

2012

Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law

Hallie Ludsin

Recommended Citation

Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 Berkeley J. Int'l Law. 62 (2003).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol21/iss1/3>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact mhoffman@law.berkeley.edu.

Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law*

By
Hallie Ludsin**

I. Introduction	63
II. Legal Pluralism In South Africa.....	65
A. What is Legal Pluralism?	65
B. Legal Pluralism in South Africa	65
1. The Development of Legal Pluralism	65
2. Legal Pluralism Today	68
C. Customary Law	70
III. Witchcraft	73
A. The Belief in Witchcraft.....	73
1. Philosophy of Witchcraft	73
2. Witches and Their Powers	76
3. Smelling Out a Witch	78
B. Social Aspects of Witchcraft Accusations	80
1. Witchcraft Accusations	80
2. Social Purpose of Witchcraft Accusations	82
IV. Witchcraft Under the Law	83
A. Treatment of Witchcraft Under Customary Law	83
1. Witchcraft Trials Before the Witchcraft Suppression Act 3 of 1957	83
2. Treatment of Witchcraft After the Witchcraft Suppression Act 3 of 1957	87
B. Treatment of Witchcraft Under the Common Law System.....	89
1. Witchcraft Legislation	89
2. Witchcraft in the Common Law Courts	91
a. Witch-Killings	91
b. Ritual and Medicine Murders	96
c. Violations of the Witchcraft Suppression Act	96

* I want to thank Marius Pieterse and Likhapha Mbatha for their invaluable advice, editing and encouragement during the research and writing of this Article. I also want to thank Ravi Nessman, Susan Ludsin and Stuart Ludsin for their love and support.

** Visiting Researcher, Centre for Applied Legal Studies of the University of the Witwatersrand (Johannesburg, South Africa).

d. Civil Cases	99
3. Proposed Reforms to the Witchcraft Suppression Act	102
V. Implications	104
A. A Repugnancy Clause	104
B. Distortion of Customary Law	109
VI. Conclusion	110

I would like to make an earnest and humble request . . . to see to it that the magistrate courts are given unlimited powers to try cases that are related to witchcraft. It is undoubtedly true that witchcraft does exist and thousands of innocent people have died and will continue to die unless drastic measures are taken to stop this malpractice and senseless killing of the people . . . I must admit that it was not very easy for the magistrates to pass a sentence against the witch, the reason being that the Constitution was biased and, as a result, the cultures and beliefs of the Blacks were not taken into consideration. Witchcraft is a way of killing people. Therefore, if killing is a crime as in the eyes of god, why should witchcraft, as a way of killing in itself, be allowed to exist?? How many more people should die before the Government can realize that witchcraft is a social evil?? As an African, I am bound to view things from an African perspective.¹

I.

INTRODUCTION

In the new era of democracy, South Africa and its Constitution formally recognize customary law as a legal system that should run alongside and in parity with the government-run common law legal system.² The official recognition holds the promise of equality for a legal system dominated by Dutch and then British colonists, and subordinated for years under successive white South African governments and Apartheid. Whether this promise will be fulfilled depends on how the South African government and its common law courts will deal with cultural beliefs reflected in customary law that conflict with the Western culture or norms that predominate the common law system. Whether these conflicting beliefs will be recognized and respected will determine whether customary law will in fact be equal to common law.

This Article will examine the treatment of witchcraft under customary law and common law, both historically and under the new legal order, and will analyze the implications this comparison reveals. The first two parts of this Article provide the background for the discussion and analysis. Part II, Section A describes the purpose of recognizing two systems of law in one country, along with the development of legal pluralism in South Africa. This section highlights the ideological and practical underpinnings of a dualist legal system. Section B

1. Letter from Bongani Siswana to the South African Constitutional Committee (Feb. 9, 1996), at <http://cape.constitution.org.za/cgi-bin/catdoc.sh/data/dat/subs/14497.doc>.

2. South Africa's government court system is a hybrid of the Roman-Dutch law instituted by the Dutch when they colonized South Africa and the British common law system enforced once Britain took over the colonies. For purposes of this Article, I will refer to the government court system as the common law system.

of Part II briefly explains what customary law is, the problems it faced under white rule, as well as the new problems it faces in complying with the Constitution. Part III explains the witchcraft belief and its role in social ordering. The majority of South Africans believe in witchcraft, despite efforts by colonists and the successive white governments to suppress this belief.³ Belief in witchcraft prevails among the educated and uneducated and within both urban and rural settings.⁴ To understand the treatment of witchcraft under customary law and common law, as well as the justices and injustices of such treatment, one must first understand the belief.

The first half of Part IV describes the customary law mechanisms developed to handle the manifestations of witchcraft belief and related violence and the changes to those mechanisms as a result of attempts to suppress the belief. The second half of Part IV examines the common law efforts to deal with the manifestations of the belief, including the Witchcraft Suppression Act, and whether this treatment changed after the end of Apartheid. The analysis in Part IV can be summed up with a quote:

There are two schools of thought in the area of witchcraft: those who say that witches do not exist and those who say that witches do exist. This difference of opinion extends to the present system of justice in the courts. Traditional courts agree that witches exist, whilst formal courts say that witches do not exist.⁵

As examined in Part V, there are two purposes for using witchcraft as the basis of this discussion. The first is to use the common law treatment of the manifestations of witchcraft belief to examine the cultural and ideological bias of the common law system. The implication of this analysis is that the colonial repugnancy clause, which made unlawful any customary law or practice deemed by colonists as against public policy and natural justice, remains in force. This places the true equality of customary and common law in doubt. The second purpose is to show how common law principles superimposed on customary law to solve customary law problems can result in distortions to customary law and practices. These distortions show: (1) the inadequacies of the common law solutions to problems arising from cultural beliefs it finds repugnant; and (2) the effects of eliminating customary solutions to these same problems. This Article concludes that, while it is important to develop customary law to comply with the Constitution, unless development efforts gain the acceptance of the population at whom it is targeted, these developments at best will exist only on paper and at worst will distort customary law and practice to the detriment of society.

3. REP. OF THE COMM'N. OF INQUIRY INTO WITCHCRAFT VIOLENCE AND RITUAL MURDERS IN THE N. PROVINCE OF THE REPUB. OF S. AFR. 12 [hereinafter COMM. OF INQUIRY REP.] (1996).

4. *Id.* at 12, 57.

5. REP. OF THE NAT'L CONF. ON WITCHCRAFT VIOLENCE 15 [hereinafter NAT'L CONF. REP.] (statement of Ralushai, Chairperson of Comm. of Inquiry into Witchcraft Violence and Ritual Murder in the N. Province) (convened by the Comm. on Gender Equality, Sept. 6-10, 1998).

II.

LEGAL PLURALISM IN SOUTH AFRICA

A. *What is Legal Pluralism?*

Legal pluralism is the recognition within any society that more than one legal system exists to govern society and maintain the social order.⁶ Perhaps a more appropriate definition for South Africa is: "the recognition and legal protection of [differing or special] customs in situations where the legal system is exported to a community different from that which gave it birth."⁷ These definitions do not suggest that each legal system is treated equally, rather legal pluralism merely accepts the existence of two or more legal systems in a society. In many instances, one legal system is treated as subordinate, allowing for the other to dominate a society.⁸

Legal pluralism serves several purposes. First, and perhaps foremost, it recognizes the different values and forms of social ordering of various cultures within a society. Since legal systems are both a part of culture and a reflection of culture,⁹ recognition of the way a culture wishes to be governed contributes to the culture's self-determination.¹⁰ Furthermore, legal pluralism provides mechanisms for dealing with cultural beliefs and practices not dealt with under the other legal systems in the society.¹¹

As described below, South Africa's colonists and the successive white governments recognized customary law for reasons unrelated to self-determination or acknowledging the importance of cultural differences. Instead, they recognized customary law to maintain their own power.¹²

B. *Legal Pluralism In South Africa*1. *The Development of Legal Pluralism*

Colonial governments recognized customary law and the authority of traditional leaders and headmen to try customary law cases to varying degrees

6. Brian Z. Tamanaha, *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, 20 J.L. Soc'Y 192-93 (1993). See also, Alice Erh-Soon Tay, *Legal Culture and Legal Pluralism in Common Law, Customary Law, and Chinese Law*, 26 HONG KONG L.J. 194-95 (1996). The sphere within which legal pluralism may be considered depends on the purpose for which it is being examined—legal pluralism can be considered within the world as a whole, within a region, a country or a section of society. For purposes of this Article, legal pluralism will be discussed within the country of South Africa.

7. Tay, *supra* note 6, at 198.

8. Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 742-43 (1999).

9. *Id.* at 739-40.

10. David M. Bigge & Amelie von Briesen, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in Magaya v. Magaya*, 13 HARV. HUM. RTS. J. 289, 305 (2000). Put differently, legal pluralism accepts that in reality a society is not governed by one uniform conception of law. Tamanaha, *supra* note 6, at 195.

11. Bigge & von Briesen, *supra* note 10, at 305 (concluding that legal pluralism within Zimbabwe is a mechanism used by the government to distribute power among traditional tribal chiefs, and in doing so, to increase the government's legitimacy in the eyes of its citizens).

12. See AA Costa, *Chieftaincy and Civilisation: African Structures of Government and Colonial Administration in South Africa*, 59 AFR. STUD. 13, 17 (2000).

throughout the regions that now make up South Africa. The amount of recognition typically depended on the number of indigenous people located in a region, although eventually customary law was recognized everywhere. In each of the regions, the Dutch and then British colonists implemented Roman-Dutch law, forcing it on the indigenous populations. As the British consolidated power in these regions and the indigenous populations under their control grew larger, the British began to recognize customary law as necessary to maintain social order.¹³ The British, however, would apply customary law only when customary law did not clash with the "general principles of humanity observed throughout the civilized world."¹⁴ This repugnancy clause was applied strictly in hopes of 'civilizing' the indigenous population.¹⁵

The colonial governments recognized customary law for pragmatic reasons. First, the colonists feared that the majority of indigenous people would be unhappy under Roman-Dutch law, which could threaten colonial power.¹⁶ The British also recognized customary law because they believed that "English law was too advanced to be applied to the indigenous peoples."¹⁷ Even so, the application of customary law was limited to areas considered "of marginal significance to the colonial regime, namely, marriage, succession, delict and land tenure."¹⁸ Despite these pragmatic reasons, the colonial governments believed recognition of customary law was a privilege granted to the indigenous populations—a privilege that could be taken away.¹⁹

When the territories of South Africa united in 1910, the white government continued to recognize customary law and even increased recognition of traditional authority to control the social and political threat from the indigenous population.²⁰ In 1927, South Africa passed the Native Administration Act,

13. In the Cape region, the Dutch and then the British instituted Roman-Dutch law without regard to the law of the KhoiSan living in the region, as they were few in number. CONFLICTS OF LAW, S. AFR. LEGAL COMM'N DISCUSSION PAPER 76 at §1.3.2 (June 30, 1998). Towards the late 1800s, Britain was forced to change this policy when it annexed the Transkei territories. No longer was it practical for the colonists to force Roman-Dutch law on a large population living in a geographically remote region. *Id.* at § 1.3.3. In Natal, after taking over the territory from the Dutch, Britain continued to impose Roman-Dutch law. By 1848, Britain changed its policy after signing treaties with traditional leaders that allowed the traditional leaders to exercise judicial functions. The Transvaal did not have specific legislation regarding customary law until 1877 when the British took control of the region. *Id.* at § 1.3.7.

14. *Id.* at 1.3.4-1.3.5. These types of limitations are referred to as repugnancy clauses.

15. GJ van Niekerk, *Indigenous Law, Public Policy And Narrative In The Courts*, 63 THRHR 403-04 (2000).

16. NJJ OLIVIER, JC BEKKER, NJJ OLIVIER JR. & WH OLIVIER, *INDIGENOUS LAW* 197-98 (1995).

17. *Id.* at 197-98.

18. CONFLICTS OF LAW, *supra* note 13, at § 1.3.10.

19. *Id.*

20. *Id.* at § 1.4.2. After the colonies united, the new government developed a system of indirect rule under which the indigenous populations were governed by a paramount chief. The paramount chief appointed by the South African government was responsible for keeping social order within his area. Other chiefs aided in this process. See Costa, *supra* note 12, at 33. Ultimately, the paramount chiefs were accountable to a "Native Administrator" from the white South African government, who essentially was the supreme chief. TW BENNETT, *HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW* 68 (1999). This system of hierarchy between chiefs had not existed prior to the union of the colonies. Costa, *supra* note 12, at 34. Nor had anything other than lineage ever determined

which eventually became the Black Administration Act 38 of 1927. Under the guise of safeguarding African tradition, the Act established segregation throughout society, including by creating separate courts to hear disputes among the indigenous populations.²¹ It also consolidated the colonial laws within the territories.²²

Under the Black Administration Act, only the courts determined to be courts of a chief or a headman or Commissioner's courts could hear customary law cases. Certain ministers to the white government had the discretion to determine which traditional leaders' courts would be officially recognized as a chief's or headman's court.²³ The jurisdiction of the approved courts was limited to "civil claims arising out of Black law and custom" and criminal suits where the accused was a black person.²⁴ Under Section 11(1) Commissioners courts had the authority to choose whether to apply customary law in customary law cases brought before them. Customary law, however, was limited by a repugnancy proviso. Decisions of the Commissioners' courts and the courts of traditional leaders and headmen could be appealed to the Native Appeals Court, later renamed the Bantu Appeals Court.

Eventually, the Special Courts for Blacks Abolition Act 32 of 1986 in large part abolished the separate court system for the indigenous populations, while retaining the jurisdiction of traditional leaders and headmen to hear customary law cases.²⁵ In 1988, South Africa introduced the Law of Evidence Amendment Act 45 of 1988. Section 1 of the law reads:

Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice.²⁶

Importantly, this section gave all South African courts jurisdiction over customary law matters. It also placed indigenous law in the same subordinate position as foreign law and subjected it to a repugnancy clause.²⁷

who was chief. This system removed chiefs from accountability to their communities and, instead, made them accountable to the Native Administrator. BENNETT, *supra* note 20, at 68. Bennett describes indirect rule as "provid[ing] future governments with the means necessary to restructure African political institutions to suit the policies of the moment." *Id.* at 69.

21. CONFLICTS OF LAW, *supra* note 13, at § 1.4.4. See also Pheny Keisent Rakate, *The Status of Traditional Courts Under The Final Constitution*, 30 COMP. & INT'L L.J. OF S. AFR 175, 183 (1997).

22. van Niekerk, *supra* note 15, at 404.

23. § 12 Black Administration Act 38 of 1927.

24. *Id.* at §§ 12, 20.

25. OLIVIER, BEKKER, OLIVIER JR. & OLIVIER, *supra* note 16, at 200. Under the 1986 reforms to the Magistrates Court Act 32 of 1944, which was subsequently repealed by the Law of Evidence Amendment Act, Magistrates courts became the court of first instance for hearing customary law claims. Customary law heard by the Magistrates courts was subject to a repugnancy clause.

26. The Law of Evidence Amendment Act immunizes certain customary law practices from the application of the repugnancy clause, including the practice of lobola or the payment of a dowry by the husband to the wife's family. This tolerance of certain practices may result from the recognition by the white government of the importance of lobola to customary marriage practices or may result from an understanding of the practice itself, making it seem less repugnant.

27. The Law of Evidence Amendment Act no longer requires parties under customary law to be black before applying customary law. This means that there may be circumstances where cus-

2. *Legal Pluralism Today*

During the negotiations that ended Apartheid, the African National Party, the National Party and the other participants agreed to the continued recognition of customary law in the new South Africa. The Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), drafted as part of the settlement, contained Constitutional Principles to which the final Constitution needed to adhere before it could be adopted. Under Constitutional Principle XII:

Every court, including courts of traditional leaders, existing when the Constitution took effect, continues to function and exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to –

- i. Any amendment or repeal of that legislation;
- ii. Consistency with the new constitution.

The Constitution of the Republic of South Africa Act 108 of 1996 formally recognizes customary law in Chapter 12 on Traditional Leaders. Section 211(3) of this chapter states: "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." By using the words "must apply customary law," the Constitution equalized customary law and common law.²⁸ The conditions the Constitution places on the application of customary law by courts are no different than those placed on the common law developed by courts. There are no explicit provisions in the Bill of Rights providing for a right to be governed by customary law, although arguably one could be inferred from sections 15, 30 and 32, which make up the right to culture and belief. Section 39(3) states: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill." While this provision does not grant any affirmative right to be governed by customary law, it does allow people to invoke rights granted by customary law to the extent those rights have not been removed by legislation and are consistent with the Bill of Rights.²⁹ Schedule 6, Section 2, however, states that all legislation in force at the time of the adoption of the Constitution remains in force unless repealed. The Law of Evidence Amendment Act has not yet been repealed, which means the repugnancy clause remains in effect. Whether customary law in fact will be treated as equal to common law will be discussed below.

Schedule 6, section 16(1) protects traditional courts in existence at the time the Constitution took effect. These courts can continue "to function and to exer-

tory law applies to whites. See C Himonga & C Bosch, *The Application of African Customary Law Under the Constitution of South Africa*, S. Afr. L.J. 306-07 (2000).

28. Compare § 11(1) of the Black Administration Act, which gave Commissioners courts the discretion whether to apply customary law to customary law issues.

