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Custom, culture and crime

A restorative justice response to culturally motivated crimes in South Africa

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South Africa's 1996 Constitution introduced a dual legal system, recognising African customary law and common law traditions. This article examines how culturally motivated crimes challenge South Africa's retributive criminal justice system, and explores restorative justice as a more appropriate alternative. Using doctrinal research methods, it analyses constitutional provisions, case law, statutory developments and indigenous practices to evaluate how cultural rights can be integrated into criminal law without undermining justice. The findings show that while South African courts have historically marginalised customary law in criminal proceedings, the Constitution provides a framework for greater incorporation of indigenous principles, particularly restorative, participatory processes that emphasise healing and accountability. The article shows that customary justice practices inherently reflect the fundamental principles of restorative justice. Accordingly, it recommends leveraging existing mechanisms such as victim-offender mediation, family group conferencing and restorative circles as culturally responsive alternatives for addressing culturally motivated crimes in South Africa.

Introduction

The 1996 Constitution introduced a dual legal system that equally recognised indigenous and common law.[2] This framework resulted in a dualistic approach to South African criminal law: the 'Western system', based on common

law and statutory principles, and the 'African system', rooted in official and living African customary law.[3]

Both systems define and categorise crimes and their respective punishments.[4] However, they differ significantly. Unlike Western common law, African customary law does not strictly separate criminal law from the law of delict.[5] Customary criminal law, based on duty, stands in contrast with the national criminal justice system, which is rooted in rights.[6] Additionally, the customary law approach to culpability extends beyond observable facts, incorporating the possibility of supernatural elements.[7]

Several challenges arise with integrating customary criminal law into the national legal framework. Firstly, the state's monopoly on force clashes with a distinct customary system that imposes penalties.[8] Secondly, the constitutional principle of legality in formal criminal law requires clearly defined crimes, whereas customary law does not hold such rigid definitions.[9] Lastly, procedural safeguards, such as the presumption of innocence and the right to legal representation, are inherent to the national criminal justice system but are absent in customary criminal law.[10] These differences complicate the recognition of customary offences.

Section 211(3) of the Constitution requires courts to apply customary law when it applies to a matter subject to the Constitution and any legislation specifically addressing customary law. Customary law is recognised as an independent and original source of law and can be enforced by traditional and Western courts.[11] It is protected by and subject to the Constitution in its own right.[12] However, like the common law, the application of customary law must align with constitutional principles, and adjustments may be necessary to uphold the values in the Bill of Rights.[13] As with the common law, customary law serves as a source of enforceable rights within the South African legal system,[14] allowing cultural minorities to assert their cultural autonomy.[15]

In some instances, customary law can serve as the basis for a criminal defence, particularly when the crime is driven by cultural factors and rooted in specific traditions, values or beliefs.[16] This defence underscores the intricate connection between cultural diversity and constitutional safeguards within South Africa's legal framework. The South African legal system has traditionally addressed culturally motivated crimes by prosecuting perpetrators for common law and statutory offences, primarily adopting a retributive approach. However, considering South Africa's constitutional framework, there is a growing emphasis on addressing criminal behaviour through participatory and reconciliatory methods. This shift incorporates a restorative justice approach that draws on indigenous and customary responses to crime, involving processes within and outside the formal criminal justice system.

Against the above, this article delves into approaches for managing culturally motivated crimes beyond the confines of the South African criminal justice system, aligning with the principles of restorative justice. To do so, the section following the introduction unpacks the South African legal system's traditional approach to managing culturally motivated crimes. The third section explores how cultural rights can be integrated into national criminal law without undermining justice. The fourth section investigates alternative approaches to managing culturally motivated crimes, while section five examines those culturally motivated crimes suitable to a restorative justice approach. Before concluding, the article's sixth section suggests restorative justice processes and programmes to manage culturally motivated crimes in South Africa.

A traditional approach to culturally motivated crimes

A culturally motivated crime refers to an act committed by a member of a minority culture that, although criminalised under the dominant legal system, may be normative or even endorsed within the offender's cultural community.[17] This tension highlights the broader challenges faced by individuals whose cultural norms diverge from those of the majority, particularly when the latter are codified into law. Members of minority cultures must often navigate the conflict between cultural identity and legal compliance.[18]

Adjudicating culturally motivated crimes requires a conceptual understanding of 'culture' and 'cultural group'. A cultural group is a community sharing a common system of values, beliefs and norms. Culture is a complex, evolving construct, providing a framework for interpreting experiences, regulating behaviour, shaping social norms, and establishing standards of conduct within a community.[19]

South Africa's criminal courts often adjudicate cases involving culturally motivated crimes. Prominent examples include witchcraft accusations, belief in supernatural entities like the *tokoloshe, muti* practices, and the custom of *ukuthwala*.

