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Essay

Influence of the Cultural Defence on Conduct and Culpability in South African Criminal Law

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Abstract: South African criminal law has no separate, distinct, or novel cultural defence. Such a defence could negate or mitigate an accused's criminal liability for a culturally motivated crime. Whether South Africa's criminal law could adopt such a defence requires understanding its influence on the requirements for criminal liability. This article evaluates the influence of the cultural defence on the elements of conduct and culpability. The first part deals with the cultural defence and voluntary conduct. The discussion then turns to culpability, which consists of criminal capacity and fault (*mens rea*). The third part considers the cultural defence's influence on criminal capacity, while the fourth considers its influence on fault. More specifically, the article evaluates how the existing types of defence that can negate conduct and culpability in South Africa's criminal law can accommodate arguments of an accused's cultural background, values, and beliefs to determine whether there is a gap that only a separate, distinct, or novel cultural defence can fill. The article concludes that South Africa's principles of conduct and culpability are already flexible enough to accommodate such arguments, obviating the need for introducing a separate, distinct, or novel cultural defence.

Keywords: cultural defence; criminal law; conduct; criminal capacity; culpability; intention; negligence

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1. Introduction

The values of individuals from minority cultures may sometimes conflict with those of individuals from a majority culture (Anonymous 1986, p. 1293). Where criminal law incorporates the majority culture's values, individuals from minority cultures may have to choose between violating their cultural values or transgressing criminal law (Anonymous 1986, p. 1293). When they choose the latter, a possible cultural defence comes into play.[1]

A cultural defence in criminal law is a legal strategy that an accused uses to argue that his cultural background, values, and beliefs negate or mitigate his criminal liability for a so-called "culturally motivated crime" (Renteln 1992, p. 439; Van Broeck 2001, p. 29; Choi 1990, p. 81; Greenawalt 2008, p. 299).[2] A culturally motivated crime is "an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation" (Van Broeck 2001, p. 5). An accused can raise a cultural defence as a standalone defence, use it as the basis for a pre-existing defence, or present it in mitigation of sentence (Phelps 2011, p. 137; Greenawalt 2008, p. 299).

The concepts "culture" and "cultural group" above warrant further explanation. Simply put, a cultural group is a group of individuals who share a common culture (Van Broeck 2001, p. 5). On the other hand, the ever-evolving concept of "culture" is notoriously difficult to define.

[1] It is acknowledged that a cultural defence is not limited to criminal law. The role of cultural factors can also be considered in other areas of law, e.g., labour law, civil law, asylum jurisprudence, and child welfare cases.

[2] A culturally motivated crime is sometimes called a "cultural offence" or "culture-based crime".

Over the years, many definitions have proliferated from psychologists, sociologists, anthropologists, and even lawyers. Some view culture as "the values and beliefs that people use to interpret experience and generate behavior, and which that behavior reflects" (Fischer 1998, p. 669). Others understand culture as an abstract driver of human behaviour that constantly adapts to peoples' contexts, demands, and needs (Du Plessis and Rautenbach 2010, p. 31). They consider it an inherent part of human life that deals with a subliminal thought process to describe the values, norms, and symbols guiding peoples' behaviour and interaction with others (Parsons and Shils 1990, p. 40). Culture is also seen as "a set of rules or standards shared by members of a society which, when acted upon by the members, produce behavior that falls within a range of variance the members consider proper and acceptable" (Fischer 1998, p. 669).

Given the ambiguity of culture, it is conceivable that a wide range of conduct can be attributed to an established culture and cultural group. Hence, various interpretations and approaches to the cultural defence in criminal law exist. The defence originated in the American literature in the mid-1980s (Phillips 2003, p. 510). Since then, evidence of its use has been documented in countries worldwide, including Australia, Belgium, Canada, England, Germany, the Netherlands, Singapore, Spain, and Zimbabwe (Renteln and Foblets 2009, p. 1; Bryant 2003, p. 20; Douglas 2005, pp. 181–82; Kugara et al. 2018).

While different jurisdictions have different views and approaches to the cultural defence, its use is part of a much larger debate on the tensions between multiculturalism and issues such as gender equality and cultural identity (Phillips 2003, p. 510; Torry 1999, p. 128; Volpp 1996, p. 1580). For those wishing to engage in further considerations of and gain new insights into the cultural defence phenomenon, more research is needed on the historical and modern uses of cultural arguments in the courts of legal systems in other parts of the world (Renteln and Foblets 2009, p. 2).

This paper aims to contribute to that body of research by exploring the possible use and approach to cultural evidence in South African criminal law. Specifically, the paper will focus on culturally motivated crimes emanating from African customary law in South Africa for three reasons. First, although South Africa has a multicultural society with various observable legal systems, the official legal system consists only of Western law and African customary law (Rautenbach 2021, p. 13).[3] South Africa's constitutional dispensation ended African customary law's subordinate status to the Western common law.[4] Despite their equal status, the two legal systems still conflict, especially in criminal law, because of their differing value systems.

Next, South Africa's constitutional era provides a framework for re-evaluating its established statutory or common law principles on crime (Burchell 2016, p. 9). At the same time, it facilitates "the continuing influence of customary law, non-state justice systems, and restorative justice on fundamental principles of fairness" (Burchell 2016, p. 9). But like the pre-constitutional reality, South Africa's present-day criminal law predominantly still comprises a mix of Roman–Dutch, English, German, and uniquely South African elements, with the difference being that they must now be tested against the norms and values in South Africa's supreme Constitution (Burchell 2016, p. 9).

Lastly, South Africa's criminal courts have a long history of dealing with culturally motivated crimes. The cases revealed several instances where indigenous law deems an individual's conduct a legitimate exercise of cultural freedom. Meanwhile, South Africa's common or statutory law outlaws it as a crime.

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[3] The Western law consists of common law, legislation, judicial precedent, and customary law other than African customary law, all of which developed within the Roman–Dutch and English common law framework. African customary law comprises the official and living versions. Official customary law is the customary law included in legislation or pronounced in judicial decisions. Meanwhile, living customary law cannot be found in legislation nor has it been confirmed by the courts.

[4] *Bhe v The Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC), pp. 637–38, *Alexkor Ltd and Another v Richterveld Community and Others* 2003 12 BCLR 1301 (CC), pp. 478–79.

Despite the above, the courts have never considered whether South African criminal law has a gap that only a separate, distinct, or novel cultural defence can fill (Rautenbach and Matthee 2010, pp. 114, 133; Phelps 2011, p. 142; Bennett 2010, pp. 23–26; Carstens 2004, p. 18). That changed with the enactment of South Africa's Constitution, which protects cultural and religious freedom as a fundamental human right.[5] This sparked a debate about whether such a development is necessary or desirable to further the notion of cultural diversity in South Africa.

Moreover, the courts were not obligated to apply indigenous law in South Africa's pre-constitutional dispensation.[6] Consequently, the South African criminal courts evaluated an accused's claims of his cultural background, values, and beliefs within the existing common law principles. The position changed when South Africa's Constitution afforded equal recognition to indigenous law and the common law, thereby establishing a dual legal system in the country.[7]

The Constitution now explicitly demands that the courts apply indigenous law when it is applicable in a matter.[8] Doing so is no easy task. The two legal systems have unique and conflicting principles. Applying them in South Africa's constitutional dispensation challenges the criminal courts to harmonise the protection of an individual or community's rights affected by crime and the legitimate exercise of an individual's constitutional right to cultural and religious freedom.

Determining whether the courts should develop South Africa's criminal law to include a cultural defence requires understanding the defence's influence on the requirements for criminal liability in South Africa. Such an understanding will elucidate the South African criminal courts' approach to culturally motivated crimes until now and their accommodation of cultural (and religious)[9] arguments in future criminal trials.