29. § 39(2) further states: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." This provision accepts that customary law will be a part of the new South Africa and seems to expect that customary law will be developed, not simply replaced, when otherwise inconsistent with the Constitution.

cise jurisdiction in terms of the legislation applicable to it" or until Parliament amends or repeals such legislation and as long as the legislation is consistent with the Constitution.³⁰ With respect to jurisdiction of such courts, Constitution section 211(2) allows traditional leaders to "observe a system of customary law" as long as Parliament has not repealed or amended its jurisdiction or the customs they apply. Nothing in the Constitution, however, limits the power of Parliament to remove this jurisdiction. For now, the jurisdiction of traditional leaders over customary law remains intact but is under the review of the South African Law Commission.³¹

30. This provision comports with § 166(e) of the Constitution, which allows Parliament to establish or recognize any other court.

31. THE HARMONISATION OF THE COMMON LAW AND INDIGENOUS LAW: TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS, S. AFR. L. COMM'N. DISCUSSION PAPER 82 (May 1999) [hereinafter HARMONISATION]. In South African Law Commission's discussion of whether to change this jurisdiction, SALC listed the reasons for continuing the role of customary courts, as well as the problems with that role. Among the benefits of the traditional courts are: (1) they protect the cultural heritage of the people whom they govern; (2) disputes are resolved much more quickly; (3) they are more accessible and less expensive than the common law courts; (4) the procedure is less complex; (5) because these courts regularly apply customary law, they know the living customs, not the official interpretations of the customs; (6) they adapt to the changing needs of society and can be adapted to the requirements of the Constitution; and (7) they reduce the workload of magistrates. *Id.* §§ 2, 3.3.2.

The primary reasons for removing traditional courts from the legal process are that the traditional chiefs, who head the courts, act as the executive, legislature and judiciary, which may be a violation of the constitutional requirement of independence of the judiciary and may be contrary to basic tenets of democracy. *Id.* at § 4.2. *But see* *Bangindawo v. Head of Nyanda Regional Authority*, 1998 (3) SA 262, 273 (TK). Also, traditional leaders are not required to have any formal legal training and their role as judge does not comport with the requirements of judges described in the Constitution. *Id.* § 2.2.3. Finally, the system of primogeniture, which determines that only men may inherit the chieftainship, also violates section 9 of the Constitution, the equality clause. HARMONISATION, at § 2.2.3. Interestingly, SALC recommends that this inheritance scheme remain intact. S. AFR. L. COMM'N. DISCUSSION PAPER 93 CUSTOMARY LAW OF SUCCESSION [hereinafter SUCCESSION] § 4.3. Finally, it is suggested that at a minimum criminal jurisdiction will need to be removed for violating the right to a fair trial because there is no representation of an accused by a lawyer and because there is no presumption of innocence or right to remain silent. *Id.* §§ 2.2.2, 6.6.1. *See also*, *Bangindawo*, 1998 (3) SA at § 277 (holding the provision of Regional Authority Courts Act under which defendants in criminal matters before customary courts cannot be represented by lawyers is a violation of the right to a fair trial guaranteed by the Constitution) and *Mhlekwia v. Head of Western Transvaal Regional Authority*, 2001 (1) SA 574, 619 (TK).

Another reason for removing the powers of traditional courts is that under Apartheid, the powers of chiefs were determined to a large extent by the Apartheid government. As described above, a traditional court was allowed to operate only when granted permission by relevant officials. Because of the restriction on recognition of traditional courts, the traditional courts became accountable to the Apartheid government rather than to the people. Janos Mihalik & Yusuf Cassim, *Ritual Murder and Witchcraft: A Political Weapon?*, S. AFR. L. J. 127, 130 (1993). Many indigenous people perceive traditional courts as functionaries of the government or otherwise favouring the government in order to maintain power, delegitimizing the role of traditional leaders generally and traditional courts particularly. Rakate, *supra* note 21, at 186.

C. Customary Law

Customary law potentially governs the majority of South Africa's citizens.³² Although prior South African governments believed they would eliminate customary law through the "process of acculturation" with Roman-Dutch and common law,³³ it remains vibrant.³⁴

Customary law "consists of rules and customs of a particular group or community."³⁵ At the heart of South African customary law is the family.³⁶ The family is expected to provide "for all an individual's material, social and emotional needs."³⁷ T.W. Bennett writes, "[b]ecause the family [is] the focus of social concern, individual interests [are] inevitably submerged to the common weal, and the normative system tend[s] to stress an individual's duties instead of his or her rights."³⁸ Unlike most Western legal systems, customary law focuses on the obligation of an individual to the family and collective, rather than on individual personal rights.³⁹

Customary law is non-specialized, meaning that it does not distinguish between varying areas of law.⁴⁰ For example, and important to this Article, customary law blurs the lines between criminal and civil law. The blurring is a recognition of the extent to which these areas of law are intertwined. Victims of criminal acts not only want to see a perpetrator punished for his or her crime, but also want to be compensated for the harm done. Rather than treat the civil and criminal actions separately, as under the common law system, traditional courts take a more holistic approach.

Traditional leaders use customary law to maintain harmony within the community.⁴¹ The main goal of traditional courts is to reconcile or mediate between disputing parties, rather than to apply rules rigidly, finding one party right and the other wrong.⁴² Traditional courts derive customary law from an oral tradition,⁴³ and are not bound by the requirements of the Law of Evidence Amend-

32. R. Loenen, *The Equality Clause in the South African Constitution: Some Remarks From a Comparative Perspective*, S. AFR. J. HUM. RTS. 122-23 (1994); TW Bennett, *Human Rights and African Customary Law*, S. AFR. J. HUM. RTS. 678 (1996).

33. BENNETT, *supra* note 20, at 1.

34. R.B. MQEKE, *BASIC APPROACHES TO PROBLEM SOLVING IN CUSTOMARY LAW: A STUDY OF CONCILIATION AND CONSENSUS AMONG THE CAPE NGUNI 188* (1997) ("We know there are two cultures in Southern Africa. These are the European culture and the indigenous African culture. By legislation the European culture was made the general culture of Southern Africa. The indigenous African culture remains, however, very much alive because it is difficult to legislate effectively for people's private lives").

35. HARMONISATION, *supra* note 31, at § 2.1.3.

36. BENNETT, *supra* note 20, at 5.

37. *Id.*

38. *Id.* at 5.

39. WOMEN AND LAW IN SOUTHERN AFRICA RESEARCH PROJECT (WLSA), *WIDOWHOOD, INHERITANCE LAWS, CUSTOMS & PRACTICES IN SOUTHERN AFRICA* 25 (1995).

40. *See infra* note 54.

41. Van Niekerk, *supra* note 15, at 406.

42. GL Chavunduka, *Witchcraft and Witch Hunts in Africa*, in NAT'L CONF. REP., *supra* note 5, at 39; HARMONISATION, *supra* note 31, at § 6.4.5.

43. Ph J Thomas & DD Tladi, *Legal Pluralism Or A New Repugnancy Clause*, 32 COMP. & INT'L L.J. OF S. AFR. 354, 356 (1999).

ment Act.⁴⁴ Traditional courts are inquisitorial, not adversarial.⁴⁵ Lawyers are barred from traditional courts and the court is responsible for examination and cross-examination of parties and witnesses.⁴⁶ The chief and his councilors, who serve as advisors, question parties on the facts and evidence in each case.⁴⁷ The inquisitorial procedure is used in both civil and criminal cases. Decisions of traditional courts are final unless appealed *de novo* to Magistrates Courts, whose decisions can be appealed to the High Courts and Supreme Court of Appeal.⁴⁸

Traditional courts have jurisdiction over civil cases arising out of customary law, except where limited by law, as well as certain criminal matters also recognized under customary law.⁴⁹ The former South African governments respected the traditional courts' criminal jurisdiction because of the chief's role in maintaining law and order in their communities.⁵⁰ Section 20 of the Black Administration Act, however, limits the types of criminal cases a traditional court may hear.⁵¹ Criminal sentences are limited to fines as traditional courts have been prohibited from imposing sentences of "death, mutilation, grievous bodily harm or imprisonment."⁵² Traditional civil remedies include damages, compensation and restitution.⁵³ Traditional courts often exceed their jurisdiction,⁵⁴ to some extent, as a result of the blurred distinction between civil and criminal law.⁵⁵

Today, there are two types of customary law practiced in South Africa: (1) official customary law, and (2) living customary law. Official customary law is customary law that has been recognized in anthropological studies, court judgments, restatements and in legal codes.⁵⁶ Living customary law, in contrast, "denote[s] the practices and customs of the people in their day-to-day lives."⁵⁷

Many consider the "official" customary law enforced by courts to be a distortion of customary law as practiced before colonialism.⁵⁸ Scholars argue that

44. GJ van Niekerk, *Democratic Aspects Of Traditional Conflict Management: Unofficial Dispute Resolution in Traditional Authority and Democracy*, in SOUTH AFRICAN 84 (UNIV. OF NAMIBIA CENTRE FOR APPLIED SOCIAL SCIENCE, ed. 1998).

45. Rakate, *supra* note 21, at 181.

46. HARMONISATION, *supra* note 31, at § 7.1.1. According to the South African Law Commission, participants at hearings in traditional courts also are allowed to ask parties questions.

47. *Id.* at § 2.2.2.

48. *Id.* at §§ 4.1, 5.1; *see also* Rakate, *supra* note 21, at 183-84.

49. HARMONISATION, *supra* note 31, at § 6.1.1. Because of the oral tradition of customary law, one may wonder how a person can live under it. Customary courts expect and assume that those governed by customary law are aware of its rules. *Id.* at § 6.3.1.

50. *Id.* at § 6.3.3.

51. According to the South African Law Commission, "The excluded offences are mainly the more serious offences such as treason, sedition, murder, culpable homicide, rape, arson, robbery. However the list includes less serious offences but whose elements may be difficult to prove such as indecent assault, receiving stolen property knowing it to have been stolen and breaking and entering any premises with intent to commit a crime." *Id.* at § 6.5.1.

52. *Id.* at §§ 6.7.1, 6.7.4.

53. HARMONISATION, *supra* note 31, at §§ 6.4.4-6.4.5.

54. *Id.* at § 6.5.2; van Niekerk, *supra* note 44, at 84.

55. van Niekerk, *supra* note 44, at 84.

56. Himonga & C Bosch, *supra* note 27, at 328-329.

57. *Id.* at 319.

58. BENNETT, *supra* note 20, at 64; SUCCESSION, *supra* note 31, at § 4.2.1.

the colonists who dominated the common law system interpreted customary law through their own belief systems and to the benefit of the colonial government.⁵⁹ In determining customary law, courts often relied on studies by colonists or on the testimony of traditional leaders. Typically, the studies and the testimony reflected the interests of the older males within both societies.⁶⁰ Thus, these scholars argue that "the official version of customary law described less what people previously did (or were actually doing) and more what the government and its chiefly rulers thought they ought to be doing."⁶¹

Also, some scholars believe that the common law courts destroyed customary law by trying to fit a system based on group rights and conciliation into the common law litigious system in which individual rights are supreme. Mistakenly believed to be a similar system of rules and laws, common law courts overlooked the many considerations taken by traditional courts before applying a customary rule or law.⁶² The nuances of customary law could not be captured in these studies, codes or restatements, thus rendering the official customary law forever flawed. Attempts to codify or restate customary law removed its inherent flexibility and ossified a system meant to evolve with the changes in the community.⁶³

In contrast to official customary law, researchers have found that living customary law is "dynamic, adaptable, flexible and practical . . . (and) devoid of rigidity."⁶⁴ The purpose of the flexibility of living customary law is to "allow for a maximum degree of latitude to achieve just and equitable results in each

59. BENNETT, *supra* note 20, at 63 ("[T]he tradition that the official version of customary law is supposed to represent is now said to be 'invented'. This epithet is meant to warn us that customary rules owe less to an ancient practice than to the interests of European writers and officials. Colonial occupation put settlers into a dominant position, one that allowed them to become arbiters of the African cultural heritage: they documented it and they determined how it was to be interpreted").

60. *Customary Marriages*, S. AFR. LEGAL COMM'N DISCUSSION PAPER 74 § 2.3.6 (Aug. 1997) [hereinafter *Customary Marriages*]; Bigge & von Briesen, *supra* note 10, at 300.

61. *Customary Marriages*, *supra* note 60, at § 2.3.5. According to Bennett, "A critical issue in any constitutional litigation about customary law will therefore be the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency." BENNETT, *supra* note 20, at 64.

62. Rakate, *supra* note 21, at 181. See also A Nekam, Third Melville J. Herskovitz Memorial Lecture for the Centre of African Studies at Edinburgh University (Feb. 28, 1966) ("What seems the most misleading about these attempted codifications of customary law is not that the formulated rules would, in themselves, be necessarily wrong, but that they are fatally incomplete. For every 'rule' assumed, there are hundreds overlooked, 'rules' which would qualify those stated, balance them, enlarge them or narrow them down."); Thomas & Tladi, *supra* note 43, at 356.

63. Bigge & von Briesen, *supra* note 10, at 301. WLSA, *supra* note 39, at 122. The WLSA researchers wrote, "The fact that customary law was written down in texts to be applied by the courts, for example, means that it is expressed in terms of strict rules that cannot hope to reflect the flexible processes of decision-making that typify a truly customary system." *Id.* at 24. The South African Law Commission similarly noted that "Earlier codes and restatements are now disparagingly called the 'official version of customary law. Modern scholars have called this version into question not only because it lags behind advances in community attitudes and behavior but also because it reflects the preconceptions of the time in which it was written." CONFLICTS OF LAW, *supra* note 13, at § 10.3.4.

64. WLSA, *supra* note 39, at 97; *Customary Marriages*, *supra* note 60, at § 2.3.1 ("The greatest value of custom in Africa is its 'dynamism reflected in the spirit or tolerance, dialogue, and consultation which bear out custom as a process whereby claims and disputes are negotiated'").

case.”⁶⁵ The fact that customary law has survived concerted efforts to suppress it attests to the strength of living customary law, its ability to adapt and the ties of the indigenous communities to it.⁶⁶ Because “living” customary law evolves over time and is adapted to each individual situation, this type of customary law does not pass the stringent test of being “readily ascertainable and sufficiently certain,” and cannot be applied by common law courts.⁶⁷

Unfortunately, while living customary law grows and adapts with changes in communities, it also develops from other influences, such as interaction with the common law, urbanization, assimilation with Western norms and values, as well as the changes that result from interaction with official customary law.⁶⁸ Such influences have led one scholar to conclude that customary law is nothing more than a “myth.”⁶⁹

III. WITCHCRAFT

To answer how South Africa treats customary law that is based on a cultural belief or practice not accepted by Western values or norms that predominate the common law system this Article will compare the treatment of witchcraft under both the customary law system and the common law. To better understand the concerns and dilemmas of both systems in dealing with witchcraft, it is necessary first to describe the belief and practice itself.

A. *The Belief in Witchcraft*

1. *Philosophy of Witchcraft*

A majority of South Africans believe in witchcraft.⁷⁰ While those beliefs vary among South Africa’s different indigenous cultures, there are many similarities that run between them. This Article will describe the features of witchcraft that predominate in most, if not all, of South Africa’s indigenous cultures. Significant differences in the beliefs will be described where necessary.

65. WLSA, *supra* note 39, at 97. According to the SALC, “unlike western-style courts, (traditional courts) do not feel constrained by pre-ordained rules. Their concern is with substantive justice.” *Customary Marriages*, *supra* note 60, at § 2.3.1.

66. Van Niekerk, *supra* note 44, at 83. While living customary law represents the practices of indigenous cultures, this does not mean living customary law solves all the problems of customary law, such as the inequalities it perpetuates among men and women.

67. M Pieterse, *Killing It Softly: Customary Law In The New Constitutional Order*, DE JURE 35, 37 (2000).

68. For example, van Niekerk described how the white governments could manipulate chiefs’ courts, particularly after the institution of indirect rule, suggesting that many chiefs would do anything to maintain their power. Van Niekerk, *supra* note 44, at 83. This suggests that, at least to some extent, living customary law may not reflect the natural development of customary law, but customary law as it has been manipulated by the white governments. While van Niekerk sees the survival of customary law despite efforts to manipulate and destroy it as evidence of its strength, Costa describes the result of such interactions with whites and the manipulation of customary law as rendering customary law “so flawed as to be barely operational.” AA Costa, *The Myth of Customary Law*, 14 S. AFR. J. HUM. RTS. 525 (1998).

69. Costa, *supra* note 68, at 525.

70. COMM’N. OF INQUIRY REP., *supra* note 3, at 262.

The belief in witchcraft is premised on the doctrines of manism and dynamism. Under manism, deceased ancestors continue to participate in the daily lives of their families.⁷¹ They provide guidance to their families and protect their family members from misfortune by communicating with the gods on the family's behalf.⁷² To receive this protection, family members participate in rituals in recognition of the ancestors' power, continuing the connection between the family and the ancestors.⁷³ Should the family forget the ancestors, this connection to the spirit world will be broken.⁷⁴ Dynamism accepts that "there are innumerable spiritual beings (including ancestral spirits) . . . who not only cause natural phenomena, but are also the vital forces behind animals, plants and inanimate objects in the world."⁷⁵ These spirits can be good spirits or evil ones capable of causing harm to people in the living world.⁷⁶

Unlike in most Western beliefs, there is little differentiation between the conscious, the unconscious and the supernatural.⁷⁷ What the Western world perceives as supernatural, traditional culture considers part of the everyday events of the natural world. Dreams and meditation, along with trance-like states or other altered consciousness, are accepted as part of the reality of people's lives.⁷⁸ What happens during these altered states actually happens to the person. Spirits and ancestors use dreams and altered states to enter a person's body in order to communicate with them.⁷⁹

In practice, witchcraft provides an explanation for the misfortune that befalls individuals. While witchcraft believers accept that a person died of a heart attack or their cattle died from a disease—which explains *how* the misfortune happened – these cultures seek a metaphysical answer for *why* it occurred.⁸⁰

71. Mathole S. Motshekga, *The Ideology behind Witchcraft and the Principle of Fault in Criminal Law*, in *LAW AND JUSTICE IN SOUTH AFRICA* 149-50 (John Hund ed., 1988).

