Influence of the Cultural Defence on Unlawfulness in South African Criminal Law

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Abstract

South African criminal law does not formally recognise a separate or distinct cultural defence despite the courts having had ample opportunity to consider doing so. A formal cultural defence could negate an accused's liability for a so-called "culturally motivated crime" or, at the very least, mitigate the accused's sentence. The desirability of recognising such a defence in South Africa's criminal law necessitates understanding its possible influence on the requirements for criminal liability. This article evaluates the influence of the cultural defence on the element of unlawfulness. The first part outlines unlawfulness in South African criminal law. The subsequent parts consider whether private defence, necessity, obedience to superior orders and consent as grounds of justification in South Africa can accommodate arguments that an accused's indigenous belief or custom resulted in a culturally motivated crime. The aim is to determine whether South African criminal law on unlawfulness has a gap that only a separate and distinct cultural defence can fill. The article concludes that South Africa's principles of unlawfulness are already broad enough to accommodate arguments of an accused's indigenous belief or custom to negate this element of criminal liability without the need for a separate or distinct cultural defence.

A. Introduction

A cultural defence is a legal strategy whereby an accused charged with a so-called "culturally motivated crime" puts evidence of his cultural background and values before a criminal court to escape criminal liability or, at the very least, receive a lighter sentence.[1] It is a versatile defence. It can be presented as a separate, distinct or novel defence or introduced as part of a pre-existing defence.[2] An accused can also use it to try and mitigate his sentence.

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1 *Jacques Matthee*, One Person's Culture is Another Person's Crime: A Cultural Defence in South African Law?, LLD Thesis, North-West University, 2014 thesis SA, 22.

2 *Kelly Phelps*, Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?, in: *Tom Bennet* (ed.), Traditional African Religions in South African Law, Landsdowne 2011, 137.

Although the South African criminal courts have had ample opportunity to consider culture as the motivation for a crime,[3] they have yet to develop the South African criminal law to include a separate, distinct or novel cultural defence.[4] However, since 2004, South African scholars[5] have debated whether the time is ripe for such a development. The debate stems from the enactment of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

The Constitution protects cultural and religious freedom as a fundamental human right.[6] It also entrenched African customary law's equal status to the South African common law.[7] Despite their equal status, the two legal systems still conflict, especially within South African criminal law.[8] As a perusal of case law reveals, an individual's conduct can be viewed as the legitimate exercise of cultural freedom in African customary law but, at the same time, considered a crime in South Africa's common or statutory law.[9]

Adopting a separate, distinct or novel cultural defence necessitates understanding its possible influence on the requirements for criminal liability in South Africa.[10] Such an understanding will reveal how the South African criminal courts have dealt with cultural (and religious)[11] arguments until now and assist in understanding any future role of such arguments in criminal trials.[12]

The South African common law prescribes six general requirements for criminal liability: legality, conduct, compliance with the definitional elements of a crime, unlawfulness,

3 See, for example, the cases of *R v Njova* 1906 20 EDC 71, *Ncedani v R* 1908 22 EDC 243, *R v Swartbooi* 1916 EDL 170, *R v Njikelana* 1925 EDL 204, *R v Mbombela* 1933 AD 269, *R v Matomana* 1938 EDL 128, *R v Mane* 1948 (1) All SA 128 (E), *R v Mane* 1948 1 All SA 128 (E), *R v Fundaku*bi 1948 (3) SA 810 (A), *Rex v Kumalo* 1952 (1) SA 381 (A), *R v Sita* 1954 (4) SA 20 (E), *R v Ngang* 1960 (2) SA 363 (T), *S v Sikunyana* 1961 (3) SA 549 (E), *S v Mokonto* 1971 (2) SA 319 (A), *S v Seatholo* 1978 (4) SA 368 (T), *S v Ngubane* 1980 (2) SA 741 (A), *S v Molubi* 1988 (2) SA 576 (BG), *S v Netshiavha* 1990 (2) SACR 331 (A), *S v Motsepa* 1991 (2) SACR 331 (A), *S v Ngema* 1992 2 SASV 650 (D), *S v Phama* 1997 (1) SACR 486 (E) and *S v Jezile* 2015 (2) SACR 452 (WCC).

4 *Christa Rautenbach* and *Jacques Matthee*, Common Law Crimes and Indigenous Customs: Some Challenges Facing South African Law, Journal of Legal Pluralism and Unofficial Law, 61, 2010, 114, 133; *Phelps*, n 2, 142; *Tom Bennett*, The Cultural Defence and the Practice of Thwala in South Africa, University of Botswana Law Journal, 3, 2010, 23-26 and *Pieter Carstens,* The Cultural Defence in Criminal Law: South African Perspectives, De Jure, 37, 2004, 18.

5 See, for example, *Rautenbach* and *Matthee*, n 4, 109-144; *Phelps*, n 2, 135-155; *Bennett*, n 4, 3-26 and *Carstens*, n 4, 1-25.

6 In sections 15, 30 and 31.

7 *Matthee*, n 1, 10-12.

8 *Matthee*, n 1, 11-12.

9 *Matthee*, n 1, 10-12.

10 *Phelps*, n 2, 142.

11 See *Matthee*, n 1, 76 where it is shown that the definition of culture is broad enough to include religion.

12 *Phelps*, n 2, 142.

capacity, and culpability.[13] The conflict above arises regarding the requirements of conduct, unlawfulness and criminal capacity. This article evaluates the influence of the cultural defence on unlawfulness. The first part outlines unlawfulness in South African criminal law. The subsequent parts consider whether private defence, necessity, obedience to superior orders and consent as grounds of justification in South Africa can accommodate a cultural defence. The aim is to determine whether South African criminal law has a gap that only a separate and distinct cultural defence can fill.

B. Overview of unlawfulness and the cultural defence

Whether a cultural defence can negate unlawfulness necessitates understanding this element of criminal liability. Unlawfulness is "a legal standard, determined by the legal convictions of the community as informed by the Constitution, reflected in the conduct of the reasonable person who knows everything".[14]

The South African courts have also described unlawfulness in their judgments. In *S v Engelbrecht,*[15] for example, Satchwell J pointed out that the reasonableness test is generally used to ascertain the legal convictions of the community or the community's sense of equity and justice (the *boni mores*). When conducting the unlawfulness inquiry, a court "must be driven by the values and norms underpinning the Constitution" as the Constitution is a "system of objective, normative values for legal purposes".[16] In the context of indigenous beliefs and customs, these values include freedom, equality and human dignity,[17] and the constitutional right to cultural and religious freedom.[18]

In *Director of Public Prosecutions, Cape of Good Hope v Fourie*,[19] Msimang AJ summarised the unlawfulness test as ultimately involving a value judgment based on morality and policy considerations of what is reasonable in the circumstances the accused's conduct took place. According to Herfer JA in *Government of the Republic of South Africa v Basdeo*,[20] the court also bases such a value judgment on its view of the community's legal convictions. It necessitates considering all the facts relevant to a particular case.[21]

There are various grounds of justification, also known as "defences", each with its unique requirements that can justify the accused's conduct in particular circumstances.[22]

13 *Callie Snyman*, Criminal Law, 7th ed., Durban 2021, 28.
14 *James Grant*, Criminal law, *Annual Survey of SA Law*, 2005, 663-664.
15 2005 (2) SACR 41 (W) par 330.
16 *Engelbrecht,* n 15, par 332.
17 S 1(a) of the Constitution.
18 SS 15(1), 30 and 31 of the Constitution.
19 2002 (1) All SA 269 (C) 272.
20 1996 (1) SA 355 (A) 367.
21 *Ibid*.
22 *Phelps*, n 2, 144.

Private defence, necessity, impossibility, obedience to superior orders, public authority, lawful chastisement, consent, and *de minimus non curat lex* are well-known grounds of justification in South African criminal law.

When dealing with culturally motivated crimes, a court must consider whether the existing defences above can accommodate an accused's indigenous belief or custom, which led them to commit a common law or statutory crime. A perusal of case law reveals that, in the past, accused have attempted to persuade the courts that private defence, necessity and consent negated their criminal liability for a culturally motivated crime. The present author submits that obedience to superior orders also lends itself to such an argument and, therefore, requires further scrutiny. The following parts deal with each defence in the order mentioned above.

