

Using the law to tackle accusations of witchcraft: HelpAge International's position



HelpAge International helps older people claim their rights, challenge discrimination and overcome poverty, so that they can lead dignified, secure, active and healthy lives.

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Introduction

HelpAge International and its partners have considerable experience of tackling and reducing accusations of witchcraft and related violence against older women and men through community based interventions. We do not, however, have the same level of experience or expertise in the use of legislation in this area.

To address this gap, we requested, through the organisation Advocates for International Development, *pro bono* guidance from lawyers on the use of legislation to address accusations of witchcraft and related violence. Three law firms offered to review relevant legislation in a total of nine countries: Burkina Faso, Cameroon, India, Côte d'Ivoire, Kenya, Malawi, Senegal, South Africa and Tanzania. We also asked the law firms to provide general guiding principles to help inform our position on the use of the legislation in this area.

This report presents the main findings of the review and our position in relation to the issues raised. It also presents a summary of key issues from the review in each of the nine countries. Information available to the law firms varied from jurisdiction to jurisdiction. Full references and sources are available on request.

Definitions

One of the key issues raised in the multi-jurisdiction review was the difficulty in defining witchcraft. No common definition exists. Problems arise when witchcraft-related legislation does not include a definition or has a very loose one, making application of the law arbitrary and dependent on individual judges' or enforcement officers' own beliefs. Problems also arise when definitions are too narrow, for example, limiting the practices to only women or when definitions include benign practices, for example, traditional medicine.

We use the following definitions:

- witchcraft: the practice of causing harm by supernatural means
- a witch: a person who is believed to cause harm by supernatural means

Witchcraft beliefs

In the majority of the countries, belief in witchcraft is widespread, with people from all sections of society sharing this belief regardless of their level of education, socio-economic group or ethnic origin. In some countries, the belief is restricted to particular sections of society.

Belief in how witchcraft is practised varies in the different countries reviewed.

In most countries witchcraft is used as a way to explain why some misfortune happens to someone, that is, witchcraft provides the rationale as to why something happened and not the explanation of how it happened. For example, people might know that malaria was the cause of a child's death but the use of witchcraft is the reason why that particular child and not her neighbour, for example, got malaria and died.

It is usually the most discriminated against and marginalised in society who are accused of witchcraft because they are either least able to defend themselves from attack and are therefore easy targets or because they are considered of little value to society and therefore a burden to it in times of hardship.

Although exact numbers are hard to come by, reports suggest that the number of accusations of witchcraft and related violence increases in times of economic or other types of hardship.

Legislative approaches to witchcraft

There are four main legislative approaches to dealing with witchcraft:

- Those that recognise the existence of witchcraft and focus on protecting society from the harm caused by witchcraft:
 1. Legislation criminalising the practice of witchcraft.
 2. Use of traditional fora, such as traditional or customary courts, with their own processes and evidence requirements which may operate alongside or in place of the formal court system.
- Those that do not recognise the existence of witchcraft and focus on protecting those accused of witchcraft:
 3. Legislation aimed at eliminating the belief in witchcraft and criminalising practices that target those accused of witchcraft.
 4. Prosecution of acts of persecution and violence against those accused of witchcraft under existing criminal or civil legislation, for example laws on assault, murder, theft of property or defamation.

Legislation should be analysed in terms of both its potential to protect as well as harm those accused of witchcraft. For example, legislation that criminalises the practice of witchcraft may encourage persecution of alleged witches, and is therefore potentially very harmful towards those accused of witchcraft.

Taking a legislative approach: summary of findings

1. Legislative approaches are not working

In the countries reviewed, legislation introduced to prevent the persecution of those accused of witchcraft is not working. Legislation is not reducing the belief in witchcraft nor providing a deterrent to accusations of witchcraft and related violence. The law does not, in practice, provide effective protection against such accusations and violence nor redress for victims of violence and other offences.

2. The law is not being enforced

The main reason for legal approaches not working is that the various types of legislation to address witchcraft are not being enforced. Reasons for this differed from one context to another but lack of enforcement was a common issue.

Barriers to enforcement include:

- In some countries, the common belief in witchcraft across all sections of society, including among law enforcement officials and members of the judiciary, means that legislation aimed at protecting those accused of witchcraft is seen as offering unfair protection to alleged witches. This results in an unwillingness to investigate and prosecute those who have committed acts of violence against those accused of witchcraft, or for members of the public to come forward as witnesses to these crimes.
- Fear of reprisals either from the community for protecting an alleged witch or from the alleged witch themselves prevents use and enforcement of the law.
- Weak judicial systems also prevent enforcement of the law. Some justice systems are under-developed, poorly resourced and cannot cope with the number of cases before them.
- Lack of legal training for those within the legal system can lead to the failure to effectively and consistently apply the law.
- Where the majority of people accused of witchcraft are poor and vulnerable, they cannot access the legal system.
- Many people may not have faith in the legal system as a way of resolving their problems.
- In some countries corruption in the legal system can prevent enforcement of the law where there may be financial gains for accusing or persecuting someone for being an alleged witch.
- In some countries, where witchcraft related legislation was introduced under colonisation, it is still associated with colonial administrations and there is a reluctance to enforce inherited legislation at odds with popular belief.

Due to the commonly held beliefs in witchcraft and its complex social and cultural dimensions, introduction of legislation will not solve this problem of lack of enforcement.

3. Problems with derogation from established principles of criminal law

The multi-jurisdiction review identified a number of serious concerns about witchcraft related legislation not adhering to established principles of criminal law. The human rights implications of these are profound with individuals not getting a fair trial, being unfairly denied their liberty, being unlawfully imprisoned and trials resulting in unsafe convictions.