In South Africa, the general requirements for criminal liability include the legality principle, conduct, compliance with the definitional elements of a crime, unlawfulness, capacity, and culpability (Snyman 2021, pp. 26–28). The conflict between indigenous and common law in South Africa's criminal law is particularly evident regarding conduct, unlawfulness, and culpability. While the influence of the cultural defence on unlawfulness is explored elsewhere,[10] this article focuses on its influence on conduct and culpability. The two elements go hand-in-hand because both require determining whether the accused could control his bodily movements when he committed the offence (Snyman 2021, pp. 128–29).

Against the above, this article aims to determine whether there is a gap in South Africa's criminal law on conduct and culpability that only a separate, distinct, or novel cultural defence can fill. To do so, the first part of the article evaluates the cultural defence's influence on conduct. It considers whether an accused's cultural background, values, and beliefs could have caused him to act involuntarily during the commission of a common law or statutory crime. The next part deals with the cultural defence and culpability. An accused's conduct is only culpable if he acted with the necessary criminal capacity and fault. Consequently, parts three and four evaluate whether an accused's cultural background, values, and beliefs can exclude his criminal capacity and fault and, therefore, his culpability for a culturally motivated crime.

2. Influence of the Cultural Defence on Voluntary Conduct in South African Criminal Law

An accused's criminal liability is usually determined by first enquiring whether he performed a voluntary act that meets the definitional requirements of a particular crime. If

[5] SS 15, 30 and 31 of the Constitution of the Republic of South Africa, 1996.

[6] S 1(1) of the Law of Evidence Amendment Act 45 of 1988 gave them a discretion to do so.

[7] *Bhe* (n. 4) par 148.

[8] S 211(3) Act 108 of the Constitution of the Republic of South Africa, 1996.

[9] The definition of culture is broad enough to include religion. See (Rautenbach 2011, p. 65; Rautenbach et al. 2003, p. 6; Amoah and Bennett 2008, p. 368).

[10] Author's forthcoming article in Recht in Afrika.

a voluntary human act is absent, the enquiry into the accused's criminal capacity and fault cannot continue because culpability would be excluded.[11]

In South African criminal law, criminal conduct is either a voluntary act or an omission. A voluntary act constitutes active, positive conduct or behaviour, while an omission is a failure to act in circumstances where there is a legal duty to do so.

An act is voluntary if the accused is physically able to prevent or control it. Voluntariness implies that the accused can act positively to prevent the commission of a crime. Moreover, the accused must be able to direct his bodily movements through his free will.[12] He must be able to decide on his conduct and carry out that decision in reality. The human mind must, therefore, control the act.[13]

An accused cannot be held criminally liable for involuntary conduct. The South African criminal courts have described involuntary conduct in many ways, including "reacting in a mechanical way",[14] "acting mechanically without intention, volition or motive",[15] acting in a "state of unconsciousness",[16] acting "involuntarily or automatically",[17] an "involuntary lapse of consciousness",[18] and "acting in a state of automatism".[19] Physical force, uncontrollable muscular movements, sleep, unconsciousness, dissociation, concussion, or automatism commonly cause involuntary conduct (Snyman 2021, p. 46; Burchell 2016, p. 72; Kemp et al. 2018, p. 153).

Automatism is particularly significant for South African criminal law because it is usually the defence raised against an allegation of voluntary conduct (Burchell 2016, p. 72). It excludes the possibility of criminal liability because a person acting in a state of automatism may appear to direct his actions through his own free will but may not be in conscious control of that action or may even be unaware of what he is doing (Kemp et al. 2018, p. 153).

Automatism can manifest organically or toxically, known as 'sane automatism', or psychogenically, known as 'insane automatism' (Snyman 2021, p. 47; Burchell 2016, p. 73; Kemp et al. 2018, p. 156). Organic automatism originates from within the body. A physical illness or injury, such as epilepsy, concussion, or a brain tumour, can cause this type of automatism (Kemp et al. 2018, p. 155). Toxic automatism is caused by an intoxicating substance such as alcohol or drugs (Kemp et al. 2018, p. 155). Psychogenic automatism originates in the mind. It can be caused by psychological factors, possibly resulting from a mental illness or defect (Kemp et al. 2018, p. 155).

There is no closed list of situations or causes of automatism. The South African criminal courts have considered sleepwalking, epilepsy, hypoglycaemia (low blood sugar), blackouts, amnesia, and intoxication as situations or causes that could lead to a defence of automatism. They have also found that dreams or nightmares, while the accused is in a "half-wakened"[20] or dissociated[21] state, can cause involuntary conduct in a state of automatism.

Nothing prevents the courts from considering arguments of indigenous beliefs and customs as a cause of automatism, and they have been doing so as far back as the 1960s. For example, in *R v Ngang*,[22] the accused dreamt that a tokoloshe[23] wanted to attack him. The accused got up and stabbed the "thing," which later turned out to be the deceased. During

11 *R v Mkize* 1959 (2) SA 260 (N).
12 *S v Pederson* 1998 (3) All SA 321 (N), p. 323.
13 See footnote 12.
14 *R v Dhlamini* 1955 (1) SA 120 (T), p. 121.
15 Ibid., p. 122.
16 *Mkize* (n. 11), p. 265.
17 *R v Ngang* 1960 (3) SA 363 (T), pp. 363, 365.
18 *S v Trickett* 1973 (3) SA 526 (T), p. 526.
19 *S v Eadie* 2002 (1) SACR 663 (SCA).
20 *Dhlamini*, (n. 14).
21 *S v Mahlinza* 1967 (1) SA 408 (A).
22 *Ngang* (n. 17).
23 The tokoloshe is a leprechaun-like mythical creature from African folklore, feared for its association with witchcraft.

the trial, the accused relied on his indigenous belief in the tokoloshe to justify stabbing the complainant. However, the court believed that the matter did not revolve around a mistaken belief in magic or witchcraft, which would have materially affected the accused's culpability, but rather on whether he had acted voluntarily. The court found that he acted involuntarily, in a state of automatism, and acquitted him.

To reach its findings, the court in *Ngang* had to accept the veracity of the accused's belief in a tokoloshe. The court did so without relying on expert evidence. Phelps (2011, p. 143) criticises the court's approach and argues that it could have easily determined the veracity of the accused's belief by evaluating it within a broader range of evidence about the tokoloshe. She warns that merely accepting an accused's version of culture or religion would allow offenders to invoke their beliefs with the cynical intention of escaping liability.

Phillips (2003, p. 513) raises a similar concern about the use of the cultural defence. She argues that "something may be claimed as a cultural practice when it has long been contested or abandoned by other members of the group; and individuals who have largely adopted the practices and conventions of the surrounding culture may suddenly 'rediscover' an allegiance to a different culture because it now serves their interests to do so". Judges in criminal trials may then be confronted with the challenge of determining whether offenders really are shaped by the prescriptions of a minority culture or if they are just using it for a legal advantage.

In the case of *S v Ngema*,[24] the accused also attempted to persuade the court that his indigenous belief in the tokoloshe caused him to lack the culpability necessary for criminal liability or that he involuntarily stabbed the deceased. Like in *Ngang*, the accused dreamt that a tokoloshe was choking him in his sleep. Frightened by the dream, he awoke, grabbed a knife leaning against his leg and stabbed in the direction of the tokoloshe. After approximately three blows, he realised that the being was not a tokoloshe but the deceased.

Contrary to the approach in *Ngang*, the court in *Ngema* relied on psychiatric evidence of the accused's conduct during and memory of killing the deceased to dismiss his contention that he acted involuntarily. However, the court was willing to accept that the accused's belief in the tokoloshe reduced his blameworthiness to such an extent that it could not convict him of murder but of culpable homicide instead. The case is further discussed below.

The cases reveal that the South African criminal courts have yet to absolve an accused of criminal liability solely because of his cultural background, values, and beliefs. Instead, they have always evaluated those arguments within the existing criminal law principles applicable to voluntary conduct. So far, the principles have proven to be flexible enough to accommodate the accused's cultural claims, making it unnecessary to introduce innovations into South African criminal law to determine an accused's voluntary conduct in cases involving culturally motivated crimes.