C. Private defence and the cultural defence

In *S v Engelbrecht,*[23] Satchwell J referred to the following accepted definition of private defence:[24]

> *A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is not more harmful than necessary to ward off the attack.*

In *S v Mokonto*[25] the court had to consider whether an accused could rely on private defence to justify killing another human being due to an indigenous belief in witchcraft. The appellant was convinced that the deceased was a witch who caused the death of his two brothers.[26] He confronted the deceased with these allegations. In response, she threatened he would not see the sunset that day.[27] The appellant took this as a sign that the deceased would kill him through supernatural means. He reacted by fatally striking her with a cane

23 *Engelbrecht,* n 15, par 228.

24 The definition corresponds with that of renowned authors in South African Criminal law. See, for example, *Snyman*, n 13, 85, *Jonathan Burchell*, Principles of Criminal Law, 5th ed., Cape Town 2016, 121 and *Gerhard Kemp et al*, Criminal law, 3rd ed., Cape Town 2018, 255-256. The term "private defence" includes various defences, namely self-defence, defence of other persons and defence of property.

25 1971 (2) SA 319 (A) 320-321.

26 *Mokonto,* n 25, 321-322.

27 *Mokonto*, n 25, 320-321.

knife.[28] He not only beheaded her "so that she could not rise up again and bewitch him" but also "severed her hands because they had handled the 'muti'".[29]

The appellant failed to persuade the court that he had acted in private defence.[30] He argued that he genuinely believed the deceased would kill him "with the same thing with which she killed [his] brothers."[31] In rejecting the defence, Holmes JA[32] espoused the fundamental principle underlying private defence as stated in *R v Attwood*[33] as follows:

> *The accused would not have been entitled to an acquittal on the ground that he was acting in self-defence unless it appeared as a reasonable possibility on the evidence that the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury.*

There are, therefore, specific requirements for a successful private defence in South African criminal law. First, there must be an unlawful attack or threat of an attack.[34] Invariably, the attack consists of some positive act on the assailant's part.[35] The assailant need not aim the attack at the person acting in private defence.[36] The defender can invoke the defence to protect a third person, even without any family or protective relationship.

Satchwell J further qualified the unlawful attack in *S v Engelbrecht*. The court had to decide the fate of an abused woman who allegedly killed her husband in private defence.[37] Her defence team urged the court to develop a general reasonableness defence instead of applying the rigid criteria of existing defences such as private defence.[38] The court declined to do so. Instead, Satchwell J interpreted the existing rules of private defence and held that an unlawful attack does not need to be physical and could include "psychological and emotional abuse, degradation of life, diminution of dignity and threats to commit any such acts."[39] Satchwell's broad interpretation of an unlawful attack would seemingly include a threat of harm through supernatural means, such as the one in *Mokonto*.

However, Satchwell's apparent development of private defence invoked criticism. The majority of the court disagreed with her that the accused had acted in private defence

28 *Mokonto*, n 25, 321.

29 *Ibid*.

30 *Mokonto*, n 25, 323.

31 *Ibid*.

32 *Ibid*.

33 1946 AD 331.

34 *Snyman*, n 13, 86; *Burchell*, n 24, 122, 125; *Kemp et al*, n 24, 257.

35 Although unlikely, there can be exceptional circumstances where the attack consists of an omission to act. See *Snyman*, n 13, 87 and *Burchell*, n 24, 122.

36 *Snyman*, n 13, 86-87; *Burchell*, n 24, 124; *Kemp et al*, n 24, 258.

37 *Engelbrecht,* n 15.

38 *Engelbrecht,* n 15*,* par 451.

39 *Engelbrecht,* n 15*,* par 344.

when she killed her abusive husband.[40] In their view, the accused had not exhausted all alternative courses of action. Therefore, her conduct was not objectively reasonable in all the circumstances.[41] Snyman[42] also criticised Satchwell's interpretation as bending the rules of private defence too far. According to him, it would muddy those rules and lead to the defence's misuse.[43]

Unfortunately, the *Engelbrecht* judgment was never appealed. Therefore, Satchwell's qualification to the traditional approach to private defence has yet to receive higher judicial scrutiny or approval.[44] Until such time, cases like *Mokonto* remain to be considered within the confines of the defence's existing requirements.

Apart from being unlawful, the attack must have commenced or been imminent but not yet completed.[45] An assailant does not have to give the first blow before the intended victim can act in private defence.[46] As Burchell[47] explains, "if the nature of the attack is such that the threatened harm cannot be avoided, the victim should be entitled to act with such anticipation as is necessary for effective protection." Therefore, the deceased's threat in *Mokonto* seemed to satisfy the imminence requirement.

However, despite the deceased's apparent imminent threat, the central issue in *Mokonto*[48] was whether the appellant believed he was in danger of death or serious injury and whether a reasonable person in his position would have held the same belief. Holmes JA[49] considered all the relevant circumstances and decided the following:

> *A plea of self-defence is usually raised in the context of immediate danger, such as that posed by an upraised knife. That physical situation is absent here. The apprehended danger being that of supernatural death. As to that, the common law of South Africa in regard to murder and self-defence reflects the thinking of Western civilisation. In considering the unlawfulness of the appellant's conduct, his benighted belief in the blight of witchcraft cannot be regarded as reasonable.*

The decision in *Mokonto* raises the question of where an accused's subjective views and perceptions fit into determining a culturally motivated crime's unlawfulness and any reliance on an associated ground of justification.

40 *Engelbrecht,* n 15*,* par 454; *Snyman,* n 13, 87.
41 *Engelbrecht,* n 15*,* par 448; *Snyman,* n 13, 87.
42 *Snyman*, n 13, 87.
43 *Ibid*.
44 *Burchell*, n 24, 123.
45 *Snyman*, n 13, 88; *Burchell*, n 24, 122; *Kemp et al*, n 24, 259.
46 *Ibid*.
47 *Burchell*, n 24, 122.
48 *Mokonto*, n 25, 323-324.
49 *Mokonto*, n 25, 324-324.

The courts use an objective test to determine unlawfulness and the success, or otherwise, of private defence.[50] In *S v Engelbrecht*,[51] Satchwell J observed that, in applying the objective test to private defence, "the courts have tried to decide what the fictitious reasonable man, in the position of the accused and in the light of all the circumstances would have done." She explains the test as one of reasonableness. The court considers what the reasonable person would have done, whether the force used was reasonably necessary in the circumstances and whether the accused acted reasonably and legitimately to protect himself against the deceased.[52] Satchwell J[53] further observes that the reasonableness test reflects the ultimate test for unlawfulness, namely the legal convictions of the community as informed by the values in the Constitution.

Legal precedent supports Satchwell's observation. To illustrate, in *R v Patel,*[54] Holmes AJA reiterated that an accused's reasonable conduct in private defence must lead to an acquittal. In *S v Ntuli,*[55] Holmes JA observed that an accused "may intentionally and lawfully apply such force as is reasonably necessary in the circumstances to protect himself against unlawful threatened or actual attack." If the accused's defence is objectively reasonable, both his application of force and his intention to apply it are lawful. Similarly, in *S v De Oliveira*[56] the court held that "the test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way."

According to Snyman,[57] the approach above cannot be faulted if the courts only use the reasonable person test to determine whether an accused's conduct is reasonable in that it corresponds with what society usually finds acceptable. Therefore, a court can hypothesise about acceptable behaviour according to the community's legal convictions by comparing it to conduct that a reasonable person finds permissible under the circumstances.[58] The court does so by putting itself in the accused's position at the time of the attack.[59]

50 *Snyman*, n 13, 83, 94; *Burchell*, n 24, 115, 130, *Grant*, n 14, 657-658, *Managay Reddi,* Battered woman syndrome: Some Reflections on the Utility of this 'Syndrome' to South African Women Who Kill Their Abusers, South African Journal of Criminal Justice 18 2005, 269, *S v Motleleni* 1976 1 SA 403 (A) 406; *S v Dingaan* 2001 JOL 8949 (Ck) 7; *S v Dougherty* 2003 2 SACR 36 (W) 37, 44-46; *S v Engelbrecht* 2005 2 SACR 41 (W) 129 and *Mugwena v Minister of Safety and Security* 2006 2 All SA 126 (HHA) 127, 133.