The question of evidence

To ensure that individuals are not unfairly imprisoned, safeguards around evidence and procedures need to be strictly applied.

Under established legal principles, circumstantial evidence, hearsay or speculation are not enough to secure a safe conviction. Confession evidence can only be admitted if it has been given freely and not under duress, torture or fear.

Evidence given to prove the practice of witchcraft or that an accusation of witchcraft is legitimate has to prove that harm has been caused by supernatural means. Evidence has to prove a causal link between the supernatural act and the harm caused.

This is impossible to do through material evidence and therefore prosecutions to prove that someone has carried out a supernatural act often rely heavily on hearsay, circumstantial and confession evidence. Sometimes judges are given the power to decide in retrospect if an act of witchcraft has taken place when there is no other logical explanation for what has happened.

Safe convictions under these circumstances are virtually impossible. This means that the legislation is counter-productive and likely to cause harm to those wrongly convicted under it. This is of particular concern in jurisdictions that retain the death penalty and prisons conditions are extremely detrimental to physical and mental wellbeing.

Absence of a legal definition

Under established legal principles, the prosecution has to prove that the defendant has committed the physical elements of the crime (*actus reus*). The prosecution also has to prove criminal intent (*mens rea*). This requires a clear definition of the crime that is not open to arbitrary interpretation.

In most of the countries reviewed, there is no legal definition of witchcraft. Sometimes there is a definition but it is unclear. In these circumstances it is impossible for the prosecution to prove that someone has or has not committed that crime.

It is also part of the right to a fair trial that the defendant fully understands the crime with which he or she has been charged. This is impossible when there is no legal definition of the crime, and so their right to a fair trial is being violated.

In addition when witchcraft-related legislation does not include a definition or has a very loose one, application of the law becomes arbitrary and dependent on individual judges' or enforcement officers' own beliefs. Arbitrary application of the law is also a violation of the right to a fair trial.

Problems also arise when definitions are too narrow, for example limiting the practices to only women when men are also in fact accused or when definitions include and therefore criminalise benign practices, such as traditional healing.

The use of traditional courts or other traditional fora

Whilst dealing with witchcraft related offences in traditional courts may seem appropriate since they are so related to cultural beliefs and social and economic conditions, the review highlighted a number of areas of concern about the use of such traditional fora.

Traditional and customary courts usually work on the premise that witchcraft exists and that society must be protected from harm caused by witchcraft. This provides a signal to the community that might encourage persecution of alleged witches.

Traditional courts operate under less strict rules of procedure and evidence than formal courts of law and often conduct trials in private with no official recording of the proceedings.

Those accused are therefore at the mercy of a justice system that recognises the existence of witchcraft, that lacks transparency and where evidential rules are less rigorous or less stringently observed. As a result potential abuse can go unchecked.

Restorative justice models that bring the victim and perpetrator together to resolve their differences at the community level can be effective alternatives to retributive justice systems. However they are less likely to be effective where belief in witchcraft and fear of reprisals are so widely and deeply held.

Some traditional fora employ trial by ordeal as a way to establish guilt or innocence of the practice of witchcraft. For example, those accused of being witches are forced to eat or drink a harmful substance and their innocence or guilt is proven by the effect this ordeal has on them. This form of justice is a gross violation of people's rights and these acts of violence are criminal offences in themselves and should be prosecuted as such.

4. Introduction of specific legislation criminalising accusations of witchcraft

Our initial request for legal guidance arose over whether introducing legislation criminalising accusations of witchcraft would provide greater protection to the older women and men that we work with, and other vulnerable people, who are accused of witchcraft. The review highlighted that introducing specific legislation criminalising accusations is highly problematic and does not result in greater protection for those accused. It also stressed the need to protect the rights of the defendant (in this case the person accusing someone of being a witch) alongside providing protection for those accused.

Legislation criminalising accusations does not work

As outlined above, legislative approaches in the countries reviewed has shown that where belief in witchcraft is widely held by all sections of society, the introduction of legislation criminalising accusations of witchcraft is unlikely to provide greater protection to those accused. This is because it goes against popular belief, is often seen to unfairly protect witches and is unlikely to be enforced (see above for review of enforcement issues).

The rights of the defendant to a fair trial and just punishment are at risk

Central to a fair trial are principles of liability and taking into account mitigating factors in sentencing and handing out a just punishment that fits the crime. The

desire to protect those accused of witchcraft should not be at the expense of these principles of justice.

The review pointed out that allowing someone who commits a crime because of a belief in witchcraft to escape criminal liability altogether is unacceptable.

However, belief in witchcraft has to be taken into consideration alongside other mitigating factors when establishing criminal liability and in passing sentence in order to ensure a fair trial.

Legislation that makes an accusation of witchcraft per se a criminal offence and does not take these principles of justice into account is inappropriate. Similarly legislation that makes the belief in witchcraft per se an aggravating factor resulting in a harsher sentence is also inappropriate. This is particularly important in places that retain the death penalty and where prison conditions are severely detrimental to physical and mental health.

The alternative: Using the existing criminal code

Existing criminal legalisation provides protection for acts of violence against those accused of witchcraft and should be used to prosecute them.

However it may not provide protection against accusations themselves. Since accusations can so often act as a catalyst to acts of violence, ostracisation and emotional persecution, a separate offence of incitement could be incorporated into the existing criminal code where such an offence does not already exist. This would need to ensure the right balance between freedom of speech and the rights of the defendant and the need to protect those accused of being a witch. This means that simple accusations that do not incite or encourage a criminal offence would not and should not be prosecuted under this provision.

Addressing the underlying causes of accusations and related violence

The underlying causes of witchcraft related violence are rooted in lack of education, gender and age related discrimination, socio-economic deprivation, environmental disasters and other factors.

