
COMPARING CRIMINAL LAW RULES: A ROLE FOR CUSTOMARY LAW CONCEPTS?

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1 Introduction

The motivation for this article, apart from my own curiosity, proceeds from two primary sources. At a previous conference of the Southern African Society of Legal Historians, held in 1999, Justice Albie Sachs issued a challenge for greater recognition of the need to grant customary (or "indigenous") legal principles their rightful status in the broader South African legal context. This challenge echoed his words in his judgment in the landmark case of *S v Makwanyane*,¹ in which the death penalty was struck down as unconstitutional,² when he stated that

[i]t is a distressing fact that our law reports and legal textbooks contain few references to African sources as part of the general law of the country. That is no reason for this Court to continue to ignore the legal institutions and values of a very large part of the population, moreover of that section that suffered the most violations of fundamental rights under previous legal regimes, and that perhaps has the most to hope for from the new constitutional order.³

This article attempts to address this neglect in an admittedly modest and circumscribed fashion, by seeking to examine to what extent the rules of customary criminal law can usefully be employed to inform, enhance and provide a context for the operation of the general criminal law rules. It should be emphasised that this endeavour is not *terra nova*, as much sound comparative work has already been done in the area of customary criminal law, not least by – and here is the second source of motivation – Professor JMT Labuschagne, whose extraordinary efforts produced a singular corpus of comparative work. Criminal law in South Africa is much poorer since his passing, and this paper is a humble tribute to his academic leadership and industry.⁴

1 1995 3 SA 391 (CC).

2 The Constitutional Court held that the death penalty constitutes cruel, inhuman and degrading punishment, and is incompatible with the right to life and the right to dignity.

3 Par [371].

4 The extent of my indebtedness to Prof Labuschagne is evident from the discussion which follows.

2 Factors complicating comparative research involving customary law

2.1 Generally

Before commencing with an examination of legal rules, there are a few caveats which should be taken into account. Comparative work in the area of customary law is complicated by the following factors:

(a) Insufficient information

There are a number of tribes in respect of which there is paucity, or even a complete lack, of information regarding customary practices,⁵ and thus the comparative work is limited to those tribes whose practices have been recorded.

(b) Danger of generalisation

There are significant differences between the respective tribes, particularly tribes belonging to the Nguni group and those belonging to the Sotho group.⁶ It is therefore very important to be aware of the danger of generalisation.⁷ This potential problem is exacerbated by the fact that certain references fail to make it clear which tribes are being referred to.⁸ In the present context, it should be noted that conduct which is a crime in the customary law of certain tribes, merely amounts to a delict with regard to other tribes.⁹

(c) Problem of acculturation and development

Since the indigenous black population of South Africa was historically pre-literate, there exists no written record of legal rules emanating from the tribes themselves.¹⁰ As a result of the process of legal acculturation which occurred due to permanent contact with European legal systems, it is extremely difficult if not impossible to establish which rules have been influenced in this way,¹¹

5 Labuschagne "Die bloedskandeverbod in die inheemse reg" 1990 *TRW* 36; Labuschagne & Van den Heever "Liability arising from the killing of a fellow human being in South African indigenous law" 1995 *CILSA* 422.

6 Bekker *Seymour's Customary Law in Southern Africa* (1989) 123.

7 Labuschagne (n 5) 36.

8 Labuschagne & Van den Heever "Theft in rudimentary legal systems: Do universal characteristics exist?" 1991 *CILSA* 352.

9 Prinsloo *Die Inheemse Strafreë van die Noord-Sotho* (Inaugural lecture, UJ, 1978) 5. In the context of the North Sotho, Prinsloo refers to theft and damage of private property as conduct criminalised by certain tribes, but merely giving rise to a civil claim in others.

10 Labuschagne "Verkragting in die inheemse reg: Opmerkings oor die oorsprong van vroulike ondergeskiktheid in misdaadskrywing" 1994 *Obiter* 85.

11 *Ibid*; Labuschagne & Van den Heever (n 8) 352.

since the information which is available regarding a particular tribe is itself acculturated in nature. Moreover, one has to take account of the fact that all legal systems are in a continual process of development, and thus that it is often extremely difficult to determine whether a legal rule is still current and valid.¹²

(d) "Official" and "non-official" customary law

In applying customary law, the courts have regard to legislative provisions and existing case law, in the absence of which they rely on the writings of lawyers and anthropologists – this may be referred to as "official" customary law. However this form of customary law may differ from "non-official" customary law, the customary law actually lived out by people, and applied in various traditional and informal tribunals.¹³

2.2 Criminal law

One of the problems with doing comparative work involving customary criminal law is the fact that a sharp distinction between criminal law and the law of delict does not obtain in indigenous law.¹⁴ It may be attributed to customary criminal procedure and civil procedure being integrated to a large extent, as a result of which there is little difference in the conducting of legal proceedings between the two areas of law. This gives rise to the perception that customary law does not distinguish between criminal law and law of delict.¹⁵ A further complicating factor is that it appears that delictual actions in customary law have not lost their punitive function.¹⁶ Nevertheless, the distinction between crime and delict is bolstered by the presence of pure criminal-law cases, such as contempt of the ruler and disobedience of administrative determinations, and pure civil-law cases, such as seduction, where the procedural and substantive legal

12 Labuschagne (n 5) 36; Labuschagne & Van den Heever "Liability for adultery in South African indigenous law: Remarks on the juridical process of psychosexual autonomisation of women" 1997 *CILSA* 76.

13 This terminology and distinction derives from Bekker & Maithufi "The dichotomy between 'official customary law' and 'non-official customary law'" 1992 *TRW* 47. See also Bennett *A Sourcebook of African Customary Law in Southern Africa* (1991) 49-50; Labuschagne & Boonzaaier "African perceptions and legal rules concerning nature conservation" 1998 *SAJELP* 67.

14 See Labuschagne & Van den Heever "Die oorsprong van en die onderskeid tussen die fenomene misdaad en delik in primigene regstelsels" 1991 *Obiter* 80. They point out that such a distinction should nevertheless be drawn. Similarly, Prinsloo (n 9) 4 argues for such a distinction.

