CONFLICT BETWEEN STATE LEGAL NORMS AND NORMS UNDERLYING POPULAR BELIEFS: WITCHCRAFT IN AFRICA AS A CASE STUDY*

I. INTRODUCTION

Beliefs about the causation of life and death, fortune and misfortune, and good and evil change over time. Often, these beliefs are based on different concepts of human agency—concepts that have important implications for views on responsibility, culpability, and liability. As normative orientations change, societies undergo periods of profound transformation, and social and interpersonal tensions often develop in the process.

One example of this phenomenon is the friction that results when norms underlying popular beliefs are at odds with emerging state legal norms. People might feel that new standards of behavior established by the courts are difficult to comprehend. They may sense that these rules apply retroactively without prior notification—in essence, they may perceive the standards as "foreign." During this transition period, judges face hard choices in establishing what is "fair" under such emerging legal norms.

Examining judicial decisions where norms underlying popular beliefs clash with emerging state legal norms provides a window on how courts negotiate periods of major belief change. It is instructive to evaluate how judges in developing countries address these problematic issues, and to specifically identify the types of legal reasoning judges employ in attempting to integrate different value systems into a coherent rule of law.

This article treats African disputes about witchcraft as a case study of the conflict between state legal norms and norms underlying popular beliefs. The aim is to examine how these disputes challenge judges to produce fair outcomes when legal cultures clash and to

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profile and explore responses judges have offered. This article questions how judges should address cases in which norms underlying popular beliefs conflict with state legal norms by specifically focusing on judicial reasoning in criminal cases involving witchcraft.[1] Parts II–IV examine how judges have addressed spectral evidence, witchcraft as the basis for a defense of provocation, and imputations of witchcraft. Part V summarizes the findings of the previous three Parts, and suggests, based on these findings, effective ways for judges to handle cases involving witchcraft.

The author combed the law reports of several common law African countries for cases involving witchcraft. The author's original intent was to trace trends in the way judges decide these cases. Thus, the author initially sought to explore changes in the form of legal reasoning over time within several legal systems (specifically Botswana, Cameroon, Kenya, Lesotho, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe). Unfortunately, because law reporting has broken down in some of these countries and some new law reports are currently incomplete, it is difficult to clearly define these trends. Nonetheless, the available cases suffice for sketching the types of judicial reasoning employed in cases involving witchcraft.

Across large parts of the African continent, beliefs in witchcraft have "run amuck."[2] According to Robert B. Seidman, "[i]n Africa, as in Europe, witchcraft superstition seemingly flourishes in times of social instability."[3] The appearance of cases involving witchcraft appear to have increased, and they illustrate one challenge many African countries face.

Modern African states generally do not see witchcraft as legitimate, although they usually stop short of criminalizing popular beliefs in witchcraft. In contrast, legislative acts criminalizing the practice of witchcraft originate in the colonial era, and independent governments have not removed these statutes—and many continue to enforce them. For example, both South Africa and Zimbabwe's Witchcraft Suppression Acts make it a crime to accuse someone of

1. This article discusses one civil case, *K. Hassani v. Kithuku & Chali*, 1985 TLR 212 (HC) in Part II.B.3, *infra*, as an example of how judges address spectral evidence in cases involving witchcraft. This case is included because the author located few published cases involving spectral evidence. As the court noted, the *Hassani* case could have been tried as a criminal case under Tanzania's Witchcraft Ordinance of 1928 (Ch. 18 of the Laws of Tanzania), because it involved the practice of witchcraft. *Id*. at 216.

2. Peter Geschière & Cyprian F. Fisiy, *Domesticating Personal Violence: Witchcraft, Courts and Confessions in Cameroon*, 64 AFRICA 323, 324 (1994).

3. PARRINDER, WITCHCRAFT: EUROPEAN AND AFRICAN 205 (1958).

being a witch.[4] According to Tanzania's Witchcraft Ordinance, anyone who is caught practicing witchcraft, or who possesses witchcraft materials, can be charged with an offense.[5] Under Section 251 of the Cameroon Penal Code:

> 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.[6]

A. Significance

This note is significant because it provides insight into the effects of a clash between norms underlying popular beliefs and state legal norms. Alan Watson, a scholar on legal transplants, presents three tests to evaluate the utility of a source of law or method of lawmaking: (1) responsiveness of the law to serious needs and desires of a community; (2) comprehensibility of the law by the people who are affected by it; and (3) comprehensiveness of the law in providing certain answers to legal problems.[7] Watson argues:

> The more easily a source of law allows law to change when society undergoes change, the better the source of law. . . . The more comprehensible the law, the more satisfactory the source of law. . . . The more certainly the existing law can provide an answer to the legal problems that arise, the more satisfactory is the source of law.[8]

Thus, a lack of responsiveness, comprehensibility, and comprehensiveness makes the law less familiar to, and less accessible by, the community it serves, essentially rendering the law ineffective. Further, "[a] law that fails to take into account the social ethos of the

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4. §1(a) Witchcraft Suppression Act No. 3 of 1957 (amended in 1997) (South Africa); §3 Witchcraft Suppression Act of 1890 (Ch. 9:19) (amended in 2001) (Zimbabwe); §4 Witchcraft Ordinance of 1928 (Ch. 18 of the Laws of Tanzania) (amended in 1956).

5. §3 Witchcraft Ordinance of 1928 (Ch. 18 of the Laws of Tanzania) (amended in 1956).

6. CYPRIAN F. FISIY, PALM TREE JUSTICE IN THE BERTOUA COURT OF APPEAL: THE WITCHCRAFT CASES 6 (1990). See André Belombé Yombi, *La répression de la Sorcellerie dans le Code Pénal Camerounais: Le cas du Kong dans le Ntem*, 5 JAHRBUCH FÜR AFRIKANISCHES RECHT 3, 3–12 (1986), for a detailed discussion of witchcraft in the Cameroon Penal Code.

7. ALAN WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY 112 (1984). Watson discusses these tests in the context of his proposed two-tier method of lawmaking. Based on Watson's three tests, a "satisfactory" method of lawmaking is one that creates laws that are familiar to, and accessible by, a community that the law serves. This implies that a satisfactory method of lawmaking is one that reconciles a conflict between state legal norms and norms underlying popular beliefs.

8. *Id*.

community it is supposed to guide risks being ignored and hence, remaining a dead letter, incapable of inducing change."[9]

The effect of a conflict between state legal norms and norms underlying popular beliefs in witchcraft, as seen in several African countries, is exemplary of Watson's argument. According to Kenyan legal scholar Onesmus K. Mutungi, killing a witch "is not only approved but . . . is also a praiseworthy service in the eyes of" many communities.[10] Thus, the judicial practice of punishing individuals who kill alleged witches creates a conflict between state legal norms and norms underlying popular beliefs. This conflict reduces the law's effectiveness, as many people believe "that the law is in collusion with the witches."[11] 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.

These kinds of challenges extend beyond the boundaries of witchcraft. For example, norms underlying popular beliefs and state legal norms clash when immigrants to the United States perform child marriages, which are prohibited by U.S. law.[12] Although it may be acceptable, even encouraged, in a culture for girls under the age of eighteen to marry adult men, according to Western cultural and legal norms, this is prohibited. Immigrants who practice child marriages potentially face imprisonment, and their children could be taken into protective custody.[13] Thus, the attempt at the reconciliation of popular and legal norms profiled in this article is useful in other contexts.

B. Witchcraft

Beliefs in witchcraft take many different forms. In Kenya, for example, one society's definitions of witches and witchcraft often differ from those employed in other societies.[14] One common notion underlying witchcraft is the belief that supernatural forces may be

9. ONESMUS K. MUTUNGI, THE LEGAL ASPECTS OF WITCHCRAFT IN EAST AFRICA WITH PARTICULAR REFERENCE TO KENYA 104 (1977).

10. *Id*. at 59.

11. *Id*.

12. Don Terry, *Child Brides in Middle America: Mideast Culture Clashes with the Law*, INT'L HERALD TRIBUNE, December 3, 1996, at 11.

13. *Id*.

14. MUTUNGI, *supra* note 9, at xviii.

used as a means to achieve a personal goal (e.g., harm, profit, fertility). In other words, "[w]itchcraft 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."[15] Beliefs in witchcraft are often used to explain fortunes and misfortunes, good and evil, and life and death. According to Mutungi:

> In the so-called civilized communities, inexplicable eventualities and misfortunes are attributed to fate, bad luck, or the will of God. The native African seeks his explanation in witchcraft. What must be noted, though, is that in both communities, the struggle is the same—a search for causal explanation for misfortunes.[16]

In many African societies, "every evil and misfortune that is incapable of rational explanation is attributed to witchcraft."[17] According to the group Research on Poverty Alleviation (REPOA), belief in witchcraft "[t]akes its origin . . . in the psychological need to provide an outlet for repressed hostility, frustration and anxiety. It provides a way to explain serious misfortunes and render those who suffer them blameless in the eyes of society."[18]

By attributing "inexplicable eventualities" and misfortunes to supernatural forces, the belief in witchcraft does not appear strikingly different from many of the world's major religions. However, unlike major religions, witchcraft is difficult to define "because it is not a coherent body of beliefs."[19] Witchcraft attributes supernatural powers to a human being, either through ascribing these attributes to a pact with the devil, similar to accusations made in New England during the Salem Witch Trials, or through other means. When deciding cases involving witchcraft during the 1930s, Sudanese courts arrived at

> a very strange dichotomy. Killing a human being, believing him to be a ghost or supernatural creature, is not an offense, and yields an acquittal. Killing a human being with supernatural powers [i.e., a witch] even if he is believed to have used them to bewitch the

15. JENNIFER WIDNER, BUILDING THE RULE OF LAW 380 (2000).

16. MUTUNGI, *supra* note 9, at 105.

17. *Id.* at xvii.

