

COMMON LAW CRIMES AND INDIGENOUS CUSTOMS

Some Challenges Facing South African Law

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1. Introduction

In 2002, a great deal of controversy concerning the relationship between crime and custom germinated in the Australian media.¹ The debate was sparked by a case involving a 50 year old Aboriginal man, Jackie Pascoe Jamilmira, who was sentenced to 13 months imprisonment on a charge of statutory rape² by a magistrate in Maningrida in the Northern Territory of Australia.³ Jamilmira appealed his sentence to the Northern Territory Supreme Court⁴ and contended, amongst others, that the magistrate had failed to give due consideration to the relevant customary law allowing him to have sexual intercourse with his "promised wife". The court accepted that the magistrate had failed to give due consideration to the customary law practice of promised wives and reduced Jamilmira's sentence to 24 hours imprisonment for statutory rape.⁵ Widespread criticisms in the media led the prosecutions to appeal⁶ and Jamilmira's sentence was increased to 12 months imprisonment. Ultimately, Jamilmira sought leave to appeal the increased sentence, but leave was refused.⁷



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

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

This quote could easily be applied to the South African setting.⁹ South African law generally consists of two components, which can best be described as a Western and an African component. The Western component comprises the Roman-Dutch law as influenced by English law and adapted and developed through judicial decisions and legislation, and is referred to as common law of South Africa.¹⁰ Traditionally the common law is divided into private and public law,¹¹ and since the criminal law primarily deals with the relationship between the state (as prosecuting organ) and the criminal (a private individual), it forms part of public law.¹²

The African component consists of the written and unwritten laws of the indigenous communities, which is referred to as customary law.¹³ It can safely be accepted that the South African Constitutions¹⁴ removed any doubt as to the status of customary law in the South African legal system; it is part of modern South African law on a par with (and not subordinate to) the common law (Roman-Dutch law).¹⁵ In the context of customary law, limited criminal jurisdiction is conferred on traditional leaders (chiefs or headmen),¹⁶ and although this system is not free from criticism, it is generally accepted that customary courts have an important role to play in the adjudication of customary law issues between individuals living in indigenous communities.¹⁷

Both the common and customary systems of law recognise and define crimes¹⁸ and both systems prescribe punishment for crimes committed.¹⁹ However, the value systems of these two systems differ considerably and it is inevitable that conflict situations will arise. It is especially the Western courts which, from time to time, had to deal with the situation where indigenous custom served as the motivation for committing a crime.²⁰ This situation has been referred to as "the cultural defence in criminal law" by other legal scholars.²¹

In assessing the available literature and case law, it becomes evident that indigenous custom has played a role in two instances: firstly, in determining whether the requirements for a particular crime have been met and secondly, in determining what the suitable punishment for a convicted accused should be. In the presentation at hand I shall limit my discussion to the nature, scope, application and extent of the cultural defence in the first instance, namely as a factor affecting the elements of a common law crime.²² The (likely?) influence of the human rights based constitutional provisions of the South African Constitution on the whole debate will also be considered.

2. Influence of custom on the requirements of a crime

2.1 General remarks

In general, there are five requirements for criminal liability under the common law, namely: legality,²³ conduct,²⁴ fulfilment of definitional elements,²⁵ unlawfulness²⁶ and culpability.²⁷ To be convicted of an offence in South Africa, the state has to prove all these elements beyond reasonable doubt. Conflict situations can arise when a particular conduct can be classified as a crime by looking at it through a common law lens, but classified as indigenous custom by looking at it through a customary law lens.

Of particular importance here, is the relationship between the requirement of culpability and practicing an indigenous custom. The mere fact that a person has committed an unlawful act which corresponds with the definitional elements of the crime does not mean that he is guilty of such a crime;²⁸ his conduct must also be culpable.²⁹ A prerequisite for culpability is criminal capacity. This means that the offender must be able to distinguish between right and wrong and must be able to act in accordance with this appreciation. Once it is clear that the offender acted with criminal capacity, the test for

culpability must continue.³⁰ Two forms of culpability can be distinguished, namely intention (*dolus*) and negligence (*culpa*).³¹

Intention consists of two elements. The first element has a cognitive (intellectual) dimension and requires *knowledge* of the definitional elements of the crime and of the unlawfulness of the act. The second element has a conative (voluntative) element and consists in directing the *will* towards a certain act or result.³² In other words, to have intent firstly means that the offender must be aware that his actions are not justified³³ and secondly, that his actions constitute a crime in terms of the law.³⁴

Some common law crimes require a lesser form of culpability than intent, namely negligence.³⁵ The test to determine negligence is based on the question whether a reasonable person in the same circumstances would have foreseen the possibility that his actions might be criminal.³⁶ Snyman³⁷ points out that this test is normative in character: it requires a value judgement by someone else than the offender himself. In the case of a culturally motivated action that constitutes a common law crime, it is usually the sophisticated and educated judge who decides what the reasonable person in the same circumstances would or should have done.

