention and Combating of Trafficking in Persons Act⁵¹. In the latter regard, the position for the Republic of Rwanda has been set out above. It is further noted that the 2009 Penal Code for the Republic of Burundi criminalises the possession of any human tissue.

The legislative position with regard to trafficking in persons or body parts for other countries in subequatorial Africa has not been found and would require further research.

2.5 BACKGROUND TO CASE LAW IN SUBEQUATORIAL AFRICA

Research has brought to light a notable number of cases in subequatorial Africa which relate, either directly or indirectly, to the profession of a *sangoma*, the use of *muthi* or witchcraft, and, to name some, in cases of: Absence of leave to train as a *sangoma*; labour disputes, including letters of indisposition; lack of efficacy of *muthi*; use of *muthi* to make family members disappear; denial as to the person being a *sangoma*; bewitchment killings; use of the services of a *sangoma* to nullify court proceedings; claims relating to road accidents; annulment of a tenant agreement due to the alleged activities of a *sangoma*, including the allegation of killing of certain animals for *muthi*; *sangoma* divination activities; rape by a *sangoma*; and the wearing of dreadlocks as part of the training to become a *sangoma*.

By comparison a paucity of case law has been found relating to the crime of violating a corpse and, as will be discussed below, it would appear that the law enforcement agencies and the courts have not focused on this crime specifically, but have rather

⁵⁰ Act 61 of 2003.

⁵¹ Act 7 of 2013.

focused on the crime of murder, usually the precursor criminal act to any violation of a corpse.

Case law, as found for subequatorial African countries, in addition to that relating specifically to the crime of the violation of a corpse, has none the less been entered into the bibliography for the record, as well as for any future research purposes.

Of particular concern is the murder, or violation of a corpse, of persons suffering from albinism, a genetic condition characterised by a complete lack of melanin, or pigment, in the skin, hair and eyes of the person affected. Persons who have a reduced melanin component, are termed albinoid.⁵² These crimes appear particularly prevalent in the United Republic of Tanzania and this will be discussed further below.

Relevant case law relating to the crime of the violation of a corpse is discussed below and has been separated into that applicable to South Africa and that applicable to other countries in subequatorial Africa.

2.6 CASE LAW IN SOUTH AFRICA

In 1918 *R v Kunene and Mazibuko*⁵³ the accused were convicted of “spoliation or violation of a dead body”. This case involved the removal of body parts for medicinal purposes.

Christison and Hoctor mention that the crime of the violation of a corpse remained unconsidered for almost three decades⁵⁴, but that it was considered extant in law by Gardiner and Lansdown⁵⁵ in 1946.

⁵² Wikipedia <https://en.wikipedia.org/wiki/Albinism> (accessed 23 December 2016).

⁵³ 1918 JS § 321 (NNHC).

⁵⁴ Christison and Hoctor (n 10 above) 33.

⁵⁵ FG Gardiner and CWH Lansdown (1946) Vol2 5ed *South African Criminal Law and Procedure* South Africa 1156.

In the case of *R v Sephuma*⁵⁶, in 1948, implicitly accepting a previous decision in *R v Letoka*⁵⁷ in 1947, the court held that the conduct by the accused in removing a portion of the face of the corpse:

[W]as a gross outrage to the feelings and sensibilities of the relatives of the child. He must be punished accordingly and made to understand that decent people look upon this sort of conduct with horror and detestation.

The judgements in *Letoka* and *Sephuma* were rejected in *Dibley v Furter*⁵⁸ in 1951 but incorrectly so, according to Christison and Hoctor, who argue that the decision in *Sephuma* amounts to 'serious infringement of the *dignitas* of the child's relatives' and that the wording of the judgement in *Letoka* could be construed as a conviction on the basis of *crimen injuria*.⁵⁹

In *S v Coetzee*⁶⁰ in 1993 the facts were as follows: the accused, an undertaker, had removed the heart and lungs from the body of a mineworker without proper authority in terms of the relevant legislation.⁶¹ The appeal court held that the crime of violation of a corpse was extant in law, upheld the convictions of both the accused and the co-accused, her husband who assisted in the matter and accepted the definition of the crime provided by Milton as cited above, in addition citing a number of other authorities who agreed that the crime existed. In the judgement to the appeal in this case, Roos J, endorsed the *dictum* in *Sephuma* and stated:

'n lyk feitlik as iets heilig beskou moet word. Daarmee stem ek saam. Selfs primitiewe volkere het die hoogste respek vir dooies en hulle grafte.

⁵⁶ 1948 3 SA 982 (T). This case concerned primarily the violation of a grave; no judgement was made as to the violation of a corpse; the judgement passed was that it was sufficient for desecration of a grave for criminal liability to follow

⁵⁷ 1947 3 SA 713 (O).

⁵⁸ 1951 4 SA 73 (C); this case concerned primarily the violation of a grave.

⁵⁹ Christison and Hoctor (n 10 above) 32.

⁶⁰ 1993 2 SACR 191 (T).

⁶¹ Occupational Diseases in Mines and Works Act, Act 78 of 1973.

In 1975, in *S v Sibande*⁶², the appellant:

... consulted a traditional healer who had advised him that if he raped his grandmother, then killed her, and then cut off a portion of her ear and chin for muti purposes he would be more successful in his gambling. The appeal against the conviction of murder and death sentence was dismissed.

In 1976, in *S v W*⁶³, the accused performed sexual intercourse with a dead woman, but was unaware of the fact that she was already deceased when the act took place. W was convicted of attempted rape. According to Milton⁶⁴, “the perpetration of an immoral or indecent act upon a body would likewise constitute the crime” of the violation of a corpse had W known that the victim was dead.

In 1980, in *S v Modisafife*⁶⁵, an uneducated man, the appeal against the conviction of murder and the death sentence was dismissed after the appellant had killed and cut out certain body parts of a child for *muthi*, at the direction of a traditional healer to protect against being struck by lightning, extenuating circumstances having been accepted by the court.

In 1984, in *S v Masemene*⁶⁶, the facts were that the appellant had murdered an adult male and had, thereafter, cut off the deceased’s head and private parts, enclosed these in a package, which he then delivered to a traditional healer. The judge indicated that there was much evidence about what had happened to the package containing the body parts, but it was not necessary to examine this further. The appellant claimed that he was in the process of studying under the traditional healer and his action in removing the body parts were at her direction and that she would kill him if he had not carried out the deed. This was accepted by both the court *a quo* and the appeal court, but the judge rejected this as any extenuating

⁶² 1975 1 SA 966 (RA).

⁶³ 1976 1 SA 1 (A).

⁶⁴ Milton (n 37 above) 284 - 285.

⁶⁵ 1980 3 SA 860 (A).

⁶⁶ 1984 ZASCA 63.

circumstance and confirmed the original sentence, the death sentence. The traditional healer was sentenced to ten years' imprisonment.

In 1985, in *S v Mapholi en Andere*⁶⁷, the deceased was murdered to use certain body parts as *muthi*. The appeal court found that evidence presented by the state witnesses was unreliable and the original convictions of guilt and sentences were set aside.

In 1990, in *S v Malaza*⁶⁸, the death sentence was confirmed on appeal as a result of the appellant having killed a suitable victim, having drunk his blood and buried his internal organs on the advice of a witchdoctor.

In 1991, in *S v Shabalala and Others*⁶⁹, the appellants were convicted in the trial court of murder and sentenced to death. The facts revolve around a dispute relating to the sale of cattle and the deceased, a reclusive and elderly man, had been not only murdered ostensibly due to the dispute, but parts of his body were also excised and kept in small bottles and in a bowl. His heart was found lying outside the house.

