



Discussion Paper 139

**THE REVIEW OF THE WITCHCRAFT SUPPRESSION  
ACT 3 OF 1957**

Project 135

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## INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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An advisory committee on the review of the Witchcraft Suppression Act was responsible for this project. The project leader responsible for the project is Professor Marita Carnelley (University of KwaZulu Natal), SALRC Commissioner. The members of the committee are:

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The researcher allocated to this project, who may be contacted for further information, is Ms Jennifer Joni.

## PREFACE

This discussion paper has been prepared to serve as a basis for the Commission's deliberations, to elicit responses and suggestions from the relevant stakeholders, and to disseminate information about the review of the Witchcraft Suppression Act to the general public. Given these purposes, this paper does not contain clearly defined recommendations for law reform. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

Respondents are requested to submit **written** comments, representations or requests to the Commission by **30 April 2016** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked "Confidential". Respondents should be aware that the Commission may in any event be required, under the Promotion of Access to Information Act 2 of 2000, to release information contained in representations.

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*S v Phahlane* [2005] JOL 14525 (T).

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## **LEGISLATION**

Adjustment of Fines Act 101 of 1991

Constitution of the Republic of South Africa Act, 1996

Criminal Law (Sentencing) Amendment Act 38 of 2007

Human Tissue Act 65 of 1983

Mpumalanga Witchcraft Suppression Bill 2007

Traditional Health Practitioners Act 22 of 2007

Witchcraft Suppression Act 3 of 1957

Witchcraft Suppression Amendment Act 50 of 1970

Witchcraft Suppression Amendment Act 33 of 1997

## **CONVENTIONS**

Convention on Civil and Political Rights (1966)

Universal Declaration of Human Rights (1948)

**LIST OF RESPONDENTS:**

1. SA Pagan Rights Alliance;
2. Traditional Healers Association;
3. SA Pagan Council;
4. Commission for Gender Equality;
5. Dr Wallace of the University of KwaZulu Natal;
6. Women's Legal Centre; and
7. South Africa Police Service.

# CHAPTER 1

## INTRODUCTION

1.1 This discussion paper follows the publication for comment, on 9 September 2014, of an issue paper,<sup>1</sup> which aimed at introducing the investigation to the public, initiating debate, and defining the legal reform necessary. The South African Law Reform Commission (SALRC or Commission) takes this opportunity to thank those who have responded to the call for comments and provided information relevant for the development of this discussion paper.

1.2 The discussion paper takes the investigation further by providing options for law reform that will hopefully lead to a concrete recommendation on the proposed review of the Witchcraft Suppression Act (the Act or WSA).<sup>2</sup> The paper clearly outlines the need for reform, submits for public comment preliminary conclusions reached by the Commission, and tests public opinion on solutions identified by the Commission.

1.3 The Commission is committed to consulting with all relevant stakeholders. In addition to publishing this discussion paper for public comment, we plan to engage with various stakeholders affected by the practice of witchcraft. After this process the Commission will prepare a report, which will contain its final recommendations and refined legislation if needed. The report will be submitted to the Minister of Justice and Correctional Services, who may then implement the Commission's recommendations by introducing the proposed draft legislation in Parliament.

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<sup>1</sup> South African Law Reform Commission, Issue Paper 29, 9 September 2014.

<sup>2</sup> Act 3 of 1957.

## A Origin and background of the investigation

1.4 In February 2007, the SALRC received a request from the South African Pagan Rights Alliance (SAPRA) to conduct an investigation into the constitutionality of the Act and the proposed Mpumalanga Witchcraft Suppression Bill which had been published in 2007.<sup>3</sup>

1.5 Around June or July 2007, after receipt of the above-mentioned request from SAPRA, other organisations such as the Traditional Healers Organisation (THO) and the South African Pagan Council (SAPC) were encouraged to join in and support the review. The review included the then newly-proposed Mpumalanga Witchcraft Suppression Bill. All three organisations made submissions to the SALRC for consideration in the review of the Act.

1.6 The SALRC convened a meeting of stakeholders on 4 September 2008, where the submission was discussed.<sup>4</sup> Following this meeting, on 14 November 2008, the Commission received a revised submission from the SAPC and a submission from the (THO), both requesting the inclusion of the investigation in the SALRC programme.

1.7 In its submission, SAPRA proposes the repeal of the Act on the ground that it criminalises witchcraft and self-defined witches such as Pagans. They further propose that there should be no legislation regulating witchcraft, and that misuse of witchcraft should be dealt with in terms of the common law. The basis of the proposal is that witchcraft is part of their recognised belief system and religion. The SAPRA submission notes that the Act is problematic as it does not provide a definition of “witch” or “witchcraft”. The SAPRA acknowledges that historically and in the South African context, the words “witch” and “witchcraft” have been used to describe evil or criminal practices associated with ritual

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<sup>3</sup> In about March 2014, subsequent to the release of the issue paper to a closed list of stakeholders, the SALRC received communication from the SAPRA pointing out some factual inaccuracies regarding the background to the investigation. These factual inaccuracies relate to the originator of the investigation and the identification of the issues that were brought to the fore and by which organisation. The SALRC is indebted to SAPRA for bringing to its attention the said inaccuracies and ensuring that the issues around the origin of the investigation are completely accurate.

<sup>4</sup> The SAPRA, the SAPC (represented by Lawyers for Human Rights (LHR)), and the THO attended the meeting. The invitation to the THO was extended by the SAPC.

killings and misfortune in general. They argue that members of SAPRA are self-defined witches and bear testimony to the existence of witchcraft, but that they are neither evil nor criminals. They further argue that the practice of witchcraft, magic and a plethora of associated traditions and practices are an expression of their religion and fall comfortably within the category of “Body, Mind and Soul” or “Esoteric” in all leading bookstores. It is their view that to the extent that the Act provides for the suppression of witchcraft, an expression of their religion, it contradicts several provisions contained in Chapter 2 of the Constitution.<sup>5</sup> By prohibiting the practice of witchcraft, such laws deny citizens their constitutional rights to religious freedom (section 15); the right to freedom of expression (section 16); equality (section 9); human dignity (section 10); freedom and security of the person (section 12); and their right to choose their trade, occupation or profession freely within South Africa (section 22).

1.8 In its submission, SAPC states that their national conference (held in 2007) voted in favour of abolishing the 1957 Witchcraft Act, and that SAPC objects to the principles outlined in the Act. At its 2007 national conference the organisation promoted what is hereinafter referred to as “the Melville mandate”. The motivation for the principles agreed on at the conference is based on the protection given to religious minorities by the Constitution.

1.9 The Melville mandate seeks to reclaim the terms “witch” and “witchcraft” so that they are understood within the modern Pagan context. The basis for this assertion is an acknowledgement that in South Africa “witch” and “witchcraft” have been used to describe “evil or criminal practices associated with ritual killings, human mutilations and misfortune in general”.<sup>6</sup> The mandate further seeks to initiate a legislative process that will prevent any further or future unfair discrimination and prejudice against Pagans who are self-defined witches.

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<sup>5</sup> Constitution of the Republic of South Africa, 1996.

<sup>6</sup> The assertion by SAPRA is supported by the definition of witchcraft that was provided by the Ralushai Commission and the definition contained in the Mpumalanga Witchcraft Suppression Bill. In the Ralushai Commission report, which is referred to in the issue paper, a “witch” is defined as a person who “through sheer malice, either consciously or subconsciously, employs magical means to inflict all manner of evil on their fellow human beings. They destroy property, bring disease or misfortune and cause death, often entirely without provocation to satisfy their inherent craving for evil doing.” The Mpumalanga Witchcraft Suppression Bill defines “witchcraft” as “...the secret use of muti, zombies, spells, spirits, magic powers, water, mixtures, etc, by any person with the purpose of causing harm, damage, sickness to others or their property.”

1.10 The SAPRA and SAPC allege that the Act prohibits Pagans from practising their religion, by providing that any person who (amongst other things) professes to use any supernatural power, or witchcraft, or professes knowledge of witchcraft, shall be guilty of an offence. They claim that the prohibition in the Act, as it relates to Pagans, violates “their constitutional rights to religious freedom, expression, equality, liberty, dignity, security and their right to choose and practice their occupation within South Africa.”

1.11 The SAPRA and SAPC lament the definitions provided for witchcraft and witches, which it claims are stereotypical definitions. These definitions associate witchcraft and witches with something that is evil or associated with ritual killings, human mutilations and misfortune. Such definitions, they claim, injure the dignity of self-defined witches.

1.12 The SAPRA asserts the existence of witchcraft and witches, which it argues are neither evil nor criminal. They claim their right to freedom of belief and religion.

1.13 In its submission, SAPRA refers to a document developed by SAPC and authored by Dr Dale Wallace, a scholar of Comparative Religions. Dr Wallace mentions that the Act has its origins in colonial administration and administrators, who were concerned about beliefs and superstition. Emphasis is made that the aim of the Act was to suppress the belief in witchcraft.

1.14 The absence of a definition of “witchcraft” in the Act, which has led to the association of witchcraft with malicious practices such as the alleged inflicting of illness, misfortune and death, together with some of the conduct that is proscribed by the Act, have been identified as cause for concern. The provisions in subsections (d) and (f) of section 1 of the Act, which criminalise the conduct of a person who professes knowledge of witchcraft and who, for gain, pretends to exercise or use any supernatural power, are problematic as they target both the indigenous practices and practitioners.

1.15 The SAPC acknowledges the pervasive nature of witchcraft among African communities and the destruction it has caused within the same communities. They argue that perceptions about witchcraft have been changing since pre-colonial times, and continue to change.



1.16 The SAPC draws attention to the fact that in post-apartheid South Africa, conduct that is prohibited in the Witchcraft Suppression Act has to be viewed through the lens of the Constitution, which requires all religions to be treated equally. The SAPC submission mentions that magic and the use of charms, which is prohibited in subsections (d) and (f), is practised by various other religions, including but not limited to Hinduism. Limiting or criminalising such practices can amount to discrimination or be viewed as prejudicial.

1.17 The SAPC points to the failure by legislation that suppresses witchcraft to eradicate the belief in witchcraft and the associated violence in post-colonial African countries. Mention is made of African countries that have retained colonial-era witchcraft legislation but have not seen any successes attributed to such legislation. The SAPC comments that other factors must also be considered when dealing with witchcraft-related violence, in addition to legislation that suppresses witchcraft. The roles of various role-players are important.

1.18 The view of the THO is that the Witchcraft Suppression Act should be repealed and replaced by a new Act. The THO submission argues that the new Act should address the problem of violence associated with witchcraft, and should provide a definition of “*busakatsi*” or witchcraft. The THO proposes that “*busakatsi*” refers to witchcraft in an African context, and includes the use of harmful medicine; harmful magic; and other means or devices that may cause illness, misfortune or death to a person, or damage to property. The THO further argues that there is a need for legislation that will identify and control *busakatsi* practices. This would enable the courts not only to protect the many innocent people who are accused by others of *busakatsi*, but also to punish people found guilty of practising *busakatsi*.

1.19 The THO supports the view of SAPRA and SAPC that the Act should be repealed. However, THO goes further and proposes that the current Act should be replaced with a new piece of legislation, which should address problems associated with witchcraft-related violence and provide clarity on the definition of witchcraft. The THO calls for a balance between protecting victims who are accused of witchcraft, and punishment of those who are found guilty of practising witchcraft.

1.20 The THO acknowledges that human rights play a role in how one deals with the beliefs of a particular group of people. They propose that the new Act should not be used to control the beliefs and morals of people.

1.21 The THO cautions against the use of labels that have been used in the past to define witchcraft, such as “witchdoctor”, “witch”, “wizard”, “sorcery”, “*muti*”, “supernatural power” and so forth, as these labels can be misleading.

1.22 The THO proposes that witchcraft should be treated like any other crime and that an *umsakatsi* should be treated as a criminal. They cite the example of a person who is found in possession of human tissue, and state that such a person should be charged in terms of the Human Tissue Act of 1983.

1.23 The THO also proposes the use of defamation laws against people who, without sufficient evidence, accuse others of being witches. They further suggest mediation in cases where there are no legal grounds for proceeding with a charge of witchcraft.

1.24 The three organisations whose submissions to the SALRC form the basis of the current investigation advocate opposing views on how the practice of witchcraft should be dealt with. On the one hand, SAPRA and SAPC argue against the suppression of the practice of witchcraft, and against regulation or state interference. On the other hand, THO argues for regulation because of the abuses associated with the practice of witchcraft.

## **B Inclusion of the investigation in the SALRC programme**

1.25 Subsequent to the meeting referred to above (see paragraph 1.6) with SAPRA, SAPC (represented by LHR) and THO; and after receiving revised submissions from these organisations, the SALRC conducted a preliminary investigation to assess the possibility of including the investigation in its programme.

1.26 At a meeting on 1 August 2009, the Commission approved the recommendations contained in a proposal paper, namely that a review of the Witchcraft Act should be included in the Commission’s programme. The recommendations and issues suggested in

the terms of reference made in the proposal paper for the investigation have been considered for purposes of developing this discussion paper.

1.27 On 15 January 2010, SALRC sent a memo to the Minister of Justice and Constitutional Development to request approval for the Commission's recommendation (made 1 August 2009) to include a review of the Witchcraft Suppression Act in the SALRC programme.

1.28 In May 2011, after the inclusion of the investigation in the SALRC's programme, the investigation was assigned to an SALRC researcher. Shortly after this, the SALRC received a letter (dated 12 October 2011) from the Minister of Women, Children and People with Disabilities, requesting an investigation into muti killings. The Minister's request was motivated by prominent cases that had been reported in the media, involving children who are alleged to have been killed for their body parts.<sup>7</sup>

1.29 At the Commission meeting on 22 October 2011, it was recommended that the Minister of Women, Children and People with Disabilities' request should be included under the current investigation. On 24 October 2011, the SALRC sent a letter to the Minister advising her that her request for an investigation on muti killings would be incorporated into Project 135 of the SALRC programme. Project 135 is the current investigation dealing with the review of the Witchcraft Suppression Act.

1.30 The issue paper on the review of the Witchcraft Suppression Act was approved by the Commission at its meeting held on 11 May 2014. The paper was published for public comment on 9 September 2014. The closing date for receipt of comments was 31 October 2014.

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<sup>7</sup> The cases that Minister Xingwana referred to involved the killing of a 10-year-old girl in Soshanguve, Gauteng, who was abducted and murdered on 31 December 2009 and her body parts removed. The other case involved a 3-year-old boy from Gugulethu in the Western Cape whose body was found in a suitcase with his throat slit.

## **C     *Scope of the investigation***

1.31   The Commission's investigation on the review of the Act is concerned with the issues placed before it by the organisations that are referred to above, namely SAPRA, SAPC, and THO. The Commission's investigation will also look at the issues that the then Minister of Women, Children and People with Disabilities brought to its attention (referred to above), and will make recommendations on how issues around muti killings can be addressed in the process of dealing with witchcraft related practices.

## CHAPTER 2

### PUBLIC RESPONSES TO THE ISSUE PAPER

2.1 After publication of the issue paper in September 2015, the SALRC received from interested stakeholders a handful of submissions in response to the issues that it had identified in the issue paper.<sup>8</sup> These submissions will be summarised in this section of the discussion paper and later elaborated upon in the relevant sections below. The summaries of the submissions below are in no particular order, and are presented in the sequence in which they were received by the SALRC.

2.2 The SA Pagan Rights Alliance (SAPRA) and the Traditional Healers' Organisation (THO) did not make any substantive submissions in response to the issues raised in the issue paper. SAPRA's input was related to the accuracy of the historical background to the investigation, as discussed in footnote 3 above. The THO, in its response to the call for submissions to the issue paper, affirmed its earlier position as contained in the original THO submission made at the inception of the investigation.

2.3. Comments were also received from the SAPC.<sup>9</sup> The SAPC starts off by acknowledging the situation in South Africa, where issues that surround witchcraft are complex. They further acknowledge the dire consequences related to the practice of witchcraft, in this case the violence associated with witchcraft, together with the prevailing conflicting ideas about the existence of other forms of witchcraft. They appeal for an appreciation of the distinction between witchcraft as a harmful practice and witchcraft as a form of religious practice by self-identified witches.

2.4 The SAPC makes the same submission it made when the investigation was initiated, namely there should be no regulation of witchcraft. Their practice of witchcraft is protected by the Constitution of the Republic, which protects religious rights. They are of the view that common law should be used to deal with crimes that individuals are charged

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<sup>8</sup> Collectively, submissions were received from SA Pagan Rights Alliance, Traditional Healers Association, SA Pagan Council, the Commission for Gender Equality, Dr Wallace of the University of KwaZulu Natal, the Women's Legal Centre, and the South African Police Service.

<sup>9</sup> Comments from the SAPC are authored by Rev Morgause Fonteleve, Convenor and Registrar for the SAPC, and were received by the SALRC on 25 May 2014.

with. In this instance they suggest that where a crime has been committed, such as crimes involving (among others) extortion of money, fraud, rape, murder, or trafficking in body parts, those perpetrators should be tried in terms of existing law.

2.5 The SAPC believes that regulation of witchcraft would increase the level of crime and violence associated with witchcraft, and would further fuel actions such as suspicion, paranoia, envy, jealousy, and fanaticism against people suspected of practising witchcraft. The SAPC is of the view that a replacement legal instrument would, in effect, regulate certain action that cannot be proved, while at the same time inadvertently sanctioning all such action.

2.6 Regulation could also have the effect of encouraging accusations and violence, the basis of which in most cases is jealousy, rivalry, suspicion, fear, and gossip. Such events could lead to expensive investigations. A dire consequence is that this scenario could also lead to people taking the law into their own hands, leading to an escalation of criminality and persecution of innocent victims who are falsely accused.

2.7 The SAPC cautions against the use of certain terms such as “muthi murder” and “witchcraft violence”. They state that murder is murder, and violence is that which it is, without having to label it as being associated with muti or witchcraft. The SAPC does not support the view that witchcraft itself is a crime, especially because the people accused of crimes associated with witchcraft never confess to being witches. This is in contrast to self-defined witches, who view their practice of witchcraft as a religion as opposed to it being a criminal activity.

2.8 The SAPC makes various proposals throughout its submission, which are accompanied by the rationale for making them. The submission also outlines issues that the organisation opposes, and the basis for such opposition.

2.9 With regard to issues that the SAPC opposes, the following are the areas they focus on:

2.9.1 First, they are opposed to the use of religious or cultural beliefs about crimes concerning witchcraft. Their view is that religion and culture should not be used as aggravation or mitigation factors in cases involving

witchcraft. They premise their argument on the fact that people accused of witchcraft-related crimes do not identify as witches. They conclude therefore that such crimes should be treated purely as acts of violence or criminality. They believe that the use of the cultural belief defence would diminish the severity of punishment and would encourage scapegoating.

2.9.2 Second, they argue that traditional courts should not handle cases dealing with harmful practices. Their view is that crimes associated with witchcraft should be investigated by appropriate authorities and dealt with in terms of the law of the country. Their opinion is that traditional courts operate as “kangaroo courts” and are viewed as places where innocent people are often found guilty and brutally executed. The SAPC recommends that when matters involving witchcraft-related crimes are brought before traditional courts, they should hand these over to the courts of law.

2.10 The SAPC also makes the following specific proposals in their submissions:

2.10.1 First, they propose that traditional healers should have a Code of Conduct that regulates their conduct, “to encourage responsible action and accountability.” Their view is that this Code should not be part of the law, as the common law and other laws already exist.

2.10.2 Secondly, they propose a non-legal intervention, namely educational programmes aimed at enlightening the general public about all facets of witchcraft.

2.11 The SAPC did not address some of the questions that the issue paper raised, and most importantly the issues around the definition of witchcraft and whether the practice should be defined.

2.12. The Commission for Gender Equality (the CGE) made a submission to the SALRC through its parliamentary office.<sup>10</sup> The CGE submits that they have been involved with

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<sup>10</sup> The comments from the CGE are authored by Ms Kamraj Anirudhra, Parliamentary Officer, Western Cape Office; the comments were received by the SALRC on 2 June 2014.

issues around witchcraft violence for a long time, dating back to 1998 when they convened a National Conference on Witchcraft Violence. This was in response to an outcry regarding how the said phenomenon disproportionately affected women, children, disabled, and elderly people. The CGE thus views witchcraft violence as being gender biased, and demands a response that promotes and protects gender equality. At the centre of the CGE's submission is the argument that witchcraft is gender-based violence, and when addressing witchcraft-related violence, this fact must be kept in mind.

2.13 The submission addresses a number of issues, including those highlighted in the issue paper. They also make recommendations on what needs to be taken into account in addressing witchcraft and related violence.