Witchcraft in indigenous traditions is associated with the use of supernatural forces to inflict harm.[20] Traditional healers often identify alleged witches, sometimes leading to violent acts against them, including killings purportedly intended to safeguard the community.[21] The criminal courts have long addressed such cases. In *S v Mokonto*,[22] for example, the court had to consider whether the appellant could rely on private defence after killing an individual he believed to be a witch. He was convicted of murder despite his genuine belief that the deceased posed an immediate threat to his life. More recently, in *S v Tyolo*,[23] the accused received a lengthy prison sentence for killing his aunt, whom he believed had cursed his brother through witchcraft.

Despite the Witchcraft Suppression Act 1957 (Act 3 of 1957) criminalising witchcraft accusations and related violence, witch killings persist.[24] In 2019, a man was sentenced to life imprisonment for killing a woman accused of witchcraft.[25] In 2022, four men received 17-year sentences for murdering a 92-year-old woman they accused of witchcraft.[26] In 2024, seven individuals were convicted of murder and arson for burning two women to death. During sentencing, the senior state advocate noted that violence against women accused of witchcraft remains widespread across the country.[27] At the same time, the presiding judge remarked that the court had 'lost count' of such cases, highlighting the persistence of these crimes.[28]

Muti practices, rooted in traditional healing, range from benign herbal remedies to ritual killings involving human body parts,[29] believed to enhance the efficacy of potions.[30] Despite stringent prosecutions, *muti*-murders remain disturbingly common.[31] In 2017, two traditional healers received life sentences for carrying out *muti*-murders.[32] In 2018, a traditional healer was one of several co-accused charged with committing a *muti*-murder and contravening the Human Tissue Act 65 of 1983.[33] In 2019, an accused received two life sentences for the kidnapping and ritual murder of two children to produce *muti* for business success,[34] while a sangoma was convicted for brutally murdering and dismembering a 17-year-old girl for *muti*.[35]

The practice of *ukuthwala*, which historically involved the arranged abduction of young women for marriage, presents enduring legal challenges. Although traditional forms of *ukuthwala* were largely consensual, involving negotiated agreements between families, contemporary manifestations often

constitute serious criminal offences such as abduction, assault, and rape. Early cases such as *R v Njova,*[36] *Ncedani v R,*[37] and *R v Sita*[38] affirmed that abduction under the guise of *ukutwhala* remained punishable under the law. In *R v Mane,* a girl was *thwala*'d and forced to engage in sexual intercourse with the accused on two occasions, both without her consent.[39] The court underscored that *ukuthwala* could only be lawful with the girl's consent. *R v Swartbooi* went further, condemning *ukuthwala* as 'barbarous' and convicting twelve accused of common assault for attacking and beating the complainant and forcibly removing her from her home without her consent or that of her guardian.[40]

Individuals accused of culturally motivated crimes often invoke a cultural defence, seeking to justify their criminal conduct by attributing it to indigenous beliefs or customs. However, the criminal courts have consistently rejected such arguments as a complete defence, affirming that cultural practices cannot justify criminal behaviour or human rights violations. However, the courts have occasionally considered cultural factors in sentencing, acknowledging the broader socio-cultural context in which offences occur.[41]

The judicial approach to culturally motivated crimes has evolved significantly since the pre-constitutional era. During that period, African customary law was not recognised as part of South Africa's official legal system. It was subordinate to the common law and applied solely at the discretion of the Western courts.[42] Although traditional courts existed and operated under the authority of chiefs and headmen, their jurisdiction was limited to minor offences, regardless of whether they originated in customary or common law.[43] However, most offences, especially serious crimes such as murder and rape, had to be transferred to the Western courts for adjudication. Consequently, an accused's cultural background, values, and beliefs were considered only insofar as they could be accommodated within the existing common law framework.