Criminal prosecution of alleged witches or of those making accusations of witchcraft will have little effect in addressing these underlying causes if large numbers of the population continue to believe that witches are responsible for the problems that befall an individual or community. Witchcraft-related legislation reinforces this belief in witchcraft and therefore prevents implementing a response appropriate to the underlying causes.

HelpAge's position

Our primary concern is the protection of those accused of witchcraft, many of whom are older women and men. The principle of doing no harm and protection of human rights for all underpin everything we do and advocate for.

Given this, our experience to date in community based interventions to protect those accused of witchcraft and the findings of this review of legislation in nine countries, we believe that:

- The most appropriate and effective response to preventing accusations of witchcraft and related violence is through non-legal, community based interventions, working directly with the people involved in making the accusations and those accused. This is the approach we take, advocate for and encourage our partners to take.
- Crimes committed against someone accused of witchcraft should be treated in the same way as crimes against any other individual. Offences related to accusations of witchcraft should, therefore, be prosecuted under existing criminal laws.
- Law enforcement officials and the judiciary should be trained in using the existing criminal code to deal with alleged crimes related to witchcraft accusations.
- An in-depth jurisdiction-specific review of existing legislation, the legal system and barriers to enforcement should be carried out before any legal reform is considered.
- Legislation that criminalises accusations of witchcraft should not be introduced.
- If this legislation is already in place, it should not be repealed. This would send a dangerous signal that persecution of alleged witches is acceptable.
- Revisions to the existing criminal code could be considered to introduce a criminal offence relating to an accusation of witchcraft where this accusation incites or encourages a subsequent criminal offence.
- Legislation that criminalises witchcraft should not be introduced.
- Existing legislation that criminalises witchcraft should be repealed.
- Witchcraft-related offences should not be dealt with in traditional courts or other fora. The potential harm for those at risk of persecution is too great.
- Trials by ordeal are totally unacceptable and such acts of violence should be prosecuted under the existing criminal code.

Jurisdiction summary: Burkina Faso

Prevalence of belief in witchcraft

Belief in witchcraft is widespread.

Impact of accusations of witchcraft

Women, including older women, are often the targets of accusations which can result in psychological trauma, physical harm, social exclusion, impoverishment and banishment from their homes and communities.

Legal system

The legal system is based on a mix of French civil law and customary law.

Legislative approach to witchcraft

1. There is no legislation criminalising the practice of witchcraft. A provision in the French colonial 1947 penal code (Article 264) that prohibited witchcraft related activity was removed in 1996 when the Burkinabe Criminal Code was enacted.
2. There is no legislation prohibiting accusations of witchcraft. Existing provisions of the penal code, threatening (Articles 348 and 349) and defamation (Articles 361, 364, and 366) are used in the case of witchcraft accusations.
3. Violence and crimes related to witchcraft accusations can be punished under general provisions of the criminal code such as murder, assault and theft.

In February 2010, according to local media, after several unexplained deaths in a village, a man was accused by his relatives of being a soul-eater. On this assumption, his relatives assaulted him and attempted to kill him. The alleged witch managed to escape and confronted his aggressors before the local court. The trial court (*tribunal de grande instance*) of Manga convicted his five aggressors of violence, trespass, libel, threat and property damages. The "leader" of the violence was sentenced to a term of 60 months' imprisonment and two other offenders to a term of 36 months imprisonment.

This case is particularly worth noting in so far that the Prosecutor insisted on the evidential difficulty of proving that someone is a witch. Furthermore, the reporting journalist indicated that the decision was very unwelcome by the audience and led to some tension. On this occasion, the Prosecutor made an interesting statement: "*We will call for the army if necessary. We are in a State where the rule of law must prevail. This conduct [i.e. witchcraft-related violence] is a serious violation of the constitution.*"¹

4. Traditional medicine is recognised as part of the national health system under Law no 23/94/ADP, and regulated through an executive order, Decree no. 2004-568, in 2004. People can only practise traditional healing with authorisation from the Ministry of Health. People practising illegally are subject to a fine.

1. Case reported by: Sidgomdè Sidwaya, *Procès sur un cas de sorcellerie à Manga: 60 mois fermes pour un militaire à la retraite*, <http://www.lefaso.net/spip.php?article35313> and H d'Africk, *Un sorcier devant les juges*, <http://reporterbf.net/index.php/archives/136-un-sorcier-devant-les-juges>

Limitations of legislative approach

1. Many people have little confidence in the judicial system and many consider it to be corrupt.²
2. Victims rarely make complaints to the judicial police as they are often afraid, do not know their rights or cannot afford the costs of court proceedings.
3. Entrenched gender inequalities make women's access to justice particularly difficult.
4. The Procureur de Faso and judicial police rarely prosecute cases related to witchcraft.³
5. The judiciary is further weakened by the general lack of resources in Burkina Faso.

2. UNDP, *Rapport sur le développement humain: Corruption et développement humain - Burkina Faso*, 2003, p.25,

http://hdr.undp.org/en/reports/nationalreports/africa/burkinafaso/burkina_faso_2003_fr.pdf

3. Magistrat Zombre LW, *Étude sur la protection juridique des femmes victimes du phénomène de sorcellerie au Burkina Faso*

Jurisdiction summary: Cameroon

Prevalence of belief in witchcraft

Belief in witchcraft extends to all realms of life.⁴ The term witchcraft is used to describe different practices relating to the supernatural: evil witches known as *bewusu*, *balemba* or *bekong*; people with power to fight evil witches, known as *bato ba mianga*, *banganga*, *besunkan*; and *ngangas*, with powers to heal and seen as a force for good. Distinctions between the three types are often blurred.