3. Influence of the Cultural Defence on Culpability in South African Criminal Law

A person is not necessarily guilty of a particular crime if he commits an unlawful act that meets the definitional elements of that crime. He must also have the necessary culpability. Only once it has been established that a person has committed an unlawful act can the question of his culpability be raised.

Culpability is determined by focusing on the accused as an individual. The question is whether an accused can be blamed for his crime considering his gifts, shortcomings, aptitude, and what the law expects of him in certain circumstances. Culpability requires that a person be free to make a choice regarding his conduct and be held liable because of it.

In South African criminal law, culpability comprises criminal capacity and fault (*mens rea*) (Snyman 2021, p. 159; Kemp et al. 2018, p. 23). Both must be present at the time of the accused's conduct for him to have the necessary culpability (Burchell 2016, p. 358; Snyman 2021, p. 149; Kemp et al. 2018, p. 23). The following sections evaluate whether an

[24] 1992 (2) All SA 436 (D).

accused's cultural background, values, and beliefs can exclude his criminal capacity and fault and, therefore, his culpability for a culturally motivated crime.

4. Influence of the Cultural Defence on Criminal Capacity as a Prerequisite for Culpability

In South Africa, an accused can only be criminally liable if the State proves that he committed the unlawful act with the necessary criminal capacity.[25] He must be mentally capable of being held responsible for his unlawful conduct.[26] The test to determine criminal capacity is twofold. It is first determined whether the accused can distinguish right from wrong and then whether he can conduct himself according to that appreciation. The first part refers to an accused's cognitive mental function and relates to his perception, thinking, reasoning, understanding, judgement, and recall (Snyman 2021, p. 138; Kemp et al. 2018, p. 376). The second part refers to an accused's conative mental function. It consists of his ability to control and direct his behaviour to achieve a particular goal and to resist acting contrary to his insights into right and wrong. An accused who lacks one of these abilities lacks criminal capacity.

The existing defences in South African law that could negate criminal capacity are mental illness, youth, intoxication, and temporary non-pathological criminal incapacity (TNPCI). Only TNPCI is relevant for the present purposes. It is a novel defence that only developed in the last four decades when the South African courts acknowledged that any factor assessed subjectively could negate an accused's intention and, therefore, his criminal capacity (Burchell 2016, p. 59; Snyman 2021, pp. 139–40). So far, the South African courts have identified intoxication, provocation, and severe emotional distress as some of those factors.

However, the list of conditions possibly causing TNPCI is open. It is, therefore, conceivable that an accused's cultural background, values, and beliefs can affect his criminal capacity. Carstens (2004, p. 145), for example, points to the possibility of the indigenous belief in witchcraft or the medicinal power of *muti*[27] leading to a defence of TNPCI. It is submitted that the case of *S v Mokonto*[28] serves as an illustration, although the defence did not yet exist in South African law when the case was heard.

The appellant in *Mokonto* had been convicted of murder. He believed his victim was a witch who weaved her evil spells to kill his brothers. When he confronted her with these allegations, she threatened that he would not see the sunset that day. The appellant took this as a threat to his life and killed her with a cane knife. He then severed her head so she could not rise again and bewitch him. He also severed her hands because he believed they had handled the *muti* she used on his brothers.

On appeal, the appellant argued that his benighted belief in the blight of witchcraft justified his actions in one of two ways. First, he killed the deceased in self-defence because he believed she could use her supernatural powers to carry out her threat against his life. Alternatively, her threat had provoked him into killing her, which should have reduced his conviction to the lesser offence of culpable homicide. The first argument falls outside the scope of this paper because it relates to the element of unlawfulness.

The Appellate Division held that the intent in crimes requiring a specific intention, such as murder, is determined subjectively by considering what transpired in the accused's mind. Provocation is relevant to that determination and is, therefore, also considered subjectively. The appellant's provocation was evident from the prosecutor's questioning of whether he was angry at the time of the killing. He responded that "there was darkness before [his] eyes, and [he] thought she might rise again and 'thakatha' (bewitch) [him]".

In deciding the appellant's fate, the court considered his responses against all the circumstances. It particularly questioned the appellant's motive in taking a knife to confront

[25] *S v Laubscher* 1988 (1) SA 163 (A), p. 166, *S v Nursingh* 1995 (2) SACR 331 (D) 334.

[26] *Eadie* (n. 19), p. 734.

[27] *Muti* refers to magical substances, most often associated with witchcraft. Indigenous people would consult a traditional healer for *muti* for benevolent and malevolent purposes.

[28] 1971 2 SA 319 (A).

the deceased. In its final analysis of the evidence, the court held that he deliberately and intentionally beheaded the deceased. It then concluded that the appellant's provocation did not negate his intention to kill but rather contributed to it and dismissed his appeal.

Although it seems possible for an accused to advance cultural arguments to establish the defence of TNPCI resulting from provocation, the law on this defence is all but settled. It has been the subject of judicial scrutiny for decades. While it has led to a complete acquittal in several cases, the South African courts have expressed discomfort with the defence, particularly its subjective enquiry (Burchell 2016, p. 329; Phelps 2011, p. 146). They have warned that if the accused's version of events is unreliable, any evidence to support his TNPCI defence based on his version of events would be equally unreliable.[29]

A turning point came with the enigmatic judgment in *S v Eadie*,[30] where the Supreme Court of Appeal sought to limit the defence of TNPCI resulting from provocation. It ultimately held that the defences of TNPCI caused by emotional stress and provocation and sane automatism are the same. More specifically, the court equated the second part of the capacity enquiry to the requirement that an accused's conduct be voluntary. If an accused, therefore, alleges that he was provoked to the point that he could no longer control himself, it amounts to an allegation of involuntary conduct because he can no longer control his muscular movements.

The *Eadie* court further restricted the defence by indicating that the courts must be slow to accept the accused's version of events about his provocation or emotional stress. They must instead approach the evidential foundation of his defence with circumspection. However, they may draw inferences from the objective surrounding circumstances to interrogate the accused's version of events. In this way, the court essentially converted an otherwise purely subjective enquiry into an objective one.

Academic commentators have criticised the *Eadie* judgment for raising more questions than providing answers to a complex and contested area of South African law (Snyman 2021, pp. 143–48; Burchell 2016, pp. 257–58; Kemp et al. 2018, pp. 465–68). The most burning question is whether the defence still exists, and if so, in which circumstances. As Snyman (2021, p. 206) points out, it would be best if the Supreme Court of Appeal or Constitutional Court could settle the matter once and for all. In the meantime, academics and the courts seem to have accepted that sane automatism and TNPCI are now the same thing, meaning the TNPCI defence can only succeed if there is evidence of involuntary conduct (Snyman 2021, p. 206; Burchell 2016, p. 329; Kemp et al. 2018, p. 466).[31]

The question arises whether the above has closed the door on the possibility of a cultural defence negating criminal capacity. It is submitted that it has not, at least for now, and not entirely. The nature of South Africa's criminal capacity enquiry lends itself to considering arguments of an accused's cultural background, values, and beliefs. The first part of the inquiry is subjective. It considers various factors affecting an accused's cognitive mental function, such as age, education level, illiteracy, and even superstitious beliefs.

However, the courts will rarely find that an accused lacks this subjective aspect of criminal capacity or that the State failed to prove it beyond reasonable doubt (Burchell 2016, p. 426). Broader society generally knows what constitutes criminal conduct. Moreover, as access to education spreads more equitably across South Africa, it becomes increasingly difficult to argue a lack of cognitive mental function (Burchell 2016, p. 426). The courts may also infer cognitive mental function from objective facts and surrounding circumstances (Burchell 2016, p. 426).

There are a handful of cases where South Africa's Western courts have dealt with offences committed by subordinates obeying their traditional leader's orders. The appellants in those cases relied on the defence of obedience to superior orders,[32] which negates

[29] *S v Potgieter* 1994 (1) SAC R 61 (A).

[30] *Eadie* (n. 19). A discussion of this case falls outside the scope of this manuscript.