72. *Id.*; Credo Mutwa, *The Sangoma's Lore of the Sole*, 2 *AFR. LEGAL STUD.* 61-62 (2001).

73. Motshekga, *supra* note 71, at 150. Without this protection, one may suffer great harm. As Howard Timmins described:

If life runs smoothly, the spirits are pleased with his (the member of the traditional culture) conduct, but he knows, as every other human being does, that there will be times when he will have to face days of anxiety. Troubles are bound to come sooner or later, dangers will assail him, physical suffering may strike him down, or the hand of death may take a dear one from his side – the spirits are then angry with him; in some way or other he has violated their laws, roused their wrath, and the forces of vengeance have been released against him.

HOWARD TIMMINS, *THE WARRIOR PEOPLE ZULU ORIGINS, CUSTOMS AND WITCHCRAFT* 299 (1974).

74. Mutwa, *supra* note 72, at 62.

75. Motshekga, *supra* note 71, at 150.

76. *Id.*

77. Interview with Edwin Ritchkin, (July 21, 2001).

78. John Hund, *Witchcraft And Accusations Of Witchcraft In South Africa: Ontological Denial and The Suppression Of African Justice*, 33 *COMP. & INT'L L.J. OF S. AFR.* 366, 372 (2000). According to Credo Mutwa, a diviner, humans have twelve senses, not five. With these senses, humans have psychic powers and the ability to change levels of consciousness. Mutwa, *supra* note 72, at 75.

79. Motshekga, *supra* note 71, at 150.

80. Isak Arnold Niehaus, *Witchcraft, Power and Politics: An Ethnographic Study of the South African Lowveld*, 17 (1997) (unpublished dissertation, University of the Witwatersrand) (on file with the University of the Witwatersrand, Johannesburg library); MAX GLUCKMAN, *CUSTOM AND CONFLICT IN AFRICA* 83 (1955).

Under this belief system, misfortune results from one of two sources—the anger of one’s ancestors or the evil practices of a witch.⁸¹ Evil spirits can enter the body when the ancestors leave a person unprotected or when witches use their connection with the spirit world to open a victim’s body to the evil spirit. When the harm results from the anger of the ancestors, those suffering accept the harm as just. In a sense, one who incurs the wrath of the ancestors is believed to have breached the social contract established between family members and their ancestors.⁸²

Viewed as unfair, however, are the practices of witches who use the evil spirits to cause harm.⁸³ Some witches practice their craft for revenge, others because they are simply evil and still others in hopes of gaining luck through the misfortune of another.⁸⁴ The Venda culture offers one explanation of how harm to one through witchcraft can benefit another.⁸⁵ The Venda believe in a “cosmic good” shared by all members of a community.⁸⁶ The size of each person’s share of that good depends on a person’s status in the community.⁸⁷ Unfortunately, this cosmic good is finite—for one person to increase his or her share, another must lose some.⁸⁸ Witchcraft is one method of accomplishing this. When each person accepts his or her share of the cosmic good without unnatural alteration, the community lives in harmony. Once evil forces are used to alter

81. NAT’L. CONF. REP., *supra* note 5, at xiii; MICHAEL GELFAND, MEDICINE AND CUSTOM IN AFRICA 28 (1964).

82. Ron Lawrence Anderson, Keeping the Myth Alive: Justice Witches and the Law in the 1986 Sekhukhune Killings, (unpublished thesis, University of the Witwatersrand) (on file with the University of Witwatersrand, Johannesburg library).

83. TW Bennett & WM Scholtz, *Witchcraft: A Problem Of Fault And Causation*, 12 COMP. & INT’L L.J. OF S. AFR. 287, 296 (1979); Anthony Minnaar, Marie Wentzel & Catherine Payze, *Witch Killing With Specific Reference To the Northern Province of South Africa* in Elierea Bornman, Rene van Eeden and Marie Wentzel, in VIOLENCE IN SOUTH AFRICA 181 (1998); Sean Redding, *Government Witchcraft: Taxation, the Supernatural, and the Mpondo Revolt in the Transkei, South Africa, 1955-1963*, 95 AFR. AFFAIRS 555, 559-69 (1996).

84. According to one member of the Malawi Parliament, the reasons witches practice their craft are “poverty, laziness, frustration, ignorance, jealousy and pleasure.” Hon. Moses Dossi, Address in NAT’L. CONF. REP., *supra* note 5, at 34. See also, Niehaus, *supra* note 80, at 11; GELFAND, *supra* note 81, at 34-35; Hund, *supra* note 78, at 386; Minnaar, Wentzel & Payze, *supra* note 83, 182. In the *National Conference Report*, the Commission on Gender Equality provided an example of a story of a person performing evil for no apparent reason:

A few years ago an old lady was caught in Vhufuli running away from her neighbour’s homestead. She was only partially dressed. When asked what she wanted at the man’s house so late at night, she replied as follows: We were going to a certain place and rested at this man’s gate, unfortunately I overslept and decided to enter this man’s homestead. The purpose of coming and entering this man’s homestead was to cause his highly pregnant wife to abort. I am very sorry. The husband of the pregnant woman then asked her: Why did you single out my wife for this evil deed? She answered: I am very, very sorry, I can honestly assure you that I will not repeat this, but remember it is beyond my control. As she had assured the family that she would not cause mischief in the family again, the two families lived in peace again until the old lady died.

NAT’L. CONF. REP., *supra* note 5, at 14.

85. Whether other South African cultures share this belief with Vendas is uncertain.

86. Minnaar, Wentzel & Payze, *supra* note 83, at 179.

87. *Id.*

88. *Id.*

the natural balance of cosmic good, this harmony is disrupted.⁸⁹ Keeping in mind customary values are premised on working toward the good of the community, witches or witchcraft powers must be destroyed to end any disruption in the community.

2. *Witches and Their Powers*

There are at least two types of witches in traditional South African witchcraft belief—the night witch and the day sorcerer. Night witches use evil spirits to bewitch others, with or without any particular motive.⁹⁰ Night witches typically are women who inherit their powers from their mothers.⁹¹ The day sorcerer uses magic formulas, spells, or medicines rather than “some unidentified mystical power inherent in their personalities.”⁹² They are capable of learning their powers from others.⁹³ The day sorcerer is considered more dangerous because his or her services can be bought, often in the form of charms or medicines capable of causing harm.⁹⁴ For purposes of this Article, both the day sorcerer and night witch will be included under the term “witch.”

Witches derive their powers through harnessing evil spirits.⁹⁵ With this power, witches cast spells, curse individuals, or use charms or medicines, all of which ultimately cause harm.⁹⁶ A person under a spell or curse is bewitched. Evil spirits manipulated by the witch enter a person's body, forcing that person to suffer the symptoms of the disease;⁹⁷ presumably, witches can enter an animal's body in the same manner. Witches can use these evil spirits to capture the spirit of the newly dead; to create frightening ghosts;⁹⁸ to cause women to become infertile; to destroy crops and property; or to cause natural disasters.⁹⁹ They can cause accidents, illness, and death.¹⁰⁰ They are capable of turning the dead into zombies who can be used for labour.¹⁰¹ Witches can use animals and

89. *Id.* at 180.

90. COMM'N. OF INQUIRY REP., *supra* note 3, at 13. GEOFFREY PARRINDER WITCHCRAFT: EUROPEAN AND AFRICAN 133 (1963).

91. PARRINDER, *supra* note 90, at 134, 143. Another way of looking at the inheritance of the powers is that ancestral spirits of a witch, who themselves were witches, possess the body of the living family member. Through this possession, the living person is able to practice witchcraft. Chavunduka, *supra* note 42, at 40.

92. Anthony Minaar, *Witchpurging and Muti Murder in South Africa*, 2 AFRICAN LEGAL STUDIES 1, 17 (2001). *Contra* Hund, *supra* note 78, at 371.

93. Chavunduka, *supra* note 42, at 40.

94. PARRINDER, *supra* note 90, at 143. All medicines, whether used for good or evil, are believed to work by magic. AC MYBURGH, INDIGENOUS CRIMINAL LAW IN BOPHUTHATSTWANA 9-10 (1980). To the extent someone purchases charms or medicines to cause harm to another, he or she also may be considered a witch. Chavunduka, *supra* note 42, at 40.

95. Motshelga, *supra* note 71, at 150; GELFAND, *supra* note 81, at 33.

96. Minnaar, Wentzel & Payze, *supra* note 83, at 181.

97. GELFAND, *supra* note 81, at 28.

98. PARRINDER, *supra* note 90, at 133.

99. *Id.* at 141; P Mayer, *Witches' Inaugural Lecture at Rhodes University* (1954).

100. Minnaar, Wentzel & Payze, *supra* note 83, at 182; PARRINDER, *supra* note 90, at 143.

101. Witches use a spell to raise the dead and create zombies. The zombies are used as field labour, to construct buildings or for any other work the witches need accomplish. Zombies appear only at night. Minnaar, Wentzel & Payze, *supra* note 83, at 182.

lightning bolts to create accidents and injuries.¹⁰² A witch's powers are so volatile he or she may bewitch someone unwittingly in a moment of anger.¹⁰³ Witches also can use medicines to prevent themselves from being discovered during their mischief and can use medicines to keep their victims sleeping while they bewitch them.¹⁰⁴ "Because witchcraft does not respect the rules of society, it is unpredictable, uncontrolled and frightening."¹⁰⁵

Those who have not inherited witchcraft powers can locate a witch capable of teaching them powers or of providing them with charms or medicines to create a desired outcome. In many cases, people seeking charms or medicines are believed to be using them to capture the fortune of those seen as more fortunate. As one scholar explained, "a man's rival or someone jealous of him or desirous of harming him, visits one of these sorcerers who is known to possess a secret medicine injurious to others. He has to pay a price for this medicine which he plants on the path of his victim or even in his food."¹⁰⁶

Medicine murder is one method used to increase one's fortune. It is the practice of killing someone seen as successful and using his or her body parts in a medicine to bring power or luck to the killer. Horrifically, the participants remove the organs and body parts from the victim while he or she is alive in order "to keep as much as possible of his/her vital energy."¹⁰⁷ Another aspect of witchcraft-related violence is ritual murder. Ritual murder involves the sacrifice of a person to benefit the community.¹⁰⁸ The sacrificial organs are used to counter particularly strong evil.¹⁰⁹

At one time, communities believed that chiefs had a special ability to communicate with ancestors. With this power, chiefs were able to protect the fertility of land and animals, to bring rain for crops, and to protect the community against the evil practiced by witches.¹¹⁰ A chief could sanction a ritual murder if it would benefit the community by restoring order to the community.¹¹¹ This connection with the ancestors helped maintain the chiefs' power over the community. Chiefs also were believed to be able to access the power of witches for their own benefit—either to increase their own wealth or to destroy their ene-

102. Motshekga, *supra* note 71, at 150.

103. Because witchcraft can be practiced unwittingly, some people accused of witchcraft will accept as true the accusations against them. Minnaar, Wentzel & Payze, *supra* note 83, at 183.

104. Chavunduka, *supra* note 42, at 40.

105. MFC BOURDILLON, *WHERE ARE THE ANCESTORS* 115 (1993).

106. GELFAND, *supra* note 81, at 34-35.

107. Veronique Faure, *Notes on the Occult in the New South Africa*, 2 *African Legal Studies* 170-71 (2001).

108. Minnaar, *supra* note 92, at 15.

109. *Id.* at 18.

110. Redding, *supra* note 83, 557; Mihalik & Cassim, *supra* note 31, at 130. The author has not found information as to whether this belief still exists. One reason the spiritual basis of a chief's power may no longer exist is because of the interference of the colonial and then Apartheid government in the powers of chiefs as well as the succession to the role of chief. *Id.*

111. Minnaar, *supra* note 92, at 17.

mies.¹¹² Today, as in the past, it is accepted to at least some extent that chiefs practice medicine murder to increase their power and wealth.¹¹³

3. *Smelling Out a Witch*

People who meet with misfortune turn to traditional healers and diviners to help them determine whether their misfortune resulted from the anger of their ancestors or from the evils of witchcraft. They also enlist diviners to cure them of any physical illness.¹¹⁴ Under a strict division of services, diviners determine the cause of the disease or misfortune while the traditional healers treat any medical problems resulting from the ancestors or witchcraft.¹¹⁵ If a diviner determines witchcraft was involved, he or she then will determine who perpetrated the witchcraft.¹¹⁶ In practice, the functions of the traditional healer and diviner overlap.¹¹⁷ For purposes of this article, I will refer to all traditional healers and diviners capable of detecting and treating symptoms of witchcraft as diviners.

Diviners are believed to have the same powers as witches to access the spiritual world, but, unlike witches, diviners use their powers for good.¹¹⁸ As with many witches, a diviner is believed to inherit his or her powers, although there is some suggestion that diviners learn how to harness the power of the spirits from other diviners.¹¹⁹ Because the power of the witch and the diviner are the same, the diviner is able to recognize another using the power for evil.¹²⁰ Unfortunately, the identical nature of the power means that a diviner is capable of becoming a witch and, in fact, will turn into one as soon as he or she uses the connection with the spirit world for evil or for his or her own gain.¹²¹

There are at least three methods diviners use to determine who is responsible for bewitching, cursing or otherwise practicing witchcraft. Some diviners

112. Redding, *supra* note 83, at 557; Mihalik & Cassim, *supra* note 31, at 130.

113. Mihalik & Cassim, *supra* note 31, at 130. Chiefs have been convicted of medicine murder in South Africa's courts. *Rex v. Magundane*, 1915 Native High Court 64 (Natal); *Rex v. Chief Butelezi*, 1910 Native High Court 84 (Natal).

114. Minnaar, Wentzel & Payze, *supra* note 83, at 182; PARRINDER, *supra* note 90, at 169, 180-81.

115. GELFAND, *supra* note 81, at 34. For a description of the differences between diviners, traditional healers and sangomas in Zulu tradition, see Hund, *supra* note 78, at 370.

116. NAT'L. CONF. REP., *supra* note 5, at xiii.

117. GELFAND, *supra* note 81, at 34. Diviners and traditional healers also are able to use their powers to protect a person's home and property from attempts at witchcraft. NAT'L. CONF. REP. (statement of Ngoako Ramthodi), *supra* note 5, at 1.

118. INEKE VAN KESSEL, BEYOND OUR WILDEST DREAMS 132 (2000); Motshekga, *supra* note 71, at 150; GELFAND, *supra* note 81, at 37-38; PARRINDER, *supra* note 90, at 182. Traditional healers, whether or not they are diviners, also may have the same powers as those ascribed to the "sorcerers." Minnaar, *supra* note 92, at 17.

119. Hund, *supra* note 78, at 378-79; COMM'N. OF INQUIRY REP., *supra* note 3, at 16, 27. A traditional healer or diviner discovers his or her powers typically after having fallen sick with an illness Western medicine cannot cure. Ultimately, a traditional healer will tell the sick person that there is no physical ailment, instead, the person's ancestors are communicating to the person their desire that he or she become a traditional healer. During the course of dreams, and sometimes with training from the traditional healer who made the diagnosis, the person will learn the art of healing. *Id.* at 27.

120. PARRINDER, *supra* note 90, at 182-83.

121. *Id.* at 183.

use divination, others a trial by ordeal and yet others are able to “smell out” witches. Divination covers many practices. The diviner must enter a trance to discover the witch and interpret the messages from the ancestors.¹²² The actual practices range from throwing bones or other objects that can be interpreted through the help of the ancestors to looking at a mirror or television screen until the image of the witch appears.¹²³

To detect witches through a trial by ordeal, a diviner prepares a special medicine for community members or accused witches to drink.¹²⁴ Those innocent of practicing witchcraft will vomit the concoction, while witches will retain the drink and develop diarrhea.¹²⁵ In another version of trial by ordeal, the diviner draws a line on the ground and sprinkles medicine along the line.¹²⁶ Members of the community are asked to walk across the line. Witches are unable to cross and instead fall paralyzed.¹²⁷

Smelling out a witch is based on the belief that witches carry a terrible smell that diviners can detect.¹²⁸ Diviners can walk through the victim’s property smelling out the objects used by the witch to cause the harm.¹²⁹ Often, diviners will not provide the name of the witch alleged to have caused the misfortune, but instead will describe the witch, leaving it to the person seeking help to determine the name.¹³⁰

Diviners are expected to counteract or destroy the witchcraft used to create a person’s misfortune.¹³¹ To fight the bewitching, diviners need to reach the ancestors in the spirit world.¹³² Diviners typically charge a substantial fee for their work.¹³³ They further seek to find witches in hopes of curing them of evil or removing their powers.¹³⁴ One possible method of removing witchcraft powers simply is to expose the activities of the witch.¹³⁵ Religious leaders also may be capable of fighting witchcraft through prayer and exorcism.¹³⁶

122. GELFAND, *supra* note 81, at 48.

123. *Id.* at 48; FREDERICK KAIGH, *WITCHCRAFT AND MAGIC OF AFRICA* 40 (1947). The diviner who uses bones receives them from a ceremony in which a calf or goat is slaughtered and burned over a fire. Once four intact bones are found from the ashes, they are presented to the diviner for future use. Mutwa, *supra* note 72, at 70.

