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## The Problem of Witchcraft Violence in Africa

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### I. INTRODUCTION

#### *A. The Nature of the Witchcraft Problem*

Often enough, laws respond to the serious needs and desires of a society. At other times, society will render the law essentially ineffective because it goes against the grain of society's moral direction. Prohibition, as well as laws against abortion, fornication, and homosexual acts, all constitute other laws driven by society's moral compass. "A law that fails to take into account the social ethos of the community it is supposed to guide risks being ignored and hence, remaining a dead letter, incapable of inducing change."<sup>1</sup>

Beliefs about life and death, good luck and misfortune, prosperity and poverty—changes that normally occur as societies undergo periods of profound transformation—are often prompted top down by colonial hegemony, or nudged by missionary proselytizing. Beliefs may evolve as a result of better education and health practices, or simply as an adjunct to the inevitable influence of globalization in communication and commerce.

In developing nations, a palpable tension develops if the "dominant group . . . enact[s] government policies that discriminate implicitly or incidentally against non-dominant traditions."<sup>2</sup> A society can ignore these problems and tensions, recognize them and refrain from proposing a solution, allow conflict resolution between groups to take its course, or enforce new norms with the force of law and punish offenders.

In Africa, this tension seems nowhere more evident than in the context of traditional beliefs about witchcraft and the laws that seek to curtail witchcraft

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1. ONESMUS K. MUTUNGI, THE LEGAL ASPECTS OF WITCHCRAFT IN EAST AFRICA WITH PARTICULAR REFERENCE TO KENYA 104 (1977).

2. Nelson Tebbe, *Witchcraft and Statecraft: Liberal Democracy in Africa*, 96 GEO. L.J. 183, 223 (2007).

practices and accusations. As discussed in this article, a significant portion of Africans believe in the efficacy of witchcraft to produce harm and fear being targeted by its practitioners. At the same time, various witchcraft suppression laws, many dating from the colonial era, make it illegal to engage in practices customarily associated with witchcraft. Usually these laws criminalize those occult practices that are intended to harm people, property, livestock, or crops. There have been long-standing objections by witchdoctors—i.e., traditional healers—who complain that the law should clearly distinguish their practices from acts of harmful witchcraft.

Prosecutions for witchcraft under the very laws intended to suppress it are rare. The failure of the authorities to take action against witchcraft produces frustration that often prompts people “to kill witches and sorcerers, and to rid the community of the peddlers of this evil craft.”<sup>3</sup> Witchcraft violence provides daily fodder for the press: “Hardly a week passes in South Africa without press reports of witches being killed.”<sup>4</sup>

Although the suspects in witch killings are hauled in and charged with murder, the prosecutions seem to have little deterrent effect on the violence, for witch killing “is not only approved but is also a praiseworthy service in the eyes” of many people.<sup>5</sup> Moreover, African courts invariably reduce the charges to manslaughter or mitigate the prison sentence on the grounds that the defendant killed in the heat of passion in response to the provocative acts of the deceased.

The rarity of prosecutions of suspected witches may be due, in part, to the fact that witchcraft laws usually make it illegal to accuse others of witchcraft, and often there is no exception for accusations made to the authorities. This is an irony in the law: on the one hand the practice of witchcraft is illegal, yet making accusations of witchcraft is also illegal. The fear of making accusations to the authorities, coupled with the knowledge that such accusations are not likely to make any headway, compounds the motivation to engage in mob violence. At the same time, Africans of all walks of life utilize witchcraft as a means of gaining advantages, often at the expense of others, such as to ensure success in warfare or in sports, to thwart a romantic rival, to win a political race, or to exact vengeance against an enemy.

To some degree, the situation seems to be hopeless. Even if the authorities wish to prosecute a suspected witch, there are the problems of the possible unfairness of a trial and the lack of evidence, as acts of witchcraft are invariably carried out in secret. Circumstantial evidence might consist of proof that the defendant was in possession of witchcraft implements, yet a wide

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3. Daniel D.N. Nsereko, *Witchcraft as a Criminal Defence, From Uganda to Canada and Back*, 24 *MAN. L.J.* 38, 44 (1996).

4. ADAM ASHFORTH, *WITCHCRAFT, VIOLENCE, AND DEMOCRACY IN SOUTH AFRICA* 255 (2005).

5. MUTUNGI, *supra* note 1, at 59.

swath of society—most notably witchdoctors or traditional healers—also possess such implements. Evidence that the individual has the reputation of being a witch is admissible in some jurisdictions, and such evidence can be very prejudicial. And there is the question of causation: What evidence is there that an act of witchcraft was the cause of the victim's harm?

Witchcraft violence often involves “muti-murders”—gruesome murders in which victims are mutilated and organs are removed from their bodies.<sup>6</sup> Body parts are amputated from living people—so as to retain as much as possible of the victim's vital energy—mixed into magic drugs and amulets, and sold in the marketplace. These murders provide African newspapers with sensational stories that reflect how witchcraft produces a widespread social pathology of fear.<sup>7</sup>

### B. The Logic of Witchcraft

The conflict between modern and traditional culture is evident in the notion that “[t]he visible and the invisible are necessarily complementary in African understandings of reality.”<sup>8</sup> The invisible forces of the occult are believed to have causal efficacy to produce harm, so that to the African mind, “witchcraft is a matter of the most deadly seriousness.”<sup>9</sup> One author stated, “From the inside of African life, witchcraft is an ‘objective’ feature of reality which invites an appropriate response from the community.”<sup>10</sup>

People will often ascribe witchcraft as the cause of “fortunes and misfortunes, good and evil, and life and death.”<sup>11</sup> Those who believe in witchcraft think it is the most likely cause of virtually any unfortunate occurrence, such as illness, accident, fatal lightning strikes, loss of livestock, impotence, crop failure, and drought.<sup>12</sup> Other causes of trouble include “cursing, the anger of ancestors, or the malevolence of ghosts.”<sup>13</sup> Witchcraft is even implicated in causing unemployment and political misfortunes.<sup>14</sup> At the same time, high unemployment fuels further witchcraft because “people are

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6. ASHFORTH, *supra* note 4, at 255.

7. Veronique Faure, *In Pursuit of the Occult: The Investigation of Satanism and Witchcraft in South Africa*, in *THE POWER OF THE OCCULT IN MODERN AFRICA* 153, 155 (James Kiernan ed., 2006).

8. Adeline Masquelier, *The Return of Magic*, 12 *SOC. ANTHROPOLOGY* 95, 99 (2004) (book review).

9. Adam Ashforth, *Witchcraft, Violence, and Democracy in the New South Africa*, 38 *CAHIERS D'ETUDES AFRICAINES* 505, 507 (1998).

10. John Hund, *African Witchcraft and Western Law: Psychological and Cultural Issues*, 19 *J. CONTEMP. RELIGION* 67, 79 (1998).

11. Mohammed A. Diwan, *Conflict Between State Legal Norms and Norms Underlying Popular Beliefs: Witchcraft in Africa as a Case Study*, 14 *DUKE J. COMP. & INT'L L.* 351, 355 (2004).

12. See ANDREW SANDERS, *A DEED WITHOUT A NAME: THE WITCH IN SOCIETY AND HISTORY* 11 (1995); Cyprian F. Fisiy, *Containing Occult Practices: Witchcraft Trials in Cameroon*, 41 *AFR. STUD. REV.* 143, 149 (1998); see also Nsereko, *supra* note 3, at 44.

13. SANDERS, *supra* note 12, at 11.

14. Ashforth, *supra* note 9, at 506.

suffering and are thus more inclined to turn upon their neighbors.”<sup>15</sup>

The belief in witchcraft is often thought of as

socially useful[,] . . . giving victims a socially prescribed target for protective or remedial action, increasing group cohesion or individual catharsis by projecting hostile or sexual impulses onto outsiders, maintaining civility in everyday life (because failure to be polite could be interpreted as malevolence), and providing social control by ridding a community of deviant persons.<sup>16</sup>

Witchcraft, some think, “[t]akes its origin . . . in the psychological need to provide an outlet for repressed hostility, frustration and anxiety. It provides a way to explain serious misfortunes and render those who suffer them blameless in the eyes of society.”<sup>17</sup> Witchcraft is also used to complement the natural explanation of events.<sup>18</sup> As Evans-Pritchard pointed out in 1937, believers in witchcraft are aware of the physical circumstances of accidents and disease, but turn to witchcraft to help explain why a particular person and not another was a victim.<sup>19</sup> Witchcraft answers the question of why this misfortune happened to this person at this precise moment: “While witchcraft believers accept that a person died of a heart attack or their cattle died from a disease—which explains how the misfortune happened—these cultures seek a metaphysical answer for why it occurred[,] . . . [blaming either] the anger of one’s ancestors or the evil practices of a witch.”<sup>20</sup>

### C. *Belief in Witchcraft on the Rise in Africa*

Witchcraft has been a potent force in African life for a long time. In 1950, C.K. Meek stated:

Witches and witchcraft do not, of course, exist, but the belief in their existence is one of the most potent in the lives of most African people. And it is a belief which cannot easily be exorcised, for it is not an isolated factor, but an integral part of the whole psychological and magico-religious system.<sup>21</sup>

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15. *Id.* at 513.

16. See ROBERT B. EDGERTON, *SICK SOCIETIES: CHALLENGING THE MYTH OF PRIMITIVE HARMONY* 172 (1992).

17. Diwan, *supra* note 11, at 355.

18. See ALEKSANDRA CIMPRIC, UNICEF, *CHILDREN ACCUSED OF WITCHCRAFT* 14 (Apr. 2010), available at [http://www.unicef.org/wcaro/wcaro\\_children-accused-of-witchcraft-in-Africa.pdf](http://www.unicef.org/wcaro/wcaro_children-accused-of-witchcraft-in-Africa.pdf) [hereinafter UNICEF REPORT].

19. See E.E. EVANS-PRITCHARD, *WITCHCRAFT, ORACLES, AND MAGIC AMONG THE AZANDE* 18-21 (1976).

20. Hallie Ludsin, *Cultural Denial: What South Africa’s Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 *BERKELEY J. INT’L L.* 62, 74-75 (2003).

21. C.K. MEEK, *LAW AND AUTHORITY IN A NIGERIAN TRIBE* 79 (2d prtg. 1950).

The fear of witchcraft is a real and present force in Africa. As Edgerton says, “When it is believed, as it so often is, that some people (witches or sorcerers, for example) possess the inherent or acquired power to harm others, the fear that they will cause injury, illness, or death often amounts to nothing less than terror.”<sup>22</sup>

African scholars have observed that “witchcraft is reproducing itself hand-in-hand with modern changes, and on a rapidly increasingly scale.”<sup>23</sup> Today, witchcraft beliefs are a central component of the cultural traditions and customs of many Africans.<sup>24</sup> Moreover, “Witchcraft, it is clear, has not declined with independence and development; it has, rather, flourished in unexpected ways and entwined itself in political action and political thinking.”<sup>25</sup>

Studies show that the belief in witchcraft “is strong, common and widespread in Africa.”<sup>26</sup> According to surveys conducted by one professor on his students over several years, about eighty percent of African students in universities believe in the reality of witches and spirit ancestors.<sup>27</sup> Government officials in South Africa estimate that eighty-five percent of African households consult witchdoctors—traditional healers who are often consulted to detect witchcraft and provide cures for hexes.<sup>28</sup> Thus, the popularity of witchdoctors reflects the prevalence of the society’s belief in witchcraft.<sup>29</sup>

One East African judge commented in a case that there are entire African communities “soaked” in witchcraft.<sup>30</sup> Another judge in Tanzania stated:

Our people, whether we like it or not, have believed, are believing and will continue to believe in witchcraft even if literacy were to become universal tomorrow morning. Science and technology have yet to explain the natural puzzles and phenomena which are peculiar to Africa. And judging from the very low level and slow pace of our technological advancement, these beliefs shall remain with us for quite some time. Should we not therefore face this fact

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22. ROBERT B. EDGERTON, RULES, EXCEPTION, AND SOCIAL ORDER 235 (1985) (describing force of witchcraft on its believers).

23. Diane Ciekawy & Peter Geschiere, *Containing Witchcraft: Conflicting Scenarios in Postcolonial Africa*, 41 AFR. STUD. REV. 1, 3 (1998).

24. See Tebbe, *supra*, note 2, at 93-94 (describing witchcraft’s prominent place in African societies).

25. James T. Siegal, *The Truth of Sorcery*, 18 CULTURAL ANTHROPOLOGY 135, 135 (2003).

26. Fabakary B. Ceesay, *Gambia: Country’s Witch Hunt Activity Brought to African Commission*, FOROYAA NEWSPAPER (SERREKUNDA), Nov. 17, 2009, <http://www.gilanifoundation.com/homepage/week94/Zone%20%20Africa%2093-94.pdf> (scroll down to page 71 of document).

27. See John Hund, *Witchcraft and Accusations of Witchcraft in South Africa: Ontological Denial and the Suppression of African Justice*, 33 COMP. & INT’L L.J. OF S. AFR. 366, 384 (2000) (discussing author’s informal student surveys regarding student’s belief in witchcraft).

28. See Tebbe, *supra* note 2, at 195.

29. See *id.* (noting healers’ popularity as protection against witchcraft indicates ubiquity of witchcraft beliefs).

30. See Nsereko, *supra* note 3, at 47 (citing *Chabijana v. The King*, 12 East Africa Court of Appeal 104).

and adjust the law accordingly?<sup>31</sup>

Decades of Christian campaigns against witchcraft proved largely ineffective in changing traditional attitudes regarding witchcraft.<sup>32</sup> In fact,

[o]ne of the biggest challenges of early Christian missionaries was how to discourage the belief in witchcraft . . . [which] is still widespread at all levels, including among those in formal employment as civil servants and teachers, religious leaders and business people in local towns and urban centers.<sup>33</sup>

Indeed, widespread belief in witchcraft exists amongst African Christians.<sup>34</sup> In Kenya, a largely Christian population, about twenty-five percent of the people believe in witchcraft.<sup>35</sup> In fact, Catholic priests in Africa often help people combat witchcraft by calling on ancestors.<sup>36</sup>

To compound matters,

people are haunted by the idea that new forms of witchcraft are spreading which are directly associated with the new forms of wealth. The new witches are supposed to no longer eat their victims, but to transform them into a kind of zombies who are put to work on ‘invisible plantations.’<sup>37</sup>

Further fueling concern, witchdoctors have become more aggressive, offering their services to protect clients from these new threats.<sup>38</sup>

In this Article, I will not judge whether beliefs in witchcraft are reasonable or unreasonable. I will not inquire as to whether occult phenomena are “real,” or whether such acts have causal efficacy. Rather, I will discuss and analyze the problem of witchcraft violence and the circumstances that fuel it. In Part II, I will provide a definition of witchcraft, discuss the fact that witchcraft beliefs are also a phenomenon outside of Africa, and describe what factors motivate acts of witchcraft. In Part III, the focus will be on the nature of witchcraft accusations—the damage that accrues from such accusations, motivations

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31. See *id.* at 59 (citing Republic v. Juma, [1974] E.A. 336, 338, per Kwikima Aa J.).

32. Nsereko, *supra* note 3, at 58.

33. Stephen Nyoka Nyaga, *The Impact of Witchcraft Beliefs and Practices on the Socio-Economic Development of the Abakwaya in Musoma-Rural District, Tanzania*, in IMAGINING EVIL: WITCHCRAFT BELIEFS AND ACCUSATIONS IN CONTEMPORARY AFRICA 247, 265 (Gerrie ter Harr ed., 2007).

34. Tebbe, *supra* note 2, at 193 (noting prevalence of belief in witchcraft among African Christians).

35. Kenya: *Belief in Witchcraft Widespread Among Christians – Survey*, ALLAFRICA.COM (Apr. 16, 2010), <http://allafrica.com/stories/printable/201004161093.html>.

36. Tebbe, *supra* note 2, at 193 n.54.

37. Peter Geschiere, *Chiefs and the Problem of Witchcraft: Varying Patterns in South and West Cameroon*, 37-38 J. OF LEGAL PLURALISM AND UNOFFICIAL L. 307, 308 (1996).

38. *Id.*

behind such accusations, and modes employed to “detect” witchcraft. In Part IV, I will discuss and compare the witchcraft suppression laws of South Africa, Zimbabwe, Uganda, and Cameroon. In Part V, attention will turn to the social forces that fuel witchcraft accusations and the frequent violence associated therewith. Part VI will shift to the serious problem of witch killings, often prompted by lax enforcement of witchcraft suppression laws. As a consequence of such killings, perpetrators are prosecuted for murder and, as discussed in Part VII, the charges are often reduced or the sentence mitigated based on a provocation defense.

The ongoing fear of witchcraft makes it inevitable that the authorities will need to bring suspected witches to justice or else allow mob violence to persist. That will be the topic of Part VIII, along with a discussion of the elements that make up witchcraft offenses and the nature of evidence that might be admitted at trials. In Part IX and X, the focus will be on the related problem of witchcraft accusations against children, and the multi-murders, or killings for body parts, that mainly target the albino population. Part XI will conclude by exploring whether the problem of witchcraft violence is hopeless, whether there is a viable solution, or whether the persistence of witchcraft beliefs will give way in future generations.

## II. AN OVERVIEW OF WITCHCRAFT

### A. Definition of Witchcraft

There are many definitions that anthropologists have given for witchcraft, but the general thrust is that witchcraft denotes the use of supernatural power to cause psychological or physical harm or annoyance to others, or injury to property.<sup>39</sup> If an act of witchcraft is “successful,” the victim may experience strange and medically undiagnosable illnesses, possession by evil spirits, or in some cases, death.<sup>40</sup>

A simple definition of witchcraft might be: “[T]he practice of secretly using supernatural power for evil—in order to harm others or to help oneself at the expense of others.”<sup>41</sup> Generally, a witch is someone who “is believed to be a malicious person who uses her powers out of spite to harm those who offend her.”<sup>42</sup> The witch is someone who causes “personal and social misfortune, often deliberately, and whose life is said to be a perversion of everything that is proper or moral.”<sup>43</sup>

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39. Katherine Angela Luongo, *Motive Rather Than Means: Legal Genealogies of Witch-Killing Cases in Kenya*, 48 CAHIERS D’ETUDES AFRICAINES, 35, 35 (2008).

40. Ludsin, *supra* note 20, at 76.

41. Tebbe, *supra* note 2, at 190.

42. SANDERS, *supra* note 12, at 10.

43. *Id.* at 1.

The power of a witch is invariably double-edged; for example, “the power to cure illnesses and other misfortunes” comes hand-in-hand with the power to cause harm.<sup>44</sup> Thus, witchcraft is an explanation for both good and bad fortune.

Often, the terms “witchcraft” and “sorcery” are used interchangeably.<sup>45</sup> Some anthropologists have made a distinction between witchcraft and sorcery by arguing that sorcerers are ordinary humans who have acquired techniques to harm others, while witches are supernatural beings who possess powers to do harm.<sup>46</sup>

There is a distinction between malevolent witchcraft and “white magic” or “witchcraft for healing.”<sup>47</sup> Hatred, malice, or the simple enjoyment of causing harm is what distinguishes a malevolent witch from other persons with an ability to harm by mystical means.<sup>48</sup> Other motivations may include selfishness, greed, ambition, or similar personal motives.<sup>49</sup>

African witchdoctors, or traditional healers, are oriented towards healing and are often employed for the purpose of identifying suspected cases of witchcraft.<sup>50</sup> These practitioners are

“white witches” or practitioners of “white magic.” These people . . . claim to possess supernatural powers to diagnose people’s problems and to find their causes; they claim to be able to counteract spells, find witches that are allegedly responsible for their clients’ ills, and to find remedies to their supplicants’ problems. To these “doctors” many supposed victims of witchcraft flock for assistance.<sup>51</sup>

Witchdoctors have the power to cure because they have the status of a “super-witch,” and they will always emphasize that their calling “has bound them with heavy interdictions to use their secret powers only to heal and not to kill.”<sup>52</sup> Witchdoctors can promote societal ills, insofar as witchcraft accusations frequently emanate from advice they give to clients.<sup>53</sup> And as we will see in Part X, some of them seem to fuel the illegal marketing of body parts used to make magic potions.<sup>54</sup>

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44. *Id.* at 11; see also Clemmont E. Vontress, *Animism: Foundation of Traditional Healing in Sub-Saharan Africa*, in INTEGRATING TRADITIONAL HEALING PRACTICES INTO COUNSELING AND PSYCHOTHERAPY 133 (Roy Moodley & William West eds., 2005) (stating benevolent sorcerers seldom discussed).

45. See Vontress, *supra* note 44, at 132.

46. Adeline Masquelier, *Witchcraft, Blood-Sucking Spirits, and the Demonization of Islam in Dogondoutchi, Niger*, in 48 CAHIERS D’ETUDES AFRICAINES 131, 131-32 (2008).