18. *Gender and Witchcraft Killings in Tanzania*, Dar es Salaam: TOMRIC Agency, March 27, 2000, *available at* http://allafrica.com/stories/printable/200003270107.html (on file with Duke Journal of Comparative and International Law).

19. MUTUNGI, *supra* note 9, at xviii.

> defendant, constitutes murder, and merits the death penalty or life imprisonment.[20]

This demonstrates the potential complexity of cases involving witchcraft. Witchcraft challenges ideas of human agency. For example, an alleged witch may be viewed either as a supernatural being or a human being with supernatural powers. If judges choose to determine how a defendant perceives a witch, a conviction of murder could be reduced if the defendant intended to kill a supernatural being and not a human being with supernatural powers. Based on the cases discussed in this article, most African beliefs in witchcraft involve the perception that a witch is a human being with supernatural powers.

Disputes involving witchcraft arrive at courts in several ways. In only a few places today are there still trials of people accused of practicing witchcraft, although legislation such as the Witchcraft Suppression Acts long ago made it possible to punish people who openly practice witchcraft or accuse others of doing so.

Recently, judges in southeastern Cameroon have meted out harsh sentences to accused witches who confess to practicing witchcraft.[21] This judicial treatment is contrary to local community norms. Communities often rehabilitate people who confess to practicing witchcraft by neutralizing their powers and re-socializing them.[22]

In South Africa and Zimbabwe, accusations of witchcraft brought to courts often come in the form of "imputations" of witchcraft. According to *S. v. Mmbengwa*, imputing means something more than mere naming.[23] Imputation "can take any form as long as it is clear to the unbiased beholder that the intention to attribute a certain characteristic exists in the mind of the imputor which finds expression in some act or attitude."[24] Imputations of witchcraft are

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20. LEO KATZ, BAD ACTS & GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 169 (1987). See KRISHNA VASDEV, THE LAW OF HOMICIDE IN THE SUDAN (1978), for more information on cases involving witchcraft in Sudan.

21. These confessions could be coerced, as "[i]t is . . . extremely difficult to get a clear picture of how interrogations are conducted by the gendarmes. No law officer ever admits to any beatings or torture. Yet, some have raised such claims during trials." FISIY, *supra* note 6, at 27.

22. FISIY, *supra* note 6, at 25.

23. 1988 (3) SA 71, 73 (VSC).

24. *Id*. at 73.

essentially a type of defamation, and they are criminalized in many African societies through legislation prohibiting acts of witchcraft.[25]

In Tanzania, the courts have reviewed several cases involving the killing of alleged witches. In these cases, defendants employ genuine belief in witchcraft as a defense to murder and manslaughter. In other words, defendants argue that the deceased's threats or actions allegedly involving witchcraft are argued to constitute such provocation that the defendant killed the deceased in the heat of passion. Part III of this article examines whether judges follow a particular standard of reasonableness when deciding these cases.

Beliefs in witchcraft are prominent on the African continent, and witch killings are alarmingly high. For example, in Tanzania approximately four hundred alleged witches were killed between 1997 and 2000 in the western part of the country, mainly among the Sukuma ethnic group.[26] Also, reports in other regions "in the western part of Tanzania[] show that more than 500 people, most of them women, were killed in various witchcraft incidents" over a four-year period.[27]

The current challenge presented by popular beliefs in witchcraft to new normative orientations in Africa is similar to the Western experience with witchcraft. Before the rise of Christianity, beliefs in witchcraft existed at the popular level in Europe. Witchcraft was practiced by "cunning folk," a term for practitioners of "white magic." This type of witchcraft involved the use of charms and supernatural forces for fortune telling, fertility rituals, healing, "the casting of spells, the making of storms, converse with spirits, [and]

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25. Under Zimbabwe's Witchcraft Suppression Act,

> Any person who imputes to any other person the use of non-natural means in causing any disease in any person or animal or in causing any injury to any person or property, that is to say, who names or indicates any other person as being a wizard or witch shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

§3 Witchcraft Suppression Act of 1890 (Ch. 9:19) (amended in 2001).

South Africa's Witchcraft Suppression Act punishes anyone who: "imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard." §1(a) Witchcraft Suppression Act No. 3 of 1957 (amended in 1997). If the imputation of witchcraft results in someone being killed, "or where the accused has been proved to be by habit or repute a witchdoctor or witch-finder," the accused can be imprisoned "for a period not exceeding twenty years." *Id.*

26. AMNESTY INTERNATIONAL, ANNUAL REPORT 2000—TANZANIA (on file with Duke Journal of Comparative and International Law).

27. *Gender and Witchcraft Killings in Tanzania*, *supra* note 18.

sympathetic magic."[28] With the rise of Christianity during the Dark Ages, popular pagan beliefs in witchcraft were frowned upon and suppressed by the church elite.[29] During the Middle Ages, religious institutions exploited pagan beliefs in witchcraft, constructing an "organized, systematic 'demonology'" that fueled the an anti-witch frenzy in the sixteenth and seventeenth centuries.[30]

According to H. R. Trevor-Roper, witch-hunts in early modern Europe were an attempt by organized religion to control certain segments of the population[31] by accusing non-conformists of practicing witchcraft.[32] English colonists brought beliefs in witchcraft to New England, location of the infamous Salem Witch Trials, which only ended after criticism of the admission of spectral evidence in trials,[33] and after people of high status were accused.[34]

In Africa, norms underlying beliefs in witchcraft pose a significant challenge to state legal norms underlying the new postcolonial normative orientation towards modernization. In Cameroon, for example, youths practiced a new form of witchcraft called *gbati*, often allegedly "directed against modern elements in the village."[35] In one case, the practice was directed at a school, and in another case, it was allegedly used to prevent the construction of a Protestant church.[36] In Cameroon, new trends in beliefs in witchcraft demonstrate witchcraft's perceived "leveling impact," which purportedly reduces inequalities and as a result poses a threat to modern forms of authority and wealth.[37] Further, in southeastern Cameroon, accusations of witchcraft are frequently "the result of the

28. H.R. TREVOR-ROPER, THE EUROPEAN WITCH-CRAZE OF THE 16TH AND 17TH CENTURIES 91 (1978)

29. *Id*.

30. *Id*.

31. *See id*. at 106–7.

32. *See id*. at 108–9.

33. PAUL BOYER & STEPHEN NISSENBAUM, SALEM POSSESSED: THE SOCIAL ORIGINS OF WITCHCRAFT 18–19 (1974).

34. *See* MARION L. STARKEY, THE DEVIL IN MASSACHUSETTS, A MODERN INQUIRY INTO THE SALEM WITCH TRIALS 226 (1969).

35. Cyprian F. Fisiy & Peter Geschière, *Judges and Witches, or How is the State to Deal with Witchcraft? Examples from Southeastern Cameroon*, 118 CAHIERS D'ÉTUDES AFRICAINES 135, 141 (1990).

36. *Id*.

37. *Id*.

jealousy and hatred of the rural poor against the younger and more advanced urban based elite."[38]

The practice of witchcraft has also been used as a device by the elite to obtain and secure authority. In southeastern Cameroon, the elite have employed the fear of witchcraft to emphasize their power over others, and they manipulate "witchcraft beliefs, through the press and public rumour, to support the otherwise fragile basis of [their] authority."[39] In Tanzania, witchcraft has been used by "government officials [who] undergo ritual[s] believing that they would get rich or secure power especially [while] . . . campaigning for the general elections."[40]

II. SPECTRAL EVIDENCE

During the Salem Witch Trials in Salem, Massachusetts, allegedly possessed girls relied on visions to detect the presence of witches among the general populace. Magistrates admitted these visions, or specters, of the alleged witches into evidence to imprison accused witches until they were brought to trial before the infamous Court of Oyer and Terminer.[41] After fasting, prayer, and executions failed to stop the flurry of witchcraft accusations, Salem inhabitants became uneasy.[42] Increase Mather's published sermon, *Cases of Conscience: Concerning Evil Spirits Personating Men*, criticized the use of spectral evidence, and eventually the Court of Oyer and Terminer was dissolved and the executions ceased.[43] A new court that refused to consider spectral evidence tried accused witches remaining in prison, and the Salem Witch Trials eventually ended.[44]

In *Salem Possessed: The Social Origins of Witchcraft*, Paul Boyer and Stephen Nissenbaum define spectral evidence as "testimony about supernatural visitations from some demonic creature . . . who

38. Cyprian F. Fisiy & Michael J. Rowlands, *Sorcery and Law in Modern Cameroon*, 6 CULTURE & HISTORY 63, 70 (1989).

39. *Id*. at 83.

40. *Witchcraft Notion Creeping in Urban Areas*, Dar es Salaam: TOMRIC News Agency, June 30, 2000 (on file with Duke Journal of Comparative and International Law).

41. *See* BOYER & NISSENBAUM, *supra* note 33, at 6; 18–19. The Court of Oyer and Terminer's "trial records have not survived[;] . . . [therefore,] no one knows how much weight [the Court] gave to the spectral testimony gathered by the magistrates in their preliminary investigations." *Id*. at 19.