2.14 On the issue of witchcraft being a religion, the CGE acknowledges the recognition of the freedom of religion (section 15) and freedom of expression (section 16) in the Constitution, and the need to afford protection to people who practise witchcraft as their religion. In this regard they are of the opinion that those who make such claims should be accommodated, provided there is appropriate classification, taking into account the existence of other mainstream religions and the need to promote harmony in society.

2.15 On the question of whether the law should be used to address violence associated with witchcraft, the CGE concedes that not enough research and analysis have been done to comfortably make a determination. However, they suggest a thorough examination of violence associated with witchcraft in the context of gender-based violence. This they regard as necessary to inform lawmakers on interventions that are necessary to deal with gender-based violence associated with witchcraft. They seem to suggest that such intervention could be social or political, and have not confirmed whether legal interventions might be necessary.

2.16 The CGE identifies some of the problems associated with having a law that regulates witchcraft. First, they argue that when criminalising witchcraft, challenges can arise, such as identifying the elements of the crime. Secondly, they identify challenges around sentencing in crimes involving witchcraft. They argue that currently the people penalised are perpetrators of witchcraft violence, but not the end users of "muti" that is made from human organs. They are of the view that the law should also punish end users.



Thirdly, the CGE is opposed to the general use of the cultural defence in witchcraft-related crimes. They argue that the use of such a defence should be compatible with the Constitution. Fourthly, the CGE argues that the court that should have jurisdiction to hear cases involving witchcraft violence should be the High Court, and not the lower courts as is currently the case. The referral of cases to the High Courts should be preceded by traditional mediation. The purpose of mediation would be to examine the events surrounding the accusations, with a view to resolving the underlying social problems.

2.17 On the issue of a definition for witchcraft, the CGE does not provide an explicit definition, but suggests that the definition should distinguish between benevolent and evil witchcraft.

2.18 With regard to traditional healers, the CGE argues that they should be regulated. This would control the use of human tissue and other poisons used in traditional medicines.

2.19 The CGE provides a list of recommendations that they want the SALRC to take into account in its investigation. The recommendations are the following:

2.19.1 That the current Witchcraft Suppression Act should be repealed. This is because it has not been effective in reducing the belief in witchcraft or witchcraft violence.

2.19.2 They caution against the use of certain terminology, especially in defining witchcraft. They indicate that a distinction needs to be made between pagans, traditional healers, and *busakatsi*. They argue that these distinctions are important, because although all practitioners use supernatural powers, they do so to achieve “fundamentally different objectives.”

2.19.3 They suggest that further research be conducted to determine whether witchcraft accusations represent male domination over women. Social circumstances lead the CGE to believe that social and political interventions are necessary to address the problems, instead of a legal instrument.

2.19.4 Because of the underlying social problems which could be the source of violence associated with witchcraft, they suggest mediation and conflict resolution under the guidance of traditional leadership.

2.19.5 Linked to the above recommendation, the CGE further suggest that there should be transformation of traditional leadership to ensure that traditional structures are gender representative and promote gender equality.

2.19.6 The CGE suggest that there should be regulation of traditional healers. This, they argue, will ensure that their dispensing activities or practices are monitored and they are prevented from using human tissue in traditional medicine. They further suggest that the development of the regulatory framework should take place in consultation with traditional healers, traditional leaders, relevant organs of the state, and the community at large.

2.20 Dr Wallace made a submission in her personal capacity, based on studies she has conducted on witchcraft in South Africa.<sup>11</sup> She is a post-doctoral student whose research area is focused on witchcraft discourse in South Africa. Her submission responds to the questions posed in the issue paper, and they will be dealt with in the sequence in which they appear in her submission.

2.21 On the definition of witchcraft, Dr Wallace highlights the challenge in providing a definition for a practice that has different meanings for different communities. She states that although there are functionally equivalent meanings between “witchcraft” and Nguni words that describe the practice of witchcraft, these problems of definition are huge because of the changed social, economic and political circumstances in society. She argues that the definition provided in the Mpumalanga Witchcraft Bill is open to many

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<sup>11</sup> Dr Wallace is a post-doctoral fellow at the University of KwaZulu Natal and is a scholar of Comparative Religious Studies: Religion and Social Transformation. She is currently researching Witchcraft Discourses in South Africa. Her comments were received by the SALRC on 31 October 2014.

interpretations.<sup>12</sup> She cautions that by defining the term, there is a risk that such definition could be associated with specific religious or political agendas, and it could be subjected to different interpretations.

2.22 With regard to the regulation of the practice of witchcraft, Dr Wallace argues that in the past, regulation failed to address problems associated with the practice, but instead fuelled violence which left victims with no available recourse. She states that witchcraft is a moral theory that cannot be wished away. She argues that the risks of regulating witchcraft far outweigh the benefits that would accompany legislating the practice. She wonders if such legislation would be feasible for the judicial system, given the constraints it currently faces.

2.23 On the question of which aspects of the practice should be prohibited, she argues that since the practice is underpinned by religious and cultural connotations, it would be unconstitutional to criminalise the practice. Although she understands that everything done in the name of practising one's religion or culture depends on moral intention, she argues that it would be difficult for the law to capture such moral intention.

2.24 On the question of whether there are any alternatives to regulation, Dr Wallace argues that the law as it stands currently prohibits certain human action, such as murder, assault, and defamation; and those should remain regulated. She argues that there are no other alternatives to regulating witchcraft.

2.25 Dr Wallace makes the point that witchcraft practices should not only be seen in a bad light, because the practice can be conducted with good intentions.

2.26 Finally, she outlines the practice of witchcraft within the Pagan sector, and argues that not all Pagans practise witchcraft. This situation, she says, would make it difficult to exclude Pagans from legislation that regulates witchcraft.

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<sup>12</sup> The Mpumalanga Witchcraft Bill of 2007 states that "Witchcraft means the secret use of muti, zombies, sells, spirits, magic powders, water, mixtures, etc, by any person with the purpose of causing harm, damage, sickness to others or their property."

2.27 The Women's Legal Centre (WLC) made a submission because of its expertise in matters affecting women.<sup>13</sup> The WLC is a non-governmental organisation (NGO) that deals with matters affecting women, and has embarked on projects focused on the effect of African customary law on women and children. Specifically, they have looked at cultural practices that are harmful to women, such as witch hunts.

2.28 In their work, they acknowledge all rights in the Constitution that allow communities to practise their cultures. They further acknowledge that the right to practise one's culture should be recognised within the confines of the Constitution, and that such practice should not violate the right to equality between men and women.

2.29 The WLC's submission narrates their experiences with witch hunts in the communities that they work with, and the dire consequences for women – especially older women – who are accused of practising witchcraft. They elaborate on the consequences suffered by women who are “sniffed out” as witches. The victims of such witchcraft accusations are usually burnt, stone beaten, or murdered.

2.30 Lastly, comments were received from the South African Police Service (SAPS), specifically the Crimes Operations division within SAPS.<sup>14</sup> The submission acknowledges the two divergent views expressed in the issue paper; that is, the view that the prohibition against witchcraft violates constitutionally protected rights on the one hand, and the other view that proposes the repeal of the Act and its replacement by a new Act.

2.31 SAPS are of the view that since laws have not been effective in regulating or addressing witchcraft and associated violence, the Act should be repealed. They do not support the replacement of the Act with another piece of legislation. They believe that violence associated with witchcraft should be dealt with using existing law, in this case existing legislation and the common law. Their argument is premised on the fact that witchcraft and muti are motives for the crimes, and these motives should be considered when considering sentencing.

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<sup>13</sup> Comments from the Women's Legal Centre are authored by Ms Hoodah Abrahams-Fayker and were received by the SALRC on 31 October 2014.

<sup>14</sup> Comments from the South African Police Service are authored by Lieutenant General JT Molefe, Executive Legal Officer, and were received by the SALRC on 8 April 2015.

## **CHAPTER 3**

# **OVERVIEW OF THE PRACTICE OF WITCHCRAFT**

## **A Introduction**

3.1 Witchcraft has been practised in a variety of communities throughout the world. In earlier eras, the practice was associated with evil, and was regarded as a rebellion against God or a rejection of the Christian religion.

3.2 This section of the paper will look at the historical context of the practice, to describe what witchcraft was like in the past and what remains of such practices in the contemporary world. This will include looking at the origins of witchcraft in Europe and Africa to draw attention to contentious issues around the practices. A contemporary view of witchcraft will also be examined to isolate the problematic aspects of the practice. Problems around the definition of witchcraft will also be discussed, so as to determine the best way to describe the practice in light of the challenge posed by Pagans. This examination of pertinent issues related to witchcraft is important, as it will guide the Commission on what needs to be taken into account in developing the best option for addressing the challenges that persist – decades after the colonial statutes were implemented.

## **B Historical context of the practice of witchcraft**

### **1 Origins of witchcraft in Europe and Africa**

3.3 This section provides a discussion on the historical context of the practice of witchcraft. It will elaborate on the origins of witchcraft from a European and American perspective, and compare that with the origins of witchcraft from an African and South African perspective. While the contextual focus of the discussion will predominantly fall on South Africa, it is of critical importance to understand the continental and global context of witchcraft beliefs and practices, as the wider context can shed light on the local context.

3.4 It should also be borne in mind at the outset that the discussion will not focus on witchcraft practices and beliefs as subjective ontological phenomena, but strives rather to present the context of these beliefs and practices in a scientific and objective manner. However, the anthropological perspective that frames this discussion is fraught with many nuances and complexities that directly or indirectly impact on how notions of “scientific” and “objective” are to be understood. It is beyond the scope of this discussion to delve into all of these nuances and complexities.

3.5 The topic will be addressed through two approaches, namely the cross-cultural comparative approach and the in-depth ethnographic approach. The former provides a broad contextualisation of witchcraft, linking the local situation to the continental and global levels. Cross-cultural comparison is based on identifying and interpreting the similarities and differences regarding witchcraft beliefs and practices between and among various societies and cultures. By contrast, the in-depth ethnographic approach develops or documents insights from within a specific cultural group or society.

**a) Background to the study of witchcraft: important aspects to consider**

3.6 The anthropological study of witchcraft has long been associated with the anthropological study of religion, leading to the notion that ethnographic studies of witchcraft have tended to locate this phenomenon within “traditional” religious beliefs.”<sup>15</sup> Anthropological literature on witchcraft has historically been divided into two schools. The first followed the conventional ethnographic approach, which focused on the structure and function of witchcraft beliefs and practices as part of the social structures of societies. This was the predominant school in early studies of witchcraft, specifically during the colonial period, as anthropologists from Britain and other European colonial powers worked among the indigenous cultures of Africa. The second school, which emerged after the end of colonialism and the start of the postcolonial context, shifted the focus to the role of witchcraft in African societies as a mechanism of adaptation to the widespread political, economic and social changes that occurred as a result of decolonisation.

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<sup>15</sup> Petrus (2006); Evans-Pritchard (1937); Leslie (1960); Middleton and Winter (1963); Mbiti (1970); and Pauw (1975).

3.7 Witchcraft became conceptualised in terms of its perceived effect on power relations at the political, economic, social, and cultural levels. It was also analysed in terms of the ways in which it was used and adapted as a response by African peoples to the demands and stresses of post-colonialism and modernity.<sup>16</sup> The most recent studies of witchcraft, located within the postcolonial school, emphasise the complex interplay between local witchcraft beliefs and practices and the authority of the state, particularly in Africa. In this regard, scholars are mainly interested in the relationship between local beliefs, on the one hand, and on the other, state agencies and institutions such as (for example) law enforcement structures and the courts.

## **b) Origins of witchcraft: perspectives and understandings**

### **i) European witchcraft**

3.8 The question of where witchcraft came from does not have a simple answer. Myriad factors inform perspectives and explanations of the origins of witchcraft – too many to describe in detail here. From an anthropological perspective, the origin of witchcraft is an issue that has perhaps as many explanations as there are cultures on Earth. In addition, the very concept of witchcraft is fraught with complexities. The belief in supernatural forces and its associated practices is as old as humanity itself. Humans, being complex multidimensional beings, have always had a spiritual dimension to their existence, which has prompted the search for a deeper meaning to life.

3.9 In the earliest cultures, this search for deeper and spiritual meaning culminated in the emergence of beliefs in entities that existed beyond the natural world. Subsequently, these beliefs became more organised, and humans started to develop religious systems around their beliefs. In most cases, these beliefs centred on supernatural entities that took on many varied forms, and were believed to influence the lives of humans in various ways.

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<sup>16</sup> Comaroff and Comaroff (1993); Geschiere (1997); Bond and Ciekawy (2001) and Niehaus (2001).

3.10 While these beliefs and practices have changed over time, humans have retained the belief in supernatural forces and/or magic, in whatever form they may take. An important point to consider is that value judgements about whether supernatural beliefs and practices are good or evil are influenced by cross-cultural contexts, not only spatially but also temporally. In other words, the natural ethnocentrism of human beings means that throughout time periods and in different locations, each culture has tended to negatively judge the beliefs and practices of others, while evaluating its own beliefs and practices positively. Consequently, if we look at examples such as those from the classic ancient civilisations of pre-Christian Greeks and Romans, as well as the Egyptians, these polytheistic societies had beliefs and practices that many people today would associate with occultism, Paganism, or even Satanism. In the contemporary world, religious ethnocentrism has not abated. There are many examples of beliefs and practices that do not conform to the mainstream or popular religious orientation, and which are therefore stigmatised, and – in extreme cases – even violently eradicated.

3.11 The complex origins of witchcraft are located in the contexts outlined above. Among ancient societies and civilisations, while there was much belief in supernatural entities, there was no concept of “witch” or “witchcraft”. These terms are essentially of European origin, and found their way into African and other non-European Western societies through colonialism. The following is an excerpt from the *Online Etymology Dictionary*, which explains the meaning and etymology of the word “witch”:

[From the] Old English *wicce* [meaning] “female magician, sorceress”, in later use especially “a woman supposed to have dealings with the devil or evil spirits and to be able by their cooperation to perform supernatural acts,” fem. of Old English *wicca* [meaning] “sorcerer, wizard man who practices witchcraft or magic”...

In a c.1250 translation of [the biblical book of] “Exodus” witches is used of the Egyptian midwives who save the newborn sons of the Hebrews...Extended sense of “old, ugly, crabbed and malignant woman” is from early 15c...Witch doctor is [used] from 1718; applied to African magicians from 1836.<sup>17</sup>

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<sup>17</sup> Online Etymology Dictionary (OED 2015)



3.12 From the above information, we may deduce that the terms “wicca” and “witch” carried associations that linked persons who were believed to have the ability to manipulate supernatural forces with evil intent. This illustrates the origins of the current problem faced by practitioners of modern Wicca. The name Wiccans use to describe themselves and their religion has a long history of being associated with evil practices, a history that started in Europe and then spread elsewhere. Coinciding with this was the emergence of the term “witchcraft” to describe all practices or beliefs that were inspired by people consorting with supernatural entities to commit evil acts. Hence, witchcraft as it came to be understood was simply applied to the African context by colonialists and missionaries, who brought their understanding of witchcraft as “consorting with demons and the Devil” to the beliefs and practices they encountered among indigenous populations.

3.13 Early European and colonial American conceptualisations of witchcraft sought to define it within the context of Puritan Christianity, such that witchcraft was considered a “diabolical power”.<sup>18</sup> It was interpreted within the framework of Judaeo-Christian beliefs concerning good and evil. Thus, to practise witchcraft was to enter into a pact with Satan, so that the practitioner would attain control over supernatural powers and entities in exchange for surrendering his or her soul. This led to witchcraft being equated with Satanism and related practices. Alleged witches were accused of, and punished for, inverting the Christian moral order. The result was the witch craze that swept throughout Europe and later through colonial America, marked by witch hunts, persecutions, and brutal executions of suspected witches. These activities were inspired by Kramer and Sprenger’s text, the *Malleus Maleficarum*.<sup>19</sup>

3.14 The medieval period is often called the “Dark Ages” because it was characterised by superstition and fear, which were readily manipulated by the Church as the supreme authority of that era. However, with the Renaissance and Enlightenment, superstition gradually became replaced by reason and scientific knowledge. Witchcraft came to be associated with backward and non-progressive superstition that was in direct opposition to the emerging goals of modernisation and progress. Under the influence of Enlightenment thinking, European colonialists who encountered the traditions, beliefs, and practices of

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<sup>18</sup> Parrinder (1963) at 11.

<sup>19</sup> *The Witch’s Hammer*, published in 1487.

African indigenous groups held the ethnocentric view that the supernatural beliefs and practices of these African cultures was basically the same as the old European beliefs in witchcraft. Along with the influence of Christian missionaries, who immediately demonised indigenous African beliefs, the association of these beliefs with evil inevitably led to the application of the term “witchcraft”, with all its original meanings, to African populations. This trend was reinforced when colonialists learned that many Africans held certain beliefs about persons who were able to manipulate supernatural forces – a belief identical to that which had underpinned the witchcraft beliefs of medieval Europe.

3.15 In the contemporary world, Wicca has taken on a specific meaning for its practitioners, who aim to undo the historical prejudices and stereotypes against their belief system. Stein and Stein describe Wicca as “a Neo-Pagan religion, meaning that it is a perceived revival of pre-Christian religious practices”.<sup>20</sup> The modern Wiccan movement evidently started in the 1950s, influenced by the work of anthropologist Gerald Gardner, who argued that in Britain, what was considered witchcraft was a pre-Christian religion. After finding a coven of witches (Wiccans), Gardner joined them and became a witch himself. He believed that this coven was among the last remnants of the old religion.<sup>21</sup>

3.16 Wiccans argue that their religion has nothing to do with devil worship or Satanism. They do not use magic for evil purposes, but advocate the opposite – that magic should only be used positively. Wicca is “closely connected to nature” and thus focuses on what is called animism, the belief that an energy or force or power exists in all things.<sup>22</sup> Typically, practitioners use rituals involving music, dance, visualisations, and objects to manipulate and control animistic forces. The objective of such magic “is often very practical and [is] meant to help with everyday challenges such as relationships, health, protection, money and employment”.<sup>23</sup>

3.17 Wicca exists worldwide, notably in Europe, North America, and South Africa. In South Africa it is a fringe religion as it falls outside the major, mainstream religions. Many adherents regard Wicca as a contemporary religion that fits well with the postmodernist

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<sup>20</sup> Stein and Stein (2011) at 147.

<sup>21</sup> Ibid at 242.

<sup>22</sup> Ibid at 147, 242

<sup>23</sup> Ibid at 147.

context and concerns. It is particularly appealing to women because of its “lack of sexist beliefs and discrimination in general”.<sup>24</sup> However, despite the growing popularity of Wicca and its official recognition in some places, practitioners continue to face persecution.

3.18 The problem that Wiccans face is twofold. First, they have to deal with the long historical legacy of the association of “witchcraft” (lit. wicca-craft) with evil practices, as outlined above. Many Wiccans prefer to call themselves witches, because the latter term has a different but important meaning and connotations. For them, ‘witch’ was a term unfairly applied to pagans, healers and people who practiced an age-old tradition of folk magic. To call themselves witches is seen as reclaiming the term and reaffirming their heritage.<sup>25</sup>

3.19 Second, Wiccans also have to contend with the link that some uninformed people make between Wicca and Satanism. This association may be due to perceived similarities between some of the practices of Wicca and those of Satanism. According to Stein and Stein, “The use of magic in Satanism does resemble somewhat the magical practices of Wicca. However, many Satanists think that the Wiccans are hypocrites because they limit their magic to positive uses.”<sup>26</sup> Thus, while certain practices may be similar, the motivation or purpose behind those practices distinguishes Wicca from Satanism. However, without insider knowledge of both these belief systems, people on the outside tend to conflate the two and view them as one and the same. This is why Wiccans face a constant challenge in convincing the wider public that they are not involved in sinister practices. This scenario also tends to make Wiccans somewhat hypersensitive to perceived prejudices and unfair treatment against them.

## **ii) African witchcraft**

3.20 Beliefs and practices associated with magic and the supernatural have existed in African societies for generations. These include beliefs and practices associated with the

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<sup>24</sup> Ibid at 243.

<sup>25</sup> Ibid at 243.

<sup>26</sup> Ibid at 226.

use of magic and the supernatural to cause harm to others. However, the term “witchcraft” probably only became used as a result of colonial influence.

3.21 As discussed above, the words “witch”, “witchcraft” and even “witchdoctor” originated in Old English, and took on specific meanings in the context of Europe. With colonialism, these terminologies and their European meanings were transposed to the African context, through European colonialists’ observations of the beliefs and practices of indigenous African communities. What has created legal and other problems of definition is precisely the use of English terms to refer to African indigenous beliefs and practices.

3.22 Thus, current problems in conceptualising what is called “witchcraft” have been inherited from old colonial (English) interpretations and concepts. Although there is no objective and scientific way to examine African supernatural beliefs and practices per se, the anthropological literature does provide an ethnographic and cross-cultural interpretation of these beliefs and practices. These writings help to shed light on how such phenomena are understood in the South African context.