47. See Luongo, *supra* note 39, at 35.

48. See SANDERS, *supra* note 12, at 11.

49. See *id.*

50. See Nsereko, *supra* note 3, at 45-46 (discussing witchdoctor’s role in coping with witches).

51. *Id.*

52. See Geschiere, *supra* note 37, at 314.

53. See Nsereko, *supra* note 3, at 46.

54. See *infra* Part X.

Nowadays, many prefer the term “traditional healer” instead of “witchdoctor,” the latter being a colonial term that may connote straightforward witchcraft rather than healing.<sup>55</sup>

*B. Witchcraft Outside of Africa.*

From medieval times through the Elizabethan period, witchcraft was a crime throughout Europe.<sup>56</sup> Witchcraft laws were initially enacted to quiet the public nerves because of the notion that witches owed their powers to an explicit pact made with the Devil.<sup>57</sup> It was supposed that covens of witches worshiped their master at nocturnal orgies known as sabbaths.<sup>58</sup> Thus, witchcraft was a Christian heresy, “the greatest of all sins, because it involved the renunciation of God and a deliberate adherence to his greatest enemy,” the Devil.<sup>59</sup>

Witches have various methods for destroying those upon whom they prey; a witch could use a spell or curse to murder an enemy, cause accidents such as falling trees that kill people, inflict illness on children, kill cattle, start fires, and cause sexual impotence in bridegrooms.<sup>60</sup>

Stealing the spirit of individuals was a main goal of witchcraft, motivated by the belief that acquiring another’s spirit adds years to the witch’s life. This motivation to “steal” someone else’s life was perhaps why old people, particularly old women, were so often suspected of witchcraft.<sup>61</sup> Even today, stealing another’s spirit is thought of as a kind of “spiritual cannibalism,” in that the spirit or life force of the victim is “consumed,” causing the victim to physically die.<sup>62</sup> Witches were invariably older spinsters or widows who were quarrelsome or thought to hold grudges against other villagers.<sup>63</sup>

Both ecclesiastical and secular authorities declared witchcraft to be a crime, and as many as 200,000 people, mainly women, were tried, half of whom were executed, between 1450 and 1750.<sup>64</sup> More than half of those tried were executed, usually by burning at the stake.<sup>65</sup> From the early part of the

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55. Tebbe, *supra* note 2, at 194.

56. See KEITH THOMAS, RELIGION AND THE DECLINE OF MAGIC 465-66 (1971) (criminalizing witchcraft through special ecclesiastical commissions or secular courts).

57. *Id.* at 468.

58. *Id.*

59. *Id.*

60. Brian P. Levack, *Possession, Witchcraft, and the Law in Jacobean England*, 52 WASH. & LEE L. REV. 1613, 1613-14 (1995).

61. See S.F. Nadel, *Witchcraft in Four African Societies: An Essay in Comparison*, 54 AM. ANTHROPOLOGIST 18, 19 (1952).

62. Umar Habila Dadem Danfulani, *Exorcising Witchcraft: The Return of the Gods in New Religious Movements on the Jos Plateau and the Benue Regions of Nigeria*, 98 AFR. AFF. 167, 171 (1999).

63. Clarke Garrett, *Women and Witches: Patterns of Analysis*, 3 SIGNS: J. WOMEN CULTURE & SOC’Y 461, 462, 464 (Winter 1997).

64. Levack, *supra* note 60, at 1614.

65. *Id.*

fourteenth century to 1650, between 200,000 and 500,000 witches were executed in continental Europe, the overwhelming majority of whom were women.<sup>66</sup>

In 1542, England made it a felony—and therefore a capital offense—to conjure spirits or practice witchcraft, enchantment, or sorcery, in order to find treasure; to waste or destroy a person's body, limbs, or goods; to provoke to unlawful action; to declare what happened to stolen goods; or “for any other unlawful intent or purpose.”<sup>67</sup> The law at that point made it a crime to commit overt acts of witchcraft rather than merely making a compact with the Devil.<sup>68</sup> However, in 1563 a second act of Parliament, more severe than the first, made it a felony to invoke evil spirits for any purpose whatsoever.<sup>69</sup> Witchcraft, enchantment, charming, and sorcery were capital felonies only if they actually resulted in the death of a human being.<sup>70</sup> A third and final witchcraft statute, enacted in 1604, adopted the full doctrine then in effect in continental Europe making it a felony to invoke evil spirits even if the victim was only injured; death was the penalty for a second offense in cases of lesser kinds of magic involving treasure, lost goods, unlawful love, destroying cattle, etc.<sup>71</sup> It also made it a felony to “consult, covenant with, entertain, employ, feed, or reward any evil and wicked spirit to or for any intent or purpose.”<sup>72</sup> This Act assumed that it might be possible, for example, to destroy a neighbor's cattle by magical means without necessarily having made any diabolical pact.<sup>73</sup> The 1604 statute remained law until it was repealed in 1736.<sup>74</sup>

Prosecutions in England focused primarily on antisocial acts of witches—casting of spells to cause damage—rather than allegations of Devil-worship.<sup>75</sup> Blackstone discusses the crime of “witchcraft, conjuration, enchantment, or sorcery,” with the caveat that

[t]o deny the possibility, nay, actual existence of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament [sic]: and the thing itself is a truth to which every nation in the world hath in its turn borne testimony, either by examples seemingly well attested, or by prohibitory laws, which at least suppose the

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66. Nachman Ben-Yehuda, *The European Witch Craze of the 14th to 17th Centuries: A Sociologist's Perspective*, 86 AM. J. SOC. 1, 6 (1980).

67. THOMAS, *supra* note 56, at 442.

68. *Id.*

69. *Id.*

70. *Id.*

71. THOMAS, *supra* note 56, at 442-43.

72. *Id.* at 443.

73. *Id.*

74. *Id.*

75. THOMAS, *supra* note 56, at 443.

possibility of a commerce with evil spirits.<sup>76</sup>

Blackstone points out that witchcraft is in the same category as heresy, and that the civil law “punishes with death not only the sorcerers themselves, but also those who consult them,” noting, however, that “we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptional conduct, the purest morals and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these.”<sup>77</sup>

Today, many cultures outside of Africa are deeply imbued with witchcraft beliefs and seek out witchcraft for personal enrichment, to harm others, or for other purposes. Throughout the West, particularly in hard economic times, there is a business boom in urban centers for magicians, psychics and occult shops.<sup>78</sup> People seek potions, candles, and spells to help produce financial success, jobs, or other good luck.<sup>79</sup>

In the United States there are about 300,000 followers of Wicca, which is a modern witchcraft cult.<sup>80</sup> A modern-day manual for witches, *Starhawk's Spiral Dance* (1979), has sold over 300,000 copies in the past twenty years.<sup>81</sup> Every year there are hundreds of pagan festivals attended by hundreds of thousands of people who claim to be witchcraft practitioners in America.<sup>82</sup>

The American South is widely known as a “hexing culture,” in which

[v]irtually any symptom—physical or emotional—may be ascribed to the operation of a hex. Often a patient will explain his illness by naming his tormentor, although sometimes the source of the hex remains unknown. Patients who were raised among hexing beliefs tend to hold to them tenaciously as perfectly rational explanations of how the world operates.<sup>83</sup>

People who think they have been hexed will consult “root doctors” or “root workers,” who abound not only in rural areas but in the cities, and who utilize herbs, roots, candles, and prayers in the cures.<sup>84</sup> Rootwork beliefs are thought

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76. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*61.

77. *Id.*

78. Cintra Wilson, *Secrets Only Your Witch Would Know*, N.Y. TIMES, Dec. 4, 2008, <http://www.nytimes.com/2008/12/04/fashion/04CRITIC.html>.

79. *See id.*

80. *See* ReligiousTolerance.org, [http://www.religioustolerance.org/wic\\_nbr3.htm](http://www.religioustolerance.org/wic_nbr3.htm) (last visited March 8, 2011).

81. Excerpt from Interview with Starhawk, RE/SEARCH PUBLICATIONS, [http://www.researchpubs.com/books/mpex\\_star.php](http://www.researchpubs.com/books/mpex_star.php) (last visited Mar. 8, 2011).

82. *See* T.M. LUHRMANN, PERSUASIONS OF THE WITCH'S CRAFT 5 (1989).

83. John E. Snell, *Hypnosis in the Treatment of the "Hexed" Patient*, 124 AM. J. PSYCHIATRY 311, 312 (Sept. 1967).

84. *See* Holly F. Mathews, *Rootwork: Description of an Ethnomedical System in the American South*, 80

to be an Afro-American form of voodoo and constitute a significant part of the worldview of many people.<sup>85</sup>

Today, in Moscow, and indeed throughout Russia, much popular attention is given to magic in everyday life.<sup>86</sup> The business world is imbued with distrust. Even small entrepreneurs are subject to common scams like prepaying for supplies and getting neither the goods nor their money back.<sup>87</sup> Magicians are called upon to protect property against vandalism and to cast spells to help reduce harassment by coercive, greedy authorities and “protection” rackets.<sup>88</sup> In the new Russia, there apparently is a lot of cheating in business transactions, and it is not uncommon for cheats to be gunned down by hired killers in broad daylight.<sup>89</sup>

Advertisements exist for love magic, for family problems, to cure addictions, infertility, and to offer help in business.<sup>90</sup> Magicians will sell amulets to help ensure business success or good luck and will give advice on concrete business problems—for example, whether to enter a new contract, or which employee is responsible for stealing.<sup>91</sup> Magicians will provide charms, spells, rituals, or prayers to help find or keep a job, or to help bring in more money for the client. A magician might ask the client to bring a pinch of salt and then will read spells over the salt to imbue the salt with “active, dynamic energy. The client then takes the salt to her shop and strews it over the goods, so that they will receive an impulse to move out of the shop, that is, to sell better.”<sup>92</sup>

Russian magicians might find that the client’s afflictions or troubles are consequences of misdeeds or betrayals of ancestors—that there is a karmic “knot” that needs to be untied. A significant portion of the population carries amulets on their person and they recite the spells or prayers that have been given to them by magicians.

In African populations, the belief in witchcraft is so pervasive that people structure their lives to avoid occasions of offending others, lest they become the target of retaliation. Witchcraft and occult practices are hardly unique to Africa, however, in that the belief in hexes and related occult ideas is a worldwide phenomenon.

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S. MED. J. 885, 885 (July 1987).

85. *See id.* at 885-86.

86. Galina Lindquist, *In Search of the Magical Flow: Magic and Market in Contemporary Russia*, 29 URB. ANTHROPOLOGY 315, 323 (2000).

87. *Id.* at 338.

88. *Id.* at 342.

89. *Id.* at 338.

90. Lindquist, *supra* note 86, at 324.

91. *Id.*

92. *Id.* at 345.

### C. Motivation for Witchcraft Practices

It is well known in Africa that the services of some witches may be purchased for fees.<sup>93</sup> Many people hire practitioners of witchcraft, or those who profess to have occult knowledge, to do their bidding, whether it is to foil an enemy, gain some favor at the expense of another, win a reluctant lover, and so on.<sup>94</sup> Sometimes a witch will cast hexes against enemies of their own, or to harm those who have offended them, or they may act with no motive other than pure evil.<sup>95</sup>

#### 1. Envy

According to anthropologists, envy is usually the principal motivation behind suspected acts of witchcraft.<sup>96</sup> One anthropologist familiar with the topic said: "In seven years I have never heard another reason given for witchcraft. It is nicely circular: Jealousy causes hate, hate drives witchcraft; witchcraft (as evidenced by its effects) must have been caused by hate. Why does anyone hate? Jealousy."<sup>97</sup> The usual reasons for killing someone by witchcraft are: "sexual success, beauty, skill in dancing, ambition for wealth and recklessness in display and in the enjoyment of worldly goods, too much power by sorcery-these are enviable failings or sins, dangerous, since they arouse the jealousy of the mighty, but surrounding the culprit with a halo of glory."<sup>98</sup> This underscores the tendency in many cultures to harbor envy and resentment at "any prominence, any excess of qualities or possessions not warranted by social position, any outstanding personal achievement or virtue not associated with rank or power."<sup>99</sup>

The people in many cultures, including Africa, regard worldly goods as limited.<sup>100</sup> If one person possesses more than others, it is thought to have been obtained at everyone else's expense; because there are scarce resources, one person's gain causes another person's loss. Any relative enrichment or improvement creates a tension in the group and is thus perceived as operating against the group's stability. There is bound to be envy if anyone acquires more land than others or produces a superior harvest.

Thus, in witchcraft cultures of Africa, people will seek to minimize occasions of envy. Cohesion, cooperation, reciprocity, and even distribution of wealth are ways of avoiding the envy of one's neighbors. People will usually

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93. See Ludsin, *supra* note 20, at 76.

94. See *id.* at 77.

95. See *id.* at 76.

96. Vontress, *supra* note 44, at 133.

97. Ashforth, *supra* note 9, at 521.

98. BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 91 (9th prtg. 1970).

99. *Id.*

100. See Ludsin, *supra* note 20, at 75. See generally George M. Foster, *Peasant Society and the Image of Limited Good*, 67 AM. ANTHROPOLOGIST 293 (1965).

avoid any public appearance of superiority about anything. For instance, among the !Kung hunter-gatherers of the Kalahari Desert in southern Africa,

[n]o one is supposed to stand out from the rest of the group. If someone were to come back from a successful hunt and show excessive pride, he would be put back firmly into his place, even if the kill were a large animal. With the freshly killed meat still over his shoulder, such an improperly proud hunter would hear the pointed teasing of his village: “What is it you have there? What a scrawny little thing! You didn’t kill that. It looks so sick and scrawny that it must have fallen dead into your arms.”<sup>101</sup>

In some respects, modern society has an attitude of the limited good—only one person can be the President, only one person can win the Oscar for best actor, only one person can win the Nobel Peace Prize—so that the success of one contender comes at the expense of those who must lose. Although we do not consciously subscribe to the doctrine of limited goods, it seems to nonetheless underlie, at least unconsciously, much of the envy that occurs. Furthermore, envy is related to competition, to the desire to excel, to prove oneself, to be successful, and to attain status and recognition.

## 2. *Witchcraft to Enforce Norms or to Exact Revenge*

Another chief motivation behind acts of witchcraft is revenge, whether for social infractions or more serious offenses.<sup>102</sup> In a sense, witchcraft has a self-regulating effect on morality. Traditionally, the practice of witchcraft was the prerogative of the chief or “the powerful, wealthy, and influential,” as a way of enforcing norms, and deterring people from behaving in ways that might be viewed as unbecoming to their station and rank.<sup>103</sup>

[T]he one who watches over the mediocrity of others is the chief, whose essential privilege and duty to tradition is to enforce the golden mean upon others. The chief, however, cannot use direct bodily violence in such matters . . . . The proper legal means for him is to resort to sorcery and be it remembered he has to pay for it out of his private purse.<sup>104</sup>

The potential threat of punishment through witchcraft “furnishes really the main source of the wholesome fear of punishment and retribution indispensable

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101. Richard Katz, *Accepting “Boiling Energy”: The Experience of !Kia-Healing Among the !Kung*, 10 SOC’Y FOR PSYCHOL. ANTHROPOLOGY 344, 347 (Winter 1982).

102. See Ludsin, *supra* note 20, at 75.

103. See MALINOWSKI, *supra* note 98, at 92-93.

104. *Id.* at 91-92.

in any orderly society.”<sup>105</sup>

In some African villages people will not only seek to avoid arousing envy, but will strive to keep on good terms with their neighbors, for any breach of moral responsibilities will inevitably be repaid through witchcraft. “[F]ear of being accused of witchcraft or of angering a witch is an incentive for individuals to treat each other well.”<sup>106</sup> A strong sense of mutual dependence makes it particularly important to avoid getting angry at other people. “People try to be on good terms with each other as much as possible . . . . Personal enemies are seen to be potential collaborators of witches.”<sup>107</sup> Thus, the best social safeguard is to refrain from offending anyone and to maintain harmony as much as possible.<sup>108</sup> If one is inclined to cast a spell or hire a witch to do so, one can have the satisfaction of believing that these efforts are successful, without igniting an open conflict.

Sometimes an association with a witch can be used as a covert threat to one’s rivals or enemies to keep them in line.<sup>109</sup> “This fear of the potential malignancy of others—through gossip, rumor, or witchcraft—can be an astoundingly effective means of assuring rule compliance,” as anthropologists have recognized for many years.<sup>110</sup>

Of course, an act of witchcraft might not be motivated by vengeance or a grievance, but simply by mean-spiritedness. As history has shown, and as is evident in the daily news reports in modern society, many antisocial acts and brutal crimes have no clear-cut motivation other than blind rage, frustration, and alienation.

Witchcraft can also be “a mechanism for initiating, continuing, containing or resolving disputes . . . .”<sup>111</sup> If someone commits an offense, such as theft, and fails to make appeasement, it is perfectly appropriate to hire a witch to cast a spell to make the offender sick. Sometimes, if one learns of being a proposed target of witchcraft, the individual might offer to pay compensation for wrongs he may have committed before things go further.<sup>112</sup>

Certain breaches of custom can be so repugnant that they are almost certain to elicit a response via witchcraft. One anthropologist gives an account of walking with a native of Tanzania in 1961. The companion inadvertently failed to observe the greeting protocol that was considered mandatory in the community. The offended person was a woman who got angry and

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105. *Id.* at 93.

106. Ludsin, *supra* note 20, at 82.

107. Nyaga, *supra* note 33, at 263.

108. See EDGERTON, *supra* note 22, at 235.

109. See Mary Patterson, *Sorcery and Witchcraft in Melanesia*, 45 OCEANIA, UNIV. SYDNEY 132, 134 (Dec. 1974).

110. EDGERTON, *supra* note 22, at 235.

111. Kenelm O.L. Burridge, *Disputing in Tangu*, 59 AM. ANTHROPOLOGIST 763, 766 (1957).

112. See Patterson, *supra* note 109, at 159.

marched toward us, shouting rebukes and accusations. That we had not noticed her—and could not have seen her—was no excuse. She was outraged. The Hehe man I was with was effusively apologetic, but the old woman indignantly rejected his explanations and left us. The errant man was agitated and worried, telling me of his fears for himself and his children. She *could* be a witch, and he had offended her. Even if she were not a witch, she might hire a sorcerer to cause harm.<sup>113</sup>

### III. THE NATURE OF WITCHCRAFT ACCUSATIONS

#### A. *Why Witchcraft Imputation Is a Criminal Offense*

Making a witchcraft accusation—known as witchcraft imputation—has, since colonial times, been a crime in Africa.

In British law, the injury done by witchcraft derived from the accusation, not the practice, and was comparable to the injury done by acts of slander; the criminal aspects of such accusations—the infraction falling under the police power of the state—was the threat of civil disturbance that might be caused by witchcraft accusations.<sup>114</sup>

Today, numerous African countries have longstanding statutes that make witchcraft imputation a crime, although in Zimbabwe the imputation is illegal only if it is made “groundlessly” or as a result of divination, and in Uganda the statute makes imputation illegal except when the accusation is made to “a person in authority.”<sup>115</sup> The purpose of witchcraft imputation laws seems to be to curtail the harm that results when such accusations foment public lynchings: “[W]itchcraft accusations in many African territories [are] akin to a sentence of death for the reviled witch,”<sup>116</sup> for “accused witches are often killed.”<sup>117</sup>

Indeed,

[h]arassment, torture, banishment and death have been disguised as “cleansing,” the individual accused standing no chance against the brutal force of the accusers. Witchcraft accusations have stripped away rights to defence,

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113. See EDGERTON, *supra* note 22, at 213.

114. William Pietz, *The Fetish of Civilization: Sacrificial Blood and Monetary Debt*, in COLONIAL SUBJECTS: ESSAYS ON THE PRACTICAL HISTORY OF ANTHROPOLOGY 77 (Peter Pells & Oscar Salemink eds., 1999).

115. See *infra* Part IV (discussing witchcraft suppression laws); see also Diwan, *supra* note 11, at 356 (describing laws of South Africa and Uganda).

116. Jonathan Skinner, *Interning the Serpent: Witchcraft, Religion and the Law on Montserrat in the 20th Century*, 16 HIST. & ANTHROPOLOGY 1, 146 (June 2005).

117. Diwan, *supra* note 11, at 380.

rights to a fair trial, rights to simply decency . . . . Witches, if people think they know them in person, are not to be tolerated but have to be cured, purged, evicted or killed, whatever measure is culturally acceptable.<sup>118</sup>

At minimum, an accusation will damage the alleged witch's reputation.<sup>119</sup>

Today, it is frequently the case that the person making an accusation, rather than the suspected witch, is the one who is charged with criminal wrongdoing.<sup>120</sup>

On occasions when authorities might pursue an investigation, a village chief or the police may search the home of the suspect in order to obtain physical evidence (such as charms, potions, or whatever articles local custom ascribes to witchcraft).<sup>121</sup>

Regardless of whether or not the accused has [later been] been found guilty, the fact that the accused has been questioned by the chief or subjected to a house search is highly stigmatizing and typically causes the accused to suffer from social ostracism in the community.<sup>122</sup>

Rumors and accusations spread around a village "can lead to community paranoia and mistrust, and a cascading chain of attacks."<sup>123</sup> In a Zimbabwe case involving witchcraft imputation, the judge said:

[T]he consequences of such an imputation can be disastrous for the victim. Very often the unfortunate victim of the imputation is an old woman who is then banished from the village, and is driven in despair to suicide. Frequently she is severely assaulted and sometimes even killed.<sup>124</sup>

### *B. Motivations Behind Witchcraft Accusations.*

While generally against the law, confrontational witchcraft accusations are quite widespread and appear to be something of a custom: "[L]aws prohibiting the imputation of witchcraft are contrary to some traditional community norms

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118. Walter E.A. van Beek, *The Escalation of Witchcraft Accusations*, in IMAGINING EVIL: WITCHCRAFT BELIEFS AND ACCUSATIONS IN CONTEMPORARY AFRICA, *supra* note 33, at 294-95.

119. Diwan, *supra* note 11, at 381.

120. Simeon Mesaki, *Witchcraft and the Law in Tanzania*, 1 INT'L J. SOC. & ANTHROPOLOGY 132, 137-38 (2009).

121. Diane Ciekawy, *Witchcraft in Statecraft: Five Technologies of Power in Colonial and Postcolonial Coastal Kenya*, 41 AFR. STUD. REV. 119, 128 (1998).