42. *Id*. at 19.

43. *Id*. at 19–20.

44. *Id*. at 20.

appear[s] in the specter (that is, shape) of an accused witch."[45] A diviner, witch doctor, or in the case of the Salem Witch Trials, a possessed person, sees the image or specter of an accused witch, and this "spectral evidence" is seen as confirming the accused as a witch.

One of the main characteristics—and problems—of spectral evidence is that it cannot be verified, since "specters were usually visible only to the person or persons for whom the visitation—vision, really—was intended. Others might be present, but they could see nothing."[46] In the late seventeenth century, a Scottish prosecutor argued that "[i]t is part of the witches' purchase from the devil that they cannot be seen at some occasions; so that the abominations committed then would remain unpunished if such witnesses [who offer spectral evidence] were not admitted."[47] Authorities had to trust that the possessed person, diviner, or witch doctor did not have opportunistic motives for providing the spectral evidence. They also had to trust that the person who provided the spectral evidence did not make a mistake when identifying a specter or image.

It comes as no surprise then that spectral evidence is viewed with great skepticism. For example, during the Salem Witch Trials, "magistrates always took pains to buttress [spectral evidence] where they could with other, more empirical forms of evidence."[48] The admissibility of spectral evidence in cases involving witchcraft during the Salem Witch Trials highlights the conflict between popular norms and emerging legal norms. What follows is an examination of spectral evidence in African cases involving witchcraft, drawing extensively on sources about the Salem Witch Trials and witch trials in Europe, since the issue of spectral evidence has not been explicitly discussed in the literature on law and witchcraft in Africa. Part II.A examines the potential dangers inherent in the admission of spectral evidence, Part II.B examines how judges in African countries have addressed the issue of spectral evidence, while Part II.C attempts to provide a cogent summary of trends in judges' reasoning vis-à-vis spectral evidence.

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45. *Id*. at 16.

46. *Id*. at 17.

47. James B. Thayer, *Trial by Jury of Things Supernatural*, *in* LEGAL ESSAYS 348 (Ezra Ripley Thayer ed., 1908).

48. BOYER & NISSENBAUM, *supra* note 33, at 18.

A. Dangers of Spectral Evidence

Spectral evidence is an unverifiable, intangible, and metaphysical type of evidence. If judges give significant weight to spectral evidence when deciding cases, they are essentially placing the fate of an accused in the hands of a witch doctor or possessed person. There is no way to ensure that opportunistic motives do not underlie the allegedly possessed person or witch doctor's accusation.

The principal victim of spectral evidence is an accused witch. As seen below, if convicted of being a witch, an accused witch often faces capital punishment, large fines or imprisonment. If acquitted or pardoned, an accused witch often faces ostracism, assault, or death. For example, in her 1703 petition to Massachusetts' General Court, Abigail Faulkner states:

> When many were accused and Imprisoned att Salem as Witches and some Executed, my selfe was accused by the afflicted, who pretended to see me by theire Spectrall Sight (not with theire bodily eyes) and that I afflicted them, upon whose accusations (and theirs only) I was Examined, Imprisoned, and brought to tryall. These being all that gave in any Evidence against me upon Oath, yet the Jury . . . brought me in guilty, and the Sentence of Death was passed upon me.[49]

Fortunately, Faulkner was pardoned because she filed her petition during a period when the Salem Witch Trials were ending and spectral evidence was no longer being considered in trials.[50] Nevertheless, Faulkner suffered as a result of the accusation made against her. In her petition, she states:

> The pardon having Soe farr had its Effect as that I am yet suffered to live, but this only as a Malefactor Convict upon record of the most heinous Crimes that mankind Can be Supposed to be guilty of. Which besides its utter Ruining and Defaming of my Reputation, will Certainly expose my selfe to Imminent Danger by New Accusations, which will therby be the more readily believed, [and] will Remaine as a perpetual brand of Infamy upon my family.[51]

Faulkner's petition provides a telling case study of how an accusation of witchcraft often harms the reputation of an accused and is instructive in our analysis of modern witchcraft controversies in Africa.

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49. CAROL F. KARLSEN, THE SALEM WITCHCRAFT OUTBREAK OF 1692 (manuscript at 35, on file with author).

50. *Id*.

51. *Id*. (manuscript at 35–36, on file with author).

In southeastern Cameroon, the admission of spectral evidence in cases involving witchcraft often results in accused witches receiving harsh sentences of imprisonment and fines. For example, in a case in Cameroon's Bertoua Court of Appeal:

> [A] fairly rich planter . . . felt that all his richness [*sic*] were of no avail. His investments remained without profit. He was especially worried by the fact that his children, despite all the tuition fees he paid, never had success at school. Therefore, he went to consult a witch doctor who *saw* that a poor neighbour . . . had thrown a spell on him. The planter, supported by the witch doctor, lodged a complaint with the *gendarmes* and the accused, despite all his denials, was sentenced to five years of jail.[52]

In this case, spectral evidence resulted in the accused witch being sentenced to a lengthy term of imprisonment for an act he denied committing. While the admission of spectral evidence is unusual in African courts today, it does occasionally occur.

B. How Judges Address Spectral Evidence

1. *Zimbabwe.* In the case *S. v. Muleya & Others*, a group of family members appealed their fifteen- and twenty-year prison sentences, following their conviction for murder.[53] In this case, three young children died in "quick succession in unexplained circumstances."[54] Their mother, Juliet Munkuli, consulted an alleged spirit medium to determine the cause of her children's deaths. The spirit medium held up a mirror. According to the spirit medium, the image of a male villager appeared in her mirror "carrying the corpse of one of the dead children. Two further corpses of Juliet's children also appeared in [the spirit medium's] mirror . . . ."[55]

Juliet's relatives gathered with other villagers to confront the man whose image had supposedly appeared in the mirror. At the gathering, the man admitted that he had caused the death of Juliet's children by witchcraft. Juliet's relatives demanded that he bring them the *muti* (or charm) that he had used to kill the children. Escorted by Juliet's relatives, the man went home to fetch the *muti*, and he later returned to the gathering with his hands bound behind his back, dragging a sledge. One of Juliet's relatives was not satisfied that the

52. Fisiy & Geschière, *supra* note 35, at 143 (first emphasis added) (case citation not provided by authors).

53. 1982 (2) ZLR 359 (SC).

54. *Id*. at 360.

55. *Id*. at 361.

man had disclosed all his *muti*, and the relative "demanded that the [man] produce a certain water bag whose existence was denied by [the man]."[56] The man was then forced to lie on his back, his sledge was placed on top of him, along with heavy rocks and soon after he was pronounced dead.[57]

In this case, the claim that the victim's image had appeared in the spirit medium's mirror constituted spectral evidence. The judge commented that the spectral evidence was "mind-boggling and remains unexplained,"[58] and he viewed it with apparent confusion and perplexity. While the judge did not believe that the spectral evidence was legitimate or credible, he did not explicitly dismiss it from consideration. The judge chose not to delve into the issue of spectral evidence, instead opting to leave it "unexplained."[59]

2. *South Africa.* In *R. v. Hlupo*,[60] a defendant appealed his conviction and sentence for violating South Africa's Witchcraft Suppression Act by imputing the use of witchcraft to residents of his village. Based on a statement by his daughter shortly before her death, the defendant believed that the death was caused by an act of witchcraft committed by a group of women.[61] The defendant arranged a meeting, and ordered his sons to tell the village gathering what his daughter told him. At the meeting, a village headman accused the women of being witches based on the defendant's claims and ordered them to leave the village.[62]

Although the judge in *Hlupo* dismissed the defendant's appeal of his conviction, he permitted the defendant to appeal his sentence. The judge determined that the defendant believed his daughter's statements to be true[63] and concluded "that the [defendant] adopted as his own the imputation of witchcraft which his dying daughter made, and he adopted it with the object of getting the [accused women] declared to be witches at this public meeting; and in fact they were so declared to be witches."[64]

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56. *Id*.
57. *Id*. at 361–62.
58. *Id*.
59. *Id*.
60. 1969 (4) SA 98, 99 (R., A.D.)
61. *Id*. at 100.
62. *Id*.
63. *Id*.
64. *Id*. at 101.

Although the judge did not explicitly address the use of spectral evidence by the defendant's daughter, he recognized that the defendant believed his daughter's accusation:

> [I]f the whole background of this case is taken into account—the fact that the [defendant] appears to be a simple tribesman who genuinely believed that his daughter had been killed by these witches—then I think . . . that the chances of an appeal against sentence succeeding are significantly good.[65]

Thus, the judge *indirectly* considered spectral evidence by allowing the defendant to appeal his sentence, because the defendant "appeare[d] to be a simple tribesman" who believed his daughter's statement that the accused women were witches.

Spectral evidence also appears in an earlier case reported in the South Africa Law Reports, *R. v. Maruberera*.[66] In this instance, the accused, an alleged witch doctor, was convicted of unlawfully imputing the use of witchcraft to a man named Sigumba.[67] Sigumba had consulted the witch doctor in an effort to find out the cause of his grandchild's death. The witch doctor claimed he had a vision of a spirit that emerged from Sigumba who killed the grandchild. As a means to appease the spirit and cause it to disappear, the witch doctor encouraged Sigumba to slaughter a goat at the site of the grandchild's death. Apparently distressed at the notion that he was somehow responsible for his grandchild's death, Sigumba was found dead of an apparent suicide the day after consulting the witch doctor. As a result, the state prosecuted the witch doctor for making an unlawful imputation of witchcraft against Sigumba.