South Africa's constitutional democracy marked a profound shift, granting African customary law equal status with Western common law.[44] Courts are now constitutionally obliged to apply customary law when it is applicable in a matter.[45] However, this dual legal system presents tensions, as the two frameworks embody distinct and conflicting values. Criminal courts must, therefore, balance cultural and religious freedoms with the need to protect individuals and uphold the rule of law.

Although cultural and religious rights are constitutionally entrenched, the formal recognition of a cultural defence remains contested in South African criminal law. Proponents argue that it would promote legal pluralism, accommodate indigenous traditions, and ensure that all citizens enjoy equal protection of the law.[46] They further assert that recognising culture as a relevant factor aligns with the principle of individualised justice, where courts consider factors such as gender, age, and mental state.[47] This argument draws support from constitutional rights, including the right to a fair trial,[48] freedom of religion,[49] the right to participate in cultural life,[50] and equality before the law.[51]

Opponents, by contrast, raise both principled and practical concerns. Principally, they argue that a cultural defence would undermine deterrence, rehabilitation, and legal certainty, risking legal fragmentation and diminishing offender accountability.[52] It could encourage recidivism and mislead minority communities into believing that harmful practices are legally permissible.[53] Furthermore, the cultural defence may disproportionately harm vulnerable groups, especially women and children, by legitimising practices that violate their rights.[54] Critics

further argue that excusing some individuals for conduct based on their cultural norms would violate the principle of equality before the law.[55] Additionally, recognising a cultural defence could further entrench reductive stereotypes and perpetuate prejudice, given the vague and fluid concept of 'culture'.[56]

Practical difficulties include distinguishing between legitimate and fraudulent claims, raising fears that individuals might exploit the defence to evade criminal liability.[57] Finally, it is suggested that cultural background can be more appropriately considered during sentencing, where courts already account for personal and contextual factors, obviating the need for a separate cultural defence at trial.[58]

The courts must, therefore, carefully navigate the constitutional imperative to promote cultural diversity while safeguarding justice. A preliminary inquiry into culturally motivated crimes must establish whether the norm underpinning the conduct is deeply rooted within a specific cultural group, and whether the accused is a legitimate participant in that tradition.[59]

Given the expansive definition of culture, many forms of conduct could, in principle, be attributed to cultural norms. However, this article focuses specifically on offences committed within the framework of African customary law, for three reasons. First, as noted above, the constitutional recognition of common law and African customary law as equal has not eliminated the tensions between these systems, especially in criminal law. This tension is evident in the persistent challenges the criminal justice system faces in adjudicating culturally motivated crimes.[60]

Second, the constitutional era offers opportunities to reimagine legal doctrines by incorporating indigenous practices and restorative justice principles into broader conceptions of fairness.[61] Nevertheless, South African criminal law remains a hybrid system of Roman-Dutch, English, German, and uniquely South African elements, all of which are now subject to the normative framework of the Bill of Rights.[62] It remains to be seen whether this legal framework will change in future.

Lastly, concerns persist regarding the coexistence of parallel criminal justice systems.[63] The South African Law Commission (SALC) has warned that applying customary criminal law alongside the common law may generate legal disorder, particularly given the association of criminal law with the assertion of state sovereignty.[64] Although it has been assumed since colonial times that the common law should provide the overarching framework for governance and social control, this assumption has never been comprehensively scrutinised in South Africa.[65] Expanding the scope of customary criminal law under the current constitutional dispensation would thus raise significant policy questions that have yet to be the subject of public debate.[66] Until such issues are addressed, compelling reasons exist to maintain the current position.[67] In this context, because crime implicates the broader public interest, there is strong justification for subjecting all individuals within the country to a single, unified legal framework based on cultural tradition, without exceptions.[68] Where laws implicate not merely individual or community interests but the welfare of society, the right to equal treatment necessarily outweighs any freedom to pursue culturally specific practices.[69]

Integrating cultural rights without undermining justice

Section 211(3) of the Constitution mandates the courts to apply customary law when it is applicable in a matter. However, the exact scope of this obligation remains debatable. The author's ongoing research into cultural defences in South African criminal law raises critical inquiries about the integration of customary law principles in adjudicating culturally motivated

crimes. Given the constitutional recognition of customary law, one would expect that courts would be required to consider and apply its substantive legal principles and procedural elements in cases where it is applicable.