122. *Id.*

123. Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 OHIO ST. J. CRIM. L. 64, 71 (2001).

124. S. v. Bhumu, 1981 (2) SA 839, 841 (ZAD).

of what is seen as reasonable conduct.”<sup>125</sup> For many years, members of an organization of traditional healers in Zimbabwe, known as Zinatha, have argued that the Witchcraft Suppression Act in that country has “impinged upon their right to expose evil-doers in their communities,” because the law of Zimbabwe makes illegal accusations that are a product of divination.<sup>126</sup> Similarly, the Traditional Health Practitioners Association of Zambia (THPAZ) has argued that the Witchcraft Act there should be amended to legalize “witch-hunting.”<sup>127</sup> Perhaps these groups wish to legitimize witchcraft imputation because divination for the purpose of identifying witches is something that traditional healers do for a living.<sup>128</sup>

Witchcraft accusations, whether genuine or fabricated, are often motivated by the same factors that dispose people to commit acts of witchcraft, such as “envy, jealousy, greed, hatred, rivalry, vengeance, misunderstanding or a lack of information, feelings and factors that are usually easily recognised by the people themselves, or at least by bystanders, neighbours and kinsmen.”<sup>129</sup>

Extreme economic disparities between rich and poor seem to be a factor in witchcraft accusations. Witchcraft accusations can be a “weapon of the weak [that] forces the elite into the moulds of the larger population, stretching the reciprocity of kinship to its very limits.”<sup>130</sup> On the other hand, powerful individuals accused of witchcraft can use the occasion “to stave off demands from their kinfolk and to underline the special position of power.”<sup>131</sup> Those who are impoverished are also accused of witchcraft, because one assumes they harbor envy and resentment and wish to destroy those who are better off.<sup>132</sup> Often those accused are bizarre or antisocial women.<sup>133</sup> Politicians and the rich are easily suspected to have pursued their careers with the aid of witchcraft.

Intra-family accusations among co-wives in polygamous marriages are quite common.<sup>134</sup> Also, accusations are often made by less fortunate kin against more affluent members “because the latter have either failed to redistribute their wealth or have been unfair in the way they share with their relations.”<sup>135</sup> Accusations may target those who are “deviating from the village community by their behavior,”<sup>136</sup> or those “perceived as weak or marginal, or, less often,

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125. Diwan, *supra* note 11, at 381.

126. *Id.* at 381 n.170.

127. *Id.* at 381 n.172.

128. Tebbe, *supra* note 2, at 195.

129. van Beek, *supra* note 118, at 301.

130. *Id.* at 306.

131. *Id.*

132. Cyprian F. Fisiy & Peter Geschiere, *Judges and Witches, or How Is the State to Deal with Witchcraft?*, 30 CAHIERS D'ETUDES AFRICAINES 135, 143 (1990).

133. Ben-Yehuda, *supra* note 66, at 8 (noting not all women accused to same extent).

134. Per Zachrisson, *Witchcraft and Witchcraft Cleansing in Southern Zimbabwe*, 102 ANTHROPOS 33, 34 (2007).

135. Fisiy, *supra* note 12, at 146.

136. Zachrisson, *supra* note 134, at 34.

troublemakers.”<sup>137</sup> Others thought to be susceptible to witchcraft accusations might be an unpopular individual resented by neighbors, someone “taciturn, unfriendly . . . hot-tempered . . . also a reputed miser . . . .”<sup>138</sup> And today, African children are often the targets of witchcraft accusations, as we will discuss in Part IX.<sup>139</sup>

In the West, we see a counterpart to witchcraft accusations in a variety of situations, expressed by scapegoating people or groups thought to have caused society’s problems. Mexican immigrants are singled out for causing crime, usurping jobs, and escalating government deficits. Hitler selected Jews and other minorities as scapegoats; Senator Joseph McCarthy launched a witch-hunt that focused on suspected communists and communist sympathizers.

Our modern witch-hunts often have been far more horrendous than those of the much discussed, and apparently much exaggerated, “European Witch-Craze.” The social tendency to seek out “witches” as a cause of misfortune remains as active in Western Europe at the end of the twentieth century as it was in the sixteenth; and as it was in tribal societies and as it is in some developing countries.<sup>140</sup>

### C. Modes of Identifying the Witch

If someone is killed or falls ill, it is customary to find out why that person has been killed. The first step is to determine whether the situation was occasioned by witchcraft in the first place, although as discussed above, in African society the belief in witchcraft is so widespread that witchcraft is often thought to be the cause of any misfortune. If in doubt, witchcraft may be “diagnosed” by a traditional healer.

#### 1. Determining Who Might Bear a Grudge.

If witchcraft is suspected as a cause of misfortune, the next step is to identify the perpetrator. The culprit is likely to be someone in the community, perhaps someone long suspected of witchcraft, perhaps an eccentric outcast who resents everyone, or perhaps a close relative who bears a grudge. There are several ways that people find out who is to blame for their misfortune. First of all, the victim may have someone in mind, looking to his conscience and identifying someone who bears a grudge against him. There may be a hostile relationship between the victim and the witch or someone who has hired the witch. Often,

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137. Widner, *supra* note 123, at 71.

138. Masquelier, *supra* note 46, at 149.

139. See *infra* Part IX (exploring children as targets of witchcraft accusations).

140. SANDERS, *supra* note 12, at 9.

there is no question that the grudge-bearer belongs to one's own family:

As a rule, the first people to be suspected of witchcraft are those living close to the complainant. People who are supposed to live communally and care for one another find themselves in antagonistic relationships, fighting where they should be cooperating. Witchcraft accusations, therefore, underline the sad fact that jealousy, hatred and aggression exist within the intimate circle of the family, where solidarity and trust should reign supreme.<sup>141</sup>

Moreover, within the family, “[p]roblems may lie dormant for a period of time with accusations re-emerging after a small incident or a minor misfortune.”<sup>142</sup>

## 2. Identification by Trial by Ordeal

When witchcraft was suspected in the past, an aggrieved party might call villagers together to determine who was responsible for the harm by conducting a trial by ordeal in which some “medicine” is administered to the people assembled.<sup>143</sup> Local lore accepts that the innocent will regurgitate the “medicine,” but it is deadly to a witch.<sup>144</sup> In one case, when a participant died after the ordeal, a man was charged with murder, but later acquitted because, according to the judge, the “medicine” was not really poison and the death was inexplicable or just a coincidence.<sup>145</sup>

In Niger, it is still customary for an accused witch to undergo a “water ordeal” to determine his guilt.<sup>146</sup> The ordeal is administered by members of a priestly lineage. The accused is forced to drink swamp water and is then asked to vomit it. If he accomplishes this, he is proved innocent. If he cannot regurgitate the water, he is proved to be a witch. “Witches, it is one of their trademarks, cannot ever regurgitate the water they take in; they only drink to extinguish the predatory desires (symptomatised as an unquenchable thirst) that consume them.”<sup>147</sup> A witch will want to drink even more water. The water effectively neutralizes his power. After a witch fails to prove his innocence, there is inevitable social ostracism and humiliation as well as erosion of the

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141. S.T. Kgatla, *Witchcraft Accusations in South Africa*, 32 *MISSIONALIA* 84, 84 (2004).

142. van Beek, *supra* note 118, at 302-03. This is also true among American Indian tribes, where “the strain of reservation life creates bad feelings among kin, which prompts witchcraft.” See Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 *AM. J. COMP. L.* 509, 557-58 (1998).

143. Ludsin, *supra* note 20, at 79.

144. Robert B. Seidman, *Mens Rea and the Reasonable African: The Pre-Scientific World-View and Mistake of Fact*, 15 *INT’L & COMP. L.Q.* 1135, 1143 (1966) (citing Palamba s/o Fundikila, (1947) 14 *E.A.C.A.* 96 (Tanganyika)).

145. See *id.*

146. Masquelier, *supra* note 46, at 138.

147. *Id.* at 137.

witch's powers. The waters have not only neutralized the witch's power, but even induced a kind of imbalance, or madness: "When he returned home, he was but a pale image of his former self. He could neither work in his fields, nor resume his trading in the market. All he could do, people told me, was pick rags off the ground and mumble incoherently to himself."<sup>148</sup>

Trials by ordeal are criminalized today. In Malawi, for instance, the Witchcraft Act prohibits a trial by the ordeal of "poison, fire, boiling water, or by any ordeal which is likely directly or indirectly to result in the death of or bodily injury to any person . . . ."<sup>149</sup>

### 3. *Diviners Used for Identification*

If the victim cannot identify the witch based on his hunches or other factors, a traditional healer will be consulted to identify the evil-doer through divination.<sup>150</sup> Divination for this purpose is illegal in most African countries, but "the role of diviners is crucial—both as persons who are believed to embody power, and as people who depend on witchcraft violence for status and income."<sup>151</sup> In some African communities, the identity of the witch might occur through an "inquest" in which the headman seeks, through his own divination, to identify the culprit.<sup>152</sup>

Traditional healers have an inherent conflict of interest: their status and income depends on witchcraft<sup>153</sup> because the bewitched will seek them out to treat symptoms of witchcraft as well as to identify the perpetrator of the harm.<sup>154</sup> People thus suspect that traditional healers work "in league with the witches in order to raise their revenues."<sup>155</sup> Some of them "thrive on their clients' special problems, ignorance and naive attitude to life."<sup>156</sup> And such healers are often instrumental in generating witchcraft accusations, motivated by personal grudges or rivalries that prompt them to point the finger.<sup>157</sup>

## IV. WITCHCRAFT SUPPRESSION ACTS

### A. *Overview*

Since colonial times the practice of witchcraft has been illegal, yet administrators regarded accusations to be "grounded on delusions which could

148. *Id.*

149. LAWS OF MALAWI, ch. 7:02, § 2.

150. Luongo, *supra* note 39, at 41.

151. van Beek, *supra* note 118, at 305.

152. See generally Robert G. Armstrong, *A West African Inquest*, 56 AM. ANTHROPOLOGIST 1051 (1954).

153. See van Beek, *supra* note 118, at 305.

154. See Nyaga, *supra* note 33, at 247; see also Ludsins, *supra* note 20, at 78.

155. Geschiere, *supra* note 37, at 314.

156. Nyaga, *supra* note 33, at 262.

157. See van Beek, *supra* note 118, at 306.

not be proven by a cause-effect relationship.”<sup>158</sup> Colonial courts insisted on tangible proof and evidence of direct causation, invariably dismissing charges, and thereby administrators were perceived as “the allies and protectors of witches.”<sup>159</sup>

Today, most of Africa continues to outlaw the “practice of magic and witchcraft.”<sup>160</sup> The witchcraft suppression laws of various African countries generally criminalize three things: (1) practicing witchcraft and related crimes; (2) consulting a diviner or other practitioner to detect witchcraft or to name a witch; and (3) imputation of witchcraft, although in some countries the imputation provision is limited in scope. For example, Malawi’s Witchcraft Act clearly makes a distinction that protects accusations made to the authorities: “Any person who, otherwise than in laying information before a court, a police officer, a Chief, or other proper authority, accuses any person with being a witch or with practising witchcraft shall be liable for a fine and imprisonment.”<sup>161</sup>

With some exceptions, the statutory language of these laws presumes that witchcraft does not exist, just as was the case in colonial days when administrators assumed that witchcraft was a falsehood. In South Africa, for example, the law makes it a crime “to claim that [one] practices witchcraft,” or even to “preten[d] to practice witchcraft.”<sup>162</sup> In Uganda and Zimbabwe, on the other hand, the statutory language presumes that witchcraft is a reality.

As we will see, critics of these laws claim they are misdirected, that they are utilized “not to punish witches but those individuals who name others as witches.”<sup>163</sup> Also, these laws in some instances are overreaching in that they impact traditional healers who are an everyday part of life for millions of Africans.

Another consequence of these laws is that tribal chiefs and village elders are not allowed to mediate witchcraft disputes. Critics say that the disadvantage of this is that “witchcraft has been perpetuated by the absence of Traditional Courts that used to try suspected perpetrators and generally adjudicate on matters related thereto.”<sup>164</sup> On the other hand, others think that to remove jurisdiction from the customary tribal courts is beneficial rather than detrimental because it preserves the rule of law.<sup>165</sup>

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158. See Fisiy, *supra* note 12, at 148.

159. See *id.* at 151.

160. See Ludsin, *supra* note 20, at 102 (noting international nature of anti-witchcraft regulation).

161. LAWS OF MALAWI, ch. 7:02, § 4.

162. MALAWI LAW COMM’N, WITCHCRAFT REVIEW PROGRAMME ISSUES PAPER 6 (2009).

163. G.L. Chavunduka, *Witchcraft and the Law in Zimbabwe*, 8 ZAMBEZIA 129, 130 (1980).

164. MALAWI LAW COMM’N, *supra* note 162, at 5.

165. Opiyo Oloya, *Witchhunting Should Be Stamped out of Uganda*, NEW VISION (Oct. 5, 2005), <http://www.newvision.co.ug/PA/8/20/459169>.

*B. South Africa's Witchcraft Suppression Act of 1957*

South Africa's Witchcraft Suppression Act of 1957 seeks to outlaw witchcraft and other occult practices.<sup>166</sup> The overall purpose of the Act is to suppress witchcraft belief, which administrators from colonial times onward regarded as mere superstition.<sup>167</sup> Also, the law deactivates tribal courts that had customarily adjudicated witchcraft disputes.<sup>168</sup> Furthermore, the law criminalizes all witchcraft-related conduct, including engaging in witchcraft itself, pretending to profess knowledge of witchcraft, witchcraft imputation, and engaging in divination techniques in order to detect witches.<sup>169</sup> The ban on divination means that people may not ask a diviner to point out a witch.

As I will discuss below, the ban on divination along with other provisions in effect criminalize the practices of traditional healers.<sup>170</sup> Moreover, the ban on divination is contrary to cultural expectations, for many Africans "believe that witchdoctors are experts on witchcraft and that they alone are the ones who can protect people from the ills of the practice."<sup>171</sup>

The Witchcraft Suppression Act was amended in 1970 and again in 1999. The law does not explicitly acknowledge that witchcraft is real, but instead refers to acts in which the accused "professes or pretends" to use witchcraft. In this regard, one court stated the following:

The short of it all is that the law does not reconsider existence of witchcraft. Therefore it cannot provide for a law against it, it only provides against proclaiming by word or actions its existence. It does not matter how strongly we believe in its existence, the law does not provide for it. This is in keeping with the need to maintain social order since evidence of witchcraft would not lie in the ordinary world but in the unnatural world to which we do not belong despite the fact that we may be victims of the same at one time if not actual practitioners ourselves. Certainly not in our generation but many to come shall incorporate, may be witchcraft practising into law.<sup>172</sup>

The amended Act reads as follows:

Section I: Any person who:

(a) Imputes to any other person the causing, by supernatural means, of any

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166. See generally Witchcraft Suppression Act 3 of 1957 (amended 1970) (S. Afr.) [hereinafter Witchcraft Suppression Act].

167. See Ludsin, *supra* note 20, at 108.

168. See *id.* at 87.

169. See *id.* at 90.

170. See *id.* at 218-19.

171. MALAWI LAW COMM'N, *supra* note 162, at 7.

172. *Id.* at 14-15 (quoting Nunku v. Republic, Criminal Appeal No. 28 of 2007 (HR) (PR) (Unrep)).

disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;

(b) In circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, imputes the cause of death, injury or grief to, disease in, damage to or disappearances of any person or thing to any other person;

(c) Employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard;

(d) Professes a knowledge of witchcraft, or the use of charms, and advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft;

(e) On the advice of any witchdoctor, witch-finder or any other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means of process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing;

(f) For gain pretends to exercise or use any supernatural power, witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill in or knowledge of any occult science to discover where an in what manner anything supposed to have been stolen or lost may be found.<sup>173</sup>

Penalties under the Act extend to 20 years' imprisonment in cases of witchcraft imputation if death of an alleged witch ensues.<sup>174</sup> The Act creates a rebuttable presumption that if the accuser is convicted under I(a) or (b) and the alleged witch is killed, the death was the direct result of the accusation.<sup>175</sup>

The strategy of the Witchcraft Suppression Act, by obliquely referring to one who "professes" or "pretends" to have knowledge of witchcraft, is a product of British colonial rule. British legislators, in dealing with the witchcraft problem in Africa, adopted the view from the British Witchcraft Ordinance of 1735, which sought to punish those who pretended to engage in witchcraft, describing the offense as "pretence to witchcraft, sorcery, enchantment or conjuration."<sup>176</sup>

Formerly, South African chiefs would mediate witchcraft disputes in customary courts, seek reconciliation when feasible, and order compensation or other remedies satisfactory to the community.<sup>177</sup> As a result of the law, tribal chiefs simply stopped conducting witchcraft inquiries except on rare, covert

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173. See Witchcraft Suppression Act, *supra* note 166.

174. *Id.* § 1(i).

175. *Id.* § 2(a).

176. Mesaki, *supra* note 120, at 133.

177. Ludsin, *supra* note 20, at 88; *see also* Hund, *supra* note 10, at 67.

occasions, and usually turned away witchcraft accusers, “which eventually led communities to feel that chiefs were protecting witches and siding with the government.”<sup>178</sup>

By outlawing tribal mediation in witchcraft accusations, disputants no longer are inclined to bring their complaints to chiefs, and because the authorities rarely touch witchcraft cases,<sup>179</sup> many people in tribal communities believe that witches are allowed to run free while witchcraft accusers are punished.<sup>180</sup> This, in turn, prompts lawlessness in the form of witch hunts and associated violence, as people turn to vigilantism against witchcraft.<sup>181</sup> Suspected witches no longer have the de jure protection of customary courts: “People became more vulnerable to witchcraft accusations and accused witches lost any chance they had for a fair trial under customary law.”<sup>182</sup>

The law has a blanket provision making it illegal for anyone, for gain, to “pretend to exercise or use any supernatural power,” and this provision clearly applies not only to witches who seek to cause harm, but to witchdoctors and other traditional healers who invariably claim to use supernatural powers.<sup>183</sup> This provision has been criticized by traditional healers and others because it not only criminalizes overly harmful practices of purported witches, but also makes it unlawful to hire traditional healers for the purpose of “smelling out a witch,” yet a significant portion of the population seeks divination services from traditional healers for that very purpose.<sup>184</sup> Subsection (f), which outlaws fortune-tellers exercising their skills for gain, is at odds with the indigenous population, a large portion of which regards “the operation of magic as normal events of everyday life.”<sup>185</sup> It might be noted that laws prohibiting fortune-telling are found throughout the world and are rarely enforced.<sup>186</sup>

While the law has generally not been enforced against witchdoctors and other traditional practitioners,<sup>187</sup> many say they are “degraded and dehumanized” by the law.<sup>188</sup> “Healers view their stigmatization as part of a more general denigration of African culture that persists in the post-apartheid

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178. Ludsin, *supra* note 20, at 87.

179. *Id.* at 88.

180. *Id.* at 87.

181. *Id.*

182. Ludsin, *supra* note 20, at 88.

183. Tebbe, *supra* note 2, at 219.

184. Gloria Waite, *Traditional Medicine and the Quest for National Identity in Zimbabwe*, 27 ZAMBEZIA 235, 257-58 (2000).

185. Ludsin, *supra* note 20, at 102 (quoting REP. OF THE COMM’N OF INQUIRY INTO WITCHCRAFT VIOLENCE & RITUAL MURDERS IN THE N. PROVINCE OF THE REPUB. OF S. AFR. 61 (1996)) [hereinafter COMM’N OF INQUIRY REPORT].

186. See N.Y. PENAL LAW § 165.35 (McKinney 2011) (criminalizing the practice of fortune telling).

187. Tebbe, *supra* note 2, at 219.

188. *Id.* (citing PARLIAMENT OF THE REPUBLIC OF S. AFR., NAT’L COUNCIL OF PROVINCES, REPORT OF THE SELECT COMM. ON SOC. SERVS. ON TRADITIONAL HEALERS 6 (1998)).

democracy.”<sup>189</sup>

Traditional medicine has long been important to the vast majority of citizens, eighty percent of whom consult such practitioners.<sup>190</sup> There are about 200,000 traditional healers in South Africa, compared with 25,000 regular physicians.<sup>191</sup>

Traditional healers are generally divided into two categories—those that serve the role of *diviner-diagnostician* (or diviner-mediums) and those who are *healers* (or herbalists). The diviner provides a diagnosis usually through spiritual means, while the herbalist then chooses and applies relevant remedies. . . . [T]he Witchcraft Suppression Act of 1957 and the Witchcraft Suppression Amendment Act of 1970 explicitly prohibited the diviners from practicing their trade . . . .<sup>192</sup>

In response to concern that acts of traditional healers are banned under the Witchcraft Suppression Act, legislators sought to correct this with landmark legislation regulating traditional healers: the Traditional Health Practitioners Act.<sup>193</sup> This law seeks to eliminate harmful practices and promote traditional medicine as part of the people’s cultural heritage.<sup>194</sup> Traditional healers now must be licensed by a regulatory agency called the Traditional Health Practitioners Council, which is charged with the duty of registering and regulating healers.<sup>195</sup> The Act protects the “traditional philosophy” of healers:

indigenous African techniques, principles, theories, ideologies, beliefs, opinions and customs and uses of traditional medicines communicated from ancestors to descendants or from generations to generations, with or without written documentation, whether supported by science or not, and which are generally used in traditional health practice.<sup>196</sup>

Nonregistered individuals are prohibited from practicing traditional healing for gain, and thus may not diagnose, examine, advise, or prescribe any

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189. *Id.*

190. *Id.* at 187.

