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**Witches and the Law in the
21st Century**

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Witches and the Law in the 21st Century

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Abstract

This article examines the practice of witchcraft and its intersection with the law in sub-Saharan Africa. Focusing on the African state of Malawi, this article examines the practice of criminalizing witchcraft. These criminal prosecutions have disastrous results for those convicted, but these are not the only costs associated with such prosecutions. This article considers the implications of this practice under domestic and international law, the cultural costs of this practice and whether there are other ways of resolving the issue.

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Introduction

The vexing problem of the legal status of witches did not begin in the 21st Century.¹ Its roots are older, deeper and much more complicated than the title of this article suggests. This problem intersects such intractable issues as religion, gender, age, and wealth discrimination, power, jealousy, fear, colonialism, and the unanswerable question of why bad things happen in the world. It is a problem that still exists in many parts of the world.² As such, it defies a one-size fits all solution. Creative proposals are necessary in order to adequately protect people from the harms that flow from the failure to realistically address this question from a legal standpoint.³

There is no simple universal solution to this complex problem⁴ It would be impossible in an article format to address all of the nuances of this issue. Instead, the author will identify the major questions that should be considered in addressing witchcraft from a legal perspective. This article proposes a possible theoretical construct that might assist countries presently struggling with the legal issues related to witchcraft. This proposal, while neither universal nor comprehensive, is one that might assist in an overall strategy that to date does not appear to have been utilized in many parts of the world.

The author will primarily focus on the legal situation for witches⁵ in Malawi. Malawi will be utilized as it continues to struggle with how to address witches and witchcraft from a legal perspective. Presently Malawi's Law Commission is studying the legal status of witches.⁶ This article will begin by discussing the problem of defining witches and witchcraft. It will then discuss some of the problems with the present legal approaches to witches and witchcraft

¹ See generally, Behringer, W. (2004). *Witches and Witch-Hunts: A Global History*. Polity Press.

² Globally, belief in witchcraft abounds. In the United States alone, there are over 300,000 practicing witches. See 'Estimates on the numbers of Wiccans in the United States,' available at http://www.religioustolerance.org/wic_nbr2.htm, [11 June 2012]. It is difficult to estimate the number of witches worldwide due to definitional ambiguities and the social stigma inherent in admitting such beliefs.

³ Most of the sources cited in this paper in some way or another catalogue the societal problems that arise from the practice of witchcraft.

⁴ *Id.*

⁵ Here, the author will assume the existence of witches who possess extra-natural powers, an assumption that most Western legal scholars have a difficulty accepting. This assumption is increasingly recognized as essential to resolving the problems associated with witchcraft. See, UN High Commissioner for Refugees, J. Schnoebelen, *Witchcraft Allegations, refugee protection and human rights: a review of the evidence*, available at <http://www.unhcr.org/4981ca712.html>. Any solution to the legal status of witches must begin from a recognition of the underlying belief system that gives rise to the legal problem. See UN Office of the High Commissioner on Human Rights, *Witches in the 21st Century*, 24 August 2009, available at <http://www.ohchr.org/EN/NEWSEVENTS/Pages/Witches21stCentury.aspx>. Indeed, as discussed infra, the failure of the law to recognize such beliefs appear to have exacerbated the harms in those societies wherein witchcraft is practiced.

⁶ C. Chilimampungwa & G. Thindwa. April 2012. 'The Extent and Nature of Witchcraft-based Violence against Children, Women and the Elderly in Malawi, A Research Study Final Report, at 9, available at http://atheistalliance.org/media/website/ASH_report.pdf, [9 June 2012].

before identifying questions that societies should ask when addressing these concerns. Finally, while recognizing that the solutions for the legal problems of witchcraft in each society have to be driven by the culture and society that faces the issue, the author will propose that countries consider the legal and societal benefits that might flow from equating witchcraft with any other belief system that attempts to address questions of meaning in the universe, that is to say to provide protections for witchcraft that recognize it as a form of religion.