[31] See *S v Scholtz* 2006 (1) SACR 442 (E) and *S v Marx* 2009 (1) All SA 499 (E).

[32] Through this defence, an accused attempts to justify his otherwise unlawful conduct as mere obedience to his superior's orders. South African law recognises obedience to superior orders as a case of duress.

unlawfulness in South African law.[33] It is, however, argued that they can also illustrate the principles above because their facts and arguments could have been raised to negate the first part of the capacity enquiry.

The first case to consider is *Rex v Kumalo*.[34] Here, the appellants were convicted of assault. The first appellant is a native chief onto whom the *Black Administration Act* 38 of 1927 conferred authority to adjudicate civil claims arising from native law and custom. He ordered the other appellants, his executive officers, to administer ten lashes with a *sjambok* (whip) to a subject who had misbehaved in his court. The lashing was so severe that the marks were still visible three months later.

On appeal, it was argued that the first appellant was authorised to punish the misbehaving subject, that common law permitted corporal punishment, that it was appropriate by native custom, and that he had acted according to native custom when he ordered the lashing. In the alternative, it was argued that, even if he lacked the authority to impose corporal punishment, he believed he had the authority, and that belief excluded his *mens rea*.

In dismissing the first appellant's appeal, the Appellate Division referred to his acknowledgement that he was appointed under the *Black Administration Act* and that the Act defined his duties, rights, and privileges. It specifically limited his punishment for offences to a fine not exceeding two heads of cattle or five pounds.[35] The court, therefore, found that he could not, and did not, say that his rights under the Act included the right to impose corporal punishment. Moreover, he knew that the Act limited the operation of native customs. While the court conceded that the first appellant was correct in saying that native custom allowed a chief to impose corporal punishment, it found that he knew perfectly well that the Act prohibited him from exercising that right.

It was argued that the other appellants only followed the first appellant's instructions as his subordinates. More specifically, they were entitled to and believed his instructions were lawful. They, therefore, essentially argued that they did not consider their actions to be wrong.

However, the court concluded otherwise based on the evidence from one of the appellants. That appellant testified that, in the olden days, his chief could punish a misbehaving subject with lashes but could now only do so if authorised by the Government. He further testified that they "took a chance" to teach the misbehaving subject not to disrespect the chief. The court believed the first appellant took the same chance. It ultimately concluded that all the appellants had known that the instructions were unlawful and dismissed their appeal.

In a similar case, *S v Molubi*,[36] the appellant, a tribal policeman and a tribal court member, was convicted of assault after he acted on the tribal court's instruction to cane the complainant for contempt of court. On appeal, it was argued on behalf of the appellant that the State failed to prove he had acted unlawfully and that *mens rea* was not established. It was further contended that he was a duly appointed member of a duly constituted tribal court, which, in turn, meant that he was authorised and had indeed carried out a lawful order of that court.

In support of his first argument, the appellant relied on the Appellate Division's landmark decision in *S v De Blom*.[37] Before this decision, South African law only recognised a mistake of fact as a valid defence. Following the judgment, a mistake of law is now also a valid defence in crimes requiring fault.

However, crimes requiring intent are distinguished from those requiring negligence. After *De Blom*, the accused's knowledge of his conduct's unlawfulness is always a requirement for *mens rea* in the form of intent (Burchell 2016, p. 387). A genuine mistake or ignorance of the law will negate *mens rea* regarding the crime's unlawfulness and, therefore,

[33] The present author explores this in a forthcoming article in Recht in Afrika.
[34] 1952 (1) SA 381 (A).
[35] S 20(3) *Black Administration Act* 38 of 1927.
[36] 1988 (2) SA 576 (BG).
[37] 1977 (3) SA 513 (A).

exclude liability for crimes requiring intent (Burchell 2016, p. 388; Kemp et al. 2018, p. 571). It is unnecessary to show that the accused knew his conduct was unlawful (Burchell 2016, p. 390). It is sufficient to show that he foresaw the possibility thereof and still proceeded (Burchell 2016, p. 390).

Moreover, proving that the accused knew the exact details of the offence or the specific law he was contravening is unnecessary.[38] It is sufficient to show that the accused knew or foresaw that he may break the law. Therefore, an accused of ordinary intelligence and life experience who commits a crime involving inherently wrong or immoral conduct will rarely convince a court that he failed to foresee at least the possibility that his conduct would contravene some law (Kemp et al. 2018, p. 571).

For crimes requiring negligence, it would be equally impossible to escape liability based on actual ignorance or mistake of law. A person who embarks on an activity, albeit briefly, must take reasonable steps to ascertain the law applicable to that activity.[39] Failure to do so constitutes negligence.

In *Molubi*, the appellant's appeal failed on this basis. Regarding his first argument, the Appellate Division found that he could not rely on the legal development made in *De Blom* because, as an executive organ and member of the tribal court, he was expected to know the law applicable to his functions.[40]

As for the second argument, the Appellate Division carefully analysed the legislative provisions governing the proceedings in traditional courts and concluded that such a court was authorised to impose corporal punishment as a sentence.[41] However, it may not do so for a married man or a male aged 30 years or older for contempt of court.[42] The judgment is silent on this point, but the complainant supposedly fell into this category because the Appellate Division found the tribal court's decision to impose corporal punishment "wrong, illegal, *ultra vires* and unconstitutional".[43] It further held that the appellant, as a professional officer of the tribal court, should have known that was the case and acted unlawfully in carrying out the order.

While the present author agrees with the Appellate Division's ultimate finding, the court's application of the principles for crimes requiring negligence is confusing. Assault in South African law requires intent. Like other common law crimes such as murder, theft, and robbery, assault also generally involves inherently wrong or immoral conduct. The appellant's position and the court's comparison of him to "any other tribesman"[44] indicate that he was of ordinary intelligence and life experience. The judgment also states that a conviction of assault with intent to do grievous bodily harm would have been more appropriate because, based on a medical examination of the complainant, the punishment appeared to have been inflicted with that intent.[45]

Against the above, the appellant would have struggled to convince the court that he failed to foresee at least the possibility of acting unlawfully. Therefore, the court's reasoning should instead have been that the appellant knew or foresaw the possibility that the tribal court's order was wrong and illegal but still proceeded with it, rendering his conduct unlawful.

A more recent case to consider is *S v Dalindyebo*.[46] Here, King Dalindyebo, the paramount chief of South Africa's abaThembu tribe, faced several criminal charges for convicting his subjects of offences outside his jurisdiction and imposing extreme punish-

38 *S v Magidson* 1984 (3) SA 825 (T), p. 830, *S v Hlomza* 1987 (1) SA 25 (A), p. 32.
39 *De Blom* (n. 38), p. 532.
40 *Molubi* (n. 37), p. 579.
41 The incident occurred in the Republic of Bophuhatswana, a former homeland during South Africa's apartheid era. The legislative provisions included section 8 of Bophutatswana's *Traditional Courts Act* 29 of 1979 and regulations 18(3) and 19 of Proclamation 8 of 1982.
42 *Molubi* (n. 37), p. 581.
43 See footnote 42.
44 See footnote 42.
45 *Molubi* (n. 37), p. 579.
46 2016 (1) SACR 329 (SCA).

ments that exceeded his authority.[47] During the trial, it emerged that Dalindyebo actively participated in the punishments. It was, for example, alleged that he publicly and viciously assaulted three young men as punishment, without a trial, for allegedly committing housebreaking and rape.[48]

Dalindyebo also involved his subordinates in his punishments. When he became tired of assaulting the three men above, he ordered his subordinates to continue the assault until they screamed.[49] Dalindyebo further instructed some of his loyalist community members to assault a fourth man, the three men's alleged co-perpetrator, in the same manner.[50] The man ended up succumbing to his injuries.

There is no indication that Dalindyebo's subordinates ever stood trial for their involvement. Should they have, they would have undoubtedly raised obedience to the king's orders as a defence to negate the unlawfulness of their actions. The present author explores this strategy in another contribution.[51] Much like the appellants in *Kumalo* and *Molubi*, Dalindyebo's subordinates would have argued that, as his subordinates, they were merely carrying out what they perceived to be lawful orders and, therefore, did nothing wrong.