191. See Rajendra Kale, *Traditional Healers in South Africa: Parallel Health Care System*, 310 BRIT. MED. J. 1149, 1182 (1995).

192. Marlise Richter, *Traditional Medicines and Traditional Healers in South Africa* (Nov. 27, 2003) (unpublished manuscript), available at [http://www.tac.org.za/Documents/ResearchPapers/Traditional\\_Medicine\\_briefing.pdf](http://www.tac.org.za/Documents/ResearchPapers/Traditional_Medicine_briefing.pdf).

193. Traditional Health Practitioners Act of 2007 (effective 2008) (S. Afr.), available at <http://www.info.gov.za/view/DownloadFileAction?id=77788>.

194. Tebbe, *supra* note 2, at 220.

195. *Id.* at 221.

196. Traditional Health Practitioners Act of 2007, ch. 1, § 1 (effective 2008) (S. Afr.), available at <http://www.info.gov.za/view/DownloadFileAction?id=77788>.

substance to patients, among other things.<sup>197</sup> Violators are subject to criminal prosecution which could result in a fine and imprisonment for up to one year.<sup>198</sup>

This law seems to serve as a means of easing tension between the government and traditional groups, for it “conveys a message of political belonging that has long been denied to Africans.”<sup>199</sup> However, the law does not authorize healers to engage in “witch finding,” which is still criminalized under the Witchcraft Suppression Act.

The Witchcraft Suppression Act, while criminalizing harmful practices customarily referred to as witchcraft, seems to have been largely ineffective in suppressing acts of witchcraft.<sup>200</sup> To some minds, the Act’s denial of the reality of witchcraft is “an unjust remnant of colonial law that badly denigrates African religion and culture.”<sup>201</sup>

South Africa has a specialized police unit, the “Witchcraft Unit,” which investigates witchcraft accusations and witchcraft-related murders.<sup>202</sup> However, pervasive nepotism and corruption make it difficult for ordinary citizens to get the police to go forward with investigations.<sup>203</sup> And often it is the case that the police will aggressively investigate and arrest suspected accusers rather than the person who is suspected of witchcraft.<sup>204</sup>

Moreover, the law “has only shown the impotence of South African state courts, as they are now constituted, to deal with witchcraft accusations.”<sup>205</sup> There is the difficult problem of proof, for, as mentioned, witches usually operate in secret and are rarely caught in the act.<sup>206</sup> As one scholar has described, “South African state courts are not equipped to convict people of an offence whose material element cannot be presented as hard evidence in a court of law . . . . State prosecutors will not touch these cases.”<sup>207</sup>

A commission that inquired into witchcraft violence suggested that the Witchcraft Suppression Act be amended so that “only an unreasonable and unjustifiable cause for naming a person a witch will be prosecuted.”<sup>208</sup> This would be similar to Zimbabwe’s law, discussed below. Under the commission’s recommendation it would still be unlawful to identify someone as a witch with the aid of a diviner. Also, the suggested amendment would do

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197. *Id.* ch. 5, § 49 (“Offences”).

198. *Id.* ch. 5, § 49(1)-(4).

199. Tebbe, *supra* note 2, at 223.

200. Ludsin, *supra* note 20, at 203.

201. *See* Tebbe, *supra* note 2, at 197.

202. Faure, *supra* note 7, at 156.

203. RIEKJE PELGRIM, AFR. STUDIES CTR., WITCHCRAFT AND POLICING 78-79 (2003), available at <https://openaccess.leidenuniv.nl/bitstream/1887/12920/2/ASC-075287668-076-01.pdf>.

204. *See* Tebbe, *supra* note 2, at 197; *see also* Oloya, *supra* note 165.

205. *See* Hund, *supra* note 10, at 68.

206. *See* Tebbe, *supra* note 2, at 197.

207. Hund, *supra* note 10, at 68.

208. Ludsin, *supra* note 20, at 103 (discussing Draft Witchcraft Control Act as proposed in COMM’N OF INQUIRY REPORT).

away with the language that refers to acts of “pretending” or “professing,” and instead prohibit “any act which creates a reasonable suspicion that [a person] is engaged in the practice of witchcraft.”<sup>209</sup>

*C. Zimbabwe’s Witchcraft Suppression Act of 2006*

In 2006, Zimbabwe amended the colonial-era Witchcraft Suppression Act and now has perhaps the most liberalized legislation pertaining to witchcraft in Africa. Chapter V, Part VI of Zimbabwe’s Criminal Law (Codification and Reform) Act [Chapter 9:23] [Act 23/2004], is entitled “Witchcraft, Witch-Finding and Crimes Related Thereto.” Unlike South Africa’s law, Zimbabwe’s law acknowledges witchcraft as a reality and outlaws only groundless naming of witches or accusations that are aided by diviners. The Act criminalizes only harmful witchcraft practices, thus insulating the practices of traditional healers, and it offers a regime for the admission of expert testimony in witchcraft trials.

Section 98, entitled “Engaging in practices commonly associated with witchcraft,” states:

- (1) Any person who engages in any practice knowing that it is commonly associated with witchcraft shall be guilty of engaging in a practice commonly associated with witchcraft if, having intended thereby to cause harm to any person, such practice inspires in the person against whom it was directed a real fear or belief that harm will occur to that person or any member of his or her family. . . .
- (2) Spoken words shall not in themselves constitute a practice commonly associated with witchcraft for the purpose of this section, unless accompanied by or used in connection with other conduct commonly associated with witchcraft.
- (3) For the avoidance of doubt it is declared that any person who assists another person to commit the crime of engaging in a practice commonly associated with witchcraft, by giving advice or providing any substance or article to enable that person to commit the crime, shall be liable to be charged as an accomplice to the crime.
- (4) A court shall not take judicial notice of any practice that is said to be commonly associated with witchcraft, but any person who, in the opinion of the court, is suitably qualified to do so on account of his or her knowledge, shall be competent to give expert evidence as to whether the practice that forms the subject of a charge under this section is a practice that is commonly associated with witchcraft, whether generally or in the particular area where the practice is

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209. *Id.*

alleged to have taken place.<sup>210</sup>

Section 99, entitled “Indicating witches or wizards,” states:

(1) Subject to this section, any person who groundlessly or by the purported use of non-natural means accuses another person of witchcraft shall be guilty of indicating a witch or wizard . . . .

(2) For the avoidance of doubt it is declared that no crime is committed by a person who, without the purported use of non-natural means and having reasonable grounds for suspecting another person of committing an offence referred to in section ninety-eight, accuses that person of committing that offence.<sup>211</sup>

The overall language of the law recognizes witchcraft as a reality rather than a superstition. Section 98(1) makes it illegal to knowingly engage in any practice that is commonly associated with witchcraft if three elements are met: (1) the defendant intends to cause harm; (2) the victim experiences genuine fear or believes that harm will result to himself or a family member; and (3) the defendant’s act consists of something above and beyond mere spoken words. This apparently exempts threatening another with adverse spells and the like, unless accompanied by further acts. Section 98(3) makes clear that it is illegal to give advice on a practice of witchcraft or to provide any substance or article, i.e., “medicine” or potions, to induce spells and the like.

Witchcraft imputation is an offense under section 99 only if the accusation is groundless or if it arose from information obtained by non-natural means (e.g., divination). Thus, it is permissible to make accusations about a suspected witch to the community if the accuser has not employed divination and has a reasonable belief that the suspect had engaged in acts customarily associated with witchcraft.<sup>212</sup> Nothing in this law makes it illegal for witchdoctors to provide divination services for the purpose of identifying a witch, but accusations arising from such “non-natural” means are not protected under section 99.

Section 100 makes it a crime to use non-natural means, or to procure the services of a person who does so (i.e., a diviner), to indicate that another person is the perpetrator of a crime. Section 101 explicitly makes the belief in witchcraft a mitigating factor when imposing sentences in cases of murder, assault or other crimes.

This law makes it more feasible to try individuals for witchcraft. Section

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210. Criminal Law (Codification and Reform) Act, ch. 5, pt. VI, § 98 (2005) (Zim.).

211. *Id.* § 99.

212. MALAWI LAW COMM’N, *supra* note 162, at 20.

98(4) provides an explicit evidentiary provision, authorizing judges to rely on expert testimony as to whether the defendant's actions are commonly associated with witchcraft.

This law also effectively legitimizes many practices of traditional healers. Under the former law it was technically illegal to be engaged in the profession of witchdoctor, for the law did not provide a distinction between witchcraft and traditional medicine practices.<sup>213</sup> Yet the people have long believed that witchdoctors are the very ones who can protect them from the harm caused by witchcraft.<sup>214</sup>

Zimbabwe, like South Africa, also enacted a Traditional Medical Practitioners Act that provides for the registration of traditional medical practitioners.<sup>215</sup> The Act established a Traditional Medical Practitioners Council to regulate and promote the practice of traditional medicine.<sup>216</sup> The Act also allows for registration of "spirit mediums."<sup>217</sup>

The chairman of the National Traditional Healers Association has described the Witchcraft Suppression Act of 2006 as "a great victory for recognizing African values that had been disparaged by the colonial government, which had no respect for indigenous thought or practice."<sup>218</sup> This law, together with the Traditional Medical Practitioners Act, indicates that Zimbabwe's government is continuing to move away from Western values and is placing more emphasis on its own traditions.

#### D. Uganda's Witchcraft Act of 1957

The Uganda Witchcraft Act of 1957 makes it a crime to practice witchcraft or to hold oneself out as a witch.<sup>219</sup> As with Zimbabwe's law and that of Cameroon, discussed below, the language of the Act recognizes that witchcraft is a reality rather than a superstition.<sup>220</sup> The chief portions of the Act are as follows:

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213. Alex Tawanda Magaisa, *Knowledge and Power: Law, Politics and Socio-cultural Perspectives on the Protection of Traditional Medical Knowledge Systems in Zimbabwe* 13 (Working Paper), available at <http://www.copyright.bbk.ac.uk/contents/publications/workshops/theme4/magaisa.pdf>.

214. MALAWI LAW COMM'N, *supra* note 162, at 7.

215. Traditional Medical Practitioners Act, tit. 27, ch. 27:14 (2002).

216. *Id.* at Part II.

217. *Id.* at Part IV, § 22.

218. Law Library of Cong., *Zimbabwe – Witchcraft Trials Now Possible*, GLOBAL LEGAL MONITOR, June-July 2006, at 29, 30.

219. Witchcraft Act of 1957, ch. 124 (2009) (Uganda). The Act states that it is a crime to directly or indirectly threaten another with death by witchcraft or by any other supernatural means, or to make threats of using witchcraft to cause disease, any other physical harm, or harm to another's livestock or property. *Id.*

220. *Id.* § 2 ("Any person who directly or indirectly threatens another with death by witchcraft or by any other supernatural means commits an offence and is liable on conviction to imprisonment for life.")

1. Interpretation.

For the purposes of this Act, “witchcraft” does not include bona fide spirit worship or the bona fide manufacture, supply or sale of native medicines.

2. Offences and penalties in relation to witchcraft.

Any person who directly or indirectly threatens another with death by witchcraft or by any other supernatural means commits an offence and is liable on conviction to imprisonment for life.

Any person who directly or indirectly threatens to cause disease or any physical harm to another, or to cause disease or harm to any livestock or harm to any property of whatever sort or another by witchcraft or by any other supernatural means commits an offence. . . .

Any person who hires or procures another person to practise witchcraft or who for evil purposes consults or consorts with another who practises witchcraft or holds himself or herself out as a witch commits an offence. . . .

3. Imputation of witchcraft.

Any person who, other than to a person in authority, imputes the use of witchcraft to another, if any harm results to that other as a result of the imputation, commits an offence. . . .

4. Possession of articles used in witchcraft.

Any person . . . in whose possession or control any article used in practising witchcraft is found, other than bona fide for scientific purposes or as a curio, commits an offence. . . .

In any prosecution under this section the prosecution shall be required to show that the article found is by common repute or belief an article which is used for the purpose of witchcraft, but shall not be required to show the particular purpose or significance of the article.

5. Evidence of reputation.

[W]here any person is charged with the commission of an offence under this Act, evidence may be adduced to show the reputation of that person as a witch; to establish that by common repute any substance, means, process or ceremony proved to have been administered, used or performed, or attempted or caused or advised to be administered, used or performed, is commonly administered, used or performed in the practise of witchcraft.<sup>221</sup>

The law to some degree exempts witchdoctors from the offense of practicing witchcraft, but not as strongly as the law of Zimbabwe. Rather, it simply exempts “bona fide spirit worship” and the supply or sale of native medicines.

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221. Witchcraft Act of 1957, ch. 124, §§ 1-5 (2009) (Uganda).

Also, nothing in the law makes it illegal for witchdoctors to provide divination services to detect cases of witchcraft.

In contrast to Zimbabwe's law, in Uganda, an act of witchcraft can be merely verbal—a threat made by direct or indirect means under section 2. Section 3, the imputation section, is unique in that it makes it an offense to accuse another of witchcraft only if harm results from the accusation. There is no requirement—like that in the Zimbabwe law—for the accusation to be based on reasonable grounds. And, unlike Zimbabwe's law, there is nothing to prohibit accusations based on non-natural means. Section 4 specifically prohibits the possession of articles customarily used in witchcraft. With respect to witchcraft prosecutions, section 5 allows the admission of evidence to show that the defendant has a reputation as a witch, and also allows testimony, presumably from experts, for the purpose of establishing that articles in evidence are used for the purpose of witchcraft.

Witchcraft violence is widespread in Uganda and other parts of Africa, as I will discuss in Part VI. Part of the reason for witch killings is the difficulty in making accusations to the authorities and the difficulty in convincing the authorities to prosecute suspected witches. A related problem, discussed in Part X, is the killing of people, particularly children and albinos, to obtain body parts and organs that are utilized in concoctions sold by unscrupulous witchdoctors. So great is the problem in Uganda that the government has banned advertisements by witchdoctors, who seem to fuel and profit from this illicit practice.<sup>222</sup>

#### *E. Cameroon's Witchcraft Act of 1967*

Section 251 of the Cameroon Penal Code of 1967 states: "Whoever commits any act of witchcraft, magic or divination liable to disturb public order or tranquility, or to harm another person, property or substance, whether by taking a reward or otherwise, shall be punished with imprisonment for from two to ten years . . . ."<sup>223</sup> The practices of "witchcraft, magic or divination" are understood in their ordinary usage in that culture.<sup>224</sup>

The Cameroon law is very short on words, but, as is the case with Zimbabwe and Uganda, it recognizes witchcraft as a reality rather than something that might be "pretended" or "professed."<sup>225</sup> Cameroon's law has no specific intent element as in Zimbabwe, and in contrast to Zimbabwe, there is no requirement that the act of witchcraft consist of something above and beyond mere words.

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222. Ruth Manuel-Logan, *Human Sacrifices: Children Are Disappearing in Uganda*, BV BLACK SPIN (Apr. 7, 2010), <http://www.bvblackspin.com/2010/04/07/human-sacrifices-children-are-disappearing-in-uganda>.

223. See Fisiy, *supra* note 12, at 144 (quoting section 251 of Cameroon Penal Code).

224. See *id.*

225. See *id.* at 151.

The only requirement is that the act or threat entail some disturbance to public order or tranquility. As a practical matter, individuals are prosecuted only in conjunction with another offense, such as murder.<sup>226</sup> Also, there is no provision pertaining to witchcraft imputation, so, presumably, witchcraft imputation is simply not against the law in Cameroon.

In parts of Cameroon, chiefs are still supposed to maintain a measure of control over witchcraft.<sup>227</sup> In these regions, chiefs still have powers to impose their own authority in witchcraft, but in other areas they lack such authority.<sup>228</sup> In trials in Cameroon, judges are allowed to enlist the support of witchdoctors as expert witnesses.<sup>229</sup>

## V. SOCIAL FORCES THAT FUEL WITCHCRAFT

There are daily news accounts all across Africa on witch hunts—a matter of substantial concern because it often entails mob justice, i.e., killing of suspected witches. The police invariably investigate and arrest participants in the crime and, as we will discuss in Part VII, the individuals are prosecuted for murder, usually with charges or sentences reduced based on the provocation defense.

Witchcraft accusations are a phenomenon that permeates African culture despite educational efforts and influences from health technology, satellite television, the Internet, mass media, and so on. Witchcraft accusations are rooted in the fact that people are riddled with fear over the possibility of being hexed by a witch, or suspicious that others are gaining in power, wealth, or prestige due to witchcraft practices.

Various social influences, discussed below, seem to both foster the belief in witchcraft and, as a consequence, perpetuate witchcraft accusations. It should be kept in mind that witchcraft is a double edged sword in that people fear its influence, yet, if occasion arises, they will utilize witchcraft on their own for the advantages they might gain or simply to exact revenge against an enemy or rival.

### A. Churches Fuel Witchcraft Accusations

Witchcraft accusations are often fueled by charismatic or Pentecostal churches that stand to profit from treatment offered to exorcise people, including children, who are identified as witches.

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226. Immigration & Refugee Bd. of Can., *Cameroon: Witchcraft in Cameroon; Tribes or Geographical Areas in Which Witchcraft Is Practised; the Government's Attitude (2004)*, (May 17, 2005, corrected March 2008), available at <http://www.unhcr.org/refworld/docid/440ed6e819.html> (last visited May 28, 2011).

227. See Geschiere, *supra* note 37, at 308.

228. *Id.* at 308-09.

229. See Fisiy, *supra* note 12, at 157.

Their pastor-prophets fight against witchcraft in the name of God, identifying witches through visions and dreams, and then offering treatment—divine healing and exorcism—to the supposed witches. This “spiritual” work, often of a violent nature, reinforces beliefs in witchcraft and increases accusations . . . . The persecution of witches has become a lucrative “business” for many pastor-prophets. The actions of the pastor-prophets “complement” those of traditional healers who also fight against the malevolent forces of witchcraft by detecting supposed witches.<sup>230</sup>

Many churches in Africa have what is described as an “avaricious and invariably occultist foundation.”<sup>231</sup> That is, relief from poverty will be promised for parishioners who subscribe to the church’s practices. Churches in Nigeria, for example, will seek to promote prosperity with occult practices. In a bid to fulfill the promises made to their followers—which is important in securing teeming followership—they resort to occult and demonic schemes to facilitate their “miraculous” power claims.<sup>232</sup>

#### *B. Use of Witchcraft by Sports Teams*

Losing sports teams will blame their loss on witchcraft, for it is well known that witches are hired, and sometimes paid by the government, to help thwart the opposing team and thereby ensure victory.<sup>233</sup> Sports in Africa are important not only for the prestige customarily ascribed to winning athletes, but also because sports are “one of the most accessible ways of expressing local and national identity and politics.”<sup>234</sup> Football, the most popular sport in Africa, of European colonial vintage, is a “means of expressing cultural and national identity.”<sup>235</sup>

Teams will employ a “magician” to produce victory—for instance, by causing opposing team members to suffer blurred vision, or causing the opponent’s ball to “slow down” in midair.<sup>236</sup> As one scholar has described, “To explain and legitimate the recourse to occult powers, actors and spectators alike readily admit that training and talent are important but say you cannot win without sorcery . . . .”<sup>237</sup>

According to witchdoctor Adamou Amadou, sports players will often consult witchdoctors in the event their performance needs enhancement.<sup>238</sup> Mr.

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230. See UNICEF REPORT, *supra* note 18, at 3.

231. Ogenyi Lewis, *Nigeria: Witchcraft—A Rising Trend*, ALLAFRICA.COM (Aug. 8, 2010), <http://allafrica.com/stories/printable/201008090941.html>.

232. *Id.*

233. Patrick Royer, *The Spirit of Competition: Wak in Burkina Faso*, 72 AFR. 464, 474 (2002).

234. *Id.* at 469.

235. *Id.* at 470.

236. *Id.* at 473.

237. Royer, *supra* note 233, at 474.

238. Leocadia Jisi Bonbeng, *South Africa/Cameroon: Potency of Witchcraft*, ALLAFRICA.COM (July 9,

Amadou has explained that magic works for football: “All I need to do is have a name of one player from the opposite side and I either make them fall, unable to run, tie their legs, or have the opponents miss their balls.”<sup>239</sup>

In 2010, a delegation of witchdoctors accompanied the Cameroon team, the Indomitable Lions, to the FIFA World Cup in South Africa.<sup>240</sup> The witchdoctors in the delegation were paid by the Cameroon government.<sup>241</sup> However, the team was one of the first to be eliminated from the competition.<sup>242</sup> After the team’s demise, there was public outcry at the squandering of public funds on witchdoctors, given that they evidently did not use their magic to the advantage of the team.<sup>243</sup> The Cameroon National Assembly took up debate on why the team gave such a dismal performance after so much had been paid to support its success.<sup>244</sup> The Minister of Sports and Physical Education said to the assembly that “witchcraft, besides mysticism, internal wrangling, jealousy and disorder was the cause of the Lions’ debacle.”<sup>245</sup>

### C. Witchcraft and Political Forces

It has been suggested that belief in witchcraft particularly “flourishes in times of social instability,” so that the almost constant state of siege in many African communities is something that fuels witchcraft accusations.<sup>246</sup> Witchcraft has “a significant impact on actual social, economic and political structures.”<sup>247</sup> Accusing political rivals of witchcraft to destroy or discredit them is a widespread tactic in Africa, where there are competing factions seeking to advance their own interests, and intense competition for power and wealth.<sup>248</sup>

As was the case with chiefs in earlier times, politicians are often thought to get their rise in power via witchcraft:

To the people it is self-evident that all these leaders, whatever the differences between them, were (and are) armed with powerful occult forces in one way or another. How else would they dare to defy the jealousy of their fellow men?