Impact of accusations of witchcraft

Men, women and children can be accused of witchcraft but as elsewhere it is usually the most vulnerable who are targeted including older people, autistic children, albinos and the mentally ill. Accusations can result in physical violence, including lynching,⁵ although banishment from the community is more common.

Legal system

Reflecting its colonial past, the Cameroonian legal system consists of two legal systems: English common law and French civil law.

Legislative approach to witchcraft

1. Article 251 of the Penal Code criminalises the practice of witchcraft which results or is liable to result in disturbance of the public peace or harm to property and people. The practice *per se* is not criminalised.
2. Witchcraft is considered an aggravating offence in cases of homicide under Article 278 and actual bodily harm under Article 279 of the Penal Code.

Limitations of legislative approach

1. There is no definition of witchcraft in the penal code. This means that witchcraft is not recognised as existing by the law. Making witchcraft a criminal offence when it does not legally exist contravenes legal principles applicable in Cameroon. Lack of a definition also means that judges have to rely on their own interpretation of witchcraft when deciding if a criminal act has taken place or not which can result in arbitrary decisions and unjust convictions. For example, in South Cameroon courts have found individuals guilty of witchcraft despite the absence of any disturbance to public peace or harm to property or persons.⁶
2. Prosecutors have to prove both that a crime has taken place (*actus reus* – guilty action) and that the accused intended to commit the crime or was aware of the harm their actions could cause (*mens rea* – guilty mind/intent). Whilst intent may be possible to prove, it is not possible to prove that supernatural powers were the cause of the harm, that is, that a criminal act has taken place. Courts therefore typically make convictions without sufficient evidence and in doing so compromise the fairness of the trial.
3. Judges often use the expertise of *ngangas* to determine if a crime has taken place. *Ngangas* are also commonly believed to be witches and have gained financially from their interventions in court which increases the scope for corruption in these cases.

4. Eone Ocar, Opening speech of the Conference on Justice and Witchcraft held in Yaoundé, 17-19 March 2005

5. See the mentions of lynching in Kwifon of Bali chiefdom in the Minutes of the Conference on Justice and Witchcraft held in Yaoundé, March 2005

6. Fisiy C F, *Le monopole juridictionnel de l'Eta et le règlement des affaires de sorcellerie au Cameroun*

4. Testimonies and confessions are also often used to prove guilt. However, given that confessions are often obtained under circumstances that means they are unreliable, for example in very stressful conditions in the presence of police or an angry crowd, these should be inadmissible in court. Cameroonian case law shows, however, that once a confession has been made, regardless of the circumstances under which it was obtained or whether it has been later withdrawn, a charge of witchcraft is more likely than not to lead to a conviction.⁷

Under these circumstances it is difficult to imagine how a safe conviction could occur. The fairness of the trial is severely compromised and can result in unjust imprisonment.

A survey of case law showed that whether someone accused of witchcraft was convicted often depended solely on uncorroborated testimony from traditional healers and the firm conviction of the judge. Courts have been heavily criticised for irrational and arbitrary decision making.⁸ When this happens the defendant's right to a fair trial is violated.

5. Enforcement is rare. There are few trials for witchcraft offences. Lawyers are reluctant to take on cases, witnesses do not come forward and some judges are unwilling to try the cases. Long delays can result in some people looking for solution in other places such as the community or through churches.⁹

6. Sanctions intended to punish those found guilty are rarely appropriate. Those found guilty will be unable to afford the fines and even imprisonment may not bring peace of mind to those who fear witchcraft as they believe those imprisoned will be angered and become more dangerous on release.

7. Geschiere P L, 'Sorcery and the State - Popular Modes of Political Action among the Maka of Southeast Cameroon', *Critique of Anthropology*, 1988, 8:1, p.35-63

8. Tebbe N, 'Witchcraft and statecraft: liberal democracy in Africa', *Georgetown Law Journal*, 96:183, <http://www.georgetownlawjournal.org/issues/pdf/96-1/Tebbe.PDF>

9. Meyer B and Pels P (ed.), *Magic and Modernity*, Stanford University Press, 2003

Jurisdiction summary: Côte d'Ivoire

Prevalence of belief in witchcraft

Belief in witchcraft is widespread.

Legal system

The legal system is based on French civil law and customary law.

Legislative approach to witchcraft

1. The practice of witchcraft likely to disturb the public peace or cause harm to people or property is a criminal offence under Article 205 of the Criminal Code of 1981. In order to convict under this legislation the prosecution has to prove that an act of witchcraft took place, that it was likely to cause harm or disturb the peace and that there was criminal intent on behalf of the accused.
2. There is no legislation prohibiting accusations of witchcraft. Other legal provisions could be used such as malicious denunciation and libel.
3. Violence related to witchcraft accusations can be prosecuted under other offences in the Criminal Code, such as murder, assault and incitement. In 2009, two brothers died suddenly after a brief fight with a man in a pub. Such man had publicly threatened the brothers with "mystic death", and the brothers' parents accused this man of witchcraft practices before the trial court of Abidjan. The court held that there was no proof of a link between the death and the threat, nor any alleged weapon. The case was converted to battery and public disorder (*voies de fait*) claims, with the defendant eventually sentenced to a term of six-month imprisonment and a 100,000 CFA fine.¹⁰

Limitations of legislative approach

1. There is no legal definition of witchcraft which is a violation of the principles of criminal law, including the principle (*principe de légalité des délits et des peines*) that criminal offences need to be precisely defined by the law in order to avoid arbitrary decisions by courts and judges and to allow the person accused to know the precise nature of the crime they are charged with. With no definition judges can make up their own depending on their cultural or religious beliefs, education or ethnic origin.
2. For a conviction under Article 205 of the Criminal Code, no actual harm needs to have been caused, merely that the practice of witchcraft is likely to cause harm. There is no requirement to prove that the practice of witchcraft has resulted in actual harm (since a supernatural act cannot be proved in a court of law). People accused of witchcraft can therefore be convicted without having caused harm to anyone.