The judge set aside the witch doctor's conviction and sentence. The judge reviewed the evidence recounting the witch doctor's alleged vision describing the death of Sigumba's grandchild and found "that it was the spirit of Sigumba that had killed the child, and, so far from indicating an identity between the spirit and Sigumba, [the witch doctor] did rather the opposite."[68] The judge referred to the witch doctor's statements encouraging Sigumba to slaughter the goat as a

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65. *Id*.

66. 1968 (1) SA 206 (R.).

67. A witch is a female practitioner of witchcraft and a wizard is a male practitioner of witchcraft. S. v. Mafunisa, 1986 (3) SA 495, 499 (VSC). See *id.* for a discussion of the difference between the terms wizard and witch. Some of the cases the author located do not use the word wizard when referring to a male practitioner of witchcraft. For the sake of convenience, the author will use the word "witch" when referring to both male and female practitioners of witchcraft.

68. *Maruberera*, 1968 (1) SA at 207.

means to vanquish the evil spirit, stating: "This, I think, indicates the lack of identity between the spirit and Sigumba, and the lack of any active use of non-natural means by Sigumba. It was not even said that Sigumba was at fault in having failed earlier to appease the spirit."[69]

After analyzing the witch doctor's description of his conversation with Siguma and his alleged vision, the judge determined that "although it may be some indication that Sigumba's primitive mind took the imputation as one of witchcraft, and even one of responsibility for the child's death, it is of itself insufficient to bring the charge home to the [witch doctor]."[70] Thus, the witch doctor was only morally responsible for the Sigumba's death. The judge believed it was tragic that Sigumba felt responsible for his grandchild's death, because his "primitive mind" misinterpreted the spectral evidence to mean that he and the spirit shared an identity, but he did not find the witch doctor legally culpable for Sigumba's death.[71] While it appears that the judge in this case believed that he had to interpret spectral evidence to make his decision, he was either unwilling, or did not consider, bringing in an expert on matters of witchcraft to interpret such spectral evidence.

3. *Tanzania.* In the civil case *K. Hassani v. Kithuku & Chali*, the plaintiff, an elderly man named Karoyo Hassani, sought damages for slander by an alleged local witch doctor.[72] The defendant had publicly accused Hassani of practicing witchcraft in front of a large crowd of assembled villagers. The alleged witch doctor had led the group to Hassani's house,[73] where he publicly announced: "I will talk about your wizardry so that the people may know about it as well."[74] The witch doctor claimed:

> that there was a pot in the house which contained witchcraft; that there was a second pot with two edges in the bed room [sic]; that the said two edges used to turn into venomous or deadly snakes which bit people; that there was a small drum in the roof which was made of female genitals; that its drum stick [*sic*] was a penis; and that its purpose was for summoning all witches and wizards.[75]

69. *Id*. at 208.
70. *Id*.
71. *Id*.
72. 1985 TLR 212 (HC).
73. *Id*. at 214.
74. *Id*.
75. *Id*.

The witch doctor also claimed that "the rice which [Hassani] was preparing and feeding to people during *Maulid* celebrations was no rice at all; it was goats' droppings, and the meat was not beef at all but meat of baboons and hyenas."[76] Hassani gave the witch doctor permission to remove the alleged objects from his house, but the witch doctor said, "circumstances were not favourable;" and that he would return the next day.[77] The witch doctor then dispersed the crowd and told them to return the next day.

The judge awarded Hassani 25,000 Tanzanian shillings in general damages. The judge found the witch doctor defamed Hassani by claiming that Hassani practiced witchcraft and maintained the accoutrements of witchcraft in his dwelling. The judge found the witch doctor's words were "likely to expose [Hassani] to hatred, ridicule, or contempt or calculated to injure him in his social standing in his community.[78] Thus, the judge viewed the witch doctor's words as placing Hassani at risk of potential harm or death, stressing that the incident "reveals a somewhat disgusting and absolutely nauseating episode."[79] Thus, the judge in *Hassani* addressed the spectral evidence seriously; rather than openly questioning its accuracy, he chose to focus on its potential for causing harm. Within the context of Hassani's village, such an utterance was seen as creating a hostile, and potentially dangerous, environment.

4. *Cameroon.* The following case provides an intriguing example of the weight given spectral evidence by magistrates in southeastern Cameroon. When deciding cases involving accusations of witchcraft, Cameroonian judges tend to rely heavily on spectral evidence provided in the testimony of witch doctors.[80] In *Affaire Medang Jacques & Mpome Moïse c/ Ministère Publique Mpel Mathurin & Baba Denis*,[81] the inhabitants of a village "were terrified by . . . numerous inexplicable deaths . . . , failure in school, and the strange noises that were coming from [a villager's] residence."[82] A renowned witch doctor, Baba Denis, was invited to detect the source of the misfortunes that plagued the village. Based on his own visions,

76. *Id*. at 215.

77. *Id*.

78. *Id*. at 216.

79. *Id*. at 213.

80. *See* FISIY, *supra* note 6, at 14.

81. FISIY, *supra* note 6, at 12–13 (discussing *Affaire Medang Jacques & Mpome Moïse c/ Ministère Publique Mpel Mathurin & Baba Denis*, Arrêt No. 8/COR du 04.10.1983).

82. FISIY, *supra* note 6, at 12.

the witch doctor accused two villagers of using witchcraft to cause the calamities in the village. He led the frightened inhabitants of the village to the first accused villager's residence

> in order to unmask witchcraft objects. Brandishing a charcoal pressing iron full of fire in his left hand, [the witch doctor] recited his incantations in a bid to locate the objects in question. In the process, he designated [the first accused villager's] bed as containing some of the objects. There, a parcel containing hair from a panther's upper lip was found, enough to decimate an entire village.[83]

According to the witch doctor,

> the unexplained noises were caused by mystical planes taking off and landing on a mystical landing strip in [the first accused villager's] house. [The first accused villager] used these *'aeronefs magiques'* with his accomplices to reek [*sic*] havoc in the neighbourhood and the neighbouring village. . . . [I]n his bid to neutralize the landing strip, [the witch doctor] was mystically attacked by [the first accused villager]. Suddenly, [the witch doctor] realized that his strength had been drained away. He almost collapsed and was helped away limping. Later in the day, he proudly claimed that he had only survived this . . . attack by defeating [the first accused villager] in their mystical fight.[84]

The second accused villager allegedly used "hair from a panther's upper lip, enough to decimate an entire village," to kill the village school's headmaster.[85] A schoolboy found the panther hair and presented it to the witch doctor, who claimed that his incantations had caused the boy to find the hair.[86]

Based on the Baba Denis' testimony and supported by the physical evidence of the panther's hair, the two accused villagers were convicted of practicing witchcraft, in violation of Section 251 of the Cameroon Penal Code. Both defendants were sentenced to five years imprisonment and fined 30,000 francs. The first accused villager was sentenced to pay an additional 40,000 francs in damages to the witch doctor.[87]

The trial of the accused villagers took place in an inquisitorial civil forum, and the judge appeared to seriously consider the witch doctor's spectral testimony without taking into account the accused villagers' arguments to the contrary. According to legal

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83. *Id*.
84. *Id*.
85. *Id*.
86. *Id*.
87. *Id*. at 13.

anthropologist Cyprian F. Fisiy, in southeastern Cameroon "[t]he judge has as his ultimate guide his conscience—*l'intime conviction du juge* (the firm conviction of the judge). When he is satisfied that a good case has been established, he will not hesitate to convict the defendant"[88] in cases alleging the criminalized practice of witchcraft. Indeed, witch doctors play a pivotal role in cases involving accusations of witchcraft, and "[t]heir assertions, especially when backed by material evidence . . . are readily accepted by the Courts . . . [located in southeastern Cameroon]."[89] In *Baba Denis*, the judge viewed the witch doctor's evidence as conclusive, without considering the witch doctor's possible opportunistic motives for making accusations of witchcraft and providing spectral evidence. According to Fisiy, "the competence [of witch doctors] is relative and depends on the apparent gain to be obtained from making or not making such accusations. For the courts to accept their evidence without critical scrutiny might be very dangerous for the rights of the accused."[90] This case is similar to Abigail Faulkner's petition discussed earlier in Part II.A, in which the trial judge relied heavily on spectral evidence provided by an "afflicted" witness describing subconscious visions in arriving at his decision that the accused was a witch.[91]

C. Summary

These cases provide a snapshot that, with the exception of southeastern Cameroon, African judges tend to view spectral evidence with a jaundiced eye, and they generally try to avoid interpreting it. Certain judges in southeastern Cameroon, where witchcraft norms continue to remain prevalent, generally continue to consider spectral evidence in their decisions.[92] By readily accepting this spectral evidence, southeastern Cameroonian judges have chosen to subordinate state legal norms to norms underlying popular beliefs in local cultures where witchcraft beliefs remain prevalent.

III. REASONABLENESS AND PROVOCATION

In cases involving witchcraft, defendants often claim a "heat of passion" defense to homicide charges, arguing that they acted to

88. *Id*. at 31 (translation by author).
89. *Id*. at 13.
90. *Id*. at 14.
91. KARLSEN, *supra* note 49 and accompanying text.
92. *See* FISIY, *supra* note 6, at 31.

protect themselves against the allegedly provocative behavior of an accused witch. Defendants argue their provocation was reasonable, and that consequently, their actions should be excused. Judges consider the reasonableness of the defendants' perceptions by asking whether a reasonable person would have perceived the context of the action as the defendant did. As such, "reasonableness" becomes a window into the way judges balance norms underlying popular beliefs and state legal norms.

