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# WITCH-KILLINGS AND THE LAW IN UGANDA

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ABSTRACT

People believed to be witches have been killed in many parts of Africa since precolonial times. Belief in witchcraft persists today among many people, occasionally resulting in the killing of the suspected witch. The killer views witchcraft as an attack similar in nature to the use of physical force and therefore kills the witch in an attempt to end the perceived attack. As it stands today, the law in Uganda fails to strike a balance between the rights of the deceased victim violated through murder and those of the accused who honestly believes that he or she or a loved one was a victim of witchcraft. This article argues that the defenses that are currently available—mistake of fact, self-defense, insanity, and provocation by witchcraft—are insufficient, as they fail to strike that delicate balance. A more pragmatic approach to the issue of witch-killing, one that deals with the elimination of belief in witchcraft, is necessary.

KEYWORDS: witchcraft, murder, witch-killing, criminal defense, Africa, Uganda

## INTRODUCTION

In June 2015, in Kabale district in southwestern Uganda, an eighty-six-year-old man was burned to death by a mob formed by his relatives. They believed that he had used witchcraft to cause a road accident that had claimed the life of his grandson.[1] In October 2016, in Moyo district in northern Uganda, another man, Francis Dramari, was viciously assaulted and subsequently burned to death by an angry mob of young men who believed him to be a witch.[2] In March 2017, a man in eastern Uganda murdered his seventy-eight-year-old mother, whom he believed had been bewitching his children.[3] In June 2018, a thirty-eight-year-old man in Bundibugyo district in western Uganda struck his eighty-two-year-old mother with her hoe, killing her instantly. He had been having dreams about his mother eating him alive, and he was convinced that she was bewitching him.[4] In February 2019, in Albetong district in northern Uganda, Private Isaac Newton Okello, a member of the Uganda People's Defence Forces, shot and killed his

1 Patrick Murangira, *Relatives Torch 86-yr-old Man over Witchcraft*, New Vision, June 5, 2015, https://www.newvision.co.ug/new_vision/news/1327665/relatives-torch-86-yr-witchcraft.

2 Scovin Iceta, *Mob Burns Suspected Witchdoctor to Death*, Daily Monitor, October 10, 2016, http://www.monitor.co.ug/News/National/Mob-burns-suspected-witchdoctor-death/688334-3411438-v4yavxz/index.html.

3 Yahudu Kitunzi, *Man Kills Mother over Family Land, Witchcraft*, Daily Monitor, March 16, 2017, http://www.monitor.co.ug/News/National/Man-kills-mother-over-family-land–witchcraft/688334-3852288-148l134z/index.html.

4 Longino Muhindo, *Son Kills Mother over Witchcraft*, Daily Monitor, June 26, 2018, http://www.monitor.co.ug/News/National/Son-kills-mother-witchcraft/688334-4631338-q031hm/index.html.



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brother, his brother's pregnant wife, and their three-year-old child because he believed them to be witches.[5]

These brutal murders of suspected witches stem from a belief in witchcraft that is as widespread as it is deep-seated among the people of Uganda. Belief in witchcraft is part of the social reality of Ugandans cutting across diverse cultures in different parts of the country[6] as it is in accord with their basic assumptions about life and modes of reasoning.[7] Attributing a calamity such as a road accident, business failure, illness, or death to malevolent spirits acting at the bidding of their human master is more reasonable to them than believing that these misfortunes are random and undirected.[8] That the law seems to do so little to protect the "victims" of witchcraft seems to bewilder many,[9] leaving them with no recourse but to go after the putative source of the spiritual violence resulting in witch-killing.

Although the incidence of witch-killings in Uganda has not been determined by any reliable empirical study, the number of police and media reports is a testament to its relative prevalence. In March 2007, it was reported that in just three months, twenty people suspected of witchcraft had been killed in Mbale district in eastern Uganda.[10] The 2008 Uganda Police report revealed that twenty-six people suspected of witchcraft had been lynched to death.[11] The 2013 police report also stated that twenty-six people had been killed on suspicion of witchcraft.[12] Subsequent police reports have noted that suspicion of witchcraft is a common cause of lynching.[13] In the first three months of 2019, there were thirteen different incidents of violence against suspected practitioners of witchcraft from different parts of the country reported by the media. Nine of them resulted in the murder of the suspected witch.[14]

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5 Isaac Otwii, *UPDF Soldier Pleads Guilty to Murdering Four Family Members*, Daily Monitor, February 6, 2019, https://www.monitor.co.ug/News/National/UPDF-soldier-pleads-guilty-murdering-four-family-members/688334-4968968-bim397/index.html.