However, like the *Kumalo* and *Molubi* cases, it is doubtful that this argument would have succeeded regarding the capacity enquiry. It was never pronounced during Dalindyebo's trial, but there were clear indications that his order and the punishments inflicted were unlawful. For example, the men above were assaulted as punishment for crimes they allegedly committed without ever receiving a trial.[52] Even if a proper trial had occurred, the *Black Administration Act* excluded the offences and punishments from Dalindyebo's jurisdiction, and he conceded to that during the trial.[53]

There are also clear indications that the subordinates knew full well they were carrying out unlawful instructions. The evidence was tendered to show that the public assault on the three men was so severe that some observers and "even his henchmen could not bear to watch".[54] To the trial court, this showed that the assaults "did not receive the approval of the community present".[55] There was also evidence that the men would not have survived the ordeal had it not been for medical intervention.[56] It also goes without saying that the assault leading to the fourth man's death was unlawful.

Against the above, a similar argument to that for *Molubi* can be made. Any person of ordinary intelligence and life experience would consider the conduct of Dalindyebo and his subordinates inherently wrong or immoral. His subordinates would, therefore, have failed to convince a court that they did not know or foresee the possibility that Dalindyebo's order was unlawful. And by proceeding with that knowledge, their conduct was also unlawful and wrong.

The discussion above shows that an accused will struggle to convince a court that he should be acquitted of a culturally motivated crime because he lacked the first part of the criminal capacity enquiry. What remains is to consider whether an accused's cultural background, values, and beliefs can negate the second part of that inquiry.

Burchell (2016, pp. 257, 426–27) argues that, following the *Eadie* judgment, the second part of the criminal capacity enquiry is now subjective and objective. With the subjective inquiry, the court may consider that any subjective factor relevant to the accused's cognitive

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47 The offences included arson, attempted murder, culpable homicide, attempting to defeat the course of justice and kidnapping. He was sentenced to an effective term of 15 years' imprisonment.

48 *Dalindyebo* (n. 50), pp. 332, 347.

49 *Sarah Evans*, Dalinyebo the 'tyrant': The court case against the king, https://mg.co.za/article/2013-07-17-dalindyebo-the-tyrant-the-case-against-the-king/ (accessed on 9 February 2024).

50 *Dalindyebo* (n. 50), pp. 332, 348, 358.

51 Author's forthcoming article in Recht in Afrika.

52 *Dalindyebo* (n. 50), p. 332.

53 Ibid., p. 349. Schedule 3 of the *Black Administration Act* excluded the offences from his jurisdiction, while section 20(2) of the Act excluded the punishments.

54 See footnote 48.

55 Ibid., p. 357.

56 See footnote 48.

mental function may have caused him to lack the capacity to control his conduct. However, the test for criminal capacity must still be evaluated against acceptable societal standards of behaviour. Therefore, with the objective inquiry, a court must determine whether the accused could have acted according to the objective societal norms of temperance, reasonable self-restraint, and reasonable fortitude.

In making its evaluation, the court will use the standard of a reasonable person with the same characteristic that the accused alleges excluded his criminal capacity to determine whether the accused could have acted differently (Burchell 2016, p. 427). Ultimately, the approach will allow subjective factors affecting the accused's appreciation, perception, and knowledge to be accommodated under the first part of the criminal capacity enquiry (Burchell 2016, p. 427). Meanwhile, subjective factors affecting the accused's judgment will be considered under the second part of the criminal capacity enquiry but tested against the objective societal norms above (Burchell 2016, p. 427).

The controversial case of *R v Mbombela*[57] can be used to illustrate how the approach to criminal capacity above can lead to equitable results in a multicultural society such as South Africa. Here, the accused mistook his nine-year-old nephew for a tokoloshe and killed him. Some children had been frightened by the presence of a human-like form with tiny feet in a nearby hut and alerted the accused. The accused shared a widespread superstition that the tokoloshe sometimes appears in this form, and looking it in the face is fatal. So, when the accused investigated, he was convinced he was confronting a deadly tokoloshe. He then fetched a hatchet and struck the believed creature several times, only to realise afterwards that it was, in fact, his young nephew.

Mbombela's defence at trial was that he genuinely believed he was killing an evil spirit, not a human being (Carstens 2004, p. 10; Burchell 2016, p. 429). The court rejected his defence and convicted him of murder. Mbombela's defence also failed on appeal because, after testing his actions against that of a reasonable person in his circumstances, the Appellate Division found that his mistake regarding the object he was striking at was unreasonable (Carstens 2004, p. 10). However, the Appellate Division found that his belief was based on a *bona fide* mistake of fact, causing him to lack the intention to commit murder. It instead convicted him of culpable homicide.

In reaching its judgment, the Appellate Division applied a standard of reasonableness that ignored Mbombela's characteristics and beliefs. Academic commentators have debated the correctness of this decision. Burchell (2016, p. 429) argues that applying the modern rules of capacity in *Mbombela* could have avoided injustice to the accused because Mbombela's characteristics and beliefs would have been considered to determine whether he could appreciate that he might kill a human being and act accordingly. He submits that the court's willingness to accept that the accused genuinely believed he was killing a tokoloshe and that a belief in the tokoloshe was prevalent in the accused's community could have easily led it to conclude that Mbombela lacked the subjective capacity to realise that his conduct was unlawful.

Moreover, the fact that children, whom customary belief considers best able to identify evil spirits, alerted Mbombela to the form's presence may have excluded his capacity to act according to his appreciation of the wrongfulness of his conduct. Therefore, Burchell (2016, p. 429) convincingly submits that Mbombela could not have acted differently.

Carstens (2004, p. 10) similarly argues that Mbombela's cultural defence should have succeeded because he was unaware of the unlawfulness of his conduct. In other words, the first part of the capacity enquiry was absent.

The *Kumalo, Molubi,* and *Dalindyebo* cases can be juxtaposed against Mbombela's regarding the second part of the capacity enquiry. Before doing so, it is vital to understand the cultural significance of the duty to obey a traditional leader. The duty is entrenched in customary law and several statutes. To explain, the *Black Administration Act* provides that

[57] 1933 AD 269.

traditional court judgments must be enforced according to Black law and custom.[58] Those laws and customs differ among traditional communities, making it impossible to outline them comprehensively. It is also irrelevant for present purposes. However, it is relevant to understand that traditional communities' laws and customs governing dispute-resolution processes focus on reconciliation, restoring harmony, and protecting the group's interests (Harper 2011, pp. 18, 20–21; Penal Reform International 2000, pp. 23–24, 26, 28, 33, 34–35; Himonga et al. 2023, p. 321).

Most African communities attach legal rights and duties to a group rather than individuals (Penal Reform International 2000, p. 23). Group members only use the collective rights belonging to a family, tribe or ethnic group. When a group member breaks the law, the entire group is deemed to have broken the law. Similarly, the whole community is considered wronged when a group member has been wronged. Because a conflict afflicts the entire community, it partakes in the dispute resolution processes, making them public and participatory (Harper 2011, pp. 18, 20; Penal Reform International 2000, p. 26). Social harmony can only be restored if the disputants and the community are satisfied with the process and the case's outcome (Harper 2011, p. 20; Penal Reform International 2000, pp. 26, 28).

However, a traditional community requires a leader to function correctly (Himonga et al. 2023, p. 321). The *Black Administration Act* put traditional leaders at the heart of the dispute-resolution process by providing for traditional courts constituted by chiefs assumed to know or dictate customary law to oversee the process.[59] Although they ultimately decree a resolution to a dispute, it is generally just a condensed pronouncement of the consensus reached by all the participants (Himonga et al. 2023, p. 388; Penal Reform International 2000, p. 27).