10. Côte d'Ivoire: Pour avoir défié un sorcier, deux jeunes se retrouvent au cimetière, <http://fr.allafrica.com/stories/printable/200903060913.html>, 2009

Jurisdiction summary: India

Prevalence of belief in witchcraft

The belief in witchcraft exists across most of India but accusations and related violence are most prevalent among certain indigenous communities¹¹ and states in the rural north east of India. Witches are believed to have supernatural power that they use only to cause harm. They are said to transform into animals, use invisible weapons or send ghosts to cause illness and death. "Witch doctors" are seen as spirit healers but also the main force to control witches, by identifying, deciding punishment and ensuring it is carried out.

Impact of accusations of witchcraft

The majority of accusations are made against women who are often unmarried, widowed or childless. Accusations are often made over property or land disputes. Men have been known to be accused as well. Accusations often result in physical and emotional abuse, banishment, torture and murder.¹²

Legal system

The Constitution of India is founded on English common law and influenced by US court decisions. Law at national, state or union level is derived from the Constitution. Courts can simultaneously apply national and state laws.

Legislative approach to witchcraft

1. There is no evidence of legislation at national level that criminalises the practice of witchcraft or accusations of witchcraft.
2. The Prevention of Witch (Daain) Practices Act in Jharkhand, a state particularly beset by witchcraft accusations and violence criminalising accusations of women as a witch that result in torture and humiliation.
3. There are a number of provisions under the Indian Penal Code that can be used to combat violence related to witchcraft accusations for example, murder, theft, grievous hurt, assault and rape offences.

Limitations of legislative approach

1. The legalisation in Jharkhand only covers women, even though men can sometimes be accused of witchcraft.
2. Treatment of offenders accused of identifying someone as a witch has been inconsistent.
3. Incidents related to witchcraft accusations are rarely dealt with by the police and when they are conviction rates are very low.¹³
4. Inconsistency in penalties under the Penal Code (for example, 1 year's imprisonment for voluntarily causing harm) and the Prevention of Witch (Daain) Practices Act in Jharkhand (6 months imprisonment for torture of someone accused of witchcraft) do little to deter witchcraft related accusations and violence.

11. International Law Memorandum: *Jharkhand's Obligation to Prevent Witch-Hunting*, Cornell University

12. International Law Memorandum: *Jharkhand's Obligation to Prevent Witch-Hunting*, Cornell University

13. Baglary P, 'Witch-hunting in India', *The Viewspaper*, 3 July 2008, <http://theviewspaper.net/witch-hunting-in-india> (22 October 2010)

5. Inconsistent sentencing also does little to deter accusations and related violence. For example in *Tula Devi and Others v State of Jharkhand*¹⁴, the High Court upheld the convictions under the Penal Code of eight defendants who assaulted a suspected witch and her husband, but quashed the defendants' equivalent convictions under the Prevention of Witch (Daain) Practices Act. Despite testimony from the victim, the Court held that it is for the victim of the witch-hunt to discharge the burden of proving that the defendants had accused her of witchcraft. Evidence of a property dispute between the victims and their accusers appeared to cast the witness testimony of the victims into disrepute.

6. Despite a growing number of lawyers, the majority of the population has little access to the justice system. Corruption is widespread, often in the form of bribes to lawyers and court officials.¹⁵

14. Jharkhand HC, 'Tula Devi & Others vs State of Jharkhand & Another', *International Law Memorandum: Jharkhand's Obligation to Prevent Witch-Hunting*, Cornell University, April 18 2006

15. Bidwai Praful, *Legal Systems in the Dock*, Inter Press Service, 2007, <http://ipsnews.net/news.asp?idnews=37972> (20 October 2010)

Jurisdiction summary: Kenya

Prevalence of belief in witchcraft

Belief in witchcraft is widespread.

Impact of accusations of witchcraft

Older people, especially older women and those who are poor, lack legal protection and are physically vulnerable are often accused of witchcraft. Accusations can have an economic incentive, or related to property and land. They often result in isolation, physical and psychological abuse, loss of property and murder, including by being burnt to death.

Legal system

Kenya has a mixed system of common law, customary law and Islamic law.

Legislative approach to witchcraft

1. The Witchcraft Act of 1925 makes a number of practices related to witchcraft offences, for example to pretend to practise witchcraft, to claim knowledge of witchcraft, to possess charms related to the practice of witchcraft. The legislation has been carried over from the colonial era and was enacted by an administration that did not believe in the existence of witchcraft.
2. The Witchcraft Act of 1925 prohibits accusations of witchcraft if they are not made through the relevant authorities.
3. Violence related to accusations of witchcraft has been dealt with under offences in the Penal Code, including murder and robbery with violence.
4. Belief in witchcraft is generally not deemed to be a mitigating factor in killing someone accused of witchcraft. In *Republic v. John Gachogu & another* (2005), the High Court ruled that a mere belief in witchcraft did not constitute a circumstance, excuse or mitigation for killing a person believed to be a witch. According to the Court, "when there is no immediate provocation, witchcraft as a provocative act can only avail an accused as a defence where the victim is shown to have done an act in the presence of the accused which he believed was an act of witchcraft against him and he was thereby angered as to be deprived of his self control"¹⁶. In this case, the accused were found guilty of murder.