The trial court judge indicated:

The only reasonable inference to be drawn from the acceptable evidence is that the three accused went to the farm either to rob the deceased of his possessions or to remove organs from his body for the purpose of muti or both. Thanks to their actions in mutilating and burning the deceased's body, we cannot make a positive finding as to the cause of death...

The appeal court judge found that since little care had been taken of the deceased's organs, it would be unsafe to draw any conclusion as to the motive in mutilating the body. The appeal was dismissed and the death sentence was confirmed.

⁶⁷ 1985 ZASCA 46.

⁶⁸ 1990 1 SACR 375 (A).

⁶⁹ 1991 ZASCA 97.

In 1993, in *S v Munyai and Others*⁷⁰, a *muthi* murder was committed for the purpose of ensuring the success of a new business if human body parts were buried on the business premises. The death sentence was confirmed on appeal.

In 2006, in *S v Alam*⁷¹, the appellant had committed a murder so that human blood sought by a *sangoma* could be used for ritual purposes. The appellant had been paid for this purpose, but the court did not impose the death sentence, accepting that poverty may have played a role in this case and the appellant was sentenced to seventeen years' imprisonment on charges of murder and rape.

In 2015 in *S v Chimboza*⁷², in which the deceased was killed by stabbing, with the subsequent removal of his heart, Binns-Ward J indicated that:

[14] The accused was not charged, as he could have been, with the violating or desecrating a corpse (Afr. lykskending)¹. It would not be appropriate in the circumstances to apply the facts related to an offence of which the accused has not been convicted to justify a heavier sentence in respect of the offence for which he has been convicted. The only relevance of the accused's conduct in regard to the body of the deceased after he had killed him by slitting his throat is the light it might shed on his over-reaction to the provocation given by the deceased. It was, to say the least, surprising therefore that the state did not see fit to call expert evidence to try to shed light on the accused's conduct and left it to the court to require such evidence to be adduced

The footnote in this judgement reads as follows:

¹ *As to the existence of this category of offence in the common-law, see S v Coetzee en 'n Ander 1993 (2) SACR 191 (T), at 193i-194c. The prosecutor suggested that charging the accused with the commission of the offence would amount to an improper splitting of charges, but there is no substance in point.*

In this case, the prosecutor had indicated that the removal of the heart was not the cause of death and that in the essential elements of the offence, no admission

⁷⁰ 1993 1 SACR 252 (A).

⁷¹ 2006 2 SACR 613 (Ck).

⁷² 2015 ZAWCHC 47; paragraph 14, together with footnote 1 thereto.

concerning the removal of the organ was not of relevant substance. Chimboza was sentenced to eighteen years' imprisonment on the charge of murder.

In 2015 in *Mogaramedi v S*⁷³ it is reported that the appellant:

... had been practising as a Sangoma for ten (10) years prior to the offence. As part of his final initiation, he had to obtain the genital organ of a close female relative. He therefore lured his younger sister, (the deceased), to his home under the false pretence that they would conduct a ritual for their incarcerated brother. He waited for the deceased to fall asleep whereupon he hit her twice on the head with an axe. He then stabbed her with a knife in the chest and waited for her to pass away. He then cut off the deceased's genital organ with an axe. He was arrested whilst in possession of the said genital organ.

The original conviction of murder and a sentence of life imprisonment were upheld.

In 2015, in *Shabalala v S*⁷⁴, the court was presented testimony by the investigating officer that the removal of the deceased's ear indicated that the murder was for *muthi* purposes, but this was dismissed by the judge who seemingly accepted the view of the pathologist that this might have been affected by animal activity and that there was, moreover no evidence of any sale of this body part, seemingly accepting that this was a feature of all such murders. The appeal was dismissed and the appellant was convicted of murder.

2.7 CASE LAW IN OTHER COUNTRIES IN SUBEQUATORIAL AFRICA

In 1968, the then-Rhodesian Appellate Division, in *R v Munyama*⁷⁵ supported the continued existence of the crime of the violation of a corpse, but by *obiter dictum*.

In 1972, the then-Rhodesian High Court in 1972 in *S v Mishkek*⁷⁶ convicted the accused of the crime of violation of a corpse, relying on the decision, cited above in

⁷³ 2015 ZAGPPHC; 2015 1SACR 427 (GP).

⁷⁴ 2015 ZAGPJHC 262.

⁷⁵ 1968 3 SA 113 (RA)

⁷⁶ 1972 3 SA 131 (R).

the 1918 South African case of *Kunene and Mazibuko*, the position taken by Gardiner and Lansdown, as well as the writings of Van der Keesel and Voet.⁷⁷ This case involved the assistance by the accused of hiding a corpse in a farm dam.

In 2007, in *S v Gadiwe*⁷⁸ in Botswana, the appellant murdered a young boy, cut his throat, removed one of his hands and excised flesh from his right thigh. The body parts were then cut into small pieces, together with other *muthi*, and distributed to various persons in matchboxes. Extenuating circumstances, namely the conclusion by the trial judge that the appellant was suffering from a mental disorder, were upheld by the appeal court and two counts of life imprisonment for murder were confirmed by the appeal court.

In 2007, in *S v Gaoalelwe*⁷⁹ in Botswana, it was found that the accused harvested body parts from the deceased, with no finding as to the reasons for this or the disposing of the body parts. The accused was found guilty of murder.

In the United Republic of Tanzania where the killing of persons afflicted by albinism is said to be widespread, Salewi does not distinguish or differentiate between the killing of such persons, or the use of body parts after the violation of a corpse, by traditional healers or for witchcraft purposes.⁸⁰

Research thus far has not brought about any other case law in subequatorial Africa and further research in this regard would be required for any fuller future discourse on the violation of a corpse.

⁷⁷ Christison and Hoctor (n 10 above) 33.

⁷⁸ 2007 BWHC 8.

⁷⁹ 2007 BWHC 200; 2004 BWHC 10.

⁸⁰ Published thesis: DH Salewi 'The killing of persons with albinism in Tanzania: A socio-legal inquiry' published LLM thesis, University of Ghana Legon, 2011.

2.8 CUSTOMARY LAW

The concept of customary law enjoys no uniform accepted definition and is defined differently by different scholars given that custom varies in different countries. It may, however, be viewed broadly as a rule of conduct, accepted by a group of persons and which governs them.

According to Ndulo⁸¹:

The sources of law in most African countries are customary law, the common-law and legislation both colonial and post-independence. In a typical African country, the great majority of the people conduct their personal activities in accordance with and subject to customary law. Customary law has great impact in the area of personal law in regard to matters such as marriage, inheritance and traditional authority, and because it developed in an era dominated by patriarchy some of its norms conflict with human rights norms guaranteeing equality between men and women. While recognizing the role of legislation in reform, it is argued that the courts have an important role to play in ensuring that customary law is reformed and developed to ensure that it conforms to human rights norms and contributes to the promotion of equality between men and women. The guiding principle should be that customary law is living law and cannot therefore be static. It must be interpreted to take account of the lived experiences of the people it serves.

Ndulo indicates further that the national legal system of any typical African state is pluralistic in that it may contain elements of religious law, such as that relating to Islam, received law, which is based on common-law or civil law depending on the colonial history, and any law adopted from the colonial state, as well as any legislation enacted by the legislative authority of that country post-independence, indicating that “the sources of customary law that are historically and presently accepted as authoritative are a product of social conditions and political motivations”⁸², and cites, in furtherance of this viewpoint, the views of Judge van der Westhuizen in *Alexkor Limited v Richtersveld Community*⁸³:

⁸¹ M Ndulo ‘African Customary Law, Customs and women’s Rights’ (2011) *Cornell Law Faculty Publications* 87-120.