Social pressure plays a significant role in enforcing customary dispute resolution outcomes (Harper 2011, p. 21; Penal Reform International 2000, pp. 26, 33). It most often derives from a normative commitment to customary rules, the traditional leader's authority, or the humiliation of jeopardising social harmony in the traditional community (Harper 2011, p. 21). Therefore, when subordinates disobey a traditional leader's orders, they defy the whole community, potentially leading to social and economic ostracism (Penal Reform International 2000, p. 33).

Additionally, defying a traditional leader's orders constitutes a customary law offence, for it violates the African custom of *inhlonipho* or *hlompho* (respect) (Himonga et al. 2023, p. 321). It is a contentious offence, for it lacks a clear definition of defiance or contempt in customary law. What constitutes disobedience is, therefore, left to the sole discretion of the traditional leader.

Although the provision in the *Black Administration Act* that first codified the offence has been repealed, there are indications that it is still part of customary law. To illustrate, traditional courts still exist and punish subordinates for contempt of court. Moreover, some of South Africa's provincial legislation still codifies the offence.[60]

Considering the above, it is conceivable for a subordinate to have the cognitive ability to distinguish right from wrong when taking orders from a traditional leader but be unable to resist acting contrary to that appreciation. However, this argument would have failed in the *Kumalo*, *Molubi,* and *Dalindyebo* cases. It cannot be said that the subordinates in any of these cases obeyed the traditional leader's instructions out of their normative commitment to the community's customs and laws, the traditional leader's authority, or fear of community sanctions or punishment for a customary law offence.

In *Kumalo*, the subordinates knew they had to obey state law, which prohibited them from administering lashes as part of native custom.[61] Moreover, they knew the chief had "no authority from the Government to give lashes".[62] But instead of refusing or resisting

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58 S 20(2).

59 As Himonga et al. (2023, p. 385) point out, this could be inferred from the wording of sections 12 and 20 of the *Black Administration Act* that recognised the traditional dispute resolution forums.

60 See sections 7(1) and 15 of the Natal Code of Zulu Law.

61 *Kumalo* (n. 35), p. 395.

62 See footnote 61.

the unlawful order, they decided to teach the disobedient subject a lesson on respecting the chief. Similar points can be raised regarding *Molubi.* The appellant inflicted more harm to the complainant than necessary instead of resisting or refusing an order he had to have known or foreseen the traditional leader had no authority to give.[63]

The *Dalindyebo* case is slightly different. There was overwhelming evidence at trial that the king had "ruled with fear and trepidation", leading the court to label him a "tyrannical and despotic king".[64] His subjects did not dare disobey his orders out of fear that he would burn their houses, crops, and livestock in full view of their families as a consequence.

In this instance, relative force (*vis compulsiva*) is at play. His subjects could subject their bodily movements to their will or intellect and act according to their appreciation of right and wrong but faced the prospect of suffering harm if they chose not to act. If the subjects did carry out his instructions and, in so doing, committed an unlawful act, they may escape criminal liability on the basis that their conduct was justified by necessity. However, necessity excludes unlawfulness and not criminal capacity.

Dalindyebo also had followers who were mindlessly devoted to him. So devoted that they would "cut the throat of a person with a knife if so ordered by the King".[65] Ostensibly, these followers fit the category of subordinates who would lack the second part of the capacity enquiry because of the cultural significance of the duty to obey a traditional leader.

However, as shown earlier, they would unlikely escape liability for inherently wrong or immoral conduct. Moreover, where it is abundantly clear that the king's orders are unlawful, their concomitant execution would be equally unlawful and wrong. Lastly, when considering the subjective factors affecting their judgment under the second part of the criminal capacity enquiry but tested against the objective societal norms of temperance, reasonable self-restraint, and reasonable fortitude, it is doubtful that a court will find that they could not have acted differently under the circumstances.

While South Africa's criminal capacity enquiry can seemingly accommodate a cultural defence, albeit within its existing principles and not as a separate or distinct defence, it must be appreciated that South Africa's criminal courts have had little opportunity to consider culturally motivated crimes since the advent of South Africa's new constitutional dispensation. In none of those they have considered, the accused argued a lack of criminal capacity because of his cultural background, values, and beliefs. It, therefore, remains to be seen how the criminal courts will approach this complex area of law.

5. Influence of the Cultural Defence on Fault (*Mens Rea*) as a Prerequisite for Culpability

Once an accused's criminal capacity has been established, an enquiry into his fault follows. An accused who lacks the necessary fault when committing the unlawful act cannot be criminally liable. Fault takes the form of intention or negligence.

Intention consists of a cognitive (intellectual) and a conative (voluntative) component. The cognitive part requires the accused to know that his conduct meets the definitional elements of a crime and that it is unlawful. The conative part involves aiming a person's will towards performing certain conduct or achieving a particular result.

If the cognitive part is lacking, a mistake (or *error*) is present, and the accused lacks the necessary intention. The mistaken belief does not have to be reasonable. It is not required that a reasonable person in the accused's position would have made a mistake. Instead, a mistaken belief must be material, and to be so, it must relate to the accused's conduct, the crime's definitional elements, and its unlawfulness. The mistake must also be *bona fide*, meaning it must not be feigned but must have existed when the accused committed the act.

The test for intention is subjective in that a court must determine what transpired in the accused's mind while committing a particular offence.[66] The court does so by putting

[63] *Molubi* (n. 37), p. 578.
[64] *Dalindyebo* (n. 50), p. 331, 348, 357.
[65] *Dalindyebo* (n. 49), p. 331, 348, 357.
[66] *S v Sigwahla* 1967 4 SA 566 (A), p. 570, *S v Lungile* 2000 1 All SA 179 (A), p. 184.

itself in the accused's shoes during the commission of the crime and considering all relevant facts and circumstances.[67]

Like the presence of intention, its absence due to a material mistaken belief is determined subjectively. It is a factual question based on the accused's notion of the events and circumstances during the commission of the act. The accused's characteristics, level of superstition, degree of intelligence, background, and psychological disposition are considered in the process.

The absence of a reasonableness requirement lends the intention element to considering cultural arguments. Once a genuine belief has been proven and cannot be rebutted, the accused's defence of a mistake must succeed, regardless of the mistake's cause (Phelps 2011, pp. 148–49). Academic commentators have also questioned the correctness of the decision in *R v Mbombela* on this point. The Appellate Division's finding that Mbombela's mistake concerning the object in the hut had to be reasonable went against the established principle in South African criminal law that a mistake of fact will only be an excuse if it is material as opposed to reasonable.[68]

The Appellate Division was South Africa's highest court at the time of the *Mbombela* judgment. The accused, therefore, had no further recourse to challenge his ultimate conviction on culpable homicide. Today, South Africa's highest court is the Constitutional Court. It may hear appeals from the then Appellate Division, now known as the Supreme Court of Appeal. It is submitted that should the Mbombela judgment have been handed down in South Africa's constitutional dispensation, it would have been taken on appeal to the Constitutional Court, who undoubtedly would have overturned it for its erroneous interpretation and application of the law.

An accused's knowledge of his conduct's unlawfulness means he must know he has no defence available. Where an accused genuinely yet mistakenly believes he is acting under a particular defence, he is acting under a putative defence. A putative defence does not vitiate the conduct's unlawfulness but the accused's intention. It may even vitiate the accused's negligence if a reasonable person would have made the same mistake. The belief need not be rational but must be genuine. The *Mbombela* case above illustrates how an accused's cultural background, values, and beliefs can influence his subjective mind to the extent that he had such a genuine yet mistaken belief.

The defence of putative obedience to superior orders requires further exploration. It is available to an accused who obeys an unlawful order or exceeds the limits of a lawful order but genuinely believes his conduct is legally justified (Burchell 2016, p. 412). Arguably, the defence could fit the circumstances in *Kumalo*, *Molubi*, and *Dalindyebo*, with the subordinates invoking the cultural significance of the duty to obey a traditional leader as the basis for a claim that they genuinely believed they committed no wrong.