Against this background, it should be clear that problems might arise when someone's actions might be seen as lawful in terms of customary law, but unlawful in terms of the common law. Can it be said that such a person has acted with the necessary culpability? An assessment of the South African case law reveals that there were at least two instances where the defence of indigenous custom came under the magnifying glass: the one example being an **indigenous custom**, namely the so-called *twala* custom³⁸ and the other an **indigenous belief**, namely a belief in the *tokoloshe*.³⁹

2.2 *Twala*⁴⁰ custom

In the *Pascoe v Hales* case,⁴¹ the Australian Appeal Court commented that it was surprising that Jamilmira was charged at all since "the incident occurred within the context of tribal law." The court was of opinion that aboriginal custom meant that the accused could have sexual intercourse with his "promised wife" even though she was only 15 years old. Another source reported that the judge observed that the girl knew what was expected of her and for that reason she did not need legal protection.⁴² Though the fact that the court did not give enough attention to the rights of minor women in indigenous culture may be criticised, the facts of the case are not unique to the Australian setting.

A custom of the indigenous communities in South Africa, which resembles the Australian custom of a "promised wife", is the *twala* custom. According to this custom, a girl is "carried away"⁴³ by a man, his family or his friends with a view to marriage.⁴⁴ The *twala* custom, its requirements and its consequences differ from community to community, but referring to the Xhosa community as illustration, three forms of *twala* can be distinguished:⁴⁵ (a) the two parties elope without the permission of the girl's

parents in order to force the parents to agree to their marriage;⁴⁶ (b) the girl is forcibly carried away without her permission, but with the permission of her parents and the parents of the man;⁴⁷ and (c) the girl is forcibly carried away without her or her parents' permission.⁴⁸

Although the *twala* custom is quite common among some indigenous communities,⁴⁹ the Western courts have been suspicious of it since early times.⁵⁰ This is so because of the fact that the custom complies in many ways with the requirements of some common law crimes such as abduction, rape or assault. The common law crime of abduction is described as the unlawful taking of "a minor out of the control of his or her custodian with the intention of enabling someone to marry or have sexual intercourse with that minor".⁵¹ The legal interest which is being protected is firstly, the factual control of the parents or guardian over the minor and secondly, the right of the parents or guardian to consent to the marriage of the minor. The consent of the minor to the acts of the wrongdoer is no defence against the crime of abduction.⁵² In the instance of the *twala* custom the carrying away of the girl without her parents' permission would satisfy the requirements for abduction (especially forms (a) and (c) as set out above).

In *R v Njova*⁵³ the court held that the removal of an unmarried girl by a "native man of a native girl" for purposes of marriage or sexual intercourse constitutes the crime of abduction.⁵⁴ In another case, *Ncedani v R*,⁵⁵ it was confirmed that the forcible removal of a minor girl without her or her guardian's consent constitutes the crime abduction.⁵⁶ Both courts refused to accept the *twala* custom as a defence against the crime of abduction.⁵⁷ More or less the same viewpoint was taken in *R v Sita*.⁵⁸ The argument was made that the parents' lack of consent in the taking away of their daughter was overcome by the custom of *twala*. In other words, it was contended that because of the custom of *twala* the accused could disregard the parents' objection and the custom stood in the place of their consent.⁵⁹ The court said that it failed to see how a custom (irrespective of the fact that the custom is legal or illegal) can override a common law crime and held:⁶⁰

The Common Law as regards this offence requires the consent of the parents and guardians before the girl can be taken from their possession for the purposes of marriage. Their consent is an essential and a right completely given to them and I cannot see how a right so given can be taken away by a custom.

Another important aspect which might have an influence on the common law crime of abduction is the fact that the consent of the girl's parents is usually obtained after she has been *twala'd*. Their consent is not always without some form of social pressure, especially in the light of the fact that the man usually pays some form of compensation or their daughter consented to her being *twala'd*. If, however, they do give their consent after the abduction, the whole incident might still be regarded as a crime.⁶¹ This fact was pointed out in *R v Sita*⁶² where the court observed:

[I]t would be remarkable if an accused could take away a girl despite the lack of consent or objection, and by so doing put pressure on the guardian to consent by facing the guardian with the position that that guardian might think it best to consent because of the scandal, or he feels that something may have happened to the girl and he had better make the best of the position brought about by the act of the accused. His consent must be completely voluntary.

The forcible removal of a girl also led to a conviction of common assault⁶³ in *R v Swaartbooi*.⁶⁴ The court referred to the *twala* custom as "barbarous"⁶⁵ and commented as follows:⁶⁶

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

It is especially forms (b) and (c) as described above which may give rise to the crime of assault since the slightest use of "force" to remove a girl without her permission can be seen as an act of assault.⁶⁷

If a man has sexual intercourse without the consent of the girl that he took away under the guise of the *twala* custom, he may be guilty of the common law crime of rape.⁶⁸ In *R v Mane*⁶⁹ a girl's guardian gave permission to the accused's brother for her to be *twala'd* for the purpose of marrying the accused without her knowing it. When she realised what was happening, she refused to marry the accused and tried to escape several times, but she was watched by the accused and his family members and was unable to do so. She was even told by her guardian not to "act foolishly but to obey" the orders of the accused and to stay with him.⁷⁰ During this time, the accused had sexual intercourse with her on two occasions, both times without her consent. When she finally escaped, she immediately reported the incident to the police. The court made it clear that an essential element of the *twala* custom is that the girl must be a consenting party and held:⁷¹

We wish to make it very clear that a man, who forces a woman to have connection with him after a marriage ceremony, which has taken place without her consent, commits the crime of rape.