A. Provocation in the Common Law

In the sixteenth century, criminal law formally acknowledged "homicides committed in the course of a sudden quarrel were less culpable than more deliberate felonious homicides."[93] In 1628, types of homicide were distinguished. Murder was defined as being committed with malice aforethought, and manslaughter as being committed in the "heat of passion caused by adequate provocation."[94] Provocation is defined as "[s]omething (such as words or actions) that arouses anger or animosity in another, causing that person to respond in the heat of passion. 'Adequate' provocation can reduce a murder charge to voluntary manslaughter."[95]

In the mid-eighteenth century, the law of provocation "reflected community norms or value judgments as to the relative degrees of moral culpability to be assigned to offenders depending upon the circumstances in which they had lost self-control."[96] These value judgments focused on the defendant's state of mind and the situation in which the homicide occurred.[97] In the mid-nineteenth century, judgments about what constituted provocation were seen "as a question of law to be determined by the judge."[98] However, in "borderline cases . . . judges began to leave the hard questions to the jury."[99] The twentieth century "witnessed a progressive relaxation" in judges making most of the value judgments, with the jury deciding the borderline cases.[100] Thus, "the reasonable man made his appearance

93. Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 446 (1981).

94. *Id*.

95. BLACK'S LAW DICTIONARY 1241 (7th ed. 1999).

96. Donovan & Wildman, *supra* note 93, at 447.

97. *Id*.

98. *Id*.

99. *Id*.

100. *See* E.O. Isedonmwen, *A Requiem for Provocation?*, 32 J. OF AFR. L. 194, 197 (1988).

in the criminal law."[101] The reasonable man test was developed to help juries make decisions in borderline cases. The reasonable man was allegedly "universal, classless, sexless," and reflective of community norms.[102] In the early twentieth century, the reasonable man was "a paragon of excellence both physically and mentally."[103] As seen in the British case *Director of Public Prosecutions v. Camplin*,[104] this trend toward reasonableness continued through the late twentieth century; however, the reasonable man standard has become much more subjective.

In *Camplin*, the House of Lords held "[f]or the purposes of the law of provocation the 'reasonable man' was not confined to the adult male; the expression meant an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it was today."[105] Further, "the 'reasonable man' is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused but in other respects sharing such of the accused's characteristics . . . [that] would affect the gravity of the provocation to [the accused]."[106] One must not only ask whether a reasonable person "would in like circumstances be provoked to lose his self-control, but would also react to the provocation as the accused did."[107] Expanding on this concept, one could argue when a traditional African who genuinely believes in witchcraft is provoked by a threat of harm by witchcraft, he or she could be reasonably provoked. The greater the provocation, the more likely a person would lose self-control and react in a fit of rage.

In theory, a trier of fact could use a reasonable traditional African standard when deciding cases involving witchcraft in which the defense of provocation is raised, however, it is unlikely that a defendant accused of killing a person in reaction to a provocative act based on witchcraft would have his or her punishment reduced simply because killing a witch is encouraged in the defendant's community. Nevertheless, one could argue that the defendant could have his or

101. *Id*.
102. Donovan & Wildman, *supra* note 93, at 448.
103. Isedonmwen, *supra* note 100, at 198.
104. 1978 (2) All E.R. 168 (H.L.).
105. *Id*. at 168.
106. *Id*. at 169.
107. *Id.*

her conviction reduced from murder to manslaughter if the judge takes into account that a reasonable person from the defendant's community would have acted in the same manner.

According to Ugandan legal scholar Daniel D. N. Nsereko,

> [p]rovided that there is an overt physical act of witchcraft, the courts are at least willing to accept an ordinary person of the community and background of the accused as the standard for determining whether or not an act of witchcraft would be sufficient to deprive a reasonable person of self-control and to induce him to commit the offence [killing out of provocation] in question.[108]

Thus, the general trend is for a subjective standard of reasonableness to be followed in cases involving witchcraft in which the defense of provocation is raised. Nsereko concludes that a genuine belief in witchcraft can

> be a partial defence to a murder charge where there has been an overt and physically provocative act on the part of the victim, to which the accused retaliates on sudden impulse. This defence is rarely successfully invoked because witchcraft, being a metaphysical phenomenon, does not usually manifest itself in overt physical acts.[109]

While there are very few materials available to examine the doctrine of provocation in the context of witchcraft, the following section discusses some African cases where the threat of harm by witchcraft can be seen as a legitimate provocative act.

B. Cases

Examining the defense of provocation in cases involving witchcraft shows whether judges consider witchcraft a mitigating factor in their decisions. The extent to which judges consider witchcraft a mitigating factor depends on whether their reasoning follows an objective (reasonable person) or subjective (reasonable traditional African) standard. The reasonableness of a defendant's provocation can make a significant difference in the defendant's conviction and sentence, however, "idiosyncrasies of individual temperament or mentality that make a man more easily provoked, or more violent in his response to provocation, ought not . . . to affect his liability to conviction, although they may justify mitigation of sentence."[110] The defense of provocation "merely recognizes the

108. Daniel D. N. Nsereko, *Witchcraft as a Criminal Defence, From Uganda to Canada and Back*, 24 MANITOBA L.J. 38, 55 (1996).

109. *Id*. at 59.

110. Royal Commission on Capital Punishment, *Report*, Cmd. 8932, para. 143 (1953).

frailty of man and his proneness to lose self-control under certain circumstances and thus to do things which he otherwise would not do."[111]

1. *Colonial Cases.* In *Rex. v. Emilio Lumu*,[112] a soldier appealed his conviction for murder. The soldier's two-year-old nephew died in his arms after suffering from a brief illness. The soldier's sister reported that his father-in-law, a reputed witch doctor named Sempogo, had fed the child a black powder, which she believed was "witchcraft medicine" that had killed the child. Upon hearing this, the soldier went to Sempogo's home and stabbed him to death.

The court acknowledged the soldier's genuine belief in witchcraft, however, it could not "find any support for the proposition that the excuse of legal provocation could be extended so as to apply to the facts of this case on the basis that [the soldier] honestly believed that [Sempogo] had bewitched the child [by feeding it the black powder] and caused its death."[113] Instead, the court assumed Sempogo "poisoned the child by natural means."[114] Since Sempogo poisoned the child in the soldier's absence, two days before the soldier killed Sempogo, Sempogo's act did not constitute legal provocation. The court upheld the soldier's conviction for murder and rejected his defense of provocation because, according to the Uganda Penal Code, the provocative act had to be done "in the presence of an ordinary person . . . who is under [the soldier's] immediate care or to whom [the soldier] stands in a conjugal, parental, filial, or paternal relation."[115]

African legal scholars Onesmus K. Mutungi and Daniel D. N. Nsereko both agree *Rex. v. Fabiano Kinene & Another*[116] "is one of the few cases in which belief in witchcraft was held to constitute legal provocation."[117] In this case, a group of villagers suspected a village headman named William of using witchcraft to kill their relatives. One night, they found William crawling naked in their compound, and fearing he was attempting to bewitch them, they killed him by

111. Nsereko, *supra* note 108, at 50–51.

112. 1946 (13) E. Afr. Ct. App. 144 (appeal taken from Uganda).

113. *Id*. at 145.

114. *Id.* at 146.

115. *Id*. at 146 (quoting Section 199 of the Uganda Penal Code).

116. 1941 (8) E. Afr. Ct. App. 96 (appeal taken from Uganda).

117. Nsereko, *supra* note 108, at 53; *see also* MUTUNGI, *supra* note 9, at 42 (noting "this was the first instance where a belief in witchcraft fulfilled the legal tenets of provocation").

forcibly inserting "about twenty raw green bananas into his anus."[118] According to the court, William's act of crawling naked in the villagers' compound at night, and their belief that he was trying to bewitch them, constituted "grave and sudden provocation."[119] The court stated:

> We think that if the facts proved establish that the victim was performing in the actual presence of [the villagers] some act which [they] did genuinely believe, and which an ordinary person of the community to which [they] belong[] would genuinely believe, to be an act of witchcraft against him or another person under his immediate care . . . he might be angered to such an extent as to be deprived of the power of self-control and induced to assault the person doing the act of witchcraft. And if this be the case, a defence of grave and sudden provocation is open to him."[120]

This case explicitly refers to the reasonableness of a defendant's belief in witchcraft. It finds the villagers' provocation by an apparent act of witchcraft to be reasonable, provided an ordinary and reasonable person from the villagers' community would share the same belief.

In the colonial precedent-setting case *Eria Galikuwa v. Rex*, the defendant appealed his conviction for murder.[121] The defendant had hired a reputed witch doctor in the hopes of recovering money stolen from him. The witch doctor was "an unscrupulous rogue who saw in [the defendant's] credulity an opportunity for unjust enrichment."[122] The witch doctor demanded exorbitant fees that the defendant could not afford, but which he promised to pay in a few days. The witch doctor threatened his witchcraft medicine would "eat [the defendant] up" if he did not pay.[123] Later, the defendant claimed he heard death threats emanating from the witch doctor's medicine.[124] As a result, the defendant killed the witch doctor by beating him with a stick.