Definitions of witches and witchcraft.

One of the most basic problems facing those who use the law to address the societal problems that arise from the practice of witchcraft involves trying to determine who is a witch and what is witchcraft.¹ Until witchcraft is clearly defined, it is difficult to formulate appropriate legal responses. Unfortunately, the definitions vary greatly.

Some legal scholars writing in this area do not even try to define witchcraft, apparently assuming the definition is clear.² A recent UNICEF report has stated that the term witchcraft simply refers to ‘occult or mystical forces.’³ However, most scholars only define witches and witchcraft in terms of evil and harm. For example, one author states that a witch is ‘a human being who secretly uses supernatural powers for nefarious purposes.’⁴ A report of the United Nations High Commissioner on Refugees defines witchcraft as ‘harmful actions carried out by persons presumed to have access to supernatural powers.’⁵ Similarly, some scholars and anthropologists describe a witch as ‘a person with an incorrigible, conscious tendency to kill or disable others by magical means.’⁶ Another legal scholar has stated that ‘[g]enerally, a witch is someone who “is believed to be a malicious person who uses her powers out of spite to harm those who offend her.”’⁷ A recent report on witchcraft in Malawi defines

¹See e.g., UNICEF, ‘Children Accused of Witchcraft, An anthropological study of contemporary practices in Africa’, (‘UNICEF Report’) at 7, April 2010, available at http://www.unicef.org/wcaro/wcaro_childre_sn-accused-of-witchcraft-in-Africa.pdf, [9 June 2012] (discussing the ambiguous nature of the terminology).

²See e.g., C. Mgbako & K. Glenn, ‘Witchcraft Accusations and Human Rights: Case Studies from Malawi,’ 43 Geo. Wash. Int’l L. Rev. 389 (2011).

³*Supra* n. 7, UNICEF Report at 7.

⁴N. Tebbe, ‘Witchcraft and Statecraft: Liberal Democracy in Africa,’ 96 Geo. L.J. 183, 187 (2007).

⁵See *supra* n. 5, Schnoebelen, at 64, (citations omitted).

⁶Quarmyne, M. ‘Witchcraft: A Human Rights Conflict between Customary/Traditional Laws and the Legal Protection of Women in Contemporary Sub-Saharan Africa.’ 17 Wm. and Mary J. of Women & L. 475, 477 (2011), citing LeVine, R. (1963) *Witchcraft and Sorcery in A Gusii Community*, in *Witchcraft and sorcery in East Africa* 221, 225 (John Middleton & H.E. Winter eds).

⁷Cohen, J. A., ‘The Problem of Witchcraft Violence in Africa,’ 44 Suffolk U. L. Rev. 803, 809 (2011), (citations omitted). The phrasing of this definition in terms of gender, specifically female, is worth noting given women have been one of the groups most often targeted for violence based on witchcraft allegations. *Seesupra* n. 5, Schnoebelen, at 8-11.

witchcraft as the “practice” or “ability” to harm someone through the use of magical or mystical powers. Consequently, a witch is a person who is believed to cause harm under the influence of the force of witchcraft.’¹

These proposed definitions define witches and witchcraft solely in reference to use of the practice for harm. However, ‘the translation of local terms for local realities by the single term “witchcraft”. . . was strongly influenced by European history and thereby [is] pejorative.’²

These narrow definitions appear to be inaccurate and inadequate. ‘Africans of all walks of life utilize witchcraft as a means of gaining advantage, often at the expense of others, such as to ensure success in warfare or in sports, to thwart a romantic rival, to win a political race, or to exact vengeance against an enemy.’³ ‘Witchcraft beliefs embrace a wide range of ideas, practices, and motivations, but in their various forms they usually share the idea that the power to inflict injury and benefit could be exercised through unobservable, supernatural means. Beliefs in witchcraft are often used to explain fortunes and misfortunes, good and evil, life and death.’⁴ ‘[T]he power of a witch is invariably double-edged; for example, “the power to cure illnesses and other misfortunes” comes hand-in-hand with the power to cause harm. Thus, witchcraft is an explanation for both good and bad fortune.’⁵ ‘In many African societies, this figure symbolized evil as much as good, who was both feared and respected because he was part of the invisible world and was consequently in contact with genies and spirits. The witch was both someone who could cause harm as well as being someone who possessed special gifts of clairvoyance and healing.’⁶