Writers such as Van Tromp⁷² have condemned the Western court's treatment of the *twala* custom. He is of opinion that the object of the *twala* custom, namely the eventual marriage, is lawful and that it is only the means employed during the *twala* custom that is irregular. Although he admits that the methods applied in obtaining the permission of the parents and/or the girl is irregular, he refuses to conceive that the *twala* custom might constitute a crime, thus expressing a worldview which is broadly comparable to the view of cultural relativism.⁷³ He points out that the attitude of the Western courts towards the *twala* custom has blurred the true character of the custom which has not

only led to resentment by the indigenous community, but also to the use of blackmail tactics by threatening the man and his family with criminal proceedings.⁷⁴ Although his argument is essentially true, it does not allow for the potential reform of the *twala*-custom by challenging the moral values or norms on which the custom is based. The mere fact that a particular action is indigenous does not necessarily mean that the action is always right; one should always be able to challenge the moral basis of any indigenous practice. In the same breath, one should acknowledge and accept that right and wrong might vary fundamentally between cultures.⁷⁵

The late writer, Labuschagne,⁷⁶ was also conscious of the problems which may develop when a particular conduct is regarded as unlawful in terms of the common law, but as lawful in terms of customary law.⁷⁷ He was of opinion that an accused should not be guilty of the common law crime if he had no knowledge that the exercise of his indigenous custom constituted such a crime.⁷⁸ In case of doubt, he argued, the law must always be interpreted in favour of personal freedom. In other words, the girl's freedom of movement and the parents' freedom to participate in the upbringing of their daughter should always prevail over the right of someone to exercise his indigenous custom.⁷⁹

Another writer favours the viewpoint that the exercise of an indigenous custom should not lead to the conviction of an accused in terms of a common law crime, and is of opinion that an accused should go free on an abduction charge if he had an "honest and bona fide belief that his act" was lawful under the *twala* custom. His argument is based on the fact that the subjective belief of the accused should be the determining factor, since the test for intent⁸⁰ is a subjective one.⁸¹ If the accused subjectively believed that his actions were lawful, the required element of intent is absent and, as a result, he should not be guilty of a crime.

From a rights-sensitive or feminist perspective it may well be argued that the *twala* custom is not just at all: a parent is coerced in giving permission for his daughter's marriage or a girl is under pressure to conclude a marriage she probably does not want. Moreover, when there are customary sanctions, it is the daughter's father who receives compensation for his abducted daughter and not the abducted daughter herself. The end result may be acceptable to the families (and the community), but is it also acceptable to the daughter (the individual)? One can also make a case for the fact that the girl should know what the *twala* custom entails and, therefore, should suffer the consequences when it happens to her. Such a viewpoint would show contempt for children's rights and the concept of "a child's best interest" as expressed in section 28 of the South African Constitution and the Children's Act.⁸²

Most of the academic publications pertaining to custom and crime emanated in the eighties and nineties before the enactment of the South African Constitution with its Bill of Rights.⁸³ In the Bill of Rights there are, as it were, two opposing centric forces that may well be irreconcilable within the context of the Bill of Rights as such. These conflicting interests have the potential of causing a constitutional tug-of-war between

the seemingly selfsame constitutional values provided for in the Bill of Rights, namely human dignity, equality and freedom on the one hand, and cultural and religious rights on the other. Courts may, for that reason, be faced with a whole new dimension these days when dealing with criminal cases flowing from an individual's exercise of his cultural rights.

2.3 Belief in *tokoloshe*⁸⁴

It is not only indigenous customs which could create conflict between the common and customary laws of South Africa, but also indigenous beliefs in supernatural beings, such as the *tokoloshe*. The *tokoloshe* is a creature stemming from African folklore and has many descriptions.⁸⁵ It has been described as a dwarf, gremlin or a hairy creature resembling a monkey; it is invisible to adults and can only be seen by children; it can transform itself into animals and can sometimes be quite helpful, but then also extremely evil under certain circumstances.⁸⁶

In the past, the South African courts had to deal with an accused's belief in the *tokoloshe* as a defence in the commission of a crime. In *R v Ngang*⁸⁷ the accused dreamt that a *tokoloshe* wanted to attack him. He got up and stabbed the "thing" which turned out to be the deceased. He was charged with the crime of assault with the intent to do grievous bodily harm. The question before the court was whether the accused acted at all, in other words whether or not the first requirement for the crime has been proved. If his actions were involuntary, it is a case of "automatism" and he would not be guilty.⁸⁸ The court defined a *tokoloshe* as a "creature or demon much dreaded by most natives"⁸⁹ and held that the facts showed that this was not merely a case of mistaken belief in magic or witchcraft, which could affect the finding of culpability, but rather of a case of automatism (involuntary or automatic action) which meant that the accused did not *act* at all. It is especially the absence of an apparent motive for the accused's actions that led the court to its decision.⁹⁰