51 *Engelbrecht*, n 15, par 327. See the cases cited in note 50 above.

52 *Engelbrecht*, n 15, par 328.

53 *Engelbrecht,* n 15, paras 330-332.

54 1959 (3) SA 121 (A) 123.

55 1975 (1) SA 429 (A) 436.

56 1993 (2) SACR 59 (A) 419.

57 *Snyman*, n 13, 94.

58 *Grant*, n 14, 659.

59 *Burchell*, n 24, 130; *Snyman*, n 13, 94.

Grant[60] warns that this approach could confuse the test for unlawfulness and private defence with the test for negligence, considering that both are objective. Moreover, putting the reasonable person in the accused's circumstances would seemingly make the test for unlawfulness and private defence subjective, like the test for negligence.[61]

However, Burchell[62] emphasises that using the reasonable person in the test for unlawfulness and private defence does not make it subjective but simply ensures an objective evaluation of the case's circumstances. He stresses that the test involves an "*ex post facto* inquiry that is qualitatively different, broader and potentially anterior to the inquiry into negligence". Meanwhile, negligence "is premised on what a reasonable person (with certain judicially attributed characteristics) would, in fact, have done or believed in the circumstances".

Snyman[63] proffers a similar view by explaining that the test for unlawfulness seeks to determine whether, on an objective, diagnostic, *ex post facto* assessment, the accused acted unlawfully and not "whether the judicially attributed characteristics of the reasonable person have been met". Snyman[64] adds that the element of unlawfulness is general and applies to all persons equally. Therefore, the accused's conduct remains unlawful, despite how reasonable his mistake or mental state might have been.[65]

In light of the above, an accused's subjective views and perceptions play no role in determining the unlawfulness of a culturally motivated crime and any reliance on an associated ground of justification. Grant[66] points out that if a defence is based on an accused's subjective views and perceptions, it becomes a personal defence or mental phenomenon "which relieves the agent of the attribution of conduct which is wrongful/unlawful." South African criminal law already provides for such defences under the element of culpability.[67] South African case law dealing with culturally motivated crimes also shows that the courts have always considered the accused's subjective views and perspectives during sentencing.[68]

Like the attack, the defensive act in private defence must also meet specific requirements. First, the defender must realise that he is acting in private defence.[69] A person acts in putative private defence where he mistakenly believes that he may resort to private

60 *Grant*, n 14, 659.

61 *Ibid*.

62 *Burchell*, n 24, 131.

63 *Snyman*, n 13, 94.

64 *Snyman*, n 13, 84.

65 *Ibid*.

66 *Grant*, n 14, 663.

67 *Ibid*.

68 See, for example, *R v Fundakabi* 1948 (3) SA 810 (A) and *S v Dikgale* 1965 (1) SA 209 (A) 209, 214.

69 *Snyman*, n 13, 93.

defence whereas he may not. Putative private defence can exclude culpability but not unlawfulness.[70] The defender should also aim his defensive act at none other than the assailant.[71]

The defensive act must be essential and, therefore, the only way to protect the defender's legally protected interests.[72] In most cases, the defender resorts to private defence to preserve his life, bodily integrity or dignity.[73] The *Mokonto* case was no exception. The facts of each case determine whether private defence was the only way to avert the assailant's attack.[74] South African criminal law does not impose an absolute duty on the defender to flee.[75] It is just one of the factors a court considers in determining the success, or otherwise, of an accused's private defence.[76]

What seems clear, though, is that the law will expect the defender to retreat instead of resorting to private defence if he can protect his interests through legal or other means.[77] The circumstances of each case determine those means. It could include a variety of efforts such as leaving the dangerous situation, turning towards state authorities such as the police and the courts, or reaching out to family, friends or other appropriate bodies for assistance.

Arguably, the appellant in *Mokonto* could have protected his interest in his life through such means instead of resorting to private defence. He could, for example, have approached the police to arrest the deceased for professing or pretending to use witchcraft, a statutory offence under the *Witchcraft Suppression Act*.[78] Witchcraft is also an offence under African customary law.[79] Therefore, the appellant could have reported the deceased to the criminal traditional court in his area.[80] Furthermore, considering the appellant's apparent genuine belief in his impending death through supernatural means, he could have warded off the deceased's imminent attack by approaching a traditional healer for *muti* to cure and protect him from the bewitchment. Ashforth[81] explains this defence as follows:

70 *Snyman*, n 13, 94; *Burchell*, n 24, 131; *Kemp et al*, n 24, 270.

71 *Snyman*, n 13, 93; *Kemp et al*, n 24, 263.

72 *Snyman*, n 13, 87; *Burchell*, n 24, 126; *Kemp et al*, n 24, 258; *Engelbrecht*, n 15, par 351.

73 Other interests include sexual integrity, personal freedom, property, preventing arson and *crimen iniuria*.

74 *Engelbrecht,* n 15, par 351.

75 *Snyman*, n 13, 90; *Burchell*, n 24, 127; *Engelbrecht*, n 15, par 353.

76 *Burchell*, n 24, 127.

77 *Snyman*, n 13, 88; *Burchell*, n 24, 126-127; *Engelbrecht*, n 15, par 351.

78 Section 1(b) and (d) of the Witchcraft Suppression Act 3 of 1957.

79 *Chuma Himonga et al*, African Customary Law in South Africa, Cape Town 2014, 215-216; *Simanga Mankayi v Nosawusi Mbi-Maselana* 4 NAC 337 (1918).

80 Section 20 of the *Black Administration Act* 38 of 1927 confers jurisdiction over customary law offences on traditional courts.

81 *Adam Ashforth*, *Muthi*, Medicine and Witchcraft: Regulating 'African Science' in Post-Apartheid South Africa?, Social Dynamics 31:2 2005, 212.

> *When a healer sets out to cure a person afflicted by witchcraft, he or she will typically promise that their muthi will return the evil forces deployed by the witch to their source, thereby killing the witch. Such violence, however, is legitimate, for it is executed in the name of defence.*

The following requirement is that the attack and the defensive conduct must be reasonable and proportionate.[82] Reasonable proportionality is a question of fact, not law, determined by a specific matter's surrounding circumstances.[83] There is no exhaustive list of circumstances. Typical examples include the assailant and defender's physical strength, the attack's time and place, the threat's nature, the threatened protected interests, and the methods or weapons at their disposal.

That said, the nature of each party's protected interest need not be exactly proportional.[84] A defender could assault or even kill an assailant to protect his property or ward off threats involving severe bodily injury or rape or against his life. The methods or weapons used by the assailant and defender may also be dissimilar.[85] As Van Deventer AJ, in the case of *Ntsomi v Minister of Law and Order,*[86] explains:

> *The victim of an unlawful assault is entitled to defend himself with whatever weapon he happens to have at hand if he has no reasonable alternative. Thus, if an offender attacks a policeman who has a dangerous weapon such as a shotgun in his hands, he has only himself to blame if the gun is used in self-defence.*

Ultimately, the question is whether the defender's chosen route was reasonable and not whether he had any alternative avenue at his disposal. The facts of each case determine what constitutes reasonable defensive behaviour.[87]

Considering the above, the South African criminal law principles on private defence are flexible enough to accommodate arguments of an accused's cultural and religious background leading to a culturally motivated crime without needing a separate and distinct cultural defence. Phelps[88] holds a similar view, arguing that the objective test to determine unlawfulness makes it doubtful that a formal cultural defence would affect this element of criminal liability. However, Carstens[89] holds that arguments of an accused's cultural background and values can negate the element of unlawfulness, particularly under the defence of necessity.

82 *Snyman*, n 13, 90; *Kemp et al*, n 24, 260; *Engelbrecht,* n 15, par 357; *S v Trainor* 2003 (1) SACR 35 (SCA) par 13.

83 *Snyman*, n 13, 90; *Trainor*, n 82, par 12.

84 *Snyman*, n 13, 90; *Kemp et al*, n 24, 260; *Engelbrecht,* n 15, par 357.

85 *Snyman*, n 13, 92; *Kemp et al*, n 24, 260-261.

86 1990 (1) SA 512 (C) 530.

87 *Burchell*, n 24, 129.