15 Labuschagne & Van den Heever (n 14) 84. Two principal differences between the procedures are (i) that the parties in a civil case are responsible for personally stating their cases, whilst in a criminal case the facts of the offence and the relevant evidence is led by a member of the court; and (ii) that whilst there can be negotiations and settlement between the parties in a civil case, the chief has sole discretion relating to criminal law matters (see *idem* 86-88). As in South African law, a further point of distinction relates to the interest infringed – private (delict) vs public (crime) – and the consequences of establishing liability – compensation (delict) vs punishment (crime) (*idem* 84).

distinctions are manifest.¹⁷ This relates to a further point of distinction between crime and delict: the injured party or violated legal interest.

A comparative project between customary criminal law and general criminal law encounters a further difficulty when one considers the nature of the legal systems compared. It brooks little argument that present-day Romanists are able to set out the written Roman law more systematically and analytically than the Romans themselves. The reason for this is that modern thinking has been enriched and refined over a period of many centuries. In the same way, it could be argued that customary law is still too casuistic in nature to draw out general principles, in particular.¹⁸ Unwritten customary law further does not contain complete definitions of offences, and although the elements of these offences, along with a fuller definition, can be established upon more detailed investigation, this state of affairs renders the enquiry more difficult.¹⁹

3 General principles

Neither unconscious human conduct, nor involuntary human movement (such as that flowing from *vis absoluta*), is regarded as an act for the purposes of customary criminal law.²⁰ Punishable conduct may take the form of a positive act or an omission.²¹ Van den Heever and Labuschagne highlight three circumstances in which liability for an omission could follow: where damage has been caused by animals (for which the accused is responsible); where damage has been caused by fire; and where disobedience or disrespect is shown towards the ruler.²² Furthermore, the failure to stop a fight is regarded as a crime in relation to the Tswana²³ and in QwaQwa.²⁴ As regards the element of causation, it seems that there has been no attempt to conceptualise causation or any test or theory thereof.²⁵ Instead, the question of causation

16 *Idem* 89-92.

17 Prinsloo *Inheemse Publiekreg in Lebowa* (1983) 170.

18 Labuschagne makes this point in a review of Myburgh (ed) *Indigenous Criminal Law in Bophuthatswana* (1980) in 1980 *De Jure* 423.

19 Prinsloo (n 9) 5.

20 Myburgh "Acts and non-acts" in Myburgh (ed) *Indigenous Criminal Law in Bophuthatswana* (1980) 7; Botha *Grondslae van die Inheemse Strafreg in QwaQwa* (1986) 11; Prinsloo (n 17) 173. Both Botha and Prinsloo comment that intoxication is not regarded as a factor excluding voluntariness. The position is the same in general criminal law: Snyman *Criminal Law* 4th ed (2002) 55; Burchell *Principles of Criminal Law* 3rd ed (2005) 179.

21 Prinsloo (n 17) 173; Botha (n 20) 11. The position is the same in general criminal law: Snyman (n 20) 59; Burchell (n 20) 185.

22 Van den Heever & Labuschagne "Kousaliteit en late-aanspreeklikheid in die inheemse reg: Opmerkinge oor die grys gebiede van die dekonkretiseringsproses" 1996 *Obiter* 316-318. The last category of omission is criminalised as the crime of disobeying orders. This is discussed in Vorster "Disobeying orders" in Myburgh (n 20) 75-7; Prinsloo (n 17) 186-199; Botha (n 20) 25-6.

23 Myburgh "Other offences: Offences by custom" in Myburgh (n 20) 107.

24 Botha (n 20) 58.

25 Nathan "Causality" in Myburgh (n 20) 9. For a discussion of causation in the general criminal law, see Snyman (n 20) 73-91; Burchell (n 20) 209-225.

appears to be approached intuitively.²⁶ Botha concludes, in the context of Southern Sotho groups, that causation is established where in terms of human experience the act in question is regarded as an essential condition for that consequence.²⁷ Nathan notes the use of the *conditio sine qua non* test, and perhaps an intervening cause test, for the Tswana.²⁸ An exception arises in respect of crimes such as witchcraft and violation of taboo, where causation is established by means of divination.²⁹

Customary criminal law recognises a number of grounds of justification. In terms of defence as a ground of justification any right under attack may be lawfully defended.³⁰ The defender may even kill in defence of person or property.³¹ However, although the accused may use as much force as necessary,³² the force used must not be excessive.³³ According to Labuschagne, the proportionality requirement is however not consistently strictly applied.³⁴ In the light of this general approach, it follows that it would not be required of the accused to flee in the face of a threat to a legal interest.³⁵ Finally, the attack must have begun or be immediately threatening.³⁶ Where the attack is completed, any counter-attack would be categorised as revenge rather than defence, which would not fall within the protection of the justification ground.³⁷

Necessity is recognised as a ground of justification in customary criminal law.³⁸ Whilst incorporating the present ambit of the defence in general criminal law,

26 *Ibid*; Botha (n 20) 11.

27 Botha (n 20) 11. A similar approach is adopted by the North Sotho – see Prinsloo (n 9) 5; Prinsloo (n 17) 173.

28 Nathan (n 25) 9.

29 Botha (1986) 11; Prinsloo (1983) 173. Van den Heever & Labuschagne (n 22) 316 criticise this form of "abstract causation" as false and mistaken.

30 Church "Defence" in Myburgh (n 20) 14, notes that this holds true for Tswana law even where the attacker would not be held criminally responsible for his actions, and further, that one could act in defence of someone outside of the defender's agnatic group (at 16). See also Labuschagne "Van instink tot norm – noodweer en noodtoestand in strafregtelik-evolutionêre perspektief" 1993 *TRW* 133. For the position in the general criminal law, which is substantially similar, see Snyman (n 20) 102ff; Burchell (n 20) 230ff.

31 *Ibid*; Botha (n 20) 12. Prinsloo (n 17) 173 only mentions the lawful killing of the attacker in circumstances where the accused's life is under threat.

32 Prinsloo (n 9) 6; Prinsloo (n 17) 173.

33 Church (n 30) 15; Botha (n 20) 12.

34 Labuschagne (n 30) 138.

35 Church (n 30) 15. Labuschagne (n 30) 139 notes that violence may be used even to protect one's honour, and thus flight would not be necessary in the event of such a threat. Botha (n 20) 12 on the other hand states that flight is required if the attacker can be evaded in this way.

36 Prinsloo (n 17) 174.

37 Botha (n 20) 12; Labuschagne (n 30) 139. Church (n 30) 16 notes that the Tswana justify this rule with the saying that to go after the attacker would be "following a snake into its burrow" (with the implication that it will bite its pursuer and he will die).