In another case, the issue was not whether or not the accused's action was involuntary, but whether the accused's actions were performed with the necessary culpability.⁹¹ The definition of a *tokoloshe* in *S v Ngema*⁹² was much more extreme and stemmed from the written admissions of the accused. It explained a *tokoloshe* to be "a leprechaun-like being, but more malevolent in nature."⁹³ In this case the accused dreamt that he was being attacked by a *tokoloshe*. He woke up, picked up his knife lying next to him and fatally struck three blows to the "thing" he believed to be the *tokoloshe*. The "thing" turned out to be a two-year-old toddler and the accused was charged with murder. The court could not find that the accused had the subjective intention to kill a human being and as a result he could not be guilty of murder.⁹⁴ What remained to be dealt with, was the question whether the accused was guilty of culpable homicide, in other words, whether he was negligent in killing the deceased.⁹⁵ The court indicated that the reasonable person test was basically an objective test, which did not take the peculiar circumstances of each accused into account in determining whether or not he acted negligently,⁹⁶ but admitted that the approach these days does allow for

some individualisation of the test of negligence (referred to as the subjectivising of the test).⁹⁷ Although the court refused to depart completely from the traditional meaning of the reasonable person test, it did accept that one must "test negligence by the touchstone of the reasonable [person] of the same background and educational level, culture, sex and ... race of the accused."⁹⁸ It was prepared to find in favour of the accused that the belief in supernatural things, such as the *tokoloshe*, was not uncommon among "people of his ilk" and that that factor must be taken into consideration in determining the negligence of his actions.⁹⁹ However, in spite of these findings, the court could not believe that the accused acted reasonably in the circumstances, namely waking up after a nightmare and striking nine blows to the "perceived object" of his dream. These actions were, to the court's mind, unreasonable (or "monstrous" as the court called it) under the circumstances¹⁰⁰ and as a result the accused was found guilty of culpable homicide. The court took the viewpoint that nightmares are not peculiar to any particular race or class, that it is something that everyone has from time to time and that it could, consequently, not render the killing of the child reasonable under the circumstances. The viewpoint of the court could not be labelled as ethnocentric; it is not the accused's belief that is being judged, but rather his action (killing of a human being), and this kind of action is condemned by most cultures, even by customary law.

What seems to be an interesting situation, is the approach of some of the courts in dealing with the phenomenon of indigenous customs and beliefs. They give the impression that they accept the fact that there are things in life they do not always understand and therefore cannot question. As a result, they seem to accept the fact that an indigenous custom or belief indeed plays a role in the commission of a common law crime without always having a sound base for such a viewpoint. Be as it may, it is the responsibility of the prosecutor in such a case to ensure that he is fully equipped to deal with these kinds of issues and, if necessary, to question the existence of a particular indigenous custom or belief. For example, if it is true that a *tokoloshe* can only be seen by children and not by adults, as many readings suggest,¹⁰¹ the versions of the two accused in *R v Ngang*¹⁰² and *S v Ngema*¹⁰³ could not have been true, because as adults it would have been impossible for them to see a *tokoloshe* as they claimed they did. However, a perusal of the cases does not indicate whether this fact was ever given any noteworthy attention.

3. Concluding remarks

Crucial to the whole debate on culture as a defence in South African criminal law, is the Constitution as the supreme law of the land.¹⁰⁴ Sections 30¹⁰⁵ and 31¹⁰⁶ protect individual and collective cultural and religious rights and section 9¹⁰⁷ confirms that everyone is equal before the law and has the right to equal protection and benefit of the law. Considering some of the issues pertaining to the cultural defence, the constitutional imperative to treat everyone equally before the law can be extremely complex and controversial. Can one argue that treating an indigenous offender differently than any other offender boils down to equal treatment of offenders, or can

one make a case that an indigenous victim should be in an unequal position than his or her Western counterpart as a result of the cultural beliefs of the offender? The Constitution recognises the fact that no right is absolute and that a right may be limited, either in terms of other individual or community rights¹⁰⁸ or generally by means of the limitation clause.¹⁰⁹ Whether these limitations can successfully be used to limit a defender's reliance on his or her indigenous customs or beliefs, remains to be seen.