124. Chavunduka, *supra* note 42, at 41.

125. *Id.* Professor Chavunduka explained that there are real problems with this method because if a diviner prepared the wrong combination of medicines, innocent people could be determined as witches, while actual witches may go undetected. *Id.*

126. *Id.* at 42.

127. *Id.*

128. KAIGH, *supra* note 123, at 40.

129. Chavunduka, *supra* note 42, at 41-42.

130. AEB Bhlohdio, *Some Views On Belief In Witchcraft As A Mitigating Factor*, DE REBUS 409 (1984). PARRINDER, *supra* note 90, at 168.

131. Hund, *supra* note 78, at 386.

132. *Id.*

133. PARRINDER, *supra* note 90, at 177.

134. COMM’N. OF INQUIRY REP., *supra* note 3, at 51; TIMMINS, *supra* note 73, at 250; PARRINDER, *supra* note 90, at 187-88.

135. PARRINDER, *supra* note 90, at 170, 191-92.

136. *Id.* at 180 (describing the practices of Basuto Christian priests and Zulu Zionist prophets).

B. Social Aspects of Witchcraft Accusations

1. Witchcraft Accusations

While accusations of witchcraft could be leveled at any person within a community, certain patterns emerge in the literature. Women seem to be the most common targets of witchcraft accusations.¹³⁷ Part of this lies in the belief that a daughter inherits her witch's powers from her mother. According to the Lovendu from the Transvaal, children "drink in witchcraft with their mother's milk."¹³⁸ The Basuto describe witches as "women (and a few men) on sticks or on fleas, [who] meet in assemblies, and dance stark naked in various places" and who use their "perverted sense of humour" to harm men.¹³⁹

Jealousy often underlies these accusations, particularly with regard to women. Anthropologists believe women are more likely to be targets of accusations because of what is considered the typically poor and often jealous relationship between mothers-in-law and daughters-in-law.¹⁴⁰ They sometimes vent their frustrations with each other through such accusations. Women also may be targeted because of cultural practice of polygyny. Having multiple wives creates the possibility that one will accuse another of witchcraft.¹⁴¹ Similarly, the cultural practice of bringing women from their fathers' families into their husbands' leaves them vulnerable to attacks on their loyalty to their new family.¹⁴²

Wealth plays an important role in accusations as well. Poorer members of the community are thought to use witchcraft in hopes of gaining the fortune of a wealthy person or simply out of jealousy.¹⁴³ As a result, wealthier people fear the poor will use witchcraft to force a redistribution of wealth.¹⁴⁴ That is not to say wealthy people are immune from such accusations, as they often are be-

137. Greg Brack & Michele Hill Carson, *Witch Persecution in Modern South Africa*, in NAT'L. CONF. REP., *supra* note 5, at 48. The Commission of Inquiry Report notes that while traditionally women are the targets of witch-killings, men also are victims of such purges. *Id.* at 14.

138. PARRINDER, *supra* note 90, at 143. See also, NAT'L. CONF. REP., *supra* note 5, at xiii.

139. PARRINDER, *supra* note 90, at 133, 143.

140. *Id.* at 98.

141. *Id.*

142. GLUCKMAN, *supra* note 80, at 98; Mayer, *supra* note 99, at 9. Other reasons suggested for why women are more often the targets of witchcraft accusations include:

- As women generally outnumber males, there are more female than male witches.
- Many males argued that women kill men once their sons have reached adulthood, so that they (women) would remain in control of the family.
- They further argued that there are very few cases in which husbands kill their wives as polygamy allows them to marry as many women as they can maintain.
- Jealousy, not only concerning love affairs, but jealousy concerning material possessions of the neighbour: If children are performing better than the children of the neighbour, the mother of those children who are performing poorly is believed to be more envious than the father of her children.

COMM'N. OF INQUIRY REP., *supra* note 3, at 15.

143. Chavunduka, *supra* note 42, at 39; Greg Brack & Michele Hill Carson, *Witch Persecution in Modern South Africa*, in NAT'L. CONF. REP., *supra* note 5, at 47; Niehaus, *supra* note 80, at 22; COMM'N. OF INQUIRY REP., *supra* note 3, at 14-15; GELFAND, *supra* note 81, at 34-35.

144. Cyprian Fisiy & Peter Geschiere, *Witchcraft, Violence And Identity: Different Trajectories In Postcolonial Cameroon*, in POSTCOLONIAL IDENTITIES IN AFRICA 194 (Richard Werbner & Terence Ranger eds., 1996).

lieved to have used witchcraft to gain their fortunes. However, this seems to be quietly condoned.¹⁴⁵

Another common target of witchcraft accusations is the elderly.¹⁴⁶ One scholar reported a pattern in which the victims of alleged witchcraft typically are young and the accused witches middle-aged or older: "The association of elders with witchcraft is . . . based on the perception that their active power of adulthood slips away into infertility and infirmity, and that their status rests purely on their control of esoteric knowledge."¹⁴⁷ For older women accusations are even more likely: "If they are women living alone they are feared as were the old wise women of Europe. Why have they lived so long? Clearly they must have obtained new soul-vitality, most likely from devouring the soul of a tender child."¹⁴⁸

When illness or hardship falls on a person, the first to be considered as a likely witch are those with whom the victim has had a conflict.¹⁴⁹ In many cases, accusations are aimed at family members or other people with whom they share a close relationship. One scholar explains this phenomenon: "As those we know best are the ones with whom there may be the greatest friction . . . [accusations are] rarely against those who live at a distance. The latter have not sufficient social contacts to make them feel hatred."¹⁵⁰

The last categories of people likely to be targeted by witchcraft accusations are anti-social, individualistic or otherwise "odd" people.¹⁵¹ Bearing in mind that traditional cultures value the community and are concerned with the contributions of the individual to the community, anti-social, morose or difficult people seem to contribute less to the community. When the community's suspicions of witchcraft arise, these people are the easiest targets for an accusation.¹⁵²

145. Niehaus, *supra* note 80, at 359-60; Fisiy, *supra* note 144; Redding, *supra* note 83, at 559-60.

146. PARRINDER, note 90, at 196.

147. Isak Niehaus, *Witchcraft in the New South Africa*, 2 AFR. LEGAL STUD. 116, 136 (2001).

148. PARRINDER, *supra* note 90, at 196.

149. Niehaus, *supra* note 80, at 123.

150. PARRINDER, *supra* note 90, at 168. *See also*, Chavunduka, *supra* note 42, at 39; Redding, *supra* note 83, at 559-560.

151. Chavunduka, *supra* note 42, at 39; PARRINDER, *supra* note 90, at 198.

152. As TW Bennett and WM Scholtz describe:

The witch is commonly one who is, in one way or another, a disturbing factor within the close-knit African community in that he infringes the norms and mores of that community . . . he may, for instance, merely be habitually miserly or inhospitable. He may of course, be a more obviously disturbing factor as, for example, if he is aggressive, sullen, morose or withdrawn. Whether he departs from the norms of the community to a minor or major degree, the point should be made that, within the confines of a small-scale African community, closely linked by kinship, any degree of aberration is naturally magnified by proximity and the expectations which arise from such proximity.

Bennett & Scholtz, *supra* note 83, at 290. *See also*, Brack & Carson, *supra* note 143, at 47; PARRINDER, *supra* note 90, at 198.

2. Social Purpose of Witchcraft Accusations

Accusations of witchcraft and subsequent punishment of witches seem to serve social purposes beyond just stopping witchcraft.¹⁵³ On a societal level, witchcraft beliefs help maintain social control within the community. First, witchcraft accusations bring tensions within the community into the open, often allowing for a traditional leader to mediate conflicts.¹⁵⁴ Second, fear of being accused of witchcraft or of angering a witch is an incentive for individuals to treat each other well.¹⁵⁵ Witchcraft accusations also curb antisocial behavior,¹⁵⁶ or remove antisocial people from the community.¹⁵⁷ Finally, witchcraft accusations set the boundaries of who belongs in the community and who does not.¹⁵⁸

Individuals seem to receive many social benefits from a belief in witchcraft. Such belief allocates responsibility for misfortune to either the ancestors or witches.¹⁵⁹ To the extent responsibility is allocated to witches, afflicted individuals can avoid personal responsibility and have a target for their anger.¹⁶⁰ As an extension of this purpose, witch-killings provide a catharsis to the community. "They ha[ve] found the public enemy who made things go wrong for all of them; they ha[ve] destroyed him; they could all breathe more freely."¹⁶¹ Witchcraft beliefs also provide a method of explaining random events like natural disasters.¹⁶² Dangerously, witchcraft may be "a banner under which people hate, denounce and even kill one another."¹⁶³

Some see witchcraft belief and accusations as a manner of controlling changes within society.¹⁶⁴ As one scholar described in 1955:

Conflicts between old and new social principles produce new animosities, which are not controlled by custom, and these open way to new forms of accusation. . . . The system of witchcraft beliefs, originally tied to certain social relations, can be adapted to new situations of conflict—to competition for jobs in towns, to the rising standard of living made possible by new goods, which breaches the egalitarianism and so forth. In response to this situation there have arisen in Africa

153. It is difficult to present the social purposes without appearing to make judgments as to whether witchcraft actually exists. The author does not intend for this section to cast judgment upon witchcraft believers or to express an opinion about the existence of witchcraft itself. This section, however, is important for understanding the role witchcraft plays in South Africa's indigenous cultures.

154. Chavunduka, *supra* note 42, at 39; Brack & Carson, *supra* note 137, at 47; Niehaus, *supra* note 80, at 24. See also, Mayer, *supra* note 99, at 13 (arguing that witchcraft accusations provide "a pretext for quarreling").

155. Adrieene van Blerk, *Sorcery and Crime*, 11 COMP. & INT'L L.J. OF S. AFR. 333 (1978); PARRINDER, *supra* note 90, at 169.

156. GLUCKMAN, *supra* note 80, at 98.

157. Bennett & Scholtz, *supra* note 83, at 291. While stated mildly, removing anti-social people from a community ranges from banishing them, to burning their huts and personal goods, to killing them.

158. Niehaus, *supra* note 80, at 18.

159. *Id.*

160. Bennett & Scholtz, *supra* note 83, at 292.

161. Mayer, *supra* note 99, at 13.

162. Niehaus, *supra* note 80, at 287; Mayer, *supra* note 99, at 20.

163. Mayer, *supra* note 99, at 11.

164. Chavunduka, *supra* note 42, at 39; Fisiy & Geschiere, *supra* note 144, at 194; PARRINDER, *supra* note 90, at 201.

movements designed to cleanse the country of witches, held responsible for social disintegration, for falling yields on over-cultivated lands, for new diseases. The philosophy of these movements against witchcraft is that if Africans would cease to hate one another and would love each other, misfortune would pass.¹⁶⁵

Finally, witchcraft and witchcraft accusations help those in power to retain power and those not in power to elevate their status. Acting against witches elevates a person's status or helps them to retain authority as it "dramatize[s] their capacity to punish the perpetrators of misfortune, and to assist those who sought compensation for the crimes that had been committed against them by witches."¹⁶⁶ More cynically, witchcraft accusations can be used to rid oneself of opponents.¹⁶⁷ A person able to convince the community of the truth of the accusation gains status, while the accused loses his or her status.¹⁶⁸ This elevated status, however, only exists as long as the community accepts the accusation—where an accusation fails to gain currency the accuser could lose status.¹⁶⁹

Unfortunately, the manifestation of witchcraft belief can lead to violence. Customary law offered its own mechanisms to control the belief, which were ultimately shut down by the successive white governments. The next section describes the historical customary law mechanisms and the common law mechanisms for controlling manifestations of witchcraft belief, as well as the results of the common law efforts.

IV.

WITCHCRAFT UNDER THE LAW

A. *Treatment of Witchcraft Under Customary Law*

1. *Witchcraft Trials Before the Witchcraft Suppression Act 3 of 1957*

Witchcraft believers take for granted that "witchcraft is an 'objective' feature of reality which invites an appropriate response from the community."¹⁷⁰ In the past, "an appropriate response was an institutional response in accordance with accepted African understandings of reality under the auspices of sangomas and chiefs."¹⁷¹ Traditional courts developed several mechanisms to deal with the manifestations of witchcraft. They punished the practice of witchcraft, mediated conflicts blamed on witchcraft, compensated for false accusations of witchcraft and granted divorces when a husband had his wife smelled out as a witch. The most interesting for those who do not believe in witchcraft is to learn how customary courts and traditional leaders set about determining the guilt of an alleged witch. What will be described below is the procedure commonly

165. GLUCKMAN, *supra* note 80, at 101. See also Diane Ciekawy & Peter Geshiere, *Containing Witchcraft: Conflicting Scenarios in Post Colonial Africa*, 41 AFR. STUD. REV. 1, 3 (1998) (discussing the relationship between witchcraft and modernity).

166. Niehaus, *supra* note 80, at 260; Redding, *supra* note 83, at 559-60.

167. Minnaar, Wentzel & Payze, *supra* note 83, at 176.

168. Anderson, *supra* note 82, at 16.

169. Consider the customary court's treatment of defamation described below.

170. John Hund, *African Witchcraft and Western Law*, 2 AFR. LEGAL STUD. 22, 49 (2001).

171. *Id.* A "sangoma" is a commonly used word for "diviner."

followed by customary courts prior to the introduction of the Witchcraft Suppression Act. These procedures may be practiced covertly today. Changes in the ways indigenous cultures deal with witchcraft due to the adoption of the Witchcraft Suppression Act will be described separately below.

A trial to determine whether someone is a witch began when the alleged victim of witchcraft approached a traditional leader to complain of some harm that resulted from witchcraft.¹⁷² Where the complainant alleged that a particular person was a witch, the chief tried to determine whether there was a legitimate claim of witchcraft or whether there was some other dispute underlying the allegation.¹⁷³ When a chief determined a dispute unrelated to witchcraft underlay the claim, he mediated between the parties to reach a solution or understanding, eliminating the allegation.¹⁷⁴ If the chief agreed that witchcraft might have been involved in the alleged harm, typically the chief sent the victim with his councilors to a diviner.¹⁷⁵ The diviner would then determine whether the harm resulted from witchcraft or the anger of the ancestors. If the diviner believed witchcraft was involved, he or she would divine or smell out the witch.¹⁷⁶ The complainant and councilors would report the diviner's findings to the chief. In some communities, a diviner identified the witch in the presence of the community and the chief.

There were several procedural protections in place to guard against false accusations of witchcraft by the complainant or the diviner. The first protection involved the chief choosing a diviner who lived significantly far from the community so that he or she would be unaware of the everyday happenings in the community and would be unfamiliar with the actors involved.¹⁷⁷ This protection was intended to stop diviners from proclaiming the guilt of a person because of influence from community members, knowledge of community relations, or because of any dislike of a community member.¹⁷⁸ Sending councilors with the accuser was another procedural protection. The chief sent his councilors to prevent the accuser from suggesting to the diviner the possible perpetrator and to stop the complainant from otherwise influencing the out-

172. Hund, *supra* note 78, at 368; Niehaus, *supra* note 80, at 259; Bhlodhio, *supra* note 130, at 409. Among the Shona in Zimbabwe, there is some conflict as to whether the victim will approach the chief directly. While some choose to do so, others use a procedure that begins with a victim requesting a diviner to determine whether witchcraft was involved with the harm and, if so, identifying the perpetrator. On returning to the village, the victim would place ash at the doorstep of the alleged witch. The chief then is informed of the allegation, typically by the accused witch. GELFAND, *supra* note 81, at 74-75.

173. Chavunduka, *supra* note 42, at 39.

174. *Id.* at 39.

175. COMM'N. OF INQUIRY REP., *supra* note 3, at 16; Minnaar, Wentzel & Payze, *supra* note 83, at 183; Bhlodhio, *supra* note 130, at 409.