Any society that is attempting to address modern witchcraft must resolve these definitional questions. A solution to the legal implications of the practice of witchcraft can only be discerned when the beliefs are clearly defined.

Negative impacts of colonial legal systems on the question of witchcraft.

It is not only in the pejorative labeling of witchcraft that the enduring effects of colonialism are felt. The imposition of western legal structure throughout colonized Africa continues to present challenges to addressing witchcraft.⁷

In Malawi, for example, the law assumes the non-existence of witches.¹ Thus, it is a crime to ‘pretend’ to be a witch.² It is a crime to allege that

¹ *Supra* n. 6, Chilimampungwa & Thindwa, at 19.

² *Supra* n. 7, UNICEF Report, at 7.

³ *Supra* n. 13, Cohen, at 804.

⁴ Diwan, M. ‘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), (citations omitted)

⁵ *Supra* n. 13, Cohen, at 810, citing Sanders, at 12.

⁶ *Supra* n. 7, UNICEF Report at 11.

⁷ For an interesting exploration of the problems that arise when a legal system is out of sync with the belief systems of those to whom the legal system applies, *See supra* n. 17, Diwan.

someone practices witchcraft.³ Trial by ordeal to determine if someone is a witch is a crime.⁴ The profession of witch hunter or witch finder is outlawed.⁵ This legal structure contrasts with the beliefs of the people of Malawi. ‘Most Malawians regardless of age, education or social position hold the belief in witchcraft and that witches are real.’⁶ Laws presuming the non-existence of witches are not unique to Malawi,⁷ nor is a societal belief in witches.⁸ ‘[C]ases involving witchcraft appear to have increased, and they illustrate one challenge many African countries face.’⁹ This situation where the law assumes witches do not exist, while society believes they do, has proven to be a recipe for disaster. It has resulted in the practice of witchcraft and the response to witchcraft being forced into the shadows.¹⁰

It has resulted in the tragic targeting of the weak and vulnerable in these societies. For example, in Malawi, ‘witchcraft accusations are mainly directed at children, women and the elderly.’¹¹ These patterns are similar to those in other African societies.¹² The results of the accusations are as troubling as who is targeted for accusation. The harm to those accused of witchcraft include, wrongful imprisonment, excommunication from the community, economic loss, assault, torture and even death.¹³

Unchecked vigilante responses to witchcraft were not always the norm. In pre-colonial Africa, certain procedural protections were invoked whenever a

¹ Malawi Law Commission. 2009. ‘Witchcraft Act Review Programme, Issues Paper.’ (hereinafter ‘Law Commission Review’) at 6, available at http://www.lawcom.mw/docs/ip_witchcraft.pdf.

² Section 6 of the Witchcraft Act of 1911 – CAP 702.

³ *Id.* at § 4.

⁴ *Id.* at § 2.

⁵ *Id.* at § 8.

⁶ *Supra* n. 6, Chilimampungu & Thindwa at 19.

⁷ States that continue to enforce statutes criminalizing the practice of witchcraft include Malawi (The Witchcraft Act 1911 – CAP 702 – Vol. 2), South Africa (§1(a) Witchcraft Suppression Act No. 3 of 1957 (amended in 1997)), Zimbabwe (§3 Witchcraft Suppression Act of 1890 (Ch. 9:19) (amended in 2001)), Tanzania (§4 Witchcraft Ordinance of 1928 (Ch. 18 of the Laws of Tanzania) (amended §4 Witchcraft Ordinance of 1928 (Ch. 18 of the Laws of Tanzania) (amended 1956)), and Cameroon (§251 Cameroon Penal Code). *See also, supra* n. 7, UNICEF Report at 7.

