

Witchcraft: A Human Rights Conflict Between Customary/Traditional Laws and the Legal Protection of Women in Contemporary Sub-Saharan Africa

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WITCHCRAFT: A HUMAN RIGHTS CONFLICT BETWEEN
CUSTOMARY/TRADITIONAL LAWS AND THE LEGAL
PROTECTION OF WOMEN IN CONTEMPORARY
SUB-SAHARAN AFRICA

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INTRODUCTION

In January 1998 the circumstances of a young man's death in Kumbungu, Ghana, were seen as unnatural,¹ and an act of "bewitchment was invoked to explain [his] death."² "Three days later, about eight masked vigilantes 'avenged' his death by bludgeoning and stoning to death two women, aged 55 and 60 years old, on suspicion that the pair were witches and had caused the man's death by supernatural means."³

1. Mensah Adinkrah, *Witchcraft Accusations and Female Homicide Victimization in Contemporary Ghana*, 10 VIOLENCE AGAINST WOMEN 325, 343 (2004) ("In Ghana, as in many modernizing societies, there is a common perception that death is unnatural unless the deceased was aged.")

2. *Id.*

3. *Id.*

Unfortunately, this same witchcraft belief system runs across most of sub-Saharan Africa, such that “every evil and misfortune that is incapable of rational explanation is attributed to witchcraft.”⁴ Most individuals branded and victimized as witches are women,⁵ especially older women and widows.⁶ Furthermore, while believers in witchcraft within sub-Saharan Africa do accept the fact that a person has died of a certain illness, be it malaria or heart disease, “which explains *how* the misfortune happened[,]—these cultures [still] seek a metaphysical answer for *why* it occurred.”⁷

This Note seeks to provide insight into the concept of witchcraft and its legal implications for women, particularly older women, in contemporary sub-Saharan Africa. Part I explores the foundation for the belief in witchcraft and witchcraft’s place in and effect on the social ordering within communities in sub-Saharan Africa. Part II examines the clash of customary/traditional laws against state legal systems, mostly common and civil law traditions. Witchcraft historically fell under the jurisdiction of customary/traditional legal systems,⁸ and, today, accused witches in sub-Saharan Africa have no specific legal or human rights protections under most state constitutions.⁹ And because there is not one universal law within sub-Saharan Africa against witch hunts,¹⁰ this Note will evaluate whether any specific

4. Mohammed A. Diwan, Note, *Conflict between State Legal Norms and Norms Underlying Popular Beliefs: Witchcraft in Africa as a Case Study*, 14 DUKE J. COMP. & INT’L L. 351, 355 (2004) (quoting ONESMUS K. MUTUNGI, *THE LEGAL ASPECTS OF WITCHCRAFT IN EAST AFRICA WITH PARTICULAR REFERENCE TO KENYA* xvii (1977)).

5. Robert A. LeVine, *Witchcraft and Sorcery in a Gusii Community*, in *WITCHCRAFT AND SORCERY IN EAST AFRICA* 221, 225 (John Middleton & E.H. Winter eds., 1963).

6. Johann Hari, *Witch Hunt: Africa’s Hidden War on Women*, THE INDEPENDENT, Mar. 12, 2009, <http://independent.co.uk/news/world/africa/witch-hunt-africas-hidden-war-on-women-1642907.html>.

7. Hallie Ludsin, *Cultural Denial: What South Africa’s Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 BERKELEY J. INT’L L. 62, 74 (2003) (citing ISAK ARNOLD NIEHAUS, *WITCHCRAFT, POWER AND POLITICS: AN ETHNOGRAPHIC STUDY OF THE SOUTH AFRICAN LOWVELD* 17 (1997) (unpublished dissertation) (on file with the University of the Witwatersrand, Johannesburg library)).

8. See *id.* at 83 (describing how traditional courts punished witchcraft, mediated conflicts involving accusations of witchcraft, and even provided remedies, including compensation for individuals falsely accused of witchcraft).

9. Although the constitutions of some sub-Saharan countries such as Ghana and South Africa offer general human rights protections, there are no specific provisions that address witchcraft. *E.g.*, GHANA CONST. ch. 5, art. 26(2) (1992) (prohibiting dehumanizing or injurious customary practices but failing to mention witchcraft); S. AFR. CONST. 1996. South Africa does, however, have domestic legislation to prevent false accusations of witchcraft, which will be discussed *infra*, in Part II.D.

10. Although there is already legislation in countries like Cameroon, the Central African Republic, and Gabon that prohibit the practice of witchcraft, such universal legislation would be difficult because “[s]orcery in Africa is not a uniform belief[.] . . . it cannot always be put into one box.” *Rights: Child Witchcraft Allegations on the Rise*, IRIN NEWS (July 16, 2010), <http://www.irinnews.org/report.aspx?Reportid=89858>.

State action is enough to protect these women, or whether specific rights are being violated under state laws. Part III follows with an analysis of various international treaties, principles, and norms and explores international law and human rights standards that could or should arguably protect this victimized class of women in contemporary sub-Saharan Africa.

In Part IV, the Note concludes by brainstorming suggestions and potential methods to handle situations involving witchcraft accusations. This is crucial, as the notion of witchcraft, as a basis of discussion, is one of many traditional belief systems, yet is one that adversely affect women within contemporary sub-Saharan Africa, and which lacks clear legal remedies.¹¹ These methods include utilizing the perspective of traditional laws, national legal systems, or a combination of both. Additionally, Part IV will focus on the different roles the international community can play in assisting these marginalized women. This Note concludes by analyzing whether an international solution, rather than a domestic grassroots approach, is the more efficient method of protecting women without simultaneously destroying the current integrated, customary/traditional, and state legal systems of contemporary sub-Saharan Africa.

I. BACKGROUND: WITCHCRAFT AND SUB-SAHARAN AFRICA

A. Definition of “Witch” and “Witchcraft”

Certain ideas, such as evil spirits, sorcery, spell casting, magic, and harmful curses, are all synonymous with the idea of witches or witchcraft.¹² A witch can be described as “a person with an incorrigible, conscious tendency to kill or disable others by magical means,”¹³ or as someone “who secretly uses supernatural power for nefarious purposes.”¹⁴

Because of the varying beliefs and practices among the different communities within sub-Saharan Africa, the definition of a witch or witchcraft is not singular.¹⁵ Instead, because “[w]itchcraft is a vague

11. See HELPAGE INT’L, *Discrimination against Older Women in Burkina Faso*, 6 (2010), available at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/JointNGO_Report_BurkinaFaso47.pdf (“Customary laws perpetuating inequality and human rights violations and the absence of clear legal and policy frameworks lead to the State’s inability to enforce legislation such as the family and penal codes.”).

12. Ludsin, *supra* note 7, at 76.

13. LeVine, *supra* note 5, at 225.

14. Nelson Tebbe, *Witchcraft and Statecraft: Liberal Democracy in Africa*, 96 GEO. L.J. 183, 190 (2007).

15. *Id.*

and loose term defying exact definition,”¹⁶ “[e]ven within a single community, beliefs [about witchcraft] are not typically organized into a coherent system.”¹⁷ In spite of this wide range of viewpoints, the concept of witchcraft typically does universally encompass “the power to inflict injury and benefit . . . through unobservable, supernatural means.”¹⁸

One of the fundamental beliefs that many ethnic groups and populations within sub-Saharan Africa share is the belief that “witchcraft is not a faith that people openly profess”¹⁹ to practice; rather, the issue only arises through others’ “accusation or suspicion.”²⁰ Secondly, witchcraft is viewed as a human, not divine, action,²¹ one that results from supernatural happenings such as a pact with the devil,²² or through other motivations, such as jealousy, hatred, or revenge.²³ In addition, witches are often accused of attacking neighbors and intimates in order to further their own selfish interests or “out of an inherent craving for causing harm.”²⁴

B. Witchcraft Accusations

Under common understandings of witchcraft in sub-Saharan Africa, accused witches may be of any age or either sex, but women are certainly the most common targets of witchcraft accusations.²⁵ For example, among the Gusii people of south-eastern Kenya, “[a] witch can be of either sex, but is much more likely to be a woman.”²⁶ This imbalance reflects the belief that witchcraft “is an acquired art . . . handed down from parent to child.”²⁷ Even though sons can learn witchcraft,²⁸ daughters are believed to inherit their mothers’ witch powers.²⁹ According to the Lovendu people of South Africa,

16. Jemma Neville, *No Country For Old Women: In Medieval Europe They Drowned Suspected Witches. In South-East Africa Today, the Killers Use Machetes*, THE GUARDIAN, Nov. 22, 2008, available at <http://www.guardian.co.uk/journalismcompetition/old-women>.

17. Tebbe, *supra* note 14, at 190.

18. Diwan, *supra* note 4, at 355 (quoting JENNIFER WINDER, BUILDING THE RULE OF LAW 380 (2000)).

19. Tebbe, *supra* note 14, at 190.

20. *Id.*

21. *Id.* at 191.

22. Diwan, *supra* note 4, at 355.

23. Tebbe, *supra* note 14, at 191.

24. *Id.* at 191-92.

25. LeVine, *supra* note 5, at 225; Ludsin, *supra* note 7, at 80.

26. LeVine, *supra* note 5, at 225.

27. *Id.* at 228.