Furthermore, another very important right, namely human dignity,¹¹⁰ may play a leading role in deciding whether or not a particular indigenous custom or belief may be offered as a defence against a specific crime. Already in the eighties, Labuschagne recognised the value of human dignity in the context of culture and crime by stating that human dignity should always prevail in matters of conflict between the exercise of a custom and infringement of human freedoms.¹¹¹

The Constitution also commands that there is a general duty on the higher courts to develop the common and customary law with reference to the constitutional rights and values.¹¹² It can consequently be argued that culture as a defence must be developed in order to provide for circumstances under which it may be successfully raised as a defence against a common law crime. Then again, this argument might be without teeth, since it is primarily the lower courts, which do not have a similar developmental function, that deal with most of the crimes in our country.¹¹³ An unformulated and unrecognised cultural defence might be, for that reason, of no value to the indigenous community whose practices may lead to the commission of a common law crime.

Be that as it may, in light of the Constitutional provisions pertaining to culture and especially the newfound status of customary law, the age-old debates pertaining to the cultural defence may rise from its ashes once again. The re-evaluation of the cultural defence will undoubtedly offer new and exciting challenges to the Western courts and legislature of South Africa, and only time will tell whether they will be able to find a fine balance between justice and legal (cultural) pluralism. However, in recognising what the challenges are and by debating these challenges, we can begin to find solutions which are acceptable to all.¹¹⁴

¹ See, for example, the interview conducted by Christiansen M on 27 June 2006 (ABC Online "PM - States resist move to exclude Indigenous customary law from sentencing"). The interview can be accessed at <http://www.abc.net.au/pm/content/2006/s1673275.htm> (date of use 9 September 2007).

² Statutory rape is defined as sexual intercourse with a female under the age of 16 years. Section 127(1) of the Northern Territory of Australia Criminal Code Act (in force on 17 May 2007) describes statutory rape as sexual intercourse with a child who is under the age of 16 years. Before this date the Criminal Code of the Northern Territory, Australia (attached as a Schedule to the (NT) Criminal Code Act 47 of 1983) applied. At the time of the case, the girl was 15 years old. The accused was also guilty of discharging a firearm and received a concurrent sentence of imprisonment of two months.

³ For more information on the case, see Bryant G "Promised Marriages – The Jackie Pascoe Case" 2003:23 *Indigenous Law Bulletin* 20; Douglas H "She Knew What was Expected of Her: The White Legal System's Encounter with Traditional Marriage" 2005 *Feminist Legal Studies* 181-182.

⁴ *Pascoe v Hales*, unreported case JA 49 of 2002 delivered on 8 October 2002.

⁵ It also reduced his sentence for the discharging of the firearm to 14 days imprisonment.

⁶ *Hales v Jamilmira* (2003) 13 NTLR 14.

⁷ *Jamilmira v Hales* [2004] HCA Transcript 18 (13 February 2004).

⁸ (1979) 30 ALR 27 36-37.

⁹ Both countries have a colonial past and both countries have an indigenous population.

¹⁰ One of the features of the South African legal system is the fact that it is largely uncodified. Every lawyer knows that he or she has to consult various sources to find the law. These sources include legislation, precedent, Roman-Dutch law, custom, customary law, modern legal textbooks and the Constitution. According to Girvin SD "The Architects of the Mixed Legal System" in Zimmermann R and Visser D (eds) *Southern Cross: Civil and Common Law in South Africa* (1996 Kenwyn Juta) 95 the mixed legal system in South Africa owes a great deal to the earlier judges of South Africa.

¹¹ The private law regulates relationships between private individuals or groups and is therefore horizontal in nature. When the law is concerned with a relationship between the state (acting with authority) and its subjects, the relationship is part of the public law and is referred to as a vertical relationship.

¹² See Snyman CR *Criminal Law* 4th ed (2002 LexisNexis Butterworths) 5.

¹³ In terms of the Recognition of Customary Marriages Act 120 of 1988 "customary law" is defined as the "customs and usages traditionally observed among the indigenous African people" and in terms of the Black Administration Act 38 of 1927 the term "Black" includes "any person who is a member of any aboriginal race or tribe of Africa". The Law of Evidence Amendment Act 45 of 1988 defines "indigenous law" as the "Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic" and the South African Law Reform Commission defines customary law as the "various laws observed by communities indigenous to the country". Although customary law and indigenous law are used as synonyms in South African law, the first is preferred, since it is also the expression used in the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution").

¹⁴ The interim Constitution (Constitution of the Republic of South Africa 200 of 1993) made provision for the indirect recognition of customary law by recognising "traditional authority which observes a system of indigenous law" (section 181(1)) and by providing for the application of customary law in the courts in terms of Principle XIII. The new Constitution (Constitution of the Republic of South Africa, 1996) is more explicit, providing for the application of customary law by the courts when applicable, but is subject to the Constitution and other legislation – see section 211(3). For a general discussion, see Rautenbach C "Comments on the Status of Customary Law" 2003 *Stell LR* 107-114.

¹⁵ *Bhe v Magistrate, Khayelitsha* (Commission for Gender Equality as Amicus Curiae); *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) (hereinafter *Bhe v Magistrate, Khayelitsha*) par 40 and 148. See also the similar view of Bennett Customary Law in South Africa (2004 Juta Lansdowne) 43. In *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) par 51 it was stated: "While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution."