38 Botha (n 20) 12; Labuschagne (n 30) 136-138; Prinsloo (n 9) 7; Church "Necessity" in Myburgh (n 20) 17. For discussion of the general law, see Snyman (n 20) 113-123; Burchell (n 20) 256-279.

including the possibility that killing in necessity be justified,³⁹ the customary defence is framed somewhat wider, in that it includes the possibility of acting in necessity in defence of one's agnatic group or even the realm.⁴⁰ In early customary law the killing of deformed children, or one of a set of twins or someone practising witchcraft, was justified in terms of the doctrine of necessity, but the test for necessity has shifted from subjective belief to an objective test, and thus would no longer be justified.⁴¹ Allowing old people to starve to death or cannibalism is also not regarded as lawful.⁴²

Impossibility is also regarded as a ground of justification in customary criminal law, and will provide a defence where the accused is faced with fulfilling competing legal duties,⁴³ or in the event of severe illness precluding the accused from fulfilling an obligation to, for example, attend a meeting. It is interesting that Nathan notes, in the context of the Tswana, that "impossibility excludes unlawfulness even if it is ascribable to the person concerned himself".⁴⁴ As Snyman points out, in South African criminal law there is case authority to the contrary.⁴⁵ However, to project the reprehensibility of the act which brings about the situation of impossibility onto the failure to comply with the law amounts to an application of the rejected doctrine of *versari in re illicita*.⁴⁶

Superior orders appear to be a ground of justification in certain tribes where the accused obeys an order to commit a crime.⁴⁷ *Negotiorum gestio* is also recognised as ground of justification in certain tribes.⁴⁸ Furthermore, consent

39 Church (n 38) 17; Botha (n 20) 13; Labuschagne (n 30) 138. As with South African criminal law, the threatened interest should generally be valued higher than the infringed interest: Botha (n 20) 13; Church (n 38) 19.

40 Church (n 38) 19; Botha (n 20) 12.

41 Labuschagne (n 30) 136-137. Prinsloo (n 9) 7 and (n 17) 174 notes that a witchcraft practitioner constituted a danger to the community, whilst the unfortunate children mentioned were believed to bring misfortune to the community if they were allowed to live.

42 Church (n 38) 17. In nomadic communities such as the San and Khoikhoi however, the aged would typically be left behind to die (Labuschagne (n 30) 137).

43 Prinsloo (n 17) 175; Nathan "Impossibility" in Myburgh (n 20) 24; Botha (n 20) 13. The accused may not, for example, simply disobey two conflicting orders, but should follow the order of the person of higher rank.

44 Nathan (n 43) 25.

45 Snyman (n 20) 63, citing *R v Close Settlement Corporation* 1922 AD 294 at 300 in this regard.

46 Snyman (n 20) 63. The *versari* doctrine, which entails a person being held criminally liable for all the consequences of his unlawful (or immoral) act, irrespective of whether his actions were intentional or negligent, was rejected by the Appellate Division in *S v Bernardus* 1965 3 SA 287 (A).

47 Vorster "Executing orders" in Myburgh (n 20) 28-9 notes that while carrying out a valid order or one authorised by the ruler, no liability can follow. As regards obedience to an order to commit an offence, where the order has come from a subordinate authority, there is some dispute as to whether this can be regarded as an offence. See also Botha (n 20) 15. For the position in the general law, see discussion at Snyman (n 20) 132-135; Burchell (n 20) 284-290.

48 Prinsloo (n 9) 6; Nathan "Consent and management" in Myburgh (n 20) 27; Botha (n 20) 14. For the position in the general law, see discussion at Snyman (n 20) 129-130; Burchell (n 20) 357.

may exclude unlawfulness, although the focus in customary law tends to be on the consent of the group, rather than the individual.⁴⁹ Labuschagne and Van den Heever argue, however, that just as consent which does not accord with public policy in general law is not recognised as a defence, so the consent of the agnatic group of the victim will not exclude the unlawfulness of the conduct where this is not in line with the interests of society.⁵⁰

Discipline as a ground of justification in customary criminal law is far wider in ambit than the equivalent defence of disciplinary chastisement in the general law. Whereas disciplinary chastisement now merely justifies moderate and reasonable parent-child discipline,⁵¹ in customary law the defence extends to a husband's right to discipline his wife,⁵² and, in some tribes, an adult's right to discipline any child, irrespective of the relationship between them.⁵³

Customary law recognises further grounds of justification which render *prima facie* unlawful conduct lawful. First, institutional action may exclude unlawfulness.⁵⁴ An institution is "a cultural stereotype involving prescribed action", and where this action is complied with the accused's conduct is lawful.⁵⁵ Examples of institutions include games; equipping oneself with material proof of a delict; cleansing ceremonies; maintenance of discipline and circumcision.⁵⁶ Secondly, in terms of the justification ground of satisfaction there are certain situations in customary law where the accused may exercise self-help lawfully in protecting his rights.⁵⁷ These include assault of a thief, rapist, kidnapper or adulterer who has been caught *in flagrante delicto*.⁵⁸ The self-help must take place during, or immediately after, the commission of the offending act,⁵⁹ and must not exceed the limits of satisfaction.⁶⁰

49 Prinsloo (n 9) 6; Nathan (n 48) 27; Prinsloo (n 17) 175; Botha (n 20) 14. For the position in the general law, see discussion at Snyman (n 20) 123-128; Burchell (n 20) 324-347.

50 Labuschagne & Van den Heever "Toestemming as verweer by gewelds- en seksuele handeling in die inheemse reg" 1995 *TRW* 148.

51 See Snyman (n 20) 135-137.

52 Myburgh "Discipline" in Myburgh (n 20) 32; Botha (n 20) 15; Labuschagne & Van den Heever "Die konflik tussen die inheemsregtelike tugbevoegdheid en die Suid-Afrikaanse strafreg" 1991 *TRW* 104.

53 Prinsloo (n 9) 7; Myburgh (n 52) 33; Prinsloo (n 17) 174; Botha (n 20) 15; Labuschagne & Van den Heever (n 52) 100.

54 Prinsloo (n 9) 7; Prinsloo (n 17) 174; Botha (n 20) 14.

55 Myburgh "Institutional action" in Myburgh (n 20) 30.

56 *Ibid*; Botha (n 20) 14.

57 Prinsloo (n 9) 6; Myburgh "Satisfaction" in Myburgh (n 20) 20; Prinsloo (n 17) 174; Botha (n 20) 13.

58 Prinsloo (n 17) 174.

59 Myburgh (n 57) 23.

60 *Idem* 21. Prinsloo (n 9) 6 points out that in earlier times an adulterer caught in the act by a husband or a murderer who encounters a member of the victim's family could be killed without punishment, thus effectively instituting severe provocation as a ground of excuse alongside the justification ground of satisfaction.