⁸ *See* Torta, B. ‘Witchcraft Believers in Sub-Saharan Africa Rate Lives Worse,’ Gallup World, available at <http://www.gallup.com/poll/142640/witchcraft-believers-sub-saharan-africa-rate-lives-worse.aspx>, [12 June 2012].

⁹ *Supra* n. 17, Diwan at 352.

¹⁰ Steward P. & A. Strathern, *Witchcraft, Sorcery, Rumors and Gossip*, Cambridge Press (2004), available at <http://catdir.loc.gov/catdir/samples/cam034/2003043949.pdf>.

¹¹ *Supra* n. 6, Chilimampungu & Thindwa at 20.

¹² *See e.g.*, Amnesty International. 2009. ‘The Gambia: Hundreds Accused of witchcraft and poisoned in government detention centers.’ (reporting on the round of mainly elderly people beaten, taken to government detention centers and poisoned), available at <http://www.amnesty.org/en/for-media/press-releases/gambia-hundreds-accused-“witchcraft”-and-poisoned-government-campaign-20>, [10 June 2012]; *supra* n. 7 UNICEF Report at 7.

¹³ *Supra* n. 5, Schnoebelen. ‘For example, in Tanzania approximately four hundred alleged witches were killed between 1997 and 2000 in the western part of the country.’ *Supra* n. 17, Diwan at 357.

person was accused of using witchcraft for harm.¹ However, with the legal imposition of the colonial denial of the existence of witchcraft, traditional responses to witchcraft were no longer tolerated and thus all but disappeared. What remains is a system where the belief is present, the fear of harm from witches is real, but there is no way to control fearful reactions. Thus, the present system encourages a vigilantism mentality.

Another approach must be found. In attempting to determine how to address this social and legal dissonance several questions should be considered regardless of the system that is eventually adopted. Moreover, societies considering the problem of witchcraft may need to utilize a new lens for viewing the issue. What follows is a discussion of the essential questions to be asked in designing a coherent and responsive legal system, as well as a proposed new starting point.

Common questions in legal systems dealing with witchcraft:

As discussed in the introduction, there is no way in an article format to do justice to the many factors that must be considered in designing a legal system to address the modern realities of witchcraft. However, here, the author is merely attempting to identify some of the most significant questions that should not be overlooked by those attempting to design a legal system that adequately address the realities of witchcraft.

What is a witch and what is witchcraft?

Any legal community that is attempting to address the legal status of witches and witchcraft cannot do so without clearly defining the community and behavior it is attempting regulate. It is important to bear in mind that even within a small country, there may be distinct and different cultural communities that define witches and witchcraft differently. Thus, while one cultural group may define witchcraft only in terms of harmful behavior, others in the same country may have a broader view that incorporates both the positive and negative behaviors associated with witchcraft.

Those designing the law need to take care to avoid defining witchcraft in a way that fails to recognize and address the realities of witchcraft in that society. If a witchcraft law paints too broadly, it may curtail behavior that has the potential to benefit society. Moreover, scholars and anthropologist have acknowledged that even the negative behaviors of witchcraft can play a potentially positive role in society.²

Additionally, societies need to realistically assess what role gender stereotyping and discrimination have played in the classifications of who is a witch and what is witchcraft. The targeting of women as witches who deny

¹*Supra* n. 12, Quarmyne, at 485-486.

²Some have argued that harmful witchcraft acts as a check on potentially anti-social type behaviors in society. *See supra* n. 12, Quarmyne, at 482-483.

they practice witchcraft is so prevalent that it is difficult to avoid the conclusion that gender stereotyping plays a role. Thus, caution is advised in carefully articulating what qualifies as witchcraft.

What role should education play in the approach to witchcraft?