Several procedural aspects of customary law deserve particular attention due to their divergence from Western or common law traditions. Unlike the formalistic, technical procedures typical of Western courts, traditional justice systems prioritise social harmony and reconciliation, emphasising restorative rather than retributive justice.[70] Traditional court proceedings are generally flexible, informal, and accessible, following an inquisitorial model where adjudicators actively investigate and resolve disputes.[71] Trials are held publicly, at times enabling broad community participation, and are conducted orally in the predominant language of the court's jurisdictional area.[72] Evidentiary rules are flexible, and extraordinary evidence, such as those related to supernatural forces, is often considered within customary adjudication.[73]

Despite these distinctive features, South African courts still predominantly evaluate culturally motivated crimes through the lens of Western legal principles, even when acknowledging cultural considerations. This raises the question of whether traditional courts should play a greater role in adjudicating such cases. The constitutional recognition of traditional courts,[74] albeit subject to legislative oversight consistent with the Bill of Rights, suggests their potential in this regard.

The legal framework governing traditional courts remains complex, comprising national and regional legislation, written customary law, and evolving living customary law.[75] The recent enactment of the Traditional Courts Act 2022 (Act 9 of 2022), intended to replace the outdated Black Administration Act 1927 (Act 38 of 1927), marks a significant development.[76] Although the Act seeks to affirm customary dispute resolution values, emphasising restorative justice, reconciliation and community harmony,[76] it still restricts the criminal jurisdiction of traditional courts.[78] Except for limited offences such as common assault, most culturally motivated crimes remain outside their adjudicative authority. This limitation underscores the need to explore alternative approaches to culturally motivated crimes within the South African legal system.

Alternative approaches to managing culturally motivated crimes

South Africa's criminal justice system remains predominantly retributive and accusatorial, often marginalising victims and focusing narrowly on punishment.[79] However, this approach has demonstrated limited success in reducing crime and meeting broader justice objectives. Consequently, there is a growing interest in restorative justice models, which emphasise participatory, reconciliatory processes that resonate deeply with African indigenous traditions.

South Africa's transition to constitutional democracy established a framework conducive to restorative justice. Historically, restorative justice principles, such as community-based conflict resolution and prioritising reconciliation, were central to African customary justice practices.[80] In rural areas, these principles are contained in traditional courts of chiefs and headmen, while in urban spaces they persist through structures like street committees and people's courts,[81] which operate in formal and informal townships on the outskirts of towns and cities.

Furthermore, South African legal policy has progressively integrated restorative justice principles, as evidenced in case law that upholds dignity and diversion programmes

designed to redirect offenders from the formal criminal justice system.

Restorative justice presents a compelling framework for addressing culturally motivated crimes. Cultural and religious practices often intensely impact communities, and restorative justice offers a means to address harm cooperatively. It involves acknowledging harm, addressing the needs of victims, offenders assuming responsibility, making restitution, and implementing preventive measures. By focusing on repairing the harm inflicted on victims and the community, restorative justice underscores the importance of support and rehabilitation for offenders, aiming to prevent future offences.

The emphasis on rehabilitation is particularly vital in culturally motivated crimes, as some communities may continue to endorse harmful cultural practices. Although educational opportunities have expanded in South Africa, resulting in an increased awareness of legal and constitutional boundaries,[82] certain beliefs and traditions may persist in ways that conflict with the law. In such cases, education concerning human rights, constitutional principles and the right to cultural and religious freedom and its permissible limits, is essential. Restorative justice, therefore, offers a comprehensive framework that integrates justice, education and community engagement, and promotes reconciliation while deterring re-offending within South Africa's constitutional framework.

Are culturally motivated crimes suitable for restorative justice?

Restorative justice is often associated with minor or 'petty' crimes, yet it holds considerable potential for addressing more serious offences, including those involving violence.[83] Its effectiveness depends less on the nature of the offence than on the stage at which it is integrated into the criminal justice process. Restorative justice interventions can be introduced at various stages, including pre-reporting, pre-trial, pre-sentence, and post-sentence.[84]

At the pre-reporting stage, restorative justice may help resolve disputes before they escalate into criminal matters, offering victim support before formal legal intervention, and potentially preventing criminal proceedings altogether.[85] Once charges have been laid, but before trial, prosecutors may refer cases to restorative processes, where successful resolutions can divert matters from formal court hearings. If no resolution is achieved, the case will proceed to trial.