As regards the requirement of *mens rea* for liability, as with the general principles of South African law, customary criminal law acknowledges the need for both imputability (criminal capacity) and fault. Imputability, which relates to the ability to distinguish between right and wrong and to act accordingly, appears to be dealt with casuistically, and the general principles of liability relating to this area are therefore undeveloped. Some trends may be identified however.

First, whilst as a result of youth an accused may be found to lack imputability, the criterion in customary law does not appear to be related to any particular age-ranges, but would relate to the level of discernment of the individual child.⁶¹ Prinsloo notes that the reason for this defence is that a young child's brain is still "too weak" for her to be held to have criminal capacity.⁶² Secondly, mental illness may exclude capacity,⁶³ since a mentally ill person is held not to be a complete person, and thus being injured by his actions is equivalent to being injured by a tree.⁶⁴ Some tribes require the mental illness to be permanent in nature for the defence to operate.⁶⁵ Thirdly, drunkenness does not seem to be accepted as a defence excluding capacity in customary criminal law,⁶⁶ although some tribes accept that intoxication may give rise to degrees of responsibility.⁶⁷ It seems that the principle of antecedent liability in relation to voluntary intoxication is found in the customary criminal law rules of differing groups. Thus where a person brings himself under the influence of alcohol or

61 Myburgh "Responsibility" in Myburgh (n 20) 39; Prinsloo (n 9) 8; Prinsloo (n 17) 176. Botha (n 20) 17 furthermore adds that in Tlokwa law an elderly person will not be tried in court since old age has affected his capacity. Labuschagne & Van der Heever "Accountability of children in rudimentary legal systems: A criminal law-evolutionary view" 1993 *CILSA* 98 suggest that one reason for the absence of specific age-ranges dictating capacity in customary law relates to the absence of official birth registers. The position in general law is dictated by the age of the child. Where a child is under the age of seven years, there will be an irrebuttable presumption of incapacity; between seven and fourteen years, there will be a rebuttable presumption of incapacity; over fourteen years, youth merely operates as a mitigating factor: Snyman (n 20) 176-179; Burchell (n 20) 364-369.

62 Prinsloo (n 9) 8 and (n 17) 176.

63 Botha (n 20) 16; Myburgh (n 61) 40; Myburgh *Papers on Indigenous Law in Southern Africa* (1985) 68; Myburgh & Prinsloo *Indigenous Public Law in KwaNdebele* (1985) 85. For further discussion of the notion of mental illness in African society and law, see Labuschagne "Die verweer van geesteskrankheid in rudimentêre regstelsels: 'n Strafregtelik-evolutionêre beskouing" 1993 *THRHR* 292; Labuschagne, Bekker & Boonzaaier "Legal capacity of mentally ill persons in African societies" 2003 *CILSA* 106. For the position in the general law, in which mental illness also operates as a defence, see discussion at Snyman (n 20) 167-176; Burchell (n 20) 370-402.

64 Prinsloo (n 9) 8; Prinsloo (n 17) 176.

65 Myburgh (n 61) 40, in the context of the Tswana law, notes that there could be "degrees of lunacy and therefore degrees of responsibility among lunatics".

66 Prinsloo ((n 9) 8; (n 17) 176) and Botha (n 20) 17. They hold that an intoxicated person is responsible for his own condition, although they acknowledge that where someone is misled while under the influence of alcohol this could operate as a mitigating factor. Prinsloo (n 17) 173 further notes that intoxication does not play a role in excluding the voluntariness of one's conduct. See also Labuschagne & Van den Heever "The effect of provocation and drunkenness on criminal and delictual liability in indigenous law" 1995 *Obiter* 52-55. Myburgh reports that there is some authority among the Rolong for the complete incapacity of a dagga-smoker after two or three inhalations ((n 61) 40). For the position in the general law, see discussion at Snyman (n 20) 221-234; Burchell (n 20) 403-423.

dagga either to facilitate the commission of a crime or in the knowledge that a predisposition to criminal conduct would arise, he would be held responsible for the ensuing conduct.⁶⁸ Finally, there seems to be consensus that provocation does not exclude capacity in customary criminal law,⁶⁹ although it may be considered a mitigating factor.⁷⁰

Fault is a requirement for liability in customary criminal law⁷¹ which recognises as forms of fault both intention and negligence.⁷² Church points out that Tswana law further evinces a good grasp of the various forms of intention.⁷³ Intention is established by inference from the acts in question, along with circumstantial evidence, and does not have to be specifically proven.⁷⁴ Mistake can exclude intention where it is material (such as misidentification of a target as an animal, when in fact it was a human being), but intention will not be excluded where the mistake was not material (as where the mistake simply related to the identity of the victim).⁷⁵ There is less certainty where the mistake relates to the lawfulness of the accused's conduct. In some systems this mistake does not affect intention since each member of the tribe has the opportunity to find out what the law is,⁷⁶ whereas in others mistake of law would exclude intent.⁷⁷ A related enquiry is what happens when the accused acts lawfully in terms of customary law, but acts unlawfully in terms of general criminal law? Examples of this situation may be found in the practices of *ukuthwala* (where a woman is abducted for the purposes of marriage)⁷⁸ and *ukuthuleka* (where a woman is kept at her father or guardian's kraal, in order to

67 Myburgh (n 61) 40.

68 *Ibid*; see Labuschagne & Van den Heever (n 66) 54.

69 Myburgh (n 61) 40; Labuschagne & Van den Heever (n 66) 55ff. For the position in the general law, see discussion at Snyman (n 20) 235-240; Burchell (n 20) 424-454.

70 Labuschagne & Van den Heever (n 66) 62.

71 Labuschagne & Van den Heever "Guilt in the South African indigenous law of delict and criminal law" 1999 *Obiter* 6. Fault is equally a requirement in general criminal law – Burchell (n 20) 455.

72 Church "Intent and negligence" in Myburgh (n 20) 35 notes, in the context of Tswana law, that there is a distinction between intent and negligence. See also Prinsloo (n 9) 8; Prinsloo (n 17) 175.

73 Church (n 72) 35, who notes that purposive intent (*dolus directus*), knowing intent (*dolus indirectus*) and reckless intent (*dolus eventualis*) are all recognised. For the position in the general law, see the discussion at Snyman (n 20) 179ff; Burchell (n 20) 459ff.