However, where an order is so manifestly unlawful, a court may be unconvinced that an accused did not know or foresee at least the possibility of it being unlawful and may then find that he must have foreseen the possibility that the order was unlawful and, by inference, did foresee that possibility (Burchell 2016, p. 412). Therefore, the order's degree of lawfulness is evidentially significant to determining the accused's state of mind (Burchell 2016, p. 412).

A reliance on the defence would have failed in the *Kumalo* case for the above reasons. The first appellant's order was manifestly unlawful, a fact all the appellants knew perfectly well. The same can be said of *Molubi*. The fact that the Appellate Division labelled the tribal court's decision "wrong, illegal, *ultra vires* and unconstitutional" indicates that it is manifestly unlawful. At the very least, it should have been clear to the appellant, who was expected to know the limits to the court's sentencing jurisdiction as a professional member of that court.

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[67] Ibid., *S v Ferreira* 2004 (2) SACR 454 (SCA), p. 467, *S v Makgatho* 2013 (2) SACR 13 (SCA), p. 16.

[68] See (Snyman 2021, pp. 143–48; Burchell 2016, pp. 399–400; Kemp et al. 2018, p. 565) for an explanation of this principle.

It speaks for itself that the defence would have failed in the *Dalindyebo* case. Not only were the king's orders manifestly unlawful, but they also far exceeded the limits of any lawful order. Also, it is clear from the facts that none of the subordinates could claim they genuinely believed their execution of the king's orders was legally justified.

While arguments about an accused's cultural background can neatly fit into South Africa's current law regarding intention, the same cannot be said of negligence. In South African criminal law, negligence is determined using an objective three-part test. The first part determines whether a notional reasonable person in the same circumstances as the accused would have foreseen the reasonable possibility that a particular consequence might occur or that his conduct might cause that specific result. It is then determined whether a reasonable person would have acted to guard against such a possibility. Lastly, it is determined whether the accused failed to take those steps. The accused is negligent if the answer to all the above is affirmative.

Defining the notional reasonable person in a country like South Africa, with a diverse society and a constitutional right to cultural freedom, is challenging (Phelps 2011, p. 151). Burchell (2016, p. 425) echoes the definitional difficulty by referring to the "potential injustice of applying a completely objective criterion of negligence in a diverse, multicultural community with varying degrees of education, literacy and backgrounds". He further points to the objective test's punitive effect: an unintelligent, ignorant, or inexperienced person may be punished for lacking the notional reasonable person's intelligence, knowledge, or experience in particular circumstances.

South Africa's courts have grappled with accurately defining the notional reasonable person long before its constitutional dispensation. In *S v Melk*,[69] the court observed that the objective test of negligence ignores the "widely differing standards of culture, education and social awareness of the various groups of persons" in South Africa. Consequently, an unsophisticated, uneducated shepherd and a professor are treated as equals before the law. The court in *S v Naidoo*[70] similarly referred to the differing standards above in expressing that applying an objective standard to South Africa's diverse society may result in hardship so unjust that it could hardly have been the legislator's intent behind a particular law. The case of *R v Mbombela* above illustrates the potential injustice in using the objective, reasonable person standard of negligence.

Meanwhile, the case of *S v Ngema* discussed earlier illustrates the judiciary's attempt to soften the blow when applying the objective, reasonable person standard of negligence in a culturally diverse society such as South Africa. As mentioned, the court convicted the accused on a lesser charge after it found that the accused's belief in the tokoloshe had eliminated his subjective intention to kill a human being.

In considering the accused's negligence, the court stated that, even though the test for negligence is objective and traditionally does not consider the accused's particular circumstances, there is still room for individualising the test. However, the court was unwilling to do away with the traditional reasonable person test. Instead, it was willing to accept that the accused's negligence should be determined according to the "touchstone of the reasonable person of the same background and educational level, culture, sex and race of the accused". In this regard, and contrary to the decision in *Mbombela*, the court held that the accused's belief in the tokoloshe "is not uncommon amongst people of his ilk" and could, therefore, be considered in determining his negligence according to the objective, reasonable person standard.

Despite the above, the court held that the accused had acted unreasonably by striking nine blows at the "thing" he saw in his dreams and convicted him of culpable homicide. The court reasoned that nightmares are not peculiar to any particular race or class and are something everyone has occasionally. It can, therefore, never make killing another human being in the accused's circumstances reasonable.

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[69] 1988 (4) SA 561 (A), p. 578.
[70] 1974 (4) SA 574 (N), p. 576.

Phelps (2011, p. 152) argues that the *Ngema* approach intended to "reflect the changing standards in South Africa during its transition out of apartheid". As such, it was ahead of the times because, although the Constitution was non-existent at the time of the judgment, the court's approach aligned with the constitutional right to cultural freedom.

At the same time, Phelps criticises the *Ngema* approach for making the test for negligence vaguer. She points to the court's statements that the accused's negligence can be determined by considering his education, culture, sex, and race while disregarding his further individual peculiarities. However, the court did not elaborate on those further individual peculiarities, nor did it distinguish them from the other characteristics the court considers part of the negligence test.

Burchell (2016, pp. 429–30) also criticises the approach for its potentially adverse effects on South Africa's general principles of criminal liability. He points out that if the capacity inquiry accommodates an accused's belief in superstition and other subjectively held beliefs, it is unnecessary to consider them in the negligence inquiry.

Since *Ngema*, other court decisions have also favoured individualising the objective test for negligence.[71] However, instead of giving direction on how courts should do so, they only added to the uncertainty surrounding this area of South African criminal law. The decisions distinguish between the accused's internal characteristics and his external circumstances. While only the external characteristics should be attributed to the reasonable person, the courts have also considered the accused's internal characteristics, such as age, gender, level of education, and race.

Burchell (2016, pp. 427–28) argues that the modern approach to criminal capacity above would mediate the harsh effect of the objective, reasonable person test in a culturally diverse society such as South Africa. It would have several advantages besides creating a middle ground between complete objectivity and subjectivity. First, a test with both subjective and objective aspects would recognise the society's diversity by accommodating an accused's subjective characteristics. Moreover, by determining whether the accused could have acted differently, it would adopt an equitable criterion of reasonableness. Next, it would not deviate from existing legal principles because the first part of the negligence test's formulation can be explained in terms of the approach. The word 'could' refers to the capacity enquiry, which is essentially subjective. The word 'should' refers to the objective negligence enquiry.

Lastly, the normative aspect of the criterion is essential for a court to determine which characteristics or beliefs a society should tolerate. It must, however, be kept in mind that the normative negligence enquiry and the modern approach to criminal capacity involve value judgments by judges. Therefore, in cases involving culturally motivated crimes, an accused adhering to an African value system can appear before a Western court with a learned judge adhering to a Western value system, who must then decide what the reasonable person in the same circumstances as the accused would or should have done. Moreover, urbanisation has made it more common to find people in South Africa who only partly subscribe to an African value system (Rautenbach and Matthee 2010, p. 117). It has important implications for South Africa's criminal law, for it raises the question of how a court should test the strength of an accused's cultural affiliation (Rautenbach and Matthee 2010, pp. 117–18). Rautenbach and Matthee (2010, p. 118) illustrate the problem using the following example:

> A young man of Zulu extraction may have gone to a university and obtained a degree in accounting. He may be domiciled in a rural area in the province of KwaZulu-Natal, have a falling out with his neighbour, an elderly woman, and set her house on fire, killing her in the process. When his day in court comes he claims that his act was culturally motivated, because he truly believed that she was a witch. In this scenario it is important to consider whether a court will react to him in the same way as it would to a peasant farmer with no schooling.

[71] See, for example, the cases of *S v Robshon*; *S v Hattingh* 1991 (3) SA 322 (W), *S v Shivute* 1991 (1) SACR 656 (Nm) and *S v Ngubane* 1985 (3) SA 677 (A).

The courts need not go further than the Bill of Rights in South Africa's Constitution, which outlines the fundamental values of a diverse and democratic state, to facilitate their identification of acceptable societal values. Those fundamental values include human dignity, the achievement of equality and the advancement of human rights and freedoms.