176. In the Green Valley of South Africa, diviners from Phunda Malia were frequently called upon to perform divinations. Where they determined an accused was a witch, they would cut holes into the witch's clothes and shave his or her hair. Niehaus, *supra* note 80, at 259. If the diviner deemed the alleged witch innocent, the accused would blow a goat's horn upon returning to the village. *Id.*

177. Bhlodhio, *supra* note 130, at 409.

178. *Id.*

come.¹⁷⁹ Where a diviner proclaimed the witch before the chief, the chief determined for himself, with the aid of councilors, whether the complainant made any improper suggestions to the diviner. If the chief or his councilors felt something was suspect in the diviner's procedures, the chief would order a consultation with a different diviner.¹⁸⁰ A last protection emanated from the diviner. Diviners, at least in the past, refused to consult with complainants without the chief's permission.¹⁸¹ In the Green Valley, in the Northern Province of South Africa, chiefs further required complainants to place a deposit of cattle with the court that would be used to compensate the alleged witch for a false allegation.¹⁸² The chief similarly required the alleged witch to deposit cattle for payment to the victim should he convict the accused.¹⁸³

Once a diviner pointed out a witch, whether by name or description, the customary court would begin a trial. Among certain indigenous cultures in southern Africa, if the complainant alleged that the accused used "poison or a potent cathartic, emetic, intoxicant, or narcotic with the intent to harm," the accused could be charged with both witchcraft and assault.¹⁸⁴ Other types of witchcraft that could be prosecuted by chiefs included using body parts for any purposes, including participation in medicine murder.¹⁸⁵

The trial required the complainant and councilors to report back to the chief on the meeting with the diviner. Chiefs often did not rely on the evidence of the diviner alone to find someone guilty of practicing witchcraft. Instead, chiefs looked for other objective evidence such as statements by the alleged witch threatening the complainant, evidence of charms, poison or other witchcraft medicine in the home of the alleged witch, or evidence of witchcraft charms or medicines found on the complainant's property.¹⁸⁶ In common law terms, this could be described as an effort to prove fault.¹⁸⁷

Divination was not necessarily required where an accused threatened the complainant with some type of harm and the harm actually occurred. In the Northern Province, an older man was convicted of witchcraft on evidence of a verbal threat and proof that the harm occurred as threatened.¹⁸⁸ The accused had warned the complainant that lightning would strike him on 9 November 1995. On that night, lightning struck the complainant's hut. He managed to escape, finding a place to stay with a friend. Two nights later, lightning struck the friend's hut. The complainant and his friend escaped the burning hut. With

179. *Id.*

180. *Id.*

181. Niehaus, *supra* note 80, at 259. While this was a successful procedural protection, the main reason the diviners refused to identify witches without a chief's permission was out of fear of reprisals from the alleged witch's family. *Id.*

182. *Id.* at 258.

183. *Id.*

184. MYBURGH, *supra* note 94, at 81.

185. *Id.* at 99.

186. *Id.* at 99; Bennett & Scholtz, *supra* note 83, at 299.

187. Bennett & Scholtz, *supra* note 83, at 294-97.

188. COMM'N OF INQUIRY REP., *supra* note 3, at 13.

evidence of both a threat and the threat coming true, the chief ordered the older man to leave the village.¹⁸⁹

On a conviction, the chief would punish the witch. Except in certain emergencies, only the chief had this right.¹⁹⁰ For a conviction of bewitching a person, punishment ranged from ostracism to payment of a fine to death. In the Green Valley, the chief imposed a fine paid as a deposit before trial.¹⁹¹ An elder in the community described: "In the past witches were not killed. Their punishment was to be exposed."¹⁹² Other communities simply shunned the witch.¹⁹³ In some regions, the chief ordered the convicted witch to cure the victim.¹⁹⁴ Banishment was another form of punishment for witchcraft,¹⁹⁵ as was burning of the witch's hut.¹⁹⁶

While some scholars protest that chiefs did not put witches to death and that this was a phenomenon that developed after the Witchcraft Suppression Act came into affect,¹⁹⁷ there is significant evidence to the contrary.¹⁹⁸ In a book published in 1947, common forms of punishment for witchcraft included "beating, spearing or burning to death."¹⁹⁹ Similarly, the *Commission of Inquiry Report* stated that chiefs commonly ordered the death penalty against convicted witches.²⁰⁰ A death sentence also was common among the Pedi in the Northern Province.²⁰¹

Two other causes of action relevant to witchcraft are defamation and divorce. Where a person accused another of witchcraft without evidence, the accuser could be charged under the customary law of defamation. Throughout South Africa, a false accusation of witchcraft resulted in a fine to the accuser, which was used to pay damages to the accused.²⁰² If a wife accused her husband of witchcraft, her biological family could be required to pay damages to her husband in the form of cattle.²⁰³

As described below, as a part of "official" customary law, a husband who has his wife smelled out as a witch essentially instituted a divorce. Under living

189. *Id.*

190. Bhlodhio, *supra* note 130, at 409; AC MYBURGH, PAPERS ON INDIGENOUS LAW IN SOUTHERN AFRICA 106 (1985).

191. Niehaus, *supra* note 80, at 259.

192. *Id.* at 259-60.

193. Minnaar, Wentzel & Payze, *supra* note 83, at 183; COMM'N OF INQUIRY REP. *supra* note 3, at 51.

194. MYBURGH, *supra* note 94, at 31. Myburgh reported that some chiefs would torture the witch until he or she cured the victim. Where the witch's attempts to cure were particularly inept, the conviction for witchcraft was reversed. *Id.*

195. COMM'N OF INQUIRY REP., *supra* note 3, at 51; MYBURGH, *supra* note 94, at 49. In some cases, family members of the witch would negotiate with another village for the witch to be accepted in the other village. Minnaar, Wentzel & Payze, *supra* note 83, at 183.

196. COMM'N OF INQUIRY REP., *supra* note 3, at 51; MYBURGH, *supra* note 94, at 50.

197. Minnaar, *supra* note 92, at 2.

198. MYBURGH, *supra* note 94, at 51.

199. KAIGH, *supra* note 123, at 40.

200. COMM'N OF INQUIRY REP., *supra* note 3, at 51.

201. Anderson, *supra* note 82, at 23.

202. Hund, *supra* note 78, at 368; Niehaus, *supra* note 80, at 259.

203. MYBURGH, *supra* note 190, at 22.

customary law, a husband could dissolve the marriage because he believed her to be a witch.²⁰⁴ Whether a wife received a divorce for being smelled out by her husband is unclear.

With the enactment of the Witchcraft Suppression Act, customary law regarding witchcraft either came to an abrupt halt, was practiced covertly, or changed drastically. The next section details the changes that resulted from the act.

2. *Treatment of Witchcraft After the Witchcraft Suppression Act 3 of 1957*

The Witchcraft Suppression Act 3 of 1957 made it an offense to accuse someone of witchcraft, to indicate someone as a witch, to pretend or profess a knowledge of witchcraft, to ask a diviner to point out a witch, or to pay someone to use "pretended" witchcraft. While details of the act will be described more fully below, it is important at this stage to describe how traditional cultures dealt with witchcraft in light of the act.

Many scholars and law enforcement personnel believe that as a direct result of the Witchcraft Suppression Act: (1) chiefs and customary law lost some of their legitimacy in their communities; and (2) people began taking justice against witchcraft into their own hands.²⁰⁵ By law, the chiefs were bound to comply with the Witchcraft Suppression Act. Also, by law, the authority of chiefs and their capacity to run traditional courts depended on the permission of the "relevant authority" on "Native Affairs" under the Black Administration Act.²⁰⁶ Many chiefs complied with the Witchcraft Suppression Act for fear of losing their power. The Apartheid government's consolidation of power pressured chiefs to comply with this act more strongly than in the past under the variety of colonial laws suppressing witchcraft.²⁰⁷ Some chiefs covertly heard witchcraft cases and mediated in witchcraft accusations.²⁰⁸ Most, however, turned away the accusers of witchcraft, which eventually led communities to feel that chiefs were protecting witches and siding with the government.²⁰⁹ Ultimately, the act undermined the chiefs' authority and the community's faith in customary law.

To many members of traditional cultures, the Witchcraft Suppression Act punished the victims of witchcraft and allowed witches to run free.²¹⁰ The act essentially forced community members to create alternative routes to justice.

204. I. Schapera, ed. *THE BANTU-SPEAKING TRIBES OF SOUTH AFRICA* 204 (I. Schapera ed., 1937).

205. Minnaar, *supra* note 92, at 1; Niehaus, *supra* note 147, at 132; Niehaus, *supra* note 80, at 359; Hund, *supra* note 78, at 366.

206. See *supra* Chapter 1, Section II(A).

207. Niehaus, *supra* note 80, at 265. Reports in the 1930s suggest that the colonial and white governments condoned witchcraft trials because they wanted to avoid "unnecessary conflicts" with the indigenous populations. Johannes Harnischfeger, *Witchcraft and the State in South Africa*, 2 *AFR. LEGAL STUD.* 78, 83 (2001).

208. Niehaus, *supra* note 80, at 127; Ralushai, *supra* note 5, at 15.

209. Niehaus, *supra* note 80, at 266.

210. COMM'N OF INQUIRY REP., *supra* note 3, at 54.

Under customary law, accusers had an opportunity to have their witchcraft accusations heard in a court and the chiefs had an opportunity to mediate any underlying dispute or provide compensation for misfortune linked to witchcraft. By removing the authority of traditional courts to hear witchcraft cases, the Witchcraft Suppression Act blocked community members' access to the justice to which they had been accustomed.²¹¹

Without the support and structure for handling witchcraft accusations provided by the customary courts and customary law, community members resorted to informal trials. Many of the procedural protections built into the traditional system disappeared. No longer did complainants of witchcraft bring their accusations to chiefs before acting, erasing the opportunity chiefs had to control the manifestations of witchcraft belief.²¹² In many cases, accusers chose disreputable diviners or ones who came from within the community or nearby. This eliminated the impartial nature of and the faith people had in the traditional system.²¹³ No longer were advisors sent to watch over the divination process to ensure complainants did not influence the diviners. People became more vulnerable to witchcraft accusations and accused witches lost any chance they had for a fair trial under customary law. As one scholar reported:

By criminalizing these judicial remedies on the ground that they were repugnant to the 'civilizing mission' of the white, eurocentric apartheid government the seeds of chaos were sown. In the wake of this confusion unfounded witchcraft accusations have proliferated and are frequently used as pretexts for personal animosity, vendettas, inter-generational and domestic rivalry, agendas for political action, and so on.²¹⁴

Nor was there any control over sentences meted out to witches. Sparked by the inaction of the government and chiefs, feeling defenseless, alleged victims of witchcraft turned to vigilantism. In *S v. Ndlovu*, the defendant explained that he had killed the witch who had killed his son after his accusations had been rejected by both the traditional leader and the police.²¹⁵ The resort to vigilante justice often is condoned within a community because it is seen as public service, an act of protecting the community, making heroes of the participants.²¹⁶

211. Niehaus, *supra* note 80, at 359.

212. Bhlodhio, *supra* note 130, at 409.

213. *Id.* at 409. In many instances during the 1980s and 1990s, diviners were forced against their will by community members to determine who was a witch. Additionally, the community members, typically the youth, forced other community members to contribute money for the divination ceremony on the threat of violence.

214. Hund, *supra* note 78, at 368. Witchcraft violence increased significantly in the late 1980s and early 1990s. Minnaar, *supra* note 92, at 1. These witch murders have led many family members of accused witches to flee their homes for fear of being accused of witchcraft because of the association. *Id.*

215. 1979 (1) SA 430, 432 (A).

216. COMM'N OF INQUIRY REP., *supra* note 3, at 15 and 31; Niehaus, *supra* note 80, at 287. At least one scholar reports that even the police treat accused witch-killers as heroes. Minnaar, *supra* note 92, at 9.

There are members of communities who condemn vigilante justice primarily because the accusations are not proved in a traditional court.²¹⁷ Unfortunately, there is little they can do to protest these changes. As described in Section III (C) of this Part, the South African government recognizes the problem of witchcraft related violence and has begun to consider how to handle vigilante justice, but no reforms have been formulated.

B. Treatment of Witchcraft Under the Common Law System

This section describes how the government officially deals with witchcraft and witchcraft accusations. The contrast between the approaches is stark and serves as a basis for analyzing how the common law system treats customary beliefs that do not underlie the common law system.

1. Witchcraft Legislation

For over a century, South African governments have made every effort to suppress witchcraft belief through legislation.²¹⁸ To the colonial and white South African state courts, it was impossible to convict a person of witchcraft when there was no empirical link between the alleged witchcraft and the harm.²¹⁹ Such difficulties made witchcraft trials incompatible with the rule of law and all the more repugnant to a "civilized" society.²²⁰ Over time, the successive white governments expected that their cultural influence, combined with legislation, would civilize the indigenous population, eradicating witchcraft beliefs. Until such "civilizing" occurred, the South African governments hoped legislation would protect innocent persons from superstitious accusations that lead to death.²²¹ An added benefit of such legislation for the white governments was that it removed more power from chiefs.²²²

The earliest enactments targeting witchcraft belief included the Cape of Good Hope Act 24 of 1886, the Black Territories' Penal Code Chapter XI Act 2 of 1895, The Witchcraft Suppression Act of 1895, the Natal Law 19 of 1891, and the Transvaal Ordinance 26 of 1904. These laws were enforced to varying degrees.²²³ The Apartheid government unified the colonial laws under the Suppression of Witchcraft Act, hoping to standardize the harsh response to the belief. Once Apartheid began, the South African government increased the

217. NAT'L. CONF. REP., *supra* note 5, at 25. Some community members feel that the older people in the community and the traditional healers are using the breakdown in witchcraft justice and the willingness of the youths to fight witches to destroy enemies and opposition. *Id.*

218. Niehaus, *supra* note 80, at 339-40; Redding, *supra* note 83, at 558.

219. Hund, *supra* note 78, at 368; COMM'N OF INQUIRY REP., *supra* note 3, at 57; Bennett & Scholtz, *supra* note 83, at 300.

220. Anderson, *supra* note 82, at 54.

221. *S v. Mafunisa*, 1986 (3) SA 495, 497 (Venda Supreme Court); van Blerk, *supra* note 155, at 332.

222. Niehaus, *supra* note 80, at 339. "Colonial Officials also saw the customary court prosecution of witches as a challenge to their authority." Niehaus, *supra* note 147, at 118.

223. Niehaus, *supra* note 80, at 340.

pressure on traditional leaders to stop hearing witchcraft cases, finding the cases "repugnant, baseless, and even diabolic."²²⁴

The Witchcraft Suppression Act, as amended in 1970 and 1999, remains in force in South Africa's new democracy. The provisions of the act create offences for:

Section 1: 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, injury or grief to, disease in, damage to or disappearances of any person or thing to any other person;
- (c) Employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard;
- (d) Professes a knowledge of witchcraft, or the use of charms, and advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft;
- (e) On the advice of any witchdoctor, witch-finder or 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 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.

Section 1(a) aims to punish accusations of witchcraft leveled at individuals. Section 1(b) targets diviners or traditional healers who 'smell out' witches, while 1(c) criminalizes efforts to hire diviners or traditional healers to find a witch. Anyone claiming to be a witch or who sells or advises in the use of charms, medicines or other tools of witchcraft can be punished under sections 1(d) and (e). Finally, section 1(f) targets persons who use "supernatural" powers to locate missing or stolen property upon payment.

The Act allows punishment of a fine or imprisonment under any offense listed in Section 1.²²⁵ Anyone convicted under 1(a) or (b) whose accusation or smelling out is found to have resulted in the death of the alleged witch can be sentenced to twenty years imprisonment.²²⁶ The Act also creates a rebuttable presumption that when the accuser has been convicted under 1(a) or (b) and the alleged witch was killed, the death was the direct result of the accusation.²²⁷

The Witchcraft Suppression Act criminalizes all aspects of witchcraft and witchcraft accusations except the actual practice of witchcraft. The statute pros-

224. *Id.* at 339. There is some suggestion that the colonial governments accepted witchcraft belief to a certain extent because of its popularity and strength, finding it more disruptive to eradicate the belief. Redding, *supra* note 83, at 556.

225. § 1(iii) limits fines to R500 or no more than five years imprisonment for violations of §§ 1(c)-(e). § (f) incurs a fine of no more than R200 or imprisonment no longer than two years. § 1(iv).

226. § 1(i).

227. § 2(a).

ecutes “pretended” witchcraft as though it is a fraud, and not a harmful act. To the believers in witchcraft, this Act punishes attempts to stop witches and it allows witches to continue causing harm at will.²²⁸

Despite the hopes that the Witchcraft Suppression Act would be a tool to eradicate witchcraft belief, the common law courts seem to have decided more cases of witchcraft related violence or civil cases arising from witchcraft accusations than prosecutions under the Act. As described in the next section, common law courts were forced to develop their own mechanisms for dealing with witchcraft violence and accusations beyond the Witchcraft Suppression Act.

2. *Witchcraft in the Common Law Courts*

The common law courts use their criminal law jurisdiction to handle cases of witchcraft-related violence and violations of the Witchcraft Suppression Act. With their civil law jurisdiction, the common law courts determine divorce and defamation cases that have some relationship to witchcraft and witchcraft accusations. Judicial decisions on divorce and defamation related to witchcraft accusations depend heavily on the customary treatment of witchcraft, while criminal law decisions treat witchcraft belief as wholly unreasonable.

a. *Witch-Killings*

The treatment of witch-killings offers the clearest view of how common law courts value cultural beliefs they do not share. From the earliest court cases the author could locate, witch-killing is treated as a murder the sentence for which may be mitigated by cultural belief under the doctrines of diminished capacity—including insanity, provocation, involuntary reaction or emotion-induced diminished capacity. Courts throughout the last century continually have refused to recognize witch-killing as a form of self-defense. As time passes and judges conclude that South Africa has been ‘civilized,’ the decisions reflect a growing impatience with and intolerance of witchcraft beliefs.

South African courts are unwilling to accept self-defense as a justification for witch-killings. In *S v. Mokonto*, the defendant alleged that the deceased had told his brothers and him “they would all die.”²²⁹ Both of the defendant’s brothers died shortly after the threat. Carrying a cane knife, the defendant confronted the deceased, who allegedly repeated that the defendant would soon die. The defendant killed the deceased. The court refused a plea of self-defense because the deceased posed no immediate threat to the defendant, as she did not have a weapon or suggest she was going to kill him at that moment.²³⁰ The court also refused the plea because the defendant’s belief that he was in danger was not reasonable: “the beknighted belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the

228. Niehaus, *supra* note 80, at 340. It also creates murderers out of traditional leaders enforcing the death penalty against the tamers of evil spirits. *Id.*

229. 1971 (2) SA 319 (A).