74 Botha (n 20) 16. Prinsloo ((n 9) 8; (n 17) 176) notes that where the accused specifically pleads absence of fault, it would have to be proven.

75 Church (n 72) 36; see also Botha (n 20) 17.

76 Botha (n 20) 17 (in relation to the law in QwaQwa); Prinsloo (n 9) 8 (in relation to the North Sotho). The implication is that *ignorance* of the law may provide a defence (eg where a foreigner acts unlawfully in a tribal area), whereas mere *mistake* of law will not.

77 Church (n 72) 36 (in relation to the Tswana).

78 See Labuschagne & Schoeman "Die inheemse *ukuthwala*-gebruik, wederregtelikheidsbewussyn en strafregtelike aanspreeklikheid weens ontvoering" 1988 *TRW* 33. Labuschagne "Verkragting in die inheemse reg: opmerkings oor die oorsprong van vroulike ondergeskiktheid in misdaadomskrywing" 1994 *Obiter* 93 indicates that the custom of *ukuthwala* may be traced back to the practice of kidnap of women for the purposes of marriage.

obtain extra cattle as part of *lobolo*).⁷⁹ In each case it may be argued that the accused would be held criminally liable as the mistake of law would not avail him where he foresaw that his action could possibly be unlawful.⁸⁰

Negligence is where the accused has not conformed to the behaviour of an ordinary man or woman.⁸¹ Church, discussing the Tswana, indicates that the test for negligence equates with that in general law: foreseeability and failure to take the steps an "ordinary person" would have taken.⁸² Moreover, a distinction is drawn between gross negligence and a lesser form of negligence which is reflected in punishment.⁸³

The rules relating to participation in customary law are similar to those of the general law. Thus one can be liable as a perpetrator, accomplice, or accessory after the fact.⁸⁴ There is, however, some difference among tribes as to whether an accused can be held liable for attempt.⁸⁵

4 Specific crimes

Whilst some writers distinguish between intentional and negligent homicide, it is doubtful whether this classification obtained in traditional customary law, although the distinction was significant in relation to punishment.⁸⁶ As regards intentional killing, a number of customary rules mirror those of murder. It is worth noting certain similarities in particular: that suicide is not a crime,⁸⁷ that euthanasia falls within the ambit of this crime,⁸⁸ and that there is some recognition for the operation of the post-partum syndrome.⁸⁹ Perhaps the most notable distinction between general criminal law provisions relating to homicide and those of customary law lies in the underlying values protected by the

79 Labuschagne "Wederregtelikheidsbewussyn, die *ukutheleka*-gebruik en die konflik tussen inheemse gebruike en die strafreg" 1988 SACJ 472.

80 Labuschagne & Schoeman (n 78) 44; Labuschagne (n 79) 476.

81 Prinsloo (n 9) 8; Prinsloo (n 17) 176; Labuschagne & Van den Heever (n 71) 7-12. For the position in the general law, see discussion at Snyman (n 20) 208ff; Burchell (n 20) 522ff.

82 Church (n 72) 36.

83 *Ibid.*

84 Prinsloo (n 9) 9; Prinsloo (n 17) 176; Botha (n 20) 21. For the position in the general law, see discussion at Snyman (n 20) 253ff; Burchell (n 20) 570ff.

85 Prinsloo (n 9) 8 states that attempt is punishable among the North Sotho, but acknowledges that this is rare, and is due to Western influence. Myburgh "Introduction" in Myburgh (n 20) 3, in the context of the Tswana, and Botha (n 20) 21, in the context of QwaQwa law, deny the possibility of attempt liability as such, and indicate that if liability is to flow from the conduct in question, it will be under the head of an existing crime. For the position in the general law, see discussion at Snyman (n 20) 280ff; Burchell (n 20) 624ff.

86 Labuschagne & Van den Heever (n 5) 429. See also Botha (n 20) 32; Prinsloo (n 9) 8; Prinsloo (n 17) 204.

87 Botha (n 20) 35; Church "Murder and culpable homicide" in Myburgh (n 20) 79.

88 Church (n 87) 79; Labuschagne & Van den Heever (n 5) 427 (in relation to the Ndebele); Botha (n 20) 34.

89 Mothers who kill new-born children are not dealt with in terms of criminal law or they receive a lesser punishment. See Botha (n 20) 35; Labuschagne & Van den Heever (n 5) 427 (in relation to the Ndebele); Church (n 87) 80.

crime. In the case of murder the sanctity of the right to life is upheld. In customary law there is further focus on the infringement of the right to patrimony and the personality rights of the deceased's agnatic group. Moreover, murder violates the ruler's interests in maintaining the number of his subjects.⁹⁰ It would appear that in order for an assault to be committed, intentional injury has to be caused.⁹¹ A verbal threat does not suffice for an assault,⁹² although violence is not required.⁹³

The crime of rape in customary criminal law is similar to the common-law crime⁹⁴ in that it can only be committed on a female victim⁹⁵ and by a male perpetrator.⁹⁶ In most instances penile penetration of the victim's vagina is required in order for liability to ensue,⁹⁷ although in some systems conduct amounting to an attempt will suffice.⁹⁸ However, customary criminal law of rape does not include within its ambit non-consensual sex between a man and his wife.⁹⁹ The consent of a woman's husband or guardian is in some cases a complete defence to rape even if the woman did not consent,¹⁰⁰ and the use of force is the distinguishing feature of the offence, and not absence of consent.¹⁰¹ It is evident that a women's autonomy over her body, and sexual integrity, are not highly valued in customary law.¹⁰²

90 Prinsloo (n 17) 205; Labuschagne & Van den Heever (n 5) 429-30. For the position in the general law, see discussion at Snyman (n 20) 421ff; Burchell (n 20) 667ff.

91 Myburgh "Assault" in Myburgh (n 20) 81; Prinsloo (n 17) 209. This accords with the position in the general law: Burchell (n 20) 688.

92 Prinsloo (n 9) 6; Prinsloo (n 17) 209; Myburgh (n 91) 81; Botha (n 20) 39. In contrast, a threat creating an apprehension of imminent harm may be sufficient in the general law: Snyman (n 20) 432; Burchell (n 20) 686.

93 Myburgh (n 91) 81; Botha (n 20) 39. Thus, as Myburgh indicates, poisoning is as much an assault as a slap in the face (although Botha (n 20) 40 states, in the context of QwaQwa law, that poisoning would be regarded as witchcraft rather than assault).