88 Phelps, n 2, 144.

89 Carstens, n 4, 19.

D. Necessity and the cultural defence

An accused who must choose between suffering some threat or harm or breaking the law to avoid it and then choosing to break the law can invoke the defence of necessity.[90] Whether the force of surrounding circumstances or a human being caused the threat or harm is irrelevant.[91] An accused can only invoke the defence if he admits to committing the criminal acts.[92] If he can prove that his conduct resulted from necessity on a balance of probabilities, it will be considered lawful.[93]

Private defence and necessity are sometimes confused because of their similarities.[94] Private defence always has an element of necessity, and an accused's conduct under both aims to prevent some kind of harm.[95] The two defences also differ significantly. Private defence requires an unlawful human attack or imminent threat of one, whereas necessity requires escaping from an emergency or its imminent threat.[96] Private defence is directed against the assailant, whereas necessity causes harm to an innocent person or violates a mere legal provision.[97]

Necessity can negate the unlawfulness of an accused's conduct or exclude the accused's fault, depending on the circumstances.[98] Either way, an accused invokes the defence to justify his conduct.[99] Like private defence, a criminal court assesses the defence through an objective reasonable person test where it places itself in the accused's position during the commission of the crime and considers all the particular circumstances.[100] The accused's subjective views and beliefs are only relevant to determine whether a reasonable person in his position would have held the same views and beliefs.[101]

Carstens[102] uses the following example to show how an accused charged with a culturally motivated crime can rely on necessity:

> *[A] headmen (nkosi) of a tribe may order/instruct one of his henchmen to assist in the killing of an elderly member of the tribe to obtain the perceived "life-giving" parts of the body (the eyes and the genitals) to be buried near the site of an annual initiation*

90 *Burchell*, n 24, 164; *Snyman*, n 13, 95; *Kemp et al*, n 24, 279.
91 *Burchell*, n 24, 164; *Snyman*, n 13, 95; *Kemp et al*, n 24, 280.
92 *S v Adams* 1979 (4) SA 793 (T) 793, 796.
93 *Ibid* 793.
94 *Adams*, n 92, 796; *Snyman*, n 13, 96.
95 *S v Pretorius* 1975 (2) SA 85 (SWA) 88.
96 *Snyman,* n 13, 96; *Pretorius*, n 105, 88; *Adams,* n 92, 796.
97 *Snyman,* n 13, 96; *Burchell*, n 24, 164; *Pretorius*, n 95, 89.
98 Snyman, n 13, 97; *Burchell*, n 24, 166; *Adams,* n 92, 796; *S v Bailey* 1982 (3) SA 772 (A) 796.
99 *Adams,* n 92, 796; *Pretorius*, n 95, 89.
100 *Pretorius*, n 95, 89.
101 *Ibid*.
102 *Carstens*, n 4, 19.

> *ceremony to be held to ward of[f] evil spirits and [to] please/appease the ancestral spirits. In terms of the hierarchy of power a henchman cannot refuse the orders of a nkosi as disobedience (albeit to an objectively unlawful order) will amount to severe punishment (and even death).*

Phelps[103] criticises Carstens' example for not revealing any new link between an accused's cultural background and the defence of necessity. The threats of harm and even death make the ordinary rules of necessity applicable and render the cultural context redundant.[104] The present author agrees with Phelps' view but submits that the example reveals a link between culture and the defence of obedience to superior orders. The next part of this article explores this link.

As with any defence, the accused must satisfy the general requirements for the defence. First, there must be a threat to some legal interest of the accused.[105] The threat must have commenced or been imminent but not caused by the accused's fault.[106] Next, it must have been necessary for the accused to avert the threat or danger.[107] Lastly, the accused must have used reasonable and proportional means to avert the threat or danger.[108]

Where one of the requirements is absent, the accused's act will be unlawful, and criminal liability will follow, provided the necessary *mens rea* is proved.[109] An accused who genuinely but mistakenly believed that necessity justified his act should be acquitted of a crime requiring intention because he lacks *mens rea* regarding the act's unlawfulness.[110] However, the erroneous belief must be due to a mistake of fact, not the law.[111]

Necessity may be a good defence in South African criminal law because of its potential success in cases involving threats of harm and death.[112] However, the courts have warned that the defence must be strictly limited to avoid misuse.[113] The difficulty lies in defining those limits. They cannot be discerned from the specific examples the Roman and Roman-Dutch authorities gave.[114] The few relevant South African decisions also do not attempt to prescribe them.[115] Phelps,[116] therefore, argues that the courts must use the objective test for

103 *Phelps*, n 2, 144.
104 *Ibid*.
105 *Snyman*, n 13, 97; *Burchell*, n 24, 167; *Kemp et al*, n 24, 281.
106 *Snyman*, n 13, 98; *Burchell*, n 24, 169; *Kemp et al*, n 24, 281.
107 *Snyman*, n 13, 99; *Burchell*, n 24, 172; *Kemp et al*, n 24, 283.
108 *Snyman*, n 13, 99; *Burchell*, n 24, 173; *Kemp et al*, n 24, 283.
109 *Pretorius*, n 95, 89.
110 *Ibid*.
111 *Ibid*.
112 *Phelps*, n 2, 144; *Pretorius*, n 95, 89.
113 *Pretorius*, n 95, 89; *R v Mahomed* 1938 AD 30.
114 *Pretorius*, n 95, 89.
115 *Pretorius*, n 95, 89.
116 *Phelps*, n 2, 144.

unlawfulness to limit the scope of an accused's cultural background within the defence of necessity.

E. Obedience to superior orders and the cultural defence

An accused raises the defence of obedience to superior orders when he attempts to justify his otherwise unlawful conduct as merely obeying his superior's orders.[117] If successful, South African law considers the conduct justified because it recognises such obedience as a case of duress.[118]

The defence usually applies to subordinates in the military and police but is not confined to those contexts.[119] Evidence shows that it was a well-known defence in specific South African traditional communities, albeit for customary law offences tried by the community's traditional court.[120] It is doubtful whether this is still the position. Over the years, legislation limited the criminal jurisdiction of South Africa's traditional courts.[121] The offences typically associated with this defence now fall outside the criminal jurisdiction of a traditional court.[122] Also, they are not offences which usually arise in a customary law context – so-called "customary law offences" – but common law or statutory offences tried by South Africa's Western courts.

Nonetheless, as mentioned earlier, the defence could still arise in cases where a traditional leader's subordinates obey their superior's orders. While South Africa's Western courts have only dealt with a handful of such cases before, it does not rule out the possibility of similar cases in future for several reasons. First, although the facts of the past cases are almost identical, the courts had differing views on the defence's success in each, making the law in this regard all but settled.

Next, the past cases predate South Africa's constitutional dispensation, which not only put African customary law on equal footing with the common law but enhanced traditional

117 *Snyman*, n 13, 112; *Burchell*, n 24, 190.

118 *Burchell*, n 24, 190.

119 *Snyman*, n 13, 112. It is a contested and controversial defence in South African law. Mostly because neither the Supreme Court of Appeal nor the Constitutional Court have authoritatively pronounced on its nature and content.

120 See, for example, *Aubrey Clement Myburgh* and *Michael Wilhelm Prinsloo*, Indigenous Public Law in KwaNdebele, Pretoria 1985, 82 where the authors explain that it was a well-known defence under Ndebele law. *Aubrey Clement Myburgh (ed) et al,* Indigenous Criminal Law in Bophuthatswana, Pretoria 1980, 28 also indicate that it was a complete defence among the Tswana people in South Africa.

121 Today, section 20(1) of the *Black Administration Act* allows a traditional court to try and punish "any offence at common law or under Black law and custom" and any statutory offence except those listed in Schedule 3 of the Act.

122 These offences include murder, rape, arson, assault, theft, espionage, sedition and public violence. Schedule 3 of the *Black Administration Act* exclude all these offences from a traditional court's jurisdiction.

leadership status in the country. Section 211(1) of the Constitution now entrenches traditional leadership's institution, status and role according to customary law. Section 211(2) allows a traditional authority observing a system of customary law to function subject to applicable legislation and customs. The legislation includes the *Traditional and Khoi-San Leadership Act* 3 of 2019, the *Black Administration Act* 38 of 1927 and various provincial legislation.