⁸² Ndulo (n 81 above) 87-88.

⁸³ 2003 5 SA 460 (CC).

... although a number of text books exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied.

Grobler indicates that in the period of drafting towards a constitution for a democratic South Africa and “ambivalent attitude towards culture became evident”⁸⁴, but concludes that the position status of customary law was improved in the final Constitution in that it guarantees various rights, such as the right to language and culture⁸⁵, the right to freedom of religion belief and opinion⁸⁶, and the right to cultural, religious and linguistic communities⁸⁷, which should be read against the right to equality⁸⁸ and also protection against unfair discrimination on grounds such as culture and religion.⁸⁹

Section 31 of the Bill of Rights of the Constitution, which relates to cultural, religious and linguistic communities provides:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
 - (a) to enjoy their culture, practice their religion and use their language; and*
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.**
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.*

Section 211(3) of the Constitution provides:

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

⁸⁴ Grobler (n 21 above) 12.

⁸⁵ Section 30 of the Constitution, 1996.

⁸⁶ Section 15 of the Constitution, 1996.

⁸⁷ Section 31 of the Constitution, 1996.

⁸⁸ Section 9 of the Constitution, 1996.

⁸⁹ Grobler (n 21 above) 12.

Grobler indicates that not only are the courts required to apply customary law, but customary law is placed on the same level as national common-law and that the improved status of customary law requires acknowledgement of cultural practices within society.⁹⁰

Further, section 39(2) of the Constitution provides:

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.

In contrast to the South African position, Ndulo⁹¹, citing the 1991 Constitution of Zambia⁹² as an example, indicates that:

Many African constitutions contain provisions guaranteeing equality, human dignity, and prohibiting discrimination based on gender. However, the same constitutions recognise the application of customary law and they do this without resolving the conflict between customary law norms and human rights provisions.

In the *Alexkor* case Judge van der Westhuizen stated that customary law must be recognised as an “integral part” of the law and “an independent source of norms within the legal system”.⁹³

According to Cuskelly⁹⁴, customary law is recognised in the constitutions of other subequatorial countries as follows:

- Articles 203, 204 and 207 of the 2005 Constitution of Democratic Republic of the Congo recognise customary rights, the execution of customary law and customary authority provided that these are “without prejudice to the other provisions of this Constitution”.

⁹⁰ Grobler (n 21 above) 13.

⁹¹ Ndulo (n 81 above) 89.

⁹² n 94 below where Cuskelly references the Constitution of Zambia as 1996.

⁹³ n 81 above.

⁹⁴ K Cuskelly *Customs and Constitutions: State recognition of customary law around the world* (2011) Annex A: 31-47

- Section 154(1) of the 1993 Constitution of the Kingdom of Lesotho provides that “unless the context otherwise requires”, customary law “means the customary law of Lesotho for the time being in force subject to any modification or other provision made in respect thereof by any act of Parliament”.
- Section 268(1) of the 2005 Constitution of the Kingdom of Swaziland provides that:

The existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.

and Section 268(2) provides:

For the purposes of this section, the expression “existing law” means the written and unwritten law including customary law of Swaziland as existing immediately before the commencement of this Constitution, including any act of Parliament or subordinate legislation enacted or made before that date which is to come into force after that date.

- Article 7 of the 2010 Constitution of the Republic of Angola provides that the “validity and legal force of custom which does not contradict the Constitution and does not threaten human dignity shall be recognised”.
- Section 15(4) of the 1966 Constitution the Republic of Botswana provides:

Subsection (1) of this section [prohibiting discriminatory laws] shall not apply to any law so far as that law makes provision- ... (d) for the application in case of members of a particular race community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect of that matter which is applicable in the case of other persons or not.

and section 88 (2) provides:

The National Assembly shall not proceed upon any Bill (including any amendment to a Bill) that, in the opinion of the person presiding, would, if enacted, alter any of the

provisions of this Constitution or affect- ... (c) customary law, or the ascertainment or recording of customary law;

- The 2005 Constitution of the Republic of Burundi reference to customary law, is a reference to culture under Article 7 which deals with the right to access to the sources of knowledge placing this “under control of the state”.
- Article 2(4) of the 2010 Constitution of the Republic of Kenya provides that any law, including customary law “that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid”.
- Article 2(1) of the 2010 Constitution of the Republic of Madagascar provides for:

The Circle for the Preservation of Fihavanana⁹⁵ ... sees to the prevention of crises and conflicts of all kinds that could affect the ancestral virtues and values amongst Malagasy with a view to preserving national unity.

and in Article 39 for:

The Fokonolona⁹⁶ ... may take appropriate measures to oppose acts that would destroy or damage the environment, dispossess lands, [and] seize spaces traditionally used for cattle herds or for rituals, as long as these measures do not affect general interests and public order. The scope and modalities of these measures as well as the powers of the Fokonolona are determined by law.

- Section 10(2) of the 1994 Constitution of the Republic of Malawi provides that in the development and application of common customary law, due regard shall be had to the principles and provisions of the Constitution.

⁹⁵ *Fihavanana*: Article 2(2) of the 2010 Madagascar Constitution: Composed of elders or persons appointed by the king (non-hereditary posts) *representing men and woman equally, traditional and socio-professional associations or organisations of all autonomous provinces of the Republic* (n 92 above) Annex A: 38

⁹⁶ *Fokonolona*: *Village council composed of elders and other local notables* ‘The Fokonolona and Traditional Governance in Madagascar’ <http://www.wildmadagascar.org/overview/loc/42-fokonolona.html> (accessed 27 December 2016).

- Article 115 (1) of the 1990 Constitution of the Republic of Mozambique provides for the state to “recognise and esteem traditional authority that is legitimate according to the people and to customary law” and in subsection (2) of this article for the state to define the relationship between traditional authority and other institutions and the part that any traditional authority should play in the “economic, social and cultural affairs of the country, in accordance with the law”.
- Article 66(1) of the 1990 Constitution of the Republic of Namibia provides that both customary and common-law in this country in force on the date of independence “shall remain valid to the extent to which such customary or common-law does not conflict with this Constitution or any other statutory law”.
- Article 201 of the 2003 Constitution the Republic of Rwanda provides that:

Unwritten customary law remains applicable as long as it has not been replaced by written laws, is not inconsistent with the Constitution, laws and regulations, and does not violate human rights, prejudice public order or offend public decency and morals.

- Article 2(2) of the 1995 Constitution of the Republic of Uganda provides that if “any law or custom is inconsistent with the Constitution, the Constitution shall prevail and that other law or custom, shall, to the extent of the inconsistency, be void”.
- Articles 23(4) of the 1996 Constitution of the Republic of Zambia regarding protection from discrimination provides:

Clause (1) shall not apply to any law so far as that law makes provision- (d) for the application in case of members of a particular race or tribe, of customary law respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

- Section 89 of the 1979 Constitution of the Republic of Zimbabwe provides:

Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the

High Court shall be the law enforcing the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.

and

- No provision for customary law is found in the 1991 Constitution of the Gabonese Republic, the 2002 Constitution of the Republic of Congo or in the 1998 Constitution of the United Republic of Tanzania.