94 For discussion of the common-law crime, see Burchell (n 20) 705-713; Snyman (n 20) 445-450; Milton *South African Criminal Law and Procedure Vol II: Common-Law Crimes* 3rd ed (1996) 438ff.

95 See, eg Myburgh "Rape" in Myburgh (n 20) 83. A noteworthy exception to this rule occurs among the Venda of Dzanani, where a man can also be raped (Labuschagne (n 78) 90).

96 A woman can therefore not commit rape as a perpetrator, but can however be held liable as an accomplice: Botha (n 20) 37; Myburgh (n 95) 83.

97 Myburgh (n 95) 84; Labuschagne (n 78) 91.

98 Both Botha (n 20) 37 and Prinsloo (n 17) 215 state that the act of throwing a woman down with the purpose of having sexual intercourse with her would suffice for liability for rape.

99 Myburgh (n 95) 84; Botha (n 20) 37; Labuschagne (n 78) 91.

100 Labuschagne (n 78) 91.

101 Myburgh (n 95) 83; Prinsloo (n 9) 6; Prinsloo (n 17) 215; Botha (n 20) 37; Myburgh & Prinsloo (n 63) 101-102.

102 Labuschagne (n 78) 92.

Customary-law crimes of defamation (or insult)¹⁰³ and kidnapping¹⁰⁴ are largely similar to the equivalent crimes in the general criminal law. As regards offences relating to unlawful sexual conduct, incest is similarly established in customary criminal law, as in general criminal law, although the degrees of prohibited relationship vary between systems.¹⁰⁵ There is a lack of clarity as to whether customary systems punish sodomy, although it seems that lesbian activities have never been punished.¹⁰⁶ Bestiality, although strongly disapproved of, seems to be regarded as a matter for the family to deal with rather than a crime.¹⁰⁷ Public indecency is not regarded as an independent crime, such conduct being punished under the crime of insult.¹⁰⁸ Another crime against community interests,¹⁰⁹ public violence, is largely consonant with its common-law equivalent.¹¹⁰

The offences of contempt of court¹¹¹ and obstructing the course of justice¹¹² are similar to their counterparts in general criminal law. With regard to the former crime, it appears to be framed somewhat wider than the common-law equivalent, such that even unnecessary litigation may be regarded as contempt of court.¹¹³ Bribery is also recognised in customary criminal law as "presenting

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- 103 Defamation and insult are treated as one in a number of tribes, and also for the purpose of this discussion. Some tribes do, however, distinguish more clearly between the two. This conduct also amounts to a delict. See the discussion in Prinsloo (n 17) 210-212; Botha (n 20) 41-43; Labuschagne & Van den Heever "An ethnographical survey of defamation in Southern African customary law" 1998 *Obiter* 294. For the position in the general law, see discussion at Snyman (n 20) 459ff; Burchell (n 20) 741ff; Milton (n 94) 519ff.
- 104 A taking away by means of violence or deception is required: see Prinsloo (n 17) 214; Botha (n 20) 38. For the position in the general law, see discussion at Snyman (n 20) 462ff; Burchell (n 20) 758ff; Milton (n 94) 539ff.
- 105 Labuschagne "Die bloedskandeverbod in die inheemse reg" 1990 *TRW* 35 points out significant differences between the Nguni tribes and the Sotho tribes. See Vorster "Unnatural sexuality" in Myburgh (n 20) 87-9; Prinsloo (n 17) 222-3; Botha (n 20) 49-50. For the position in the general law, see discussion at Snyman (n 20) 355ff; Burchell (n 20) 772ff; Milton (n 94) 234ff. Labuschagne argues strongly elsewhere for the decriminalisation of incest except where there is sexual abuse of a relationship of authority or dependency: "Dekriminalisasie van bloedskande" 1985 *THRHR* 435; "Die inestaboe in 'n regstaat: Regsantropologiese kantaantekeninge" 1999 *South African Journal of Ethnology* 59.
- 106 Prinsloo (n 9) 11 and (n 17) 223 states that sodomy was not a crime in the original law; Vorster (n 105) 88 is not clear on the point; and Botha (n 20) 51 seems to indicate that there may be criminal liability for sodomy. All writers are agreed that female homosexuality is not criminal, although Botha (*ibid*) opines that there may be criminal liability where one party is a minor, as there would be if the intercourse was between an adult female and a male youth (Vorster (n 105) 89). The common-law crime of sodomy has been declared unconstitutional by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 557 (CC).
- 107 Prinsloo (n 9) 11; Prinsloo (n 17). See also Vorster (n 105) 89; Botha (n 20) 50. For the position in the general law, see the discussion at Snyman (n 20) 360-361; Burchell (n 20) 887; Milton (n 94) 230ff.
- 108 Prinsloo (n 17) 223; Botha (n 20) 52.
- 109 if the classification of crimes in Burchell (n 20) is followed.
- 110 See discussion in Prinsloo (n 17) 220; Botha (n 20) 48. For the general law relating to public violence, see discussion at Snyman (n 20) 319ff; Burchell (n 20) 867ff; Milton (n 94) 73ff.
- 111 See the discussion in Botha (n 20) 30; Prinsloo (n 17) 202; Myburgh "Contempt of court" in Myburgh (n 20) 68. For the position in the general law, see the discussion at Snyman (n 20) 323ff; Burchell (n 20) 945ff; Milton (n 94) 163ff.
- 112 See the discussion in Van Blerk "Obstructing the course of justice" in Myburgh (n 20) 104; Prinsloo (n 17) 201; Botha (n 20) 29. For the position in the general law, see discussion at Snyman (n 20) 337ff; Burchell (n 20) 939ff; Milton (n 94) 101ff.
- 113 Myburgh (n 111) 71; Botha (n 20) 32.

or accepting patrimony as a private reward for a public service".¹¹⁴ The giving of a gift as a mark of respect or gratitude at the provision of a public service is however permissible.¹¹⁵ Labuschagne points out that it is extremely difficult to distinguish between a gift which is a bribe, and one which is a permissible gift of thanks.¹¹⁶ The matter is further complicated, according to Labuschagne, by certain incorrect perceptions arising out of traditional modes of thought: that the official concerned needs to be paid by the party receiving the service, and, on the part of the official, that he is entitled to such gifts.¹¹⁷