3.23 The best-known pioneer of witchcraft studies in Africa was Evans-Pritchard, whose most influential work was his account of witchcraft among the Azande of the Sudan. Evans-Pritchard’s work influenced subsequent generations of African anthropologists, who helped to establish witchcraft studies within anthropological enquiry. The problems of applying European terms and concepts to African contexts became clear early on, as many scholarly conceptualisations of “witchcraft” contradicted each other – largely because of differing cultural contexts, which informed differing perceptions. Evans-Pritchard, for example, found that the Azande distinguished between what he considered to be witchcraft and sorcery. Although both formed part of witchcraft in general, the distinction was that while witchcraft was inherent in an individual, sorcery was not. Witchcraft was thought to emanate from within the bowels of a person, caused by a “witchcraft substance” inherited from one generation to another. It was this substance that gave a witch his or her power. The power was mainly psychic in nature, and involved the ability to “eat the soul” of a victim.<sup>27</sup> Sorcery, by contrast, was more externally driven and practical. It was a more conscious act that involved the use and manipulation of natural

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<sup>27</sup> Evans-Pritchard (1937); Parrinder (1963) at 133.

substances, such as medicines or poisons, which were often associated with the use of rites and spells. As Evans-Pritchard explained:

Azande believe that some people are witches and can injure them in virtue of an inherent quality. A witch performs no rite, utters no spell, and possesses no medicines. An act of witchcraft is a psychic act. They [the Azande] believe also that sorcerers may do them ill by performing magic rites with bad medicines. Azande distinguish clearly between witches and sorcerers.<sup>28</sup>

3.24 From the above descriptions, one can perceive confusion in the use of terminology. In the context of Evans-Pritchard's description, the term "witchcraft" is ambiguous. It is a general term that refers to both the psychic act of soul-eating as well as harming others through the use of medicines. However, by Evans-Pritchard's own account, the Azande draw a distinction between a witch and a sorcerer. Hence, the use of the term "witchcraft" in a generic sense is actually incorrect, because it does not portray this clear distinction.

3.25 Reynolds picked up the inherent problems in terminology in the use of "witchcraft" or "witch" when comparing the meanings of the English terms with those of the vernacular among the Barotse of the former Northern Rhodesia (now Zambia).<sup>29</sup> According to Reynolds:

The term *muloi* [pl. *baloi*] is commonly translated...as "witch". This is misleading, for the vernacular term includes both "witch" and "sorcerer". Both are believed capable of harming others by magical means but, whereas the former has an inherent power for evil...the latter uses acquired powers, spells, rites or medicines...<sup>30</sup>

3.26 In the former Southern Rhodesia (now Zimbabwe), Crawford found a slightly different understanding of witchcraft among the Shona. According to Crawford, "Belief in witchcraft is an attempt by man to rationalise and understand the malevolent forces of nature and the misfortunes of life. At first sight this distinction between witchcraft and sorcery is not applicable to Shona belief..."<sup>31</sup> The Shona conceptualise witches as being able to perform both psychic witchcraft and witchcraft with medicines. However, the Shona

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<sup>28</sup> Evans-Pritchard (1937) at 21.

<sup>29</sup> Reynolds (1963) at 14.

<sup>30</sup> Reynolds (1963) at 14.

<sup>31</sup> Crawford (1967) at 73.

distinguished between a “real” witch and a variety of other witches: “Only a “real” witch is capable of psychic acts...[and is defined as]...a person possessed by an evil ancestral spirit (*mudzimu*) or an evil spirit...derived from outside the family circle (*shave spirit*)”.<sup>32</sup> According to Crawford, the Shona view of witchcraft differed from that described by Middleton and Winter, who had argued that whereas “witchcraft” explains generalised misfortunes, “sorcery” explains specific misfortunes.<sup>33</sup> Crawford stated that the Shona believed witchcraft caused both generalised and specific misfortunes, hence they had no conceptualisation of sorcery.<sup>34</sup> People who tried to harm others through the use of medicines were not considered “real” witches, unlike those who were thought to possess psychic abilities.

3.27 In southern Africa, anthropologists also found varying interpretations of what they called witchcraft among various groups. In the former Bechuanaland, Schapera drew a distinction between night-witches and day-sorcerers, similar to what was found among the Azande.<sup>35</sup> Ashton also distinguished between witches and sorcerers among the Basuto – although for them, witches posed a special terror due to the belief that they could capture the souls of the dead and turn them into ghosts.<sup>36</sup> The Lobedu of the Limpopo Province were known to conceptualise witches and sorcerers by referring to them by the same term (*vuloi*), suggesting there was no distinction between the two. However, the Lobedu did use qualifying terms to indicate whether they were referring to night-witchcraft (corresponding to the psychic variety), and day-witchcraft (corresponding to sorcery), the latter of which included the use of medicines to cause harm. Night-witches inherited their powers from their mothers, whereas day-witches had acquired special knowledge of their witchcraft. Lobedu witches differed from the Azande; in the Lobedu context, witches were not believed to have any witchcraft-substance.<sup>37</sup>

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<sup>32</sup> Ibid at 74.

<sup>33</sup> Middleton and Winter (1963) at pages 2-3.

<sup>34</sup> Crawford (1967) at 75.

<sup>35</sup> Schapera (1937).

<sup>36</sup> Ashton (1952).

<sup>37</sup> Krige and Krige (1943).

### **c) A comparative perspective on Euro-American (Western) and African witchcraft**

3.28 The above discussion shows that beliefs and practices associated with magic and the supernatural have long been part of the cultures of both Western and African societies. However, phenomena that have been labelled “witchcraft” have significant similarities and differences, if one compares these phenomena between Western and African contexts.

3.29 One key similarity between Western and African societies is that even in the modern era, beliefs and practices associated with witchcraft still exist in both contexts. However, historical and modern factors have influenced those belief systems differently. In the Western context, witchcraft has, since the earliest times, been associated with persons who were believed to have the ability to manipulate natural and supernatural forces, mostly for evil purposes. However, the rise of modernisation and rationalism led to the gradual decline in witchcraft beliefs, which came to be seen as backward superstition and an obstacle to progress. In spite of this, witchcraft beliefs have remained in Western societies and have manifested more recently in the belief system known as Wicca.

3.30 In the modern context, Wicca represents a non-mainstream Pagan religion that can be included in what is called the New Age movement. As outlined earlier, one of the major goals of Wicca is to remove the historical negative association of this religion with Satanism, by emphasising nature worship, and to adapt these beliefs to the contemporary modern context. In many Western societies, and even in developing ones such as South Africa, Wicca is practised by a minority of adherents.

3.31 While Wicca is considered a minority religion, in the African context, beliefs and practices that have been called “witchcraft” form an inherent part of the cosmological and belief systems of entire cultures. This was the case in the past<sup>38</sup> and is still a reality in the present postcolonial context.<sup>39</sup> In these communities, witchcraft is an inescapable fact of life, and individuals and families take conscious steps within culturally approved institutions to actively avoid becoming targets of those believed to use magic to cause harm.

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<sup>38</sup> See for example Evans-Pritchard (1937); Parrinder (1963); Middleton and Winter (1963); Pauw (1975).

<sup>39</sup> See Bond and Ciekawy (2001); Geschiere (1997); Niehaus (1997) ; Petrus (2009)

Witchcraft is thus not regarded as a fringe religion or superstition, but is considered a real threat and a cause of otherwise inexplicable misfortune, illness, or death. As in early Western societies, African societies believe that persons labelled “witches” or “sorcerers” (depending on the context) can harm others through the use of evil or so-called black magic, or through the use of medicines. The former involves the use of witchcraft agents or familiars that the alleged witch can send so as to harm victims. The latter (medicines) may be used to poison a victim’s food or drink.<sup>40</sup> While these are broad conceptualisations, there are subtle and more overt variations in beliefs between different cultural groups.

3.32 Witchcraft was historically contextualised within a Judaeo-Christian religious framework in pre-modern Europe. It was not until the arrival of Christianity in Africa that African supernatural beliefs were firstly labelled as witchcraft, and secondly were contextualised within a Christian framework. With the rise of the African Independent Churches (AICs), witches came to be associated with Satanism in a similar manner to what had occurred in early Europe and colonial America. The mainstream European Christian churches in Africa attempted to eliminate witchcraft beliefs – as defined by Christian missionaries – by labelling them as mere superstition, mainly through the medium of Western colonial education. However, the AICs encouraged witchcraft beliefs by adapting them to the Christian context, and by providing Christian methods to address them.<sup>41</sup> The mainstream missionary churches followed an approach influenced by the ethnocentric colonial view of African witchcraft as uncivilised and backward. Consequently, this dominant view of African witchcraft became entrenched in colonial legislation in many African colonies, and has continued to influence legal conceptualisations of witchcraft to the present time.

## **2 Definition of witchcraft**

3.33 This section will analyse and discuss the prevailing definitions of witchcraft, illustrating how specific contexts within which witchcraft is understood may affect the understanding and interpretation of the phenomenon.

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<sup>40</sup> Petrus (2009) at 130.

<sup>41</sup> Osei (2003); Petrus (2009) at 131.



3.34 As seen in the above discussion of historical context, the origins of the application of the term “witchcraft” to the African context provided the conditions for the conceptual problems inherent in the concept, which have led to the need to review the current legislation. In order to determine those complexities, it is necessary to look at how colonial legislation interpreted witchcraft and what effect those interpretations had.

3.35 Colonial attempts to impose European understandings of witchcraft on African communities culminated in the development of legislation aimed at suppressing and outlawing beliefs and practices that colonial authorities and lawmakers associated with witchcraft. The Enlightenment influence permeated the philosophy underpinning this legislation, as it was deemed that African beliefs in witchcraft were irrational. According to Reynolds,<sup>42</sup> “By Europeans, witchcraft [was] generally regarded as mere superstition... [and...was] not respectable.” Consequently, when Europeans discovered that African peoples considered witchcraft a reality and were willing to take various steps to protect themselves from the threat that witchcraft represented, colonialists took it upon themselves to suppress and outlaw these “outdated” beliefs. Hence, various laws were created to suppress witchcraft beliefs. In order to “develop” the new colonies in the manner that had occurred in Europe, the colonialists believed it was necessary to systematically dispel and discourage such “irrational” beliefs and practices. Thus, Eurocentric values and ideas underpinned the criminalisation of African indigenous beliefs and practices. Through ignorance and lack of understanding, the colonial authorities sought to outlaw any practice or belief that had anything to do with the supernatural. To aid this process, colonial missionaries were expected to convert the indigenous people to Christianity and to convince them to break with most, if not all, of their traditional African beliefs. Often the African belief system went beyond witchcraft and included other key aspects, such as ancestor veneration and consultation with traditional healers.

3.36 Witchcraft legislation in South Africa and the former Northern Rhodesia showed marked similarities to European legal conceptualisations of witchcraft, and what Europeans considered as witchcraft-related crimes. Section 1 (d) of the WSA<sup>43</sup> stipulated that “Any person who... professes a knowledge of witchcraft, or the use of charms... shall be guilty of an offence and liable on conviction... where the accused has been proved to

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<sup>42</sup> Reynolds (1963) at xi.

<sup>43</sup> The provisions of the Act are dealt with in detail in Chapter 4 below.

be by habit or repute a witchdoctor or witch-finder...". This wording was similar to that found in the Northern Rhodesia Witchcraft Ordinance,<sup>44</sup> which stipulated "Whoever shall be proved to be by habit or profession a witchdoctor or witch finder shall be liable upon conviction to a fine...".<sup>45</sup> The problem is that in the two pieces of legislation, no distinction is drawn between practitioners of "good" magic (diviners, herbalists, and traditional healers in general) and those believed to practise so-called black or evil magic (whom Europeans labelled as witches). The colonial legislators simply labelled everyone who professed knowledge of the supernatural or magic as a practitioner of witchcraft. Furthermore, both the WSA and the Witchcraft Ordinance outlawed the practice of consulting traditional healers, whom the colonialists also erroneously labelled witchdoctors or witch-finders. Section 1 (c) of the WSA stipulates that "Any person who... employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard... shall be guilty of an offence...". Likewise, the Witchcraft Ordinance stated "Whoever employs or solicits any person to name or indicate any person as being a wizard or witch [or] to advise him on any matter... by means of witchcraft or non-natural means shall be [held] liable...".<sup>46</sup> Thus it became a criminal offence for African people to use their own traditional conventional means to seek explanations for misfortune, illness, or death.

3.37 The Eurocentric understanding of witchcraft in the WSA has had a negative effect on African communities, not least of which was the increase in witchcraft-related crimes in the country. The criminalisation of traditional healers and the act of consulting them denied African people an important means of recourse, and ignored the critical role of the institution of traditional healing in indigenous communities.

3.38 Also, the use of the term "witchdoctor" is problematic. Traditional healers not only deal with patients believed to be afflicted by evil magic, but also diagnose and treat patients for other causes of illness and misfortune. To refer to traditional healers as "witchdoctors" is to ignore the range of services and functions that the healer performs in his or her community. The Act failed to recognise the positive role that diviners and herbalists played, not only as protectors of their communities but also as mediators between the spiritual world and the world of humans. The criminalisation of the act of

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<sup>44</sup> No 31 of 1952.

<sup>45</sup> Reynolds (1963) at 166.

<sup>46</sup> Reynolds (1963) at 167.

consulting a traditional healer cut off African people from using a previously culturally approved mechanism for dealing with misfortune. It also led to the interpretation that the legislation was, in fact, protecting practitioners of evil magic. As a consequence, more people started to deal with suspected practitioners of evil magic directly. This led to an increase in violence against so-called suspected witches in most communities.

3.39 A contributing factor to the conceptualisation problems in the WSA is the perceived ambivalence of magic and its associated powers. Within the context of the Xhosa-speaking peoples of the Eastern Cape, for example, the ambivalence of magical powers illustrates the complexity inherent in defining whether a person is a practitioner of “good” or “bad” magic. The *isangoma* (diviner) and *ixhwele* (herbalist) are normally perceived as being “good” practitioners, in contrast to the *igqwirha* or *umthakhathi* (interpreted as “witch”). However, Xhosa people also acknowledge that diviners and herbalists can control the same occult powers and knowledge as those used by practitioners of evil magic. Thus the perception among Xhosa-speaking people is that if a person has knowledge of magic, he or she may well participate in magical practices. In other words, traditional healers can only counter the effects of evil magic if they themselves have extensive knowledge of it. Thus, traditional healers, as important as they are in their communities, are also highly ambivalent figures. In reality the distinction between practitioners of good and evil magic lies in the intent or motive of the practitioner. Those who use their knowledge of magic to help or heal are normally regarded as traditional healers, while those who use this knowledge to cause harm are classified as practitioners of evil magic. Magic itself is neutral, and is merely manipulated by humans for either beneficial or evil purposes. Such distinctions, and the ambivalent position of traditional healers, were not taken into account in the roughshod manner in which “witchcraft” was defined in the colonial legislation.<sup>47</sup>

3.40 A further definitional problem arises in the WSA with regard to the difficulty of determining who exactly is a “witch”, especially in situations where there are accusations and counter-accusations of witchcraft. For example, in some cases a client who considers himself to be a victim of another’s witchcraft may request a traditional healer to perform

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<sup>47</sup> A case in point is the provision in section 1 (d) of the WSA which criminalises traditional healing. The prohibition on traditional healing does not take into account the value that these healers add to their communities, especially because they deal with a variety of issues other than just witchcraft.

protective magic to counter the alleged witch's magic. If the alleged first witch then falls ill or dies, the possibility exists that the deceased's kin may accuse the traditional healer, as well as the client, of witchcraft. The deceased's kin, in retaliation, might consult their own traditional healer to counter the witchcraft of the first client. Among the Xhosa-speaking peoples of Mpondoland, retaliatory violence linked to accusations and counter-accusations of witchcraft and witch killings was a common occurrence in the mid-1990s. Research in Mpondoland showed that places such as Tsolo were often divided by factional violence, caused not only by stock theft but also accusations and counter-accusations of witchcraft. In such cases, how does one define who exactly the "witch" is? Such ambiguities might have given rise to the generalisations that appear in the WSA, but the generalisations themselves caused more problems than they solved.<sup>48</sup> Thus, the importance of the need for a clear legal definition of witchcraft is emphasised when dealing with the related problem of defining who the actual "criminal" is.

3.41 To illustrate, in 2007 in Mpumalanga, a sixty-year-old woman was accused of bewitching a teenager who had committed suicide. The police arrested and charged two women, in terms of the WSA, for accusing the old woman. However, the elderly "suspect" then admitted to having used witchcraft to cause the teenager's death. The complication of determining who the criminal is in this scenario was reflected in comments made by one of the arresting officers:

[W]e arrest[ed] two women for making unfounded accusations. Then it turns out that the arrested women were not wrong after all. How are we going to prosecute the 60-year-old woman? What do we charge her with? The police are bound to protect [her]. We cannot allow anybody to take the law into their own hands.<sup>49</sup>

3.42 The increase in witchcraft-related violence during the 1990s may be interpreted as a response by African communities to contest the WSA. From an African perspective, the WSA used colonial – and later apartheid-era – definitions of "witchcraft" that contradicted the status of African-defined witchcraft as a reality. Hence it may be argued that violence

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<sup>48</sup> Petrus (2009) at 134-135.

<sup>49</sup> Petrus (2009) at 135.

against suspected “witches”, in the past and present, is at least a reaction to the problematic manner in which legislation deals with witchcraft.

3.43 Despite previous efforts to address the definitional problems in the legislation, such as that proposed by the Mpumalanga provincial government in 2007, the challenges of conceptualisation remain. The Mpumalanga government proposed a Witchcraft Suppression Bill in an attempt to reduce witchcraft-related violence in the province. However, subsequent to the proposal of the Bill, SAPRA expressed its dissatisfaction on the basis that the Bill was discriminatory against self-defined witches. As Damon Leff publicly commented, “The [Mpumalanga Witchcraft] Bill seeks to suppress witchcraft and will imprison self-defined witches on the assumption of automatic inference of criminality.”<sup>50</sup> In response to Leff’s comments, Petrus (2007) stated in *The Herald* newspaper that –

[T]he term “witchcraft” means different things to different people. Differences in the perception of witchcraft are largely based on differences in context. In the context of Wicca, witchcraft is viewed as something positive as witches are practitioners of “white” or good magic...[However], in the African context, witchcraft is viewed negatively as witches are seen as practitioners of “black” or evil magic...<sup>51</sup>

In other words, in SAPRA’s view, the Bill was yet another manifestation of the centuries-old problem experienced by Wicca practitioners (as outlined earlier). However, in the South African context, it is not only the position of Wiccans that must be considered, as the African view takes a directly opposite view as far as “witchcraft” is concerned, and is equally important to consider.

3.44 Besides the attempts at defining “witchcraft” discussed above, others too have ventured into this territory. Tebbe suggests that “witchcraft is the practice of using supernatural power for evil, in order to harm others or to help oneself at the expense of others.”<sup>52</sup> This author goes on to define “witch”, which he states “is a human being who deploys supernatural power for nefarious purposes.”<sup>53</sup> In another publication, the same

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<sup>50</sup> Quoted in Petrus (2009) at 137).

<sup>51</sup> Quoted in Petrus (2009) at 137.

<sup>52</sup> Tebbe in Bennett *Traditional African Religions* 160-161.

<sup>53</sup> Ibid

author defines witchcraft as “the practice of secretly using supernatural power for evil - in order to harm others or help oneself at the expense of others.”<sup>54</sup>

3.45 None of the stakeholders who submitted responses to the issue paper made any proposals for consideration on how witchcraft should be defined. Some did not offer any reasons for their reluctance to propose a definition. Some provided reasons why there should be no definition of witchcraft. The CGE, while not attempting to define witchcraft, suggested that a definition of witchcraft should distinguish between benevolent and evil witchcraft. Dr Wallace suggests that there cannot be a definition of witchcraft, as it has different meanings for different communities.

## **C Witchcraft in contemporary South Africa**

3.46 As discussed in the above section on historical context, witchcraft practices have plagued communities and society at large for decades. Challenges associated with witchcraft beliefs or the practice of witchcraft, as experienced by societies in the past, are still experienced in present-day South Africa.

3.47 The request for the current investigation and the submissions made by the various organisations further remind us that issues around witchcraft and/or harmful witchcraft practices remain in our society. It is also clear from the submissions made to the SALRC, both by the requesters of the investigation and from outside stakeholders, that there are different contexts within which witchcraft has to be understood, and varying expectations that groups have for the outcome of this investigation. More important for the SALRC is not to lose sight of the people most affected by the scourge, namely women and children in communities.