Restorative justice can also influence sentencing. Courts may impose participation in a restorative programme as a condition of a suspended or postponed sentence. After sentencing, restorative practices can assist with rehabilitation and reintegration through correctional or pre-release programs, helping offenders reintegrate into society.[86] Each case requires careful evaluation to determine the most appropriate stage for restorative intervention, particularly when serious or violent offences are involved. While minor offences may be more easily diverted from trial, violent crimes often warrant restorative justice interventions at the pre-sentencing or post-sentencing stage.

Despite its broad potential across the criminal justice process, restorative justice faces significant scepticism and practical challenges, particularly regarding its application to serious and violent offences.[87] A prevailing judicial concern is that restorative processes may diminish the perceived gravity of such offences. Too often, restorative justice is relegated to a mere sentencing alternative rather than being recognised as a complementary approach, contributing to its underutilisation in cases of serious wrongdoing, where it is sometimes dismissed as overly lenient.

Critics argue that offences such as murder, sexual assault, and domestic violence are ill-suited to restorative processes, given the profound harm inflicted.[88] Victims in such cases may feel unsafe or unwilling to engage directly with offenders, and the risk of re-traumatisation is considerable.[89] Moreover, not all offenders are appropriate candidates for restorative justice, particularly those reluctant to accept responsibility or demonstrate genuine remorse.[90] In cases marked by significant power imbalances, such as *ukuthwala*, an offender's participation may be perceived as manipulative rather than sincere, undermining the aims of justice and victim protection.[91]

A central challenge in integrating restorative justice into contemporary criminal justice administration is achieving an appropriate balance between restorative and retributive models.[92] Although restorative justice promotes a more compassionate and rehabilitative response to crime, there are instances where retributive measures are necessary to safeguard public safety and uphold the rule of law. Critics contend that restorative justice should not supplant punishment in cases involving serious offences, where deterrence and retribution may justifiably take precedence.[93] Achieving an effective equilibrium between these approaches demands careful consideration of the offence's nature and severity, the victims' needs and interests, and the prospects for genuine offender rehabilitation.

Additionally, ensuring consistency and fairness across restorative justice cases remains a significant challenge.[94] Given that restorative processes are tailored to individual circumstances, there is an inherent risk that similar cases may be treated differently, fostering perceptions of inequity. Such perceptions can erode the legitimacy of restorative justice initiatives, especially if they are seen as affording preferential treatment to certain offenders or victims.

To mitigate these concerns, it is imperative to establish clear guidelines and procedural safeguards that promote the consistent and equitable application of restorative justice.[95] Judicial oversight and robust community accountability mechanisms can further reduce the risk of bias and reinforce restorative justice's credibility as a principled alternative to traditional punitive models.

To realise the full potential of restorative justice, courts should integrate it as a foundational principle within the broader justice system. Rather than perceiving restorative and retributive justice as mutually exclusive, courts should seek to align restorative justice with deterrence, denunciation, and retribution objectives.[96] A balanced approach would allow restorative justice to complement retributive justice, ensuring its relevance and effectiveness even in addressing serious criminal offences.

Potential for restorative justice in dealing with culturally motivated crimes

Existing restorative justice programmes differ significantly in their structure and application, reflecting diverse interpretations of conflict and varying approaches to conflict resolution.[97] The main categories of programmes include victim offender mediation, family and victim-offender group conferencing, and dialogue, peace and sentencing circles. Many customary justice practices in South Africa already embody the fundamental principles of restorative justice, such as reconciliation, community participation, and offender accountability. The following discussion explores how these existing restorative justice programmes can effectively be leveraged as culturally responsive mechanisms for addressing culturally motivated crimes within South Africa.

Victim offender mediation

Victim offender mediation programmes are designed to address the needs of crime victims while ensuring that offenders are held accountable for their actions.[98] In appropriate cases, victims and offenders may meet in a secure, structured setting, facilitated by a trained mediator, to discuss the crime and collaboratively reach an agreement that addresses both parties' needs and resolves the conflict.[99]

With regard to culturally motivated crimes, the mediation process can be led by a respected community figure, such as a headman or traditional leader, who facilitates dialogue and encourages the offender to acknowledge the impact of their actions and take responsibility for the harm caused. Participation by the victim is entirely voluntary. Victims are afforded substantial input into the formulation of the restorative agreement or sanction. They are supported in seeking assistance where necessary and are allowed to talk about the personal consequences of the crime as well as request information regarding the offence.[100]