The court rejected the defendant's defense of provocation, because "a mere threat to cause injury to health or even death in the near future cannot be considered as a physical, provocative act."[125] The defendant's fear of, and genuine belief in, witchcraft was not

118. *Kinene,* 1941 (8) E. Afr. Ct. App. at 98.
119. *Kinene,* 1941 (8) E. Afr. Ct. App. at 101.
120. *Id*.
121. 1951 (18) E. Afr. Ct. App. 175 (appeal taken from Uganda).
122. *Id.* at 175–76.
123. *Id.* at 176.
124. *Id.*
125. *Id.* at 178.

enough for the court to find his provocation reasonable. The court found he "was motivated not by anger but by fear alone. He struck, not in the heat of passion, but in despair arising from the recognition of his inability to raise the money demanded and his hopeless fear of the consequences . . . he was not suddenly deprived of his self-control"[126]

According to the court, the following elements are required for a successful defense of provocation:

1. [T]he act causing the death must be proved to have been done in the heat of passion, that is in anger: fear alone, even fear of immediate death is not enough.
2. [T]he victim [must have been] . . . performing in the actual presence of the accused some act which the accused did genuinely believe, and which an ordinary person of the community to which the accused belongs would genuinely believe, to be an act of witchcraft against him or another person under his immediate care.
3. A belief in witchcraft *per se* does not constitute a circumstance of excuse or mitigation for killing a person believed to be a witch or wizard when there is no immediate provocative act.
4. The provocative act must amount to a criminal offence under [c]riminal [l]aw.
5. The provocation must be not only grave but sudden and the killing have been done in the heat of passion.[127]

2. *Postcolonial Cases.* In the Tanzanian case *Joseph Kamiliango & Five Others v. R.*, four sisters arranged for an alleged witch doctor to kill their other sister, Martina Adolf, who they believed had used witchcraft to kill members of their family and to make their father ill.[128] Martina was brutally murdered, her body was found with "a cut wound on the back of the head," and her breasts, genitals, and appendages had been mutilated.[129] The four sisters argued they had "acted under provocation arising out of their firm belief that [Martina] was practicing witchcraft and was determined to finish them off."[130] The appellate court judge found that Martina had not provoked her four sisters, because they had the opportunity to deliberate about how to kill her, after which they hired a witch doctor

126. *Id*.
127. *Id.* at 176–78.
128. 1983 TLR 185 (CA).
129. *Id*. at 187.
130. *Id*. at 189.

as an accomplice. Thus, the four sisters acted "with cool minds and in full possession of their faculties."[131] The judge did not discuss the reasonableness of the four sisters' belief in witchcraft, and he dismissed the appeal of their convictions for murder outright.

In the Tanzanian case *John N. Rudowiki v. Republic*, the defendant appealed his conviction for murder and his death sentence for killing his grandfather.[132] The defendant's grandfather had come to the defendant's home and "threatened to kill him by witchcraft, following which [the defendant] picked up an axe" and killed his grandfather.[133] The defendant maintained he had a genuine belief in witchcraft, because "[o]n a number of occasions [he] had consulted witchdoctors who told him that [his grandfather] had killed a number of people in the family and had caused temporary sterility of his own daughter through witchcraft, and on being asked [his grandfather had] confirmed this."[134]

The appellate court judge reduced the defendant's conviction to manslaughter and reduced his death sentence to twelve to a prison term of twelve years. The judge found the defendant had been shocked by his grandfather's threat, especially in light of his grandfather's confession to have killed and caused misfortune to several family members.[135] The judge did not explicitly state whether provocation based on a death threat that involves witchcraft was reasonable, however, by taking into account the defendant's genuine belief in witchcraft, and the accused party's perception of his grandfather's threat as real, the judge found the defendant was reasonably provoked.[136] According to the judge, the killing in this case "was rooted in the belief of witchcraft which ought to be discouraged. This was a bad case of manslaughter which came very near murder, and which calls for a severe sentence."[137]

In the Tanzanian case *Herman Nyigo v. Republic*, the defendant appealed his conviction for murdering a person named Musa Chatila.[138] The defendant had gone to a tavern (*pombe shop*), where, without warning, he killed Chatila by attacking him with a bamboo

131. *Id*.
132. 1991 TLR 102 (CA).
133. *Id*. at 103.
134. *Id*.
135. *Id*. at 105.
136. *See id.*
137. *Id*. at 106.
138. 1995 TLR 178 (CA).

stick while Chatila was talking to another person. A witness heard the defendant tell Chatila: "I am killing you because of your sorcery."[139]

The appellate court judge rejected the defendant's appeal for a lesser conviction and denied his defense of provocation. The judge agreed with the lower court, which had determined that provocation was not involved because the defendant attacked Chatila without a "quarrel or fight, in an unprovoked manner."[140]

The judge wrote: "The [defendant's] utterances that he was killing [Chatila] because of sorcery is in our view a clear manifestation of malice aforethought."[141] The judge did not attempt to determine if the defendant had a genuine belief in witchcraft. If the judge's reasoning followed a reasonable traditional African standard, he might have viewed the defendant's belief in witchcraft as a mitigating factor in the case, especially if killing a witch was seen as a praiseworthy service to the community as a whole, as discussed above.[142]

These postcolonial Tanzanian cases are largely consistent with trends in Ugandan law. The Uganda Penal Code's requirement that provocation be sudden prevents defendants from using the defense of provocation in situations where "killers of the so-called witches take considerable time brooding and nursing suspicions against their victims. The victims, for their part, often say no word or do no overt act to the accused that the law would recognize as sudden provocation."[143]

In reference to provocation, the Uganda Penal Code "requires some physical and overt act or insult that is capable of derailing a person's fortitude and power of self-control and likely to induce him to retaliate by killing the person who offers it. Metaphysical phenomena, such as fears of witchcraft, are not such acts."[144] Thus, a defendant who kills someone out of a genuine fear that the deceased had bewitched him or her would not likely be able to avail himself or herself of the defense of provocation in Uganda. It appears that Ugandan law encourages judges to find that a genuine fear of witchcraft does not constitute provocation. This is consistent with the

139. *Id*. at 179.
140. *Id.* at 180.
141. *Id*.
142. *Supra* note 9, and accompanying text.
143. Nsereko, *supra* note 108, at 52.
144. *Id*.

colonial case *Eria Galikuwa*, which held that an "act causing . . . death must be proved to have been done in the heat of passion, that is in anger: fear alone, even fear of immediate death is not enough" to constitute provocation.

C. Summary

The colonial era cases, discussed in Part III.B.1 above, come from a period between the 1940s and 1950s and generally suggest that when conventional defenses such as provocation are used by defendants, they have generally been rejected by the courts. The postcolonial cases, discussed in Part III.B.2 above, generally come from the 1980s and 1990s. In the postcolonial era, judges seem to have followed the colonial case *Eria Galikuwa*[145] by allowing the alleged appearance of witchcraft to count as provocation as long as the killing is not premeditated, is sudden and is not based solely on fear.

Trends in judges' reasoning have followed the development of the common law doctrine of provocation, since defendants are not acquitted due to their beliefs in witchcraft, but rather their convictions are sometimes reduced from murder to manslaughter, and their sentences are adjusted accordingly. Since the late 1950s, taunts unaccompanied by violence could constitute provocation in the common law.[146] Trends in cases involving witchcraft have followed a similar path; since *Kinene*[147] (1941) and *Eria Galikuwa*[148] (1951), non-physical acts have been considered adequate provocation under very restricted circumstances.

IV. IMPUTATIONS OF WITCHCRAFT

Legal reasoning in the common law tradition places significant importance on the concept of reasonableness, or what is "[f]air, proper, or moderate under the circumstances."[149] In common law, the concept of reasonableness appears in both the civil and criminal branches of the law. In civil law, the reasonable person standard is used as "a test of liability for negligence," and defendants' conduct is often measured according to "reasonable care" or the "degree of care

145. 1951 (18) E. Afr. Ct. App. 175 (appeal taken from Uganda).

146. *See* Dir. of Pub. Prosecutions v. Camplin, 1978 (2) All E.R. 168, 172–73 (H.L.).

147. 1941 (8) E. Afr. Ct. App. 96 (appeal taken from Uganda).

148. *Eria Galikuwa,* 1951 (18) E. Afr. Ct. App. 175 (appeal taken from Uganda).

149. BLACK'S LAW DICTIONARY 1272 (7th ed. 1999).

that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances."[150] A reasonable person is a person who "acts sensibly, does things without serious delay, and takes proper but not excessive precautions."[151] The reasonable person standard also appears in criminal law. Reasonableness was mentioned as early as 1803 in the criminal law doctrine of self-defense,[152] and in the mid-nineteenth century, the reasonable man appeared in the law of provocation.[153] As seen in Part III.A above, the reasonable person standard is an important part of the modern law of provocation.

According to Osborne M. Reynolds, Jr., the development of the reasonable person standard "is generally thought to have been necessitated by the difficulty of applying a constantly changing standard based on individual capabilities and limitations, and the need of those who live in society to expect and require that all others behave, to some minimal extent, in a prescribed way."[154] The reasonable person "possess[es] and exercis[es] those qualities of attention, knowledge, intelligence and judgment that . . . society require[s] of its members for the protection of their own interests and the interests of others."[155] The personification of reasonableness in the law helps to "constrain judicial decision-making by forcing judges to consider the societal consensus embodied in the concept of reasonableness when deriving results."[156]

What follows is an analysis of judicial reasoning in cases involving accusations or imputations of witchcraft. Generally, a plaintiff claims that he or she suffered injury due to an accusation that he or she is using witchcraft. Outside of Africa these cases tend to fall under the law of defamation, but in South Africa and Zimbabwe such imputations are criminal and judges generally seem to apply a reasonableness standard in assessing injury.