3.48 The issue paper discussed some case law in which harmful witchcraft practices were implicated, and how the courts have dealt with those cases. The issue paper also painted a picture of stories, from daily newspapers, about harmful witchcraft-related incidents. These have not abated; since the finalisation of the issue paper, witchcraft-

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<sup>54</sup> Tebbe ‘Witchcraft and Statecraft’ (2007), 190.

related stories have continued to dominate the media. Witchcraft-related incidents that are reported in the media are not necessarily contained in specified geographical areas, but occur across most of the provinces in South Africa.

3.49 In 2013 there were numerous media reports regarding witchcraft-related cases that courts in various provinces had to deal with. In the Eastern Cape, the Regional Court in Willowvale convicted an accused to 15 years in prison. He had allegedly murdered a 44-year-old woman whom he accused of witchcraft, by assaulting her with a stick until she died.<sup>55</sup> In Mpumalanga, the court in Nelspruit dealt with a case where an accused stood trial for murder, with the deceased having been kidnapped from a tavern (bar) in the early hours of the morning. The deceased was allegedly killed in the vehicle in which he was kidnapped, and had one of his testicles, nipples, part of his brain, and legs removed. This was done apparently to strengthen businesses belonging to one of the accused.<sup>56</sup> In Limpopo, the High Court handed down life terms to two men who appeared for an alleged muti killing. The accused were charged with the killing of a young man, whose genitals they removed. They allegedly tried to sell the body parts to a sangoma, who declined the offer and reported them to the police.<sup>57</sup> In KwaZulu Natal, the High Court in Pietermaritzburg dealt with a case in which three men had battered two women to death because they suspected them of practising witchcraft. The women were subjected to the most gruesome injuries: their heads were hit with a hammer that fractured their skulls, while other injuries were inflicted with a bolted stick and a spear. The court reportedly handed down a 20-year sentence to each of the accused. The judge in that case argued that in modern-day South Africa, one's subjective belief in witchcraft did not justify murder.<sup>58</sup>

3.50 In 2014, media reports continued to highlight incidents of witchcraft violence and witchcraft-related cases in various provinces. In Mpumalanga, a six-year-old girl was allegedly killed by a woman in whose care the girl's mother had left her. When the mother came back from her errands, the child-minder informed the mother she did not know where the child was, and had thought that the child was with her father when she could not

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<sup>55</sup> News24 "Man sentenced 15 years for murder." 15 January 2015. Web

<sup>56</sup> Independent online 'Four in the dock for 2009 muti murder.' 14 August 2014. Web

<sup>57</sup> Independent Online "Life terms for Limpopo Muti Killers." 14 August 2013. Web

<sup>58</sup> Independent Online "Witch' killers get 20 year jail terms.' 17 October 2013. Web

find her. When the matter was reported to the headman and the headman questioned the child-minder about the whereabouts of the child, her response was that she did not kill the child. The body of the girl was found by locals in a nearby river, with her body mutilated. It was alleged that the motive for the murder was to use her body parts for muti. The court handed down life sentences to the accused.<sup>59</sup> In Gauteng, in Mamelodi (a township outside Pretoria), a man was accused of killing his wife because she had allegedly turned into a beast-like snake that was ready to attack him. The judge hearing the case did not accept his defence; he found him guilty of murder and handed down three life sentences. The judge dismissed the accused's defence that witchcraft was the motivation for the crime.<sup>60</sup> In the Western Cape, the High Court dealt with a divorce involving a Cabinet Minister who accused his wife of witchcraft. He argued that he had engaged in an extra-marital affair with another woman, because after nine years of marriage his wife was involved in witchcraft and had caused witchcraft rituals to be conducted at his home. He accused his wife of taking some of his clothes to a sangoma and requesting their child-minder to sprinkle substances in his food. Regardless of the accusations of witchcraft, the court granted the divorce.<sup>61</sup>

3.51 In 2015, there were further witchcraft-related stories in the media. In North-West Province, police assistance was sought when community members torched a traditional healer's home because he was alleged to have worked with two women who were accused of practising witchcraft. The two women, one of whom was related to the traditional healer, had snatched a month-old baby from its home. The case against the two women was withdrawn because they had returned the baby. Investigations in the case continued, while the court proceeded with the cases of arson and assault with intent to do grievous bodily harm.<sup>62</sup>

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<sup>59</sup> Independent online 'Child's muti killers get life sentences.' 7 March 2014. Web.

<sup>60</sup> Independent online "Father who killed 'witch' wife gets life. 9 April 2014. Web.

<sup>61</sup> TimesLive 'Senior Cabinet Minister granted divorce, accuses ex-wife of using witchcraft.' 2 June 2014. Web.

<sup>62</sup> Independent online 'North West witchcraft case withdrawn.' 2 April 2015. Web.



## 1 Witchcraft and indigenous communities

3.52 The media reports mentioned in the section above illustrate the practice and understanding of witchcraft among indigenous communities in South Africa. The media reports also show the association between witchcraft and the ability to manipulate supernatural powers to cause harm to people and their property. Apart from media reports, the dominant view on the ground is that the people most often accused of witchcraft are older women,<sup>63</sup> whereas the perpetrators of witchcraft-related violence are usually younger men. People are believed to engage in witchcraft because of jealousy and envy.<sup>64</sup>

3.53 People accused of practising witchcraft are usually older individuals (especially women), although there are certain instances where young people have been accused.<sup>65</sup> People are often accused because it is thought they had used witchcraft to better their circumstances.<sup>66</sup>

3.54 When confronted with witchcraft, people usually consult practitioners such as herbalists, diviners, and traditional healers, so as to counteract misfortune or supposedly to undo curses and destroy the witchcraft.<sup>67</sup> The other way in which communities react to witchcraft is by taking the law into their own hands. In these cases, people affected by the harm caused by alleged witches may retaliate, either individually or as a community, by killing or burning the suspected witches or banishing them from their villages. A study conducted in 2009 showed that the most common form of violence against suspected witches was damage to property, followed by forced relocation from one village to another.<sup>68</sup>

3.55 Another phenomenon that is rife among indigenous communities is muti killings. This prompted the Ministry of Women, Children and people with disabilities to request the Commission to investigate such murders. Mutu killings involve the murder of a victim, after

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<sup>63</sup> Van Wyk 2004 HTS 1210.

<sup>64</sup> Van Wyk 2004 HTS 1215.

<sup>65</sup> Tebbe in Bennett *Traditional African Religions* 163.

<sup>66</sup> Ibid 164.

<sup>67</sup> Van Wyk 2004 HTS 1217.

<sup>68</sup> Yaseen A *Witch hunts in modern South Africa: An under-represented facet of gender-based violence*, Fact Sheet, June 2009, Medical Research Council.

which their body parts are used to make traditional medicine, commonly known as muti. Media reports referred to in this paper and case law highlight instances where victims are killed and their body parts are sold to people who make muti for treating their patients.

3.56 The issue paper discusses in detail how the democratic government attempted to deal with witchcraft violence. Reference is made in the issue paper to the appointment of a Commission of Inquiry in 1995 to look into witchcraft violence and ritual murders in the Northern Province (now Limpopo).<sup>69</sup> Although the recommendations of the Ralushai Commission were not implemented, they form a basis for understanding witchcraft and associated violence in the South African context.<sup>70</sup>

3.57 Another attempt by government to deal with the scourge of witchcraft and witchcraft violence was the development of the Mpumalanga Witchcraft Bill. This Bill was an attempt by the provincial government to deal with witchcraft, which they regarded as prevalent in that province. The process was aborted and the Bill was never promulgated into law.

3.58 Witchcraft among indigenous communities need not be understood only from a cultural belief perspective, but with also with an appreciation that religious beliefs play a significant role in how witchcraft is perceived. Olupona pointed out that “African spiritual experience is one in which the ‘divine’ or the sacred realm penetrates into the daily experience of the human person so much that religion, culture, and society are imperatively related.” According to Ellis and Ter Haar,

There is widespread evidence that many Africans today continue to hold beliefs derived from traditional cosmologies which they apply to their everyday activities, even when they live in cities and derive their living from jobs in the civil service or the modern economic sector.<sup>71</sup>

This statement indicates that traditional conceptions of reality still play an important role in the lives of modern African people.

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<sup>69</sup> Issue Paper 29 paras 2.100 to 2.113.

<sup>70</sup> Ralushai Commission of Inquiry (Chairperson Professor NV Ralushai) *Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of the Republic of South Africa* 1996. This paper refers to the Commission as ‘the Ralushai Commission’ and its report as ‘the Ralushai Commission Report’

<sup>71</sup> Ellis S and Ter Haar G *Religion and politics in sub-Saharan Africa* (1998) at 177.

3.59 Anecdotes exist that explain how the religious sector has responded to issues around witchcraft. The responses are from the African Indigenous Churches (AICs), mission churches, Pentecostal churches, and traditionalists respectively. Within the AICs there is a strong belief in the presence of evil. Such evil is often conceptualised as witchcraft. This conceptualisation of evil is part of an elaborate discourse in church theology, and is often referred to in sermons and other forms of communication. Emphasis in these ministries is on arming and protecting members against its effects. Members are encouraged to employ all the strategies that the church has devised, to protect themselves against the effects of this evil, anti-life force. If one is still affected – since these forces are devious – there are further elaborate rituals and procedures to cleanse and restore people to the fullness of life. The healing process does not deal only with the individual but also with the environment in which the individual lives.

3.60 In mission churches, including for example the Methodist church, there is a prevalent belief in witchcraft. The majority of people believe in the existence of witchcraft but a few are sceptical. However, there is no formal reference to it in sermons and other formal communications by the church. There is a widespread belief that some congregants are good Methodist by day but Zionists by night. This statement points to the tendency of some people in mainstream churches to also secretly visit Zionist churches for healing rituals. The official church doctrine is that evil can be explained in terms of the devil (Satan) and demonic attacks, and that prayer is the only cure for such attacks. However, since the majority of people attending these churches are brought up in contexts where belief in witchcraft is rife, instead of approaching traditional healers (who are sometimes perceived as representing “the enemy”), they resort to visiting the AICs, especially the Zionist churches. Such visits to AICs and traditional healers are often made secretly.

3.61 With regard to Pentecostal churches, the belief is similar to that held by the AICs. The miracle healing churches, such as those of Pastors PFP Motsoeneng (Mboro),<sup>72</sup> Lesego Daniel,<sup>73</sup> Chris Oyakhilome<sup>74</sup> and many others reinforce the belief in witchcraft. Some church-goers are told that they have an assortment of animals in their bellies, especially snakes. The presence of those animals in people’s stomachs is the result of

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<sup>72</sup> Incredible Happenings Church.

<sup>73</sup> Rabbini Center Ministries.

<sup>74</sup> Christ Embassy.

work by witches. In most cases the identities of the witches are not revealed. In churches like these, people are usually promised protection against all forms of evil including witchcraft.

3.62 There are also anecdotes about the responses to the beliefs mentioned above by the traditionalists, who believe in the existence of witchcraft, which is feared. This group perceives witchcraft as the opposite of goodness, purity, and good neighbourliness. The bulk of cases attended by traditional healers have to do with witchcraft. Traditional healers, through their rituals of expulsion, help their patients to recover from the effects of witchcraft. Some traditional healers and cultural experts maintain that there is a very clear association between witchcraft and *ukuthakatha*, and the latter is associated with evil. Other traditional healers claim that as healers, they have nothing to do with muti killings or the sale of human body parts. They regard their job as being the restoration of the human body, and the use of human body parts would go against this function.

## 2 Witchcraft as a religious expression

3.63 The submission by SAPRA and SAPC highlights the existence of practices associated with supernatural powers, beyond African communities. People practising witchcraft in this context associate it with an expression of their religion. Pagans claim protection under the Constitution, and recognition as a religious minority.<sup>75</sup> Pagans define their religion as a nature-venerating religion that believes that the Earth and its creatures are sacred. They embrace environmental awareness and conservation, and the worship of the Divine in its various forms.<sup>76</sup>

3.64 In September 2007, Pagans in South Africa converged to reclaim the terms “witch” and “witchcraft” within the Pagan context. The purpose of the reclamation by self-defined witches was to entrench their constitutionally protected rights and demand the repeal of the Act, which criminalises the practice of witchcraft in South Africa. The action by the

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<sup>75</sup> Leff D, Fontleve M and Martin L A *Pagan Witches Touchstone Witchcraft and Witch hunts in South Africa* 5.

<sup>76</sup> *Ibid* at 52.

Pagans acknowledges the generally negative perception of witchcraft in South Africa such that the term is widely associated with criminal or evil practices.<sup>77</sup>

3.65 Pagans acknowledge the problems associated with the lack of a definition in the Act, and the solutions that were offered by the Ralushai Commission in its report, and those contained in the Mpumalanga Witchcraft Bill. They argue that the definitions are problematic because they stereotype witchcraft.

3.66 Pagans believe that as practitioners of the religion, and/or as self-defined witches, they should be responsible for defining the words “witchcraft” and “witches”. As such, the definition that they ascribe to their practice is as follows:

Witchcraft is an ancient religio-magical technique and modern pagan spirituality that employs the use of divination, sympathetic magic and pagan ritual practices.

3.67 The proposal that has been made by Pagans is that no law should be developed to deal with witchcraft; instead, harmful practices associated with witchcraft would be dealt with under the common law.

## **D Evaluation and recommendations**

3.68 The submissions received by the SALRC to initiate the current investigation, submissions received in response to the issues raised in the issue paper, and the research conducted in pursuit of understanding witchcraft phenomena have been quite revealing. For one, these processes illustrate the extent of the belief by humans across the world in supernatural forces and associated practices. The question of whether such beliefs in a supernatural power are good or evil depends on different cultural contexts. The context presented by Pagans is that the witchcraft they practise is not associated with any evil. On the other end of the spectrum, submissions have been made that suggest that in the South

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<sup>77</sup> See paras 1.8 to 1.9 above. It is alleged that in 2008 the Department of Home Affairs approved the designation of Pagans as a religious organisation in accordance with the Civil Rights Union Act.

African context, witchcraft is associated with all that is evil – or at least that which is intended to cause harm.

3.69 The submissions presented to the Commission also highlight the need to separate the practice of Pagan witchcraft from practices associated with harmful witchcraft. This separation is important to determine whether it is possible to have the practice of witchcraft seen in its own right, and not to be subsumed by the harmful practices sometimes associated with it.

3.70 At the centre of this investigation, which calls for the reform the WSA, are claims based on the exercise of religious rights protected in the Constitution. On the other hand, there is a need to recognise the rights of people who locate their practice or belief in witchcraft in the realm of “traditional African religion” or an expression of their culture, which are both protected by the Constitution.

3.71 While the SALRC recognises the need to separate the practise of witchcraft as necessary, it cannot ignore the lived realities of many South Africans who are adversely affected by harmful practices associated with witchcraft. The submissions by most of the stakeholders have confirmed that witchcraft is destroying the lives of many innocent people in communities across the country. Traditional healers, through their submission made by the THO, confirmed the need to seriously deal with violence associated with witchcraft. Media reports, as referred to in this paper, continue to highlight terrifying stories of the witchcraft violence confronting some communities. Violence associated with witchcraft is experienced by communities in both urban and rural areas. The media reports and evidence presented to the SALRC reveal that people accused of witchcraft, or those subjected to witchcraft violence, end up having their houses torched, or are assaulted or murdered, and their bodies are mutilated and body parts removed for making muti.

3.72 The individuals most affected by practices associated with harmful witchcraft are vulnerable and require protection. The research conducted and submissions made to the Commission show that women and children have been the most affected by witchcraft violence. Children have been killed and their bodies mutilated for purposes of making muti. Women and elderly people are often accused of practising witchcraft, and this has led to them being assaulted, murdered, or banished from their communities.

3.73 The SALRC is mindful of the divergent views expressed by those who made submissions regarding whether or not there should be legislation regulating harmful practices associated with witchcraft. We are well aware that while some stakeholders, such as the THO, complain about the absence of legislation to protect innocent people accused of witchcraft and to punish those found guilty of practising witchcraft, others – such as SAPRA, SAPC and partially the CGE – argue that there should be no law to deal with witchcraft specifically. In the latter category, the view of some is that laws already exist to deal with violence such as murder, assault, and arson. Others, such as the CGE, are of the view that if witchcraft is made a crime, it might be difficult to identify the elements of that crime.

3.74 It is correct that the common law and other pieces of legislation exist to deal with certain harmful practices related to witchcraft. However, the question is whether those are sufficient to address a problem that has been with humanity for centuries. The issue that the Commission has to consider and make recommendations on in this investigation is whether such laws are sufficient to address the problems discussed in this paper.

3.75 On the face of it, the laws have not assisted communities in curbing the violence associated with harmful witchcraft practice. Surely this requires some attention, to consider how better the law can assist.

3.76 One of the problems to be overcome in the process of regulation, should this be the route followed, is to define “witchcraft” or “harmful witchcraft”. This point is what the investigation will focus on. Defining harmful witchcraft cannot be avoided, as it is essential to establish a common position from which all concerned stakeholders can move forwards. Already the Commission appreciates the difficulties that have been identified in defining witchcraft. Despite those challenges, the Commission recommends the following definition as one that should be adopted for purposes of the current investigation and related recommendations:

‘Harmful witchcraft’ means the intentional or purported use of non-natural or supernatural means (whether that involves the use of physical elements or not) to threaten, or to cause,

- (i) Death or injury to or disease or disability to any person; or
- (ii) Destruction or loss of or damage to property of any description; or

- (iii) Utilises belief and particular practices associated with harmful witchcraft to instil psychological distress or terror.

3.77 The research already conducted in this investigation has convinced the Commission that specific harmful practices do exist that are associated with witchcraft, which have devastating effects on communities. Consequently, the Commission recommends that a list be established to identify the harmful practices to be regulated. Cognisant of the problems associated with development of this list, the Commission suggests that it should contain those categories of harmful practices that can already be identified; however, the said list need not be a closed one due to possible developments in the future. At this juncture, the Commission recommends that the crimes or harmful practices to be subjected to regulation are the following: witchcraft accusations, witch findings, crimes associated with harmful witchcraft practice, and muti killings.

3.78 From the categories identified in the paragraph above, one can deduce that some of the prohibited conduct is clear-cut, such as witchcraft accusations, witch findings, and muti killings. The category dealing with crimes associated with harmful witchcraft practice is less clear at this point. The Commission notes that there are instances where people have confessed to harming others through witchcraft, and this area needs to be looked at. The proposed solution should therefore not only criminalise those who respond to threats of witchcraft, but also those who cause or threaten to cause harm to others through witchcraft. This area will be explored further during the public consultation process that the Commission will embark on during the course of the investigation.



# CHAPTER 4

## REGULATION OF WITCHCRAFT

### A Introduction

4.1 The Act under review exists within a legal framework that instructs all that the Constitution is supreme, and all law that is contrary to the spirit of the Constitution is unconstitutional. The Constitution is a unique document that protects rights of the country's citizens. The rights that are central to the current investigation are protected in the Constitution. Initiators of this investigation have argued that the Act prohibits them from exercising their constitutionally-protected rights – in this case, their right to religious freedom, freedom of expression, equality, dignity, security, and their right to choose and practice their occupation within South Africa. What is most important for this group is that the Act prevents them from exercising their right to religion. A separate group of people who initiated this investigation, while cognisant of the religious and cultural rights of others, argue that these rights must be weighed against the protection to be accorded to victims of harmful practices associated with witchcraft.

4.2 Common law and customary law are also critical to this investigation, as they are implicated when one interrogates the discourses on witchcraft and/or harmful practices. The case law discussed below will illustrate that in cases involving witchcraft, arguments are founded on culture rather than religion. In such cases, the question has been whether culture can be used as a defence. It is not clear whether common law has been developed to recognise this defence as part of South African law. Questions have been asked about whether such a defence should be introduced as a new defence, or should form part of pre-existing defences.

4.3 Indigenous communities were, and mostly still are, regulated by customary law, which – like common law – is not codified. Since the belief in witchcraft is based on a community's cultural beliefs, in rural settings traditional leaders are consulted to resolve

witchcraft-related disputes. Of importance, therefore, is whether customary law can be developed to deal with issues associated with harmful practices associated with witchcraft.

4.4 The way of life of communities still governed by traditional law, whose cultural beliefs are recognised by the Constitution, is important in understanding witchcraft practices in South African society. This section will briefly look at the evolution of the recognition of traditional healers, who also play a critical role in witchcraft-related matters among indigenous communities.

4.5 The issue paper briefly discussed how the Constitutional Court has dealt with the rights of religious minorities. The conclusion drawn from the constitutional jurisprudence is that the courts have ensured protection of the rights of religious minorities. This suggests that calls by people who claim that the practice of witchcraft is part of their religious expression should be taken into account when determining whether witchcraft practice must be outlawed.