Countries trying to address the question of witchcraft must recognize that the law alone cannot solve this problem. Education is a key component to the success of any strategy to deal with the issue of witchcraft.¹

At a minimum, the society must know the parameters of the law pertaining to witchcraft.² To the extent that a community does not understand the law, it is apt to engage in extra-legal ‘justice’ when faced with actors who are believed to have harmed the society through witchcraft. However, it is not solely education about the law that needs to be incorporated. Societies must educate their members about those harm-producing phenomena that are naturally explainable. Where members of the society believe that a harm, e.g., the death of a child, that is naturally explainable, could only have been caused by a witch because they do not understand how natural forces operate, they might respond violently. Thus, general education must be a key component.

This author is not positing that education will eradicate the belief in witchcraft. Indeed, though it was previously believed that modernization would eliminate a belief in witchcraft, increasingly, this conclusion is being rejected by scholars.³ This may be due to the fact that for many practitioners of witchcraft, while understanding that a death is caused by natural forces, e.g., a heart attack, they turn to their beliefs in witchcraft to help them explain why the death happened at this time and to this particular person.⁴ However, when science and natural explanations provide an answer to the why question, e.g., a person died of a heart attack because they had a congenital heart condition that was inherited from their parent, it might lessen those situations where people resort to false accusations of witchcraft.⁵

Is the goal restorative justice or punitive justice?

In addressing the question of witchcraft, the society should be clear as to its objectives before designing the system. If a given society’s purpose is to ensure the community is made whole, the approach taken may be very different

¹Miller, N. (2012). *Encounters with Witchcraft, Field Notes from Africa*. SUNY Press, African-Caribbean Institute. (Epilogue: The Future of Witchcraft)

²A recent study in Malawi noted that many members of the society are ignorant as to the terms of the Witchcraft Act. *See supra* n. 6, Chilimampungwa & Thindwa.

³*Supra* n. 7 UNICEF Report at 9.

⁴Ludsin, H. ‘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).

⁵*Supra* n. 8, Mgbako & Glenn, at 404-408.

than that taken by a society whose objective is to punish. This focus must necessarily be multifaceted.

It must focus on the members of the community who are witches and who practice witchcraft, as well as those who believe they are the victims of harmful witchcraft. The failure to recognize all of the component parts to this analysis will result in a failed system and will likely perpetuate the problems inherent in the present system.

Depending on the objective of the legal system, a country might focus its legal intervention through a civil liability model, as opposed to a criminal model. It may focus on informal processes such as mediation as opposed to formal legal processes, such as trials. It is only through constant focus on the legal objectives hoped to be achieved, that the designers of the law have a chance of meeting those objectives.

What procedural protections should be put in place?

Determining what procedural protections to put in place in order to address the question of witchcraft will necessarily be a key component of any attempt to design a legal system addressing the practice of witchcraft. There may be significant merit to designing a legal system that focuses on early and informal procedures to address witch accusations. Anecdotal evidence suggests that this type of intervention is beneficial.¹ Moreover, there are already organizations and processes in some countries that could facilitate this early intervention. For example in Malawi, the work of the Paralegal Advisory Service provides great potential for early intervention in addressing some of the common problems associated with witchcraft.² There may be groups in other countries facing issues of witchcraft that could play a similar role.

Another consideration in designing the processes to address witchcraft is the degree of flexibility those processes should possess. Because belief systems that incorporate witchcraft continue to evolve,³ some degree of flexibility should be built into the procedural approaches adopted.

How will the law be enforced given the politics of the powerful?

A final consideration in designing a legal system to address questions of witches and witchcraft is the reality that the weak and vulnerable are most likely to be targeted with the false label of 'witch.'⁴ One of the ironies of false accusations of witchcraft is that those accusing a witch believe themselves to be the vulnerable. Unless the system that is implemented addresses this reality, it is likely that false targeting will continue.

In order to compensate for this, a country could implement special compensation schemes to redress false accusations. It could implement safe

¹*Id.*

²For examples of the role that groups like the Paralegal Advisory Service can play, *see id.*

³*Supra* n. 7, UNICEF Report at 5.