The primary focus of this discourse is the crime of violating a corpse and while consideration has been given to customary law and its role in subequatorial countries, with prominence given to the South African position, it is appropriate to note that there might be a difference between the South African position regarding customary law and that in other African countries as expounded by Ndulo⁹⁷ above.

2.9 CONCLUSION

Research thus far has determined only a paucity of case law for dealing with the crime of violating a corpse, in addition to the legal position encompassed in the penal codes of certain subequatorial African countries, with the position in South Africa being that it is a common-law crime.⁹⁸

Section 8(3)(a) of the South African Bill of Rights of the Constitution provides that a court is obliged, in order to give effect to a right, to apply that right, or if necessary develop the common law to the extent to either promote, or limit that right, dependent on Section 36 which provides for the limitation of rights, including the importance of the purpose, as well as the nature and extent of the limitation.

The *Mogaramed*⁹⁹ case, which has particular reference to belief or custom, will be discussed further below, but it is mooted that when the legal position regarding the

⁹⁷ Ndulo (n 81 above) 89.

⁹⁸ Christison and Hooctor (n 10 above) 23.

⁹⁹ n 73 above.

crime of violating a corpse, either for traditional medicine or witchcraft purposes, is reviewed by the judiciary in South Africa, it will be clarified further to the extent that customary law, or any cultural defence, will not be accepted in such cases, based on the specific judgement in this particular case.

As indicated above, the constitutional provisions regarding the right to life aside, any barbaric acts against a corpse or the profaning of cadaver are proscribed in terms of the penal codes of the Democratic Republic of the Congo, the Gabonese Republic, the Republics of Angola, Botswana, Burundi, Kenya, Malawi, Rwanda, Uganda and the United Republic of Tanzania. It is not believed that a defence of customary law will be entertained by the courts for this crime.

No specific reference to the violation of a corpse has been found for the Kingdoms Lesotho and Swaziland, the Republic of the Congo, the Republics of Madagascar, Mozambique, Namibia, Zambia and Zimbabwe. With regard to these countries, it is submitted that since the right to life is provided for in the constitutions of all these countries, it is not believed that customary law will prevail as a defence in the violation of a corpse flowing from any murder or for use in traditional medicine, but further research would be required to ascertain current authority, if any.

CHAPTER 3

USE OF BODY PARTS IN TRADITIONAL MEDICINE AND IN WITCHCRAFT

3.1 USE OF BODY PARTS IN TRADITIONAL MEDICINE

As presented above, this discourse is limited to a discussion of the use of body parts used in traditional medicine, but harvested from a corpse, and does not expound on the harvesting of body parts from live victims, or where victims are killed to harvest body parts, on the crime of murder.

According to Carstens belief systems surrounding the use of human *muthi* hold that body parts used as *muthi* serve specific objectives and this author cites a number of body parts used for specific objectives¹⁰⁰:

- Vitality is enhanced by drinking the blood of a victim.
- Any important business venture will succeed or give foresight by the use of a victim's eye.
- Listening to the views of an owner will be enhanced by the use of a victim's ear.
- The breast of a victim ensures reliance by customers on a business owner and may also be used to ensure fertility.
- The vagina of a young girl is used to ensure productivity and wealth to a business venture.
- Testicles serve to enhance sexual prowess and sexual performance.
- A human skull, if built into the foundation of a new building, ensures successful commercial activity; and
- Hands of victims' or parts of hands serve to attract clients and victims in cases of *muthi* crimes might also be hypnotised by using these body parts.

¹⁰⁰ Carstens (n 22 above) 13.

According to Behrens, whose article does not differentiate between witchcraft and traditional healing, but confines itself to views of practices by traditional healers, such body parts are then prepared by the traditional healer, together with other ingredients, such as plants herbs or animal plants, then cooked, and provided to the person seeking *muthi* with instructions for use. This process leads to the creation of human *muthi*.¹⁰¹

In personal discussions with two traditional healers, neither of whom wished to be identified, in November 2016, both persons denied the use of body parts in traditional healing. In the case of one of the persons, it was claimed that such a practice was not condoned by the South African Traditional Healer Organisation, a voluntary association constituted at common-law granting registration to traditional healers and established prior to the Interim Traditional Health Practitioners Council.

The paucity of case law in subequatorial Africa, as set out above, provides scant detail relating to the crime of violating a corpse for the purposes of the use of body parts in traditional medicine.

In the *Kunene and Mazibuko* case¹⁰² body parts were removed for medicinal reasons from a drowned body, but the context, whether by traditional healer or others, and the specific purpose for the removal of the body parts is not mentioned by Christison and Hocter.¹⁰³

Reasons for the removal of body parts in the cases of *Sephuma*¹⁰⁴, *Coetzee*¹⁰⁵, *W*¹⁰⁶, *Shabalala and Others*¹⁰⁷, *Chimboza*¹⁰⁸, and *Shabalala*¹⁰⁹, *Mishkek*¹¹⁰,

¹⁰¹ C Behrens 'Challenges in investigating and preventing "muti"-related offences in South Africa' (2013) 26(1) *Acta Criminologica: Southern African Journal of Criminology* 7.

¹⁰² n 52 above.

¹⁰³ Christison and Hocter (n 10 above) 33.

¹⁰⁴ n 56 above.

¹⁰⁵ n 60 above.

¹⁰⁶ n 63 above.

¹⁰⁷ n 69 above.

¹⁰⁸ n 72 above.

¹⁰⁹ n 74 above.

¹¹⁰ n 76 above.

*Gadiwe*¹¹¹ and *Gaoolelwe*¹¹² do not explicitly link the removal of the body parts from the corpses to use in traditional medicine or witchcraft.

In the case of *Mapholi en Andere*¹¹³ the evidence presented in this case in the trial court was found to be unreliable by the appeal court judge and the convictions and sentences were set aside.

In the case of *Munyai and Others*¹¹⁴, for the purpose of the use of body parts was for the belief that the buried body parts would ensure a successful business venture.

The cases of *Sibande*¹¹⁵, *Modisafife*¹¹⁶, *Masemene*¹¹⁷, *Malaza*¹¹⁸, *Alam*¹¹⁹ do, however, link the act of the removal of body parts either at the direction of a *sangoma* or a witchdoctor.

The *Mogaramedi*¹²⁰ case is, however, both particularly disturbing and pertinent. The facts indicated that the appellant had been practising as a *sangoma* for a decade and required the body part, in this case the genital organ of a deceased close female relative, as part of his final initiation as a traditional healer.

Acting Judge Dosio commented in this case as follows:

[24] *The appellant's religious beliefs and convictions cannot supersede the deceased's right to life. Although everyone has a right to practice their belief, as soon as this belief leads to an action which falls within the bounds of illegality, for instance a murder to obtain body parts, then in terms of section 31(2) of the Bill of Rights it can no longer be condoned or protected merely because it is based on a religious or cultural belief. Cultural and religious beliefs must respect life and must be practiced*

¹¹¹ n 78 above.

¹¹² n 79 above.

¹¹³ n 67 above.

¹¹⁴ n 70 above.

¹¹⁵ n 62 above.

¹¹⁶ n 65 above.

¹¹⁷ n 66 above,

¹¹⁸ n 68 above

¹¹⁹ n 71 above.

¹²⁰ n 73 above.

in line with the Bill of Rights. If one allows such factors as in this present case to be regarded as substantial and compelling it will open the floodgates for many other accused found guilty of killing innocent victims and dismembering their bodies, for muti purposes, to seek lesser sentences than those prescribed.

...