28. *Id.* Sons are less likely to accept their mothers’ witch training and can “avoid becoming [a witch] by having as little contact as possible with [their] mother[s].” *Id.*

29. Ludsin, *supra* note 7, at 80.

these powers are inherited when “children drink in witchcraft with their mother’s milk.”³⁰ As for the mother,

she will try to train her children in witchcraft, at first by sending them to procure the exuviae of prospective victims. The daughters of a witch are considered more likely to accept this training because girls are more obedient than boys and also because they spend more time [sic] with their mothers.³¹

Also, among the Akans in Ghana, the belief that most witches are female can be attributed to the fact that women “are considered the weaker sex and [so are] more susceptible to be[ing] ‘carriers of witchcraft.’”³² Furthermore, persons who “learn witchcraft in adulthood from someone other than their parents are typically married women,” who are educated by their mothers-in-law.³³ Interestingly, these same “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,” who may spitefully accuse each other of witchcraft as part of competition for the son/husband figure.³⁴

Often, those typically thought to be witches are middle-aged or elderly individuals, particularly those who are in poor health.³⁵ Of these, elderly women are said to be more susceptible to accusations because of their particular physical features, such as drooping breasts, eyes that are yellow or red, wrinkled skin, missing teeth, and a hunched stance.³⁶ People who exhibit anti-social, difficult, or otherwise odd behavior are also likely targets of witchcraft accusations.³⁷

Additionally, as a result of the HIV/AIDS epidemic in sub-Saharan Africa, many women have outlived their children.³⁸ With the loss of the “so-called ghost generation of HIV/Aids,”³⁹ these older women are left to care for their orphaned grandchildren.⁴⁰ Yet these grandmothers are increasingly viewed with suspicion by the community,⁴¹

30. *Id.* (internal quotation marks and citation omitted).

31. LeVine, *supra* note 5, at 228.

32. Adinkrah, *supra* note 1, at 335.

33. LeVine, *supra* note 5, at 229.

34. Ludsin, *supra* note 7, at 80.

35. Adinkrah, *supra* note 1, at 336.

36. *Id.*

37. Ludsin, *supra* note 7, at 81. Living alone is deemed a form of anti-social behavior, which may explain why older women are the primary targets of witchcraft accusations. *Id.*

38. Neville, *supra* note 16.

39. *Id.*

40. *Id.* (“Unicef estimates that 14% of all children in Tanzania are orphans, of whom 64% are cared for by grandparents.”).

41. *Id.*

which makes them even more “vulnerable targets with which to attribute blame for unforeseen problems.”⁴²

C. How an Accusation of Witchcraft Operates

In sub-Saharan Africa, some of the common notions about witchcraft are “that witches are nocturnal, traveling secretly, as balls of fire, at night to remote locations where they cavort with other witches and feast on unsuspecting relatives, causing physical and psychological harm.”⁴³ In addition to being thought to operate in groups, witches are also believed to carry out all of their evil deeds while in spirit form, during which time their physical bodies are still sleeping.⁴⁴

Witches are described as deriving their powers either through inheritance or by learning them from others.⁴⁵ They are also believed to use these powers to “cast spells, curse individuals, or use charms or medicines, all of which ultimately cause harm.”⁴⁶ Through supernatural powers, a witch, can, for example, manipulate evil spirits, enter someone’s body, and force the individual to suffer symptoms of a certain disease. According to traditional African beliefs, “[w]itches can [also] use animals and lightning bolts to create accidents and injuries.”⁴⁷ Throughout sub-Saharan Africa, ailments such as infertility in women, the destruction of crops and property, accidents, sickness, and even death can be attributed to acts of witchcraft.⁴⁸

No one ever admits to being a witch; witchcraft accusations “are based on mere suspicion, rumor, or gossip” that circulates within the community.⁴⁹ For example, in South Africa, when misfortunes are experienced, traditional healers and diviners are often sought to determine and explain whether the source of the misfortune was witchcraft.⁵⁰ The belief is that diviners can smell out a witch because “witches carry a terrible smell that diviners can detect.”⁵¹

Along this same line, in Ghana, when individuals believe they may have been bewitched, they “may consult an oracle or witch

42. *Id.*

43. Adinkrah, *supra* note 1, at 335.

44. *Id.*

45. Ludsin, *supra* note 7, at 76 (citations omitted).

46. *Id.*

47. *Id.* at 76-77 (citation omitted).

48. *Id.* at 76.

49. Adinkrah, *supra* note 1, at 337.

50. Ludsin, *supra* note 7, at 78. Some fear they may have upset their ancestors, while others believe their misfortunes have resulted from witchcraft. *Id.*

51. *Id.* at 79 (citing FREDERICK KAIGH, WITCHCRAFT AND MAGIC OF AFRICA 40 (1947)).

doctor, who, through divination, may establish, confirm or reveal the identity of the offending witch.”⁵² In many communities within sub-Saharan Africa, “after a witchcraft accusation is leveled, the suspected witch is threatened, drugged, beaten, forced to submit to humiliating ordeals, or is coerced into confessing” to her supposed evil powers.⁵³ In extreme cases, accused witches are even butchered to death because of an allegation of witchcraft.⁵⁴

D. Statistics of Witchcraft Accusations in Sub-Saharan Africa

The ordeal of Sato Magdalena Ndela, a shrunken, elderly woman from Kenya, is particularly poignant.⁵⁵ Sato cannot remember when she was called a witch for the first time, but she vividly recalls an attack in 1995 that has forever left her scarred.⁵⁶ As told to a reporter,

It happened in the night. I heard people opening the door without knocking . . . They shone a light in my face. I thought—what is happening? What can I do? That was when I felt the first cut into my body. I looked down and saw my hand was cut right off. Then they cut into the right one and it was hanging. Then I felt a blow against my head and I lost consciousness.⁵⁷

Sato’s story is just one of many.⁵⁸ The statistics regarding witchcraft accusations leveled against women in sub-Saharan Africa are grave. HelpAge International estimates that around 1,000 witchcraft-related killings occur in Tanzania each year, and the victims are mostly older women.⁵⁹ In March 2009, Amnesty International reported that as many as 300 people in Sintet village in The Gambia were kidnaped from their homes by “witch doctors” and placed in detention centers, where they were “forced to drink hallucinogenic concoctions” as part of a witch-hunting campaign.⁶⁰ The report also indicates

52. Adinkrah, *supra* note 1, at 337.

53. *Id.*

54. Hari, *supra* note 6.

55. *Id.*

56. *Id.* Sato’s “head is one long scar, and her ear is a twisted lump. Ever since the attack in 1995, her right eye has been weeping salt tears and pus. . . . Now [she] can’t do anything.” *Id.* (internal quotation marks omitted).

57. *Id.*

58. Neville, *supra* note 16 (“Villages along the shores of Lake Victoria have encountered escalating numbers of murders: mostly older women, who have been accused of witchcraft.”).

59. *Id.*

60. *The Gambia: Hundreds Accused of “Witchcraft” and Poisoned in Government Campaign*, AMNESTY INT’L (Mar. 18, 2009), <http://www.amnesty.org/en/for-media/press-releases/gambia-hundreds-accused-%E2%80%9Cwitchcraft%E2%80%9D-and-poisoned-government-campaign-20>.

that at least two people forced to drink the concoction died from kidney failure.⁶¹

Another report has revealed that in Northern Ghana, 5,000 to 8,000 accused witches have been banished from their homes and forced to live in shelters, where they endure “physically dehumanizing conditions.”⁶² Many fear returning to their families for fear of community reprisal.⁶³ Across sub-Saharan Africa, similar situations involving witchcraft accusations have been reported in countries such as Cameroon, Botswana, Nigeria, and Mozambique, to name a few.⁶⁴

E. Witchcraft and Its Effects on the Social Ordering Of Communities Within Sub-Saharan Africa

The belief in witchcraft throughout sub-Saharan Africa cuts across all social lines.⁶⁵ It is a belief held by traditional and religious groups⁶⁶ as well as by urban and rural populations.⁶⁷ For example, even though many educated individuals within sub-Saharan Africa may “not believe that witches have all the powers traditionally ascribed to them,” they nevertheless believe in the notion of witchcraft and that witches do exist.⁶⁸

Some may argue that allegations of witchcraft and the subsequent punishment of suspected witches serve a social purpose.⁶⁹ The reasons cited include the notion that “witchcraft accusations bring tensions within the community into the open . . . often allowing for a traditional leader to mediate conflicts.”⁷⁰ It is also argued that the threat of witchcraft accusations “curb antisocial behavior” and provide an incentive for people “to treat each other well.”⁷¹ Even though these may be legitimate arguments, witchcraft accusations not only

61. *Id.*

62. Adinkrah, *supra* note 1, at 328.

63. *Id.*

64. Aleksandra Cimpric, *Children Accused of Witchcraft: An Anthropological Study of Contemporary Practices in Africa*, U.N. CHILDREN'S FUND, 12 (2010), available at http://www.unicef.org/wcaro/wcaro_children-accused-of-witchcraft-in-Africa.pdf.

65. *See id.* at 9 (“Contrary to a number of hypotheses . . . that were quick to predict the decline or disappearance of . . . *superstitious* beliefs as a result of the rise of economic development, urbanization, [and] education . . . witchcraft belief has not disappeared. It is apparent as an unquestionable component of private and public life.”).

66. *See id.* at 37 (noting that in these communities, individuals look to both traditional healers and religious pastors to heal “witchcraft-related” illnesses”).

67. *Id.* at 9 (“[W]itchcraft is no longer a village affair.”).

68. LeVine, *supra* note 5, at 229.

69. Ludsin, *supra* note 7, at 82.

70. *Id.* (citation omitted).

71. *Id.*

discriminate against women in sub-Saharan Africa, they also have the effect of disenfranchising women within their communities. Not only are accused women victimized by communal notions of witchcraft, they are also treated as second-class citizens and face a myriad of social problems within their communities as a result.⁷²

Among those subjected to witchcraft accusations, most are elderly and, almost always, widowed women with no personal income, and so are dependent on others for their well being.⁷³ Therefore, “[i]n addition to facing physical abandonment and physical abuse, women accused of being witches are often materially and financially neglected by kin. The consequences of financial neglect are grave.”⁷⁴ In addition, not only will an accused lose honor and respect within her community, this stigmatization may also lead to major emotional distress and mental anguish.⁷⁵

Witchcraft accusations levied against old women may also have severe social and economic impacts on the crucial role of grandmothers within the community. Socially, older women in African communities are viewed as a strong “learning institution” for the younger generation.⁷⁶ Thus, if these women are marginalized within their communities, there may be no one to inspire the younger generations. Another issue that arises with respect to the importance of grandmothers is based on an economic concern: who, besides grandmothers, will look after the orphaned children of sub-Saharan Africa now that the continent is losing a generation of parents to HIV/AIDS?⁷⁷

II. THE “MULTI-FACETED” LEGAL STRUCTURE IN SUB-SAHARAN AFRICA

Though today “[l]aw’ in Africa is a multi-faceted concept,” this was not always the case.⁷⁸ Before its colonization, the foundation of sub-Saharan Africa’s legal structure embodied a well-developed customary law that governed the indigenous tribal and ethnic populations

72. See Adinkrah, *supra* note 1, at 338 (noting that women accused of witchcraft lose their status in the community and their honor with their relatives).