⁴*Id.*

houses for those falsely accused. If a country implemented criminal penalties for the practicing of evil witchcraft, it could implement special appellate protections such as to a court of human rights that specializes in these types of cases.¹

This author recognizes that these ideas alone are likely inadequate to protect the vulnerable. Those answers must come from the communities that are faced with the issue. They simply are presented as possible jumping off point in the discussion of how to guard against false accusations that target the vulnerable.

A proposal to broaden the definition of religion to include witches.

In reviewing the laws and scholarship regarding the legal status of witches, one factor appears to have been largely overlooked. Many (if not all) of the countries presently plagued by the problems associated with witchcraft have protections available that if properly tapped, might provide a strong starting point for designing a functional legal structure to deal with witchcraft. These countries could focus on the protections afforded to religion already inherent in their founding documents and constitutions.² For example, in Malawi, §33 of the Malawi constitution guarantees every person has the right to ‘freedom of conscience, religion, belief and thought, and to academic freedom.’³ Application and interpretation of this section may be the most important tool in developing a legal system that adequately addresses the issue of witchcraft.

For the most part, equating witchcraft with religion does not appear to have played a role in the legal status of witches in many places. That witchcraft is essentially the equivalent to religion has been recognized by those who have recently considered the issues of witchcraft and the law. ‘By attributing “inexplicable eventualities” and misfortune to supernatural forces, the belief in witchcraft does not appear strikingly different from many of the world’s major religions.’⁴ However, some scholars distinguish witchcraft from religion by asserting that unlike major religions, witchcraft is difficult to define ‘because it is not a coherent body of beliefs.’⁵

¹There is a concern voiced in countries where the law criminalizes false accusation that the law protects witches. This concern is no different from concerns voiced anytime there are procedural protections afforded to those accused of anti-social behavior.

² Presently, a case is pending before the Constitutional Court of Malawi that challenges section 6 of the Witchcraft Act of 1911 as unconstitutional in contravention of the plaintiff’s private belief that he is a wizard. *Supra* n. 21, Law Commission Review, at 8, *Medson Gibson Kachilika v. The Attorney General*, Constitutional Case no. 5 of 2007 (Lilongwe District Registry).

³Malawi Constitution, Article IV (Human Rights), § 33, available at [http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/4953f2286ef1f7c2c1257129003696f4/\\$FILE/Constitution%20Malawi%20-%20EN.pdf](http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/4953f2286ef1f7c2c1257129003696f4/$FILE/Constitution%20Malawi%20-%20EN.pdf), [11 June 2011].

⁴*See Supra* n. 17, Diwan at 355.

⁵*Id.* at 352 (citing Onesmus K. Mutungi, *The Legal Aspects of Witchcraft in East Africa with Particular Reference to Kenya* 104 (1977)).

In contrast, courts in the United States, have recognized the practice of witchcraft as a religion and thus, entitled to protection under the First Amendment Freedom of Religion clause.¹ In reaching this conclusion, the courts have rejected a focus on ‘the world’s major religions’ in defining what religions are protected under the United States Constitution. Instead, courts have focused on the question of whether an individual’s belief system holds that place in the person’s life that organized religion holds to an adherent of other organized, traditionally recognized religions.²

Considering the question of witchcraft from this perspective could have a number of benefits to those countries dealing with witchcraft. First, for countries such as Malawi that protect religion as a fundamental or constitutional right, it would provide a pre-existing overarching value that has been adopted by the country to use as a starting point for its analysis of the issue. For those countries that do not provide this level of protection, there may be international covenants that protect religious freedom that have been adopted by the country.³ Thus, international covenants could provide the same benefit as an already accepted norm recognizing the value of religious freedom. In either case, the country has a starting point that is already accepted in the country.