However, as shown above, belief in witchcraft can be a mitigating factor in sentencing if the person who was killed carried out an act of witchcraft that made the accused so angry that he was provoked into killing. In *Patrick Tuva Mwanengu v. Republic* (2007), the Court of Appeal applied these principles and found that the sentence of the accused should be reduced from murder to manslaughter.¹⁷

5. Under the Act, District Commissioners have the power to relocate those suspected of practising witchcraft.
6. Kenya does not regulate traditional healers or recognise them as legitimate medical practitioners.

16. Wetangula E, 'Witchcraft no excuse for committing offence', *Kenya Law Reports*, February, 2006, http://www.kenyalaw.org/Articles/show_article.php?view=167&cat=7

17. 'Patrick Tuva Mwanengu v. Republic', Kenya Court of Appeal, 2007, http://www.kenyalaw.org/Articles/show_article.php?view=274&cat=20

Limitations of legislative approach

1. There is no legal definition of witchcraft in the Witchcraft Act of 1925.
2. The offence of making an accusation is severely limited by the fact that accusations are allowed if they are made to a District Commissioner, a police officer or “any other person in authority”.
3. The Witchcraft Act does not address the challenges of proving supernatural practices in a court of law (the “evidentiary challenge”).
4. The Witchcraft Act is rarely used. None of the six cases that involved witchcraft related killings between 1983 and 2010 were brought under the Witchcraft Act, but under murder and manslaughter charges.
5. Many Kenyans do not have access to the justice system. Older women and men accused of witchcraft are often unaware of their rights, have no access to legal advice or redress. Barriers include lack of physical infrastructure of courts in some regions, unaffordable court and lawyers fees, illiteracy and lack of information about the system. The lack of independence and impartiality of the judiciary is a further barrier to justice.¹⁸ Corruption is also a barrier. In 2009 the East African Bribery Index identified the Kenyan police force as the most corrupt institution in East Africa.¹⁹
6. Police and the judiciary may be unwilling to prosecute cases related to witchcraft because of fear of reprisals or of being perceived as protecting those accused of witchcraft.
7. The power of the District Commissioner to relocate a person suspected to practising witchcraft is open to abuse and contravenes the Constitution of Kenya and human rights legislation Kenya has ratified.

18. Connie Ngondi-Houghton, ‘Access to justice and the rule of law in Kenya’, 2006, http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/15_Kenya/15_3_Access_to_Justice.pdf

19. Transparency International, ‘East African Bribery Index 2009: The Kenya Police is the most corrupt institution in East Africa’, 2 July 2009, http://www.transparency.org/news_room/latest_news/press_releases_nc/2009/2009_07_02_kenya_index

Jurisdiction summary: Malawi

Prevalence of belief in witchcraft

Belief in witchcraft permeates all sections of society. Most Malawians, regardless of age, education or social position believe in the existence of witchcraft. In 2008, the Malawi Police Service stated that it was dealing with hundreds of cases involving witchcraft allegations each week²⁰ and in 2009 hospital staff in certain hospitals threatened to strike unless action was taken to tackle the problem of children being taught witchcraft.²¹

According to Malawian belief, two types of witch (*mfiti*) exist. *Mfiti m'pheranjiru* are humans believed to use supernatural means (rather than possessing the powers themselves), to cause harm to others. By contrast, the *mfiti yenyeni* (true witch) is a human who undergoes an ordeal to become a witch, usually being given human flesh or a magic potion (*mwakhwala*).²²

Impact of accusations of witchcraft

The most vulnerable people, including older women, are likely to be accused of being witches. The number of accusations of witchcraft has increased in recent years sometimes resulting in outbursts of violence and widespread disruption.²³ Those accused of witchcraft can be banished from their communities or be subjected to physical harm from the practice of trial by ordeal, acts of violence by the community and unlawful imprisonment. In September 2010 alone, 86 were convicted of practicing witchcraft and sentenced to prison terms.²⁴

Legal system

The legal structure is based on the English legal system and the law administered broadly follows English legal principles. Traditional courts were abolished in 1994.

Legislative approach to witchcraft

1. It is a criminal offence under the Witchcraft Act of 1911 to accuse someone of witchcraft (unless through the relevant authority), pretend that you practise witchcraft, claim to be a witch finder, direct, assist or be present at a trial by ordeal or use any charm with a view to committing an unlawful act. The Act was enacted under British colonial rule.

2. Violence related to witchcraft accusations can be prosecuted under other offences in the Criminal Code, such as murder, assault and incitement.

3. There is no provision under the Penal Code prohibiting accusing someone of being a witch.

Limitations of legislative approach

1. There is no legal definition of witchcraft.

2. The Witchcraft Act does not give guidance on how to prove or disprove supernatural claims since it works on the premise that witchcraft does not exist. The Criminal Procedure and Evidence Code should, therefore, be adhered to in

20. Gondwe, 'Witchcraft Strife Storms Malawi', *Groundreport*, 3 February 2008

21. 'Witchcraft Terrorises Balaka Hospital', *Nation Reporter*, 6 May 2009

22. Van Breugel, *Chewa Traditional Religion*, 2001

23. Namangale, 'Bangwe Again: Girl Thrown out of Witchcraft Plane', *The Nation*, 2009; Report by the Human Rights Consultative Committee Chairman Justin Dodzi, cited in Semu Banda, 'Witchcraft and Mob Justice in Malawi', *The WIP*, 21 May 2008

24. Smith David, 'Dozens jailed for witchcraft in Malawi', *The Guardian*, 14 October 2010

witchcraft related trials. This throws up a number of challenges that can prevent a fair trial and lead to unlawful convictions and imprisonment.