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2010), <http://allafrica.com/stories/printable/201007090204.html>.

239. *Id.*

240. *Id.*

241. *Id.*

242. Bonbeng, *supra* note 238.

243. *Id.*

244. *Id.*

245. *Id.*

246. E.G. PARRINDER, WITCHCRAFT: EUROPEAN AND AFRICAN 205 (1958).

247. Dirk Kohnert, *On the Renaissance of African Modes of Thought – The Example of the Belief in Magic and Witchcraft*, MUNICH PERSONAL REPEC ARCHIVE, Dec. 2007, at 37, available at <http://mpira.ub.uni-muenchen.de/7019>.

248. SANDERS, *supra* note 12, at 138-39.

How else could they succeed in accumulating so much power and wealth?<sup>249</sup>

Politicians will employ witchcraft to eliminate “socially undesirable people or one’s personal rivals,” and blame witchcraft for unfortunate events.<sup>250</sup> In Uganda, for example, where more than six million people believe in witchcraft, it is not uncommon for political leaders to turn to the practice in order to win political office.<sup>251</sup> In similar fashion to sports teams, competing politicians will employ witchcraft to “seek to improve their relative power positions,” or to aid and advance their own agendas.<sup>252</sup>

African politicians are vulnerable to accusations of witchcraft from opponents and critics in much the same way those in the West are vulnerable to accusations of sexual, financial, or other impropriety. The mere accusation is enough to cause great uproar and a flurry of negative media attention, making the person of power unable to go forward with his or her broader agenda.

We also see witchcraft employed outside of Africa for political purposes. In Papua New Guinea, for example, witchcraft is used to both attract voters to a candidate running for provincial elections in villages and to blind them to the candidate’s defects.<sup>253</sup>

#### *D. Use of Witchcraft by Rival Co-Wives*

The prevalence of polygamy seems to have a role in witchcraft accusations in that wives will buy potions to protect themselves from being bewitched by their co-wives.<sup>254</sup>

Women in this kinds [sic] of marriage, more often than not, harbour the notion that they must have an edge, one way or the other, over their counterparts, and a situation where every wife gets equal attention is unacceptable. This belief instigates them to indulge in evil practices which may involve charming their husbands, so as to secure his undivided attention and consequently causing the other wives to run out of favour and privileges. The rivalry, most of the time, extends to the children who are also willing to participate in the physical and spiritual battle, as it is not uncommon to find in these families, insane and wayward children, deaf and dumb, handicaps, and strange and untimely deaths. These circumstances are usually the product and effect of witchcraft.<sup>255</sup>

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249. Geschiere, *supra* note 37, at 313.

250. Levack, *supra* note 60, at 1619.

251. Flavia Nalubega & Patrick Kanyomozi, *Uganda: Politicians Promoting Witchcraft, Says Buturo*, ALLAFRICA.COM (May 4, 2010), <http://allafrica.com/stories/printable/201005040268.html>.

252. SANDERS, *supra* note 12, at 6.

253. DEBORAH GEWERTZ & FREDERICK ERRINGTON, *TWISTED HISTORIES, ALTERED CONTEXTS: REPRESENTING THE CHAMBRI IN A WORLD SYSTEM* 121 (1991).

254. Nyaga, *supra* note 33, at 265.

255. Lewis, *supra* note 231.

### *E. Witchcraft Accusations in Business*

Witchcraft accusations are not uncommon within companies. For instance, in one case where management promoted hardworking employees, “[t]he whole system of performance appraisal was brought to a standstill because the employees who were promoted were accused by their colleagues of using witchcraft to bluff their supervisors.”<sup>256</sup> Moreover, the likelihood of envy may often deter people from advancing in economic development for fear that they will be the subject of witchcraft accusations.<sup>257</sup>

### *F. Use of Witchcraft by Criminals and by Police*

In addition, some think that “a majority of crimes committed in Nigeria [are] either assisted by or connected with witchcraft.”<sup>258</sup> It is not uncommon for “[a]rmed robbers, kidnappers, blood money ritualists, cultists,” in addition to business people, to utilize charms obtain from occult specialists “to facilitate their endeavours usually at the expense of other innocent people.”<sup>259</sup>

## VI. WITCH AND WITCH KILLINGS

### *A. The Nature of the Problem*

Public lynchings and private killings of suspected witches are clearly a reality in Africa. In May 2009, a Special Rapporteur reported to the United Nations Human Rights Council that “[t]he persecution and killing of individuals accused of practising so-called ‘witchcraft’—the vast majority of whom are women and children—is a significant phenomenon in many parts of the world . . . .”<sup>260</sup>

In Tanzania, approximately 400 people in the western part of the country were killed after being accused of witchcraft between 1997 to 2000. And in other regions of the West “more than 500 people, most of them women, were killed in various witchcraft incidents” over a four-year period.<sup>261</sup> In an

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256. Selaelo Kgatla, *Containment of Witchcraft Accusations in South Africa: A Search for a Transformational Approach to Curb the Problem*, in IMAGINING EVIL: WITCHCRAFT BELIEFS AND ACCUSATIONS IN CONTEMPORARY AFRICA, *supra* note 33, at 269, 270.

257. *Id.*

258. Lewis, *supra* note 231.

259. *Id.*

260. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, ¶43, U.N. Doc. A/HRC/11/2 (May 27, 2009) (by Philip Alston), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/134/39/PDF/G0913439.pdf?OpenElement>.

261. Diwan, *supra* note 11, at 357.

epidemic of killings between June and July, 2001, over 800 people were killed in a witch hunt in the northeastern Democratic Republic of Congo.<sup>262</sup> In the Northern and Eastern Cape Provinces of South Africa alone, thousands of suspected witches were murdered in the 1990s.<sup>263</sup>

As discussed in Part IV, various laws make it a criminal offense to practice witchcraft, yet there have been almost no prosecutions of suspected witches in recent years in Africa.<sup>264</sup> Perhaps this is due to the difficulty of proving that an act of witchcraft has occurred, or the reluctance of authorities to entertain prosecutions where there is no concrete proof that acts of witchcraft have causal efficacy. Another factor simply may be the widespread use of witchcraft by politicians, sports teams, the public at large, and even the police. But whatever the reason for lax prosecution, the consequences are the same: private enforcement.<sup>265</sup> A similar phenomenon occurred in eighteenth-century England, when it had become nearly impossible to get a conviction in the courts for witchcraft, whereupon people continued to make witchcraft accusations, taking the law into their own hands.<sup>266</sup>

It is true that witches cannot be easily prosecuted, and anyone who accuses another of witchcraft himself runs the risk of being prosecuted for witchcraft imputation. But the failure to prosecute alleged witches leads to many occasions of witch hunts and witch killings.<sup>267</sup> The killing of a suspected witch is viewed as a praiseworthy service to the community and is “not necessarily seen as a deviation from expected behavior.”<sup>268</sup> Rather, “[t]he resort to vigilante justice often is condoned within a community because it is seen as public service, an act of protecting the community, making heroes of the participants.”<sup>269</sup> Witch killing is often said to be justified as a mode of justice directed toward “social malefactors.”<sup>270</sup> Witch killings “provide a catharsis to the community.”<sup>271</sup> As one scholar noted, “[W]itches or sorceresses are generally viewed with revulsion, fear, and abhorrence. They are considered to be inhuman and not fit to live.”<sup>272</sup> Moreover, “[a]cting against witches elevates a person’s status or helps them to retain authority as it ‘dramatize[s] their capacity to punish the perpetrators of misfortune . . . .’”<sup>273</sup>

Effective responses on the part of authorities to protect people from

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262. Oloya, *supra* note 165.

263. Kohnert, *supra* note 247, at 42.

264. Tebbe, *supra* note 2, at 187-88.

265. *Id.* at 233.

266. THOMAS, *supra* note 56, at 453.

267. Tebbe, *supra* note 2, at 232.

268. Diwan, *supra* note 11, at 380.

269. Ludsin, *supra* note 20, at 88.

270. Luongo, *supra* note 39, at 43.

271. Ludsin, *supra* note 20, at 82.

272. Nsereko, *supra* note 3, at 44.

273. Ludsin, *supra* note 20, at 83 (quoting Isak Arnold Niehaus).

witchcraft could help deter mob justice and might well help exonerate those who are wrongly accused. A concerted effort to prosecute for violations of the witchcraft laws “would do a great deal to make citizens feel secure, thereby strengthening the legitimacy of the government against the criticism that it is not doing enough to protect the populace against all forms of violence.”<sup>274</sup>

To some degree, the various anti-witchcraft laws facilitate the prospects for prosecutions. In Zimbabwe, for example, the judge may hear expert evidence as to whether certain practices are commonly associated with witchcraft. In Uganda, evidence that the defendant has the reputation of being a witch may be admitted. And South Africa’s law is straightforward in focusing on whether the defendant has pretended or professed knowledge of witchcraft, thus eliminating the question of whether the individual was, in truth, a witch.

### *B. African News Accounts of Witch Killings.*

So commonplace are killings and other acts of violence against suspected witches—and the resulting trials of those arrested for murder—that reports of witch hunts are part of the daily diet in the African media, some examples of which are summarized below.

- In Kenya, a group of about 300 young men killed eleven people accused of witchcraft by slitting their throats or clubbing them to death and then burning their bodies. The villagers complained that the suspected witches were “making the bright children in the community dumb.”<sup>275</sup>

- In Uganda, a 90-year-old woman and her daughter were lynched over witchcraft accusations and the huts and homesteads of the accused were burned.<sup>276</sup> A police spokesman said that “the attackers accused the women of bewitching their daughter, who recently became mentally impaired.”<sup>277</sup>

- In a soccer-related incident, a witch hunt ensued in 2005 after three players were killed in an automobile accident on their way home from a match outside their village in South Africa.<sup>278</sup> About 100 people ran through the village and torched the homes of suspected witches, believing they were responsible for the accident.<sup>279</sup>

- In the Masaka district of Uganda, a mob destroyed the home and plantation of Godfrey Buyonje, accusing him of witchcraft. The raid followed rumors that Buyonje and another person had kidnapped a 16-year-old girl and took her to his home where they forced her to engage in acts of witchcraft. The girl told

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274. Tebbe, *supra* note 2, at 234.

275. *Kenya: Gang Kills Suspected Witches*, N.Y. TIMES, Mar. 22, 2008, [http://www.nytimes.com/2008/05/22/world/africa/22brief-GANGKILLSSUS\\_BRF.html](http://www.nytimes.com/2008/05/22/world/africa/22brief-GANGKILLSSUS_BRF.html).

276. Richard Adrama, *Five Women Lynched over Witchcraft*, ALLAFRICA.COM (Feb. 14, 2010), <http://www.allafrica.com/stories/printable/201002150528.html>.

277. *Id.*

278. *See* Tebbe, *supra* note 2, at 199.

279. *See id.*

the press that “they smeared me with cow dung, blood and other stinking liquids.”<sup>280</sup>

- Villagers in Kamengo, Uganda accused a man of witchcraft following the death of a young girl. As a result, a mob invaded the man’s home and destroyed his property. The man and his family managed to escape unharmed. A police investigator was quoted as saying: “They demolished his house, killed three cows, burnt two motorcycles and cut down his banana plantation. The perpetrators are on the run, but we shall soon get them.” The residents reportedly suspected that in addition to the young girl, eight other people were killed by witchcraft.<sup>281</sup>

- At a meeting of 243 clan members in the Alebtong district, Uganda, a clan chief decreed a “death sentence” on a man who reportedly confessed to killing people by witchcraft. The clan leader promptly beat the suspected witch to death. Police reported the arrest of six people in connection with the murder.<sup>282</sup>

- A man in Nigeria was arrested and charged with attempted murder after he stabbed his mother over alleged witchcraft that he claimed had caused setbacks in his family’s prosperity.<sup>283</sup>

- In a Uganda village a mob attacked a man accused of practicing witchcraft. In this case the man was accused of killing his enemies just by pointing at them. The villagers had previously banished the man from the village, and the attack occurred when he unexpectedly returned to the village to visit his children.<sup>284</sup>

- A Uganda man was beheaded by assailants who thought him to be casting bad spells.<sup>285</sup>

- In Malawi, scores of people attacked a man and his family for suspected witchcraft in February, 2008. The husband was accused of teaching witchcraft to children in the community. Some children were found naked outside their home, bleeding profusely from their genitals. Two of the girls died a few hours after the incident. The surviving children reported that the family was teaching them witchcraft. The children were described as having their hands distended abnormally long, their mouths extended, and their lips “dropping close to their chests with protruding bellies and buttocks.” The accused witchcraft instructor,

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280. Ali Mambule, *Masaka Mob Destroys Home, Plantation*, ALLAFRICA.COM (Aug. 9, 2010), <http://www.allafrica.com/stories/printable/201008101070.html>.

281. *Police Hunt Residents over Mob Justice*, ALLAFRICA.COM (Sept. 16, 2010), <http://www.allafrica.com/stories/printable/201009170210.html>.

282. Bonney Odongo, *Clan Leaders Kill Suspected Witchdoctor*, ALLAFRICA.COM (Sept. 14, 2010), <http://www.allafrica.com/stories/printable/20100915065.html>.

283. Seun Joseph, *Nigeria: Man Attempts to Kill Mother Over Witchcraft*, ALLAFRICA.COM (Jan. 6, 2010), <http://allafrica.com/stories/printable/201001070030.html>.

284. Ali Mambule, *Masaka Residents Attack Colleague over Witchcraft*, ALLAFRICA.COM (Nov. 12, 2009), <http://www.allafrica.com/stories/printable/200911130132.html>.

285. David Kazungu, *Uganda: Man Killed Over Sorcery*, ALLAFRICA.COM (Nov. 11, 2009), <http://allafrica.com/stories/printable/200911110476.html>.

77-year-old Medson Kachilika, admitted to the police that he is a witch and that he had been teaching over 100 children in the area. The police forced him to change the children back into their normal appearance. Later, villagers went amok and torched the man's two houses. The police said that in some areas they get an average of five cases of witchcraft complaints a day, but that their hands are tied because the country's witchcraft law does not empower them to prosecute suspects of witchcraft because it does not acknowledge the existence of witchcraft.<sup>286</sup>

- One Livingstone Nsenga was accused of witchcraft in his village in Uganda.<sup>287</sup> Nsenga had wanted to buy another man's land, "but when he declined, Nsenga buried a bottle containing unknown chemicals in his doorway, and on removing it" the man fell ill and died.<sup>288</sup> Several other villagers also fell sick and died after arguing with Nsenga.<sup>289</sup> As a consequence of these witchcraft accusations, the village council voted to banish Nsenga.<sup>290</sup>

- In South Africa, a 75-year-old church elder was killed by two men who claimed she was a witch.<sup>291</sup> The assailants were arrested and charged with murder.

These are just a few of the recent articles that appeared in the African press at the time this Article was written.<sup>292</sup>

#### VII. MURDER PROSECUTION FOR WITCH KILLING: SELF-DEFENSE AND PROVOCATION AS MITIGATING FACTORS

Witch killings are invariably treated as murder investigations by the police, and perpetrators are arrested and charged with murder. A typical defense strategy throughout Africa is to argue for reduction of the charge to manslaughter or mitigation of sentence based on provocation.<sup>293</sup> It is quite common for provocation arguments to be successful either to negate mens rea

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286. Gregory Gondwe, *Witchcraft Strife Storms Malawi*, GROUND REP. (Feb. 3, 2008), <http://www.groundreport.com/article.php?articleID=2854513>.

287. Henry Nsubuga, *Uganda: Village Expels Suspected Sorcerer*, ALLAFRICA.COM (May 3, 2010), <http://allafrica.com/stories/printable/201005040500.html>.

288. *Id.*

289. *Id.*

290. *Id.*

291. Buhle Mbonambi, *Church Elder Killed for Being a "Witch"*, SUNDAY TRIBUNE (South Africa) (Oct. 10, 2010).

292. Examples of further news items include: *Duo Jailed for Killing in Witchcraft Attack*, LEGALBRIEF TODAY (Dec. 7, 2010), <http://www.legalbrief.co.za/article.php?story=20101207082642345>; *Murdered Family Was Suspected of Witchcraft*, LEGALBRIEF TODAY (Sept. 30, 2010), <http://www.legalbrief.co.za/article.php?story=20100929132136510>; *Man Pleads Guilty to Killing "Witch"*, LEGALBRIEF TODAY (Mar. 8, 2011), <http://www.legalbrief.co.za/article.php?story=20100115082213482>; *Albino Murder Suspects Jailed*, LEGALBRIEF TODAY (July 27, 2009), <http://www.legalbrief.co.za/article.php?story=20090727154012134>; *Albino Killers Arrested*, LEGALBRIEF TODAY (Mar. 23, 2009), <http://www.legalbrief.co.za/article.php?story=20090323170056153>.

293. Nsereko, *supra* note 3, at 46.

or to persuade the judge to mitigate the sentence.

Another strategy is to argue self-defense as an excuse or justification for the killing. Self-defense, however, is rarely accepted as justification or excuse for witch killings.

#### A. *Self-Defense Rejected as a Defense in Witch Killings*

If a witch threatens the defendant, one might argue that the killing is in the nature of self-defense. For example, in a case from Malawi, the deceased had argued with the defendant, telling the latter that he would not live to see the next day. The defendant interpreted this to be a threat to kill him by witchcraft. He killed the deceased before the day was over, shooting her with an arrow through the stomach, and then striking her head with a hoe. In a trial for murder, the defendant argued self-defense on the ground that his belief in the threat and the prospect of imminent death was reasonable.

The trial court agreed that the defendant's belief that his life had been threatened with witchcraft was reasonable, but the self-defense argument was reversed on appeal.<sup>294</sup> The appellate court held that the standard for evaluating self-defense must be based on "what would appear reasonable to the ordinary man in the street in England," and that what constitutes a reasonable belief regarding witchcraft to someone in Malawi is not relevant.<sup>295</sup>

In a case from West Africa, the defendant, charged with murder of a suspected witch, sought to interpose self-defense. The court rejected that defense and held that the defendant's belief in witchcraft, while honest and widespread in his community, was not reasonable so as to excuse murder. The West African Court of Appeal said:

I have no doubt that a belief in witchcraft such as the accused obviously has is shared by the ordinary members of his community. It would, however, in my opinion be a dangerous precedent to recognize that because a superstition, which may lead to such a terrible result as is disclosed by the facts of this case, is generally prevalent among a community, it is therefore reasonable. The courts must, I think, regard the holding of such beliefs unreasonable.<sup>296</sup>

Another case that rejected self-defense was *S v. Mokonto*, in which a suspected witch in South Africa had told the defendant and his two brothers that "they would all die."<sup>297</sup> The defendant's brothers actually died shortly after the threat, whereupon the defendant confronted the deceased, who

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294. *See id.* at 48.

295. *Id.* (quoting Attorney General of Nyasaland v. Jackson, [1957] Rhodesia and Nyasaland Law Reports 443 at 448).

296. *Id.* at 49 (quoting Gadam v. R., [1954] 14 West African Court of Appeal 442).

297. *See* Ludsin, *supra* note 20, at 91 (quoting *S. v. Mokauto*, 1971 (2) SA 319 (A) (S. Afr.)).

allegedly repeated the threat that the defendant would die soon. The defendant killed her with a cane knife and was charged with murder. The court rejected a plea of self-defense on the ground that the deceased posed no immediate threat to the defendant, as she had no weapon at hand to suggest she was going to kill him on the spot.<sup>298</sup> The court said that his belief of being in danger of death by witchcraft was not reasonable: “To hold otherwise would be to plunge the law backward into the Dark Ages.”<sup>299</sup>

Perhaps cases along these lines serve the function of educating people, or perhaps inculcating them in standards embraced by the dominant culture. “If judges insist that the accused ought to know that witchcraft is superstitious nonsense, the law is telling him or her to strive to get educated and become more enlightened.”<sup>300</sup> However, there is some doubt as to whether education or inculcation of Western attitudes has any significant impact on suppressing witchcraft beliefs in Africa.<sup>301</sup>

I would argue that this line of judicial thinking is not only insensitive to the vast majority of Africans who believe in witchcraft, but promotes a condescending attitude suggesting that peoples’ “primitive minds may well have led them to such belief[s].”<sup>302</sup>

This attitude is . . . unrealistic and unfair. When the majority of the people in a community are uneducated and unenlightened, is it reasonable or fair to expect them to behave as if they were educated and enlightened? Are the ends of criminal justice subserved by standards that are too high for the ordinary member of the community to reach? One may be permitted to doubt it.<sup>303</sup>

In the self-defense cases pertaining to witch killings, the fact that even an overwhelming majority of the community believes in witchcraft does not translate into grounds for self-defense. However, the reasonableness of the belief becomes relevant by another means: the provocation defense.

### *B. Provocation as a Mitigating Factor in Witch Killings*

A genuine belief in witchcraft is not a basis for self-defense to excuse or justify murder. However, it can afford the accused a provocation defense and thereby either reduce murder charges to manslaughter or act in mitigation at the sentencing phase of the trial.<sup>304</sup>

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298. *Id.*

299. *Id.*

300. Nsereko, *supra* note 3, at 50.

301. Kgatla, *supra* note 256, at 274.

302. *See* Nsereko, *supra* note 3, at 49.

303. *Id.*

304. *See* Diwan, *supra* note 11, at 357.