Furthermore, Section 211(3) of the Constitution obliges the courts to apply customary law when that law is applicable, subject to the Constitution and any legislation dealing with customary law. This section goes hand in hand with sections 15, 30 and 31, which afford cultural and religious freedom to every individual in South Africa. Lastly, in recent years the media reported on cases that could lend themselves towards the defence. The discussion that follows explores the reasons further.

The defence's success depends on four requirements. First, someone in lawful authority over the accused must have given the order.[123] The law must, therefore, authorise the superior to issue the order.[124] Several South African laws authorise a traditional leader to issue orders to subordinates. Section 7(1) of the *Traditional and Khoi-San Leadership Act* allows for recognising traditional leadership positions, including king or queen, principal traditional leader, senior traditional leader, and headman or headwoman. Once recognised, section 15 of the Act allows traditional and Khoi-San leaders to perform the functions "in terms of customary law and customs of the traditional or Khoi-San community concerned and in terms of any applicable national or provincial legislation." As explained below, part of those functions includes issuing orders to subordinates.

Section 20(1) of the *Black Administration Act* confers powers on chiefs and headmen to try and punish criminal matters within the area under their control. However, section 20(2) of the Act limits their sentencing jurisdiction. They may not impose punishment involving death, mutilation, grievous bodily harm, imprisonment, a fine exceeding R100 or two heads of large stock or ten heads of small stock, or corporal punishment.

The *Traditional Courts Act* 9 of 2022 aims to replace the *Black Administration Act* and allow for customary dispute resolution in line with South Africa's constitutional imperatives and values.[125] Section 4 of the Act allows a traditional leader to convene a traditional court to deal with less serious criminal offences that disturb harmonious community relationships.[126] Unlike its predecessor, the Act does not specify a traditional court's sentencing jurisdiction. Instead, section 8 of the Act provides an extensive list of restorative orders to restore the relations between parties and promote community harmony.

123 *Snyman*, n 13, 113; *Burchell*, n 24, 192; *Kemp et al*, n 24, 297.

124 *Burchell*, n 24, 192; *Kemp et al*, n 24, 297.

125 At the time of publication, the President of South Africa had signed the Act into law, but its date of commencement had yet to be determined.

126 Schedule 2 of the Bill outlines the offences.

The defence's next requirement entails that the subordinate must be under a duty to obey the superior's order.[127] Once again, the law determines this duty.[128] Today, criminal courts are constitutionally obliged to make that determination under customary law when dealing with the defence in a customary law context. South Africa's Constitution "acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system."[129] Moreover, section 211(3) of the Constitution obliges a criminal court to apply the customary law regarding a subordinate's duty to obey a traditional leader's orders. In doing so, the court must be mindful of any constitutional and legislative provisions relevant to that duty and interpret the customary law in light of South Africa's constitutional values.[130]

The above said, the duty to obey a traditional leader's orders is firmly rooted in customary law and reflected in several statutes. To illustrate, section 20(2) of the *Black Administration Act* provides for the execution of traditional court judgments according to the community's recognised customs and laws. The customs and laws are unique to the communities they govern, making a comprehensive outline nearly impossible. It also falls outside the scope of the present discussion.

Nevertheless, safeguarding group interests, reconciliation and maintaining social harmony lies at the heart of the customs and laws involved in all traditional communities' customary dispute-resolution processes.[131] Unsurprisingly, customary dispute resolution is a public and participatory process involving the entire community.[132] That community's proper functioning depends on having a leader, whether a king, chief or family head.[133] Therefore, defying a traditional court's orders, and thereby a traditional leader, is tantamount to defying the entire community and may result in social and economic ostracism.[134] The social pressure to comply with a traditional court's orders may stem from the normative commitment to customs and laws, the traditional leader's authority or the shame of disrupting the community's social harmony.[135]

127 *Burchell*, n 24, 192; *Kemp et al*, n 24, 297.

128 *Burchell*, n 24, 193.

129 *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) 479.

130 The constitutional values include human dignity, the achievement of equality and the advancement of human rights and freedom, non-racialism and non-sexism, supremacy of the Constitution and the rule of law.

131 *Chuma Himonga et al*, n 79, 218-219; *Penal Reform International*, Access to Justice in Sub-Saharan Africa, The Role of Traditional and Informal Justice Systems, London 2000, 23-24, 26, 28, 33, 34-35; *Erica Harper*, Customary Justice: From Program Design to Impact Evaluation, Italy 2011, 18, 20-21.

132 *Penal Reform International,* n 131, 26; *Harper*, n 131, 20.

133 *Himonga et al*, n 79, 218.

134 *Penal Reform International,* n 131, 33.

135 *Harper*, n 131, 21.

Aside from the threat of social sanctions, defying a traditional leader's orders is punishable as a customary law offence because it violates the African values of *inhlonipho* or *hlompho* (respect).[136] The repealed section 2(9) of the *Black Administration Act* first codified the offence.[137] It remains part of customary law, though, because the traditional courts continue to exist and may impose punishment for contempt of court.[138] Moreover, it is still part of provincial legislation in South Africa. To illustrate, section 7(1) of the Natal Code of Zulu Law authorises chiefs in South Africa's KwaZulu-Natal province to require their subjects' compliance with their duties under Zulu law and to give orders for that purpose. Similarly, section 115 of the Code makes it a customary law offence to defy the family head's authority.

The defence can only succeed if the superior's order is not manifestly and palpably unlawful.[139] A court determines this requirement objectively by considering whether a reasonable person would have perceived the order as unlawful.[140] If so, and the subordinate still obeyed it, the defence fails.[141] In *Rex v Kumalo,*[142] the appellants' defence to a charge of assault failed on precisely this point. The first appellant, a native chief exercising his civil jurisdiction under the *Black Administration Act*, ordered the other four appellants, his executive officers, to impose corporal punishment on a subject who misbehaved in his court. In appealing their conviction, the other four appellants argued that they were only subordinates who executed what they considered a lawful order by the first appellant.[143]

The court's judgment indicated that the first appellant professed to have acted according to native custom in ordering the complainant's whipping.[144] However, it was clear to the court that the first appellant knew the *Black Administration Act* limited the native custom's operation.[145] Moreover, he knew the Act prohibited him from imposing corporal punishment on his subjects.[146] Based on this, the court concluded that all the appellants knew the order was unlawful and dismissed their appeal.[147]

136 *Himonga et al*, n 79, 219.

137 *Ibid*.

138 *Ibid*. The court in *Makapan v Khope* 1923 AD 551 held that chiefs exercising civil jurisdiction may summarily convict and punish for contempt of court committed *in facie curiae.*

139 *Snyman*, n 13, 113; *Burchell*, n 24, 193; *Kemp et al*, n 24, 299.

140 *Burchell*, n 24, 194.

141 *Ibid*.

142 1952 (1) SA 381 (A).

143 *Ibid* 384, 391.

144 *Ibid* 393.

145 *Ibid* 395.

146 *Ibid*.

147 *Ibid*.

The court in *S v Molubi*[148] dealt with similar facts and gave a similar judgment. Here, the tribal court instructed one of its members to cane the complainant for contempt of court.[149] He appealed his subsequent conviction for common assault by relying on obedience to superior orders.[150] The appellate court deemed the tribal court's order unlawful because it exceeded the limits prescribed by relevant legislation.[151] It further held that the appellant, as a member of the tribal court, ought to have known that he was carrying out unlawful instructions.[152] His defence, therefore, failed, and his appeal was dismissed.

The defence succeeded in the case of *S v Seatholo*.[153] The first appellant, a chief, sentenced the complainant to corporal punishment for contempt of court, which the second appellant, one of the first appellant's tribal councillors, meted out.[154] They were subsequently convicted of assault.[155] On appeal, it appeared to the court that the second appellant had considered it his duty to carry out the sentence.[156] To decide whether this was the case, the court had to determine whether the first appellant had the power to impose corporal punishment and, if so, whether he exercised it lawfully.[157] Lastly, the court had to determine whether the specific punishment fell within the first appellant's jurisdiction.[158]

To determine the first point, the appellate court had to decide whether section 20 or 21 of the *Black Administration Act* empowered the first appellant to impose corporal punishment.[159] The sections distinguish the sentencing powers of chiefs in different areas.[160] The appellate court confirmed section 21 as the empowering provision.[161] It added that although section 21 did not expressly refer to corporal punishment, the section's wording lends itself to an interpretation that "a chief referred to in 21 may impose corporal punishment on condition it does not involve grievous bodily harm".[162]

148 1988 (2) SA 576 (BG).