73. *Id.*

74. *Id.*

75. *Id.*

76. Judi Aibel, *Grandmothers: A Learning Institution*, U.S. AGENCY FOR INT’L DEV., 1 (2005), available at <http://www.beps.net/publications/GrandmothersFINALTAG.pdf>.

77. AMY S. PATTERSON, *THE AFRICAN STATE AND THE AIDS CRISIS* 5 (2005) (“11 million African children under 15 years old . . . have lost at least one parent to AIDS.”); Neville, *supra* note 16.

78. FAREDA BANDA, *WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE* 13 (2005).

“for whom custom was law.”⁷⁹ Though colonialism was somewhat short-lived in many African countries, “[t]he significance of this brief colonial history is that one of the results of the new political dispensation was the imposition of a new legal system on the colonized country,” one that superseded the customary law.⁸⁰

Still, “[t]here were of course regional variations [based on] differences in the approaches of the different colonisers.”⁸¹ For example, in most former British sub-Saharan colonies, the legal system reflects the English common law system, whereas most former French colonies follow the civil law system.⁸² Some countries in Southern Africa even adopted, and continue to follow, the Roman-Dutch legal structure.⁸³

Colonial independence in Africa brought about its own challenges, especially with regard to choice of law.⁸⁴ Whereas certain aspects of customary law assimilated with the imposed European legal structures,⁸⁵ a “romanticised notion of restoring [true] ‘customary law’ and ‘African culture’ to” independent Africa also created a legal enigma with respect to the role customary beliefs should play in law.⁸⁶ One such customary belief is the notion of witchcraft,⁸⁷ coupled with the traditional perceptions and legal implications of one being an accused witch. So, “punishing individuals who kill alleged witches creates a conflict between state legal norms and norms underlying popular beliefs” because, culturally, the act of killing a witch is often praised.⁸⁸ Due to this conflict, most African states have “stop[ped] short of criminalizing popular beliefs in witchcraft,” despite the fact that they “generally do not see witchcraft as legitimate.”⁸⁹

A. History of Legal Systems Within Sub-Saharan Africa

“In traditional African societies, custom [was] the principal, if not the only, source of law.”⁹⁰ “Customary” or “traditional” law can

79. Julie A. Davies & Dominic N. Dagbanja, *The Role and Future of Customary Tort Law in Ghana: A Cross-cultural Perspective*, 26 ARIZ. J. INT'L & COMP. L. 303, 303, 305 (2009).

80. See BANDA, *supra* note 78, at 15.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 13, 19.

85. See Davies & Dagbanja, *supra* note 79, at 305-06 (describing the integration of the received common law with the customary law in Anglophonic African countries).

86. BANDA, *supra* note 78, at 19.

87. Hence, “[i]n Africa, norms underlying beliefs in witchcraft pose a significant challenge to state legal norms underlying the new postcolonial normative orientation towards modernization.” Diwan, *supra* note 4, at 358.

88. *Id.* at 354.

89. *Id.* at 352.

90. Justice Mobido Ocran, *The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa*, 39 AKRON L. REV. 465, 467 (2006).

be described as “a set of established norms, practices, and usages derived from the lives of people,”⁹¹ and it has thrived in sub-Saharan Africa since the region was first populated.⁹² “The source of [customary law’s] legal validity is the cultural expression of the particular society where it is practiced.”⁹³ Customary law incorporates the “influential morals and religious beliefs of the people”⁹⁴ and “govern[s] topics such as family law and social relations.”⁹⁵

Because customary law is comprised of the rules of customs and beliefs of a particular group or community, it “is non-specialized [in] that it does not distinguish between varying areas of law.”⁹⁶ For example, customary law is known to “blur[] the lines between civil and criminal law.”⁹⁷ Perhaps because it is often unwritten,⁹⁸ customary law is thought of as “living” entity that is “dynamic, adaptable, flexible and practical.”⁹⁹ Yet, although “devoid of rigidity,”¹⁰⁰ customary law is also used to impose and maintain social order and harmony in the community.¹⁰¹ This may be explained, in part, by the fact that customary law raises the collective interests of the community above individuals’ personal rights.¹⁰²

Traditional leaders have long played an instrumental role in customary law. For instance, in some pre-colonial African societies, the procedure for determining whether someone was a witch started with an alleged victim approaching a traditional leader with a complaint of having suffered some harm as a result of witchcraft.¹⁰³ The traditional leader then looked into the allegation to determine whether it was legitimate or whether it instead involved another underlying issue.¹⁰⁴ If the accused was believed to have used witchcraft, the individual was handed over to a “diviner” for subsequent identification as a “witch,”¹⁰⁵ and, if found to be a witch after a trial was conducted, the community leader would punish the individual.¹⁰⁶ On the other hand,

91. Davies & Dagbanja, *supra* note 79, at 303.

92. *Id.*

93. *Id.*

94. Ocran, *supra* note 90, at 467.

95. Davies & Dagbanja, *supra* note 79, at 303.

96. Ludsin, *supra* note 7, at 70 (citation omitted).

97. *Id.*

98. Ocran, *supra* note 90, at 467.

99. Ludsin, *supra* note 7, at 72 (internal quotation marks and citation omitted).

100. *Id.* (internal quotation marks and citation omitted).

101. *Id.* at 66, 70 (noting how the focus of customary law is on helping parties reconcile their differences, rather than on having one party win and the other lose).

102. *Id.* at 70.

103. *Id.* at 84.

104. *Id.*

105. Ludsin, *supra* note 7, at 84.

106. *Id.* at 85-86.

if the leader determined that the dispute was not related to witchcraft, he mediated the parties' dispute to find a solution.¹⁰⁷ Therefore, even though this system had flaws, it also had within it certain ascribed procedural mechanisms designed to protect against abuse.¹⁰⁸

After colonization, although indigenous Africans were sometimes allowed to retain their personal customary laws in the private sphere,¹⁰⁹ "the foreign law became the general law."¹¹⁰ Still, customary law was only accepted to a certain extent:¹¹¹ the particular "aspects of African customs that European culture found most appalling, ridiculous, or simply unhelpful" were declared repugnant pursuant to "repugnancy clauses,"¹¹² which were then incorporated into the customary law definition.¹¹³ As such, not all customs were tolerated by the colonial legal system, and the customary rules and traditions not consistent with written laws were deemed invalid.¹¹⁴

The belief in and notion of witchcraft was one such aspect of customary law found to be repugnant to European culture.¹¹⁵ In particular, "the question of proof" of witchcraft under the customary system was problematic for the colonial jurists.¹¹⁶ Apart from the question of proving how one was a witch, another problem presented by witchcraft accusations was how to determine the legal options available to the victim or the victim's family.¹¹⁷ For example: "[w]as it appropriate, or legally excusable, to kill someone believed to be a witch? More particularly, was it legally excusable to kill a witch in an anticipatory strike, in the manner of self defense?"¹¹⁸ Certainly there were no clear answers, so the colonizers sought instead to eliminate the notion of witchcraft within the customary-law prong of sub-Saharan Africa's newly developed dualist legal system through the creation of repugnancy clauses.¹¹⁹ Yet because the belief in witchcraft

107. *Id.* at 84

108. *Id.*

109. BANDA, *supra* note 78, at 16.

110. *Id.* at 15.

111. Ocran, *supra* note 90, at 470.

112. *Id.*

113. *Id.* at 475. "The repugnancy clauses were meant to rule out laws and customs perceived to be against Christian values and morality or cruel and unusual by the standards of the colonizers." *Id.* (citation omitted).

114. *Id.*

115. *See id.* at 470 ("Two things particularly baffled the British. One was the crime of suicide, and the other was witchcraft.").

116. Ocran, *supra* note 90, at 472.

117. *Id.*

118. *Id.*

119. *Id.* at 474-75 ("In the face of this clash of cultures and of legal thought, what were the British to do in Africa? . . . The legal strategy was to introduce 'repugnancy clauses' into the definition of customary law.").

was still prevalent within the community,¹²⁰ these clauses ironically had the effect of eliminating the procedural protections for accused witches that were in place under customary law.

B. Sources of Law Within Contemporary Sub-Saharan Africa

“The coming of independence to African countries, from Ghana in 1957 to South Africa in 1994, brought about its own dilemmas,” igniting a very romanticized idea of bringing traditional law and culture back to Africa.¹²¹ In certain aspects, a conflict-of-laws had been created because, as with the dualist court systems of the past,¹²² independent sub-Saharan Africa emerged with a system that integrated customary law with the State legal systems implemented during colonization.¹²³

Notably, “[t]he customary law invoked in post-independent states was not the flexible, dynamic custom of pre-colonial years, but rather the court/state/man manufactured hand-me-down of the colonial era,”¹²⁴ just with modifications of colonial repugnancy clauses in some countries.¹²⁵ In countries like Botswana, Ghana, and Sierra Leone, for example, “[i]ncompatibility with legislative enactments or of decisions of the highest court of the land became the main criteria for” determining whether customary law was viewed as unacceptable or permissible within these new legal systems.¹²⁶ Consequently, “[a] hierarchy of norms had been created” whereby the rules of customary law that conflicted with state court decisions were struck down.¹²⁷

This jurisprudential hierarchy is present in Ghana’s constitution,¹²⁸ which states its sources of law as the following: “The laws of Ghana shall comprise—(a) this Constitution; (b) enactments made by or under the authority of the Parliament established by this Constitution; (c) any Orders, Rules and Regulations made by any

120. See Diwan, *supra* note 4, at 357 (discussing how beliefs in the existence of witchcraft remain prominent in Africa today).