4.6 The Constitution is also instructive on the status of international law. Section 39 of the Constitution, which deals with interpretation of the Bill of Rights, provides that South African courts must consider international law when interpreting the Constitution. The issue paper illustrated the position at an international level, and listed a number of the instruments of the United Nations (UN) that recognise the right to religion. The paper mentioned the Universal Declaration of Human Rights (UDHR) and the Convention on Civil and Political Rights (ICCPR).

4.7 Article 18 of the UDHR provides that everyone has the right to freedom of thought, conscience and religion. This includes the right to change one's religion or belief; and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief in teaching, practice, worship and observance. Article 18 of the ICCPR, which also provides for the protection of religious rights, encourages State parties to undertake to respect the religious rights of citizens.

4.8 It is imperative that in developing mechanisms aimed at addressing the scourge of witchcraft violence, we remain cognisant of interventions by the UN to deal with witchcraft-related issues. The issue paper mentions the appointment by the UN of the Special

Rapporteurs to respond to witchcraft-related killings in Africa. The interventions suggested by the UN in addressing witchcraft in Africa will be taken into account in developing the approach that South Africa needs to follow in the review of its witchcraft legislation.

4.9 The sentiments and legal instruments that are discussed in this paper demonstrate the need for a holistic examination of the legal framework. That is, the investigation should focus not only on laws in South Africa but also on laws in other countries in the continent that have sought to deal with the scourge of witchcraft, as well as the WSA (as the law under review) and other legal instruments developed in South Africa, to provide an understanding of the role the WSA has had in our legal system. This section also provides a constitutional analysis of the WSA to offer possible guidance on issues that the Commission should consider in its quest to find a solution to the problem presented to it.

## **B Legal framework**

### **1 Domestic legal framework**

#### **a) Witchcraft Suppression Act 3 of 1957**

4.10 The Act was passed in 1957, and was amended in 1970 and 1997 by the Witchcraft Suppression Amendment Act and the Abolition of Corporal Punishment Act respectively.<sup>78</sup> These amendments to the Act did not deal with substantive matters under the Act, but replaced the pound denominations with the rand, and added other offences under the Act.

4.11 The Act has four sections and only two of them are relevant to this investigation. It must be noted that the Act does not contain a definition section; this is unfortunate, as the meaning of “witchcraft”, which forms part of all the offences, is not defined. This shortcoming also extends to some of the terms used in the Act, which could have many interpretations and are not defined.

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<sup>78</sup> Act 50 of 1970 and Act 33 of 1997.

4.12 The provisions in sections 1 and 2 are relevant here, as they contain categories of conduct that is prohibited in terms of the Act. The sections describe conduct that is prohibited, and for which a person would be guilty of an offence and liable to conviction. These sections provide as follows (emphasis added):

### **1 Offences relating to the practice of witchcraft and similar practices**

Any person who–

- a) imputes to any other person the causing, by supernatural means, of any 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 of, injury or grief to, disease in, damage to or disappearance 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 advice of any witchdoctor, witch-finder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means or 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 uses any supernatural powers, witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill in or knowledge of occult science to discover where and in what manner anything supposed to have been stolen or lost may be found.

shall be guilty of an offence and liable on conviction–

- (i) in the case of an offence referred to in paragraph (a) or (b) in consequence of which the person in respect of whom such offence was committed, had been killed, or where the accused has been proved to be by habit or repute a witchdoctor or witch-finder, to imprisonment for a period not exceeding 20 years;
- (ii) in the case of any other offence referred to in the said paragraph, to a fine or imprisonment for a period not exceeding ten years;
- (iii) in the case of an offence referred to in paragraph (c), (d) or (e), to a fine not exceeding five hundred rand or to imprisonment for a period not exceeding five years, or both such fine and imprisonment;
- (iv) in the case of an offence referred to in paragraph (f), to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding two years.

### **2 Presumptions**

Where any person in respect of whom an offence referred to in paragraph (a) or (b) of section 1 was committed, is killed, it shall be presumed, until the contrary is proved, that such person was killed in consequence of the commission of such offence.

[Emphasis added]

4.13 The offences created by section 1 of the Act prohibit conduct relating to various aspects, as discussed in the next seven paragraphs (paras 4.14 to 4.19). Subsection (a) prohibits any person from accusing another person of using witchcraft to cause any disease or injury or damages to any person or thing, or to name or indicate that any person is a wizard. This prohibition covers instances of the pointing out of witches, or witch hunts, where individuals are accused of causing harm to others through witchcraft or the use of supernatural powers.

4.14 Subsection (b) prohibits any person from professing or pretending to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, to attribute the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person. This provision affects persons known as “witchdoctors.” For there to be a violation of the provision, the conduct of the “witchdoctor” must result in causing harm such as death, disease, damage or disappearance of a person or thing.

4.15 Subsection (c) deals with situations where an individual employs or uses the services of a “witchdoctor” or “witch-finder” or any other person to name or to “sniff out” a witch or wizard. In this instance, an offence is committed when a person employs the services of someone such as a witchdoctor to advise him or her of the identity of a witch.

4.16 Subsection (d) prohibits situations where a person who professes knowledge of witchcraft or the use of charms advises any other person on how to bewitch or injure any person, or to damage a thing, or supplies any person with pretended means of witchcraft.

4.17 Subsection (e) prohibits the practice of witchcraft. What is prohibited are situations where any person, on the advice of any witchdoctor, witch-finder or other person, or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means or process which, in accordance with such advice or their own belief, is calculated to injure or damage any person or thing. What is prohibited is the independent practise of witchcraft, or witchcraft practised on the advice of another person (such as a witchdoctor or witch-finder).

4.18 Subsection (f) covers those people who, for reward, pretend to use witchcraft or a pretended means of witchcraft or knowledge of supernatural powers, to find or discover where and in what manner anything supposed to have been stolen or lost may be found.

4.19 Section 1(i) creates an offence where a person is killed as a consequence of conduct prohibited in terms of subsections (a) or (b), or where the accused has a reputation of being a witch-finder. The punishment for the offence in this subsection is the most severe as it carries a 20-year imprisonment term. This provision is linked to section 2 of the Act, which provides that where a person is killed as a result of conduct prohibited in terms of subsections (a) or (b), unless proven otherwise, that person will be presumed to have killed as a result of the commission of the prohibited conduct.

4.20 The Act, like many such laws in the African continent and elsewhere, prohibits the practise of witchcraft and related activities associated with witchcraft. The tough prison sentences and high fines that can be imposed for committing such offences are notable.<sup>79</sup>

4.21 Crimes that attract the toughest penalty and are therefore regarded as serious in the Act are those listed in subsections (a) and (b). For commission of these crimes, an accused attracts a term of imprisonment that does not exceed ten years, or a fine of R200 000.00. Where a victim was killed as a result of the crime committed, the term of imprisonment is increased to 20 years.

4.22 Crimes related to offences listed in subsections (c), (d) or (e) attract a prison term of a period up to five years, or a fine of R100 000.00. With regard to a crime relating to the offence in subsection (e), which includes the involvement of a witchdoctor in the crime, if a victim is killed as a result of that crime, then subsection (i) could apply and the prison term could be increased to a period not exceeding 20 years.

4.23 Crimes committed under subsections (f) attract lesser penalties; the period of imprisonment is up to two years, with a fine of R40 000.00. This subsection could also attract the penalty in subsection (i), where the penalty can be for a period not exceeding 20 years if, as a result of the assistance provided to the accused, someone was killed.

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<sup>79</sup> The fines referred to in the paragraphs below have been adjusted to current monetary value according to the latest schedule issued in terms of the Adjustment of Fines Act 101 of 1991.

4.24 The provisions in the Act, and the penalties for committing the prohibited conduct, show how seriously the legislature at the time viewed the conduct so prohibited. Also important to recognise are the offences that are regarded as serious in terms of the Act, which are witchcraft accusations and witch hunts. These were serious concerns at the time the Act was passed and still have devastating consequences in society today.

4.25 The crimes committed in terms of subsections dealing with the practice of witchcraft, witch-findings, and using the services of witchdoctors need thorough examination, especially in light of the Constitution and its imperatives. In present-day South Africa there are sections of the community, such as Pagans and witchdoctors (now known as traditional healers), who proclaim that they practise witchcraft as part of their religion or culture – rights that are protected in the Constitution. The activities of traditional healers today must be seen in the context of the Traditional Health Practitioners Act,<sup>80</sup> which not only regulates this practice but also recognises these healers as part of the mainstream health care system. Witch hunts or witch-findings are a serious concern, as they were decades ago. The recent Beatification of the Blessed Daswa by the Catholic Church reminds us that witch hunts or witch-finding had dire consequences in the past and that this scenario has not changed in modern-day South Africa.<sup>81</sup> The principles contained in the subsection dealing with the services of traditional healers need to be examined, because when people use such services they do so as part of their cultural beliefs, which are also protected by the Constitution.

4.26 The sentiments in paragraph 4.25 can also apply to the prohibited conduct related to the use of supernatural powers – something that Pagans and traditional healers do as part of their business.

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<sup>80</sup> Act 22 of 2007. This Act will be briefly discussed below.

<sup>81</sup> On 13 September 2015, the Catholic Church celebrated the anointing of Mr Daswa as a saint. He was a teacher in the then Northern Province (now Limpopo). He was murdered on 2 February 1990 by members of his community, for refusing to accept the power of witchcraft or to participate in witch-finding. On 22 January 2015, Pope Francis authorised the Congregation for the Causes of Saints to promulgate and decree the martyrdom of Benedict Daswa. This process led to the beatification, which is public recognition by the Catholic Church that Benedict Daswa is “a blessed martyr of Christ and intercedes in heaven before God for the needs of God’s people”.

4.27 This discussion of the provisions of the Act and consequences for those who contravene the law illustrate how difficult it can be for the courts to deal with witchcraft-related matters, especially under the constitutional dispensation.

4.28 Courts have dealt with a number of witchcraft-related cases, two of which were briefly discussed in the issue paper. The cases discussed in that paper illustrated whether the courts had considered the cultural defence in dealing with witchcraft cases. In both cases, the court had not accepted the cultural defence presented by the accused.

4.29 In reviewing cases for purposes of this paper, it was established that there are two main types of cases that the courts have dealt with. That is, those where the accused was charged with a crime regulated by criminal law, and those where the accused was charged in terms of the Act under review. Case law also shows that in the majority of cases, the issues dealt with relate to naming a person as a witch (witchcraft accusations), killing to protect oneself from harm, and muti killings. These three categories of cases, and the outcomes therein, are discussed below.

4.30 The first category is cases in which naming someone as a witch was brought to court, and the accused was charged in terms of the WSA. In cases where an accused is charged with naming a person as a witch, the courts have emphasised the seriousness of such accusations and the need to protect communities against repercussions faced by people identified as witches. In *S v Phalane*,<sup>82</sup> the accused were convicted and sentenced for crimes committed under section 1(a) of the Act. The accused were villagers who had accused the complainant of practising witchcraft, after a community member had died in the village. The accusations did not originate from the accused, as the issue of the complainant's witchcraft had been discussed at a village meeting and she had allegedly been reprimanded for her witchcraft. Soon after the death of a villager, the accused had approached the complainant and continued with their accusations. They allegedly also called the community to assemble at the complainant's house, and later at a sports field, where they incited the villagers to burn the complainant. The High Court was satisfied with the conviction and sentence of the lower court, which had imposed a fine of R3 000.00 or

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<sup>82</sup> [2005] JOL 14525 (T).



ten months' imprisonment for each of the accused. In *S v Mashimbye*,<sup>83</sup> the accused had committed the offence in terms of section 1(a) of the Act while extremely drunk. He was sentenced to ten years' imprisonment. The High Court argued that the sentence by the lower court was excessive, as the prescribed sentence in terms of the Act is not more than ten years. In reducing the sentence to four years, half of which were suspended, the Court argued that the accused had committed the offence while he was drunk. Although it appreciated the seriousness of the offence that the accused was charged with, and agreed that the accused should be severely punished, the Court argued that his state of mind should be taken into consideration. In the case of *S v Maluleke*,<sup>84</sup> the accused was charged in terms of section 1(a) of the Act, as she had named the complainant a witch after confronting the complainant about removing soil in which the accused's child's shoe had left a footprint. The accused was sentenced to a year of imprisonment, and appealed against that sentence. The Court was not satisfied with the harsh sentence, but argued that the charge was a serious one. The Court emphasised the fate suffered by people who are called witches, which includes "serious humiliation, injury and even death at the hands of certain communities."

4.31 Although the offences in terms of section 1(a) attract a prison sentence of not more than ten years' imprisonment, the courts' decisions in the cases referred to above have varied. The sentences imposed were for imprisonment of ten months, four years, and one year respectively. Notwithstanding the acknowledgement that the crimes the accused were charged with were serious, the courts were prepared to pay attention to mitigating circumstances around the crimes committed.

4.32 The second category includes killing to protect oneself from harm, or where harm has been caused to the complainant/s. In a case that came before the Appellate Division (AD), an accused had killed another person – his neighbour – because of the accused's belief in witchcraft. The court accepted as a mitigating factor the accused's belief, as an explanation for the offence committed.<sup>85</sup> The lower court had sentenced the accused to imprisonment for ten years for the crime. In reducing the prison term to four years, the Court on appeal accepted as the only reasonable explanation the accused's belief in

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<sup>83</sup> [2005] JOL 16159 (T).

<sup>84</sup> [2007] JOL 19283 (T)

<sup>85</sup> *S v Netshivha* 1990 (2) SACR 331 (A).

witchcraft, when he had struck with an axe his neighbour – whom he mistook for a bat. The courts have not all necessarily followed the reasoning and approach of the AD in dealing with cases of witchcraft violence. In *S v Phama*,<sup>86</sup> the accused had killed the deceased victim after being advised by a witchdoctor that the victim was responsible for his relative's demise. The Court did not accept that the belief in witchcraft was a mitigating factor. The Court argued that the motive for the murder was vengeance, not a belief in witchcraft. The Court confirmed the lower court's sentence of 12 years' imprisonment. In *S v Latha*,<sup>87</sup> the court dealt with a case involving the murder of a grandmother by her grandchildren. The victim was accused of having bewitched a relative, who had died as a result. One of the accused had also consulted a sangoma, who advised him that the deceased victim had bewitched him. The court sentenced the first and second accused to 20 years' and 15 years' imprisonment respectively. The court considered the fact that the accused had committed the crime because the deceased posed a threat to their families' wellbeing. It also took into account their diminished capacity to appreciate the extent of their crime because of their state of intoxication while committing the crime.

4.33 The third category is cases dealing with muti killings. This is where human body parts are removed from victims after they have been murdered, and those body parts are used to make muti (medicine). The pattern established in these cases, as discussed in the next paragraph, is that the courts have distinguished between cases where the killing was done not to protect oneself but for personal gain, and those where the killing was committed because the perpetrator or accused had a belief in witchcraft. Courts have also been concerned with cases where the murders were premeditated.

4.34 In *S v Alam*,<sup>88</sup> the accused had been approached by a traditional healer, who offered him a sum of money for the purchase of human blood that he wanted for a ritual. Although the court acknowledged that the crime was not premeditated, it could not find any evidence to show that the accused's actions were based on a belief in witchcraft, which could have been considered in mitigation. The court emphasised the serious light in which it views ritual murder. The court argued that the accused had not committed the murder because of his belief in witchcraft but for personal gain. A sentence of 15 years, three of

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<sup>86</sup> 1997 (1) SAR 485 (E).

<sup>87</sup> 2012 (20 SACR 30 (ECG).

<sup>88</sup> 2006 (2) SACR 613 (Ck).

which were suspended, was handed down for the murder, with an additional ten years – five of which were suspended – for the rape charge. The court argued that sentences for ritual murders should send the message that such murders cannot be tolerated. In *Mogaramedi v S*,<sup>89</sup> the accused was a practising sangoma who had murdered his sister to obtain her genital organ, which he required to complete his final initiation to practise. The lower court had sentenced him to life imprisonment in terms of the Sentencing Act of 1997, and he appealed against the sentence. The basis of the appeal was that he had committed the offence because of his religious belief, namely that the act of killing his sister was necessary for him to complete his initiation. The court aired its concern about the prevalence of ritual murders and how communities respond to such crimes. The court made reference to cases where murders were committed because people wanted to protect themselves from harm. It argued that those circumstances should be distinguished from circumstances where the crime is committed for personal gain or selfish interest. The court dismissed the appeal, saying that that the life sentence imposed by the lower was appropriate. It stated that such a sentence was also necessary to deter other people from committing ritual murder.

4.35 The conclusion to be drawn from the categories of the cases discussed here is that the courts in South Africa have used the provisions of the WSA in dealing with witchcraft-related practices. This is different from other African countries, where other charges – such as murder – are uniformly used in witchcraft cases. The cases reviewed show that there aren't any instances where a person has been accused only of practising witchcraft; it is the consequences of that practice that have been the source of all cases that have come before the courts. What is also important to note is that the courts have been willing to recognise the cultural practices that influence people who commit crimes associated with witchcraft. While some cases have recognised the cultural defence, others have only considered the cultural belief in witchcraft in mitigation of sentencing. The status of the cultural defence in South African law is therefore not clear. This has created discourse among legal scholars, with some asking whether the cultural defence is part of our law.

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<sup>89</sup> 2015 (1) SACR 427 (GP).

## b) Traditional Health Practitioners' Act

4.36 The prohibition of the practice of witchcraft and use of supernatural power invites an examination of the role of traditional healers in matters associated with witchcraft. It is important to note that the estimated number of South Africans who consult traditional healers to attend to their medical needs is extremely high. For example, between 2007 and 2011, an estimated 70 to 80 percent of the population consulted traditional healers, who are perceived as being more accessible than western medical doctors.<sup>90</sup> Traditional healers are also consulted to defend against supernatural harm or to retaliate against witches.<sup>91</sup> Available information suggests that there are a variety of traditional healers, such as those who use religious, spiritual, personal, or supernatural divination.<sup>92</sup> Most communities recognise two main types of healers, namely herbalists (*inyangas*) who specialise in traditional medicine, and diviners (*sangomas*) who specialise in matters of spirituality.<sup>93</sup>

4.37 The belief in traditional healers is not confined to any specific sector of the population and is widespread. Unlike formal medical practice, which is regulated, traditional healers have for a long time remained unregulated. In fact, in terms of the WSA, the practice of traditional healing is outlawed.

4.38 The Ralushai Commission Report,<sup>94</sup> which was discussed in the issue paper, mentioned the role traditional leaders and healers play in matters concerning witchcraft. At the time of the investigation by the Ralushai Commission, traditional healers were identified as playing a significant role in matters concerning witchcraft. It is claimed that they played an indirect role in certain witchcraft murders, because they allegedly influenced the belief in witchcraft through their divinations. In addition, it is alleged that some ritual killings are influenced by them, in instances where victims are killed for body parts that are then taken to healers for making muti.<sup>95</sup>

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<sup>90</sup> Eastman in Bennett *Traditional African Religions* 184. Tebbe *Witchcraft and Statecraft*, 195.

<sup>91</sup> Tebbe *Witchcraft and Statecraft* 194

<sup>92</sup> Eastman in Bennett *Traditional African Religions* 184.

<sup>93</sup> Tebbe *Witchcraft and Statecraft*, 194

<sup>94</sup> Note 60.

<sup>95</sup> Ralushai Commission report 47-49.

4.39 The passing by Parliament of the Traditional Health Practitioners Act<sup>96</sup> in 2007 was an indication of government's recognition of traditional healers and their role in contemporary South Africa. The purpose of the Act, as provided for in section 2, is to:

...

(b) provide for the registration, training and practices of traditional health practitioners in the Republic; and

(c) serve and protect the interest of members of the public who use the services of traditional health practitioners.

The Act also defines concepts that are relevant for this paper, which are "traditional health practice", "traditional medicine", and "traditional philosophy". These are defined in the Act as follows:

**'traditional health practice'** means the performance of a function, activity, process or service based on a traditional philosophy that includes the utilisation of traditional medicine or traditional practice and which has as its object-

- (a) The maintenance or restoration or prevention of a physical or mental illness; or
- (b) The diagnosis, treatment or prevention of a physical or mental illness; or
- (c) The rehabilitation of a person to enable that person to resume normal functioning within the family or community; or
- (d) The physical or mental preparation of an individual for puberty, adulthood, pregnancy, childbirth and death

...

**'traditional medicine'** means an object or substance used in traditional health practice for-

- (a) The diagnosis, treatment or prevention of a physical or mental illness; or
- (b) Any curative or therapeutic purpose, including the maintenance or restoration of physical or mental health or well-being of human beings,

but does not include a dependence-producing or dangerous substance or drug.

**'traditional philosophy'** means 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;

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<sup>96</sup> Note 80.