¹⁶ See Rautenbach C "Therapeutic Jurisprudence in the Customary Courts of South Africa: Traditional Authority Courts as Therapeutic Agents" 2005 *SAJHR* 327-329; Koyana DS, Bekker JC and Mqeke RB "Traditional Authority Courts" in Bekker JC, Rautenbach C and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa* 2nd ed (2006 LexisNexis Butterworths Durban) 136-137.

¹⁷ In general, these courts may only adjudicate on customary law issues between black persons. Koyana, Bekker and Mqeke "Traditional Authority Courts" 137, 146.

¹⁸ The word "crime" is an umbrella term used to refer to crimes, offences, violations and contraventions. See Snyman CR *Strafreg* 5th ed (2006 LexisNexis Butterworths Durban) 6-7.

¹⁹ Although punishment in customary law usually entails payment (cash or in kind) of compensation.

²⁰ Labuschagne JMT "Wederregtelikheidsbewussyn, die Ukutheleka-gebruik en die Konflik tussen Inheemse Gebruike en die Strafreg" 1988 *SACJ* 472-477; Labuschagne JMT and Schoeman NS "Die Inheemse Ukuthwala-gebruik, Wederregtelikheidsbewussyn en Strafregtelike Aanspreeklikheid weens Ontvoering" 1988 *TRW* 33-45; Labuschagne JMT "Geloof in die Toorkuns: 'n Morele Dilemma vir die Strafreg" 1990 *SACJ* 246-266; Dhlodhlo EB "Some Views on Belief in Witchcraft as a Mitigating Factor" 1984 *De Rebus* 409-410; Jonck JW "Geloof in Toorkuns as Versagende Omstandigheid: *S v Phokela A and Another* 1995 1 PH H22 1997 *TRW* 202-206; .

²¹ See, for example, Carstens PA "The Cultural Defense in Criminal Law: South African Perspectives" 2004 *De Jure* 312-330.

²² A discussion of culture as mitigating factor has been dealt with extensively by other authors; see footnote 21 above.

²³ Legality means that the law must regard a particular conduct as a crime.

²⁴ Conduct includes an act or omission.

²⁵ Each crime has its own description distinguishing it from other crimes, and in order to commit a particular crime, one has to comply with the definition of that crime.

²⁶ If there is no justification for the particular crime, the conduct will be unlawful.

²⁷ Culpability has two forms, namely: intent or negligence, but before a person can be said to have acted with culpability, he must have had criminal capacity. The legally stamped test for criminal capacity is two-fold, namely (a) is the person able to appreciate the wrongfulness of his conduct and (b) is the person able to conduct himself in accordance with such appreciation. Snyman *Criminal Law* 147, 158.

²⁸ Snyman *Criminal Law* 143.

²⁹ Also referred to as *mens rea*. Snyman *Criminal Law* 143.

³⁰ Snyman *Criminal Law* 157-179.

³¹ Snyman *Criminal Law* 147.

³² Snyman *Criminal Law* 179-180, 200-202.

³³ Whether his actions are justified or not, is a question of fact. See Snyman *Criminal Law* 201.

³⁴ Whether his actions constitute a crime or not, is a question of law. See Snyman *Criminal Law* 201. Since the judgement of the Appellate Division in *S v De Blom* 1977 3 SA 52 (A), it is trite law that ignorance or mistake of the law is indeed a valid excuse in certain circumstances. See Snyman *Criminal Law* 204 for his criticism against this judgement.

³⁵ The only two crimes requiring negligence are culpable homicide and contempt of court. See Snyman *Criminal Law* 209.

³⁶ See Snyman *Criminal Law* 209 for a description of the complete test usually applied by the courts.

³⁷ Snyman *Criminal Law* 209-210.

³⁸ See par 2.2 hereafter.

³⁹ See par 2.3 hereafter.

⁴⁰ Also referred to as the *baleka*, *ukuthwala* or *ukutheleka* custom. Bennett TW *Customary Law in South Africa* (2004 Juta Lansdowne) 212; Olivier NJJ, Olivier NJJ and Olivier WH *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 3rd ed (1989 Butterworths Durban) 17-19, 352-358. See also Labuschagne and Schoeman 1988 *TRW* 33 and the sources they refer to for a detailed discussion of this particular custom.

⁴¹ Unreported case JA 49 of 2002 delivered on 8 October 2002.

⁴² Douglas 2005 *Feminist Legal Studies* 187.

⁴³ The terms "abduct", "kidnap" or "seize" are sometimes use to describe the custom *twala*.

⁴⁴ *R v Swartbooi* 1916 EDL 170.

⁴⁵ Van Tromp *J Xhosa Law of Persons* (1948 Juta Cape Town) 63-75.

⁴⁶ This is a form of elopement; the "resistance" of the girl is a mere sham and she wants to elope with the man. If there is no marriage and they had had sexual intercourse or she became pregnant, the man will have to pay compensation to the girl's father. Van Tromp *Xhosa Law of Persons* 64, 67.