121. BANDA, *supra* note 78, at 19.

122. See Davies & Dagbanja, *supra* note 79, at 305-06 (describing the dual court system established by the British, whereby courts applying “general law” existed separately from local courts, which administered customary law).

123. See *id.* at 306 (noting that the constitutions of many post-independence “Anglophonic African countries” have integrated statutes with common law decisions and customary law).

124. BANDA, *supra* note 78, at 22.

125. Ocran, *supra* note 90, at 477. “[T]he African intellectual elite . . . felt insulted by the notion that their own African laws were somehow repugnant. . . . They wished to emphasize the fact that these laws represented their own ethos.” *Id.*

126. *Id.* at 477.

127. *Id.* at 478.

128. *Id.*

person or authority under a power conferred by this Constitution; (d) the existing law; and (e) the common law.”¹²⁹ Chapter Four of Ghana’s Constitution further clarifies that the common law shall be comprised of not only the rules of law “generally known as the common law,” but also of the rules of customary law “applicable to particular communities in Ghana.”¹³⁰ In this way, the newly integrated legal system in Ghana assimilates customary law into its common law definition. Still, mandate that all parliamentary and judicial decisions be held as the supreme law of the land, pursuant to their State constitutions.¹³¹

The definition of “traditional leaders” under Chapter 12 of the South African Constitution similarly recognizes customary law as a source of South Africa’s domestic law.¹³² Section 211(3) of this chapter states that “[t]he courts must apply customary law when that law is applicable,” though such law is “subject to the Constitution and any legislation that specifically deals with customary law.”¹³³ As such, when dealing with the issue of witchcraft in contemporary sub-Saharan Africa, the question becomes whether the notion of witchcraft falls under the ‘modern’ legal standard of customary law as defined by the particular state constitution.¹³⁴

C. Witchcraft: A Legal Enigma in Sub-Saharan Africa

Like most of the world, sub-Saharan Africa is absorbed in urbanization and globalization.¹³⁵ Therefore, much of its law deals with “modern legal issues.”¹³⁶ Still, some concepts used in resolving these legal issues have roots in the common law. For example, the concept of “reasonableness,” which is significant in both civil and criminal matters, has different meanings under common and civil law.¹³⁷

129. GHANA CONST. ch. 4, arts. 11(1)(a)-(e) (1992); Ocran, *supra* note 90, at 479.

130. GHANA CONST. ch. 4, arts. 11(2)-(3) (1992).

131. *Id.* ch. 1, art. 1(2) (1992) This appears to mimic the Supremacy Clause of the United States Constitution and its role in establishing the hierarchy of law in the American legal system. The text of the Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

132. S. AFR. CONST. 1996, ch. 12, § 211; Ludsin, *supra* note 7, at 68.

133. S. AFR. CONST. 1996, ch. 12, § 211.

134. Ludsin, *supra* note 7, at 92.

135. Davies & Dagbanja, *supra* note 79, at 303-04.

136. *Id.* at 304.

137. Diwan, *supra* note 4, at 377.

Whereas under the common law, the issue of reasonableness asks whether a defendant has acted in a way that was “[f]air, proper, or moderate, or proper under the circumstances,”¹³⁸ in civil law systems, the question of reasonableness centers upon whether a defendant has acted with “reasonable care” by exercising “the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances.”¹³⁹

Therefore, in theory, because witchcraft is generally a common-law offense, a trier-of-fact in a dispute involving the accusation of witchcraft within sub-Saharan Africa should apply the customary law’s understanding of reasonableness when deciding the case.¹⁴⁰ The question of what is considered ‘reasonable,’ however, may be an issue in itself: should the standard of reasonableness be based on modern beliefs about the legitimacy of witchcraft, on strong traditional community beliefs, or on a combination of both?¹⁴¹ A related issue is whether it is reasonable for a court to convict an individual for witchcraft when there is no observed link between the alleged witchcraft and the harm suffered.¹⁴²

Some countries in sub-Saharan Africa continue to enforce and criminalize accusations of witchcraft or the practice of witchcraft through reference to legislative acts in place during colonial era.¹⁴³ For instance, the Witchcraft Suppression Acts in South Africa and Zimbabwe criminalize accusing another of being a witch.¹⁴⁴ On the other hand, Tanzania’s Witchcraft Ordinance criminalizes all aspects of witchcraft, including “possess[ing] witchcraft materials.”¹⁴⁵

In South Africa and Zimbabwe, accusations of witchcraft often come to the courts “in the form of ‘imputations’ of witchcraft.”¹⁴⁶ Though not referred to as such, the law essentially equates disputes involving witchcraft accusations against innocent individuals as

138. *Id.* (internal quotation marks and citation omitted).

139. *Id.* at 377-78 (internal quotation marks and citation omitted).

140. *See id.* at 378 (“[I]n South Africa and Zimbabwe such imputations [of witchcraft] are criminal and judges generally seem to apply a reasonableness standard in assessing injury.”).

141. In South Africa, civil suits involving accusations of witchcraft are adjudicated within the context of “the customary treatment of witchcraft,” whereas, in criminal cases, witchcraft beliefs are treated “as wholly unreasonable.” Ludsin, *supra* note 7, at 91.

142. *Id.* at 89.

143. Diwan, *supra* note 4, at 352.

144. *Id.* at 352-53 (citing Witchcraft Suppression Act No. 3 of 1957, § 1(a) (amended in 1997) (South Africa); Witchcraft Suppression Act of 1890, § 3 (amended in 2001) (Zimbabwe)).

145. *Id.* at 353 (citing Witchcraft Ordinance of 1928, § 4 (Tanzania) (amended in 1956)).

146. *Id.* at 356. Imputations are “something more than mere naming.” *Id.* (citation omitted).

defamation suits.¹⁴⁷ Under the standard for proving wrongful imputation of witchcraft, it must be “clear to the unbiased beholder that the intention to attribute a certain [witch] characteristic exists in the mind of the imputor which finds expression in some act or attitude” of the accused.¹⁴⁸ As such, the modern “judicial practice of punishing individuals who [defame] alleged witches creates a conflict between” the state legal system and strongly held traditional beliefs.¹⁴⁹ Punishing these acts leads “many people [to] believe ‘that the law is in collusion with the witches.’”¹⁵⁰ Arguably, “[a] law that fails to take into account the social ethos of the community . . . remain[s] a dead letter, incapable of inducing change.”¹⁵¹ Witchcraft law that better accounts for the beliefs of the general population, then, can perhaps reconcile the conflict that exists between popular beliefs and state legal norms.¹⁵²

In contrast to those laws that criminalize imputing witchcraft to another, Section 251 of the Cameroon Penal Code criminalizes actual “witchcraft”:

Whoever commits any act of witchcraft, magic or divination liable to disturb public order or tranquility, or to harm another in his person, property or substance, whether by taking a reward or otherwise, shall be punished with imprisonment for from two to ten years, and with a fine of five thousand to one hundred thousand francs.¹⁵³

Under the Cameroonian system, the question of proof in identifying who is indeed a witch may lie almost conclusively with the courts.¹⁵⁴ By readily accepting at face value evidence from the community regarding suspicions and accusations of witchcraft,¹⁵⁵ the legal systems in countries like Cameroon “have chosen to subordinate state legal norms to norms underlying popular beliefs in local cultures.”¹⁵⁶

147. *Id.* at 356-57 (“Imputations of witchcraft are essentially a type of defamation, and they are criminalized in many African societies through legislation prohibiting acts of witchcraft.”).

148. *Id.* at 356 (internal quotation marks and citation omitted).

149. *Id.* at 354.

150. *Id.* (quoting ONESMUS K. MUTUNGI, *THE LEGAL ASPECTS OF WITCHCRAFT IN EAST AFRICA WITH PARTICULAR REFERENCE TO KENYA* 59 (1977)).

151. *Id.* at 353-54 (quoting ONESMUS K. MUTUNGI, *THE LEGAL ASPECTS OF WITCHCRAFT IN EAST AFRICA WITH PARTICULAR REFERENCE TO KENYA* 104 (1977)).

152. *Id.* at 354.

153. Diwan, *supra* note 4, at 353 (citation omitted).

154. “When [a judge] is satisfied that a good case has been established, he will not hesitate to convict the defendant . . .” *Id.* at 368 (internal quotation mark and citation omitted).

155. *Id.* (discussing a case in Cameroon where the judge relied on the sole testimony of a witch doctor to determine the validity of a witchcraft accusation).

156. *Id.*

Because African countries handle allegations of witchcraft differently, it is very difficult for witchcraft trials to always be compatible with both the rule of law and customary law in the new ‘civilized’ African societies.¹⁵⁷ For example, in adjudicating crimes that involve witch-killing, the common law courts have adopted “the doctrines of diminished capacity—including insanity, provocation, involuntary reaction or emotion-induced diminished capacity”¹⁵⁸ to deal with “cultural beliefs they do not share.”¹⁵⁹ Additionally, accusations of witchcraft are often redressed civilly, through defamation lawsuits or by seeking divorce.¹⁶⁰ This disconnect between the newly adopted “culture” and the customary law renders the system less effective.¹⁶¹

Thus, the current legal systems within sub-Saharan Africa do not resolve the issues that the belief in witchcraft presents, but rather create a new host of problems related to witchcraft accusations.¹⁶² It is therefore not surprising that, “[w]ithout the support and structure for handling witchcraft accusations . . . community members [have] resorted to informal trials”¹⁶³ and witch-killings,¹⁶⁴ a phenomenon that has gravely and disproportionately affected women, as women are those who most often become the victims when witchcraft is suspected.¹⁶⁵

Paradoxically, “the Witchcraft Suppression Act[s have] failed to meet [their] primary goal of suppressing witchcraft . . . [yet also] erased what may have been a potentially adequate mechanism for controlling the manifestations of witchcraft belief . . .”¹⁶⁶ African state governments have thus failed at both curbing the notion of witchcraft beliefs and providing sufficient relief for those accused of witchcraft.¹⁶⁷ As victims, women, especially older women, in contemporary sub-Saharan Africa, have fallen through the cracks of states’ legal

157. Ludsin, *supra* note 7, at 89.

158. *Id.* at 91.