The success of the process depends on three critical conditions: First, the offender must accept – or not deny – responsibility for the crime; second, the victim and the offender must be willing to participate; and third, both parties must feel safe engaging in the process.[101] This model may be especially suitable for culturally motivated crimes involving witchcraft and *muti*, as the mediation process is designed, as far as possible, to facilitate reparation and some form of compensation for the harm suffered by the victim.[102]

Family and victim-offender group conferencing

This process involves the victim, offender, family, friends, and key community members in deciding how to address the crime's aftermath.[103] It empowers victims, enhances offender accountability, and draws on the offender's support system to promote behaviour change.[104]

Indigenous justice systems, which administer justice within traditional communities through complex problem-solving forums,[105] lend themselves towards this process. At the family level, justice is often administered through a 'family council', especially when it is an inter-family dispute, with respected elders guiding the resolution process.[106] If unresolved, matters may escalate to village-level forums involving traditional leaders, religious leaders, specialists, and experts in indigenous law or conflict resolution.[107]

This process may be relevant in managing culturally motivated crimes, such as those associated with the practice of *ukuthwala*, especially when there is no prior agreement between the families or proper consent. The case of *S v Jezile* illustrates the complexities surrounding *ukuthwala* in contemporary legal contexts.[108] The appellant was convicted of multiple offences against a 14-year-old girl he forcibly took.[109] He sought to justify his actions by claiming adherence to customary practices as he understood them, arguing that the girl's family had voluntarily participated in the process and consented to the customary marriage.[110] He further asserted that the girl implicitly consented, contending that it is customary for a female to feign resistance as a demonstration of modesty during the *ukuthwala* process.[111]

Expert testimony refuted Jezile's claims, describing the practice in this case as a 'misapplied form', a 'perversion of the custom', and 'aberrant', due to its non-compliance with customary and legal requirements.[112] A detailed analysis of these requirements is beyond this article's scope but is explored elsewhere.[113] However, it is suggested that any misunderstanding or ambiguities regarding

the requirements of *ukuthwala* can be clarified through the aforementioned process in similar cases.

Dialogue, peace and sentencing circles

Dialogue, peace, and sentencing circles offer a unique approach to conflict resolution by fostering consensus among key stakeholders, including victims, offenders, their supporters, community members, judicial officers, prosecutors, defence counsel, law enforcement, and court personnel.[114] These participatory processes aim to address the concerns of all parties while promoting reconciliation, restitution and reparation.[115] Emphasising the value of consensus, all participants in the circle actively contribute to formulating constructive responses to crime and assume collective responsibility for the outcome.[116] The circle often continues to monitor the offender's compliance with the agreed resolution, and provides ongoing support post-sentencing.[117] Beyond resolving individual cases, these practices also engage with the underlying causes of criminal behaviour and contribute to strengthening community cohesion.[118]

It is proposed that the traditional court, even in an unofficial capacity, could serve as a platform for these processes. A theoretical comparison between restorative justice circles and traditional courts reveals fundamental similarities. Both adopt an inclusive and non-hierarchical approach to conflict resolution, deeply embedded in specific communities' cultural, traditional and indigenous practices.[119] Central to both is the philosophy of human interconnectedness, which embraces a holistic perspective that considers the spiritual, emotional, physical, and mental dimensions of human experience.[120]

In both settings, litigants, witnesses, and community members actively participate in proceedings by presenting evidence, posing questions and deliberating on potential outcomes.[121] Justice is considered a collective community responsibility due to its social impact. These processes allow for comprehensive deliberation to determine why a dispute is unacceptable under community norms and legal traditions, ensuring offenders take responsibility.[122] Crucially, the outcome must align with community expectations and the disputing parties' sense of justice, as enforcement relies on social accountability.[123]

Through these processes, traditional communities can adjudicate disputes based on their first-hand knowledge of local customs and their development over time. This approach allows disputes to be adjudicated according to living customary law, which often represents the most authentic expression of a community's legal norms, as it considers the current social context and is more in touch with the customs of the people.[124] Unlike rigid official customary law, living customary law emerges through adaptation and negotiation, reflecting various groups' voices, perspectives, and lived experiences within rural society.[125] This makes it dynamic and responsive to contemporary social realities, while preserving its foundational principles.