⁴⁷ The girl is usually ignorant of the pre-arranged plans between the two families and, if she refuses to marry the man after her seizure, there are certain remedies she can apply. Under this form of *twala* the man has tacit permission from the father of the girl to seduce her to sexual intercourse and, therefore, the customary crime of rape has not been committed. If there is no marriage and they had had sexual intercourse or she became pregnant, the man will have to pay compensation to the girl's father. Van Tromp *Xhosa Law of Persons* 69-70.

⁴⁸ The man has to pay compensation for his actions before he can enter into marriage negotiations with the girl's father. Marriage will only ensue upon the consent of the girl's father and the girl herself. If the man has sexual intercourse with the girl without the necessary consent, it will be regarded as customary law rape for which the punishment is quite severe. Van Tromp *Xhosa Law of Persons* 71.

⁴⁹ From the case law it is evident that an unmarried girl would have no cause of action under customary law if she is carried away under the *twala* custom; however, she will always have one under common law. In *Mkupeni v Nomungunya* 1936 NAC (C & O) 77 78 the court declared as follows: "While it is recognized that the custom of 'twala' is still largely practised among the natives, this Court is not prepared to countenance its use as a cloak for forcing unwelcome attentions on a patently unwilling girl."

⁵⁰ See

⁵¹ Burchell J *Burchell and Milton's Principles of Criminal Law* 3rd ed (2006 Juta Lansdowne) 762.

⁵² *Snyman Strafreg* 373-374.

⁵³ 1906 EDC 71.

⁵⁴ The accused was a labourer who removed the minor girl from her father's house without the latter's consent and with the purpose of having sexual intercourse with the girl. He was sentenced to a fine of £20, alternatively, to six months imprisonment.

⁵⁵ 1908 EDC 243.

⁵⁶ In this case, three Pondo men abducted a minor girl against her will and the will of her guardian for the purpose of marrying her to another man. The court found that they were accomplices to the crime of abduction and as a result they were each sentenced to pay a fine of £5, alternatively, to undergo three months imprisonment with hard labour.

⁵⁷ *Ncedani v R* 1908 EDC 243 245.

⁵⁸ 1954 4 SA 20 (E). The accused took the girl to his homestead with her consent, but without the consent of her parents. He was then charged with the crime of abduction, but pleaded the custom of *twala* as defence.

⁵⁹ *R v Sita* 1954 4 SA 20 (E) 22.

⁶⁰ *R v Sita* 1954 4 SA 20 (E) 22.

⁶¹ Van Tromp *Xhosa Law of Persons* 73-74.

⁶² 1954 4 SA 20 (E) 24.

⁶³ Common assault can be described as the unlawful and intentional application of force to the person of another or "inspiring a belief in that other person that force is immediately to be applied to him or her." Burchell *Burchell and Milton's Principles of Criminal Law* 161; Snyman *Criminal Law* 430.

⁶⁴ 1916 EDL 170. Twelve accused were charged with the crime of common assault. They all united forces to forcibly remove the complainant without her and her guardian's permission.

⁶⁵ *R v Swaartbooi* 1916 EDL 170 171.

⁶⁶ *R v Swaartbooi* 1916 EDL 170 172.

⁶⁷ See Snyman *Criminal Law* 431-433 for a discussion of examples of the various forms of assault.

⁶⁸ Currently rape is defined as the unlawful and intentional sexual intercourse between a male and female without the consent of the latter. Snyman *Criminal Law* 445; Burchell *Burchell and Milton's Principles of Criminal Law* 162.

⁶⁹ 1947 EDLD 196. The facts of the case show a remarkable likeness to the Australian *Jackie Pescoe* case discussed in par 1 above.

⁷⁰ *R v Mane* 1947 EDLD 196 198.

⁷¹ *R v Mane* 1947 EDLD 196 199.

⁷² *Xhosa Law of Persons* 74-75.

⁷³ For a detailed discussion of the meaning of cultural relativism, see Tilley JJ "Cultural Relativism" 2000 *Human Rights Quarterly* 501-547.

⁷⁴ Van Tromp *Xhosa Law of Persons* 74.

⁷⁵ Tilley 2000 *Human Rights Quarterly* 514-515 discusses various arguments for cultural relativism.

⁷⁶ Labuschagne 1988 *SACJ* 476-477.

⁷⁷ Labuschagne 1988 *SACJ* 476-477.

⁷⁸ This is said against the background of the *S v De Blom* 1977 3 SA 52 (A) where the court held that it is a cliché that "every person is presumed to know the law" and that the opinion "ignorance of the law is no excuse" cannot prevail in law. See Labuschagne 1988 *SACJ* 476.

⁷⁹ Labuschagne 1988 *SACJ* 477.

⁸⁰ Intent is the form of culpability needed for a conviction of the crime of abduction, rape and assault.

⁸¹ Dukada 1984 *De Rebus* 387. See also Snyman *Criminal Law* 186 for a discussion of the test for intent.

⁸² 38 of 2005. The preamble of the Act declares, *inter alia*, that "the State must respect, protect, promote and fulfil" the rights of children as set out in section 28 of the Constitution.