Additionally, considering religious freedom in this way would allow for maximum respect for non-dominant religious beliefs and practices and thus provides tolerance for diversity in an increasingly diverse world. Even in countries with largely homogeneous populations, there are inevitably variations and sub-sects of believers whose religious beliefs and practices fall outside of the mainstream.⁴ Protecting the variations in beliefs would promote the value of tolerance.

Importantly, use of this as a framework would not preclude the development of strategies to regulate both those practices of witchcraft that are perceived to cause societal harm, nor the clearly harmful responses by those who believe that they have been victimized by witchcraft. For example, in countries that criminalize false accusations of witchcraft, one of the common complaints by those who believe that they were victims of witchcraft is that the law protects witches.⁵ By protecting the belief in witchcraft, these individuals will understand that the law is designed to protect them also. Additionally, protecting the belief in witchcraft does not mean that any and all practices associated with that religion would be protected. However, it might mean that

¹See e.g., *Dettmer v. Landon*, 799 F.2d 929, 931 (4th Cir. 1986), *Kay v. Bemus*, 500 F.3d 1214 (10th Cir. 2007), *O’Brien v. Bureau of Prison*, 349 F.3d 399 (7th Cir. 2003).

²*United States v. Seeger*, 380 U.S. 163 (1964).

³See Article 18, International Covenant on Civil and Political Rights, and Article 18, Universal Declaration of Human Rights.

⁴For example, while Malawi is largely various denominations of Christianity, 12% of the population practices Islam, 3% is “other” and 4% are non-believers. About.com, Africa Travel, ‘Basic facts and map of Malawi.’ available at <http://goafrica.about.com/library/bl.mapfacts.malawi.htm>. [13 June 2012].

⁵C.F. Fisiy. (1990). *Palm Tree Justice in the Bertoua Court of Appeal: The Witchcraft Cases*. Leiden African Studies Center. at 4.

before a practice could be criminalized there should be an element of demonstrated intent to harm.¹

Moreover, this framework need not make the practice of witchcraft a defense to a law that is generally applicable.² For example, if the law prohibits murder, recognizing witchcraft as religion would not mean that someone could murder an albino simply because they believed that albino body parts had magical characteristics.³ Additionally, this analytical framework would not allow a person to assault someone because they believed that person to be a witch.

Instead, this starting point could frame the response to witchcraft and be used to design legal responses to harmful witchcraft. The legal mechanisms to address harmful witchcraft would eliminate the justification for resorting to vigilante violence to keep these practices in check. When there are legal solutions to harmful witchcraft, an accused could not claim they had no alternative but to use physical violence, a requirement of self defense.

While this framework is not the panacea for all the questions associated with witchcraft, it might provide a starting point that potentially holds some promise to attacking the problems of witchcraft.

Conclusion

Neither witchcraft nor the attendant legal problems will magically disappear. Any solution will require serious effort. The time has come for societies to invest that effort to make the legal problems associated with witchcraft a thing of the past.

It is imperative that each society facing the questions of witchcraft work toward finding a solution that is of its own making, one that is consistent with norms of human rights and cultural factors at work in that society. The proposals presented here are intended to encourage dialogue and action on this growing problem that harms far too many innocents.

¹The author recognizes that requiring an intent to harm as an element of a crime might not be a perfect elixir to cure the problems of false accusations of harmful witchcraft. However, the same could be said of requiring intent in any criminal case. Just as there are people wrongfully convicted of any crime that requires intent, so too there will likely be the same problem in this instance. Ideally the procedural protections put in place would minimize this. However, it provides a better measure of protection than allowing people to be convicted simply for practicing witchcraft.

²The US Supreme Court has held that the application of a law that is neutral and of general applicability does not implicate the freedom of religion.

³In some African countries, albinos are killed and dismembered by witchdoctors to bring good luck and 'to make people rich.' BBC, 'Tanzania fear over albino killing' (Dec. 17, 2007), available at <http://news.bbc.co.uk/2/hi/africa/7148673.stm> [12 June 2012].