230. *Id.* at 324.

Dark Ages.”²³¹ The standard the *Mokonto* court used was subjective in that the reasonable standard was based on minority beliefs or those of the “civilized” culture.

South African courts also reject a defense that an accused acted under the superior order of the chief and his customary law powers to put a witch to death. A defendant hoped to use obedience to an order as a justification for his act, negating the unlawfulness of it. In *Rex v. Masongo*,²³² the court held that the accused could not rely on this defense because the chief did not have the authority to make the order under applicable witchcraft legislation. Furthermore, the court wrote:

But assuming, merely for argument's sake, you were ordered to do this, it is no excuse . . . if we were to accept your plea it would mean that in every case where witchcraft is involved, and where an allegation is made that the persons considered were ordered to commit the deed by their Chief, those persons are to be allowed to go free.²³³

The court also suggested that the chief in the instant case likely would be forced to stand trial for his part in the murder.²³⁴

With uneasiness, the common law courts have been willing to treat the belief in witchcraft as an extenuating circumstance mitigating a murder sentence where the defendant honestly believed the deceased intended to use witchcraft to harm the defendant or his relations, or where the defendant believed he was acting in the public interest.²³⁵ The courts seem to have at least some sympathy for accuseds who acted on genuine fears of witchcraft. An extenuating circumstance is defined as “a fact associated with a crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt.”²³⁶ Typically, extenuating circumstances involve some form of di-

231. *Id.* In the 1917 *Rex v. Hlatshwayo* decision, the Native High Court rejected a self-defense plea with little explanation. Because the court suggested that the accused could argue an insanity defense, it seemed to be saying that the belief in witchcraft is unreasonable, therefore insufficient to meet the standard for self-defense. In certain circumstances, an accused may qualify for an insanity defense. 1917 Native High Court 262, 262 (Natal).

232. 1916 Native High Court 42 (Natal).

233. *Id.* at 45.

234. *Id.* This case seems correctly decided given that, under the Witchcraft Suppression Act, traditional authorities cannot prosecute witchcraft cases, making the underlying order unlawful. Had the traditional leader carried out the order himself, it would still be unlawful.

235. *S v. Lukhwa*, 1994 (1) SACR 53 (A); *S v. Motsepa*, 1991 (2) SACR 462 (A) (mitigating factor if accused believed he was acting to protect the community); *S v. Nxele*, 1973 (3) SA 753 (A); *R v. Bungweni*, 1959 (3) SA 142 (Eastern Cape); *S v. Thonga*, 1993 (1) SACR 365 (V) (holding that the belief that one is serving the community by killing or banishing witches may be a mitigating factor); *S v. Magoro*, 1996 (2) SACR 359 (A) (court refused to accept belief in witchcraft as an extenuating circumstances where no evidence of such belief was put forth at trial); The headnotes of *S v. Dikgale*, 1965 (1) SA 209 (A) explain: “Where accused are convicted of murder, and the only probable reason why they had so treated the deceased and committed the crime was that they believed that he was a bad and dangerous witchdoctor, then his must be an extenuating circumstances, even if the witchdoctor did not affect the accused or their near relations.” Some scholars fear that defendants take advantage of the doctrine of mitigating circumstances by claiming to believe in witchcraft when they do not or the motivation for killing had nothing to do with the belief. Minnaar, *supra* note 92, at 8.

236. Minnaar, Wentzel & Payze, *supra* note 83, at 179.

minished capacity²³⁷—whether due to intoxication, provocation, or severe emotional stress.²³⁸ By common law standards, witchcraft beliefs seem to be one of the “factors which may contribute towards the conclusion that he [the accused] failed to realize what was happening or to appreciate the unlawfulness of his act,” thus mitigating the accused’s moral blameworthiness.²³⁹ Keeping in mind that witchcraft belief is not legally reasonable, this is one of the few options open to courts to limit an accused’s liability.²⁴⁰

Not every circumstance of witch-killing leads to mitigation. Where a person not believed to be a witch is injured or killed along with the alleged witch, the defendant may be prosecuted fully, without consideration of extenuating circumstances.²⁴¹ The accused in *R v. Bungweni* burned the hut of an alleged witch believing that an innocent child also was inside.²⁴² The court found that this recklessness for another’s life, in combination with the calculation with which the accused murdered the deceased, eliminated any extenuating circumstances based on a strong cultural belief.²⁴³ Nor can a defendant invoke a belief in witchcraft as a mitigating factor when he or she was paid to kill a witch. In *S v. Ngubane*,²⁴⁴ the defendant claimed he was commissioned by friends to kill a witch whom they believed was killing children in the community. While the court agreed that “a belief in witchcraft, forming the motive for the killing of one believed to practice it, almost invariably is a relevant consideration,”²⁴⁵ the defendant did not prove that he acted because of a genuine fear of harm or for the ‘common good’ of the community, rather, he killed for payment.²⁴⁶ To be considered an extenuating circumstance, the belief in witchcraft must have motivated the crime.

Although ultimately rejected on the facts, court decisions suggest that insanity and provocation can mitigate the culpability of an accused in a witch-killing case. In *S v. Mokonto*,²⁴⁷ the court stated that, where an accused kills a person he or she believes to be a witch because the victim provoked the accused with an immediate threat of witchcraft, the charge could be lessened from murder to culpable homicide.²⁴⁸ To qualify for a provocation defense, the accused must act in the heat of the moment, without time to think through his or her behavior. In the instant case, the defendant brought a cane knife with him when

237. CR SNYMAN, *CRIMINAL LAW* 152 (1995); EM BURCHELL & PM HUNT, *SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE* 201 (vol. 1, 1996).

238. BURCHELL & HUNT, *supra* note 237, at 204-05.

239. *Id.* at 204 (quoting *S v. Van Vuuren*, 1983 (1) SA 12 (A)).

240. *See also S v. Netshiavha*, 1990 (2) SACR 331, 333 (A) (“Objectively speaking, the reasonable man so often postulated in our law does not believe (sic.) in witchcraft.”).

241. *Bungweni*, 1959 (3) SA at 146.

242. 1959 (3) SA 142.

243. *Bungweni*, 1959 (3) SA at 241.

244. 1980 (2) SA 741 (A).

245. *Id.* at 745.

246. *Id.* at 746. *See also, S v. Mafu*, 1992 (2) SACR 494 (A) (where motive was to punish the deceased for refusing to allow his son to belong to the comrades, witchcraft belief is not a mitigating factor).

247. 1971 (2) SA 319.

248. *Id.* at 325.

he confronted the deceased about practicing witchcraft. Although the deceased may have threatened the accused with more witchcraft, the court concluded that because he brought the cane knife, he must have premeditated the death.²⁴⁹

Insanity also may remove a defendant's culpability for witch-killings. The Natal Native High Court, in its 1917 *Hlatshwayo* decision, stated that an accused may plead insanity in defense to a witch-killing charge.²⁵⁰ In that case, the accused killed a person he believed used witchcraft to cause lightning to strike his hut. Despite the suggestion, the court noted that the defendant did not actually appear insane.²⁵¹ The tenor of the court's decision suggests that belief in witchcraft alone is insufficient to support an insanity plea.

In at least one instance, a South African High Court accepted as a defense to assault the involuntary reaction of a defendant to what he believed to be a *tokoloshe*, a particularly evil spirit, but was in fact a friend. In *R v. Ngang*,²⁵² the defendant had a nightmare that there was a *tokoloshe* in the room. When he awoke after the dream, the defendant placed a knife under the bed and went back to sleep. When he awoke again, the defendant mistook his friend for a *tokoloshe* and stabbed him. Finding no possible motive, the court accepted that the defendant's action was a reflex, removing the necessary criminal intent for assault. The court distinguished the defendant's action from a belief in witchcraft that leads a fully conscious and competent person to kill an alleged witch:

This was not proved to be a case merely of mistaken belief in magic or witchcraft or something like that by a person whose mind was not otherwise affected so that a possibility of finding the necessary mens rea could be said to arise. The appellant acted involuntarily or automatically and cannot be held criminally responsible for his act which was no more than a purely physical reflex.²⁵³

Implicitly, it seems the court accepted a belief in *tokoloshes* as sufficiently reasonable to justify an involuntary reaction defense.

There is at least some indication that South Africa's courts may further limit the use of the witchcraft belief to mitigate an accused's culpability for attacks against alleged witches because of the continued "modernization" of South Africa. In *S v. Phama*,²⁵⁴ the court refused to allow a defendant to argue that his belief in witchcraft mitigated the murder of two alleged witches. In strong dicta, the court argued:

Modern South African courts have for over a hundred years been passing sentence in cases where the background to or motivation for a killing is a belief in witchcraft. In many cases this has been regarded as strong mitigation: cases where the accused and the victim come from a primitive society steeped in superstition, where the accused and his immediate family have been exposed to disease, death and disaster, and where the accused kills the deceased because in his mind this is the only way to put a stop to the curse which he firmly believes has been put on him and his family by supernatural means. This degree of mitigation is not pre-

249. 1971 (2) SA at 325.

250. *Hlatshwayo*, 1917 Native High Court at 262.

251. *Id.*

252. 1960 (3) SA 363 (T).

253. *Id.* at 366.

254. 1997 (1) SACR 485 (EC).

sent here. The accused is uneducated and from a simple rural background, but he is not a tribesman from some remote district completely cut off from the influences of modern civilization. . . He now lives in a suburb in quite a large, developing town which is the local political and commercial capital. He is able to function properly to hold his own in modern society. While he may not have escaped entirely from the beliefs and superstitions of his forebears, he is expected to control those beliefs and superstitions instead of allowing them to regulate his behaviour towards his fellow human beings. The accused, the victims, and their families do not come from a primitive society, and the message which my sentence must shed out is not a message from a primitive society.²⁵⁵

The court's language implies that a person living in the modern world, no matter how uneducated or how strong his belief, should be able to control himself when faced with a witch.²⁵⁶ Ultimately, the court found that the defendant sincerely believed in witchcraft and believed the deceased were witches. The court, however, did not believe that he killed them to protect his family or community from an imminent threat of witchcraft, but that the killing was revenge for prior witchcraft.²⁵⁷ What makes this decision difficult from a cultural perspective is that the court ignored that people who believe in witchcraft see it as truly dangerous and threatening, so much so that witchcraft must be eradicated no matter what the cost and despite so-called "modern influences."

The decision in *S v. Matala*,²⁵⁸ further suggests that South African courts are less willing to use witchcraft belief as an extenuating circumstance. This decision requires the defendant to provide support for his or her belief that the deceased practiced witchcraft before a court can mitigate a sentence. In *Matala*, the defendants attended a meeting where the speaker urged the participants to aid in the battle against witches. Following the meeting, a mob of people went to individual houses to kill alleged witches. Facing criminal charges, the defendants initially stated that they did not believe in witchcraft, while also stating that they participated in the actions to stop witches. The court held that a denial of a belief in witchcraft is not conclusive where there is evidence to the contrary. In the instant case, however, the court concluded, "There is not the slightest evidence that the deceased had ever behaved in any way which could have afforded grounds, reasonable or otherwise, for a belief that she [the deceased] was practicing witchcraft or anything remotely akin to witchcraft."²⁵⁹ By requiring such evidence, the court is applying something like a reasonableness test to believing a person is a witch. Absent a basis for believing the deceased was a

255. *Id.* at 487-88.

256. Even before the advent of the Witchcraft Suppression Act, the court in *Rex v. Magebeni*, 1911 Native High Court 107 (Natal) felt South Africa too civilized to accept a belief in witchcraft as a mitigating factor. The court commented, "When is it to come that these Natives are to learn that consulting diviners and committing murders will not be tolerated by the British Government? As I have already said, these men lived under a Magistrate for ten or twelve years. Is this sort of thing to continue for ever?" *Id.* at 111.

257. *Phama*, 1997 (1) SACR at 487.

258. 1993 (1) SACR 531 (A).

259. *Id.* at 535.

witch, an accused could not depend on a belief in witchcraft by itself to be a mitigating factor.²⁶⁰

The actions of the government of the Transkei from the 1970s to the 1980s provide an interesting commentary on the extenuating circumstances doctrine. In 1977, the independent government of the Transkei grew frustrated with the number of witch-killing cases that came before the courts. The government enacted legislation removing witchcraft belief from the list of extenuating circumstances to be considered in a murder case.²⁶¹ They hoped this would deter witch-killings, as it meant all witch-killers would be given the death penalty if no other extenuating circumstances were found.²⁶² After the change in rules, the witch-killings continued at the same rate and members of the legal community complained about the number of hangings as a result of the policy.²⁶³ In 1988, after a military takeover in the Transkei, the act forbidding the use of witchcraft belief as an extenuating circumstance was repealed in large part because of the complaints in the legal community.

b. Ritual and Medicine Murders

In contrast to witch-killing cases, South African courts do not tolerate or mitigate ritual or medicine murder offenses. Ritual or medicine murder cases lack the element of belief of real and imminent harm necessary to mitigate a witch-killing. Furthermore, the targets of ritual or medicine murder typically are not those believed to practice witchcraft, but are innocent victims and often children. The court in *S v. Modisadife* refused to accept a belief in witchcraft as a mitigating factor for a defendant who killed his brother's eleven-year-old step-daughter to use certain parts of her body in a medicine that would protect him from harm.²⁶⁴ The court noted that the harm being protected against was an amorphous one and that the victim had nothing to do with any threat of harm.²⁶⁵ Conviction for ritual and medicine murder is treated no differently than other murder convictions primarily because the goal is to kill for gain, not to protect family or the community from perceived imminent harm.²⁶⁶

c. Violations of the Witchcraft Suppression Act

Somewhat surprisingly, there are few published decisions on violations of Section 1(a) of the Witchcraft Suppression Act, which makes pointing out or

260. *Id.* at 536.

261. DS Koyana, *The Demise of the Doctrine of Extenuating Circumstances in the Republics of South Africa and Transkei*, CONSULTUS 115, 116 (1991).

262. *Id.*

263. *Id.*

264. 1980 (3) SA 860, headnote (A).

265. *Id.*

266. *S v. Mnyai*, 1993 (1) SACR 252 (A); *S v. Marhungu*, 1981 (1) SA 56 (A); *Rex v. Magebe*, 1916 Native High Court 167 (Natal); *Rex v. Magundane*, 1915 Native High Court 64 (Natal); *Rex v. Fayedwa*, 1915 Native High Court 44 (Natal); *Chief Butelezi*, 1910 Native High Court 84 (Natal); *Rex v. Qoqa*, 1911 Native High Court 112 (Natal); *Rex v. Mabebana*, 1911 Native High Court 235 (Natal).

naming a witch an offense.²⁶⁷ Interesting questions of interpretation have arisen in these cases. The first is whether violations of this section must meet the criteria for defamation. The court in *S v. Mafunisa* determined that a person may be convicted of naming another as a witch by making the allegation directly to the alleged witch, meaning that the accusation need not be published more broadly as required in other defamation cases.²⁶⁸ Perhaps more interesting, the same court had to decide whether the terms “witch” and “wizard” are intended to include both males and females or whether someone can indicate only women as witches and men as wizards. The *Mafunisa* court noted that dictionaries define witches as women and wizards as men. But, the court held, the purpose of the statute is to protect against all accusations of witchcraft, regardless of gender, so each term includes both male and female witches and wizards.²⁶⁹ South African courts also confronted the issue of whether a person can be charged under the Witchcraft Suppression Act for indicating someone as a healer who uses supernatural powers to cure illness. One case flirted with answering this question, suggesting that pointing out a healer who uses the power for good likely would not contravene the Act.

The majority of the cases the author was able to locate in which persons were convicted of divination were prosecuted under predecessor statutes to the Witchcraft Suppression Act and significantly before 1957. These opinions condemn diviners for the harm that results from having smelled out someone as a witch. For example, the Natal Native High Court, in *Rex v. Nozindhlela*, wrote: “If a man is smelt out as an *Mtakati* [witch], it is no exaggeration to say that he is in grave danger. The stigma is not easily removed; he is regarded with suspicion.”²⁷⁰ That all these cases were decided long before the enactment of the Witchcraft Suppression Act and that they are relatively few in number is surprising because scholars believe the diviner is a key actor in the witchcraft-related crimes.²⁷¹

The South African courts have faced some interesting difficulties when dealing with charges for professing knowledge of witchcraft.²⁷² In *S v.*

267. From the decisions recorded in the *Commission of Inquiry Report*, 190 persons were accused of naming others as witches. Niehaus, *supra* note 147, at 120. Forty-five percent of the allegations resulted in convictions. *Id.* Unfortunately, the report does not provide sufficient detail to analyze any trends in what leads to acquittals or to convictions.

According to some scholars, the successive white governments were unwilling to enforce the act because of the amount of policing and force it would require. *Id.*; Harnischfeger, *supra* note 207, at 82.

268. 1986 (3) SA 495, 499 (Venda).

269. *Id.* at 497. For another interesting interpretation question, see *S v. Mmbengwa*, 1988 (3) SA 71 (Venda) (holding that, where a defendant acts upon the suggestion by another that a person is a witch, the defendant contravenes the Act).