[31] *... This belief to kill another human being for muti related purposes goes against the very core of our constitution. Due to the appellant's deep rooted belief that it is a necessity to kill a human being to complete his initiation as a Sangoma there is a strong probability that the appellant may in future give the same advice to another prospective Sangoma initiate. ... Deterrent and retributive objects of punishment have to play a dominant role in such a case.*

...

[35] *Bearing in mind the strong cultural belief surrounding traditional healers and the fact that muti killings are unlikely to stop in the future, it is the task of this court to deter the killing of innocent people for such purposes. The community must be protected. The aspect of general deterrence is important to restore the trust the community have in the justice system. To regard such killings as substantial and compelling circumstances would send out the wrong message to the community. The prevalence of such cases in South Africa is high ^{xviii} 121. The continuation of such killings will create more instability in the communities where such practices arrive. A strong message must be sent out that such conduct will not be condoned in a civilised society. Where such killings arise they must be punished with the full strength of the law.*

Only in three cases were the accused convicted of violating a corpse and in the other cases the accused were convicted of murder, confirming the view by Carstens above¹²² that no proper legal distinction is made and perpetrators are charged with the crime of murder.

Behrens indicates that "Most traditional healers do not condone the use of human *muti* ..." ¹²³, which was also cited in this case by Acting Judge Dosio.

¹²¹ D Dosio AJ citing DN Swart 'Human trafficking and the exploitation of women and children in a Southern and South African context' (2012) 13(1) *Child Abuse Research in South Africa* 62-73.

¹²² Carstens (n 22 above) 13.

¹²³ Behrens (n 101 above) 9.

3.1 USE OF BODY PARTS IN WITCHCRAFT

As set out in the preceding section the act of the removal of body parts either at the direction of a *sangoma* or a witchdoctor could be researched in only some six cases and it is, moreover, unclear from the case law that the use of body parts was for purposes of traditional medicine or witchcraft by the *sangoma* or witchdoctor, personally, in the preparation of *muthi*.

In the United Republic of Tanzania, Salewi indicates that albinos, considered outcasts in society, are victims of witchcraft, since, in such situations the demand for body parts becomes high¹²⁴ due to the various myths surrounding this group of persons, including that they are born as punishment, that it is a curse to give birth to an albino and that they are spirits.¹²⁵ Phatoli and others quote an interviewee as stating that albinos are termed *isishawa*, denoting persons who are cursed or *inkawu*, denoting a ‘white baboon’ in isiZulu.¹²⁶

In the further discourse on this phenomenon, Salewi indicates that there is a belief that charms “made with body parts, particularly hair, genitals, limbs, breasts, fingers, the tongue and blood make strong magic potions” sell for higher prices than the average annual income in this country and that the demand for body parts from this group of persons has prompted inhumane attacks where living persons are mutilated for their body parts and then left to die.¹²⁷ Salewi’s discourse examines international legal protection of this group of persons, as well as the national legal framework and while mentioning the 1945 Penal Code of this country, focusing on the crime of murder, she does not address the crime of violating a corpse.¹²⁸

Salewi further indicates that a temporary suspension of the licensing of “traditional healers”, who are key suspects in the trading of albino parts, has been effected. The

¹²⁴ Salewi (n 80 above) 9.

¹²⁵ Salewi (n 80 above) 1.

¹²⁶ R Phatoli et al ‘Being black in a white skin: beliefs and stereotypes around albinism at a South African university’ (2015) 4(1) *African Journal of Disability* 4.

¹²⁷ Salewi (n 80 above) 12-13.

¹²⁸ Salewi (n 80 above) 14-30.

licensing of “traditional witch doctors” has been withdrawn, and consequent to this banning, a mass departure of some of the witchdoctors has occurred to neighbouring countries such as the Republic of Burundi. She indicates that by 2011, in the United Republic of Tanzania, the High Court had sentenced only seven people to death for the killing of persons suffering from albinism.¹²⁹

According to Smith¹³⁰

At least 74 people with albinism have reportedly been murdered in the East African country since 2000. After a surge in 2009, the government placed children with albinism in special homes to protect them.

These statistics, if viewed against the perception that the killing of such persons is said to be widespread, are seemingly insignificant.

3.2 CONCLUSION

The paucity of case law in subequatorial Africa is such that it is unable to be determined whether body parts are used by either practitioners of traditional medicine or by persons exercising witchcraft, seemingly from the case law cited above then only at the direction of either the *sangoma*, witch or as a result of a belief in witchcraft.

¹²⁹ Salewi (n 80 above) 34.

¹³⁰ D Smith ‘Tanzania bans witchdoctors an attempt to end albino killings’ <https://www.theguardian.com/world/2015/jan/14/tanzania-bans-witchdoctors-attempt-end-albino-killings> (accessed 29 December 2016).

CHAPTER 4

REVIEW OF THE USE OF BODY PARTS IN TRADITIONAL MEDICINE AGAINST THE CRIMINALISATION OF THE VIOLATION OF A CORPSE

4.1 REVIEW OF THE LEGAL POSITION

Various legislative instruments, as well as common-law, for countries in subequatorial Africa have been examined and their review follows below.

4.1.1 CONSTITUTIONAL LAW CONSIDERATION IN SOUTH AFRICA

Section 11 of the Bill of Rights of the Constitution provides for the right to life by everyone, whereas section 10 of the Bill of Rights of the Constitution provides:

Everyone has inherent dignity and their right to have their dignity respected and protected.

Section 12(2)(b) of the Bill of Rights of the Constitution provides for the right to bodily and psychological integrity, and to security in and control over the body of the person.

In *S v Makwanyane*¹³¹, O'Regan J, commenting on the constitutional right to dignity:

[326] *The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to sharing the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.*

¹³¹ 1995 ZACC 3; 1995 3 SA 391 (CC).

[327] *The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity. ...*

In the same case, Langa J commented:

[225] *An outstanding feature of Ubuntu¹³² in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. during violent conflicts and times when violent crime is rife, distraught members of society decrying the loss of ubuntu. Thus heinous crimes are the antithesis of ubuntu. Treatment that is cruel, inhuman or degrading is bereft of ubuntu.*

As indicated by Acting Judge Dosio in the *Mogaramedi*¹³³ case, any religious belief or conviction which falls within the ambit of illegality, such as any *muthi* murder, cannot supersede any person's right to life and may not be tolerated in terms of section 31(2) of the Bill of Rights simply for reason that it is based on a religious or cultural belief.

In all other countries in subequatorial Africa the right to life is protected, as it is in South Africa.

4.1.2 COMMON AND CRIMINAL LAW IN SUBEQUATORIAL AFRICA

The violation of a corpse is a common-law crime in South Africa.¹³⁴ In other subequatorial African countries, any barbaric acts against a corpse or the profaning of cadaver are proscribed in terms of the penal codes of the Democratic Republic of the Congo, the Gabonese Republic, the Republics of Angola, Botswana, Burundi, Kenya, Malawi, Rwanda, Uganda and the United Republic of Tanzania.

¹³² *Ubuntu* 'A quality that includes the essential human virtues; compassion and humanity'
https://www.google.com/search?q=ubuntu+meaning&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&ei=MI1iWOyADOOo8wfalaxg (accessed 27 December 2016).

¹³³ n 73 above.

¹³⁴ Christison and Hctor (n 10 above).

No specific reference to the violation of a corpse has been found for the Kingdoms of Lesotho and Swaziland, the Republic of the Congo, the Republics of Madagascar, Mozambique, Namibia, Zambia and Zimbabwe. In these subequatorial African countries, however, the right to life is protected, as it is in South Africa, as has been mentioned above.