People accused of murdering suspected witches are often successful in proffering the provocation defense, but the mere belief in witchcraft is not sufficient for the defense. In addition, there must be some sort of provocative act on the part of the deceased. As noted by the Uganda Court of Appeal for Eastern Africa, “A belief in witchcraft per se does not constitute a circumstance of excuse or mitigation for killing a person believed to be a witch or wizard when there is no immediate provocative act.”<sup>305</sup> Another Ugandan court stated: “a genuine belief by someone that the deceased [caused] the deaths of his relative, coupled with words and insults by the deceased against the appellant in such circumstances as to cause any reasonable person . . . sudden and temporary loss of self control” will constitute mitigating circumstances.<sup>306</sup> The court added that provocation may be proved as long as the evidence raises a reasonable probability that provocation exists.<sup>307</sup>

The provocative act must anger the defendant “to such an extent as to be deprived of the power of self-control and induced to assault the person doing the act of witchcraft.”<sup>308</sup> With the provocation defense, “defendants argue that the deceased’s threats or actions allegedly involving witchcraft . . . constitute such provocation that the defendant killed the deceased in the heat of passion.”<sup>309</sup>

Not every instance of witch killing has facts amenable to the provocation defense. As the High Court of Appeals for Eastern Africa noted:

The plea has been frequently put forward in murder cases that the deceased had bewitched or threatened to bewitch the accused, and that plea has been consistently rejected except in cases where the accused has been put in such fear of immediate danger to his own life that the defense of grave and sudden provocation has been held proved.<sup>310</sup>

The defense applies “where there has been an overt and physically provocative act on the part of the victim, to which the accused retaliates on sudden impulse.”<sup>311</sup> Typically there must be some sort of “overt act or insult that is capable of derailing a person’s fortitude and power of self-control and likely to induce him to retaliate by killing the person who offers it.”<sup>312</sup> Moreover, “[t]he threat must be physical, not metaphysical.”<sup>313</sup> Therefore, the

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305. See Nsereko, *supra* note 3, at 50.

306. See *Uganda v. Godfrey*, (2003) [2003] UGHC 32, at 32 (Uganda High Ct.), available at [www.ulii.org/ug/cases/UGHC/2003/32.html](http://www.ulii.org/ug/cases/UGHC/2003/32.html).

307. See *id.*

308. See Luongo, *supra* note 39, at 49.

309. Diwan, *supra* note 11, at 357.

310. Luongo, *supra* note 39, at 46.

311. Nsereko, *supra* note 3, at 52.

312. *Id.*

313. Seidman, *supra* note 144, at 1142.

provocative act must consist of something “overt, i.e., physical, visible or audible.”<sup>314</sup> This physical requirement is often liberally construed in favor of the defense or altogether overlooked by the court.

In addition, the defense applies only if the evidence shows that the killing occurred immediately or very soon after the provocative act.<sup>315</sup> A further issue is whether the provocative act will be judged according to “what would appear reasonable to the ordinary man in the street in England,” as in the self-defense cases discussed above, or on a subjective or community-based standard.<sup>316</sup> The provocation defense in the context of witchcraft-killing cases can be broken down into the following elements: bona fide belief in witchcraft, physical or overt provocative act, imminent threat, immediate response, and reasonableness standard.

### 1. *Bona Fide Belief in Witchcraft*

This is perhaps a trivial, but threshold requirement, that the defendant prove he had a bona fide belief in the efficacy of witchcraft to cause grave harm.<sup>317</sup>

### 2. *Requirement of Physical or Overt Provocative Act*

A hurdle with the provocation defense is the requirement, sometimes overlooked by the courts, that the provocation consist of a tangible act of witchcraft—in other words, something “physical” or “overt.”<sup>318</sup> In reported cases there is usually little evidence to support a straightforward physical act. Witchcraft, “being a metaphysical phenomenon, does not usually manifest itself in overt physical acts.”<sup>319</sup>

While in some cases there is evidence that the defendant actually witnessed the deceased perform an actual ritual of witchcraft, usually there is no evidence of an overt, physical act because witchcraft is often performed in secret.<sup>320</sup> In some instances, the defendant may learn about the act by the witch’s admission, accompanied by a verbal threat.

Perhaps this provision is liberally construed because, to those who believe in witchcraft, a threat of witchcraft “ranks as a form of physical attack,” and “the insidious nature of the magician’s attack makes him a potential threat to the whole community.”<sup>321</sup> Moreover, witchcraft “is perceived to be unjust in much

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314. Luongo, *supra* note 39, at 52 (internal quotation marks omitted).

315. *See id.* at 50.

316. Nsereko, *supra* note 3, at 48.

317. *See* Luongo, *supra* note 39, at 50.

318. *See* Nsereko, *supra* note 3, at 55.

319. *Id.* at 59.

320. *See* Tebbe, *supra* note 2, at 187-88.

321. R. Linton, *Universal Ethical Principles: An Anthropological View*, in *MORAL PRINCIPLES OF ACTION: MAN’S ETHICAL IMPERATIVE* 658 (R.N. Anshern ed., 1952).

the same way as physical violence.”<sup>322</sup>

### 3. *Imminence of Threat Rather Than Threat of Future Harm*

In witch killing cases, the provocative act often consists of a verbal threat to cause grave harm via witchcraft. The threat might be made directly to the defendant or told to the defendant by a third party. The general rule is that a threat of future harm, while evoking fear, is not in and of itself sufficient to constitute provocation.<sup>323</sup> “Threats of future harm by themselves . . . are unacceptable as a foundation for the defence of provocation.”<sup>324</sup>

As explained by the Court of Appeal for Eastern Africa:

It seems that a mere threat to cause injury to health or even death in the near future cannot be considered as a physical provocative act. In any case, the appellant’s own evidence shows clearly (a) that he was motivated not by anger but by fear alone. He struck, not in the heat of passion, but in despair arising from . . . his hopeless fear of the consequences [of the deceased’s threat]; and (b) that he was not suddenly deprived of his self-control but acted as he did deliberately and intentionally . . . .<sup>325</sup>

This provision is liberally construed by the courts as long as the threat pertains to harm that will result in the same day—such as “you will not live to see the light of day”—or if the timing of the threatened harm is ambiguous.

### 4. *Immediacy of Response*

A further requirement is that the defendant must act more or less on the spot in response to the provocative act. Often, witch killings occur after the defendant has the opportunity to deliberate about how to kill the suspected witch, and the killing may involve lying in wait or other elements indicating that the defendant acted with a cool mind and in full possession of his faculties.

For example, in the *Mokonto* case, discussed in Section A above, the court rejected the self-defense argument. The provocation defense was also rejected because the accused had time to cool off and deliberate about his behavior and due to the fact that he armed himself with a cane knife before coming to meet the deceased suggested premeditation.<sup>326</sup> However, in some instances where the witch’s threat occurred outside the presence of the defendant, or where the defendant learned about the act of bewitching days after it occurred and then acted to kill the deceased, the court may nonetheless find in favor of the

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322. Tebbe, *supra* note 2, at 187.

323. See Nsereko, *supra* note 3, at 54.

324. *Id.*

325. *Id.* at 52.

326. See Ludsin, *supra* note 20, at 94.

provocation defense.<sup>327</sup>

### 5. Reasonableness Standard—Community-Based

A final element is to convince the court to adopt a subjective rather than “reasonable man” standard in analyzing the nature of the provocative threat. Earlier cases held that “[t]he threat must be the sort that a reasonable Englishman would recognise, not the sort which would seem frightening only to an African steeped in the culture of the bush.”<sup>328</sup> But more recently, the provocative act is analyzed from the standpoint of an “ordinary person of the community to which the accused belongs,” or “by the standards of a reasonable member of the unsophisticated community to which he belongs.”<sup>329</sup>

South African courts have indicated that the provocation defense will be limited to cases where the defendant is clearly from “a primitive society steeped in superstition” or “a tribesman from some remote district completely cut off from the influences of modern civilization.”<sup>330</sup> One who is found to live in the suburbs of developing towns is “expected to control those beliefs and superstitions instead of allowing them to regulate his behaviour towards his fellow human beings.”<sup>331</sup> This suggests that even a genuine belief that a witch’s threat is real and imminent will be discounted if the defendant resides in a more or less modern setting.

### C. African Cases Construing the Provocation Defense

A situation that constitutes legal provocation is illustrated by the following Ugandan case, *Rex v. Fabiano Kinene & Another*.<sup>332</sup> In that case, a group of villagers were charged with murder after confronting and killing a village headman named William, whom they had long suspected of using witchcraft to kill their relatives. They found William crawling naked in their compound, fearing that he was there to cast a hex; they killed him by forcibly by inserting “about twenty raw green plantains into his anus.”<sup>333</sup> The defendants argued that they were suddenly provoked to kill and that their belief that the victim was performing an act of witchcraft against them was reasonable under the circumstances. The Court of Appeal for Eastern Africa said that an ordinary person of this community “might be angered to such an extent as to be deprived of the power of self-control and induced to assault the person doing the act of witchcraft. And if this be the case, a defence of grave and sudden provocation

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327. See Nsereko, *supra* note 3, at 54.

328. Seidman, *supra* note 144, at 1142.

329. Nsereko, *supra* note 3, at 54.

330. Ludsin, *supra* note 20, at 94.

331. *Id.* at 95.

332. See Diwan, *supra* note 11, at 373.

333. See *id.*

is open to him.”<sup>334</sup>

It seems that this case hinged on the overtness of the perceived threat, in which the deceased appeared to be casting a hex, and the immediacy of the defendants’ response. The court utilized the standard of an “ordinary person of the community to which the accused belongs,” rather than the more rigid standard of reasonableness adopted in the self-defense cases discussed above—”what would appear reasonable to the ordinary man in the street in England.”<sup>335</sup>

The community-based standard seems to have gained acceptance in the courts:

[P]rovided that there is an overt physical act of witchcraft, the courts are at least willing to accept an ordinary person of the community and background of the accused as the standard for determining whether or not an act of witchcraft would be sufficient to deprive a reasonable person of self-control and to induce him to commit the offence in question.<sup>336</sup>

Another example of application of the provocation defense to reduce charges of murder to manslaughter is the Tanzanian case, *John N. Rudowiki v. Republic*.<sup>337</sup> The defendant was on trial for killing his grandfather, who had come to his home and “threatened to kill him by witchcraft, following which [the defendant] picked up an axe” and killed his grandfather.<sup>338</sup> The evidence showed that the defendant had a genuine belief in witchcraft and that witchdoctors had informed him that his grandfather had used witchcraft to kill a number of people in his family as well as caused temporary sterility in his own daughter, and the grandfather had admitted as much to his grandson.<sup>339</sup> The judge found that the defendant was genuinely shocked by his grandfather’s threat, particularly in light of the grandfather’s admission of killing and causing misfortune to other family members.<sup>340</sup> In this case, the defendant’s response to the threat was immediate. The threat itself was an overt, verbal threat rather than a physical act. Perhaps the admission of the grandfather that he had killed others using witchcraft added to the weight of the threat.

Provocation may be proved if the defendant learns, after the fact, that an act of witchcraft occurred and then suddenly acts to retaliate against the suspected witch. For example, in *Uganda v. Bonefasi Muvaga*, the defendant suspected that the victim had bewitched his son to death.<sup>341</sup> He encountered the victim

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334. *Id.*

335. Nsereko, *supra* note 3, at 48, 54.

336. *Id.* at 55.

337. See Diwan, *supra* note 11, at 375.

338. *Id.* (internal quotation marks omitted).

339. *Id.*

340. *Id.*

341. See Nsereko, *supra* note 3, at 54.

loitering in the doorway of his house; she threw something wrapped in cloth into the bushes. The defendant confronted the woman and accused her of killing his son. She replied, "If you are not careful I will also kill you." The defendant promptly killed her. Based on these facts the court held that the defendant had acted under provocation and therefore convicted him of manslaughter rather than murder.<sup>342</sup> A combination of factors in this case appears to support the provocation defense, even though the hex and resulting death of the defendant's son had already occurred. The defendant acted immediately upon learning that the victim killed his son. The defendant's state of mind may have been affected in part by the verbal threat of the victim, although the threat was ambiguous as to when it might play out. The court may have construed the action of throwing what might have been a witch's implement into the bush as further evidence of provocation.

In the South African case, *Rex v. Tsita*, the Lesotho Court of Appeal found the defendant guilty of murder in the brutal attack of the deceased with a spear.<sup>343</sup> The defendant argued that he mistook the victim for a strange black creature that he chased and speared. Several witnesses testified that the defendant told them he would kill a witch before nightfall and that the accused believed the victim was responsible for the death of his newborn baby. However, the defendant testified that he did not believe in witchcraft. Nonetheless, the court found that the defendant believed in witchcraft and that the killing was prompted by the belief that the deceased had practiced witchcraft on the defendant's child. In sentencing the defendant, the judge said the defendant had acted in response to provocative acts of the victim and reduced the sentence to ten years in prison.

Similarly, in *Rex v. Lehlohonolo*, the defendant was convicted of murder by stabbing a woman to death.<sup>344</sup> There was evidence the victim engaged in acts of witchcraft and that when the defendant stabbed the woman, he accused her of having bewitched him. However, the defendant testified that he was fond of the victim, he did not believe in witchcraft, and he had no reason to suspect she was involved in witchcraft. The court rejected the defendant's statement that he did not believe in witchcraft and held he in fact believed that the victim had bewitched him. The court then held that extenuating circumstances warranted a reduced sentence of ten years' imprisonment.

In *Rex v. Tlaitlai*, the defendant was charged with murder for the stabbing death of a woman who he believed had bewitched his mother, who had died earlier in the year.<sup>345</sup> On the night of the stabbing, the victim came unannounced to visit the defendant while he was listening to obituaries on the

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342. *Id.*

343. See *Rex v. Tsita*, (2001) CRI/T/31/99, at 1651 (Lesotho High Ct.).

344. See *Rex v. Lehlohonolo*, (1980) CRI/T/7/80, at 74 (Lesotho High Ct.).

345. See *Rex v. Tlaitlai*, (1995) CRI/T/68/91, at 1651 (Lesotho High Ct.).

radio. The defendant testified that the victim refused to say why she was visiting and refused to leave. The defendant also testified that the obituaries on the radio suddenly reminded him of his deceased mother, and he took a knife and stabbed the victim. The court found him guilty of murder, but reduced the sentence to ten years based on finding that the defendant believed in witchcraft, believed the victim killed his mother by witchcraft, and believed she came to his home to bewitch him. This case is unusual in allowing the provocation defense when the defendant's mother—who he believed was bewitched by the deceased—died earlier in the year, so there was no immediate response between the time of the bewitching and the time of the murder. Perhaps the court felt the defense was appropriate because the defendant was provoked anew on the night the victim visited him, believing that she was about to bewitch him, while being reminded of his mother's tragic death.

In *Rex v. Maboka & Another*, the court rejected the provocation defense.<sup>346</sup> The defendant and an accomplice were convicted of murder in the stabbing death of a woman who had a reputation of being a witch. The brother of the defendant had been struck by lightning and killed. In Lesotha and elsewhere, it is commonly believed that witches can cause lightning to strike specific victims.<sup>347</sup> Shortly afterwards, the defendant received information that implicated the victim in the death of his brother. On the day after his brother's death, the defendant tried to talk to the victim but she ran away. The following evening he went to her house with the co-defendant, and after a brief conversation stabbed her six times; the accomplice then set her house on fire. Witnesses testified that the defendant had stated his intention to kill the deceased. The defendant testified that when he visited the deceased at her home she threatened to kill him and admitted killing his brother, which provoked him to stab her. However, the court did not believe the defendant's statement. The court said that although the defendant may have been provoked upon learning that the deceased was responsible for his brother's death, enough time elapsed for his passion to cool. Nonetheless, the defendant and his accomplice received what seemed to be a reduced sentence of nine years in prison.

The cases on provocation suggest that courts often agree to reduce the charges or the sentence if there is evidence that the defendant believed that the victim was responsible for an act of witchcraft or was threatening to commit an act of witchcraft against the defendant or close relatives. But the availability of the provocation defense—though a concession to the real fear people have of witchcraft—does little to curtail acts of witchcraft. “Merely lessening punishments for private citizens who engage in self-help to protect their communities against enchantment cannot satisfy them that the government is

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346. See *Maboka v. Rex*, [2000] C of A (CRI) no. 1 of 2000, at 124 (Lesotho).

347. See Fisiy, *supra* note 12, at 149.

ensuring individual security, administering retribution against wrongdoers, and guaranteeing law and order.”<sup>348</sup> Witch killings are likely to be a continuing problem as long as authorities fail to take measures to prosecute suspected witches.

### VIII. BRINGING ACCUSED WITCHES TO JUSTICE

#### A. Introduction

Witchcraft is an area in which customs and the law collide. In colonial times accused witches were set free for lack of concrete evidence, and accusers—especially those who engaged in violence—were dealt with severely:

The frightening outcome of witchcraft trials was that witches were constantly set free by these colonial courts for lack of substantive proof. Aggrieved parties who took matters into their own hands and attacked witches, either in self-defense or during moments of sheer provocation, were instantly convicted for their acts and harsh sentences were meted out against them by the same colonial courts.<sup>349</sup>

While the practice of witchcraft is criminalized throughout Africa, prosecutions are rare “due to the difficulty of prosecuting a crime for which there is no hard evidence.”<sup>350</sup> Yet if vigilantes are to be discouraged from engaging in witch killings, authorities may need to consider conducting witchcraft trials as a way of placating the public’s fears.

The existence of an act of witchcraft cannot be easily proved by any physical or tangible act that the witch does. “In only a few places today are there still trials of people accused of practicing witchcraft, although legislation such as the Witchcraft Suppression Acts long ago made it possible to punish people who openly practice witchcraft or accuse others of doing so.”<sup>351</sup> The occasional witchcraft trials have varying results.

In Zimbabwe, for instance, a court found a woman guilty of witchcraft after an expert witness—a senior member of Zinatha, an organization of traditional healers in Zimbabwe—testified that her walking naked around a garden was a practice commonly associated with witchcraft and that the people were likely frightened by it. The judge imposed a suspended jail sentence after the village chief said that the woman would be received back into the community without punishment, and she would get effective counseling.<sup>352</sup> In Malawi, however,

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348. Tebbe, *supra* note 2, at 218.

349. Fisiy, *supra* note 12, at 149.

350. Tebbe, *supra* note 2, at 187-88.

351. Diwan, *supra* note 11, at 356.

352. *Zimbabwe: Witchcraft Case a Legal Minefield*, ALLAFRICA.COM (June 10, 2009),

about eighty women were sentenced to as much as six years' imprisonment for practicing witchcraft; a human rights group has called on the country's president to release them.<sup>353</sup>

In this section we will first discuss how communities informally deal with witchcraft allegations on a tribal level, the problems of witchcraft trials, and suggestions to help mitigate these problems.

### B. *Handling of Witchcraft Disputes in Tribal Communities*

Under customary law, tribal courts adjudicated witchcraft conflicts and ordered compensation for false accusations of witchcraft.<sup>354</sup> This was considered a good way of dealing with such issues, for "witchcraft accusations bring tensions within the community into the open, often allowing for a traditional leader to mediate conflicts."<sup>355</sup> Sometimes a claim of witchcraft is really a ruse for an underlying dispute, a fact that can be ferreted out by a tribal leader.<sup>356</sup> But if the decision of a council leader—imposing a sentence of death, for instance—is carried out, the individuals who executed the sentence will often end up being prosecuted by authorities for murder.

In tribal communities, witchcraft accusations were dealt with on a local level, with the chief mediating disputes. "The whole African world used to be focused on social balance and peace, and because of that the African justice system was of a reconciliatory nature. A chief would always try to reconcile two fighting parties."<sup>357</sup> Typically, a witchcraft accusation would be handled as follows:

[I]f I, for example, had suspicions that my aunt was a witch, I would have to consult a sangoma [i.e., a witchdoctor]. If he or she indeed told me that it is my aunt who is bewitching my new-born son, making him weak and sick, then I would have to go to the chief and inform him about my problem. I would explain that I went to consult a sangoma and that the sangoma told me that my aunt is bewitching my little boy. The chief would then ask me whether I have any proof for this allegation and I would tell him that this is not the case, that it was only the sangoma who told me. The chief would then ask me whether I would want him to deal with this matter, whether he should call my aunt to explain her side of the story. If I agreed on this, the procedure would have to be as follows: I would have to bring the chief two beasts as a deposit. If the allegations that I was making against my aunt would prove false, I would then

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<http://allafrica.com/stories/printable/200906100191.html>.

353. See Bill Corcoran, *Call for Release of "Witchcraft Prisoners"*, IRISH TIMES (Oct. 10, 2010), <http://www.irishtimes.com/newspaper/world/2010/1016/1224281250334.html>.

354. See Ludsin, *supra* note 20, at 83.

355. *Id.* at 82.

356. See *id.* at 84.

357. PELGRIM, *supra* note 203, at 71 (quoting public prosecutor).

have to forfeit the two beasts. If they turned out to be correct, I would get my beasts back and my aunt would have to compensate me for what she has done. This compensation would also be something in the line of one or two beasts.<sup>358</sup>

The chief would determine guilt or innocence by a procedure known as the throwing of the bone, and he had the authority to issue a reprimand if it was a first-time offense or, if a repeat offender, to expel the individual from the village.<sup>359</sup>

In various African communities, witchcraft allegations are still dealt with on the tribal level, albeit surreptitiously.<sup>360</sup> For example, in Uganda, a village chairman called a meeting at which a woman, Jane Rose Nassuuna, was charged with witchcraft and given a death sentence. A mob of villagers descended on the woman and killed her with stones and axes. Several suspects were arrested on murder charges.<sup>361</sup> In another incident from Uganda, the elders of a village convened a meeting at which they decided to compile a list of suspected witches, following which young men were selected to kill them. One victim was pursued by four young men and killed with knives, clubs and stones. The four men were prosecuted for murder and sentenced to death.<sup>362</sup>

Another practice in some tribal communities to protect against witchcraft consists of so called witch-cleansing cults. These cults seem to be a kind of coercive scheme to exact payments for “protection” from various communities that are beset with fears of witchcraft, with the promise of “neutralizing” the witches.<sup>363</sup>

[T]he pattern is remarkably similar all over Africa. First, there is the arrival of the cult’s representatives, who initiate negotiations, usually in secret, with the local headman. The latter generally appears willing to see his village benefit from the new cult, notwithstanding the expense involved. He is under pressure, for to refuse to receive witch-cleansers could have sinister implications for himself, particularly if neighbouring villages are eagerly adopting the new ritual.<sup>364</sup>

After specific witches are identified, usually via confession, the entire village, including the accused, will consume some “medicine” to protect the

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358. *Id.* at 95 (quoting villager from traditional TshiVenda society in South Africa).