270. 1916 Native High Court 163, 164 (Natal). See also *Rex v. Fayedwa*, 1905 Native High Court 84, 90 (Natal), *Rex v. Mabebana*, 1911 Native High Court 235 (Natal); *Fayedwa*, 1915 Native High Court 44.

271. Niehaus, *supra* note 147, at 128 (citing the COMM’N OF INQUIRY REP.).

272. For decisions in which a defendant was convicted of professing knowledge of witchcraft, see *R v. Butelezi*, 1961 (1) SA 91 (Natal); *Mpanza v. Mtembu*, 1929 NAC 148 (Natal and Transvaal).

Patel,²⁷³ the complainant paid the defendant to help protect her house from whatever was causing her children to die in infancy. The defendant sold her a rabbit's foot to keep in her home and was charged with professing knowledge of witchcraft. The court found the sale of the charm insufficient evidence of professing such knowledge.²⁷⁴ Furthermore, the court differentiated between professing knowledge of witchcraft aimed at bewitching someone and attempts to undo "a purported prior magicking."²⁷⁵ The court changed the charge from a violation of the Witchcraft Suppression Act to one of fraud because the accused pretended for payment he could undo the curse on the complainant's family.²⁷⁶

Perhaps even more difficult, the Natal Provincial Division in *S v. Dlamini* had to decide whether a priest in the Zionist Church should be convicted of professing knowledge of witchcraft.²⁷⁷ During the course of a religious ceremony, the priest used stones and objects that were supposed to have supernatural powers. The court refused to convict the priest because religious leaders are expected to have a relationship with God that may involve supernatural powers. The court explained:

To a member of the faith concerned the conduct of the accused would be absolutely normal in the discharge of his duties as a minister of God. However strange the ceremonies of the Zionist Church might seem to people outside the Church, it is clear that there is no question of witchcraft involved here. The accused professed a knowledge of God, and this seems *prima facie* to exclude a profession on his part of a knowledge of witchcraft. Nor does the use of symbolic objects or belief in the efficacy thereof constitute witchcraft. The pilgrim to Lourdes believes in the 'supernatural' quality of the waters of the grotto. Moreover, many shrines and even cathedrals housing relics would be unattended by pilgrims seeking divine assistance where the 'supernatural' objects of belief and intercession to be dismissed as no more than the tools of witchcraft.²⁷⁸

The Natal court concluded that the practices of the accused were in accordance with Christianity and, at a minimum, the state had failed to meet the burden of proof that the priest professed knowledge of witchcraft.²⁷⁹ As in the *Patel* case above, this court noted that the priest was not using his connection to god or his supernatural powers to bewitch anyone.²⁸⁰

The two previous decisions considered whether the person accused of professing knowledge of witchcraft seemed to be using the powers for good or evil, also suggesting that when supernatural powers are used for good, the 'pretended' use is not witchcraft.

Finally, the author located one decision charging an accused with consulting a diviner under a predecessor statute to the Witchcraft Suppression Act. The

273. 1973 (2) SA 208 (Northern Cape).

274. *Id.* at 216.

275. *Id.* at 217; *see also*, *Rex v. Ngodhlewani*, 1904 NAC 48 (Natal) (overturning a conviction for practicing as a diviner for lack of evidence).

276. *Patel*, 1973 (2) SA at 217.

277. 1973 (3) SA 629.

278. *Id.* at 632. It would be interesting to see a court explain the difference between witchcraft and Satanism.

279. *Id.*

280. *Id.*

court in *Rex v. Behngu* held that where a person approaches a healer to use his or her powers for good purposes, there is no violation of the predecessor statute.²⁸¹ The accused had approached a healer to help his wife become pregnant. The court wrote, "there is no offence in a man consulting a doctor because his wife won't get in the family way . . . There is not a bit of evidence to show that this man was a diviner or a lightning or rain doctor."²⁸² The court differentiated between seeking the aid of supernatural powers to name witches and approaching a traditional healer for help with a medical problem.

d. Civil Cases

At least in the past, South African courts looked to customary law treatment of witchcraft accusations before making decisions in defamation and divorce cases.²⁸³ As described above, a person accused of witchcraft can approach a traditional leader or traditional court for damages for false accusations. The South African courts follow this lead, allowing accused persons to recover damages for defamation.²⁸⁴ Interestingly, in *Twala v. Nboqo*,²⁸⁵ the court held that, since "witchcraft is not recognized by the law of the land, an action for damages for such a claim could only be granted under customary law."²⁸⁶ While common law has no remedy, a complainant could claim defamation under customary law. Whether the customary and common law distinction remains today is unclear.²⁸⁷

Common law courts treat defamation under customary law similarly to how common law treats defamation, with variations necessary because of the state's stance on witchcraft. The plaintiff must show that the defendant actually called the complainant a witch.²⁸⁸ Hiring a diviner who identifies a witch is not

281. 1916 Native High Court 18 (Natal).

282. *Id.* at 20.

283. The author was unable to locate any decisions on divorce resulting from being smelled out as a witch after the adoption of the Witchcraft Suppression Act.

284. *Moumakwa v. Nageng*, 1951 NAC 14 (Central); *Tsepe v. Tjamela*, 1946 NAC (4) 98 (Natal and Transvaal); *Nqoko v. Nqoko*, 1942 NAC (3) 86 (Natal and Transvaal); *Mothoagae v. Mothoagae*, 1941 NAC 105 (Natal and Transvaal); *Ngobese v. Zulu*, 1939 NAC (2) 71 (Natal and Transvaal); *Mansa v. Temba*, 1938 NAC 115 (Natal and Transvaal).

285. 1968 BAC 10 (North-Eastern).

286. *Id.* at 13. See also, *Buthelezi v. Msimang*, 1964 BAC 105 (Johannesburg) (holding that the customary apportionment of damages applies to civil claims of imputation of witchcraft, not common law) and *Tubela v. Roemese*, 1946 NAC 24 (Cape and Orange Free State) (concluding that because no actions lie in customary law of defamation for accusing someone of seeking the assistance of a diviner, the defendant did not defame the plaintiff).

287. See *Ntembo v. Nohlovu*, 1947 NAC 93 (Natal and Transvaal) (holding "if the imputation of witchcraft is a criminal offense, it must also be defamatory of a person's character to accuse him of practicing supernatural means").

288. *Ngcobo v. Mzobe*, 1950 NAC 235, 236-37 (North-Eastern Division) (refusing to make defendant vicariously liable for the statements of the diviner he hired); *Dhlamini v. Gwebu*, 1944 NAC 7, 8 (Transvaal). In 1970, a case came before the Bantu Appeals Court where the diviner had smelled out a witch with the description of the person but no name. The description was that the witch was a person who accompanied the defendant to see the diviner. There was conflicting evidence on the number of people who went on the trip. The court refused to grant damages because there was no evidence that the defendant named the plaintiff as a witch, simply that the plaintiff assumed he had been named. *Buthelezi v. Magwaza*, 1970 BAC (3) 33, 35 (Natal and Transvaal).

enough to support a defamation action under the doctrine of vicarious liability. The defendant in a defamation case cannot defend on the basis of truth of the statement, as common law courts refuse to hear any such evidence.²⁸⁹

What privileges to apply to defamation cases is a more difficult question for South African courts, particularly when faced with whether to grant damages when the accusation of witchcraft is made to a traditional leader. The courts had to consider that traditionally community members brought all such accusations to the traditional leader. In one decision, the Native High Court in Natal set aside a damages award to a complainant because the alleged defamatory statement was made to a traditional authority under "an honest, although mistaken belief, without malice and in good faith."²⁹⁰ More recently, the Bantu Appeals Court found a privilege for certain situations in which witchcraft accusations were made to a chief. When a person approached a chief in hopes of beginning a witchcraft trial, accusations of witchcraft before the chief could form the basis of an action in defamation.²⁹¹ No privilege would attach to situations, as the chief had no authority to hear such cases. On the other hand, when the chief had to look into a defamation complaint, accusations made to the chief were privileged.²⁹² The courts appeared caught between the traditional role of the chief, the privileges that attach to that role, and the perceived necessity of suppressing witchcraft belief.

Another privilege may arise when the complainant agreed to join the smelling out ceremony.²⁹³ Publication of the results of the ceremony to those who participated in and paid for the ceremony is insufficient to meet the requirements of defamation.²⁹⁴ When persons present at the ceremony report the results beyond this limited group, however, they can be found liable for damages resulting from the loss of reputation.²⁹⁵

In the past, South African courts also followed customary law with respect to divorces that were carried out on grounds of having been smelled out as a witch.²⁹⁶ Almost all of the cases were decided well before the Witchcraft Suppression Act came into force but after the enactment of the first suppression statutes. Essentially, when a man had his wife "smelled out" as a witch and she

289. Hund, *supra* note 78, at 368.

290. Yoli v. Sitendeni, 1900 Native High Court 34 (Natal).

291. Makhoba v. Makhoba, 1966 BAC (1, 2) 28, 30 (Eshave); Zungu v. Zungu, 1942 NAC 8, 9 (Natal); Sibisi v. Mtshali, 1939 NAC (2) 137, 139 (Natal and Transvaal).

292. Makhoba, 1966 BAC at 30; Ngcobo v. Mdhlalose, 1949 NAC (1) 68 (North Eastern Division). There is some suggestion that this privilege also applies to a report to a kraal-head, Fungula v. Sithole, 1956 NAC (4) 172, 173 (North-Eastern), or to a family meeting. Majola v. Ngubane, 1970 BAC (3) 36, 37 (Natal and Transvaal).

293. Ziqubu v. Ziqubu, 1953 NAC 72, 74 (North-Eastern); Miya v. Miya, 1947 NAC 108, 108-109 (Transvaal and Natal).

294. *Id.* See also, Buthelezi, 1970 BAC (3) at 35. But see, Sibisi, 1939 NAC (2) 137 (holding that the privilege does not exist simply because the plaintiff agreed to the meeting with diviner; plaintiff must have consented to the report back to the chief for the privilege to arise).

295. Ziqubu, 1953 NAC at 74.

296. It appears from one case that by statutory law, a woman could be granted a divorce for being smelled out as a witch under certain conditions. Ngubane v. Ngubane, 1937 NAC 27, 28 (Natal and Transvaal).

returned to her home, if the man did not request her return within a short period of time, a divorce followed.²⁹⁷ The wife and her father were expected to report the divination to the chief on her return to her father's home, giving the chief the opportunity to question the husband about the wife's claim.²⁹⁸ Where this criteria was not met, the court would require evidence that the wife was driven from her home or that the situation was so intolerable she was forced to leave before recognizing a dissolution.²⁹⁹

Once the divorce ensued, the ex-husband lost any privileges he normally would have received from a wife as a result of the divorce. For example, the husband could not claim entitlement to repayment of *lobola* or dowry, a common entitlement when a wife leaves a husband.³⁰⁰ Nor could the ex-husband receive the benefits he would have been entitled to had he remained married or had not caused the divorce. For example, the ex-husband lost the right to *lobola* paid for daughters born to the ex-wife after the dissolution of the marriage, even if he is the natural father.³⁰¹ The father of the woman smelled out as a witch by her husband could request damages.³⁰² These same rules applied when the husband's family had the wife smelled out as a witch on the husband's death.³⁰³

There are conflicting decisions on whether the woman also lost her rights to the husband's estate following a divorce on these grounds. In *Mdungzawe v. Mabecela*,³⁰⁴ the widow was allowed to claim against the estate of her husband on behalf of her minor son born to the husband but after the divorce.³⁰⁵ Three years later, the Native Appeals Court decided that any child born after the woman was smelled out and had returned to her own family was a non-marital child, which under customary law means the child cannot inherit from his father.³⁰⁶

From this review of the government and common law treatment of witchcraft belief, it becomes evident that the government and common law courts will

297. *Mafaka v. Dyaluvana*, 1903 NAC 65, 66 (Transkeian Territories). Even where a husband did return for his wife, courts have found that a divorce ensued. *Links v. Mdyobeli*, 1947 NAC 96, 97 (Cape and Orange Free State).

298. OLIVIER, BEKKER, OLIVIER, JR., & OLIVIER, *supra* note 16, at 66; *Mxonya v. Moyeni*, 1940 NAC 87, 88 (Cape and Orange Free State). But see *Nyamekwangi v. Maduntswana*, 1951 NAC 313, 314 (Southern Division).

299. *Mqitsane v. Panya*, 1951 NAC 354, 355 (Southern Division).

300. *Nqambi v. Nqambi*, 1939 NAC 57 (Cape and Orange Free State); *Petrus v. Alice*, 1916 Native High Court 86, 86 (Natal). Under customary law, when a woman marries, she becomes a part of her husband's family. The husband's family is required to pay *lobola* or the dowry for the woman, which may be returned to the husband's family should the woman cause a divorce.

301. See *Maxobongwana v. Funda*, 1909 NAC 273, 273 (Transkeian Territories); *Mtuyedwa v. Tshisa*, 1906 NAC 122, 122 (Transkeian Territories); *Juleka v. Sihlahla*, 1905 NAC 88, 88 (Transkeian Territories). There is some authority that if the wife is pregnant at the time she is smelled out, the ex-husband remains entitled to *lobola* paid for that child. *Nyamekwangi*, 1951 NAC at 314. This may imply a reciprocal duty of the father to maintain the child.

302. *Somabokwe v. Slooto*, 1911 NAC 118, 119 (Transkeian Territories); *Maxobongwana*, 1909 NAC at 273.

303. *Tsibiyani v. Ngoceni*, 1908 NAC 204 (Transkeian Territories).

304. 1908 NAC 219 (Transkeian Territories).

305. *Id.* at 219.

306. *Somabokwe*, 1911 NAC at 119.

suppress cultural beliefs whose manifestations they find abhorrent. Witchcraft belief can never be a defense to witchcraft-related violence. To the extent a defendant in a witchcraft violence case can prove he or she could not discern right from wrong because of that belief, the court may reduce the charge to a lesser crime or shorten the sentence for the crime. Where the crime seems particularly cold or calculated, the mitigation witchcraft belief provides will likely be erased. The government and its courts may not suppress particular aspects of the customary law treatment of these cultural beliefs when the results of the customary law meet the goal of eliminating the belief. For example, the common law courts willingly enforce customary law treatment of witchcraft accusations that punishes accusers—such as in defamation or certain divorce cases. Surprisingly, in light of the courts' desire to protect the 'innocent' victims of witchcraft accusations, the courts seem hesitant to punish persons violating the Witchcraft Suppression Act, or, perhaps, prosecutors were unwilling to prosecute the cases.

3. *Proposed Reforms to the Witchcraft Suppression Act*

Changes to customary practices and law related to witchcraft and the failure of the Witchcraft Suppression Act to alter witchcraft beliefs or to control witchcraft violence have forced the government to begin thinking about a reform process for the Witchcraft Suppression Act.³⁰⁷ Described below are a few proposals for reforming the Act.

The Minister of Safety and Security of the Northern Province in 1996, Seth Nthai, declared witch-killings the number one social problem in the province.³⁰⁸ In 1996, the Executive Council of the Northern Province commissioned a report researching the causes of witchcraft violence and ritual and medicine murder. The head researcher was Professor NV Ralushai of the University of the North. Professor Ralushai approached the issue from the perspective that the government can no longer deny or suppress witchcraft beliefs. Instead, the government needs to integrate the customary law and common law treatment of witchcraft to reach a more effective solution to witchcraft accusations and violence. This holds particularly true since the witchcraft belief itself is not the problem, but the actions taken on those beliefs. The *Commission of Inquiry Report* makes many recommendations but for purposes of this Article, the author will describe recommendations for the role of law in combating witchcraft violence.³⁰⁹

The report's recommendations on the role of law begin by describing how most sub-Saharan African countries continue to outlaw "the practice of magic and witchcraft . . . which [is] not readily appreciated by people, of whom a large number regard the operation of magic as normal events of everyday life."³¹⁰

307. Hund, *supra* note 170, at 49. From 1990-1995, and in 1997 and 1998, over 400 witchcraft related cases a year were recorded in the Northern Province. Faure, *supra* note 107, at 172-73.

308. Hund, *supra* note 170, at 23.

309. It is not the purpose of this Article to critique the Commission of Inquiry Report or the Draft Witchcraft Control Act, which it recommends, as a critique will do little to answer the questions posed in the paper.

310. COMM'N OF INQUIRY REP., *supra* note 3, at 61.

Recognizing the unpopularity of witchcraft-suppression legislation, the report recommendations presume that the success of any reforms depends on whether the populations at whom the reforms are aimed accept them.³¹¹

In place of the Witchcraft Suppression Act, which it concludes is wholly ineffective, the *Commission of Inquiry Report* recommends the adoption of the Witchcraft Control Act. The proposed act accepts that witchcraft in fact exists and believes law can control it.³¹² Under the proposed act, only an unreasonable and unjustifiable cause for naming a person a witch will be prosecuted.³¹³ A victim of witchcraft, however, cannot seek the aid of a diviner to find a witch, no matter how reasonable or justifiable the belief a witch was involved in the harm.³¹⁴ Nor is it legal for a diviner to practice his or her craft.³¹⁵ The Act also would criminalize: (1) "any act which creates a reasonable suspicion that he is engaged in the practice of witchcraft"³¹⁶ and (2) anyone who "on the advice of any witchdoctor, witch-finder or other person or on the ground of any 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."³¹⁷ These provisions deem the belief in witchcraft as reasonable, which would alter the common law significantly. And, unlike under the existing Witchcraft Suppression Act, all acts of witchcraft would be criminalized under the Witchcraft Control Act.