4.1.3 SOUTH AFRICA: REGULATIONS TO THE NATIONAL HEALTH ACT¹³⁵

Regulations No.R.180, gazetted by the Minister of Health in March 2012 in terms of sections 90(1), read together with section 68(1) of the National Health Act, provide for the general control of human bodies, tissue, blood, blood products and gametes.

These regulations provide that no person may remove human tissue, blood or gametes from the body of another living person unless with written consent only and that such may only be used for medical or dental purposes, including transplantation or for the production of therapeutic, diagnostic or a prophylactic substance, for testing purposes, administration to another living person or the production of a blood product, as well as in cases of artificial insemination. Illegal use is therefore criminalised, but only where such is harvested from a living person.

Section 64 of this act provides that where a body, tissue blood or blood products of deceased persons are donated, such may only be used for the purposes of training of students, health research, advancement of health sciences, therapeutic purposes or the production of a therapeutic, diagnostic or prophylactic substance. Section 64(2)(a) and (b) of this act provides that this act does not, however, apply to the preparation of a body of a deceased person in cases of embalming, whether or not such preparation includes the making of incisions in the body for the withdrawal of blood and replacement thereof by a preservative or the restoration of any disfigurement or mutilation of the body before its burial.

¹³⁵ Act 61 of 2003.

As indicated above, Carstens indicates that in any *muthi* murder, either in cases where a body part or a body with missing parts is found, a medico-legal autopsy is performed in light of legal precepts relating to the concept of “other than a natural death”.¹³⁶ Other autopsies are conducted by the consent of either the person, while alive, or by relatives of the deceased or where such an examination is necessary for determining cause of death in terms of section 66 of this act.

4.1.4 SOUTH AFRICA: PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS ACT¹³⁷

For the purposes of this act, “body part” is taken to mean any blood product, embryo, gamete, gonad, oocyte, organ or tissue as defined in the National Health Act,¹³⁸ which has been discussed in the immediately preceding section of this discourse.

The definition in this act for “exploitation” includes the “removal of body parts”, with the latter being defined as “the removal of or trade in any body part in contravention of any law”.

4.1.5 2009 PENAL CODE: REPUBLIC OF BURUNDI AND 2012 ORGANIC LAW INSTITUTING THE PENAL CODE: REPUBLIC OF RWANDA

The 2009 Penal Code for the Republic of Burundi criminalises the possession of any human tissue. The 2012 Organic Law Instituting the Penal Code of the Republic of Rwanda provides for offences in human trafficking, the illegal removal, sale and use of body parts and criminalises the removal of organ or some of the body products from a dead person, without proper consent during that person’s lifetime, or if the removal prevents the determination of the cause of death.

¹³⁶ Carstens (n 22 above) 1.

¹³⁷ Act 7 of 2013.

¹³⁸ Act 61 of 2003.

4.1.6 WITCHCRAFT LEGISLATION

As indicated above, legislation regarding this paradigm is not the primary focus of this discourse, but research has brought to light some legislative instruments seeking to control this practice, namely for the Republic of South Africa, as well as the Republics of Botswana, Kenya, Uganda and the United Republic of Tanzania. All these instruments show a significant degree of similarity, proscribe the practice, but also, in some cases, the possession of witchcraft articles, termed “charms” or a “curio”. These articles might reasonably be regarded as being body parts, as indicated by Salewi¹³⁹ and further research would be required for the other subequatorial African countries not mentioned.

The South African Criminal Law (Sentencing) Amendment Act¹⁴⁰ amended the Criminal Law Amendment Act¹⁴¹ to include the following provisions into section 51 of this act with regard to sentencing:

Murder, when-

...

(e) the victim was killed in order to unlawfully remove any body part of the victim, or as a result of such unlawful removal of a body part of the victim; or

(f) the death of the victim resulted from, or is directly related to, any offence contemplated in section 1(a) to (e) of the Witchcraft Suppression Act, 1957 (Act 3 of 1957).

This legislation does not address the use of the body parts for *muthi* in the violation of a corpse, except where the violator is also the murderer.

The Witchcraft Suppression Act¹⁴², the proposed Mpumalanga Witchcraft Suppression Bill¹⁴³, as well as the Ralushai Commission report are not salient to the purposes of this particular discourse, but the findings of the latter commission, to

¹³⁹ Salewi (n 80 above) 14-30.

¹⁴⁰ Act 38 of 2007.

¹⁴¹ Act 105 of 1997.

¹⁴² Act 3 of 1957.

¹⁴³ 2007.

state succinctly, include the finding that traditional healers were involved in witchcraft-related killings and ritual murders, albeit indirectly.¹⁴⁴

The Kingdom of Swaziland Immigration Act¹⁴⁵, in section 9(iv), prohibits the immigration of persons into this country who have contravened any law:

... relating to habit-forming drugs or of a law relating to the practice of herbalism or witchcraft...

4.2 CONCLUSION

It has been established that the violation of a corpse is a criminal offence in the Democratic Republic of the Congo, the Gabonese Republic, the Republics of Angola, Botswana, Burundi, Kenya, Malawi, Rwanda, South Africa, Uganda and the United Republic of Tanzania, for whatever purposes, including then for use in traditional medicine or for use in witchcraft, either by persons believing in such or by witches themselves.

Further, the removal of body parts is proscribed in South Africa by legislation concerning the trafficking of persons, as it is in the Republic of Rwanda. The 2009 Penal Code for the Republic of Burundi criminalises the possession of any human tissue.

South African legislation also regulates and controls the removal of tissue, blood, blood products or gametes, as indicated above, whether from living persons or from donated bodies and for specific purposes only.

The legal position of the violation of a corpse for the Kingdoms of Lesotho and Swaziland, the Republic of the Congo, the Republics of Madagascar, Mozambique, Namibia, Zambia and Zimbabwe is not known and further research is required in this specific regard, but in light of the constitutional provisions regarding the right to

¹⁴⁴ Ralushai (n 30 above) 40.

¹⁴⁵ Unnumbered, 1964.

life, it is believed that the violation of a corpse, for whatever reason, will constitute a criminal offence.

No mitigation of the use of body parts after any violation of a corpse in traditional medicine is thus found.

CHAPTER 5

CULTURAL DEFENCE OR MITIGATION WITHIN CUSTOMARY LAW

5.1 CULTURAL DEFENCE

The SALRC¹⁴⁶ suggested that the acknowledgement of witchcraft might lead to the possibility of creating a cultural defence in criminal law, but questioned whether this should be encouraged.

Grobler¹⁴⁷, in discussing the demarcation of cultural offences and the cultural defence, refers to Van Broeck, who, in stating that the definition is a more elaborate version of the definition given by the Dutch legal anthropologist, Strijbosch, defines a cultural offence, as:

*... an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation.*¹⁴⁸

Van Broeck, citing various authorities, regards the following as a substantial definition of a cultural defence:¹⁴⁹

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

and concludes that a formal definition¹⁵⁰ of a cultural defence would be:

¹⁴⁶ SALRC (n 19 above) 6-7.

¹⁴⁷ Grobler (n 21 above) 69.

¹⁴⁸ J van Broeck 'Cultural defence and culturally motivated crimes (Cultural offence)' (2001) 9(1) *European Journal of Crime, Criminal Law and Criminal Justice* 5.

¹⁴⁹ Van Broeck (n 148 above) 29.