359. *See id.* at 96.

360. *See* Tebbe, *supra* note 2, at 200.

361. *See* Oloya, *supra* note 165.

362. *See* Watete v. Uganda, (1999) [1999] UGCA 10 (Uganda Ct. App.), available at <http://www.ulii.org/ug/cases/UGCA/1999/10.html>.

363. *See* R.G. Willis, *Instant Millennium: The Sociology of African Witch-Cleansing Cults*, in WITCHCRAFT CONFESSIONS AND ACCUSATIONS 129 (Mary Douglas ed., 1970).

364. *Id.* at 130.

innocent against hexes and to prevent the evil-doers from reverting to their former ways.<sup>365</sup> “Secure in this assurance, the past can be forgotten. Most reports suggest that the self-confessed witches immediately resume their accustomed places in the community, without any hint of ostracism.”<sup>366</sup> Perhaps the advantage of this cult method of witch eradication is that it averts bloodshed, and often the witch, after confessing, is reconciled to the community.

### C. *The Problem of Witchcraft Trials*

Witchcraft accusations made to the authorities are usually given short shrift even though witchcraft and other occult practices are criminalized everywhere in Africa. On the other hand, in the Republic of Central Africa, about forty percent of court cases consist of witchcraft prosecutions.<sup>367</sup> According to a lawyer who has defended a number of cases in the region, “The problem is that in a witchcraft case, there is usually no evidence . . . . The judge will look at them and see if they act like witches,” i.e., “strangely” or “nervously” in court.<sup>368</sup> Evidence of witchcraft may be elusive, for the acts are most often done in secret, and therefore there are usually no eyewitnesses to behavior that might be commonly associated with witchcraft rituals. Cases may rely on circumstantial evidence such as proof that the suspect was in possession of implements commonly associated with witchcraft, and in some cases reputation evidence might be admitted to show that the individual was known to be a witch in the community.<sup>369</sup> Also, expert testimony of witchdoctors may be admitted to explain whether the acts of the accused are customarily associated with witchcraft.<sup>370</sup>

Even if an accused witch is proved to have engaged in certain acts or rituals typical of witchcraft—gathering nail clippings or food leavings of a victim and performing some ritual over them—it is difficult to prove an intent to injure, and there may be substantial disagreement whether the ritual in question has any causal efficacy.

### D. *Evidence in Witchcraft Trials*

What constitutes elements of the crime of practicing witchcraft? What can be done to distinguish between those who are falsely accused from those who

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365. *Id.* at 131.

366. *Id.*

367. See Graeme Wood, *Hex Appeal: Witches are Overwhelming the Courts in the Central African Republic and That May Be a Good Thing*, ATLANTIC MAG. (June 2010), available at <http://www.theatlantic.com/magazine/archive/2010/06/hex-appeal/8103>.

368. *Id.* (internal quotation marks omitted).

369. See Witchcraft Act of 1957 § 4, 5 (2009) (Uganda).

370. See Witchcraft Suppression Act of 2006 § 98(4) (Zim.).

are not? How can the law establish guilt of witchcraft by plausible, objective evidence given that witchcraft is “undetectable by ordinary methods [and] is impossible to prove in any principled way”<sup>371</sup> Should proof be required that actual harm resulted from the acts in question, or simply that the victim was in fear of being harmed? What role should expert witnesses play, such as traditional healers or witchdoctors? Should evidence of possession of articles customarily used in witchcraft be probative? How can these be distinguished from articles used generally by traditional healers?

The question of how modern judges in Africa deal with witchcraft cases, and particularly, the question of evidence, is of fundamental importance if trials are to have any measure of fairness. The problem with witchcraft trials is that it may be impossible to establish guilt by objective proof.<sup>372</sup> Because casting a spell is usually done in secret, witchcraft is difficult to prove by use of direct or eyewitness evidence.<sup>373</sup>

Further, too much latitude in evidence can easily fuel false accusations of witchcraft.

Once familiar to westerners, who endured their own struggles to control witchcraft in an earlier era, the laws and standards are used by the courts to reduce the opportunistic use of witchcraft allegations, which may provoke further community violence. When courts loosen these standards, and especially when they allow spectral evidence, retaliatory practices tend to proliferate and the judiciary itself may be pressured to become a forum for pursuing witchcraft suspects. Anecdotal evidence of this pattern surfaced in Cameroon, where the law contained fewer evidentiary restrictions and a flood of witchcraft allegations disrupted communities.<sup>374</sup>

Before we explore evidentiary issues that pertain to witchcraft trials, it should be noted that a survey by a researcher of forty witchcraft cases failed to show any correlation between kinds of evidence presented and outcomes achieved.<sup>375</sup> It is also noteworthy that evidentiary standards in Africa are different than those in the West; hearsay may often be admissible, defendants often testify on their own behalf, in-court confessions of witchcraft are not uncommon, there are no jury trials, and community sentiment may tend to exert

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371. Tebbe, *supra* note 2, at 233.

372. *See id.* at 232. In customary law, the identity of the witch might be proven entirely with circumstantial evidence. For instance, if a swarm of locusts sweeps through the community and one man's land is spared, his less fortunate neighbors may accuse him of witchcraft. The mere fact that his plantation was spared is used as proof that he sent the swarm of locusts onto the neighbors' land. *See* LUCIEN LEVY-BRUHL, *PRIMITIVE MENTALITY* 398 (Lilian A. Clare trans., 1923).

373. *See* SANDERS, *supra* note 12, at 11.

374. Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 OHIO ST. J. CRIM. L. 64, 71 (2001).

375. *See* Tebbe, *supra* note 2, at 233.

psychological pressure on judges.<sup>376</sup>

### *1. Issue of Causal Efficacy of Witchcraft Practices*

Something that confounded colonial courts was the question of the effectiveness of witchcraft practices. A recurring problem was that there is no scientific evidence that performing an act of witchcraft has any physical result: “Based on a Western reading of what amounted to a punishable offense, colonial judges dismissed witchcraft accusations as being grounded on delusions which could not be proved by a cause-effect relationship. This refusal to integrate the local cosmology during criminal trials alienated the courts from these communities.”<sup>377</sup> Still, in Africa, people genuinely believe that witches cause harm, a causal nexus exists between rituals performed by witches and harm inflicted, and authorities should be responsive to their plight.

African witchcraft is no more a theory of the natural world than the Christian and Islamic dogma of Divine Providence is—what these three belief systems have in common is that they seek to articulate what is beyond empirical knowledge; but all may be pushed to a point where they imply the possibility of miracles (i.e., incidental departures from physical laws).<sup>378</sup>

Some witchcraft laws, including those of Uganda and Zimbabwe, presume the reality of such practices and therefore it is unnecessary to prove causal efficacy. Rather, witchcraft is a crime of intention—an intention to do harm—without the need for establishing a causal nexus between the action and the harm purportedly done.

### *2. Evidence of Threats to the Defendant*

Evidence of threatening remarks, however vague, may be admitted into evidence. Such evidence may include “statements by the alleged witch threatening the complainant,” and if applicable, “proof that the harm occurred as threatened.”<sup>379</sup> In Uganda, an act of witchcraft can be merely a verbal threat.<sup>380</sup>

A problem with this approach is that “comments she has made, possibly with the most innocent of intentions, become reinterpreted as threats.”<sup>381</sup>

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376. See Jennifer Dumin, *Superstition-Based Injustice in Africa and the United States: The Use of Provocation as a Defense for Killing Witches and Homosexuals*, 21 WIS. WOMEN'S L.J. 145, 159 (2006).

377. Fisiy, *supra* note 12, at 148.

378. Wim van Binsbergen, *Witchcraft in Modern Africa*, in WITCHCRAFT DIALOGUES 215 (George Clement Bond & Diane M. Ciekawy eds., 2001).

379. Ludsin, *supra* note 20, at 85.

380. See Witchcraft Act of 1957 ch. 125, § 24 (2009) (Uganda).

381. SANDERS, *supra* note 12, at 11.

Threatening utterances—such as “you shall see!”—were rejected in evidence by colonial courts in the absence of more tangible proof.<sup>382</sup> Colonial courts tended to hold that “the threats must be physical not metaphysical. The threat must be such that a reasonable Englishman would recognise, not the sort which would seem frightening only to an African seeped in the culture of the bush.”<sup>383</sup>

### 3. *Self-Incriminating Statements*

A confession of being a witch—in or out of court—or of having cast a hex that produced harm in a given case, is considered admissible evidence to establish guilt.<sup>384</sup> Confessions are surprisingly common.

The moral pressure to confess is enormous. For the accused, the choice is between outlawry and reintegration into the community. Not surprisingly, most do what is wanted. Whether and in what sense the alleged witches also believe their confessions is another and difficult question which need not detain us here.<sup>385</sup>

While confession evidence has a unique power—“confessions are more prejudicial than other powerful forms of evidence, such as eyewitness identifications and character testimony”—false confessions are a disturbing reality.<sup>386</sup> False confessions, even in the absence of coercive interrogations, might be motivated by “a morbid desire for notoriety . . . [and] the unconscious need to expiate guilt over previous transgressions,” or may be a product of mental illness, which renders an individual “unable to distinguish between fantasy and reality.”<sup>387</sup> In-court confessions are also not uncommon in witchcraft cases.<sup>388</sup> Perhaps such individuals are emotionally unstable, or perhaps what motivates a confession is to make others fear them, “to build up a reputation as powerful individuals,” or to enhance their status in the community.<sup>389</sup>

### 4. *Reputation Evidence*

Reputation evidence can be very damaging to the defendant’s case. In Uganda, the prosecution of a suspected witch can be bolstered by testimony “to

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382. See Fisiy, *supra* note 12, at 148.

383. Seidman, *supra* note 144, at 1142.

384. See Fisiy, *supra* note 12, at 154; see also Hund, *supra* note 10, at 68.

385. Willis, *supra* note 363, at 130.

386. Eugene R. Milhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 8 (2008).

387. THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 76-77 (Saul M. Kassir & Lawrence S. Wrightsman eds., 1985).

388. See Chavunduka, *supra* note 163, at 138.

389. *Id.*

show the reputation of that person as a witch.”<sup>390</sup> Reputation for evidentiary purposes does not mean “a rumour or fame spread by gossip, but that reputation which springs from acknowledgment, conduct and life.”<sup>391</sup> Sometimes entire families are believed to be witches, so that

young men are told not to court certain girls because either the girl herself is believed to be a witch or her close relatives are; it is also said that people should never accept food, a particularly social commodity, from certain families because they are thought to be witches and may have mixed the food with some form of *muti*.<sup>392</sup>

Unfortunately, sometimes evidence will not specifically pertain to reputation as a witch, but might consist of vague testimony, for example, that the accused “behaves in what is considered to be an odd manner.”<sup>393</sup>

#### 5. Possession of Articles of Witchcraft

Important circumstantial evidence might consist of the “possession of charms” or “poison or other witchcraft medicine in the home of the alleged witch, or evidence of witchcraft charms or medicines found on the complainant’s property.”<sup>394</sup>

#### 6. Expert Testimony

Expert testimony, by way of witchdoctors and other traditional healers, may adduce that the actions of the accused or implements seized from the defendant and introduced into evidence are customarily associated with witchcraft rituals.

In Uganda, for example, evidence of witchcraft may be provided by expert witnesses—such as traditional healers—who have long been subject to regulation in that country.<sup>395</sup> Similarly, in Cameroon, which has long been conducting trials of suspected witches, evidence, at times, has consisted largely of the uncorroborated testimony of traditional healers.<sup>396</sup> In Cameroon, expert testimony of witchdoctors plays “a crucial part in the prosecution since only they have the expertise to ‘prove’ the witches’ guilt,”<sup>397</sup> and their testimony is

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390. See Witchcraft Act of 1957 §§ 4, 5 (2009) (Uganda); see also MALAWI LAW COMM’N, WITCHCRAFT ACT REVIEW PROGRAMME ISSUES PAPER 11 (2009), available at [http://www.lawcom.mw/docs/ip\\_witchcraft.pdf](http://www.lawcom.mw/docs/ip_witchcraft.pdf).

391. *Uganda v. Oyuko*, (1973) [1973] UGHC 35 (Uganda High Ct.).

392. See PELGRIM, *supra* note 203, at 55.

393. See SANDERS, *supra* note 12, at 10.

394. WITCHCRAFT DIALOGUES 128 (George Clement Bond & Diane M. Ciekawy eds., 2001); Ludsin, *supra* note 20, at 85.

395. See Tebbe, *supra* note 2, at 189.

396. See *id.* at 232.

397. Fisiy & Geschiere, *supra* note 132, at 137.

“taken very seriously by the judges.”<sup>398</sup>

It should be noted, however, that during the colonial era the testimony of witchdoctors to establish facts during witchcraft trials “was rather ignored by colonial judges. Witch-doctors were instead prosecuted for fomenting false accusations of witchcraft; they were never seen as providing expert evidence in court.”<sup>399</sup>

Zimbabwe law also allows the judge to hear testimony from “any person who, in the opinion of the court, is suitably qualified . . . on account of his or her knowledge” to provide testimony as to whether acts that are subject to the charge are commonly associated with witchcraft.<sup>400</sup>

### 7. Spectral Evidence

During the Salem Witch Trials in Massachusetts, accusations of witchcraft were based largely on spectral evidence.<sup>401</sup> Spectral evidence consists of testimony of visions, supernatural visitations, appearances of the witch in dreams, or other testimony about a vision that identifies the accused as a witch.<sup>402</sup> In the sixteenth and seventeenth centuries, spectral evidence, at times, involved testimony of children, who were “used for ‘crying out’ witches, and their accusations were taken as gospel by priests, judges, and respected members of the community.”<sup>403</sup>

Today, spectral evidence is disregarded as inherently unreliable because it is entirely intangible and metaphysical in nature, and it cannot be corroborated, for the vision is seen only by the person who might testify about it.<sup>404</sup> Other people might have been present during the vision, but they do not have access to the vision.<sup>405</sup> Finally, spectral evidence may easily be abused by someone who has a grudge against the accused.<sup>406</sup>

In Africa, one who suspects witchcraft might consult a traditional healer or “witch finder” who will utilize divination to identify the source of the problem and identify the suspected witch. However, except in Uganda, such practices are generally illegal so that the testimony of a witch finder would presumably be inadmissible.<sup>407</sup>

Conducting witchcraft trials is fraught with problems—particularly with

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398. *Id.* at 135.

399. Fisiy, *supra* note 12, at 150-51.

400. Criminal Law (Codification and Reform) Act ch. 5, part VI, §98(4) (2005) (Zim.).

401. *See* Diwan, *supra* note 11, at 359.

402. *See id.* at 359-60.

403. WITCHCRAFT CONFESSIONS & ACCUSATIONS 161 (Mary Douglas ed., 1970).

404. *See* Widner, *supra* note 123, at 71; Diwan, *supra* note 11, at 360.

405. *See* Diwan, *supra* note 11, at 360.

406. *See* Widner, *supra* note 123, at 71 (recognizing increase in retaliation tactics when courts allow spectral evidence).

407. *See, e.g.*, Witchcraft Act of 1957 § 99 (2009) (Uganda); Criminal Law (Codification and Reform) Act ch. 5, part VI, § 98(4) (2005) (Zim.).

regards to the type and scope of evidence admitted—but the paucity of prosecutions seems to be the main factor that contributes to witch hunts and witch killings in the first place. Efforts by law enforcement to bring suspects to trial “would do a great deal to make citizens feel secure, thereby strengthening the legitimacy of the government against the criticism that it is not doing enough to protect the populace against all forms of violence.”<sup>408</sup>

An alternate solution might be to create special witchcraft courts to hear such cases.<sup>409</sup> These courts would have the power to impose fines or other penalties for witchcraft practices as well as to punish those who make groundless accusations.<sup>410</sup> Cases involving witchcraft violence would continue to be handled by the criminal courts. Another alternative might be to return to customary practices by which chiefs were allowed to adjudicate cases of witchcraft, although in pre-colonial times the chief was allowed to impose the death sentence on convicted witches, or enslavement.<sup>411</sup>

Today it is not uncommon for chiefs to conduct witchcraft inquiries and impose sentences surreptitiously and without legal authority; in some instances this has resulted in mob violence.<sup>412</sup> But it may be worthwhile to establish a legal protocol for chiefs to observe, and authorize them to conduct hearings with a view towards reconciling the parties, rehabilitating the offender, or ordering compensation for damages.

#### IX. THE PROBLEM OF WITCHCRAFT ACCUSATIONS AGAINST CHILDREN

Today, witchcraft accusations are often made against society’s most vulnerable and innocent members—children. The number of children accused of witchcraft in Africa is on the rise, as are the number of children enduring extreme physical or psychological violence as a result.<sup>413</sup>

A report from UNICEF’s Regional Office for West and Central Africa, entitled “Children Accused of Witchcraft,” utilized anthropological studies to shed light on accusations against children. The report states, “Whereas in the past, elderly people, particularly women, were accused, these days the number of children accused of witchcraft is increasing.”<sup>414</sup> The most vulnerable children are orphans, who exist in large numbers due to the considerable loss of life in civil wars and coups d’etat.<sup>415</sup> Also vulnerable are children with physical or mental disabilities or physical abnormalities, those with a physical illness such as epilepsy or tuberculosis, gifted children, and those showing any

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408. See Tebbe, *supra* note 2, at 234.

409. See Ludsins, *supra* note 20, at 104.

410. *Id.*

411. See Luongo, *supra* note 39, at 41; Mesaki, *supra* note 120, at 104.

412. See *supra* Part VIII.B.

413. See UNICEF REPORT, *supra* note 18, at 5.

414. *Id.* at 2.

415. *Id.*

unusual behavior.<sup>416</sup> Children who are a product of abnormal or premature birth are vulnerable to witchcraft accusations.<sup>417</sup> A final target group consists of children with albinism, discussed in Part X below, who are killed to harvest body parts for magical potions.<sup>418</sup>

As touched upon in Part V above, it is not uncommon for family pastors to accuse children of being a witch.<sup>419</sup> Local pastors will make such accusations based on “mystical revelations,”—spectral evidence.<sup>420</sup> The preachers may “blame the failure of their prophecies on interference by a child sorcerer,” or may blame a child for a family’s misfortunes.<sup>421</sup> Sometimes, in family structures in which polygamy is common, accusations of witchcraft might come from a second wife who is seeking to get rid of another wife’s child.<sup>422</sup> Unwanted children might be suspected of witchcraft if they behave in any way that is disruptive, such as bed wetting or hyperactivity.<sup>423</sup>

Children accused of witchcraft are killed, banished, emotionally harmed, or maimed, according to the UNICEF report.<sup>424</sup> Some children are killed not because of witchcraft accusations, but because they are believed to be possessed by evil spirits. Bishop Sunday Ulup-Aya, a Nigerian witchdoctor, confessed on a television documentary that he had killed over 100 children he believed were possessed by evil spirits.<sup>425</sup>

It is theorized that poverty is a main factor that has fueled the rise of witchcraft accusations against children, for as a result of accusations, many such children will leave the household and fend for themselves, thus relieving parents of responsibilities to provide for them.<sup>426</sup>

Witchcraft accusations target mostly boys.<sup>427</sup> In the Congo alone it is reported that thousands of children alleged to be witches have been forced out of their homes to live in the streets.<sup>428</sup> Witchcraft accusations against children

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416. *Id.*

417. See UNICEF REPORT, *supra* note 18, at 2.

418. *Id.*

419. Katharine Houreld, *African Children Denounced as “Witches” by Christian Pastors*, HUFFINGTON POST (Oct. 18, 2009 12:01 AM), [http://www.huffingtonpost.com/2009/10/18/african-children-denounce\\_n\\_324943.html](http://www.huffingtonpost.com/2009/10/18/african-children-denounce_n_324943.html).

420. Naomi Cahn, *Poor Children: Child “Witches” and Child Soldiers in Sub-Saharan Africa*, 3 OHIO ST. J. CRIM. L. 413, 422-23 (2006).

421. *Id.* at 423.

422. *Id.*

423. *Id.*

424. UNICEF REPORT, *supra* note 18, at 1.

425. Ozioma Uabukoh & Bernard Tolani Dada, *Nigeria: Akwa Ibom “Child-Witches” – the Man Behind the Abuse*, ALLAFRICA.COM (Jan. 31, 2009), <http://allafrica.com/stories/printable/200902020381.html>; see also Okey Ndibe, *Nigeria’s Savaged Children*, SAHARA REP. (Jan. 1, 2009), <http://www.saharareporters.com/column/nigeria%E2%80%99s-savaged-children-0>.

426. UNICEF REPORT, *supra* note 18, at 1.

427. Kofi Akosah-Sarpong, *Sierra Leone: Battling Child Witchcraft Accusation*, ALLAFRICA.COM (Aug. 2, 2010), <http://allafrica.com/stories/printable/201008030139.html>.