159. *Id.*

160. *Id.*

161. Diwan, *supra* note 4, at 354.

162. Ludsin, *supra* note 7, at 87-88. For example, many scholars argue that witchcraft legislation in South Africa undermined the legitimacy of the customary law and the authoritative role of chiefs within the community, “block[ing] community members’ access to justice.” *Id.* at 88. Furthermore, the belief that the laws were “ineffective” caused “people [to] beg[i]n taking justice against witchcraft into their own hands. *Id.* at 87.

163. *Id.* at 88.

164. Hari, *supra* note 6.

165. *Id.*

166. Ludsin, *supra* note 7, at 109.

167. Ironically, “th[is] attempt[] by 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.” *Id.*

systems.¹⁶⁸ Thus, the devastating realities that the belief in witchcraft creates can be reframed as a human rights problem: the discrimination and marginalization of women within sub-Saharan Africa because of conflict between customary and state legal systems.¹⁶⁹

III. WITCHCRAFT AND HUMAN RIGHTS

A. *The Human Rights Question and Sub-Saharan Africa*

Inasmuch as “[t]he universality of human rights norms is a central tenet in human rights discourse,”¹⁷⁰ it is argued “that there can be no fully universal concept of human rights for it is necessary to take into account the diverse cultures and political systems of the world.”¹⁷¹ Indeed, each of the more-than fifty countries in Africa is defined by its own history, unique social, religious and cultural perspective, and “distinct political econom[y].”¹⁷² Therefore, when the discussion turns to articulating ‘universal’ human rights standards, it is important to remember that “drawing sweeping conclusions for a continent as diverse and complex as Africa may be an exercise in futility.”¹⁷³

In evaluating human rights in the context of sub-Saharan Africa, the concern of the individual and the protection of her liberty and fundamental rights against unwarranted state interferences presents a different social question.¹⁷⁴ Whereas, the “traditional conceptions of human rights in the African context subsume the interests of the individual to those of the community,”¹⁷⁵ the broader human rights perspective focuses more on the rights of the individual.¹⁷⁶ Under an African analysis of human rights, “the realization of such rights extend beyond individual concern and must be expanded to encompass . . . family and community” obligations.¹⁷⁷ Therefore, inasmuch as the rights of the individual are important, the role the individual

168. Hari, *supra* note 6.

169. See HELPAGE INT’L, *supra* note 11, at 5 (noting that the underlying causes of witchcraft accusations “are deeply rooted in cultural beliefs and gender and age based discrimination”). Notably, customary laws and the lack of a clear legal framework perpetuate human rights violations. *Id.* at 6.

170. Fareda Banda, *Global Standards: Local Values*, 17 INT’L J.L. POL’Y & FAM. 1, 3 (2003).

171. *Id.* at 4. (quoting ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 96-97 (1994)).

172. J. Oloka-Onyango, *Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?*, 6 BUFF. HUM. RTS. L. REV. 39, 40-41 (2000).

173. *Id.* at 41.

174. *Id.* at 42.

175. *Id.*

176. *Id.*

177. *Id.*

plays in her community's well-being is equally important.¹⁷⁸ Thus, "[t]o say to a[n African] woman that she has entitlements which may bring her into conflict with the rights of others is to present her with a seemingly intractable problem."¹⁷⁹

For example, one of the rights of women in many sub-Saharan African countries, as recognized by many human rights instruments, is that of equality, which "is based on a notion of sameness with men—[that] women are to be made or put in the same position as men."¹⁸⁰ Alongside this notion, however, exists the very unequal status of African women within the African social structure.¹⁸¹ As such, it is important to acknowledge that, even with the legal instruments affording protection to women within sub-Saharan Africa,¹⁸² "the social, economic and cultural disadvantages suffered by African women" have resulted in women maintaining a lower social status, as compared to that of their male African counterparts.¹⁸³ A woman in sub-Saharan Africa is therefore viewed under traditional societal norms as having a status inferior to that of men.¹⁸⁴

In spite of the generally-accepted inferior role of women within sub-Saharan Africa, many have written about the law's usefulness to women, and about the human rights protections that exist for women within the law.¹⁸⁵ For instance, under the bill of rights included in various African state constitutions, there are well-established human rights standards, which include various rights and protections—often some specifically ascribed to women—that have been recognized as human rights throughout the world.¹⁸⁶

178. Banda, *supra* note 170, at 15 ("From an African woman's perspective, one of the problems of the whole human rights enterprise is the individualized nature of human rights. Women in many parts see themselves and are identified as being part of a collective." (internal citation omitted)).

179. *Id.*

180. *Id.* at 8 (citation omitted).

181. *Id.* Fareda Banda talks about the inferior status of women and "the socio-structural inequalities of women," as well as the cultural and economic disadvantages women face. *Id.* (citation omitted).

182. See TIYANJANA MALUWA, INTERNATIONAL LAW IN POST-COLONIAL AFRICA 127-28 (1999) (listing the various human rights protected by instruments that have been adopted by African States such as Malawi and South Africa, including a right of non-discrimination and to equal spousal rights).

183. Banda, *supra* note 170, at 8.

184. See Sylvia Tamale, *Gender Trauma in Africa: Enhancing Women's Links to Resources*, 48 J. AFR. L. 50, 55 (2004) (arguing that social structures in Africa function to "normalize gender inequality" such that "[m]ale domination as the status quo is constantly defended and protected").

185. See BANDA, *supra* note 78, at 13 (discussing the evolution of norms relating to the human rights of women).

186. MALUWA, *supra* note 182, at 121, 128.

Even within this sphere, however, the challenges faced by African state governments come from various attempts to institute a democratic rule of law into their political systems and to build “a political culture founded on a conception of human rights.”¹⁸⁷ Thus, the main puzzle lies in connecting modern-day universal human rights and democracy issues, with the dynamic and distinct cultural systems in place sub-Saharan Africa.¹⁸⁸ The principle challenge to solving this puzzle is that the concept of “human rights and democracy in Africa differ because its culture differs.”¹⁸⁹ Thus, it is difficult to apply general, universal human rights principles across the continent. As a result, in evaluating the human rights question within sub-Saharan Africa, the answer may lie in tailoring human rights concepts to fit the realities of sub-Saharan Africa by finding a balance between the African “collective” and Western “individual” human rights perspectives.¹⁹⁰

B. The Human Rights Answer to the Witchcraft Challenge

In the past, a state’s treatment of its citizens was considered a domestic affair, not a matter of international law.¹⁹¹ That is not the case today.¹⁹² The field of international human rights has developed such that states have increasingly come to believe that it is their obligation, and that of the entire international community, to protect the civil, political, economic, social, and cultural rights of all people.¹⁹³

Consequently, the norms found in international human rights law can be employed to protect women in sub-Saharan Africa against human rights violations, like being accused of witchcraft. This may be achieved by transforming the rationale behind local community laws and reconciling local laws with regional and international perspectives on human rights.¹⁹⁴ This is important because, “while human

187. *Id.* at 122.

188. *See id.* at 123 (posing the question: “[w]hat is culture, and how does it fit into the African conception of human rights?”).

189. *Id.*

190. Ludsin, *supra* note 7, at 70.

191. MALUWA, *supra* note 182, at 124-25.

192. *Id.* at 125.

193. *See* U.N. Charter arts. 1, 55, 56 (recognizing the international obligations of states to protect certain universal rights); *see also* Universal Declaration of Human Rights, G.A. Res 217 (III) A, publ., U.N. Doc A/RES/217 (III) (Dec. 10, 1945) (“Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms . . .”). Together, these instruments set out same standards of customary international law and general principles of international human rights law.

194. *See* Fitnat Naa-Adjeley Adjetey, *Reclaiming the African Woman’s Individuality: The Struggle Between Women’s Reproductive Autonomy and African Society and Culture*,

rights are universal in nature . . . the significance of national and regional particularities and various historical, cultural, and religious backgrounds”¹⁹⁵ must be accounted for and utilized in order to protect marginalized women, particularly those victims of witchcraft accusations, in sub-Saharan Africa. In analyzing this approach, certain regional and international human rights instruments are crucial, and will be discussed in later sections.

C. The Local/Regional Perspective on Women’s Rights in Africa

On the domestic level, the rights of women within sub-Saharan Africa can be protected, first and foremost, through the use of local laws.¹⁹⁶ In some countries, for example, international human rights norms have been integrated into domestic laws by way of incorporation into national constitutions.¹⁹⁷ For instance, Article 26 of the Constitution of Ghana, which addresses fundamental human rights and freedoms, makes clear that “[a]ll customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited.”¹⁹⁸ Witchcraft accusations and their devastating effect on women, especially older women, would certainly seem to fall under such domestic protection.¹⁹⁹ Another example is the Republic of Gambia, under whose constitution the general protection of the rights of women is implemented through a broad scheme of fundamental rights and freedoms.²⁰⁰ Chapter 28 of the Gambian Constitution, states that “[w]omen shall be accorded full and equal dignity of the person with men.”²⁰¹ But, as with Ghana, this provision may be described as only “being on the books”: even with the general protections supposedly available under the law, women in present-day Gambian society accused of witchcraft still experience marginalization and discrimination from their communities.²⁰²

Hence, despite these supposed constitutional protections, and even though African countries like Sierra Leone may recognize the

44 AM. U. L. REV. 1351, 1353-54 (1995) (arguing that efforts to address human rights abuses against women should begin on the local level). “International human rights norms . . . must be linked to local laws and regional human rights instruments to make people realize that these norms are not part of an alien culture which is to be imposed on them.” *Id.* at 1354.

195. Banda, *supra* note 170, at 3.

196. Adjetey, *supra* note 194, at 1353-54.

197. *Id.* at 1370.