149 *Ibid* 557.

150 *Ibid*.

151 *Ibid*. The incident occurred in the Republic of Bophuhatswana, a former homeland during South Africa's apartheid era. Section 8 of Bophutatswana's *Traditional Courts Act* 29 of 1979 provided that corporal punishments could not be imposed on a married man or a male of 30 years or more (for contempt of court even if committed in *facie curiae*).

152 *Molubi,* n 148, 577, 581.

153 1978 (4) SA 368 (T).

154 *Ibid* 369-370.

155 *Ibid*.

156 *Ibid*.

157 *Ibid*.

158 *Ibid*.

159 *Ibid* 370.

160 Section 21 applied to chiefs in British Bechuanaland, while section 20 applied to chiefs other than those referred to in section 21.

161 *Seatholo,* n 153, 370.

162 *Ibid*.

To determine whether the first appellant exercised his power lawfully, the appellate court considered whether the magistrate was correct in finding that no proper trial had taken place, rendering the punishment unlawful.[163] It concluded that, on a conspectus of all the evidence, the State failed to prove that the first appellant and his councillors held no proper trial.[164]

Regarding the last point, the appellate court had to decide whether the punishment involved grievous bodily harm, which fell outside the first appellant's sentencing jurisdiction.[165] It concluded that "a beating on the buttocks with a plastic sjambok" (a whip) is not "in excess of that normally inflicted by the imposition of corporal punishment".[166] Consequently, the appellate court found that the second appellant had considered it his duty to carry out the first appellant's lawful order and upheld the appeal.[167]

As mentioned, the few cases above far predate the advent of South Africa's constitutional dispensation. That does not mean similar cases do not occur in present-day South Africa, which could then confront the Western courts with this defence in a customary law context. The recent case against King Dalindyebo of the abaThembu in South Africa's Eastern Cape province is a good example. He faced a laundry list of criminal charges after he exceeded his authority by imposing egregious punishments on his subjects for offences falling outside his jurisdiction.[168]

While King Dalindyebo meted most of the punishment himself, he also involved his subordinates. He, for example, punished three young men, without a trial, for allegedly committing housebreaking and rape by assaulting them in front of their families and the community.[169] When he became physically exhausted, he ordered his subordinates to continue the flogging until the men screamed.[170] Although the three men survived the ordeal, a fourth, who was allegedly party to their crimes, did not. At trial, the state contended that community members loyal to the king had, on his instructions, assaulted the fourth man to the point where he died of his injuries.[171]

The king stood trial alone. There is no indication that his subordinates faced criminal charges for their involvement. They undoubtedly would have raised obedience to the king's orders as their defence if they had faced charges. While it would have been interesting

163 *Ibid*.

164 *Ibid*.

165 *Ibid* 371-372.

166 *Ibid* 372.

167 *Ibid* 374.

168 *S v Dalindyebo* 2016 (1) SACR 329 (SCA) 329; *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 21 December 2022). The charges included arson, attempted murder, culpable homicide, attempting to defeat the course of justice and kidnapping.

169 *Dalindyebo,* n 168, 332.

170 *Evans,* n 168.

171 *Evans,* n 168; *Dalindyebo,* n 168, 332, 348, 358.

to see the court's approach to their defence, it could hardly have succeeded for several reasons. First, although neither the trial court nor the appellate court in Dalindyebo's case pronounced this, the evidence and witness testimonies point to the fact that the punishment and king's order were unlawful. The assaulted men did not receive punishment following a trial. Even if there was a trial, the crimes and punishments fell outside the king's jurisdiction.[172] The king conceded to this fact during the trial.[173] Moreover, based on the *Kumalo* and *Molubi* judgments above, it is submitted that the king's subordinates knew, or at least ought to have known, that they were carrying out unlawful instructions.

Lastly, it cannot be said that the subordinates obeyed the king's instructions out of a normative commitment to the community's customs and laws, a fear of facing community social sanctions or punishment for the customary law offence discussed earlier. There was overwhelming evidence at trial that King Dalindyebo "ruled with fear and trepidation".[174] His subjects only obeyed his orders out of fear that their or their family's homesteads would be burnt down and they would be evicted.[175] Others were blindly loyal to the king. One of his subordinates testified that he would "cut the throat of a person with a knife if so ordered by the King", a sentiment shared by many of the king's other loyal followers.[176]

The defence's last requirement entails that the accused must not have exceeded the order's limits and caused more harm than is necessary.[177] This determination requires a factual analysis of the "reality on the ground" the subordinate faces.[178] The appellate court's decision in *Seatholo* exemplifies where the subordinate met this requirement.

The same cannot be said of the Dalindyebo case. Here, the three men were stripped naked, bound and assaulted for two hours.[179] They were beaten with sjamboks and "made to "frog jump" while Dalindyebo whipped their feet, causing bleeding and permanent scarring".[180] The assault was so brutal that some observers could not bear to watch and had to leave the hut where it took place.[181] The men survived because they eventually received medical attention but could not walk afterwards.[182] One even became mentally impaired, although it is unclear whether as a result of the incident.[183] It speaks for itself that the assault leading to the fourth man's death far exceeded the limits of the order.

172 Schedule 3 of the *Black Administration Act* exclude the offences from his jurisdiction, while section 20(2) of the Act excludes the punishments.

173 *Dalindyebo,* n 168, 349.

174 *Ibid*, 357.

175 *Ibid*.

176 *Ibid*.

177 *Snyman*, n 13, 113; *Burchell*, n 24, 194; *Kemp et al*, n 24, 300.

178 *Kemp et al*, n 24, 300.

179 *Evans,* n 168.

180 *Ibid*.

181 *Ibid*; *Dalindyebo,* n 168, 332, 347.

182 *Ibid*.

183 *Ibid*.

The perusal above reveals that, as with private defence and necessity, the South African criminal law principles on obedience to superior orders are flexible enough to accommodate arguments of an accused's cultural and religious background without needing a separate and distinct cultural defence.

F. Consent and the cultural defence

Consent by the victim of a crime may, in certain instances, render an accused's unlawful conduct lawful.[184] The general rule in South African law is that a person cannot validly consent to actual bodily (physical) harm unless the law considers its purpose legitimate according to public policy.[185]

Three requirements determine the defence's success. First, the law must recognise consent as a possible defence in particular circumstances.[186] It is only a valid defence to certain crimes and in certain circumstances.[187] A complete discussion thereof falls outside the scope of this paper.

Traditionally, consent has been a defence to crimes resulting from religious, customary and superstitious practices only where they result or are likely to result in minor injury.[188] Even then, the practice must not seriously offend public policy by not being "recognised by modern usage as a normal and accepted practice of society".[189] The differing judgments in *R v Njikelana*[190] and *S v Sikunyana*[191] illustrate the above.

In *Njikelana,* a traditional healer rubbed a powder, supposedly an aphrodisiac, onto the complainant's private parts, which caused her bladder to become painful. The traditional leader was subsequently convicted of assault. On appeal, however, the court held that the complainant's consent to the powder's application, coupled with the transient nature of her discomfort, vitiated the unlawfulness of the appellant's conduct.[192]

In *Sikunyana,* four traditional healers were convicted of assault with intent to do grievous bodily harm. The complainant, a young woman, had consulted them to exorcise an evil spirit from her. To do so, they made her inhale fumes of medicine sprinkled over live coals while holding her over the coals under a blanket. She sustained severe burns and injuries.

184 *Snyman*, n 13, 102; *Kemp et al*, n 24, 340.
185 *Burchell*, n 24, 208; *Kemp et al*, n 24, 340.
186 *Snyman*, n 13, 102; *Burchell*, n 24, 209; *Kemp et al*, n 24, 340.
187 *Ibid*.
188 *Burchell*, n 24, 226; *Kemp et al*, n 24, 343.
189 *Burchell*, n 24, 226; *S v Sikunyana* 1961 (3) SA 549 (E) 551.
190 1925 EDL 204.
191 *Sikunyana*, n 189.
192 *Njikelana*, n 3, 205; *Burchell*, n 24, 226; *Kemp et al*, n 24, 344.