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150. *Id*. at 204.

151. *Id*. at 1273.

152. Donovan & Wildman, *supra* note 93, at 443.

153. *Id*. at 447.

154. Osborne M. Reynolds, Jr., *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature"*, 23 OKLA. L. REV. 410, 414 (1970).

155. Elmo Schwab, *The Quest for the Reasonable Man*, 45 TEX. B.J. 178, 178 (1982).

156. Robert Unikel, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326, 329 (1992).

A. Background

Before examining cases involving imputations of witchcraft from South Africa and Zimbabwe, it is instructive to examine why defamation is criminalized in these cases. Defamation is part of tort law, otherwise known as the law of delict in the mixed common law and Roman-Dutch legal systems in southern Africa.[157] A delict is "a wrong looked at from the individual's point of view . . . [that] seeks to regulate the relationships between individuals."[158] A crime "is a wrong viewed from the perspective of the State."[159] Imputations of witchcraft are criminalized in both South Africa's and Zimbabwe's Witchcraft Suppression Acts.[160]

According to South African legal scholar Jonathan Burchell, in Roman-Dutch law private actions were historically penal in nature, and "[a]n award of damages for defamation was more like a fine than a recompense for the plaintiff."[161] Also, "criminal proceedings for injury to reputation [i.e., defamation] were not confined to 'serious' cases," and "the Roman-Dutch authorities did not take a clearly defined line on whether criminal defamation was confined to the more serious cases or not."[162] The Zimbabwean and former Rhodesian courts have held that "the 'seriousness' of the defamation is an element of the offence."[163] Yet in South Africa, it is not clear whether defamation must be "serious" in order to fall under criminal

157. The Roman-Dutch law tradition is the common law tradition of six Southern African countries, two of which are South Africa and Zimbabwe. Roman-Dutch law was brought to South Africa and Zimbabwe by the Dutch East India Company, which was given a charter by the Estates-General, the highest authority in the Dutch Republic that lasted from 1581–1795. As a Dutch possession, the Cape of Good Hope, located in what is now South Africa, received the Roman-Dutch law from Dutch settlers.

From the end of the eighteenth century to the beginning of the twentieth century, the British ruled the Cape, and British settlers brought influences of English law; however, Roman-Dutch law remained in place. The Cape system of law was eventually extended to British protectorates, one of which was Rhodesia, or what is now Zimbabwe. Thus, the Roman-Dutch law remains a major influence on the common law of South Africa and Zimbabwe. *See generally* Richard Goldstone, *The Reception of the Dutch-Roman Law in Southern Africa and Sri Lanka, and its Influence on Civil Liberties*, *in* LAW IN MULTICULTURAL SOCIETIES: PROCEEDINGS OF THE INTERNATIONAL ASSOCIATION OF LAW LIBRARIES MEETING, JERUSALEM 21–26, 1985 (1989).

158. JONATHAN M. BURCHELL, PRINCIPLES OF DELICT 2 (1993).

159. *Id*.

160. §1(a) Witchcraft Suppression Act No. 3 of 1957 (South Africa); §3 Witchcraft Suppression Act of 1890 (Ch. 9:19) (Zimbabwe).

161. JONATHAN A. BURCHELL, THE LAW OF DEFAMATION IN SOUTH AFRICA 323 (1985).

162. *Id*. at 325.

163. *Id*. at 326.

law. Indeed, "neither the Roman-Dutch authorities nor the South African cases provide an answer to the question whether defamation must be 'serious' for criminal liability to result."[164]

Further, "[t]he South African and English law of criminal defamation were originally influenced by the purpose of preventing a breach of the peace."[165] Yet, "[l]ittle attention has been given to the tendency of a statement to provoke a breach of the peace in the South African authorities on criminal defamation, and a clear distinction between 'seriousness' and a tendency to lead to a breach of the peace has not always been drawn."[166] Burchell argues civil law can provide adequate redress of damaged reputation and "the criminal law of defamation both [in South Africa] . . . and in England is seldom used," suggesting that "it is too drastic a method for controlling speech and expression."[167]

Imputations of witchcraft are certainly serious in the context of African societies, where accused witches are often killed. In many African societies murdering a witch is not necessarily seen as a deviation from expected behavior. In such cases, a judge would have to take into consideration the genuineness of a defendant's belief in witchcraft and the reasonableness of the defendant's crime according to a reasonable person from the defendant's community where such witchcraft beliefs remain prevalent. According to Daniel D. N. Nsereko, "[i]n Uganda, as is the case in many African countries, witches or sorceresses are generally viewed with revulsion, fear, and abhorrence. They are considered to be inhuman and not fit to live."[168] Therefore, accusing someone of being a witch not only harms his or her reputation, it puts his or her life in danger, thus warranting the criminalization of witchcraft imputation.

In cases involving imputations of witchcraft, reasonableness comes into play at two points. On the one hand, people who genuinely believe in witchcraft might find it reasonable to think one has an obligation to point out suspected witches. On the other hand, accused witches would suffer injury to their reputations and likely physical injury. A "modern" standard of reasonableness, the reasonable person standard, would view accusations of witchcraft as foolish and harmless. Neither imputing the use of witchcraft to

164. *Id*. at 327.
165. *Id*. at 330.
166. *Id*. at 330–31.
167. *Id*. at 332.
168. Nsereko, *supra* note 108, at 44.

someone nor fearing injury from the community at large after an imputation of witchcraft would make sense. Yet, the law and courts in certain African countries take a slightly different view and discourage accusations of witchcraft, likely because the state has an interest in making people change their beliefs, while at the same time recognizing that in communities of believers, such witchcraft accusations or imputations can put the accused at risk.

Traditionally, imputations of witchcraft were not seen as criminal in the communities of the parties involved in these cases and the parties would have likely resolved their disputes through informal, community-based, extra-judicial dispute resolution mechanisms. Indeed, laws prohibiting the imputation of witchcraft are contrary to some traditional community norms of what is seen as reasonable conduct. By recognizing that these imputations cause harm in communities where witchcraft beliefs are common, judges implicitly modify the objective reasonable person standard to incorporate traditional community norms.

In Zimbabwe, the national association of traditional healers (Zinatha) challenged the Witchcraft Suppression Act's punishment for the imputation of the use of witchcraft.[169] For many years, "[m]embers of Zinatha have cried foul that the law [has] impinged upon their right to expose evil-doers in their communities."[170] Zinatha and other groups like it argue that "[i]t is time the Witchcraft Suppression Act was revisited and those people who practise witchcraft and sorcery should be punished."[171] In Zambia, "[t]he Traditional Health Practitioners Association of Zambia (THPAZ) urged Government to recognise the existence" of African witchcraft and to amend the Witchcraft Act to legalize "witch-hunting."[172]

B. Cases

The following criminal cases involve instances in which defendants are punished for imputing the use of witchcraft. An analysis of these cases will provide insight into whether the reasoning

169. Mclytton Cleaver, *Sunday Opinion: About Crimes and Witches*, ZIMBABWE STANDARD (Harare), Apr. 12, 1998, *available at* http://allafrica.com/stories/printable/199804120017.html (on file with Duke Journal of Comparative and International Law).

170. *Id.*

171. *Id*.

172. *Amend Witchcraft Act, Government Urged*, TIMES OF ZAMBIA (Ndola) Apr. 23, 1998, *available at* http://allafrica.com/stories/printable/199804230040.html (on file with Duke Journal of Comparative and International Law).

of African judges in witchcraft cases appears to follow a particular standard of reasonable conduct, and whether any trends can be discerned over time and across countries.

1. *Zimbabwe.* In the Zimbabwean case *S. v. Bhumu*, the defendant, a witch doctor, was convicted of violating Section 3 of the Witchcraft Suppression Act of 1890 for imputing the use of witchcraft to an elderly woman.[173] The witch doctor appealed his sentence of eight months' imprisonment with labor. The appellate court judge dismissed the appeal, holding the sentence was not excessive because the defendant was an alleged witch doctor and as a result his imputation was seen as particularly harmful, even though no harm to anyone resulted from it. The judge viewed the imputation as punishable because

> the consequences of such an imputation can be disastrous for the victim. Very often the unfortunate victim of the imputation is an old woman who is then banished from the village, and is driven in despair to suicide. Frequently she is severely assaulted and sometimes even killed. Fortunately for her, these consequences did not apparently overtake the complainant in this case, but they could very easily have . . . .[174]

The judge's reasoning appears to follow a reasonable traditional African standard. He accepts that imputations of witchcraft made by witch doctors cause injury and he acknowledges that an accused witch faces immediate danger. Yet, to a certain extent, the judge's reasoning also follows the reasonable person standard, in that he upholds the witch doctor's conviction for the act of imputing witchcraft

Although judges often acknowledge that imputations of witchcraft can cause harm, they generally dismiss actions not grounded in actual harm. For example, in the Zimbabwean case *S. v. Pivisayi*, the defendant, claimed that a woman used "fairies" to harass his wife and children.[175] The judge overturned the defendant's conviction for imputing the use of witchcraft to the woman, because according to the Witchcraft Suppression Act, the imputation must be that the person used "non-natural means to cause disease or injury"[176] and the judge held that the act of mere upsetting was not equivalent to disease or injury. Yet, judges seem attentive to local opinion about