198. GHANA CONST. ch. 5, art. 26(2) (1992).

199. Adinkrah, *supra* note 1, at 338; Hari, *supra* note 6.

200. GAMBIA CONST. ch. 4, art. 28(1) (1997).

201. *Id.*

202. *Witchcraft, An Idiom of Power*, GAMBIA J. (Apr. 21, 2009), <http://www.thegambiajournal.com/Top-News-and-Analyses/298.html>.

importance of additional human rights protections within their local and state laws, there are still considerable violations against women, particularly within the arena of witchcraft accusations.²⁰³ One could argue that the lack of domestic resources within poor state government systems leads to weak domestic enforcement mechanisms that fail to implement the law.²⁰⁴

Apart from the economic factors that may affect state governments' ability to enforce sanctions for violations of human rights, generally-accepted cultural practices again play an important part in the perception and role of women within individual African countries.²⁰⁵ For example, "[i]n 2002, the Vice-President of Uganda made public the fact that she had, over a number of years, been subjected to physical violence by her husband," a revelation that resulted in a public outcry *against* her.²⁰⁶ Even though some viewed the abuse as wrong (mainly women's support groups), "[t]he majority of people, men as well as women" viewed this as a private, "home" incident, which should have been kept as such.²⁰⁷

This example illustrates how, often, "the 'privacy' argument trump[s] the woman's right to protection from violence."²⁰⁸ Even the woman's status as Vice-President did not exempt her from having to adhere to the generally-accepted gender roles in Uganda, which value only those wives who are submissive and obedient.²⁰⁹

With "a general cultural expectation that women demonstrate respect, passivity, obedience, submissiveness, and acquiesce toward men,"²¹⁰ it is therefore not surprising that the general responsiveness to witchcraft accusations has been underwhelming within patriarchal African states.²¹¹ Even though there are constitutional provisions and

203. *Id.*; see AMNESTY INT'L, *Sierra Leone: Women Face Human Rights Abuses in the Informal Legal Sector*, 7, 19 (2006) [hereinafter *Sierra Leone*], available at <http://www.amnesty.org/en/library/info/AFR51/002/2006> (follow "Download: PDF" hyperlink) (asserting that the Government of Sierra Leone has failed to protect women from human rights abuses by not enacting legislation to prevent discrimination and, furthermore, by failing to stop local chiefs from imposing "arbitrary charges against women, such as 'witchcraft'").

204. Sierra Leone is the world's poorest country. Thráinn Eggertsson, *Response: Mapping Social Technologies in the Cultural Commons*, 95 CORNELL L. REV. 711, 725 n.55 (2010).

205. See BANDA, *supra* note 78, at 159 (discussing the African "universal wife" concept, which dictates that "a good wife is one who is obedient and who does not challenge accepted gender roles").

206. *Id.* (citing Tamale, *supra* note 184, at 55).

207. *Id.*; see also Tamale, *supra* note 184, at 55 (noting that many Ugandans believe that these home "issues do not belong in the public arena").

208. BANDA, *supra* note 78, at 159.

209. *Id.*

210. Adinkrah, *supra* note 1, at 331.

211. *E.g.*, *Sierra Leone*, *supra* note 203, at 7 & n.14 ("It is unlawful for Chiefs to adjudicate on cases of witchcraft. There is no crime of 'witchcraft' in Sierra Leonean law, and

laws for the protection of women, they clearly are not being utilized.²¹² Yet aggressive efforts at the domestic level through enforcement mechanisms by state governments and civic groups may still be the best answer for protecting women against accusations of witchcraft.²¹³

In addition, the use of regional efforts to achieve the common goal of the protection of all African women from the ramifications of a customary belief in witchcraft may be another crucial tool.²¹⁴ Especially “[w]here local laws do not permit the pursuits of women’s rights . . . regional human rights instrument[s]” can be effective in bridging the gap between local laws and international human rights norms.²¹⁵

The African Charter²¹⁶ encompasses this regional approach by recognizing the culture of Africa within—and incorporating this culture into—its conception of human rights.²¹⁷ The Charter also contains the recently enacted 2003 Protocol on the Rights of Women in Africa (the Protocol),²¹⁸ designed specifically to protect African women from “all forms of discrimination,”²¹⁹ including those “particular to Africa.”²²⁰ Article 2 of the Protocol, for example, requires that “State Parties . . . combat all forms of discrimination against women through appropriate legislative, institutional and other measures,”²²¹ including through an “integrat[ion of] a gender perspective in[to] their policy decisions, legislation, development plans, programmes and activities.”²²² Article 17 of the Protocol also states that “[w]omen shall have the right to live

thus any such charge is arbitrary and violates international human rights standards.”). Neither has the rest of the world taken note of the human rights violations perpetrated against women accused of being witches: “[a]cross Africa, a war is being waged on women—but we are refusing to hear the screams. . . . For decades, we have not wanted to know, because it sounded too much like the old colonialist claims of African ‘primitivism . . .’” Hari, *supra* note 6.

212. *See supra* note 150 and accompanying text (juxtaposing the protections in the Gambian Constitution with the witch hunt instituted by the country’s own President).

213. *See* Adjetey, *supra* note 194, at 1353, 1372 (describing how concentrating efforts locally will better achieve human rights protections for women).

214. *See id.* at 1369 (suggesting that African NGOs join together to “devise a plan of action,” because “[w]idespread education on human rights is . . . essential to alter peoples’ way of thinking.”).

215. *Id.* at 1373.

216. African Charter of Human and Peoples’ Rights, adopted June 27, 1981, 1520 U.N.T.S. 217.

217. Adjetey, *supra* note 194, at 1374.

218. Protocol to the African Charter on Human Rights and Peoples’ Rights on the Rights of Women in Africa, Sept. 13, 2000, OAU Doc. CAB/LEG/66.6(2003) [hereinafter The Protocol].

219. *Id.* art. 2(1).

220. Kristin Davis, Note, *The Emperor is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination*, 42 VAND. J. TRANSNAT’L L. 949, 952 (2009) (citation omitted).

221. The Protocol, *supra* note 218, art. 2(1).

222. *Id.* art. 2(1)(c).

in a positive cultural” environment,²²³ and requires “States Parties [to] take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.”²²⁴

The Protocol also requires States to implement legislation to curb “harmful practices” that jeopardize women’s health and safety.²²⁵ Defined under Article 1 of the Protocol, “[h]armful [p]ractices’ means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.”²²⁶ One may naturally conclude from this language that the accusation of witchcraft constitutes a “harmful practice” against women, and thus is very much renounced by the Protocol.

Furthermore, because the Protocol incorporates “both civil and political[,] and socio-economic and cultural rights”²²⁷ it is more comprehensive than any pre-existing instrument dealing with the rights of African women, and so is regarded as the best.²²⁸ Indeed, “the Protocol is the first international human rights instrument to affirm a woman’s right to seek an abortion.”²²⁹ Thus, such a right theoretically exists in contemporary African society. Notably, the Protocol also addresses issues such as the impact of armed conflicts on the lives of African women.²³⁰ This and other provisions are designed to specifically address and provide protection against the particular abuses suffered by African women. Hence, because accusations of witchcraft mostly victimize elderly widows in sub-Saharan Africa,²³¹ protections against these accusations should be recognized and guaranteed under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

Yet the extent to which the African Charter and its Protocol can protect women within sub-Saharan Africa against allegations of witchcraft is debatable. One of the criticisms levied against the Protocol is

223. *Id.* art. 17(1).

224. *Id.* art. 17(2).

225. *Id.* art. 2(1).

226. *Id.* art. 1.

227. BANDA, *supra* note 78, at 79.

228. Davis, *supra* note 220, at 952 (noting that the Protocol is lauded as being “the most progressive tool for protecting women’s rights to date” (citing Anne Gathumbi, *Making Reproductive Health Rights a Reality*, PAMBAZUKA NEWS, Jan 20, 2005, <http://www.pambazuka.prg/en/category/features/26455>)).

229. *Id.* at 962. Article 14 of the Protocol on health and reproductive rights affirms women’s “right to control their fertility.” The Protocol, *supra* note 218, art. 14(1).

230. The Protocol, *supra* note 218, art. 11. The Protocol also grants “Widows’ Rights,” *id.* art. 20, and recognizes the need for “Special Protection of Elderly Women.” *Id.* art. 22. Both of these provisions may aid in the protection of women from accusations of witchcraft in sub-Saharan Africa.

231. Hari, *supra* note 6.

that its provisions are unobtainable, despite being “legally binding” on all African countries.²³² For instance, although “Article 26 of the Protocol calls upon States Parties to ensure the implementation of” its provisions into domestic law,²³³ this requirement is arguably beyond the reach of the Protocol because it fails to take into account the differences within each country’s legal system,²³⁴ be they political, or socio-economic. Further, the Protocol’s not allowing state parties to deviate from its conventions has resulted in a reality where state parties with different political and socio-economic standards refuse to be bound by the same human rights rules.²³⁵

Another excuse invoked by states not following the Protocol is “that the people who ratify human rights instruments tend to be the political élite in a country and may not necessarily be representing the position of all in that country.”²³⁶ These problems undermine the Protocol’s effectiveness because, over time, permitting states to ignore obligations “create[s] evidence of an acceptable customary international norm or state practice that ultimately makes such illegal behavior legally acceptable.”²³⁷ As a result, within a society like Cameroon, where witchcraft is punishable as a crime,²³⁸ the Protocol may be deemed entirely ineffective. In other countries, such as South Africa and Kenya, where the belief in witchcraft is rampant even among the educated,²³⁹ it is not surprising that community vigilante justice is still utilized to eradicate alleged witches or witchcraft, despite the existing forms of human rights protections, be they domestic, or regional, like the Protocol.²⁴⁰

The Protocol is further criticized for its heavy reliance on various United Nations treaties like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Declaration on the Elimination of Violence against Women.²⁴¹ This reliance has led commentators to describe the Protocol as “uncompromisingly

232. Davis, *supra* note 220, at 952.

233. *Id.* at 966 (internal quotation marks and citation omitted).