4.40 Although the objects of the Act include the management and control over specified categories of professional traditional health practitioners, the Act does not specify those categories. This is made difficult by the fact that the definition of “traditional health practitioner” is a person registered under the Act. The fact that only a herbalist is defined makes one wonder if that is the only category that is recognised by the Act. Be that as it may, there is now an assumption that all traditional health practitioners who existed before the Act are now recognised.

4.41 This investigation is not concerned with the shortcoming identified in the law regulating traditional healers; that is beyond its determined scope. We briefly examine the law in question to highlight the steps that government has taken to regulate the sector, in line with the recognition of cultural practices in the Constitution. The investigation also seeks to emphasise the challenges of regulating a practice that leans on witchcraft practice or the use of supernatural powers, which is closely associated with the business of traditional healers.

### **c) Other legislative developments**

4.42 For a long time, the South African community has continued to grapple with harmful practices associated with witchcraft and its devastating effects. Courts have continued to deal with criminal cases involving incidents of witchcraft violence. The late 1980s and early 1990s saw an escalation in the incidents of witchcraft violence, and there was a marked shift from witchcraft-related killings to muti murders.<sup>97</sup>

4.43 In 2007, in an attempt to reinforce the instruments that are used to deal with violence associated with witchcraft, Parliament passed the Criminal Law (Sentencing) Amendment Act 38 of 2007 (Sentencing Act). This amendment deals with punishment for activities associated with witchcraft practice and removal of body parts.<sup>98</sup> It should be noted that the amendment deals with crimes that are already dealt with in the Human Tissue Act and the Act under review. Surely the legislature recognised the need to create still stricter measures to punish people accused of crimes under the Sentencing Act.

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<sup>97</sup> Tebbe in Bennett *Traditional African Religions* 158-159.

<sup>98</sup> Ibid.

4.44 Section 5 of the Sentencing Act, which amends Schedule 2 of the Criminal Law Amendment Act of 1997, provides as follows:

- (a) by the addition in Part 1 after paragraph (d) of the paragraphs setting out the categories of “murder”, of the following paragraphs:
- (e) the victim was killed in order to unlawfully remove any body part of the victim, or as a result of such unlawful removal of a body part of the victim;
- (f) the death of the victim resulted from, or is directly related to, any offence contemplated in section 1 (a) to (e) of the Witchcraft Suppression Act, 1957 (Act No3 of 1957); ...

4.45 The Sentencing Act is aimed at punishing the perpetrators of witchcraft violence rather than people who use body parts obtained through muti killings (that is, the “end users”). Section 1 of the Sentencing Act makes provision for a discretionary minimum sentence of life imprisonment for murders aimed at removing body parts, or for murders relating to violations of subsections (a) to (e) of the Witchcraft Suppression Act.<sup>99</sup>

4.46 Even after the passing of the Sentencing Act, calls continued for government to focus on people who use muti made out of body parts, as these consumers are seen to create the demand for such muti.<sup>100</sup> The then Minister of Women, Children and People with Disabilities had proposed even harsher punishments for muti murder, and improved processes to report crimes related to muti murder.<sup>101</sup>

4.47 Also in 2007, Mpumalanga attempted to legislate the practice of witchcraft. It is not clear why that province sought to regulate witchcraft, in addition to the national legislation dealing with witchcraft – that is, the Act and the Sentencing Act. Some argue that this move might have arisen through frustration with government’s perceived delays in reviewing witchcraft legislation.

4.48 The Provincial Legislature proposed the Mpumalanga Witchcraft Suppression Bill of 2007, which was intended “to provide for the suppression of witchcraft in the province,

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<sup>99</sup> Tebbe in Bennett *Traditional African Religions* 173.

<sup>100</sup> Tebbe in Bennett *Traditional African Religions* 158.

<sup>101</sup> Tebbe in Bennett *Traditional African Religions* 174. This ministry continues to add its voice by encouraging government to develop mechanisms to deal with muti killings. This was seen in their appeal in 2011, when they requested the Commission to investigate muti murders. The issues raised by the ministry now form part of this investigation.

to set out the Code of Conduct for Traditional Healers, to provide for the responsibilities of the Traditional Leaders and to provide for matters incidental thereto.”

4.49 The Mpumalanga Witchcraft Suppression Bill was intended to criminalise witch hunts and the act of accusing someone of witchcraft, as well as pretending to practise witchcraft. The Bill further allowed for a more stringent regulation of “traditional healers”.<sup>102</sup>

4.50 The THO and SAPRA opposed the Bill and made submissions to the Mpumalanga government. The THO’s objection was based on the sentiment that the Bill was “backward, racist, Christian, neo-liberal, [and] lacks respect for other religious beliefs...”. By contrast, SAPRA objected to the criminalising of their practices, and the constitutional violation this would imply.<sup>103</sup>

4.51 The Bill was abandoned and was never passed into law by the provincial government. This might have been a result of the opposition to the Bill raised by the THO and SAPRA.

## **2 Constitutionality of the Witchcraft Suppression Act**

4.52 It is common cause that the provisions of the WSA violate some of the rights of people such as Pagans and traditional healers, who claim that activities associated with witchcraft are part of their religion or cultural beliefs. These rights are protected in the Constitution and cannot be violated without justification that meets the requirements of the Constitution.

4.53 It is trite that the rights in the Constitution are not absolute. All the rights in the Bill of Rights can be limited, if that limitation is “reasonable and justifiable in an open and democratic society.” Some of the rights in the Bill of Rights have internal limitations, and

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<sup>102</sup> Tebbe in Bennett *Traditional African Religions* 158. With regard to the regulation of traditional healers, the Bill proposed a requirement that Chiefs and Headmen must discourage gatherings aimed at identifying witches.

<sup>103</sup> Ibid.



others may be limited in terms of the general limitation clause, section 36 of the Constitution.<sup>104</sup> Section 36 (1) provides as follows:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a) The nature of the right;
- b) The importance of the purpose of the limitation;
- c) The nature and extent of the limitation;
- d) The relation between the limitation and its purpose; and
- e) Less restrictive means to achieve the purpose.

4.54 Section 36 provides criteria that should be used in determining whether the limitation of a right is justifiable. This means that a limitation is acceptable if it can be justified in terms of the set criteria – a point which has been confirmed by the Constitutional Court in a number of cases. The section provides for a two-stage inquiry, which first asks whether a right has been infringed, and secondly whether the infringement of the right can be justified. The difference between the two stages of inquiry is that in the first stage, the focus is on the interpretation of the right, whereas the second stage requires a rigorous inquiry to demonstrate the justifiability of the limitation.<sup>105</sup>

4.55 The limitation test provided in section 36 requires the law that infringes rights to serve an acceptable purpose, and requires a balance between the harm caused by the infringing law and the benefits that society will gain from such infringement. The application of the limitation test was eloquently set out in *S v Mokwanyana*,<sup>106</sup> where the court said:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing of competing values, and ultimately as assessment based on proportionality...The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant

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<sup>104</sup> Currie & de Waal *'The Bill of Rights Handbook'* 2005, 164.

<sup>105</sup> Currie & de Waal (2005) 167.

<sup>106</sup> 1995 (3) SA 391 (CC).

considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question...<sup>107</sup>

4.56 An analysis of the constitutionality of the WSA is necessary for this investigation, not only to determine whether the Act as it stands is constitutional or not, but also to clarify whether specific legislation can be developed to govern this area. In order to engage with the issue, it is necessary to examine each crime identified by the Act itself. In the following section, each provision in the Act is analysed to determine whether its limitation of constitutional rights is justifiable.

**a) Identifying someone as a witch**

4.57 Section 1(a) of the Act provides that it is an offence for any person to

‘impute to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard.’

The offence carries with it a sentence of 20 years in prison, if a person has been killed because of the imputation or if the accused is proved to be “by habit or repute a witchdoctor or witch-finder”. In other instances, the penalty is ten years’ imprisonment. The provisions make it clear that the offence is regarded as very serious. The constitutionality of the offence created by this provision will be discussed later.

4.58 The provision seems to prohibit referring to someone as a witch or wizard or indicating that someone caused harm to another by supernatural means. There immediately seem to be several possible violations of rights. The first involves a restriction on what individuals may say or impute. This violates section 16 of the Constitution, which provides that “Everyone has the right to freedom of expression which includes –...freedom to receive or impart information or ideas”. If a person believes that someone caused harm by supernatural means, the provision in section 1(a) would prevent them from legally

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<sup>107</sup> Ibid para 104.

saying so. This, *prima facie*, appears to be a violation of freedom of expression. It also potentially violates section 15 of the Constitution, which provides that “everyone is entitled to freedom of conscience, religion, thought, belief and opinion”. In *S v Lawrence*, the Constitutional Court held that:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear, hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.<sup>108</sup>

4.59 *Prima facie*, the provision in section 1(a) interferes with the right to express one’s beliefs. However, such beliefs may form part of a range of South African cultures and religions that include a belief in the supernatural. At the same time, as a matter of substantive engagement with the provision, the focus of the Act can be seen to have been directed primarily at African cultural beliefs about witchcraft. There are widespread beliefs in South Africa that harm can, at times, arise from supernatural means. This links to the fact that there is also a communal dimension to the violation, which relates to section 31 of the Constitution. Section 31 provides that “Persons belonging to a cultural, religious or linguistic community, may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language”. Arguably, there might also be a violation of section 9 of the Constitution, as the provision could be regarded as discriminating – at least *prima facie* – on grounds of conscience, belief and culture.

4.60 In the constitutional order of South Africa, a *prima facie* infringement of a right does not end the enquiry into constitutionality. A further question arises as to the justifiability of such an infringement. That justification may take place in relation to some of the provisions outlined above at various stages of the enquiry. In relation to freedom of expression, there may be a question as to whether such imputations constitute hate speech. In equality, there is a question of whether the discrimination is unfair. To avoid lengthy discussion in relation to legal doctrines of each right, the section 36 enquiry will be analysed and this should cover most of the issues arising in the other internal limitations of the rights.

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<sup>108</sup> *S v Lawrence; S v Nagel; S v Solberg* 1997 (4) SA 1176 (CC) para 92 quoting Dickson CJ in *R v Big M Drug Mart* (1983) 13 CRR 64.

4.61 After engaging with the nature of the rights in question (which are all important), the first key element of section 36 is to identify the purpose of the provision. It has been illustrated that in South Africa, naming someone as a witch can lead to their persecution and often results in direct violence against their person.<sup>109</sup> As the offence provision indicates, this can lead to death or severe harm to their bodily and psychological integrity. There may also be a gender component to the goal of such a provision, in its attempt to protect women who fall outside the mainstream of society from being stigmatised as witches through patriarchal social structures being imposed on them. If the purpose of the prohibition is to stop such stigmatisation, hounding, and violence against people identified as witches, the purpose appears to be entirely legitimate.

4.62 The next element of the enquiry involves identifying the nature and extent of the limitation: clearly, one's freedom of expression and religion are limited but not to a large degree. One simply cannot impute supernatural harm to another person or name them a witch or wizard. An important argument raised by SAPRA relates to the fact that some people now practise a "positive" form of witchcraft, in which individuals positively identify as witches. The limitation here would be moderately severe as inhibiting a clear and important element of a religious practice.

4.63 The next element of the proportionality enquiry requires thinking through the relation between the limitation and its purpose. Does the criminalisation of such imputations effectively stop the attacks on alleged witches? It seems that there could well be a rational relationship between the law and its purpose, as the goal is to deter such imputations through the possibility of severe penalties. There is also a question as to the extent to which such a law is known across the country, which may inhibit its effectiveness. However, this is a topic for the government to educate the people about, rather than being a matter the law can achieve alone.

4.64 The last test concerns whether or not there is a viable "less restrictive means" that could be used to achieve the legislative purpose. That is, is there a measure that has a lesser impact on the right, but still achieves the purpose it aims at? The question for this

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<sup>109</sup> The media reports referred to in paragraphs 3.50 to 3.52 above demonstrate how people's lives can be placed in danger if they are accused of witchcraft.

provision is whether it is perhaps too wide and over-broad.<sup>110</sup> In other word, there is a need to think through whether the provision is too wide and allows the criminalisation of, for instance, legitimate religious worldviews. Ultimately, the key interest of the state is to inhibit violence against and stigmatisation of persons who are, or are accused to be witches. As such, it need not prohibit every reference to someone as a “witch or wizard”, particularly where this may have positive connotations – as argued by SAPRA. Being over-broad does not mean that the provision cannot be saved and brought in line with the Constitution. For instance, it might well be that this provision could be developed to indicate that the imputation that someone is a witch must carry an “intention to stigmatise or cause harm, whether physical or psychological, to the individual”. The problem concerns whether such an intention could easily be proved though the context of an utterance, which may indicate the intention. If someone in a crowd of people who have weapons shouts “Let’s get the witches in house A and B”, it would be clear that such an intention were present. It thus seems that a narrower prohibition might be justifiable in terms of the constitutional framework.

## **b) A witch attributing harm to another witch**

4.65 Section 1(b) of the Act provides for an offence by any person who -

in circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, imputes the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person.

This provision is very poorly worded. It seems to refer to a prohibition on someone professing or pretending to use a supernatural power to assert that someone else is a “witch” who caused harm to another person. The concerns regarding this provision are similar to those relating to subsection (a), as borne out by the offence provision, which is similar in relation to both sections. Section 1(b) prohibits people who are thought to exercise supernatural powers from effectively asserting that someone else has sought to cause harm to others in a supernatural way.

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<sup>110</sup> *Case v Minister of Safety and Security; Curtis v Minister of safety and Security* 1996 (3) SA 617 (CC).

4.66 The infringement analysis is similar to the discussion of section 1(a) above, except that the restriction on speech would only apply to someone who “professes or pretends” to exercise a supernatural power. The scope of the provision is narrower and the infringement less extensive. The justification again would similarly be rooted in seeking to avoid the imputation of witchcraft to particular people to avoid stigmatisation, hounding, and violence against their person. The proportionality analysis would be a similar, and perhaps this would be easier to justify due to the less extensive nature of the violation. At the same time, it is interesting to consider the “less restrictive means” analysis again. It may be that in this case, it is necessary to prohibit such an imputation by anyone who professes or pretends to exercise supernatural powers; presumably this refers to sangomas. Such a person may simply, as part of their professional work, respond to a request to identify someone as a witch, but without any intent to cause harm. However, the implications of an identification of someone as a witch by such a respected member of the community may be sufficiently serious to warrant a complete restriction on their ability to do so, whether they intend to cause harm or not.

**c) Employing someone to find a witch**

4.67 Section (c) of the Act prohibits any person who

employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard.

This provision prohibits an individual from approaching a witchdoctor or sangoma to name someone as a witch. It thus seeks to stop the practice at the first step of identification. It clearly interferes with individuals who believe in witches, and thus constitutes infringements in a similar manner to that described in the analysis of section 1(a) above. At the same time, the justification once again relates to preventing persons from seeking to find out if someone is a witch. This is quite a wide-ranging interference and it may be over-broad without some kind of limiting provision. It is not clear that in all cases, a person would wish to know if someone is a witch only in order to harm them. Therefore, to cure a possible unconstitutionality, it may well be necessary to limit this provision with terms such as “in order to stigmatise a particular individual or to harm their bodily or psychological integrity”.

**d) Prohibition on spreading knowledge of witchcraft**

4.68 Section (d) of the Act creates an offence for someone who –

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.

This offence attracts a fine not exceeding five hundred rand,<sup>111</sup> or imprisonment up to five years.

4.69 Once again, this provision is badly drafted. It is unclear what exactly is prohibited, especially because of the use of the words “and” and “or” in the provision. The first part of the offence appears to prohibit someone from claiming knowledge of witchcraft or the use of charms. Is that sufficient for the commission of the offence? It is not entirely clear, but the best interpretation would probably suggest that it is not. Two other additional elements are necessary. The person must either (a) advise any person how to bewitch or injure or damage another; or (b) supply any person with any pretended means of witchcraft. It thus seems possible to be convicted of such an offence if one professes knowledge of witchcraft and supplies a person with the means of witchcraft, even without an intention or attempt to harm another. This section closely relates to the name of the Act, which speaks about the suppression of witchcraft. This provision essentially prohibits the spreading of witchcraft.

4.70 *Prima facie*, the subsection appears to violate several rights. It primarily appears to violate section 15 of the Constitution, which involves the right to freedom of conscience, religion, thought, belief and opinion. As already mentioned, this includes the right to practise one’s beliefs. If we take into account that there are religions and cultures that do practise witchcraft in South Africa, there is also an infringement of section 31. Further, there is a potential claim for discrimination under section 9 on the grounds of conscience, belief and culture. An interesting element in relation to section 9 may also be a claim of discrimination on grounds of sex and/or gender, given that witchcraft is often associated

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<sup>111</sup> In terms of the current schedule the fine for a crime committed under this subsection is R100 000.00.

mainly with women; therefore, the prohibition may disproportionately affect certain practices of women.<sup>112</sup>

4.71 The question arises as to whether or not this provision can be justified in terms of section 36(1) of the Constitution. The nature of the right is important, so the next question concerns the importance of the purpose of the limitation. It is not clear what the purpose of this provision is which affects its justifiability.

4.72 The main purpose seems to be to prohibit harm being caused by witchcraft to any person or anything. This prohibition seems to relate specifically to the spreading of witchcraft by enabling others to gain the means to use witchcraft. The purpose seems to assume that witchcraft itself exists as an entity, and that it can cause concrete harms to individuals. The problem in assessing the purpose of this provision concerns establishing, on evidential grounds, whether this assumption is correct, and what harms may be caused to individuals. The difficulty in assessing the importance of this purpose relates to the question of whether the fact that a large segment of South Africa's people believe in witchcraft and its harms is sufficient basis upon which to criminalise such a practice, or similarly to criminalise assisting other people to perform witchcraft. It is clearly legitimate for the state to seek to prevent people from harming others through physical or psychological means. The difficulty with this issue is whether a criminal prohibition can be allowed to stand on the basis of particular supernatural beliefs that are not open to scientific verification. Given the severe consequences of a finding of criminal liability, traditionally it has been regarded as inadvisable to base charges on particular religious views or beliefs that are not open to scientific verification. At the same time, the Commission recognises that a belief in witchcraft can be used to create a feeling of terror in those who believe in it. Some individuals may confess to using witchcraft in a manner that is intended to harm others. Whether actual physical harm results or not, that process may in fact cause severe psychological harm and distress to individuals in the community. The Commission believes that if harmful practices associated with witchcraft are to be criminalised, it is the intentional use of such practices to harm or cause psychological distress that should be targeted.

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<sup>112</sup> Albertyn C and Goldblatt B 'Equality' in *Constitutional Law of South Africa* (Juta, 2005) 35-55 to 56



4.73 The nature and extent of the limitation affect a small class of persons, and would not severely impact upon their ability to perform lawful activities. Does the limitation relate rationally to the purpose? Presumably, the prohibition on sharing knowledge of witchcraft with others would limit the practice, and thus limit the potential harms it would cause (if these are accepted). Is there a less restrictive means to achieve the purpose? The provision too seems over-broad as it includes all forms of witchcraft rather than only the harmful forms. Particularly, if the offence can be committed – which is unclear – as a result of spreading the means of witchcraft, it might include in its domain people who wish to profess and spread the beliefs mentioned by SAPRA, which do not seek to harm others. If the provision is kept, it must be amended to stipulate that advice on how to harm someone is a necessary part of the provision, so as to exclude non-harmful forms of witchcraft.

4.74 Ultimately, the question relates to whether or not supernatural harm based on the beliefs of a large group of South Africans can found a legitimate purpose in constitutional law, where these views are not shared by all South Africans and lack an evidence . As the Commission has argued, the legislature may intervene to prohibit the purported use of witchcraft that may create psychological distress in others.

**e) Prohibition on witchcraft**

4.75 Section (e) of the Act creates an offence for a person who –

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

This provision is the one that actually prohibits the practise of witchcraft that is calculated to injure or damage any person or thing. The infringements of the rights would follow the analysis of subsection (d) above. The justifications analysis would be similar. The question is really whether it is legitimate, in a constitutional democracy, to prohibit engaging in supernatural processes that are designed to harm others. It is of course justifiable for the state to ban practices that will lead to concrete harms against others. The problem here, once again, lies in the fact that not all South Africans hold beliefs about whether such

harms can indeed result, and these beliefs are not amenable to scientific verification. If someone, in the privacy of their home, were to say every ten seconds “I want supernatural forces to harm X”, would this be prohibited? Presumably, it would not, if it were believed that no effective harm could result. However, if it is believed that harm can result, then the legislature might have grounds for intervention based upon the intention of a person to harm, as well as the psychological distress caused to those against whom the threats are made. The worry here is that the law opens up the possibility for criminalisation of activities, and perhaps even people, that large segments of the population are opposed to because of supernatural beliefs, and that such criminalisation can infringe the rights of others. It would usually be regarded as problematic to cause a concrete harm to an individual based on an unverified and contentious belief of another. Any state action to criminalise thus needs to be based upon clear evidence of an intention to harm on the part of the perpetrator, or to create severe psychological distress.