Burchell (2016, p. 430) further argues that, while there is no question that the reasonable person standard must be individualised, if it can be achieved within the already partially subjective, preliminary inquiry into capacity, justice and logic will coincide and avoid an unnecessary duplication of inquiries. Phelps (2011, p. 153) agrees with Burchell that if arguments of cultural beliefs were considered when determining criminal capacity, there would be no need to reconcile the objective nature of the test for negligence with the subjective features of cultural beliefs.

6. Conclusions

This paper considered whether South Africa's enactment of a supreme Constitution revealed a gap in its criminal law on conduct and culpability that necessitates the development of a separate, distinct, or novel cultural defence. The paper concludes that South Africa's existing criminal law principles on conduct and culpability remain flexible enough to allow for cultural arguments, even in the constitutional dispensation that enshrines cultural and religious freedom as a fundamental human right. Moreover, South Africa's pre-existing defences negating conduct and culpability are still accommodating an accused's cultural background, values, and beliefs.

The defence of automatism in South Africa can accommodate an accused's cultural background, values, and beliefs and negate the element of voluntary conduct without departing from its existing principles. Similarly, the defence of temporary non-pathological criminal incapacity can accommodate cultural claims to negate the element of criminal capacity. More specifically, the second part of the criminal capacity test now entails a subjective and objective inquiry that could accommodate cultural arguments. In this way, the law can reflect South Africa's diversity without introducing a separate, distinct, or novel cultural defence.

The courts already consider an accused's cultural background, values, and beliefs during the subjective enquiry into intention. Whether the courts should develop a principled manner for doing so is debatable. Meanwhile, the South African courts seem willing to consider an accused's cultural arguments in an individualised reasonable person test for negligence. However, it would seemingly only compound an already unclear area of South African law.

Renteln (2004, p. 200) warns that even if it is theoretically possible to raise a cultural defence during a trial, this will not happen if judges view culture as irrelevant. However, as mentioned, South African criminal courts have a constitutional obligation to consider indigenous law if and when that law is applicable. Therefore, when an accused argues that his indigenous beliefs and customs caused him to commit a crime, indigenous law will be relevant, and the court may not ignore the importance of those cultural considerations.

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Abbreviations

TNPCI Temporary Non-pathological Criminal Incapacity

References

Amoah, Jewel, and Tom Bennett. 2008. The Freedoms of Religion and Culture under the South African Constitution: Do Traditional African Religions Enjoy Equal Treatment? *African Human Rights Law Journal* 8: 357–75. [CrossRef]

Anonymous. 1986. The Cultural Defense in the Criminal Law. *Harvard Law Review* 99: 1293–311.

Bennett, Tom. 2010. The Cultural Defence and the Practice of Thwala in South Africa. *University of Botswana Law Journal* 10: 3–26.

Bryant, Gerard. 2003. Promised Marriages—The Jackie Pascoe Case. *Indigenous Law Bulletin* 23: 20–21.

Burchell, Jonathan. 2016. *Principles of Criminal Law*, 5th ed. Cape Town: Juta, pp. 51, 59, 72–73, 257–58, 329, 349, 358, 390–91, 399–400, 425–30.
Carstens, Pieter. 2004. The Cultural Defence in Criminal Law: South African Perspectives. *De Jure* 37: 1–25.
Choi, Carolyn. 1990. Application of a Cultural Defense in Criminal Proceedings. *UCLA Pacific Basin Law Journal* 8: 80–90. [CrossRef]
Douglas, Heather. 2005. 'She Knew What was Expected of Her': The White Legal System's Encounter with Traditional Marriage. *Feminist Legal Studies* 13: 181–203. [CrossRef]
Du Plessis, Anel, and Christa Rautenbach. 2010. Legal Perspective on the Role of Culture in Sustainable Development. *Potchefstroom Electronic Law Journal* 13: 27–71. [CrossRef]
Fischer, Michaël. 1998. The Human Rights Implication of a Cultural Defense. *Southern California Interdisciplinary Law Journal* 6: 663–702.
Greenawalt, Kent. 2008. The Cultural Defense: Reflections in Light of the Model Penal Code and the Religious Freedom Restoration Act. *Ohio State Journal of Criminal Law* 6: 299–321.
Harper, Erika. 2011. *Customary Justice: From Program Design to Impact Evaluation*. Rome: International Development Law Organization, pp. 18, 20–21.
Himonga, Chuma, Thandabantu Nhlapo, I. P. Maithufi, and Sindiso Mnisi Weeks. 2023. *African Customary Law in South Africa—Post-Apartheid and Living Law Perspectives*. Cape Town: Oxford University Press, p. 321.
Kemp, Gerhard, Shelley Walker, Robin Palmer, Dumile Baqwa, Christopher Gevers, Brian Leslie, and Anton Steynberg. 2018. *Criminal Law*, 3rd ed. Cape Town: Oxford University Press, pp. 23, 153, 156, 376, 465–68.
Kugara, Stewart, Pfarelo Matshidze, and Vhonani Netshandama. 2018. A critical Evaluation of Cultural Defence of Witchcraft in Zimbabwe and South Africa. *Journal of Gender, Information and Development in Africa* 7: 105–24. [CrossRef]
Parsons, Talcott, and Edward Shils. 1990. Values and Social Systems. In *Culture and Society: Contemporary Debates*. Edited by Jeffrey Alexander and Steven Seidman. New York: Cambridge University Press, p. 40.
Penal Reform International. 2000. *Access to Justice in Sub-Saharan Africa, The Role of Traditional and Informal Justice Systems*. London: Penal Reform International, pp. 23–24, 26, 28, 33–35.
Phelps, Kelly. 2011. Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law? In *Traditional African Religions in South African Law*. Edited by Tom Bennet. Landsdowne: UCT Press, pp. 135–55.
Phillips, Anne. 2003. When Culture Means Gender: Issues of Cultural Defense in the English Courts. *The Modern Law Review* 66: 510–31. [CrossRef]
Rautenbach, Christa. 2011. Umkhosi Ukweshwama: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage. In *Traditional African Religions in South African Law*. Edited by Tom Bennet. Landsdowne: UCT Press, pp. 63–89.
Rautenbach, Christa. 2021. *Introduction to Legal Pluralism in South Africa*, 5th ed. Cape Town: LexisNexis, p. 13.
Rautenbach, Christa, and Jacques Matthee. 2010. Common Law Crimes and Indigenous Customs: Some Challenges Facing South African Law. *Journal of Legal Pluralism and Unofficial Law* 42: 109–44. [CrossRef]
Rautenbach, Christa, Fanie Jansen van Rensburg, and Gerrit Pienaar. 2003. Culture (and Religion) in Constitutional Adjudication. *Potchefstroom Electronic Law Journal* 6: 2–20.
Renteln, Alison Dundes. 1992. A Justification of the Cultural Defense as Partial Excuse. *Southern California Review of Law and Women's Studies* 2: 437–526.
Renteln, Alison Dundes. 2004. *The Cultural Defense*. New York: Oxford University Press, p. 200.
Renteln, Alison Dundes, and Marie-Claire Foblets. 2009. Introduction. In *Multicultural Jurisprudence Comparative Perspectives on the Cultural Defense*. Edited by Marie-Calire Foblets and Alison Dundes Renteln. Portland: Hart Publishing, pp. 1–3.
Snyman, Callie. 2021. *Criminal Law*, 7th ed. Durban: LexisNexis, pp. 26–27, 46–47, 128–29, 138–40, 149–59, 170–71, 179, 206.
Torry, William. 1999. Multicultural Jurisprudence and the Cultural Defense. *Journal of Legal Pluralism and Unofficial Law* 44: 127–61. [CrossRef]
Van Broeck, Jeroen. 2001. Cultural Defence and Culturally Motivated Crimes (Cultural Offences). *European Journal of Crime, Criminal Law and Criminal Justice* 9: 1–32. [CrossRef]
Volpp, Leti. 1996. Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism. *Columbia Law Review* 96: 1573–617. [CrossRef]