234. *Id.* at 966-67 (noting how the Protocol contains much “overarching vagueness,” and arguing that more guidance is needed in light of “the fact that States Parties [sic] legal systems are as diverse as the continent itself”).

235. *See id.* at 965 (observing how some “African countries have wholly ignored” provisions of the Protocol that “interfere with customary practices,” such as common-law marriage (citation omitted)).

236. Banda, *supra* note 170, at 5 (citation omitted).

237. Davis, *supra* note 220, at 953.

238. Diwan, *supra* note 4, at 353.

239. LeVine, *supra* note 5, at 229.

240. Ludsin, *supra* note 7, at 88-89.

241. Banda, *supra* note 170, at 18. CEDAW will be discussed in greater detail in the following section.

pro-woman and anti-defence of discriminatory cultural practices,”²⁴² and as “mak[ing] far-reaching demands” that are impractical and inapplicable as applied to certain customary African traditions.²⁴³ For example, under Article 6, which governs marriage, “monogamy is encouraged as the preferred form of marriage.”²⁴⁴ Yet “[m]ost legal systems on the continent recognize polygamy, either as a customary or religious ‘right.’”²⁴⁵ The Protocol thus creates a system of law that alienates the actual culture within African society. This consequently undermines the positive effects such a provision can have for women by triggering non-enforcement from individual state actors.²⁴⁶

Dealing with witchcraft allegations may therefore be described as a situation in which States parties know of their human rights obligations, but, because of unique domestic/cultural circumstances, their “excuses” for not following these obligations are readily accepted without the states having to suffer any consequences. Therefore, even though the Protocol is praised as having adopted practical protections for women within sub-Saharan Africa,²⁴⁷ it actually may not be an effective tool for protecting of women from charges of witchcraft because of problems relating to the implementation and enforcement of its provisions.²⁴⁸

D. The International Perspective on Women’s Rights

For the reasons just discussed, international norms and other mechanisms, such as treaties, may be the tool necessary to protect women from the stigma—and danger—of being labeled a witch in sub-Saharan Africa. One of these treaties is CEDAW.²⁴⁹ Adopted by the United Nations General Assembly in 1979, CEDAW protects women against all forms of prejudice by guaranteeing the equality of women within all sectors. These protections extend to all “political, economic, social, cultural [and] civil” rights.²⁵⁰ Often referred to as

242. *Id.*

243. *See id.* (listing several provisions that fail to take into account customary African beliefs and practices).

244. The Protocol, *supra* note 218, art. 6.

245. Banda, *supra* note 170, at 18.

246. *See id.* at 18-19 (arguing that these culturally-insensitive provisions undermine support for the instrument, and that without support from “ordinary people,” the Protocol is “likely to be yet another paper tiger”).

247. Davis, *supra* note 220, at 951-52.

248. *See id.* at 974 (describing how some countries’ constitutions elevate customary views of gender and discrimination over contemporary views, such as those found in the Protocol).

249. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

250. *Id.* art. 1.

a “bill of rights for women,”²⁵¹ CEDAW defines “discrimination” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . on a basis of equality of men and women, of human rights and fundamental freedoms.”²⁵² Under this definition of discrimination, CEDAW makes irrelevant the issues of whether an act was committed “by a state actor or a private individual or private organisation” and whether the discrimination was direct or indirect.²⁵³

With a goal of promoting equality and preventing the marginalization of women, CEDAW’s preamble and sixteen “substantive articles” make it a comprehensive legal instrument.²⁵⁴ State governments, “that have ratified or acceded to the Convention are legally bound to put its provisions into practice.”²⁵⁵

CEDAW is not the only option. Because sub-Saharan women accused of witchcraft face being subjected to violent acts and other forms of victimization,²⁵⁶ the protections of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)²⁵⁷ can also be invoked because it protects against “cruel, inhuman or degrading treatment or punishment.”²⁵⁸ Under Article 2, CAT calls for each state party to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,”²⁵⁹ and may implement comparable domestic laws and regional mechanisms to comply with fundamental human rights under CAT.²⁶⁰ The role of state parties in sub-Saharan Africa is thus to use their domestic legislation to prevent and provide redress for such violations of CAT, including violence committed against women accused of witchcraft.

251. Press Release, Women’s Anti-Discrimination Committee Holds 27th Session in New York, 3-21 June: Will Review Reports of Eight State Parties, U.N. Doc. WOM/1337 (May 30, 2002) [hereinafter U.N. Press Release], available at <http://www.un.org/News/Press/docs/2002/WOM1337.doc.htm>.

252. CEDAW, *supra* note 249, art. 1.

253. BANDA, *supra* note 78, at 59.

254. U.N. Press Release, *supra* note 251.

255. *Id.*

256. See Hari, *supra* note 6 (stating that witch beatings and killings happen almost daily in parts of Africa such as Sukumaland, Tanzania).

257. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

258. See *id.* pmb.

259. *Id.*, art. 2(1).

260. See Ronald L. Nelson, *Torture in the Law of the Fifty American States: Searching for Definition*, 4 WAR CRIMES, GENOCIDE & CRIMES AGAINST HUMANITY 1, 8 (2010) (noting that the United States, which is a signatory to CAT, has federal legislation implementing CAT’s terms into the domestic law, which CAT requires signatory States to do).

Because CEDAW and CAT are binding legal instruments, “States are responsible for bringing their domestic law and practice into conformity with their obligations under international law to protect and promote human rights.”²⁶¹ Yet the reality is that states often elevate their own interests over this obligation.²⁶² This is essentially one of the main criticisms of international mechanisms like CEDAW and CAT. For example, even when a state has ratified a treaty, implementing legislation may be necessary for the treaty obligations to take legal effect, “[y]et many states that ratify human rights treaties do not enact all of the necessary implementing legislation.”²⁶³ As a result, treaties like CEDAW, “which specifically aimed to protect women from discrimination [have] failed to meet the needs of women in the African context.”²⁶⁴

Another criticism of international mechanisms is that, unlike the Protocol, the general approach to addressing fundamental issues affecting women’s rights worldwide, an approach reflected by CEDAW, often does not take into account the issues raised by specific customs, practices, and traditions. This means that culturally unique and sensitive issues, like the allegations of witchcraft common in sub-Saharan Africa, are addressed only generally.²⁶⁵ In addition, “it is not uncommon for states to formally commit to human rights agreements, but fail to change their practices to conform to the treaty requirements.”²⁶⁶

Furthermore, “[a]chieving domestic enforcement requires that state parties have the legal and structural capacity to create and enforce legal rights and obligations,”²⁶⁷ which may not be the case in sub-Saharan Africa. Lastly, because only the elite play an important role in implementing international agreements within African societies,²⁶⁸ the inhabitants of these states, who comprise mostly rural populations and informally educated communities,²⁶⁹ may not accept

261. Adjetey, *supra* note 194, at 1370 (citation omitted).

262. See Anthony D’Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1113 (1982) (discussing how it might not be in the “collection of interests” for a “hypothetical new nation . . . to accept any of the[] [rules of international law] as obligatory upon itself”).

263. Angela M. Banks, *CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa*, 32 FORDHAM INT’L L.J. 781, 790 (2009) (citation omitted).

264. Davis, *supra* note 220, at 958 (citation omitted).

265. *E.g.*, CEDAW, *supra* note 249, art. 2. CEDAW simply requires States “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” *Id.*

266. Banks, *supra* note 263, at 785 (citation omitted).

267. *Id.* at 791.

268. Banda, *supra* note 170, at 5 (citation omitted).

269. Davis, *supra* note 220, at 988 (noting that “rural and informally educated communities” have been excluded from the dialogue of human rights law).

or understand the “legitimacy of the international legal obligations and norms” because they have not been socially internalized.²⁷⁰

Accordingly, the lack of enforcement mechanisms, practical domestic laws, and ratification standards in sub-Saharan communities means that the harm resulting from allegations of witchcraft made against women in contemporary sub-Saharan Africa cannot easily be alleviated by local, regional or international human rights mechanisms. Furthermore, the dilemma presented by choice of law and conflicts within the law, namely the “conflict between state legal norms and norms underlying popular beliefs in witchcraft,” reduces any effectiveness that laws meant to punish individuals who kill accused witches may have.²⁷¹ As a result, women in sub-Saharan Africa have fallen through the cracks present in human rights and domestic legal instruments.

IV. POSSIBLE SOLUTIONS

The notion of witchcraft and its effect on women’s human rights is a problem unique to contemporary Africa, and, as such, it will need a contemporary “African” solution. Even with the modern domestic, regional, and international legal protections available to women in sub-Saharan Africa who are victims of human rights abuses, such as those suffered as a result of being accused of witchcraft, the systems for providing protection and redress are still riddled with conflict.²⁷² The principle conflict is that which lies between existing beliefs in witchcraft and modern practical standards punishing those who act violently when witchcraft is suspected. Fortunately, several possible solutions do exist.²⁷³

According to Professor K.O. Adinkrah,²⁷⁴ a professor of law at the University of Ghana, the general protections within sub-Saharan Africa against witchcraft accusations can be described as “legally protected on paper, but unprotected in reality.”²⁷⁵ This may be the number one problem facing the eradication of the belief in witchcraft within sub-Saharan Africa. For example, under the Ghana Constitution, as with other constitutions in Africa, there are legal protections

270. Banks, *supra* note 263, at 799.

271. Diwan, *supra* note 4, at 354.

272. *Id.*

273. *Id.* (“If the law is more responsive to popular needs to regulate witchcraft, and if it provides a comprehensive way of addressing these needs in a manner accessible to the general population, perhaps the conflict between popular and state legal norms would be reconciled.”).

274. Dr. K.O. Adinkrah, LLB (Hons), LLM (Ghana) & JSD (Berkeley), is a renowned legal scholar specializing in family law at the Ghana School of Law. He is also a practicing Barrister and Solicitor.