The four accused relied on *Njikelana* to appeal their conviction, arguing that the complainant consented to the treatment.[193] In dismissing their appeal, the court held that the cases were distinguishable. There was no evidence in *Njikelana* that the powder was harmful.[194] Meanwhile, the appellants in *Sikunyane* "knew or must have known that their treatment was dangerous and involved the risk of serious bodily harm to the complainant."[195] Consequently, the court concluded that "a highly dangerous practice superstitiously designed to secure the exorcism of an evil spirit cannot be rendered lawful by the consent of the afflicted person."[196] The court's approach aligns with the general rule in South African law.

However, Burchell[197] argues that factual complexes like those in *Njikelana* and *Sikunyane* "might well be amenable to the more nuanced, modern evaluation that includes the accommodation of cultural diversity." He refers to the judgment in *R v Lee*[198] where the New Zealand Court of Appeal radically departed from the established category-based decision-making approach to determine when a victim's consent can be a defence to the intentional infliction of actual bodily harm.[199] It moved away from a decision based on a generic type of harm-causing conduct and directly applied public policy factors relevant to the law on consent to the specific factual scenario.[200] Burchell[201] lists various public policy factors considered by *Lee* that resonate in South African criminal jurisprudence, including individual autonomy, dignity, privacy, religious practices, and beliefs.

Tolmie[202] argues that the *Lee* approach "gives actual consideration to individual autonomy and victim vulnerability in a manner that decision making by category of behaviour logically cannot." Burchell[203] holds a similar view and adds that it provides "an approach to the defence of consent that is viable and truly sensitive to individual autonomy, collective security and cultural diversity." He adds that it is also compatible with South African case

193 *Sikunyana*, n 189, 551-552.

194 *Sikunyana*, n 189, 552.

195 *Ibid*.

196 *Ibid*.

197 *Burchell*, n 24, 226.

198 2006 (22) C RNZ 568 (CA). The appellant, a pastor, was convicted of manslaughter for accidentally killing one of his parishioners during an exorcism. The issue on appeal was whether he could rely on the victim's consent as a defence.

199 *Julia Tolmie*, Withdrawing the "defence" of victim consent to risked or intended harm: Moving away from category based decision making, https://www.law.ox.ac.uk/events/withdrawing-defence-victim-consent-risked-or-intended-harm-moving-away-category-based (accessed on 23 December 2022).

200 *Lee,* n 198, par 316; *Julia Tolmie,* Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making, Criminal Law Review, 9, 2012, 659.

201 *Burchell*, n 24, 220.

202 *Tolmie*, n 199.

203 *Burchell*, n 24, 220.

law on consent, where the courts have already considered certain policy factors.[204] Moreover, South African law has already recognised the severity of the bodily harm inflicted as a crucial factor in deciding the defence's success, albeit not the only determining factor.[205]

The present author agrees with Burchell on a more modern approach to cultural and religious practices and the defence of consent. Like obedience to superior orders, most cases on the defence in a customary law context predate the Constitution that enshrines human dignity,[206] privacy[207] and cultural and religious freedom as fundamental human rights.[208] How these constitutional provisions could influence South Africa's approach to the defence must therefore be considered. As Burchell[209] points out, "not only is the essence of the defence of consent in the South African cases regarded as individual autonomy, but individual autonomy is recognised as part of the constitutionally entrenched concepts of dignity and privacy."

In 2014, the appellate court in *S v Jezile*[210] considered the defence in a case involving the indigenous custom of *ukuthwala*. The custom is "a form of abduction that involves kidnapping a young girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations".[211] It is difficult to pin down the exact requirements and consequences for a valid *ukuthwala* because it differs from community to community.[212] However, Nhlapo outlined the custom's traditional and essential features as an expert witness to the court in *Jezile*. Only two are relevant for present purposes, namely that the women must be of marriageable age and that both parties must consent to perform *ukuthwala*.[213]

204 *Ibid*, 221.

205 *Ibid*.

206 Section 10.

207 Section 14.

208 Apart from *Njikelana* and *Sikunyana*, see *Njova*, *Ncedani*, *Sita*, *Mane* and *Swartbooi*, n 3 where the defence was raised in the context of the indigenous custom of *ukuthwala*.

209 *Burchell*, n 24, fn 70.

210 2015 (2) SACR 452 (WCC).

211 *Maluleke*, Let's Protect Our Children, https://www.justice.gov.za/docs/articles/2009_ukuthwala-kidnapping-girls.html (accessed 13 January 2023). For similar definitions see *Digby Sqhelo Koyana* and *Jan Christoffel Bekker*, The Indomitable Ukuthwala Custom, De Jure, 40, 2007, 139, *Bennett*, n 4, 7, *Rautenbach* and *Matthee*, n 4, 119, *Lea Mwambene* and *Julia Sloth-Nielsen*, Benign Accommodation? *Ukuthwala*, 'Forced Marriage' and the South African Children's Act, Journal of Family Law and Practice, 2.1, 6 and *Nicolaas Johannes Jacobus Olivier et al.*, Indigenous Law, in: *Willem Adolf Joubert* (ed.), The Law of South Africa, Durban, 2000, par 89. The facts in *Njova*, *Ncedani*, *Swartbooi*, *Mane* and *Sita,* n 3 illustrate examples of *ukutwhala* in practice.

212 *Rautenbach* and *Matthee*, n 4, 119; *Matthee*, n 1, 164.

213 *Jezile*, n 210, 473.

The court *a quo* convicted Jezile of several offences against a 14-year-old girl whom he had *twala*'d.[214] He relied on consent to the custom to justify his conduct. He argued that he complied with the custom's traditional practices as he understood it because the girl's family had willingly participated in the process and given her away in a customary marriage.[215] Furthermore, the girl had consented to their customary marriage because it is "customary practice that a female would not explicitly consent to the removal by the man when conducting the *ukuthwala* and would pretend to resist as a sign of her modesty".[216]

However, Nhlapo[217] testified that it was not a proper *ukuthwala* for several reasons. The complainant did not meet the age requirement and did not consent to the custom. Moreover, the payment of *lobolo* preceded the custom.[218] Several other expert witness testimonies coincided with Nhlapo's view and referred to the custom in this instance as a "misapplied form", a "perversion of the custom", and "aberrant".[219]

Nhlapo[220] further argued that the substantive minimum requirements for a valid customary marriage in the *Recognition of Customary Marriages Act* 120 of 1998 equally apply to a valid *ukuthwala*. The requirements entail that both parties to the marriage must be 18 years or older and consent to the customary marriage.[221] The marriage must also have been negotiated, entered, or celebrated under customary law.[222] In the case of minors, both the minor's parents must consent to the marriage.[223] The legal guardian must consent to the marriage if the minor has no parents.[224]

All the above requirements are absent in *Jezile*. The evidence presented in the court *a quo* consistently showed that the complainant never consented and even attempted to flee from the appellant on several occasions.[225] The complainant's mother also never gave consent and testified that she would never have because the complainant was too young.[226] Furthermore, the purported marriage cannot be considered negotiated, entered, or celebrated under customary law. As the expert witnesses explained, the appellant's assertion

214 He was convicted of one count of human trafficking, three counts of rape, one count of assault with intent to cause grievous bodily harm, and one count of common assault.

215 *Jezile*, n 210, 478.

216 *Ibid*.

217 *Ibid*, 474.

218 *Ibid*.

219 *Ibid*.

220 *Ibid*, 476.

221 S 3 of the *Recognition of Customary Marriages Act* 120 of 1998.

222 *Ibid*.

223 *Ibid*.

224 *Ibid*.

225 *Jezile*, n 210, 456-459.