**f) Prohibition on witchcraft and fortune-telling for gain**

4.76 Section (f) makes it an an offence if any person –

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 and in what manner anything supposed to have been stolen or lost may be found.

This is another confusing provision, which may itself be void on grounds of ambiguity and lack of clarity. It seems to prohibit the following three activities: (a) pretending to use a supernatural power for gain; (b) undertaking to tell fortunes (for gain or not?); and (c) pretending, through use of supernatural assistance, to find out where something supposedly stolen or lost may be found.

4.77 Apart from the other rights mentioned before, and potential infringements of some of those rights, this provision draws on section 22 of the Constitution, which provides that “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law”. It may legitimately be asked why someone cannot use a psychic skill or claim to be a fortune-teller to make a

living. Clearly, there is a law which prohibits this, but if that law lacks justification then it might not constitute a “legitimate law”. If section 22 does not apply, then one may fall back on the right to human dignity in section 10, which arguably entails the right to make a living through the means one has at one’s disposal. Section 12 could also be implicated, namely, the right to freedom and security of the person as well as to bodily and psychological integrity.

4.78 Thus, the question of justification arises once more. The provision does not directly relate to harming others but rather using supernatural powers for gain. What is the interest of the state in this regard? The state may well argue that it is attempting to stop individuals from being duped to pay money for services that are mere hoaxes. The focus seems to be on people “pretending”: perhaps there is a rationale akin to the prohibition on fraud here, to protect individuals from those professing to have supernatural powers when they do not. The problem then relates to how to determine who is pretending and who is genuine, with regard to supernatural powers, since by definition this cannot be scientifically established. The Act as it stands might potentially stop the practice of traditional medicine, which is recognised as legitimate in terms of other legislation.

4.79 Moreover, it is clearly paternalistic and at odds with individual freedom to dictate what people may wish to purchase. Arguably, many people believe in medicinal home remedies, in a variety of charms, and much else which the state does not regulate. Why single out these practices? The current Act thus seems essentially to be based on making a very judgmental claim about supernatural powers and fortune-telling, without clear justification for doing so. The nature and extent of the limitation is severe against those who profess to have these powers, as they cannot profit at all from them. Given the lack of a clear purpose, it is also unclear how to assess the last two enquiries of the limitations clause. This provision is the least justifiable and most clearly unconstitutional. The legislature seems to have been unclear as to how severe this was by recognising reduced sentences for the offence in section 1 (f) compared to others found in the rest of the Act. Nevertheless, the criminalisation itself is unconstitutional.

## **g) Offences**

4.80 There is a gradation of offences in terms of how serious these are perceived to be. Clearly, the most serious charges are aimed specifically at stopping the practice of imputing witchcraft to individuals. As we saw, this is the most justifiable of the aims of the Act in section 1 (i), although is constitutionally suspect. The first part makes sense: the offence of imputing witchcraft to an individual is most dire where someone is killed as a result of this imputation. The second part is puzzling: the severity of the offence increases if the accused “has been proved to be by habit or repute a witchdoctor or witch-finder”. It is quite unclear what is meant by being “by habit” a witchdoctor. “By repute” is also unclear, and allows accusations and community hysteria to increase the severity of such an offence. Moreover, it is entirely unclear why it matters whether the person who imputes witchcraft to someone else is a witchdoctor or witch-finder. The aim of the provision seems to be to deter such imputation; thus, it should deter this on the part of anyone. It is not clear why it is justifiable to increase the penalty substantially based on the identity of the person who makes the imputation rather than upon what they do. As a result, it seems that the provision to this extent lacks justification and would for that reason be unconstitutional.

## **h) Presumption**

4.81 The provision dealing with the presumption, that is, section 2 of the Act, states that if there is an imputation of witchcraft to a person and they are then killed, it is presumed that the person was killed in consequence of the commission of the offence (unless proven otherwise). In general, the Constitutional Court has found reverse onus provisions to be unconstitutional.<sup>113</sup> The important question relates to justification: is there a clear relationship between the commission of an offence in the Act and the killing? The problem is that the presumption seems to be too wide. It mentions the person being killed without providing more detail – for instance, when was the imputation made? If it was made ten years before the person was killed, is it necessarily still relevant to their being killed? Unfortunately, violent crime today is so rife that a person can be killed without necessarily being connected to such an accusation. The circumstances of the killing and its

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<sup>113</sup> See, for instance, *S v Manamela* 2000 (3) SA 1 (CC).

relationship with the imputation need to be investigated to determine if there is indeed a connection. Ordinarily, that will require the normal criminal investigative process to take its course. In the premises, it is likely that this reverse onus provision is unconstitutional. The killing would need to be proved to be linked to the imputation, given the seriousness of the consequences for the individual.

4.82 In conclusion, this analysis has involved an engagement with the key provisions of the Act, to understand them and to consider the possible infringements of fundamental rights that may exist, and the possible justifications for such infringements. It has identified certain provisions that can be saved, should that be the preferred route, as long as they are brought in line with the Constitution.

### **3 Developments in other jurisdictions**

4.83 The issue paper briefly examined witchcraft in two other African countries, specifically developments with regard to how those countries have dealt with witchcraft-related matters. The said countries are Malawi and Zimbabwe. This discussion paper will look at a few more countries in Africa, to ascertain developments in those countries around witchcraft practices and violence associated with witchcraft. This is intended to give a broader understanding of how other countries in the continent are dealing with issues that surround the scourge of witchcraft or witchcraft-related violence. Particular attention is paid to whether any relief is brought about by modernising witchcraft laws to take account of changed societal dynamics and needs. The discussion paper will look at Cameroon (West Africa), Kenya (East Africa), Malawi (south-east Africa), and Zimbabwe (southern Africa).

4.84 As observed in the issue paper, most parts of Africa that were colonised have statutes that were, or still are, aimed at stamping out the belief in witchcraft. Some of these statutes date back to the late 19<sup>th</sup> century or mid-20<sup>th</sup> century. Since gaining independence, some former colonies have taken steps to reevaluate their witchcraft legislation, which they regard as being in conflict with the beliefs of the majority of the population in those communities.

4.85 A study conducted by an international organisation called HelpAge International (HelpAge Report)<sup>114</sup> looked at various countries in Africa, specifically to determine whether the law or legislative frameworks can be used to deal with witchcraft. The HelpAge Report highlights interesting observations and findings on the status of witchcraft laws in the countries they studied.

4.86 First, in all the countries surveyed there is a widespread belief in witchcraft, and in most cases all sectors of society share this belief in witchcraft. Witchcraft is often used to explain certain misfortunes suffered by members of the community. The findings showed that in most countries surveyed for the HelpAge Report, targets of abuse were vulnerable people, including women (especially older women), children, people with albinism, and people with mental illness. Communities illegally punish people who are accused of witchcraft in a range of ways, from banishing them from the community to physically harming and even murdering them.

4.87 Secondly, since all the countries studied are former colonies, most have statutes that deal with witchcraft and/or witchcraft-related violence. The legal framework in these countries will be discussed in detail below. The laws regulating witchcraft in all these countries all lack a definition of “witchcraft”.<sup>115</sup> The lack of definition makes it difficult to adjudicate such cases, and leaves a lot in the hands of judicial officers adjudicating those cases.<sup>116</sup>

4.88 The HelpAge Report identifies four distinct legislative approaches that have been used to deal with witchcraft. These are:

- (a) Legislation that criminalises the practice of witchcraft;
- (b) Use of traditional courts;
- (c) Laws aimed at eliminating the belief in witchcraft and criminalising the practice that targets those accused of witchcraft; and

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<sup>114</sup> HelpAge International. *Using the Law to tackle accusations of witchcraft: HelpAge International's position.* [www.helpage.org/.../using-the-law-to-tackle-accusations-of-witchcraft-helpage-internationals-position.pdf](http://www.helpage.org/.../using-the-law-to-tackle-accusations-of-witchcraft-helpage-internationals-position.pdf) Accessed on 30 April 2015. The HelpAge report surveyed nine countries: Burkina Faso, Cameroon, India, Cote d'Ivoire, Kenya, Malawi, Senegal, South Africa and Tanzania.

<sup>115</sup> HelpAge Report at 4.

<sup>116</sup> *Ibid.*

- (d) Prosecution of cases of violence against those accused of witchcraft, using existing criminal laws.<sup>117</sup>

4.89 In the first two approaches (a and b), there is recognition of the existence of witchcraft. The aim of legislation is then to protect society from harm caused by witchcraft.<sup>118</sup> By contrast, in the other two approaches (c and d) there is no recognition of the existence of witchcraft, and the focus is on protecting people accused of witchcraft.

4.90 The findings in the HelpAge Report are enlightening as far as regulation of witchcraft is concerned. The report shows that legislation aimed at those accused of witchcraft is not working, as it has failed to reduce the belief in witchcraft; nor has it served as a deterrent to accusations of witchcraft or violence related to witchcraft.<sup>119</sup>

4.91 Another finding relates to lack of enforcement of laws regulating witchcraft. Enforcement is almost impossible, especially where there is a belief in the existence of witchcraft across all sectors of society. At the centre of the problem is lack of access to justice by those accused; also, sometimes lack of faith in the legal system is a barrier to enforcement.<sup>120</sup>

4.92 The fact is that when dealing with witchcraft, one deals with a derogation from established principles of the law, especially criminal law, and this is a cause for concern. The HelpAge Report also shows that when dealing with witchcraft cases, there is usually a departure from established principles such as admissibility of circumstantial and hearsay evidence, rules of admissible evidence, and proof of the causal link between the crime committed and the supernatural act.<sup>121</sup> As discussed elsewhere in this paper, the lack of a definition of “witchcraft” in almost all legal instruments regulating witchcraft makes it difficult, on the one hand, for courts to prove that a crime was committed. On the other hand, the person accused of witchcraft does not know the elements of the crime they are charged with. This in turn violates the right to a fair trial. With regard to the use of traditional courts, the HelpAge study found that this is not helpful, as methods used in

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<sup>117</sup> HelpAge report at 5.

<sup>118</sup> Ibid.

<sup>119</sup> HelpAge Report at 6.

<sup>120</sup> Ibid.

<sup>121</sup> HelpAge Report at 7.

those courts are problematic. This is because traditional courts move from the premise that witchcraft exists and that members of society have to be protected from harm associated with witchcraft.<sup>122</sup>

#### a) Cameroon

4.93 Like most countries in Africa, in Cameroon the belief in or practice of witchcraft is widespread. Witchcraft is described as a practice relating to the supernatural, which could either be evil witches, people with powers to fight evil witches, or people with powers to heal.<sup>123</sup> As in other settings (which will be discussed below), the most vulnerable in the community who are targeted are older women, autistic children, and people with albinism or mental illness. Those accused of witchcraft are exposed to physical violence and banished from the community.<sup>124</sup> An interesting aspect about Cameroon is that it has a history of conducting trials of people suspected of being witches.<sup>125</sup>

4.94 Witchcraft in Cameroon is regulated by a post-colonial legal framework that was developed after the country gained independence in 1960. The Penal Code, specifically Articles 251, 278 and 279, regulate witchcraft. Article 251, the main article dealing with witchcraft, provides as follows:

Whoever commits any act of witchcraft, magic or divination liable to disturb public order or tranquillity, or to harm any person, property or substance, whether by taking a reward or otherwise, shall be punished with imprisonment for from two to ten years ad with a fine of five thousand to one hundred thousand francs.<sup>126</sup>

Article 278 provides that witchcraft is an aggravating offence in cases of homicide or murder, and Article 279 provides that witchcraft is considered as actual bodily harm.<sup>127</sup>

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<sup>122</sup> HelpAge Report at page 8.

<sup>123</sup> HelpAge Report page 13.

<sup>124</sup> Ibid.

<sup>125</sup> Tebbe N, 'Witchcraft and statecraft: liberal democracy in Africa', *Georgetown Law Journal* 96:183, 2007 at 232.

<sup>126</sup> Ibid.

<sup>127</sup> See HelpAge report page 13.



4.95 For a long time after the existence of regulation of witchcraft by the Penal Code, there was hesitance in enforcing it. This changed in about the 1980s, when courts started hearing witchcraft-related cases. Judges have to rely on their own interpretation of witchcraft, and sometimes have convicted suspected witches on the evidence of traditional healers.<sup>128</sup> Cases involving witchcraft are said to be difficult to prove, especially because prosecutors find it difficult to prove that supernatural powers caused the harm complained of.

4.96 Despite attempts to use the law to deal with witchcraft cases, there have not been many successes. Taking these cases through the justice system has not been successful.

## **b) Kenya**

4.97 This East African country is also seized with widespread belief in witchcraft. People accused of witchcraft are isolated, abused (physically and psychologically), and sometimes murdered.<sup>129</sup>

4.98 In Kenya, witchcraft is regulated by the Witchcraft Act of 1925, which was colonial regulation that was re-enacted after independence.<sup>130</sup> This Act prescribes a number of witchcraft practices as offenses; these are “to pretend to practise witchcraft, to claim knowledge of witchcraft, to possess charms related to the practice of witchcraft.”<sup>131</sup> The Act further prohibits witchcraft accusations that are not made through the relevant authorities. Like other similar laws in the continent, the Act does not define “witchcraft”. There is also the Penal Code, which deals with violence associated with witchcraft, including murder and robbery.<sup>132</sup>

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<sup>128</sup> Ntebbe (2007) at page 232.

<sup>129</sup> HelpAge Report at page 18.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid. The offences created in the Kenyan Act are similar to most that are found in the South African Witchcraft Suppression Act discussed in this paper.

<sup>132</sup> HelpAge Report at page 18.

4.99 Ordinarily, a belief in witchcraft is not regarded as a mitigating factor in witchcraft-related cases, except where the victim conducted themselves in a way that made the accused believe it was an act of witchcraft.

4.100 The Witchcraft Act is not often used in Kenya. Most cases are brought under the Penal Code, with murder and manslaughter charges.

**c) Malawi**

4.101 There is a widespread belief in witchcraft in Malawi, and the people most frequently accused of witchcraft are elderly women. Witchcraft in that country is regulated by the Witchcraft Act of 1911. This Act does not define “witchcraft”, nor does it provide guidance on how witchcraft cases should be dealt with.<sup>133</sup> Most witchcraft-related cases are dealt with in terms of the Criminal Procedure and Evidence Code.

4.102 The Malawian Witchcraft Act is similar in many respects to the South African Witchcraft Suppression Act. It, too, prohibits witchcraft accusations, the pretence of using witchcraft, and the practices of witchdoctors or witch-finders.

4.103 Although there is appreciation that Malawi’s Witchcraft Act is intended to protect people from dangerous practices associated with witchcraft, some have argued that the Act is out-dated. It was passed in 1911.<sup>134</sup> The problem that has been identified with the Act is that it does not recognise the existence of witchcraft, hence it criminalises witchcraft accusations. Most people believe that witchcraft practice should be criminalised so as to protect communities from witchcraft. However, there is acknowledgement of the challenges that exist in criminalising witchcraft, such as evidentiary proof in such cases, considering that witchcraft involves supernatural powers. Those opposed to the current Act are dissatisfied with the fact that it does not protect the victims of witchcraft accusations.

4.104 Witchcraft is used to explain misfortune or negative events that befall people. Witches are believed to act with the sole purpose of harming others, and witches are seen

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<sup>133</sup> HelpAge Report at page 20-21.

<sup>134</sup> Malawi Law Commission *Issues Paper 6*.

as being capable of inflicting misfortune on their victims.<sup>135</sup> Witchcraft accusations are rife in Malawi, and those who are accused face various forms of abuse – such as physical abuse, destruction of property, and sometimes even death.<sup>136</sup> Apart from such accusations, people are also hunted down where there are claims that the suspected witches are responsible for teaching young children how to practise witchcraft, or where witches are blamed for causing death or other misfortunes.<sup>137</sup>

4.105 In Malawi, unlike South Africa, many people are in the criminal justice system because they are victims of witchcraft accusations, that is, they have been accused of practising witchcraft.<sup>138</sup> Those who accuse others of practising witchcraft are hardly dealt with.<sup>139</sup>

4.106 Malawi has started a process of reviewing its witchcraft legislation. The Malawi Law Reform Commission (Malawi LRC) is busy with the process of investigating a review of the Witchcraft Act. In April 2009, Malawi LRC published an issue paper towards a review of that country's witchcraft legislation.<sup>140</sup> The law reform process was necessitated by calls from members of the public for a review of the Witchcraft Act, which they alleged was foreign to the common beliefs of Malawians.<sup>141</sup> The Malawian Witchcraft Act assumes that witchcraft does not exist, but this assumption is contrary to common beliefs among Malawians.

4.107 One of the submissions made in response to the Malawi issue paper supports retaining the provisions of the law to protect women against harmful practices.<sup>142</sup> The Bar Human Rights Committee (BHRC) suggests that there is no need to reform the law, as it complies with international human rights standards that protect women. The BHRC

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<sup>135</sup> Byrne C *Hunting the vulnerable: Witchcraft and the law in Malawi*, 16 June 2011. Web

<sup>136</sup> HelpAge Report at page 20-21

<sup>137</sup> Ibid.

<sup>138</sup> Malawi: *Suspected witches jailed*. IRINNews

<sup>139</sup> Ibid.

<sup>140</sup> Malawi Law Commission *Issue Paper*.

<sup>141</sup> Malawi Law Commission *Issue Paper 5*.

<sup>142</sup> Submission to the Malawi Law Commission titled *Observations of the Bar Human Rights Committee on the relevant international legal standards*, Bar Human Rights Committee of England of Wales (2011), 9. This submission is referred to as the BHRC submission.

indicates that what could be done is to strengthen the current legal provisions by introducing non-legislative measures, such as education and outreach.<sup>143</sup>

4.108 The issue paper also discussed the stigmatisation of children through witchcraft accusations. In response to this issue, the BHRC argues that the current Malawi Act protects children against witchcraft accusations.<sup>144</sup> They make reference to sections 4 and 3 of the Act, which criminalise the stigmatisation of persons as witches and trials by ordeal, respectively.<sup>145</sup>

4.109 The law reform process in Malawi has stalled. The Malawi LRC has indicated that since the publication of the Issues Paper in 2009, no other research paper has been published.<sup>146</sup>

#### **d) Zimbabwe**

4.110 In Zimbabwe there is also widespread belief in witchcraft, although the phenomenon is not universal.<sup>147</sup> A scholar of religious studies, Mafico, argues that the lack of universal belief has resulted from certain cases that were investigated by the police, where the plants that were allegedly used to kill people proved to be benign when tested. The same argument is advanced for cases where post-mortems were conducted on people killed by witches who had “confessed”, but the autopsies showed that the deaths were due to natural causes. The same goes for corpses which were claimed to have been mutilated by witches but were found to be intact.<sup>148</sup>

4.111 It is reported that there are differences in how the traditional courts and formal courts deal with witchcraft cases. The traditional courts start with the premise that witchcraft does exist, while the formal courts’ view is that witchcraft does not exist.<sup>149</sup> The

<sup>143</sup> Ibid.

<sup>144</sup> BHRC submission at page 15.

<sup>145</sup> Ibid.

<sup>146</sup> The status of the investigation was confirmed during an email communication between the designated researcher and a senior official of the Malawi LRC in May 2015.

<sup>147</sup> Mafico T.J *Witchcraft: Belief and realities: A debate*, 1986 Zambezia at 119-130.

<sup>148</sup> Mafico (1986) 122.

<sup>149</sup> Mafico (1986) 119.

formal courts' view was based on the philosophy contained in the Witchcraft Suppression Act (Ordinance 14) of 1899, which regulated witchcraft in that country until 2006.<sup>150</sup>

4.112 The 1899 Act was intended to punish those who named others as witches (witchcraft accusations). The Act defined "witchcraft" as "the throwing of bones, use of charms and any other means and devices adopted in the practice of sorcery."<sup>151</sup> Sociologists such as Chanvunduka criticised the definition, arguing that it was wrong to associate the throwing of bones with witchcraft, as throwing bones is a means of divination used by traditional healers. The same arguments were made about the prohibition of the use of charms, as it is believed that many charms have nothing to do with witchcraft.<sup>152</sup> In detecting whether a person is a witch, trials by ordeal were conducted. This method of detection was severely criticised and regarded as an out-dated myth.<sup>153</sup> The conclusion reached by those who do not believe in witchcraft was that it is a figment of people's imagination.<sup>154</sup> This group associates a belief in witchcraft with conditions such as poverty, rampant disease, groundless hatred and fear.<sup>155</sup>

4.113 The conclusion that can be drawn about the witchcraft discourse in Zimbabwe is that some scholars accepted the belief in witchcraft, while others remained convinced that witchcraft does not exist.