- Hearsay evidence is inadmissible but in practice it is often used.
- Circumstantial evidence is admissible but can only be relied on alone if no other possible conclusion can be derived from the evidence except guilt. In practice, this does not provide adequate protection from convictions based solely on circumstantial evidence which does not meet this criterion, since witchcraft is so readily accepted as the cause of unexplained events.
- Confession evidence is also admissible, even if made under torture or duress. Given the stigma attached to witchcraft, it is unlikely that confessions of witchcraft are given freely.

3. The Witchcraft Act is at odds with the vast majority of Malawians who believe in witchcraft, including the police, judiciary and jurors who are responsible for implementing legislation. As a result the enforcement of the Witchcraft Act has been confused and inconsistent.

4. Lack of funding and resources has led to few judgements being reported, no easily accessible database of case law or legislation and no current guidance on the status and application of the law for the judiciary.

5. Despite the Witchcraft Act prohibiting accusations of witchcraft, accusations and related violence have increased and convictions against those making accusations are rare. The law has clearly failed to protect those accused of witchcraft.

6. The practice of witchcraft is not a criminal offence under the Witchcraft Act (which in contrast criminalises *pretending* to practise witchcraft). There should, therefore, be no convictions or imprisonment for the practice of witchcraft. Yet in 2009, at least 44 women were known to be detained on charges of practising witchcraft in Malawi.²⁵ In September 2010, a spate of arrests of alleged witches saw 86, of which 68 were older men and women, sentenced to terms of imprisonment of four to six years, many with hard labour.²⁶ Confused application of the law has resulted in the unlawful imprisonment of those accused of witchcraft.

7. Despite being prohibited, trials by ordeal continue and deaths resulting from them are thought to be common. The researchers found no examples of a successful prosecution for simple attendance at a trial by ordeal.

8. Although legal aid should be made available by the state to those who cannot afford a lawyer, the combination of corruption²⁷, lack of resources and the custom of giving "gifts" to lawyers taking on your case, means that many poor Malawians have no access to justice. Other barriers to accessing justice include fear of approaching a lawyer, lack of awareness of the legal system and legal institutions only being in urban centres.

25. In 2009, CEDAW visited 11 women's prisons in Malawi. There were an average of four women in each prison who were detained or sentenced to terms of imprisonment on charges of practising witchcraft. The female prison population is comparatively low in Malawi and therefore this figure is surprisingly high. It is not known how many men are detained on similar charges. *Shadow Report submitted to the CEDAW Committee's 45th Session*, 2010, http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WLSAMalawi45_session.pdf (21 July 2010)

26. Smith, 'Dozens jailed for witchcraft in Malawi', *The Guardian*, 14 October 2010

27. Kamanga Ivy, *Combating Corruption: Challenges In The Malawi Legal System*, Report for the tenth international training course on the criminal justice response to corruption, http://www.unafei.or.jp/english/pdf/PDF_rms/no76/18_p153-159.pdf (23 August 2010)

9. Many cases involving witchcraft accusations do not go to trial as lawyers are reluctant to take on cases, witnesses do not come forward and the police fear reprisals for investigating and making arrests.

Jurisdiction summary: Senegal

Prevalence of belief in witchcraft

Belief in witchcraft is widespread.

Legal system

The legal system is based on French civil law.

Legislative approach to witchcraft

1. The practice of witchcraft likely to disturb the public peace or cause harm to people or property is a criminal offence under Article 234 of the Criminal Code of 1965. The Criminal Code was modified in 2000. The researchers did not have access to the revised version but it seems the witchcraft provision was not amended. In order to convict under this legislation the prosecution has to prove that an act of witchcraft took place, that it was likely to cause harm or disturb the peace and that there was criminal intent on behalf of the accused.

2. There is no legislation prohibiting accusations of witchcraft. Other legal provisions could be used such as malicious denunciation and libel.

3. Violence related to witchcraft accusations can be prosecuted under other offences in the Criminal Code, such as murder, assault and incitement.

Limitations of legislative approach

1. There is no legal definition of witchcraft which is a violation of principles of criminal law. Under one such legal principle (*principe de légalité des délits et des peines*) criminal offences need to be precisely defined by the law in order to avoid arbitrary decisions by courts and judges and to allow the person accused to know the precise nature and cause of the crime they are charged with. With no definition judges can make up their own depending on their cultural or religious beliefs, education or ethnic origin.

2. For a conviction under Article 234 of the Criminal Code, no actual harm needs to have been caused, it is merely necessary that the practice of witchcraft is likely to cause harm. There is no requirement to prove that the practice of witchcraft has resulted in actual harm (since a supernatural act cannot be proved in a court of law). People accused of witchcraft can therefore be convicted without having caused harm to anyone.

Jurisdiction summary: South Africa

Prevalence of belief in witchcraft

The belief in witchcraft is still widely held in contemporary South Africa, across different socio-economic groups and in both urban and rural areas.

Impact of accusations of witchcraft

Women, including older women, are the most common targets of witchcraft accusations but men can be accused. Poor people, people who are felt to be anti-social, different or behave oddly and those whom there have been conflicts are also accused. Accusations often lead to violence carried out by groups of young people.

Legal system

The legal system is based on Roman-Dutch civil law and English common law. The judicial system consists of the Supreme Court of Appeal, courts of appeal, the High Court, and various lower and specialised courts. The Constitutional Court is the highest judicial authority in all cases involving constitutional matters. Community courts have recently been established which focus on restorative justice with alternative sentences to the formal courts. In these courts, an authorized African headman or his deputy may decide cases using indigenous law and custom, brought before him by an African against another African within his area of jurisdiction.²⁸

Legislative approach to witchcraft

1. The Witchcraft Suppression Act of 1957 criminalises the use of charms, professing knowledge of witchcraft, pretending to practise witchcraft, advising anyone how to bewitch a person or thing and supplying anyone with the pretended means of witchcraft. The Act is based on the premise that witchcraft does not exist.
2. The Witchcraft Suppression Act of 1957 criminalises accusations of witchcraft and employment of a witch-finder to identify a witch.
3. The Traditional Health Practitioners Act of 2007 regulates traditional healing in South Africa. It defines traditional healing and established a national register of traditional healers. Once registered, traditional healers are able to practise legally.
4. Killing of witches is treated as murder which may be mitigated by cultural belief under diminished capacity.