¹⁵⁰ Van Broeck (n 148 above) 29.

... a specific doctrine that recognises the cultural background of the defendant as an excuse or mitigating circumstances in a penal case.

Carstens¹⁵¹ concludes that any such defence should be regarded with circumspection and the defence should be categorised into crimes which are induced by a genuine belief in witchcraft and those in which persons are killed for *muthi* for purposes of financial gain, the latter presumably referring to instances in which *sangomas* or witchdoctors have directed the provision of body parts.

5.2 CONSTITUTIONAL RIGHTS

As indicated above, with regard to the constitutional rights in all countries in subequatorial Africa, the right to life is a primary tenet of the constitutions of all these countries. In addition, in South Africa, the rights to dignity, security and control over the own body are also protected by the Constitution.

Customary law, as indicated above, is overwhelmingly subject to any constitution in any of the subequatorial African countries, with exceptions in the constitutions of the Gabonese Republic, the Republic of Congo and the United Republic of Tanzania.

In South Africa, the judgement in the *Mogaramedi*¹⁵² case, as cited above, clearly indicates that any cultural defence cannot supersede any person's right to life and may not be tolerated in terms of section 31(2) of the Bill of Rights simply for reason that it is based on a religious or cultural belief.

5.3 CONCLUSION

It is not believed the cultural defence, or mitigation within customary law, will succeed in respect of the violation of a corpse for traditional medicine purposes in light of the customary law precepts and the fact that the right to life is a primary tenet of all constitutions in subequatorial Africa.

¹⁵¹ Carstens (n 22 above) 21.

¹⁵² n 73 above.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

In preparing this discourse, I have examined whether the use of body parts for medicine or for other purposes, commonly termed *muthi*, falls within the paradigm of traditional medicine in countries in subequatorial Africa. Legislative instruments in these countries have been researched for this purpose and case law relating to this topic has also been examined. The practice of witchcraft, while not the main focus of this discourse, given the professed use of body parts in the practice, has also been examined.

6.2 REVIEW OF THE REGULATORY FRAMEWORK

The crime of the violation of a corpse has been found to be extant in South African common-law. Penal codes of the Democratic Republic of the Congo, the Gabonese Republic, the Republics of Angola, Botswana, Burundi, Kenya, Malawi, Rwanda, Uganda and the United Republic of Tanzania criminalise acts of violation on any corpse, but are applicable only to perpetrators and not to end-users.

No specific reference to the violation of a corpse had been found for the Kingdoms of Lesotho and Swaziland, the Republic of the Congo, the Republics of Madagascar, Mozambique, Namibia, Zambia and Zimbabwe.

In addition, South African legislation regulates and controls the removal from human bodies of tissue, blood, blood products and gametes in cases of consent for use in prescribed conditions. Legislation in South Africa and for the Republic of Rwanda sets out to control the removal of body parts in situations of human trafficking and the 2009 Penal Code for the Republic of Burundi criminalises the possession of any human tissue.

The South African Criminal Law (Sentencing) Amendment Act¹⁵³ amended the Criminal Law Amendment Act¹⁵⁴ to provide for sentencing of body part removal in cases of murder, but does not address the use of body parts for *muthi* in the violation of a corpse, except where the violator is also the murderer.

In all countries in subequatorial Africa, the right to life is provided for in the constitutions of these countries.

6.3 END-USER LIABILITY FOR USE OF BODY PARTS IN TRADITIONAL MEDICINE

The SALRC¹⁵⁵ suggested inclusion, as a term of reference, as to whether the provisions of the Human Tissue Act¹⁵⁶ had been successful in curbing *muthi* murders and dealing with the offence of the illegal possession of human body parts.

This legislation was repealed in March 2012 and replaced by promulgation of regulations in terms of Chapter 8 of the National Health Act¹⁵⁷, which regulate and control the removal of human tissue, blood or gametes in cases of consent only for use in prescribed conditions.

The SALRC¹⁵⁸ also posed the question as to whether persons who demand and use *muthi* should not be punished.

The Prevention and Combating of Trafficking in Persons Act¹⁵⁹ was promulgated in 2013 and criminalises both the removal or trade of any body part in contravention of any law. Legislation for the Republic of Rwanda criminalises the illegal removal, sale and use of body parts, presumably including and criminalising any end-user.

¹⁵³ Act 38 of 2007.

¹⁵⁴ Act 105 of 1997.

¹⁵⁵ SALRC (n 19 above) 7.

¹⁵⁶ n 26 above.

¹⁵⁷ Act 61 of 2003.

¹⁵⁸ SALRC (n 19 above) 48.

¹⁵⁹ Act 7 of 2013.

The 2009 Penal Code for the Republic of Burundi criminalises the possession of any human tissue.

Despite the promulgation of these legislative instruments and as from the dates of promulgation, only in two cases, namely in *Chimboza*¹⁶⁰ and *Mogaramedi*¹⁶¹, were the accused convicted of murder, but they were not charged with any offences under these legislative instruments.

It would be appropriate, it is believed, if end-user liability for the use of body parts were to see legislative review, as is recommended below.

6.4 RECOMMENDATIONS

Behrens in discussing the challenges in investigating and preventing *muti*-related offences indicates that there are:

*... factors related to the nature of muti-related offences that make their successful investigation difficult. Many of these factors also have an impact on any attempts to prevent muti crime ...*¹⁶²

The subequatorial African geographical environment is particularly harsh given the generally high temperatures in the environment, with various degrees and the range of humidity in tropical or subtropical environments can lead to the relatively quick degradation of a corpse; desiccation in desert environments likewise compromises forensic examination of a corpse. These factors militate against proper identification of the victim, the cause of death, whether wounds were made ante- or post-mortem, or whether animal activity has occurred compromising the integrity of the crime scene and the corpse.

¹⁶⁰ n 72 above.

¹⁶¹ n 73 above.

¹⁶² Behrens (n 101 above) 12.

The following recommendations are based on Behrens's views, which are accepted as valid not only for South Africa, but also for the other subequatorial African countries.¹⁶³

6.4.1 THE SOUTH AFRICAN POLICE SERVICE (SAPS)

There is no identified category for *muthi*-related offences, whether in cases of murder or in cases of the violation of corpse, in the SAPS statistic database. An identified category for statistical reasons would be expedient in the identification of these crimes, the number of cases prosecuted, ensuing convictions and sentences passed. Such statistics would be of use to law enforcement agencies, the judiciary and the executive alike, as well as to researchers.

6.4.2 CATEGORY OF CRIME

As illustrated above, only three cases were found to have dealt specifically with the crime of violating a corpse.

A distinction should be made between witchcraft murders and witchcraft or *sangoma*-related *muthi* murders, supported by Minnaar¹⁶⁴ and Carstens¹⁶⁵, but also where corpses are violated for *muthi* purposes, by whichever perpetrator. The common-law crime of violating a corpse is extant in South African law and law enforcement agencies seemingly do not include this crime to the charge sheet. Perpetrators who commit murder and subsequently violate a corpse are seemingly prosecuted for the common-law crime of murder only, given the statistics mentioned in the first paragraph of this subsection.

¹⁶³ Behrens (n 101 above) 12-14.

¹⁶⁴ Minnaar (n 6 above) 86.

¹⁶⁵ Carstens (n 22 above) 1.

The provisions of the National Health Act¹⁶⁶ and the Prevention and Combating of Trafficking in Persons Act¹⁶⁷ should be reviewed to ensure that the crime of violating a corpse is encased in these legislative instruments.