4.114 Of relevance for this investigation is the state of affairs since the passing of the "modern" witchcraft law in Zimbabwe, and in particular how the courts have dealt with witchcraft cases. The new legislation, the Criminal Law (Codification and Reform) Act of 2006 (Codification and Reform Act), recognises the existence of witchcraft and prohibits the use of practices that are associated with witchcraft. It should be noted that the law regulating witchcraft is not a stand-alone statute but one that deals with the entire criminal code of the country.

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<sup>150</sup> In 2006, Zimbabwe passed the Criminal Law (Codification and Reform) Act, which replaced the Witchcraft Act of 1899.

<sup>151</sup> Chavundika G.L. *Realities of Witchcraft* 1986 Zambesia at 130-135.

<sup>152</sup> Ibid.

<sup>153</sup> Mafico (1986) 123.

<sup>154</sup> Mafico (1986) 122.

<sup>155</sup> Mafico (1986) 123.

4.115 Part VI of chapter 2 of the Codification and Reform Act deals with crimes related to witchcraft, and is titled “Witchcraft, witch-finding and crimes related thereto.” This part has isolated the crimes that the Act seeks to regulate and deal with. The Act prohibits engaging in practices commonly associated with witchcraft, indicating witches and wizards, employing non-natural means to resolve crimes or delict; and provides alternative or concurrent charges with those under the relevant part. Part VI also provides that the belief in witchcraft will be regarded as a mitigating factor and not a defence to crimes provided for in the law.

4.116 The Part also provides a definition of some of the terms that are used in the provisions. The terms defined are “accuse a person of witchcraft” and “non-natural means.” The Part provides that “accuse a person of witchcraft” means to indicate that the person –

- (a) has used, is using or is likely or able to use non-natural means to cause–
  - (i) death or injury to or disease or disability in any person; or
  - (ii) destruction or loss of or damage to property of any description;
- or
- (b) is possessed by a spirit which has caused, is causing or is likely or able to cause–
  - (i) death or injury to or disease or disability in any person; or
  - (ii) destruction or loss of or damage to property of any description;

The definition for “non-natural means” includes the practice of witch-finding. Unfortunately, no definition of “witchcraft” is provided in the law.

4.117 Court cases have been reviewed for this investigation to determine the rulings that the courts have made in light of the provisions of the 2006 law. An overall observation is that the courts have not used the provisions of the new law to deal with witchcraft cases. The cases reviewed show that the criminal justice system uses the crimes provided for in the Codification and Reform Act, not the specific crimes listed in Part VI of Chapter 2 of the Codification and Reform Act.

4.118 In the cases dealing with murder motivated by witchcraft, the accused were charged with the crime of murder as regulated by section 47 of the Codification and Reform Act. Although the accused persons in those cases were not charged with the crimes under sections 97 to 102, issues of witchcraft were mentioned in passing. For

example, in *S v Simoyi*<sup>156</sup> the accused had stabbed his father to death during an altercation, which had occurred because the accused had imputed his mother of practising witchcraft. The witchcraft arguments did not arise but were mentioned in passing by the court when sentencing the accused. The accused was sentenced to 12 years for the murder. In *S v Techu & Others*,<sup>157</sup> the accused were charged with murder in terms of section 47 of the Codification and Reform Code. The murder of the deceased was allegedly motivated by accusations of witchcraft that were levelled against the deceased. In sentencing the accused to 18 years' imprisonment, the court took into account the accused's belief in witchcraft as mitigation for the crime committed. In *S v Hamunakwadi*,<sup>158</sup> the accused had killed his mother because of his belief that she was bewitching him. This allegation emanated after confirmation he received from traditional doctors, who had indicated that his mother was the cause of his marital trouble. Although the court argued that a belief in witchcraft was recognised in law as a mitigating factor, it rejected the defence of provocation through suspicion of witchcraft, because the offence was not committed in the heat of the moment. The court argued that when the accused killed his mother, he had not been provoked.

#### e) Conclusion

4.119 South Africans can learn from events in other countries in the region. In the African context and among indigenous groups, it is a fallacy to deny that the belief in witchcraft and witchcraft practices that are harmful to others still exist. What is required is a balance between acknowledging traditional belief in witchcraft on the one hand, and on the other hand passing laws that regulate harmful practices associated with witchcraft.

4.120 The inclusion of traditional healers as "expert witnesses" in court cases dealing with witchcraft-related offences has also been debated in other African countries. In Cameroon, for example, state courts employ certified "witch-diviners" (*nkong*) to testify against alleged witches.<sup>159</sup> Although Cameroon has officially criminalised witchcraft

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<sup>156</sup> [2015] ZWHHC 560

<sup>157</sup> [2015] ZWHHC 271.

<sup>158</sup> [2015] ZWHHC 323.

<sup>159</sup> Fisiy and Rowlands, (1989); Fisiy and Geschiere (1990); Geschiere and Fisiy (1994); Fisiy (1998); Niehaus (2001).

practices, the use of traditional witch-diviners seems to reinforce the very beliefs that the state may be trying to eliminate.

## **C EVALUATION AND RECOMMENDATIONS**

4.121 This review of the Act comes at a time when all laws in the Republic of South Africa are required to be consistent with the Constitution. When the Act was passed, there was insufficient recognition of rights and so it did not have to be constitutionally compliant. The Act was an invasive one and had little respect for cultural beliefs that indigenous communities held at the time. In order to deal with witchcraft practices and related harmful practices, that Act simply suppressed all forms of witchcraft activity.

4.122 Society has evolved, especially in the context of South Africa, where the dictates of the Constitution are supreme. The practice of witchcraft can no longer be seen only through the lens of indigenous communities, where it is necessarily associated with evil. There are other sections of the community that now practise what they term “witchcraft”, which is alleged to be an exercise of the right to religion. The religious rights of this small group cannot be ignored, especially in light of the constitutional jurisprudence, which emphasises the protection of religious minorities. The cultural beliefs of indigenous communities, some of which have a bearing on harmful practices associated with witchcraft, also need some form of recognition and protection, because those beliefs too are protected in the Constitution.

4.123 The Act under review is still in the statute book, and other laws have been implemented to address concerns around the practice of witchcraft. Yet all these legal instruments have not discouraged harmful practices associated with witchcraft. Courts have not ignored their responsibility of enforcing the law and protecting citizens, as they have continued to punish those who contravene the provisions of the legal instruments aimed at curbing witchcraft violence.

4.124 We have learned from other jurisdictions that have similar problems that the challenges created by the belief in witchcraft are prevalent not only in South Africa but in the world at large. Countries in the African continent have a mixture of laws, notably those



that ignore the belief in witchcraft among communities, and those that are premised on the existence of the belief in witchcraft.

4.125 The time has come for the recognition of the widespread belief in witchcraft, coupled with the recognition that not all forms of witchcraft practice are harmful. However, some forms are indeed harmful. An important distinction must therefore be made between the practice of witchcraft per se and harmful practices associated with witchcraft. The courts are called upon to deal with cases dealing with harmful practices associated with witchcraft, and not necessarily the belief itself. As a result, the Commission recommends that the current Act, which fails to adequately make these distinctions, should be repealed.

4.126 The Act that is repealed should be replaced with a modern law that concerns itself with prohibiting conduct that is harmful to society. It is true that many laws already exist that can be used to deal with harmful practices, including criminal laws and other laws such as the Human Tissue Act. The Commission believes that as things stand, these laws have not been of much assistance. More could be achieved if a single law is developed to deal with harmful practices associated with witchcraft. In this regard the Commission therefore recommends the development of a law that will deal with harmful practices associated with witchcraft practice. The proposed law is to be called the “Prohibition of Witchcraft Practices Associated with Witchcraft Beliefs Act,” and will be a one-stop mechanism to address the negative and antisocial problems associated with witchcraft.

4.127 The proposed law will address issues such as witchcraft accusations, witch findings, crimes associated with or motivated by the belief in witchcraft, and muti killings. The constitutional analysis provided in this chapter has illustrated how some parts of the current Act can be modified or transformed to meet constitutional requirements. The Commission therefore recommends the regulation of conduct such as witchcraft accusations, crimes associated with witchcraft, and muti killings. The proposed law will also make it clear that a belief in witchcraft is not a defence in such serious cases, but can be used in mitigation. The law will also prescribe sentences for harmful conduct prohibited by the Act. The details of the proposed law are discussed in Chapter 5 below.

## **CHAPTER 5**

### **OPTIONS FOR LAW REFORM**

#### **A Harmful practices associated with witchcraft**

5.1 The practice of witchcraft and harmful practices associated with it bear distinct issues that need to be addressed separately. The practice of witchcraft has been claimed to be associated with an expression of religious and cultural practices. Those who practise witchcraft, whether as a religion or cultural practice, are minorities that require protection in terms of the Constitution. By contrast, harmful practices associated with witchcraft are a phenomenon that requires special attention because of its serious consequences in many communities.

5.2 The Commission emphasises this distinction, as it is important to understand its approach in dealing with matters relating to witchcraft. Witchcraft practice, as presented by many including Pagans – who are self-defined witches – is not a threat or concern for the Commission. The real issues are those practices that divide communities, allow for targeting of witches, and cause people to live in fear.

5.3 The Commission has identified (in Chapter 4 above) activities that seek attention and need regulation. Those are witchcraft accusations, witch finding, crimes associated with witchcraft, and muti killings. These are issues that have been subjected to adjudication before many courts over a long period of time.

#### **B Regulation of the practice of witchcraft**

5.4 The submissions made to the Commission to initiate this investigation have highlighted important issues for the law reform process to take into account. Firstly, the issues presented to the Commission have demonstrated the challenges still faced by many communities as a result of practices associated with witchcraft. Secondly, there are

various competing interests that need to be balanced – such as those of people who practise witchcraft and those of victims who suffer the consequences of harmful practices associated with witchcraft.

5.5 The Commission recognises its responsibility to promote and protect the rights in the Bill of Rights, especially cultural rights and the rights of religious minorities. However, the Commission is mindful of the fact that these rights are not absolute and cannot be exercised to the detriment of others. The exercise of the rights in the Bill of Rights by Pagans and traditional healers must not prevent regulation that would deter infringement of the rights of others – in the present case, the rights of victims who deserve protection from harmful practices.

5.6 Research presented in this paper, especially case law, has shown that in court cases where witchcraft is involved, witchcraft practice is seldom a source of dispute. The reason could be the difficulties inherent in proving that a person is indeed a practising witch. More often than not, the disputes centre on the crimes associated with witchcraft.

5.7 The Commission has interrogated the calls that have been made for criminalisation of witchcraft, such as those by the Ralushai Commission and other prominent institutions. Those calls cannot be seen in isolation; they must be counter-balanced with the calls from people who practise witchcraft as part of their religion or culture. What is usually at the centre of the debate is *harmful practices* associated with witchcraft belief.

5.8 The Commission has grappled with a definition of “witchcraft”, and this has been a challenge for many before. Developing a definition of witchcraft, specifically “harmful witchcraft practice”, has been necessary to clarify what the Commission seeks to regulate. Since the proposed definition highlights the fact that prohibited witchcraft involves the use of non-natural means or supernatural power to cause or threaten to cause harm, practices such as that of Pagans and traditional healers would not be covered under the proposed law. Pagans and traditional healers don’t intend to harm anybody through their practices.

5.9 For the reasons stated above, the Commission will recommend that harmful practices associated with witchcraft be regulated.

## **C Prohibited harmful witchcraft practices**

5.10 This paper has discussed and highlighted harmful practices that are associated with witchcraft practices, and how these have dire consequences for many communities. Various laws exist to deal with the scourge of witchcraft violence, but to date no solution has been found. All the laws that deal with witchcraft provide for harsh sentences for people charged with crimes related to harmful witchcraft practices.

5.11 This paper, following a constitutional analysis of the current Act, has identified conduct that still needs to be prohibited to ensure that the fight against crimes related to witchcraft is strengthened. The Commission suggests that prohibitions against the following activities be provided for in the proposed law:

- witchcraft accusations;
- witch finding;
- crimes associated with harmful witchcraft; and
- muti killings.

5.12 Aspects of the prohibited conduct are briefly discussed below. Detail on the extent of the prohibitions is presented in the draft Bill that accompanies this discussion paper.

### **1 Witchcraft accusations**

5.13 The research conducted and the submissions received from interested parties show that the crime of accusing a person of being a witch is a serious one. In terms of the Act, it carries a sentence of imprisonment of not more than ten years. In instances where a person has been killed as a result of the witchcraft accusations, the sentence is increased to a period of imprisonment of not more than 20 years.

5.14 Reports of violent crimes directed at those accused of witchcraft cannot be ignored. The fact that the targeted group is mostly vulnerable people, especially women – and elderly women in particular, is noteworthy and alarming.

5.15 The constitutional analysis of the limitation of rights of people who accuse others of witchcraft, such as freedom of expression and communal rights, has demonstrated that the limitation of rights can be argued to be a justifiable limitation. This is because the purpose of the prohibition is to stop stigmatisation and violence against those identified as witches. In line with the said analysis, the Commission therefore recommends that the prohibition on accusations be limited to those instances where the intention is to stigmatise or cause harm (physical or psychological).

## **2 Witch findings**

5.16 It has been indicated in the research in this paper that people in certain communities may approach witchdoctors to “smell out” witches. The Act currently prohibits the conduct of witch hunting. It must be understood that the witch hunts are done primarily to harm those identified as witches. The only difference between witchcraft accusations and witch hunts is that the latter are sometimes done with the assistance of a witchdoctor. This is very serious among some communities, and it results in harm to those identified. Surely this conduct is unbecoming and should be prohibited.

5.17 Case law review has shown how people who are identified as witches through witch hunts suffer at the hands of their persecutors. The only reasonable way to deal with these witch hunts is to prohibit the conduct and punish the perpetrators.

5.18 In this regard, the Commission recommends the prohibition of witch findings that have the intention of stigmatising and causing harm to people identified as witches.

## **3 Crimes associated with harmful witchcraft**

5.19 Various crimes are perpetrated because of a belief in witchcraft. It is true that many South African communities believe in witchcraft, and there is fear of bewitchment among many. The issues that require attention are the existence of people who profess or confess to harming others through the use of witchcraft, and those who fear bewitchment and therefore act out their fear by defending themselves against people accused of practising

witchcraft. The basis for creating an offence for the category of people who profess to use practices associated with witchcraft in order to instil psychological distress in others needs to be regulated.

5.20 Case law has revealed gruesome cases involving harm perpetrated against people who have been accused of practising witchcraft. None of the cases demonstrate that those accused were indeed practitioners of witchcraft. The current law prohibits the practise of witchcraft – for all practitioners including Wiccans. The proposed new law should penalise those who practise harmful witchcraft or instil fear in others that they will be bewitched, while not restricting harmless practices associated with Wicca or traditional healing.

## **4 Muti killings**

5.21 This paper has highlighted the context within which muti killings take place. In some cases, the killings are influenced by traditional healers, who advise their clients to get body parts for them to make muti. The people significantly affected by these killings are young children, who deserve protection in our constitutional democracy. Section 28 of the Constitution instructs us about the importance of protecting the rights of children in our society.

5.22 The Act under review does not deal with muti killings. This phenomenon is partially dealt with by the Sentencing Act, which prescribes harsh sentences for those who commit murder to remove body parts. The provision in the Sentencing Act is not linked to killings associated with witchcraft.

5.23 The Commission regards killings committed in order to remove body parts to make muti as a serious societal concern. The then Ministry of Women, Children and People with Disabilities requested that muti killings be looked at and legislative amendments effected in the current regulation of such crimes.

5.24 The Commission's view on muti killings is that the focus should be at various levels, that is, on the perpetrators of the violence (those who do the actual killing of victims), traditional healers who contract others to commit murders to get body parts for

them, and the end users of such muti. The Commission believes that the conduct of all players in the “value chain of production” of muti should be prohibited and punished, with the hope that this criminalisation would reduce such crimes.

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REPUBLIC OF SOUTH AFRICA

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**PROHIBITION OF HARMFUL PRACTICES ASSOCIATED WITH WITCHCRAFT  
BELIEFS BILL**

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(As introduced.....)

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MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

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**BILL**

To provide for the prohibition of harmful practices associated with the accusations that a person is a witch; to protect communities from violence often associated with claims about harmful witchcraft practices; to criminalise harmful practices associated with witchcraft beliefs; to provide for penalties for harmful practices identified; and to provide for matters connected therewith.

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**BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:**

**1 Definitions**

In this Act, unless the context indicates otherwise----

**“harmful witchcraft practice”** means the practice as understood in traditional African communities through the use of the words ukuthakatha, ukuloya, boloi ubugqwira, which thus involves the intentional or purported use of non-natural or supernatural means (whether that involves the use of physical elements or not) to threaten or to cause:

- (i) Death or injury to or disease or disability to any person; or
- (ii) Destruction or loss of or damage to property of any description; or



(iii) Utilises belief and particular practices associated with harmful witchcraft to instil psychological distress or terror.

“**witch finding**” means any act performed with the intent to identify a person as practising harmful witchcraft;

“**muti**” means traditional medicine prepared by an expert in traditional medicine; and

“**muti crimes**” means the unlawful commission of an act prohibited by law for purposes of harvesting any part of the body for the creation of muti;

## **2 Objects of the Act**

The objects of this Act are –

- (a) to identify practices associated with harmful witchcraft and the accusations that a person practises witchcraft that is harmful to society;
- (b) to prohibit the harmful practices associated with the practise of witchcraft and the accusations of witchcraft;
- (c) to provide for penalties for perpetrators of the harmful practices associated with witchcraft.

## **3 Witchcraft accusations**

(1) Any person who accuses any other person of practising harmful witchcraft or causing any disease, injury or damage to property through the practice of witchcraft, with the intention to:

- (a) stigmatise; or
- (b) cause physical or psychological harm;

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding five years, or a fine.

(2) Where a person has been killed as a result of the offence committed in subsection (1), the person responsible for the harm shall be liable on conviction to a minimum sentence for murder for causing such death.

(3) Where a person accused of practising witchcraft admits to practising witchcraft, this will function as mitigating factor in sentencing.

## **4 Witch finding**

(1) Any person who solicits the assistance of a traditional healer or anyone else, with the purpose of identifying or revealing the identity of another person as a witch or to

impute that a person is practising harmful witchcraft and has caused disease, injury or damage to property through the practice of harmful witchcraft, shall be guilty of an offence and liable to a conviction, provided the intention of such identification is to:

- (a) stigmatise; or
- (b) cause physical or psychological harm.

(2) A traditional healer, or any person who purports to use supernatural means, is prohibited from providing assistance to any other person for purposes of identifying or revealing someone as a witch or to impute that any other person is practising witchcraft and has caused disease, injury to persons or damage to property through the practice of witchcraft.

(3) The conviction for the offences in subsections (1) and (2) will be for a term of imprisonment not exceeding five years; and if a person has been killed as a result of being so identified, the minimum sentence for murder must be imposed.

## **5 Crimes associated with harmful witchcraft**

(1) Anyone who holds themselves out to be a practitioner of harmful witchcraft shall be guilty of an offence.

(2) A conviction for an offence in terms of subsection (1) shall carry with it a penalty of not more than two years' imprisonment, or a fine.

## **6 Muti crimes**

(1) Any person who –

(a) participates in the unlawful and intentional killing of a person in order to unlawfully remove any body part from that person; or

(b) participates in any act which results in the unlawful removal of any body part of a person; or

(c) participates in any trade in human body parts for purposes of making muti; shall be guilty of an offence.

(2) Notwithstanding any other law, a person –

(a) convicted of an offence referred to in section 1(a) is liable to a sentence prescribed as a minimum sentence for murder;

(b) convicted of an offence referred to in section 1(b) is liable to a sentence of imprisonment for a period not exceeding ten years, or a fine; and

(c) convicted of an offence referred to in section 1(c) is liable to a sentence of imprisonment for a period not exceeding five years, or a fine.

## **7 Repeal of laws and savings**

(1) Subject to the provisions of subsection (2), the law specified in the Schedule is hereby repealed to the extent set out in the third column of the Schedule.

(2) Any offence committed or deemed to have been committed under the provisions of a law repealed by subsection (1), and which is capable of being committed under any provision of this Act, shall be deemed to have been committed under this Act.

## **8 Short title and commencement**

This Act shall be called the Prohibition of Harmful Practices Associated with Witchcraft Belief Act, 2016, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

### **Schedule**

#### LAWS REPEALED

<b>Number and year of law</b>	<b>Title</b>	<b>Extent of repeal</b>
Act 57 of 1957	Witchcraft suppression Act, 1957	The whole