428. Fabakary B. Ceesay, *Gambia: Country’s Witch Hunt Activity Brought to African Commission*,

are not confined to Africa. Today in the United Kingdom it is not unknown for children to be accused of witchcraft based on the alleged use of supernatural powers to control people or events:

Once made these accusations can be used to justify serious physical, emotional or sexual abuse, frequently in the name of “exorcising” the child. In the few cases researchers have analyzed, the perpetrators tend to be carers—often not the natural parent—and the abuse generally takes place in the home.<sup>429</sup>

There were seventy-two reported cases of witchcraft accusation that led to child abuse between 2000 and 2006 in the United Kingdom, but with the increase of immigrants from Africa it is feared that many more cases occur but fail to get reported to the authorities.<sup>430</sup> There are daily news accounts in the African media of children being accused of witchcraft. For example: a ten-year-old boy in the Congo was accused of witchcraft by his parents after his brother got sick. He was forced by a pastor to drink pigeon’s blood and oil, and for three days was denied food and was beaten.<sup>431</sup>

In another instance, a married couple in Nigeria allegedly killed their two-year-old son by feeding him a plate of poisoned rice. This occurred after the parents consulted a “prophet” at a local church, who declared that their son was a witch. Police sought the fleeing prophet with a view towards charging him in complicity for murder.<sup>432</sup> In Uganda, a father was found guilty and imprisoned for conspiring to murder his son for \$2000 that he collected from a wealthy man for the head of his son.<sup>433</sup>

In Nigeria, witchcraft accusations have been leveled against hundreds of children in recent years.<sup>434</sup> For instance, in response to accusations of a local pastor, the uncle of a seven-year-old boy, Godwin Okon, locked him and his grandmother in a room with the embalmed body of the boy’s mother, accusing the pair of using witchcraft to kill her.<sup>435</sup>

As punishment, Godwin was told to eat his mother’s corpse; the belief being

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ALLAFRICA.COM (Nov. 17, 2009), <http://allafrica.com/stories/printable/200911180612.html>.

429. Rowenna Davis, *How Some African Cultural Beliefs Can Lead to Child Abuse*, COMMUNITY CARE (Jan. 12, 2010), <http://www.communitycare.co.uk/Articles/2010/12/01/113531/the-challenge-of-witchcraft-to-child-protection-social-services.htm>.

430. *See id.*

431. Katrina Manson, *Congo’s Children Battle Witchcraft Accusations*, REUTERS, July 22, 2010, available at <http://www.reuters.com/article/2010/07/22/us-congo-democratic-witches-idUSTRE66L2TB20100722>.

432. Gabriel Engholase, *Nigeria: Man, 32, Kills Two-Year-Old Son Over Witchcraft*, ALLAFRICA.COM (Nov. 20, 2009), <http://allafrica.com/stories/printable/200911200434.html>.

433. *See* Manuel-Logan, *supra* note 222.

434. *See* Jonathan Clayton, *More Children Accused of Witchcraft as AIDS and Poverty Take Their Toll*, TIMES (London), May 14, 2010, <http://www.timesonline.co.uk/tol/news/world/africa/article7125914.ece>.

435. *Id.*

that if a demon eats the flesh of its victim, it will die itself. He refused—prompting his uncle to enter the room and physically force the boy’s head into his mother’s body. Still he refused to eat, so he was beaten and burnt.<sup>436</sup>

He was rescued by the police and taken to the Child Rights and Rehabilitation Network, a British-backed organization in Nigeria, where 200 other children who have suffered similar experiences are presently housed.<sup>437</sup>

Witchcraft accusations against children are a phenomenon seen in Britain as well.<sup>438</sup> There are dozens of cases that come to light every year involving burnings, beatings, and murder.<sup>439</sup> Child protection authorities claim this is just the tip of the iceberg.<sup>440</sup> In Britain there are over 4000 African churches, and the growing problem of these accusations against children seems to be fueled, at least in part, by rogue pastors who seek large sums of money for “deliverance.”<sup>441</sup>

#### X. THE PROBLEM OF “MEDICINE MURDER” OF ALBINOS

Witchcraft practices include marketing of magical concoctions to ensure good luck, particularly with regards to economic advantages, and occult shops around the world trade in such products.<sup>442</sup> But in Africa, the preparation of such concoctions often entails the pervasive practice of killing people, particularly albino children, to acquire body parts and organs that are sold by underground organ hunters, and then used as ingredients for the potions.<sup>443</sup> Killing for body parts was rare in the past, but is now stimulated by market forces.<sup>444</sup> Each body part has a unique application in the occult marketplace. For example, “A victim’s hands are ‘symbols of possession.’ Eyes imply vision, genitals imply fertility.”<sup>445</sup>

Parts of the body may be used to secure certain advantages from the ancestors. A skull may, for instance, be built into the foundation of a new building to ensure a good business, or a brew containing human parts may be

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436. *Id.*

437. *Id.*

438. Jonathan Owen, *Rogue Preachers Use “Witch” Scares to Abuse Children*, THE INDEPENDENT (London), July 25, 2010, <http://www.independent.co.uk/news/uk/crime/rogue-preachers-use-witch-scares-to-abuse-children-2034998.html>.

439. *Id.*

440. *Id.*

441. *Id.*

442. Jean Comaroff & John L. Comaroff, *Occult Economies and the Violence of Abstraction: Notes from the South African Postcolony*, 26 AM. ETHNOLOGIST 279, 290 (1999).

443. *Uganda: Our Biggest Fear Is Living, Albinos Cry*, ALLAFRICA.COM (Aug. 22, 2010), <http://allafrica.com/stories/printable/201008210129.html>.

444. See Comaroff, *supra* note 442, at 290.

445. *Id.*

buried where it will ensure a good harvest.<sup>446</sup> In the newspapers there are frequent “horrifying accounts of mutilated remains” and publication of the going rate for various body parts sold by witchdoctors.<sup>447</sup>

Sometimes the practice is called muti-murder, or “medicine murder.”

It is the practice of killing someone seen as successful and using his or her body parts in a medicine to bring power or luck to the killer. Horrifically, the participants remove the organs and body parts from the victim while he or she is alive in order “to keep as much as possible of his/her vital energy.”<sup>448</sup>

According to the South Africa Police Service, “there is a belief that body parts taken from live victims are rendered more portent by their screams, which means victims must be subjected to pain before death.”<sup>449</sup> And human skin is one of the most sought-after organs by ritual killers in Malawi, Zambia, Mozambique, and South Africa.<sup>450</sup> In 2008, more than 300 cases of ritual-type murders were reported to Ugandan police, of which eighteen made it into the courts.<sup>451</sup> Some of the suspects were parents and relatives of child victims. It is theorized that poverty, food shortages, famine, and unemployment contribute to the prevalence of these crimes.<sup>452</sup>

Albinos, and particularly albino children, are especially targeted for this insidious practice, most often in Ghana, Nigeria, South Africa, Tanzania, and Zambia.<sup>453</sup> Body parts of albinos, including the skin, tongue, hands, ears, skull, heart, and genital organs, are thought to have special magical powers and are used in potions sold in the occult marketplace.<sup>454</sup> Limbs and other body parts are sold as “charms.”<sup>455</sup>

All children are at risk in Africa for kidnapping and grisly mutilations, but albino children are the most vulnerable group, as the organs and body parts of these individuals are believed to possess particularly potent magical powers.<sup>456</sup> Their body parts are thought to have supernatural properties that can “make people wealthy overnight or enable fishermen to catch more fish.”<sup>457</sup> Some

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446. *Id.*

447. *Id.*

448. Ludsins, *supra* note 20, at 77.

449. *Uganda: Our Biggest Fear Is Living, Albinos Cry*, *supra* note 445.

450. *Id.*

451. *Id.*

452. *Id.*

453. Paul Redfern, *Africa: Rising Number of Children Accused of “Crime of Witchcraft”*, ALLAFRICA.COM (July 26, 2010), <http://allafrica.com/stories/printable/201007261355.html>.

454. *Id.*

455. Jeffrey Gettleman, *Albinos, Long Shunned, Face Threat in Tanzania*, N.Y. TIMES, June 8, 2008, <http://www.nytimes.com/2008/06/08/world/africa/08albino.html>; *Burundi: Albino Boy Killed for Parts*, N.Y. TIMES, Jan. 3, 2009, [http://www.nytimes.com/2009/01/03/world/africa/03briefs-ALBINOBOYKIL\\_BRF.html](http://www.nytimes.com/2009/01/03/world/africa/03briefs-ALBINOBOYKIL_BRF.html).

456. Redfern, *supra* note 455.

457. Ray Naluyaga, *Tanzania: Albino Killings – Obama Asked to Put Pressure on Kikwete*,

fishermen weave albino hairs into their nets, believing this will enhance their catch.<sup>458</sup>

In Tanzania, witchdoctors are known to sell various body parts of albinos.<sup>459</sup> Criminals there, in association with witchdoctors, were reportedly responsible for killing at least thirty-five albinos in 2008.<sup>460</sup> Recently, two men in Mozambique were sentenced to twenty years' imprisonment for killing a twelve-year-old boy: They seized the boy, held him down and cut out his eyes and his penis, then left him for dead. They sold the organs to a witchdoctor for about \$650. The boy survived and helped police find the perpetrators.<sup>461</sup> In another case, an 8-year-old girl's body was found near her home with her tongue cut out, which police explained as a ritual killing for body parts used to bring health or wealth.<sup>462</sup> In Tanzania, a 17-year-old albino girl was eating dinner with her family when two men invaded their hut with knives, quickly hacked up the girl and carried away limbs.<sup>463</sup> The fear and pressure on parents of albinos not infrequently prompts them to abandon their children, who in turn live on the streets.<sup>464</sup> The President of the World Association for the Defense and Solidarity of Albinos (Asmodisa) states: "People think we are magical creatures, that we've come back from the dead as a punishment by God for something we did in our previous life."<sup>465</sup>

In Uganda, the problem of child sacrifices is so alarming that recently the government established an Anti-Human Sacrifice Taskforce.<sup>466</sup> Posters at police stations show a sinister stranger luring young girls into a car with a caption saying "Prevent Child Sacrifice."<sup>467</sup> In 2009, thirty people were charged with ritual killing in Uganda, although police corruption and the country's lethargic courts are factors that make convictions a dubious matter.<sup>468</sup> Also in 2009, the United States spent \$500,000 to train 2000 Ugandan police to investigate human trafficking, including ritual killings.<sup>469</sup> It has been suggested that the problem is exacerbated by violent and popular Nigerian films that depict a common theme of families reaping fortunes after sacrificing

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ALLAFRICA.COM (Feb. 3, 2010), <http://allafrica.com/stories/printable/201002030866.html>.

458. See Gettleman, *supra* note 455; France-Presse, *supra* note 455.

459. See Gettleman, *supra* note 455; France-Presse, *supra* note 455.

460. *Albino Boy Killed for Parts*, *supra* note 455.

461. *Mozambique: 20 Year Sentence for Mutilation*, ALLAFRICA.COM (Oct. 14, 2010), <http://allafrica.com/stories/printable/201010140930.html>.

462. *Ritual Sacrifice of Children on Rise in Uganda*, CBS NEWS (Apr. 5, 2010), <http://www.cbsnews.com/stories/2010/04/05/world/main6364466.shtml>.

463. See Gettleman, *supra* note 455.

464. See Redfern, *supra* note 453.

465. *Id.* (citations omitted).

466. *Ritual Sacrifice of Children on Rise in Uganda*, *supra* note 462.

467. *Id.*

468. *Id.*

469. *Id.*

humans.<sup>470</sup>

The ongoing problems of children being accused of witchcraft and killings associated with the marketing of body parts underscore the concern that witchcraft is a dangerous reality that needs to be “controlled and if possible eradicated in one way or another.”<sup>471</sup> Poverty seems to be a key factor that contributes to children being targeted with witchcraft accusations. Witchdoctors seem to fuel the market for body parts, coupled with the already widespread belief in the efficacy of witchcraft potions and charms.

## XI. CONCLUSION

Witchcraft associated crimes admit of no simple solution, yet the existing state of affairs is clearly unsatisfactory. Understanding contemporary Africa means not only understanding the history, evolution, and rapid modernization of the region, but also requires a respect of its mystical dimension. Modernity and the mystical realm coexist in contemporary Africa, and witchcraft is a pervasive reality, both feared as the cause of misfortune and sought after for success, wealth, and other advantages in life.

Throughout history we have seen numerous examples of the tension between traditional customs and the pressure to adopt new ways. No cultural elements are so fully settled that they are beyond change. Cultures can and do change within themselves, though it may take generations for people to adopt and become accustomed to new norms.

Each population’s worldview, produced by years of accumulated experiences, is consciously or unconsciously transmitted to the next generation. Quite often, the explanation for certain customs practiced in a culture is elusive. There may be no rhyme or reason to certain long-standing beliefs other than myths, legends, folklore, superstitions, or even ignorance of a people. Witchcraft beliefs are of ancient origin, defy logical explanation, and seem to have a powerful emotional grip on the psyche of millions of Africans. Perhaps witchcraft is related to something real in human experience because it has flourished and been feared in all parts of the world, throughout history. Even if witchcraft is a pagan superstition, it is a real force in the life of Africans and requires precautions, responses, protections, and, in some cases, intervention from the authorities.

While in past decades it was predicted that witchcraft would decline or disappear with the rise of economic development, education, and the infusion of Christianity and Islam, today “fear of enchantment is a primary source of personal insecurity for many Africans.”<sup>472</sup>

Anthropologists have suggested that the belief in witchcraft in Africa

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470. *Ritual Sacrifice of Children on Rise in Uganda*, *supra* note 462.

471. WITCHCRAFT IN CONTEMPORARY TANZANIA 9 (Ray Abrahams ed., 1994).

472. See Tebbe, *supra* note 2, at 219.

reflects “people’s worries about globalization’s threatening encroachment on intimate spheres of life,”<sup>473</sup> and that witchcraft has “become a symptom of the ways in which the values attributed to capitalist accumulation and the possession of material goods generate friction in the local moral economy.”<sup>474</sup>

Education does not appear to be a buffer to widespread witchcraft beliefs in Africa. The belief in witchcraft permeates all socio-economic classes in Africa, regardless of educational levels.<sup>475</sup> Despite a Western education, many public officials are very much the product of their villages where people believe in witchcraft.<sup>476</sup>

The fear of being bewitched make most people fear being seen to prosper in business and to be able to educate their children up to a higher level. Parents with educated children often advise them to buy a piece of land far from home for fear that they might be bewitched if they develop their family land. Other parents refuse to have a decent house built by their children for fear that this might endanger their live [sic].<sup>477</sup>

Those who are not convinced of its reality are nonetheless disturbed by the potential for violence associated with witch hunts, while perpetrators of witchcraft violence believe they are providing a public service.<sup>478</sup> Most Africans regard attacks against witches as “normal events of everyday life.”<sup>479</sup> Moreover, a majority of black African police believe in witchcraft and are hence reluctant to intervene in cases of witch-hunt violence.<sup>480</sup> The advent of legislation banning witchcraft accusations has arguably “increased fear and tension in the villages.”<sup>481</sup> Witchcraft beliefs are socially embedded in Africa and it is extremely difficult to alter these beliefs or to suppress witchcraft violence.<sup>482</sup>

Sometimes certain customs might, objectively speaking, be harmful to the well-being of a society. Witchcraft makes people distrustful and fearful of their own neighbors and family members. The urban elite are afraid to return to their villages if they have “failed to redistribute their wealth or have been unfair in the way they share with their relations,” lest witchcraft be leveled against

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473. Peter Geschiere, *Globalization and the Power of Indeterminate Meaning: Witchcraft and Spirit Cults in Africa and East Asia*, 29 DEV. & CHANGE 811, 813 n.5 (1998).

474. Jane Parish, *From the Body to the Wallet: Conceptualizing Akan Witchcraft at Home and Abroad*, 6 J. ROYAL ANTHROPOLOGICAL INST. 487, 488 (2000).

475. Kgatla, *supra* note 256, at 274.

476. See Fisiy, *supra* note 12, at 151.

477. Nyaga, *supra* note 33, at 258.

478. WITCHCRAFT IN CONTEMPORARY TANZANIA, *supra* note 471, at 9.

479. See Comaraoff, *supra* note 442, at 285 (citations omitted).

480. *Id.*

481. WITCHCRAFT IN CONTEMPORARY TANZANIA, *supra* note 471, at 18-19.

482. Ludsin, *supra* note 20, at 102.

them by less fortunate kin.<sup>483</sup> Political leaders argue that witchcraft is “the main barrier to development” and official projects.<sup>484</sup> Witchcraft fuels violence and killing, outrageous accusations against children, and the marketing of body parts and organs.

Many believe that the persistence of witchcraft is associated with poverty: “[T]he incidence of witchcraft is closely associated with poverty and therefore poverty reduction will reduce the incidence of witchcraft.”<sup>485</sup> The eradication of poverty may take generations.

Witchcraft violence is not decreasing, but increasing compared to pre- and early colonial times “when less violent forms of punishment for witches (e.g. ransom, enforced migration, etc.) were applied.”<sup>486</sup> Witch hunts persist despite the efforts of authorities to prosecute perpetrators for murder.<sup>487</sup> Even tribal chiefs, “formerly considered to be the guardians of customary law, are now at pains to cope with the situation because of considerable changes in the incidence, content, and form of witchcraft accusations over time.”<sup>488</sup>

The witchcraft suppression laws have failed to decrease witchcraft related offenses, for customary courts no longer had jurisdiction, witchcraft accusations became criminalized, and the lack of enforcement by the authorities induced people to take the law into their own hands.<sup>489</sup>

[P]eople became dissatisfied. They felt that the law was protecting the witches. Witches were not tried by the traditional courts or by the western law. So the people felt that witches became free people, that they could do whatever they wanted. . . . That is why people started taking the law into their own hands.<sup>490</sup>

If people are reluctant to report suspected acts of witchcraft to the authorities for fear of being prosecuted for making such accusations, then to whom can they turn?

For the present, it seems that in order to curtail witchcraft violence the authorities need to adopt greater enforcement efforts in response to witchcraft accusations and to crack down on witchdoctors and others who trade “charms” and potions made of body parts. Conducting witchcraft trials could help reduce the amount of witchcraft violence, for anxiety may well be appeased if people know that their fears are no longer being ignored.

In South Africa, intellectuals have “called for witches to be tried in state

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483. Fisiy, *supra* note 12, at 146.

484. Fisiy & Geschiere, *supra* note 132, at 147.

485. Mesaki, *supra* note 120, at 137.

486. Kohnert, *supra* note 247.

487. See Fisiy, *supra* note 12, at 158.

488. Kohnert, *supra* note 247, at 45.

489. PELGRIM, *supra* note 203, at 97.

490. *Id.* (quoting South African detective inspector).

criminal courts.”<sup>491</sup> Trials under witchcraft suppression laws are authorized, and the laws of some jurisdictions, most notably Zimbabwe and Uganda, offer an evidentiary approach that allows expert testimony to help the judge evaluate the actions of the defendant. Courts could give people falsely accused of witchcraft a chance to clear their names. Fines could be imposed on people making reckless or self-serving witchcraft accusations and on those found guilty of actually practicing witchcraft.<sup>492</sup>

Courts that try witchcraft cases should be familiar with the cultural, social, and psychological aspects of witchcraft. It is helpful to examine the events that led to the accusation and to attempt to solve the social problems involved. There may be tensions in the household, village, or community that underlie the accusation. The tension might be a conflict over property succession, misunderstandings, social improprieties, or other troubles that can be identified and resolved so as to achieve reconciliation of the disputing parties.

If witchcraft trials are not a viable solution, then the parties should be required to go through mediation or other alternative forms of dispute resolution.<sup>493</sup> Efforts should be made to reconcile the parties and to rehabilitate the offender, who may well have terrorized a number of people in the community. Imposing jail time may have the disadvantage of fostering more hard feelings and could fuel more witchcraft attacks when the offender is released. Moreover, prison is “precisely the place where people are supposed to learn new secrets from other prisoners. Hence, when they are released, they will probably be even more dangerous witches than before.”<sup>494</sup>

As we have seen, the witchcraft violence also involves accusations against children, ritualized murder of albinos, and trafficking in body parts.<sup>495</sup> Accusations against children are often goaded by fringe preachers who profit from pointing the finger at children whom they insist are possessed by evil spirits. Children accused of being witches may suffer significant physical and emotional abuse and end up being neglected and homeless. There must be a concentrated effort, led by politicians, social workers, educators, and religious leaders to work with communities so as to discredit these invidious accusations. Witchdoctors associated with “medicine murder” must be brought to justice.

The ineffectiveness of witchcraft suppression laws can be averted by stepped-up enforcement, and clearly the lack of enforcement has produced an untenable situation. When a community so vehemently and desperately tries to achieve its objectives through lawlessness, the law becomes a symbol of incapacity, of failure. It is possible that even if prosecutions succeed in abating witchcraft violence, witchcraft practices might well continue to flourish, for in

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491. Tebbe, *supra* note 2, at 231.

492. Hund, *supra* note 10, at 81.

493. Tebbe, *supra* note 2, at 132.

494. Fisiy & Geschiere, *supra* note 132, at 153.

495. Kohnert, *supra* note 247, at 36.

everyday life, “[f]rom urban to rural, the elite to peasants, the rich to the poor, witchcraft remains an idiom through which life is experienced and acted upon.”<sup>496</sup>

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496. Mesaki, *supra* note 120, at 132.