As regards crimes against property, whilst the basic features of the customary crimes are the same as their general-law equivalents, the lack of systematisation is evident. Thus, whilst theft of public resources is a crime, some sources classify theft of private property as a crime whilst others regard it as a delict.¹¹⁸ Further, there are conflicting views as to whether unauthorised borrowing constitutes theft.¹¹⁹ Nevertheless, both theft and fraud are required to be committed intentionally.¹²⁰ Though robbery may not be distinguished from theft in all systems,¹²¹ it is dealt with as the intentional violent appropriation of another's goods.¹²² Extortion is defined differently in customary criminal law as the crime can only be committed by an official (which makes the offence more serious), and where a patrimonial benefit is sought.¹²³

Damage to property belonging to another, whether public property or private property, is also recognised as a crime in customary law in a number of tribes.¹²⁴ It is required that the accused intentionally cause damage in order for

114 Nathan "Bribery and extortion" in Myburgh (n 20) 102; Botha (n 20) 26. For discussion of the common-law crime, see Burchell (n 20) 889ff, who argues (correctly, it is submitted, at 891) that the repeal of the *Corruption Act* 94 of 1992, which repealed the common-law crime of bribery, has effectively reinstated the crime.

115 Botha (n 20) 26.

116 Labuschagne "Korrupsie en die inheemse gemeenskapslewe" 1991 *SACJ* 63. The rationale for this gift may be traced back to the days when persons in positions of authority did not receive a salary, and hence were dependent on such gifts (62).

117 *Idem* 64.

118 Myburgh (n 9) 5; Van Blerk "Theft" in Myburgh (n 20) 90; Botha (n 20) 44; Myburgh (n 63) 68; Labuschagne & Van den Heever (n 8) 352. For the position in the general law, see discussion at Snyman (n 20) 469ff; Burchell (n 20) 782ff; Milton 577ff.

119 Van Blerk (n 118) 90. Botha (n 20) 46 and Prinsloo (n 17) 217 report that this conduct will be regarded as theft. However, this conduct does not form part of the crime of theft in general law (Snyman (n 20) 490, although punished by s 1(1) of the *General Law Amendment Act* 50 of 1956, discussed by Burchell (n 20) 810-811).

120 See, eg, Van Blerk (n 118) 90 and Van Blerk "Fraud" in Myburgh (n 20) 93. Van Blerk reports, in the context of the Tswana, that the customary-law crime of fraud is similar to the common-law version of the crime (at 93).

121 Eg, Van Blerk (n 118) 90; Labuschagne & Van den Heever (n 8) 354.

122 Myburgh (n 9) 6. For the position in the general law, see discussion at Snyman (n 20) 506ff; Burchell (n 20) 817ff; Milton (n 94) 642ff.

123 Nathan (n 114) 102; Botha (n 20) 27. For the position in the general law, see discussion at Snyman (n 20) 386ff; Burchell (n 20) 826ff; Milton (n 94) 681ff.

124 Prinsloo (n 9) 5; Prinsloo (n 17) 219; Myburgh & Prinsloo (n 63) 104-105; Labuschagne & Van den Heever "Aanspreeklikheid vir saakbeskadiging in die inheemsereg" 1997 *TRW* 133. See also Botha (n 20) 43, who notes that such conduct can also amount to a delict in relation to private property. Myburgh (n 23) 108 limits the ambit of the crime among the Tswana to

criminal liability to ensue.¹²⁵ Arson is not regarded as a separate offence, but due to its uncontrollable nature it is seen as an aggravated form of the crime of damage to property, and thus the same principles apply as in the case of other intentional damage to property.¹²⁶

Certain customary crimes have no equivalents in general criminal law, and are thus not considered in this discussion. This group of crimes includes: crimes relating to supernatural harm such as practising black magic¹²⁷ and violating taboo;¹²⁸ crimes, such as abortion,¹²⁹ which no longer exist in the traditional form in the general criminal law; crimes, such as adultery,¹³⁰ which have been abolished in South African law; and crimes such as contempt of the ruler,¹³¹ violating an administrative determination,¹³² and disobeying orders,¹³³ which in the form of independent offences are unique to customary criminal law.

5 Concluding remarks

The purpose of this enquiry was to establish whether a comparison with customary criminal law could inform or enhance the general criminal law. It should be conceded that the considered response is probably in the negative, or at least largely so. One can generalise that customary criminal law is less

damage of public resources. For a discussion of the common-law crime of malicious injury to property, see Snyman (n 20) 535ff; Burchell (n 20) 849ff; Milton (n 94) 765ff.

125 Prinsloo (n 17) 219; Botha (n 20) 43.

126 Labuschagne & Van den Heever (n 124) 144; Labuschagne & Boonzaaier (n 13) 68. For the position in the general law relating to arson, see discussion at Snyman (n 20) 538-539; Burchell (n 20) 853-856; Milton (n 94) 777ff.

127 See the discussion of this crime in Vorster "Practising black magic" in Myburgh (n 20) 99-101; Prinsloo (n 9) 15-21; Prinsloo (n 17) 223-230; and Botha (n 20) 53-56. Labuschagne "Geloof in toewery, die regsbewussyn draende persoonlikheid en die voorrasonele onderbou van die regsorder: 'n Regsantropologiese evaluasie" 1998 *South African Journal of Ethnology* 78 states that belief in witchcraft is contrary to the basic requirements of democracy and a human rights dispensation.

128 See the discussion of this crime in Vorster "Violating taboo" in Myburgh (n 20) 94-98, where the types of taboo among the Tswana are classified as seasonal taboo, taboo in human crises, taboo for official secrecy, and taboo which are in doubt. See also Prinsloo (n 17) 230-232; Botha (n 20) 56-58.

129 See the discussion in Nathan "Abortion" in Myburgh (n 20) 85-86; Prinsloo (n 17) 213-214; Botha (n 20) 35-36. Although abortion is still criminalised in certain circumstances (see Burchell (n 20) 661ff), as Snyman notes, the liberal conditions under which abortions may take place in South Africa make the likelihood of prosecutions very slim, and thus the matter is best dealt with in terms of other areas of law ((n 20) v).

130 This crime still exists in certain tribes – see Prinsloo (n 9) 5; Myburgh (n 23) 107; see also Labuschagne & Van den Heever (n 12) 95, who point out that the crime's existence (along with its existence as a customary delict) reflects the subordinate position of women in customary society.