275. Interview with Dr. K.O. Adinkrah, Professor of Law, Ghana School of Law, Accra, Ghana (Jan. 8, 2010) [hereinafter Adinkrah Interview].

against acts that constitute “cruel, inhuman or degrading treatment or punishment.”²⁷⁶ Victims of witchcraft accusations may bring claims under criminal law that they have suffered a form of degrading treatment or cruel punishment, and/or perhaps invoke defamation and slander suits as a means to protect against witchcraft accusations.²⁷⁷ The issue, however, is whether such suits actually get to court.²⁷⁸ Unless an individual accused of being a witch is already being tried criminally, it is less likely that she will seek relief through the court system, if indeed such relief is available.²⁷⁹ Hence, even though there may exist the necessary means of relief within African court systems for individuals prosecuted for outdated crimes like witchcraft, such injustices are rarely redressed through the court systems.²⁸⁰

To find a solution for this dilemma, African governments must first recognize that a problem exists within their legal systems. They must then address the need for more integration between customary and state legal systems, specifically in the context of witchcraft accusations and violence against suspected witches.²⁸¹ For example, instead of adopting Witchcraft Suppression Acts, states could adopt legislation that attempts to control witchcraft. By accepting that the belief in witchcraft in fact exists, but acknowledging that the “law can control it,”²⁸² the State thus harmonizes the customary and state legal systems.

As accusations of witchcraft certainly can have serious consequences,²⁸³ the law and the courts of sub-Saharan Africa should also discourage “false” claims.²⁸⁴ One way to accomplish this may be to modify the objective standard of “reasonable” within the court systems to include a traditional community norm standard of reasonableness for evaluating cases.²⁸⁵ In addition, states could create special witchcraft courts to handle all aspects of witchcraft accusations, including punishments and fines for false and self-serving accusations.²⁸⁶ In this way, sub-Saharan African states can recognize the interests

276. GHANA CONST. ch. 5, art. 15(1)(a) (1992); *see also* S. AFR. CONST. 1996, ch. 2(12)(1)(e) (“Everyone has the right to freedom and security of the person, which includes the right . . . not to be treated or punished in a cruel, inhuman or degrading way.”).

277. Adinkrah Interview, *supra* note 275.

278. *Id.*

279. *Id.*

280. *Id.*

281. Ludsins, *supra* note 7, at 102.

282. *Id.* at 103. This is especially true because “the witchcraft belief is not the problem, but the actions taken on those beliefs.” *Id.* at 102.

283. *See* Diwan, *supra* note 4, at 381 (noting that imputations of witchcraft can risk harm to those accused and often cause problems in the community).

284. *Id.*

285. *Id.* In some communities, laws that guard against “imputation[s] of witchcraft are contrary to some traditional community norms of what is seen as reasonable conduct.” *Id.*

286. Ludsins, *supra* note 7, at 104.

of the people in preserving customary traditions, yet still curb the risks associated with witchcraft accusations.

On the other hand, some may say that there are enough legislative and criminal protections against the harms associated with the notion of witchcraft, and that governments should instead focus more on the efficacy of domestic enforcement mechanisms within the continent.²⁸⁷ Whether the focus is on prevention or enforcement, the criminal justice systems within sub-Saharan countries must take more proactive steps to stop such abuses, particularly in light of the fact that witchcraft accusations can result in serious injuries, and even death, to the innocent woman accused.²⁸⁸

In the prevention of such crimes, direct and serious actions must be taken against those who kill individuals accused of witchcraft, as well as enforced. For example, the imposition of minimum sentencing standards will be introduced throughout the continent through public service announcements and campaigns. The witchcraft issue would thus be thrust to the forefront, and all would know that acts taken against accused witches are crimes for which there are serious repercussions in all African communities.²⁸⁹

Additionally, in part because of the social circumstances within sub-Saharan African society and the lack of education for women and girls,²⁹⁰ women in Africa are generally not very assertive, and they are less likely to invoke the legal protections of customary law or state legal systems, even if doing so could legally protect them from victimization.²⁹¹ Yet because the belief in witchcraft functions to marginalize women,²⁹² education of girls and women must be encouraged. Indeed, “[e]ducation is one of the most important means of empowering women with the knowledge, skills, and self confidence necessary to participate fully in a development process”²⁹³ in sub-Saharan Africa, and thus should be a particularly important focus.

African governments and local leaders should also educate their communities with respect to the fallacy of witchcraft accusations and

287. Banks, *supra* note 263, at 782 (arguing that domestic enforcement mechanisms are “one of the most effective means of enforcing” human rights obligations). “Recognizing the value of domestic enforcement,” the CEDAW Committee urges states to “strengthen domestic enforcement mechanisms” in order to fully realize human rights protections. *Id.* at 782-83 (citation omitted).

288. Ludsin, *supra* note 7, at 63 (noting that thousands of innocent individuals have been killed as a result of witchcraft accusations).

289. *But cf.* Tebbe, *supra* note 14, at 217-18 (discussing how Africans who believe witchcraft is real feel wronged by the State punishing those who accuse others of witchcraft).

290. Sharon LaFraniere, *Another School Barrier for African Girls: No Toilet*, N.Y. TIMES, Dec. 23, 2005, at A1 (emphasizing that “poverty, tradition, and ignorance” have deprived 24 million African girls of an education).

291. Adinkrah Interview, *supra* note 275.

292. Adinkrah, *supra* note 1, at 338.

293. Adjetej, *supra* note 194, at 1378.

the harmful effects such accusations have on women.²⁹⁴ Aggressive television and newspaper public service campaigns broadcast and written in every local language should be encouraged.²⁹⁵ Governments, community grassroots efforts, and nonprofit organizations should set aside public service and educational resources to find ways to encourage women to “step out of their prescribed social roles”²⁹⁶ and feel confident enough to assert their rights.²⁹⁷

Professor Adinkrah also suggests that competing interests and demands in contemporary African societies may be blamed for today’s problem of the victimization of women suspected of witchcraft.²⁹⁸ He has suggested that perhaps society should simply allow such practices to go on until the attitudes of the people change, especially as the continent lacks the necessary resources to promote effective change.²⁹⁹ This view is reflective of the “cultural purist approach,” which “favour[s] . . . the retention of the status quo.”³⁰⁰ Following this approach, issues like the victimization of women accused of witchcraft would remain subject to customary law systems, rather than state legal systems, thereby maintaining the status quo.³⁰¹

But one must wonder whether, and at what time, society will change, as women suspected of witchcraft have long been victimized despite the various legal protections that have become available in domestic, regional, and international systems. Hence “[to] argue for things to remain as they are is both unrealistic and unhelpful”³⁰² in saving this class of victimized women. Accusations of witchcraft and their implications certainly remain a contemporary problem faced by women in sub-Saharan Africa. This problem needs immediate, domestic solutions.

CONCLUSION

Like the unfortunate old women in Kumbungu, Ghana who were bludgeoned and stoned to death for “bewitchment” of a young man,³⁰³ the notion of witchcraft and the consequent vigilante justice it inspires against women still exists in modern-day sub-Saharan Africa.³⁰⁴ In

294. Adinkrah, *supra* note 1, at 349.

295. *Id.* at 349.

296. Davis, *supra* note 220, at 992 (citation omitted).

297. Adjetey, *supra* note 194, at 1378. The author talks about the frustration she has felt in trying to convince illiterate women in Ghana to understand and believe they have rights.

298. Adinkrah Interview, *supra* note 275.

299. *Id.*

300. Banda, *supra* note 170, at 14.

301. *Id.* This approach was utilized by South African chiefs to resist the application of anti-discrimination principles to customary law. *Id.*

302. *Id.*

303. Adinkrah, *supra* note 1, at 343.

304. Hari, *supra* note 6; Ludsins, *supra* note 7, at 88.

spite of the various protections available in domestic, regional, and international human rights instruments, women in contemporary sub-Saharan Africa still face considerable discrimination pursuant to the notion of witchcraft and fall between the cracks present in these legal instruments.

Part of the problem may be based on the existence of fairly complex “integrated” legal systems within contemporary sub-Saharan Africa.³⁰⁵ Where common law and civil law traditions are infused with modern customary/traditional interpretations, the result is a conflict of laws between state protections against allegations of witchcraft and customary laws that preserve the belief in witchcraft.³⁰⁶ In addition, even though the states purport to denounce the belief in witchcraft that still holds fast in contemporary sub-Saharan Africa, there generally are few civil or criminal actions, and few enforcement mechanisms for such actions, to protect women,³⁰⁷ despite the fact that vigilante justice is often employed to “take care” of witchcraft’s presumed harm. This has led to grave human rights violations against women, particularly older women, in contemporary sub-Saharan Africa.

It is therefore suggested that a local/domestic solution is the best method for solving the unique problems associated with the belief in witchcraft. Through individualized, state-specific protective standards that seek to harmonize state legal systems and customary/traditional laws in African communities, the victimization and marginalization of women within sub-Saharan African societies can be stopped. With the right implementation standards, the law can finally protect women in contemporary sub-Saharan Africa from the harms suffered following an allegation of witchcraft.

MAAKOR QUARMYNE*

305. See Davies & Dagbanja, *supra* note 79, at 305-06 (noting that in post-independence countries like Ghana, the legal system is an integration of both state or “general law” and customary/traditional law).

306. See Diwan, *supra* note 4, at 354.

307. HELPAGE INT’L, *supra* note 11, at 6 (“Accused women have no support[] [or] access to legal advice or redress . . .”). Further, “the absence of clear legal and policy frameworks lead to the State’s inability to enforce legislation” that may already be in place to protect women from witchcraft accusations and violence. *Id.*

* J.D. Candidate 2011, William & Mary School of Law; B.B.A. International Business, James Madison University. The author will like to thank her family for their continued love and support through her educational and professional pursuits—most especially, Mummy Val for the great incite for this note on the witchcraft situation affecting women in Northern Ghana. Finally, Alice Walker said it best, “the most common way people give up their power is by thinking they don’t have any” and thus the goal is to give back the power to all marginalized people, especially that of women across the globe.