⁸³ The Bill of Rights is contained in chapter 2 of the Constitution.

⁸⁴ A *tokoloshe* (also referred to as *tikoloshe*, *tokolosh*, *tokoloshi*, *tikaloshe*). <http://www.tokoloshe.tk/> [date of use 7 September 2007].

⁸⁵ The descriptions of how a *tokoloshe* looks, varies. It has also been described as "fabulous, short and hairy-looking elf said to be mischievous and fond of women and sour milk". See Mkhize N "Mind, gender, and culture: A critical evaluation of the phenomenon of Tokoloshe 'sightings' among prepubescent girls in KwaZulu-Natal" Proceedings of the 2nd Annual Qualitative Methods Conference: "The Body Politic" 3-4 September 1996, Johannesburg, South Africa at <http://www.criticalmethods.org/bodtwo.htm>. [date of use 7 September 2007].

⁸⁶ Lillejord S and Mkabela N "Indigenous and Popular Narratives: The Educational Use of Myths in a Comparative Perspective" 2004 *SAJHE* 259-261 gives an expose of the various perceptions pertaining to the *tokoloshe* in South Africa.

⁸⁷ 1960 3 SA 363 (T).

⁸⁸ *Snyman Criminal Law* 55-56, 171-172.

⁸⁹ 364B-C.

⁹⁰ 366A-B, E-F: The court found that his action "was no more than a purely physical reflex". The occurrence of crimes being committed while "sleepwalking" is not unknown in South African law. In *R v Dhlamini* 1955 1 SA 120 (T) the accused was acquitted on a charge of murder where it was proved that he stabbed the deceased mechanically (without a motive) when he was half-awaken after a nightmare. The fact that there is no motive present for the attack seems to be one of the reasons why the courts are swayed to reach a conclusion of automatism. See also *S v Ncube* 1978 1 SA 1178 (R).

⁹¹ Based on psychiatric evidence as to the accused's actions and memory of the events, the court found that his actions were voluntary (at 652-655).

⁹² 1992 2 SASV 650 (D).

⁹³ 653A-B.

⁹⁴ 655D-E.

⁹⁵ 655E. The test for negligence is generally the actions of the reasonable person in the same circumstances as the accused. See *Snyman Criminal Law* 209-210 for an explanation of the complete test.

⁹⁶ 655E-F.

⁹⁷ 656-657.

⁹⁸ 657E-F.

⁹⁹ 657G-H.

¹⁰⁰ The court pointed out that nightmares are not peculiar to any particular race or class, and that would be monstrous to accept that the accused's actions were reasonable under these circumstances. 657G-H.

¹⁰¹ Lillejord and Mkabela 2004 *SAJHE* 260; "The Tokoloshe (Tokolosh, Tokoloshi, Thokoloshi, Tikaloshe, Africa's Brownie)" found at www.tokoloshe.tk [date of use 7 September 2007].

¹⁰² 1960 3 SA 363 (T).

¹⁰³ 1992 2 SASV 650 (D).

¹⁰⁴ Section 2 of the Constitution reads: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

¹⁰⁵ "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

¹⁰⁶ "(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, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

¹⁰⁷ The relevant subsections read as follows: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, **culture**, language and birth." Own emphasis.

¹⁰⁸ For example, in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) the court said that the purpose of the Bill of Rights is not to identify individual rights but to contextualise these rights in relation to their prospective social benefits and effects.

¹⁰⁹ Section 36 of the Constitution is extremely important and states: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

¹¹⁰ Section 7(1) of the Constitution affirms that human dignity is a democratic value and section 10 of the Constitution reads: "Everyone has inherent dignity and the right to have their dignity respected and protected."

¹¹¹ Labuschagne 1988 *SACJ* 477.

¹¹² The relevant subsections of the application clause read as follows: "(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court— (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

¹¹³ Section 170 of the Constitution and section 110 of the Magistrates' Court Act 32 of 1944 excludes the jurisdiction of the lower courts to decide constitutional issues, but in interpreting and applying the ordinary law the court must take account of and give effect to the values embodied in the Bill of Rights. Thus in exercising their ordinary civil and criminal jurisdiction, magistrates must apply the Bill of Rights. See *Qozeleni v Minister of Law and Order* 1994 1 BCLR 75 (E). The *Qozeleni* decision was followed in two Eastern Cape high court cases: *Da Silva Mendes v Kitching* 1995 12 BCLR 1672 (E) and *Port Elizabeth Municipality v Prut* 1996 3 SA 533 (E), but disapproved in the Transvaal high court in *Bate v Regional Magistrate, Randburg* 1996 7 BCLR 974 (W) and *Walker v Stadsraad van Pretoria* 1997 1 All SA 436 (T). In *Wild v Hoffert NO* 1998 3 SA 695 (CC) the Constitutional Court said: "It goes without saying that, should an application for a remand be made by the prosecutor, the magistrate will remain mindful of the provisions of the Bill of Rights."