131 Van Berk "Contempt of the ruler" in Myburgh (n 20) 65 defines the crime as consisting in "unlawfully and intentionally violating the dignity or authority of the ruler". See further the discussion of the crime by Prinsloo (n 9) 12-15; Prinsloo (n 17) 179-186; Botha (n 20) 23-25.

132 Van Berk "Violating an administrative determination" in Myburgh (n 20) 73 defines this crime as unlawfully and intentionally violating an administrative determination – which falls to be observed by the whole realm – made by the ruler in consultation with the appropriate advisers. See further the discussion of the crime by Prinsloo (n 17) 189-190; Botha (n 20) 27-29.

133 See discussion in Vorster (n 22) 75-77; Prinsloo (n 17) 186-189; Botha (n 20) 25-26. An order may be defined as "an instruction directed at a particular individual or group" (Van Berk (n 132) 73).

sophisticated than general criminal law, and this is evident from the predominance of patriarchal rules affecting the defences of consent and discipline, and the position of women generally, as indicated above. Moreover, there are a number of matters where customary rules appear outmoded: the paucity of development of the doctrine of attempt; the lack of distinction between intentional and negligent homicide; the limited ambit of assault liability, which does not include the mere making of verbal threats; the focus in the crime of rape on force, rather than lack of consent; and the restriction of the ambit of extortion to patrimonial loss occasioned by unlawful pressure caused by an official.

On the other hand, as Sherlock Holmes might have it, this inquiry has "not entirely been devoid of interest", and there are certainly some matters deserving of more thoroughgoing research. First, it is clear that there is a very large core of shared values between general criminal law and customary criminal law. Two areas where such shared values are perhaps less obvious, and where criminal liability would be perhaps less readily foreseen in customary law (at least from an outsider's perspective) are the crimes relating to trespass¹³⁴ and corruption. It is indeed noteworthy that customary criminal law, as is the case in general criminal law, allows both killing in defence of property and killing in necessity. However, since the advent of the Bill of Rights, it has been questioned whether such killing ought to be justified, and it may be that general criminal law will be adapted accordingly.¹³⁵ One wonders whether, when these matters come before the courts for argument, the values embodied in customary law will be adduced in determining the issue of lawfulness. Furthermore, in the light of the constitutional endorsement of the ethos of *ubuntu*,¹³⁶ it may be that the substance and application of general criminal law rules will be adjusted accordingly to properly take account of this ethos, which suffuses customary law.¹³⁷

134 See Botha (n 20) 59, in relation to the law in QwaQwa. Thus it is evident that customary law also countenances protection of the peaceful possession of one's property against the incursions of the lawless.

135 Burchell (n 20) 253 indicates that the rule that killing in defence of property could be justified, established by the Appellate Division in *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 1 SA 488 (A), could be challenged in terms of the fundamental right to life entrenched in s 11 of the 1996 *Constitution*. See also Ally & Viljoen "Homicide in defence of property in an age of constitutionalism" 2003 *SACJ* 121, who contend that this rule is unconstitutional. As regards killing in necessity – which was held to fall within the ambit of the justification ground of necessity by the Appellate Division in *S v Goliath* 1972 3 SA 1 (A) – in *S v Mandela* 2001 1 SACR 156 (C), Davis J held that killing in necessity could no longer be justified in the light of s 11, although it could nevertheless exclude *mens rea*.

136 See *S v Makwanyane* (n 1), par 225 where Langa J states that in terms of this ethos, the life of another is at least as valuable as one's own.

137 It is noteworthy that an attempt to overtly apply the ethos of *ubuntu* to a substantive criminal-law matter may be found in the case of *S v Mandela* (n 135) where Davis J rejected the

Moving from underlying values to legal doctrines, there are evident similarities between customary criminal law and general criminal law, reflecting the development of customary criminal law in respect of a number of areas. A few such areas may be mentioned for purposes of example: youth, where the focus is on the mental development of the accused; intention, where customary law reflects the same categories of intent as the general law; negligence, where the "ordinary man" concept of customary law accords with the "reasonable person" of the general law; participation, where customary rules relating to categories of participation mirror those of the general law; and homicide, where customary law appears to deal similarly with matters such as suicide, euthanasia and post-partum syndrome as the general law.¹³⁸ Moreover, customary law does not appear to have punished consensual homosexual intercourse between adults, unlike the position until recently in terms of the general law.¹³⁹ Bestiality is also regarded as a matter for family correction, rather than resulting in criminal liability as in the general law.¹⁴⁰ It could thus be argued that in the latter two instances customary law is, at least on the face of it,¹⁴¹ more progressive than the general law.

Though the relative lack of sophistication of customary criminal law restricts the utility of comparative work between customary law and the general law, there are nevertheless a few areas where more detailed research may well provide some useful findings. In particular, the quest for underlying values for the South African legal system should take account of the values foundational to customary criminal law. In this way, due recognition will finally be given to Justice Sachs' charge,¹⁴² and to Professor Labuschagne's splendid, untiring comparative work.

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- accused's defence of compulsion in relation to a murder charge, as seeking to lower the regard for life and undermine *ubuntu*.
- 138 In the light of the aforementioned concerns however, the question must be posed whether these rules represent acculturation or development.
- 139 Cf (n 106).
- 140 Labuschagne "Dekriminalisasie van homo- en soöfilie" 1986 *TRW* 185, Milton (n 94) 230, and Hogan "On modernising the law of sexual offences" in Glazebrook (ed) *Reshaping the Criminal Law* (1978) 187 are of the view that bestiality ought to be regarded as a disease that requires treatment rather than a crime resulting in punishment, and thus should be decriminalised on this basis. For a contrary view see *S v M* 2004 1 SACR 228 (O); Carmelley & Hoctor "Bestiality: the paradox of the 'paragon of animals'" 2004 *Obiter* 506.
- 141 The question arises whether the lack of criminalisation of these offences arose out of a strongly-held communal view that such conduct did not deserve criminal sanction or whether it was simply due to the view that such conduct did not occur.
- 142 Ironically, it does not seem that Justice Sachs's survey of customary-law authority, from which he concluded that the "relatively well-developed judicial processes of indigenous societies did not in general encompass capital punishment for murder" is necessarily a correct statement of customary law – eg the Tswana (Myburgh "Punishment" in Myburgh (n 20) 51), the North Sotho (Prinsloo (n 9) 9), the tribes in Lebowa (Prinsloo (n 17) 177) and the tribes in QwaQwa (Botha (n 20) 18) all recognised the death penalty as punishment for murder, as well as other crimes, such as practicing black magic.