Living customary law, recognised under section 211(2) of the Constitution, allows traditional communities to adapt and shape their legal frameworks consistent with constitutional principles.[126] This enables the evolution of customary law, enhancing its continued relevance and legitimacy while reflecting tradition and contemporary societal expectations. This dynamism makes customary law particularly suited to addressing culturally motivated crimes in ways that are authentic to tradition and responsive to modern human rights standards.

Conclusion

The persistence of culturally motivated crimes in a multicultural society such as South Africa is inevitable. With the constitutional entrenchment of cultural and religious freedoms and the broad, evolving definitions of these concepts, new forms of culturally motivated crimes are likely to continue emerging. These developments strain an already overburdened criminal justice system that remains retributive.

As this article has demonstrated, it is imperative to consider alternative legal responses that account for the nuanced relationship between culture, crime, and justice. A restorative justice approach presents a compelling alternative. It reduces recidivism, empowers victims, promotes active community participation in resolving conflict, and is a more efficient and cost-effective process than adversarial litigation.

Notably, customary justice practices in South Africa already embody many of the fundamental principles of restorative justice, including reconciliation, participatory decision-making and offender accountability. Drawing on this synergy, the article has shown that existing restorative justice programmes, specifically victim offender mediation, family and victim-offender group conferencing and dialogue, peace and sentencing circles, offer culturally appropriate and constitutionally sound responses to culturally motivated crimes. These processes provide a practical framework for resolving such offences in ways that respect cultural identity while upholding justice, healing, and accountability.

Notes

1 Dr Jacques Matthee is a Senior Lecturer and Vice-Dean for Learning, Teaching, Innovation and Digitalisation at the Faculty of Law, University of the Free State, South Africa. He specialises in Legal Pluralism, African Customary Law, Criminal Law and Medical Law.

2 This was achieved through sections 39(2)-(3), 211(3), 212(2), and Part A of Schedule 4 of the *Constitution of the Republic of South Africa*, 1996, which cemented African customary law's position as part of the South African legal system.

3 Christa Rautenbach and Jacques Matthee, Common law crimes and indigenous customs: Some challenges facing South African law, *The Journal of Legal Pluralism and Unofficial Law* 42(61) (2010), 109–144, 113.

4 Ibid.

5 Kallie Snyman and Shannon Hoctor, *Snyman's criminal law*, 7th Ed, South Africa: LexisNexis, 2020, 19; Nina Mollema and Kamban Naidoo, Incorporating Africanness into the legal curricula: The case for criminal and procedural law, *Journal for Juridical Science* 36(1) (2011), 49–66, 56; Christa Rautenbach, South African common and customary law of intestate succession: A question of harmonisation, integration or abolition, *Electronic Journal of Comparative Law* 12(1) (2008), 1–15; Hallie Ludsin, Cultural denial: What South Africa's treatment of witchcraft says for the future of its customary law, *Berkeley Journal of International Law* 21(1) (2003), 62–110.

6 Snyman and Hoctor, *Snyman's Criminal Law*, 19.

7 Ibid; Erica Harper, *Customary justice: From program design to impact evaluation*, Italy: International Development Law Organization, 2011, 23.

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11 *Gongqose v Minster of Agriculture, Forestry and Fisheries* [2018] (2) SACR 367 (SCA); *Bhe v Magistrate*, *Khayelitsha, (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* [2005] (1) SA 580 (CC); Snyman and Hoctor, *Snyman's Criminal Law*, 19.

12 In terms of sections 15, 30, 31, 36, 39 and 211 of the *Constitution*, 1996. Also see *Bhe v Magistrate, Khayelitsha, (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa*.

13 *Gongqose v Minster of Agriculture, Forestry and Fisheries; Bhe v Magistrate, Khayelitsha, (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*.

14 *Gongqose v Minster of Agriculture, Forestry and Fisheries*.

15 This is evident from the right to religious freedom afforded by sections 15, 30 and 31 as well as the right to equality afforded to every individual in section 9 of the Constitution, 1996.

16 This is known as a 'cultural defence' in criminal law. An accused asserts that their cultural background, values, and beliefs negate or mitigate their criminal liability for a culturally motivated crime. See Alison D Renteln, A justification of the cultural defense as partial excuse, *Southern California Review of Law and Women's Studies*, 2 (1992), 437–526, 439; Jeroen van Broeck, Cultural defence and culturally motivated crimes (cultural offences), *European Journal of*

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17 Van Broeck, Cultural defence and culturally motivated crimes (cultural offences), 29.

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