173. 1981 (2) SA 839 (ZAD).
174. *Id*. at 841.
175. 1982 (2) ZLR 260 (HC).
176. *Id.*

what constitutes reasonable behavior. In *S. v. Ndhlovu*, a school principal claimed that a man caused a child's illness (described in the opinion as possession by a flock of magical birds).[177] The judge found the principal's action to be in violation of the Witchcraft Suppression Act, which states:

> Whoever imputes to any other person the use of non-natural means in causing any disease in any person or animal or in causing any injury to any person or property, that is to say, whoever names or indicates any other person as being a wizard or witch shall be guilty of an offence.[178]

The judge in *Ndhlovu* determined that the child "was regarded as being ill by all concerned" in the controversy, and that given local norms regarding witchcraft, injury had in fact resulted from the principal's imputation given local norms.[179]

2. *South African Conduit Pipe Cases.* The South African cases *S. v. Nomgca*[180] and *S. v. Mmbengwa & Others*[181] are similar to the cases discussed above, however, the South African cases address defendants utilizing the so-called "conduit pipe" defense. Under this defense, by making an imputation of witchcraft, the imputor allegedly acts as a mere "conduit pipe" or conveyor of information for someone or something else.

In both of these South African cases, the judges rejected the "conduit pipe" defense. The judges found acting as a conduit pipe for an imputation of witchcraft to be a culpable act. In *S. v. Nomgca*, the defendant had imputed witchcraft to a local woman claiming that a spirit (*mfufanyana*) had appeared to him and told him that the local woman was a witch who was trying to kill his wife.[182] The judge argued that the principle in such a "conduit pipe" case involving imputations of witchcraft

> is no different from that in cases of defamation. It is not an answer for an editor of a newspaper to say "I merely published what X has said and, if X says that the complaint or the plaintiff is a thief and I publish that, I am not responsible because I am merely repeating what somebody else said."[183]

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177. 1984 ZLR 175 (SC).

178. *Id.* at 76 (quoting §3 Witchcraft Suppression Act of 1890 (Ch. 73)) (this statute was amended in 2001. See *supra* note 25, for the amended text of Section 3).

179. *Ndhlovu,* 1984 ZLR at 179.

180. 1980 (2) SA 707 (TkSC).

181. 1988 (3) SA 71 (VSC).

182. *Nomgca,* 1980 (2) SA at 708.

183. *Id.* at 709.

Thus, claiming to act as a conduit pipe does not relieve someone of criminal liability for making an imputation of witchcraft. In reference to a group of men accused of attacking an elderly woman after a child claimed that he had been bewitched by the woman, the judge in *S. v. Mmbengwa & Others* reasoned that

> [b]y accepting [the child's] express or implied indication of the [elderly woman] as the person who had caused his illness through the use of supernatural powers, and by acting on it in assaulting [the elderly woman], [the group of men] *imputed* the cause of the illness to her, quite apart from a verbal indication or pointing out.[184]

In both of these conduit pipe cases, the judges refused to consider the defendants' genuine belief in witchcraft as a mitigating factor. Instead, both judges focused on the potential harm an imputation of witchcraft could cause an "imputee." In *S. v. Nomgca*, the judge wrote, "it seems to me irrelevant to the present appeal whether [the defendant] believed in *mfufanyanas* or not."[185] The judge was not concerned with the defendant's belief in witchcraft, and he focused on the principle that by transmitting the spirit's message to the woman, the defendant made an imputation of witchcraft.

C. Summary

Both Zimbabwe's Witchcraft Suppression Act and Section 1(a) of South Africa's Witchcraft Suppression Act punish the imputation of the use of unnatural means to cause disease or injury.[186] The law in both Zimbabwe and South Africa generally encourage judges to follow a reasonable person standard that does not consider the imputation of witchcraft to be reasonable behavior, however, by recognizing the potential harm an imputation of witchcraft can cause, the Witchcraft Suppression Acts do not regard these imputations as mere silliness or nonsense. For example, in Zimbabwe,

> [i]t is clear from the [Witchcraft Suppression] Act read as a whole that the object is to suppress witchcraft in all its various manifestations . . . The purpose behind the Act, therefore, appears to be to suppress all those practices of witchcraft which are likely to cause some injury to the unfortunate victim. It is true that the object of the Act is to suppress witchcraft but the object of the suppression is none-the-less [*sic*] to prevent injury to individuals.[187]

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184. 1988 (3) SA at 73.

185. *Nomgca*, 1980 (2) SA at 708 (emphasis added).

186. §3 Witchcraft Suppression Act of 1890 (Ch. 9:19) (Zimbabwe); §1(a) Witchcraft Suppression Act No. 3 of 1957 (South Africa).

187. R. v. Hunda, 1956 (3) SA 696, 697 (S.R.).

Judges' reasoning in South African conduit pipe cases does not take into account the imputor's belief in the conveyed imputation of witchcraft. Rather, the act of being a conduit pipe itself, regardless of whether one believes in the message being conveyed, is seen as an illegal imputation of witchcraft. In *Nomgca*, the judge's likening of a conduit pipe to a newspaper editor who publishes a defamatory statement demonstrates how in conduit pipe cases, judges appear to focus less on genuine belief in witchcraft and more on the criminalization of imputation, regardless of a defendant's intention. The author was only able to locate two such conduit pipe cases, both from South Africa. The likely existence of other conduit pipe cases that are unreported or published in less widely circulated law reports makes the trend found in the two cases discussed above tentative. Conduit pipe cases may also be unreported in other African countries.

V. CONCLUSION

This study of judicial reasoning demonstrates that while African judges generally tend to give deference to state legal norms over norms underlying popular beliefs when the two conflict, judges do not give absolute superiority to such state legal norms. In some narrow circumstances, witchcraft is considered a mitigating factor in judges' decisions. It appears that African judges in witchcraft controversies seek to establish the new normative orientations towards modernization and western norms that have emerged in the postcolonial period.

In general, during the postcolonial period, judges have avoided admitting spectral evidence, and given significant consideration to norms underlying popular beliefs when deciding cases involving imputations of witchcraft and provocation. Perhaps this greater consideration of popular norms in cases involving the defense of provocation has been due to judicial reasoning following the development of the common law doctrine of provocation. This doctrine has seen an increase in the subjectivity of the reasonable person standard, and the inclusion of acts that are not overtly physical as reasonable provocation. Also, there could be a conscious effort by judges to reconcile the conflict between norms underlying popular beliefs and state legal norms, which is why judges have at times been willing to reduce a murder conviction to manslaughter if the defendant was reasonably provoked by an alleged act of witchcraft. Similarly, the governments of South Africa and Zimbabwe view the

imputations of witchcraft as having the potential to cause serious harm, and as a result, the imputation of the use of non-natural means to cause disease or injury has been criminalized. Here, state interests tie directly into norms underlying popular beliefs, as the potential threat that witchcraft imputations pose to social order is the likely motivation for the law.

Southeastern Cameroonian judicial attitudes towards norms underlying popular beliefs in witchcraft serve as an exception. These judges have been particularly responsive to popular beliefs and local norms, and they have generally subordinated state legal norms to popular ones by basing their decisions on spectral evidence provided by witch doctors. In responding to popular needs to curb the practice of witchcraft, southeastern Cameroonian judges have gone too far, as accused witches whose guilt is based on dubious spectral evidence often receive harsh sentences. By subordinating state legal norms to norms underlying popular beliefs, judges in southeastern Cameroon have shown a reluctance to accept the new normative orientation that has emerged in postcolonial African law.

The cases discussed in this article demonstrate the challenge a new normative order can pose to preexisting popular norms—a challenge that takes the shape of a conflict of norms that is played out in the legal system where the two normative orientations clash head on. To effectively reconcile old and new normative orientations, particularly norms underlying popular beliefs with state legal norms, the law should be responsive to serious needs and desires of a community, comprehensible by the people who are affected by it and comprehensive in providing solutions to legal problems that arise.[188] The cases involving witchcraft discussed in this article have shown that, with the exception of southeastern Cameroon, courts have not been consistently responsive to popular opinion demanding that the practice of witchcraft be curbed.

This note is intended to serve as an exploratory survey to provide insight into the conflict between state legal norms and those norms underlying popular beliefs. If solutions are not devised for the effective reconciliation of the conflict between norms underlying popular beliefs and state legal norms, the function of the law as an effective mechanism of social control in regions where local witchcraft norms remain salient will continue to pose a challenge. Granting customary courts jurisdiction over certain types of witchcraft-related

188. WATSON, *supra* note 7.

disputes in limited circumstances may provide one potential solution. Alternatively, codification of customary law is another, less likely option. Judges can also employ non-binding but authoritative texts on customary law or texts that restate established state law that provide insight into the manner judges have addressed witchcraft-related legal issues in previous disputes as guidelines to follow when norms underlying popular beliefs clash with state legal norms. The integration of norms underlying cultural beliefs are integrated to varying degrees by judges in African courts addressing witchcraft-related disputes. In order to prevent state legal norms from being perceived by many traditional Africans as illegitimate and foreign, thus undermining the continued development of legal systems throughout the region, state policies encompassing a more uniform integration of underlying cultural norms is advocated.

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