The *Commission of Inquiry Report* does recognize that witchcraft cannot be proved through eyewitnesses, and perhaps not at all.³¹⁸ The recommendations do not suggest how to deal with evidentiary problems in common law courts, nor does the report say whether jurisdiction over witchcraft trials should be returned to customary law courts.

In September 1998, a few years after the completion of the *Commission of Inquiry Report*, the Commission for Gender Equality, a national statutory body, organized a Conference on Witchcraft Violence. The conference members approved the recommendations of the *Commission of Inquiry Report*, including the integrated approach to reform.³¹⁹

The *National Conference Report*, which reflects the events of the conference, includes a list of working groups, the action the working groups hope to take, by whom the actions will be completed and time frames for the completion. Under the working group on legislation, the first action expected is the repeal of the Witchcraft Suppression Act and its replacement with new legisla-

311. *Id.*

312. For a discussion of the problems courts would face in prosecuting witches, see Harnischfeger, *supra* note 207, at 83-86.

313. Draft Witchcraft Control Act, in COMM. OF INQUIRY REP., *supra* note 3, at 55.

314. *Id.* This provision seems incongruous with the goal of treating witchcraft as real. If witchcraft is real, how are people supposed to protect themselves? Perhaps the *Commission of Inquiry Report* envisions an institutional mechanism to meet this need.

315. *Id.*

316. *Id.*

317. *Id.*

318. COMM'N OF INQUIRY REP., *supra* note 3, at 57.

319. Harnischfeger, *supra* note 207, at 100.

tion.³²⁰ The Department of Justice and Constitutional Development was expected to call a meeting with stakeholders including the Department of Safety and Security, the Departments of Education and Welfare, traditional leaders, traditional healers and victims of witchcraft violence.³²¹ The target date for the meeting was the end of October 1998. The second piece of expected legislation would govern traditional healers by bringing them under regulation.³²² The Department of Health planned to coordinate with stakeholders by August 1999 to discuss this legislation. According to the working group schedule, the Department of Constitutional Development planned to complete a greenpaper on controlling the manifestations of witchcraft belief by August 1999.³²³ The government has not produced a greenpaper.

The Institute for Multi-Party Democracy recommends the creation of special witchcraft courts to hear witchcraft cases.³²⁴ These courts would handle the same issues as the chiefs formally did and would fine people for false, reckless or self-serving accusations of witchcraft as well as fines for the practice of witchcraft.³²⁵

Each of these recommendations provides for reforms that accept the belief in witchcraft as true, while fighting the negative manifestations of the belief. As discussed in the next section, whether South Africa will adopt the provisions that integrate customary and common law mechanisms for controlling the manifestations of witchcraft belief remains unclear and seems unlikely.

V. IMPLICATIONS

This Article has shown that the present answer to the question of how the common law system treats witchcraft, a traditional belief accepted by customary law that is not valued by the common law system, is that it attempts to suppress the belief. The implications of this include: (1) that the repugnancy clause instituted by colonists remains intact, and (2) that common law solutions to customary problems may lead to distortions of customary law that harm society in general. Unfortunately, these implications apply more broadly than to just the witchcraft belief.

A. *Repugnancy Clause*

The language of recent court decisions on witchcraft violence, together with the acquiescence of the new South African government to the Witchcraft Suppression Act and the apparent halt on discussions to reform the act, lead the

320. NAT'L. CONF. REP., *supra* note 5, at 64.

321. *Id.*

322. Keep in mind that diviners fall under the category of traditional healers.

323. COMM'N OF INQUIRY REP., *supra* note 5, at 64.

324. Hund, *supra* note 170, at 52. These courts may have problems complying with the constitutional rights to a fair trial if the concept of fair trial remains based in Western norms and values.

325. *Id.* Many fear that it will be impossible for traditional courts to regain the trust and the perception of legitimacy they had before the Black Administration Act and before the Witchcraft Suppression Act. *Id.*

author to believe that little will change in the treatment of witchcraft belief under the new constitutional dispensation. Somewhere between unreasonable and insane, witchcraft belief may never be treated as more than mere superstition. It appears that customary beliefs and practices, particularly the witchcraft belief, will continue to be subjected to a repugnancy clause, despite the change to a democracy in which believers are in the majority. As a reminder, the colonial and successive white governments used the repugnancy clause to measure customary law and its underlying beliefs and values against the white, minority notions of "public policy" and "natural justice." Any customary law that did not measure up to these Western notions could not be recognized by the common law courts or enforced by customary law courts. Under the new democratic system, both common law and customary law were intended to be subordinate to the Constitution, but not to each other. Yet, the continued use of the repugnancy clause suggests that customary law remains subordinate to common law, as the government can suppress customary law it deems unacceptable.

Several tools are available for the government to subordinate customary law. South Africa's parliament has the most far-reaching power, as it can legislate away any customary law it deems repugnant or less than repugnant through statutes aimed directly at customary law.³²⁶ Parliament, however, also has the power to legislate away common law based on Western values and norms. By itself, the existence of the power to legislate against customary law does not subordinate it.

The courts, however, can access an explicit repugnancy clause provided in Section 1 of the Law of Evidence Amendment Act, which states that courts cannot recognize customary law to the extent to which it is "opposed to the principles of public policy and natural justice." This clause is a remnant of the colonial past devised to suppress and subordinate indigenous beliefs and practices. Inherently, the repugnancy clause measures customary law against Western and minority values and norms. From the common law court discussions of uncivilized indigenous beliefs and the modernizing and civilizing effects of white influence, the concepts of public policy and natural justice explicitly are based on Western norms and values.³²⁷ The courts also can apply a repugnancy clause implicitly by explaining how customary law violates public policy, without specific reference to the Law of Evidence Amendment Act.

326. There are some limitations to this power—it must not be used to violate anyone's rights to culture or beliefs, unless the practice or belief itself is inconsistent with the Constitution. CONST. §§ 15, 30 and 31. How well such rights arguments will succeed depends on the justification for legislating against the customary law. This burden does not seem too difficult in repugnancy clause application, as by definition the custom targeted must be against 'public policy' and "natural justice."

327. Fortunately, the Supreme Court of Appeal recognizes the need to change the basis of public policy away from the norms of the minority to those of the majority. In *Amod v. Multilateral Motor Vehicle Accidents Fund*, 1999 (4) SA 1319, the Court wrote: "it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it." *Id.* at 1329.

There is at least some question as to whether the Bill of Rights serves as a repugnancy clause. Section 211 makes application of customary law "subject to the Constitution." Because the Constitution predominantly protects individual rights, rather than collective rights, scholars argue that the Constitution is based on Western norms and values rather than African norms and values. Reading Section 211 with this argument in mind leads to the conclusion that customary law is once again being subordinated by the minority system.³²⁸ This may, in fact, be true to the extent Parliament reforms customary law by replacing it with common law rather than developing customary law to bring it into compliance with the Constitution.³²⁹

That the tools for subordinating customary law exist does not mean they will be used. Unfortunately, the language of a post-Apartheid common law cases on witchcraft-related violence, which relied on past treatment of witchcraft, and the continued validity of the Witchcraft Suppression Act provide ample evidence that the repugnancy clause remains in effect. Since the early twentieth century, common law decisions have deemed witchcraft belief primitive and uncivilized. In 1911, hearing a witch-killing case, the Natal Native High Court lamented the tenacity of such primitive beliefs: "When is it to come that these Natives are to learn that consulting diviners and committing murders will not be tolerated by the British Government? As I have already said, these men lived under a Magistrate for ten or twelve years. Is this sort of thing to continue forever?"³³⁰ Sixty years later, the South African High Court declared that any acceptance of witchcraft belief by the white government would "plunge" South Africa back into the Dark Ages.³³¹

The exceptions common law courts make to the treatment of witchcraft beliefs as uncivilized further support the proposition that witchcraft belief has always been measured against Western values. In a few decisions, courts acquitted persons of professing knowledge of witchcraft when the common law judge could relate the alleged professions to Western superstition or practice. As described above, in *S v. Patel*,³³² a traditional healer sold a woman a rabbit's foot to place in her home, which the defendant claimed would stop the complainant's children from dying in infancy. Finding insufficient evidence of professing knowledge of witchcraft, the court altered the charge to fraud. By contrast, the Natal Provincial Division convicted a woman of professing knowledge of witchcraft because she implied through her conduct that a bottle and its

328. For example, customary law as practiced in South Africa follows rules of primogeniture and patriarchy, which stands in direct conflict with gender equality. Some scholars suggest that the equality clause could eliminate up to 85 percent of customary law. Mqoke, *supra* note 34, at 5. See also Loenen, *supra* note 32, at 123 ("Because African culture is pervaded by the principle of patriarchy, the gender equality clause now threatens a thorough-going purge of customary law"); AJ Kerr, *Inheritance in Customary Law Under the Interim Constitution and Under the Present Constitution*, S. AFR. L. J. 263, 267 (1998).

329. Integrating customary law and the common law could keep the two systems equal, unlike wholesale implantation of common law.

330. *Magebeni*, 1911 Natal High Court at 111.

331. *Mokonto*, 1971 (2) SA at 324.

332. 1973 (2) SA 208.

contents had supernatural powers that would allow the defendant to diagnose the complainant with an ailment.³³³ The court wrote: "it is sufficient to bring home the present charge, for the Crown to prove that the appellant claimed or represented by his words or conduct that the bottle with its contents was endowed with a quality such as to render its use by him in the circumstances the exercising of a kind of supernatural power or witchcraft."³³⁴ The difference between these two cases seems to be the defendant's choice of objects he or she claimed had supernatural powers. The court in the first decision, at least implicitly, recognized a rabbit's foot as a good luck charm under Western superstition and treated the case as one of fraud, not witchcraft. It seems unlikely the court would have reached the same conclusion if the traditional healer had sold her a goat's ear. When the court could not understand the idea that a bottle and its contents held supernatural powers, the court convicted the defendant of professing knowledge of witchcraft.³³⁵

Another example of the difference it makes when the judge relates to the alleged witchcraft practice is *S v. Dlamini*. In that case, the court understood a priest's claim to access to supernatural powers through charms because of the similarity with Western Christian priests who are believed to have similar access.³³⁶ The court explained that a Zionist priest using supernatural powers in a religious ceremony is no different than charms endowed with supernatural powers used in churches and cathedrals around the world. This understanding for Church-related supernatural belief stops when people who are not priests claim to have access to the spirit world that provides them with Western notions of supernatural power.

In *S v. Phama*, one of the few post-Apartheid witch-killing trials, the court explicitly accepted the Western premise that witchcraft belief is primitive and uncivilized. The court found the defendant was uneducated and genuinely believed in witchcraft, yet refused to accept the belief as a mitigating factor to a murder conviction because: "The accused, the victims, and their families do not come from a primitive society, and the message which my sentence must shed out is not a message from a primitive society."³³⁷

Even to the extent other South African court decisions will continue to treat witchcraft belief as an extenuating circumstance, as long as the belief remains an extenuating circumstance based on diminished capacity the repugnancy clause will remain in force. Judging a belief as unreasonable requires it to be measured against something. Without explicit language to the contrary, it can be assumed that Western perceptions of "public policy" and "natural justice" will remain the measuring stick. Although public policy should "mirror the community's sense

333. *Butelezi*, 1961 (1) SA 91.

334. *Id.* at 93.

335. *Cf. Mpanza*, 1929 NAC 148 (Natal and Transvaal) (licensed doctor agreed to protect a kraal against evil for payment; was convicted under Zululand proclamation No. VII of 1895 §§ 268, 269 and 270, which prohibited the use of spells and charms and make it a criminal offence to do these things).

336. *Dlamini*, 1973 (3) SA at 632.

337. *Phama*, 1997 (1) SACR at 487-88.

of justice,"³³⁸ here it will represent Western beliefs and legal values. If public policy were truly indicative of the community's beliefs and values, it would reflect that the majority of South Africans believe in witchcraft. No longer would the belief be legally unreasonable.

Other evidence of an implicit repugnancy clause is the unchanged Witchcraft Suppression Act. "The underlying premise of this Act was that witchcraft did not exist . . . and moreover that these practices were merely superstitious African nonsense."³³⁹ By keeping the Witchcraft Suppression Act intact, despite the frustration of the majority of South Africans with legislation that allows witches to run free and unfulfilled plans to reform the Act, the new multi-cultural government implicitly accepts and is willing to enforce these Western premises. The express purpose of the Witchcraft Suppression Act is to suppress witchcraft belief. Many of the provisions are aimed directly at the belief, not just at its negative manifestations. This Act could be challenged as a violation of the constitutional rights to one's culture and beliefs, although no action has been taken so far. The likelihood of success for such a challenge is beyond the scope of this Article.

The treatment of witchcraft by the government and common law courts provides an easy example of the continued existence of a repugnancy clause. Unfortunately, there is no easy solution to witchcraft that would erase the repugnancy clause. Scholars believe that many problems will arise if witchcraft is formally recognized and controlled by the South African government. It is not the purpose of this Article to analyze or recommend reform efforts; however, it will describe a few of these problems. First, problems arise from the patterns in the accusations of witchcraft. Of great concern is the belief that women are more likely to be witches, especially older women. Would the recognition of witchcraft serve as another hurdle to equality? Regarding the poor, one scholar remarked: "More significantly, the condoning of witchcraft accusations would entrench social inequality . . . Villagers believe the witches are deprived, marginal, and poorer persons . . . Persons who have relatively greater status and influence have manipulated this cultural fantasy to their own advantage."³⁴⁰ Others argue that formal acceptance of witchcraft belief will hamper development and exacerbate racism: "the recognition of the existence of crimes of an occult nature would be counter-productive to modernity and development, perpetuating the stereotyped notions of atavism and African barbarism that racist theories are always quick to use as a political argument."³⁴¹ Finally, scholars fear that formal mechanisms to control witchcraft will violate the constitutional guarantees of a fair trial because of the difficulty of proving a causal link between alleged witchcraft and the harm.

This Article has focused on witchcraft to show that the government and common law courts (1) continue to perpetuate a Western bias in the treatment of

338. Van Niekerk, *supra* note 15, at 416.

339. Minnaar, *supra* note 92, at 3.

340. Niehaus, *supra* note 147, at 135.

341. Faure, *supra* note 107, at 171-72.

customary law and beliefs, and (2) have not acted to eradicate the repugnancy clause. As long as customary law, beliefs and values continue to be measured against Western norms and values, customary law will never be equal to common law, despite the intentions of the drafters of the Constitution.

B. Distortion of Customary Law

A similarly important implication of this research is that statutory law intended to suppress or remove aspects of customary law actually may distort it. This creates the possibility that the effects of the statute may be worse than the customary law. A comparison of customary legal treatment of witchcraft before and after the enforcement of the Witchcraft Suppression Act illustrates this point. The Witchcraft Suppression Act failed to meet its primary goal of suppressing witchcraft, as indicated by reports that witchcraft belief remains prevalent among indigenous cultures. The Act did accomplish the goal of removing some power from traditional leaders, but it also proved the adaptability of living customary law. When the government built roadblocks to the community's access to witchcraft justice, community members dug a tunnel under it. Society paid a heavy price for that tunnel: (1) the statute eliminated the procedural protections to witchcraft trials, while not eliminating the actual trials; (2) the statute removed chiefs from hearing witchcraft cases, replacing them with individuals who believe they have been wronged; (3) diviners garnered a new power to destroy opponents and enemies (or the enemies and opponents of others for pay); and (4) vigilantism came to seemingly reigns over social order.

In the end, the attempts of one legal system to suppress another in a legal dualist society erased what may have been a potentially adequate mechanism for controlling the manifestations of witchcraft belief and replaced it with a less fair, more dangerous mechanism.³⁴² People are far more vulnerable to witchcraft accusations and accused witches no longer benefit from procedures designed to make witchcraft trials fair. Now, as one law enforcement official reports, customary law no longer can control the negative manifestations of witchcraft beliefs after the common law's failed attempts: "Even traditional authorities, formerly considered to be the guardians of customary law, are now at pains to cope with the situation, because of the considerable changes in the incidence, content, and form of witchcraft accusations over time, and the compromising attitude of traditional authorities during the Apartheid regime."³⁴³

The end result of the common law's supremacy over customary law is that no mechanism exists to control witchcraft-related violence. The solution to violence caused by witchcraft beliefs turned out far worse than the problems initially identified by colonial and successive white governments. This research

342. Because there are so few resources that examine customary treatment of witchcraft, it is difficult to ascertain whether prior customary legal treatment adequately handled the negative manifestations of witchcraft belief.

343. Dirk Kohnert, *Witchcraft and the Democratization of South Africa*, 2 AFR. LEGAL STUD. 177-78 (2001).

should remind reformers to proceed with caution when attempting to replace customary law with foreign law and practices.

VI.

CONCLUSION

An examination of the treatment of witchcraft belief by the government and by common law courts shows that the repugnancy clause—created by the colonial and perpetuated by successive white governments—remains in force. The “civilized” solution to repugnant customary beliefs can result in such distortions to customary law that the solution may become worse than the initial “primitive” problem. The government, courts and reformers need to rid themselves of cultural and ideological biases when approaching problems in customary law. Until they do so, customary law is likely to remain subordinate to common law. Secondly the government, courts and reformers need to search for solutions within the communities whose problems they are trying to address. Unless reform efforts gain the acceptance of the citizens at whom legislation is aimed, such efforts will fail.