Limitations of legislative approach

1. The Witchcraft Suppression Act of 1957 contains no legal definition of witchcraft.
2. The Witchcraft Suppression Act has failed to prevent accusations of witchcraft and protect those accused from related violence. The *Conference Report of the National Conference on Witchcraft Violence* concluded that the *Witchcraft Suppression Act* fails to address or quell witchcraft-related killings.²⁹

28. Cape Gateway, *The Courts of South Africa*, http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E#13

29. Commission on Gender Equality, *Conference Report*, p.15, http://www.cge.org.za/index.php?option=com_docman&task=doc_download&gid=122&Itemid=

3. The Act is also seen as potentially unconstitutional. Rights which may be violated by the Act include section 15 (freedom of religion and belief), section 22 (culture) and section 31 (occupation and profession of choice).³⁰

4. The Witchcraft Suppression Act is felt to be contrary to the beliefs of a large part of the population in that it is seen to protect those who are believed to commit acts of supernatural aggression and harm, it outlaws traditional ways of dealing with resolving witchcraft disputes and it punishes the victims of witchcraft. Inaction of the government and the judicial system to protect victims of witchcraft has resulted in vigilante violence which is often condoned by the community as a public service.³¹

5. The Witchcraft Suppression Act does not address the challenges of proving supernatural practices in a court of law (the "evidentiary challenge").

6. Formal courts' willingness to accommodate the belief in witchcraft has varied over time. As democracy has matured, courts have felt freer to take it into account. Community courts believe that witchcraft does exist. Community courts are not permitted to try witchcraft related cases but some continue to do so.

30. Commission on Gender Equality, *Conference Report*, p.15,

http://www.cge.org.za/index.php?option=com_docman&task=doc_download&gid=122&Itemid=

31. Ludsin H, 'Cultural Denial: What South Africa's treatment of witchcraft says for the future of its customary law', *Berkeley Journal of International Law* 62, 2003

Jurisdiction summary: Tanzania

Prevalence of belief in witchcraft

Belief in witchcraft is pervasive throughout Tanzania. In recent years, two trends related to incidents linked to witchcraft have emerged: 1) the continued persecution of people labelled as witches and 2) the killing of albinos for the purpose of witchcraft.³²

Impact of accusations of witchcraft

Accusations of witchcraft are most often made against older women, who are particularly vulnerable due to their low status in society due to entrenched gender inequality, low levels of literacy and the inability to defend themselves. Characteristics of old age (for example wrinkled skin and red eyes from years of cooking over wood fires) are thought to be signs of being a witch. These accusations can result in psychological abuse, intimidation, banishment from homes and communities, isolation, violence and murder.

Legal system

Tanzania has a mixed system of common law, customary law and Islamic law.

Legislative approach to witchcraft

1. The Witchcraft Act of 2002 is the revised version of the colonial legislation. It criminalises the practice of witchcraft and possession and supply of instruments used in the practice of witchcraft, as well as employing someone else to practise witchcraft.
2. The Witchcraft Act of 2002 criminalises accusations of witchcraft if they are not made to the correct authorities.
3. Punishment varies according to whether the intent was malevolent (to harm) or benevolent (to do good). Malevolent intent is punished more severely.
4. Under the Act, District Commissioners have the power to relocate those suspected of witchcraft.

Limitations of legislative approach

1. The Witchcraft Act of 2002 does not contain a true definition of witchcraft but merely refers to various synonyms for witchcraft.
2. In 1992 the Nyalali Commission, which was established to make recommendations on Tanzania's legal and political future, observed that the witchcraft legislation remained entrenched in the colonial experience, noting that it was "useless" and that it should be repealed.
3. The Witchcraft Act is failing to prevent, and provide redress to victims of, accusations and related violence and murder.
4. The Witchcraft Act is seen to protect witches rather than protect against the harm that witches are popularly believed to cause. As a result witnesses are unwilling to testify and name perpetrators of violence and police unwilling to enforce the law.

32. Kipobota C and Louw S, *Tanzania Human Rights Report 2008: Progress Through Human Rights*, Legal and Human Rights Centre, 2008 p.18 (ISBN: 978-9987-432-74-5)

5. Lack of resources and corruption³³ have been cited as factors hampering access to and delivery of justice to the majority of people including the most vulnerable and those accused of witchcraft.
6. The Witchcraft Act does not address the challenges of proving supernatural practices in a court of law (the “evidentiary challenge”).
7. Accusations of witchcraft are an offence unless they are made through a court, a member of the police force, a local government authority or “any public officer”. The use of the expression “any public officer” severely limits the scope of the prohibition.
8. The power of the District Commissioner to relocate a person suspected of practising witchcraft is open to abuse and contravenes the Constitution of Tanzania and the international human rights legislation Tanzania has ratified.

33. Executive Board of the United Nations Development Programme and of the United Nations Population Fund, ‘Draft country programme document for Tanzania’, DP/DCP/TZA/1, 2007-2010, Second Regular Session 2006, p.3, available online at [http://www.undp.org/africa/programmedocs/Tanzania%20-%20CPD%202007-2010%20\(English\).pdf](http://www.undp.org/africa/programmedocs/Tanzania%20-%20CPD%202007-2010%20(English).pdf)