Further, it is recommended that legislation be reviewed to cover acts by all perpetrators of the crime, as is discussed further below, and legal scopes of practice for traditional health practitioners should specifically include a prohibition of the use of any body parts as part of their pharmacopoeia.

6.4.3 TRAINING FOR LAW ENFORCEMENT AGENCIES

The training of law enforcement agencies needs to address the fears and beliefs of its members towards a better understanding of the concept of witchcraft, as contrasted with traditional medicine. It may reasonably be believed that fear of witchcraft exists and some members of the law enforcement agencies fear retribution as a result of investigation into such crimes. The training should also encompass the question of cultural diversity within any one of the subequatorial African countries given the pluralistic and multicultural nature of these countries. Consideration should be given to the establishment of a specialist unit to address these crimes and it is also important that a sound working relationship be built up with traditional leaders to obtain co-operation in these matters.

6.4.4 LAW ENFORCEMENT RESOURCES

Rural areas in subequatorial Africa are generally under-resourced. This, together with a general mistrust of authority, compromises the proper investigation of these crimes. A number of reasons, such as mistrust, or fear of retribution also lead to the underreporting of these crimes and it is recommended that the organisational capacity of law enforcement agencies be extended to servicing under-resourced areas and to building trust with traditional leaders and communities in these areas.

¹⁶⁶ Act 61 of 2003.

¹⁶⁷ Act 7 of 2013.

A further factor which may compromise proper investigation of these crimes relates to general levels of illiteracy in rural areas, particularly, but also possibly to the improper record-taking and record-keeping related to these crimes.

6.4.5 PERPETRATORS OF CRIMES

In *muthi* crimes there may be more than one person involved in the crime, depending on the exact circumstances of the case.

- Firstly, the perpetrator of the crime who kills the victim and violates the corpse, whether for simple sale as in the trafficking of human body parts or for the provision of such to another person such as a witch or a traditional healer;
- Secondly, the person at whose behest the crime is committed, whether witch, traditional healer or other person; and
- Thirdly, the buyer of the *muthi*, or the end-user of the *muthi* containing body parts.

Law enforcement agencies should investigate all persons involved in these crimes with a view to prosecuting all parties involved, which may pose some considerable difficulty. In cases where victims have not died, for example, they are able to testify as to the alleged attacker, but not necessarily to the person who requested the body part or the end-user, which compromises the investigation by law enforcement agencies.

6.4.6 STATE FORENSIC LABORATORIES AND MORTUARIES

While science has developed to the extent that forensic investigation authorities may use sophisticated techniques in the identification of any corpse, laboratories experience a severe backlog in carrying out such duties and the allocation of greater financial resources to expedite forensic work is required.

With regard to mortuaries, from which it is averred that body parts have been stolen, it is incumbent that proper security measures are put in place to prevent such crimes.

The Protected Disclosures Act¹⁶⁸ as a South African legislative instrument to protect whistle-blowers when reporting crimes, whether in forensic laboratories or in mortuaries, should be revised to ensure the proper protection of any person reporting a crime, if applicable.

6.4.7 NATIONAL IDENTIFICATION DATABASE

It is common cause that the identity details of all persons are not captured in relevant databases; cases also exist where identity details are either partially, or incorrectly, captured. Relevant agencies should strive for complete compliance in this regard.

6.4.8 PUBLIC AWARENESS AND EDUCATION CAMPAIGNS

Campaigns should be implemented to draw the attention of the public to *muthi* crimes, to encourage reporting of such and for traditional leaders to denounce such within their communities.

6.4.9 POLITICAL WILL

None of the issues mentioned above will see resolution unless there is political will within the governments in subequatorial Africa to redress *muthi* crimes comprehensively and these should view such as a priority, redress any *lacunae* in relevant laws and allocate financial resources to the various bodies under whose remit such matters fall.

¹⁶⁸ Act 26 of 2000.

6.5 CONCLUSION

No mitigation for the use of body parts in traditional medicine post-violation of a corpse has been found in South African common-law or other legislative precept.

The penal codes of the Democratic Republic of the Congo, the Gabonese Republic, the Republics of Angola, Botswana, Burundi, Kenya, Malawi, Rwanda, Uganda and the United Republic of Tanzania criminalise acts of violation on any corpse, but are applicable only to perpetrators and not to end-users, except for the Republic of Rwanda and possessors of body parts for the Republic of Burundi.

In addition, South African legislation regulates and controls the removal of human tissue, blood or gametes from living persons in cases of consent only and for use in prescribed conditions. Legislation also controls the removal and trade of body parts in situations of human trafficking, but no specific provision is made for end-users. Legislation of the Republic of Rwanda makes the illegal the removal, sale and use of human body parts a crime and legislation for the Republic of Burundi criminalises the possession of any human tissue.

No specific reference to the violation of a corpse had been found for the Kingdoms of Lesotho and Swaziland, the Republic of the Congo, the Republics of Madagascar, Mozambique, Namibia, Zambia and Zimbabwe. With regard to these countries, it is submitted that since the right to life is provided for in the constitutions of these countries, it is not believed that customary law will prevail in the violation of a corpse flowing from any murder where the perpetrator of the crime of murder is the same person as the violator of the murdered body, but this will be for the courts of these countries to decide on the basis of the specific provisions for the recognition and application of customary law against the relevant constitutions.

The South African legal position is clear in that customary law, or a cultural defence, will not be condoned in instances of murder for body parts, as set out by Acting

Justice Dosio in the *Mogaramedi*¹⁶⁹ case and it is not believed that such defences would prevail in those other subequatorial countries whose penal codes criminalise the violation of a corpse. The South African Constitutional right to dignity and *Ubuntu* in the *Makwanyane* case have been addressed by Judge O'Regan and Judge Langa¹⁷⁰. Against this background, the views of the Christison and Hctor also resonate fundamentally to the common-law crime of the violation of a corpse with respect to dignity:

*Although a corpse has no legal personality at all, to contend that protection of a person's dignity is extinguished by the mere fact of death is to diminish the content of the right, and to undermine the normative framework embodied in the Constitution. Although the dead are incapable of enforcing the right to dignity (and in a technical legal sense, of possessing it), it is submitted that society as a whole has an interest in the preservation of dead persons' dignity and the State a role as custodian of this right. Criminalising the act of violation of a corpse (or a grave, for that matter) can thus be justified on the basis of this need to recognise the possibility of injury to a deceased person's dignity. It is submitted that the effect of criminalisation insofar as this purpose is concerned, is to clothe a charge of *crimen injuria* in a manner that is compatible with our laws present conception of legal personality. The right to dignity, together with the right to privacy and thus collectively, the concept of *dignitas* underpins the right to bodily and psychological integrity, which is enshrined in section 12 (2) of the Constitution...*¹⁷¹

As demonstrated above, research has discovered only a paucity of case law relating to the crime of violating a corpse in traditional medicine. It has not been possible to ascertain whether such use is widespread within traditional medicine, or is confined to specific instances only. Further research would be required for any further fuller discourse on the matter. In termination of this discourse, it is submitted that the legal position of the crime of violating a corpse for the use of body parts in traditional medicine should not be reviewed to accommodate such use, but should preferably provide purposely for clarification of all legal precepts relating to the specificity of this crime and to oppose any perception of such practices and beliefs in traditional medicine as being justified in any manner.

¹⁶⁹ n 73 above.

¹⁷⁰ 1995 ZACC 3; 1995 3 SA 391 (CC).

¹⁷¹ Christison and Hctor (n10 above) 35-36.

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