226 *Ibid,* 459.

that the complainant is expected to show feigned resistance to the "abduction" is only true for a consenting female.[227]

Nhlapo also contended that a form of *ukuthwala* leading to a marriage that does not comply with the *Recognition of Customary Marriages Act* violates the Constitution.[228] The present author makes a similar submission elsewhere.[229] There it is shown that the custom violates a girl's constitutional right to equality,[230] freedom and security of the person,[231] the right not to be subjected to slavery, servitude or forced labour[232] and the right to basic education.[233] In addition, the custom violates constitutional safeguards aimed at protecting children.[234]

The above alludes to a potential conflict between the right to cultural and religious freedom and the right to enjoy other freedoms in the Constitution. The right to cultural and religious freedom is considered prominent among those entrenched in the Bill of Rights, which raises the question of resolving such conflict.[235] Rautenbach and Matthee[236] argue that the constitutional provisions themselves contain the solution. Sections 15, 30 and 31 of the Constitution contain internal limitation clauses that require an individual's exercise of his right to cultural and religious freedom to be consistent with the Constitution and the Bill of Rights. In addition, the Constitution's general limitation clause, section 36, provides that all constitutional rights may be limited. Therefore, the protection of cultural and religious freedom cannot outweigh a violation of other fundamental human rights.[237]

The appellate court in *Jezile* ultimately found that "the appellant had not asserted any customary law precept to have justified his conduct, or that he had acted in the belief that he had entered into a customary marriage that permitted sexual coercion".[238] The court

227 *Ibid,* 478.

228 *Ibid,* 476.

229 *Jacques Matthee*, Indigenous Beliefs and Customs, the South African Criminal Law, and Human Rights: Identifying the Issues, The Journal of Legal Pluralism and Unofficial Law, 53, 2021, 534-535; *Matthee*, n 1, 253-256.

230 S 9 of the Constitution.

231 S 12 of the Constitution.

232 S 13 of the Constitution.

233 S 29 of the Constitution.

234 These constitutional safeguards are found in section 28 of the Constitution.

235 *Matthee*, n 1, 257, *Jacques Matthee*, Casting a Constitutional Light on the Cultural Defence in South African Criminal Law, African Journal of Legal Studies, 15, 2023, 126, *Lourens du Plessis*, Religious Freedom and Equality as Celebration of Difference: A Significant Development in Recent South African Constitutional Case-law, Potchefstroom Electronic Law Journal, 12, 2009, 10-11.

236 *Rautenbach and Matthee*, n 4, 136.

237 *Ibid*, 137; *Matthee*, n 235, 127.

238 *Jezile*, n 210, 453, 479.

further held that the practices associated with the aberrant form of *ukuthwala* could not secure protection under South African law and dismissed the appeal in part.[239]

The defence can only succeed if the consent given is genuine.[240] The meaning of consent for purposes of criminal liability is difficult to define.[241] However, it must be a unilateral act performed expressly or tacitly.[242] Also, active consent is required, not mere submission or silence.[243] Similarly, consent induced by duress, threats, force or intimidation is not genuine consent.[244]

The ostensible consent by the complainant relied upon by the appellant in *Jezile* meets none of the requirements above. The evidence in the court *a quo* reveals that she "pleaded with her uncle never to force her into a customary marriage", but her plea fell on deaf ears.[245] Instead, her uncle and the appellant's family member forcibly restrained her by her arms while carrying her off to be married.[246] En route, she also "cried and pleaded but was instructed by her uncle to stop".[247] Further evidence showed that she continued to protest and resist the purported marriage and its related duties but was forced into submission every time.[248]

The defence's last requirement entails that the person giving consent must have the mental capacity to do so.[249] In other words, the person must be mentally capable of forming and exercising his will.[250] A person may lack this capacity due to youth, mental defect, intoxication or unconsciousness.[251] Of course, consent by proxy, by someone with authority to do so, is permissible.[252] The *Jezile* case is a typical example where consent by proxy, by the complainant's mother and not her family members, was required. However, it was shown above that the law still requires the complainant's voluntary consent to the marriage.

239 *Ibid*, 452, 479. The appeal succeeded regarding the two convictions for assault because they amounted to a duplication of convictions.

240 *Burchell*, n 24, 209, 226; *Kemp et al*, n 24, 354.

241 *Burchell*, n 24, 226; *Kemp et al*, n 24, 351.

242 *Burchell*, n 24, 227; *Kemp et al*, n 24, 351.

243 *Ibid*.

244 *Burchell*, n 24, 227; *Kemp et al*, n 24, 355.

245 *Jezile*, n 210, 457.

246 *Ibid*.

247 *Ibid*.

248 *Ibid,* 457-458.

249 *Burchell*, n 24, 233; *Kemp et al*, n 24, 351.

250 *Kemp et al*, n 24, 351.

251 *Burchell*, n 24, 233; *Kemp et al*, n 24, 351-352.

252 *Burchell*, n 24, 233; *Kemp et al*, n 24, 353.

G. Conclusion

This article considered whether existing criminal law defences negating unlawfulness in South Africa could accommodate arguments that an accused's commission of a crime was culturally motivated. It did so to determine whether South Africa requires a separate and distinct cultural defence to fill a previously unknown gap in its criminal law. The investigation was sparked by South Africa adopting a supreme Constitution, which afforded equal status to the common law and African customary law in the country and entrenched cultural and religious freedom as a fundamental human right.

The analysis revealed that a separate and distinct cultural defence would not fill a gap in the South African criminal law on private defence. South Africa's criminal courts have been unwilling to accept that a truly held indigenous belief alone can justify an accused's conduct in private defence. The belief and concomitant perceived threat fall outside the scope of an unlawful attack and the imminence-requirement for the defence. Recently, there was an attempt to qualify and develop the traditional approach to private defence that seemingly includes a threat of harm through supernatural means as an unlawful attack. However, until that attempt receives higher judicial scrutiny or approval, such cases remain to be considered within the confines of the defence's existing requirements. Those requirements are currently flexible enough to accommodate arguments of an accused's cultural and religious background leading to a culturally motivated crime. Moreover, an accused's subjective views and perceptions do not influence such a crime's unlawfulness. Instead, South African courts have always considered them when determining the accused's culpability and an appropriate sentence.

Similarly, it appears that an accused's cultural background also has no new role to play in South African law on the defence of necessity. Scenarios suggested to fall within the scope of the defence do not require special consideration of their cultural context and can be dealt with within the defence's ordinary rules. Alternatively, the scenarios could lend themselves towards the defence of superior orders.

The South African courts have limited exposure to the defence of superior orders in a customary law context. However, the possibility of such cases in South Africa's constitutional dispensation, with its emphasis on cultural and religious freedom and entrenchment of traditional leadership institutions, status and role, cannot be ruled out. The discussion in this paper showed that the defence could arise in cases where a traditional leader's subordinates obey their superior's orders. However, an analysis of the defence's requirements reveals that, as with private defence and necessity, they can already accommodate arguments of an accused's cultural and religious background.

The last defence considered in this paper is that of consent. South African criminal law already has an established approach to the defence in crimes resulting from religious, customary and superstitious practices. However, this paper explored a suggested modern approach to cultural and religious practices and the defence of consent, considering that most cases on the defence in a customary law context predate the Constitution that en-

shrines human dignity, privacy and cultural and religious freedom as fundamental human rights. The present author agrees with the approach because, as Burchell[253] so eloquently puts it:

> *The approach should help to achieve a nuanced resolution of the matter by striking a viable balance between individual autonomy and collective welfare, respecting cultural diversity, avoiding blanket, category-based decisions by focusing on the individual facts of the case and ultimately giving clarity to the vague label of public policy by identifying specific factors to weigh in the balance.*

It is ultimately concluded that there is no gap in South Africa's criminal law on unlawfulness that only a separate and distinct cultural defence can fill. South Africa's principles of unlawfulness are already broad enough to accommodate arguments of an accused's indigenous belief or custom to negate this element of criminal liability.

Furthermore, a separate and distinct cultural defence will not augment the notion of cultural diversity in South Africa's constitutional dispensation.[254] Cultural and religious groups are free to practise their culture and religion, albeit within the confines of the Bill of Rights in the Constitution.[255] Indigenous beliefs and customs can never supersede individual human rights.[256] Therefore, it should not simply be a valid defence or mitigating factor for committing culturally motivated crimes.[257]

253 *Burchell*, n 24, 221-222.

254 *Matthee*, n 235, 130.

255 *Matthee*, n 235, 134; *Ndyebo Kingsworth Momoti*, Law and Culture in the New Constitutional Dispensation with Specific Reference to the Custom of Circumcision as Practised in the Eastern Cape, LLM dissertation, Rhodes University 2002, 89.

256 *Matthee*, n 235, 134; *Rautenbach and Matthee*, n 4, 140; *Momoti*, n 255, 89.

257 *Ibid*.