6 Kefa M. Otiso, Culture and Customs of Uganda 24 (2006).

7 John Middleton & E. H. Winter, *Introduction* to Witchcraft and Sorcery in East Africa 1, 3 (1963).

8 Dominic Kwikiriz, Witchcraft Today: An Investigation into the Factors that Influence Catholics to Get Involved in Witchcraft in Yerya Parish, Fort-Portal Diocese (2014).

9 There have been several calls from citizens and legislators for more stringent laws against witchcraft. John Tugume, *"Law on Witchcraft Should Be Changed,"* Daily Monitor, April 14, 2013, https://www.monitor.co.ug/Magazines/PeoplePower/-Law-on-witchcraft-should-be-changed-/689844-1747488-buaawhz/index.html; Malik Fahad Jjingo, *Rakai Residents Demand Review of Witchcraft Act*, Uganda Radio Network (February 19, 2013), https://ugandaradionetwork.com/story/rakai-residents-demand-review-of-witchcraft-act; *Parliament Bolsters Crackdown on Witchcraft*, Chimpreports (April 2, 2014), https://chimpreports.com/18850-parliament-bolsters-crackdown-on-witchcraft/; Nobert Atukunda, *Legislator Drafts Bill to Ban Witchdoctors*, Daily Monitor, December 13, 2018, https://www.monitor.co.ug/News/National/Legislator-drafts-Bill-ban-witchdoctors/688334-4892952-10t7lloz/index.html.

10 Joseph Elunya, *Twenty Suspected Witches Lynched in Mbale*, Uganda Radio Network, March 15, 2007, https://ugandaradionetwork.com/story/twenty-suspected-witches-lynched-in-mbale.

11 Uganda Police, Annual Crime Report 2008, at 28 (2009).

12 Uganda Police, Annual Crime and Traffic/Road Safety Report 2013, appendix X (2014).

13 Uganda Police, Annual Crime Report 2014, at 20 (2018). Uganda Police, Annual Crime Report 2019, at 26 (2019).

14 Julius Ocungi, *Residents Burn Down Church over Cult Worship*, Daily Monitor, January 30, 2019, https://www.monitor.co.ug/News/National/Residents-burn-down-church-over-cult-worship-/688334-4957334-5xoqw8z/index.html; Joseph Kato, *Mob Kills 42 in 7 Weeks—Police*, Daily Monitor, March 6, 2019, https://www.monitor.co.ug/News/National/Mob-kills-42-in-7-weeks-police/688334-5010694-yaiqd7/index.html; Fred Muzaale, *Residents Flee Village as Police Hunt Killers of 75-Year-Old Man in Kayunga*, Daily Monitor, February 16, 2019, https://www.monitor.co.ug/News/National/Residents-flee-Police-hunt-killers-75-year-old-man-Kayunga/688334-4984948-kdmnoqz/index.html.



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Nine of the killers of Francis Dramari whose murder has been mentioned above were tried and convicted in the 2018 case *Uganda v. Ujiga & 8 Others*.[15] At the trial, it was revealed that the late Dramari was believed by many in his village to possess a charm called "Abiba," which was believed to be "a fire coming from the anus just like lightening [*sic*] that can be sent to harm others."[16] Realizing that his life was under threat from members of the community, Dramari asked the cultural leaders and elders to intervene and protect him. The leaders convened a convocation of the village at an agreed-upon venue seeking to put the rumors of witchcraft to rest. However, a group of rowdy youths disrupted the meeting with threats of violence. Due to the ensuing commotion, the cultural leaders decided to leave the venue and asked the deceased to go with them. They were intercepted by about twenty rowdy youth, who assaulted the cultural elders forcing them to flee. The youth assaulted Dramari with sticks, kicks, and punches. They then piled dry grass on his comatose body, which was then set ablaze. There were sufficient witnesses to prove that the accused did indeed participate in the killing, which nullified the possibility of a defense of total denial. There remained only four defenses open to the nine accused. These four defenses have been used in similar cases in Uganda and other common law jurisdictions in Africa, where witch-killings have occurred. First is mistake of fact, which is based on the idea that the accused made a reasonable mistake in believing that the deceased was a witch. Second is self-defense, which is based on the idea that the accused killed the deceased as a means of defending themselves against witchcraft. Third is insanity, which would mean that the accused had suffered from a delusion of mind that led them to believe that the deceased was a witch. Fourth is provocation by witchcraft, meaning that the deceased's apparent engagement in witchcraft had provoked the accused to commit the murder. On this occasion, none of these defenses was accepted and the accused were convicted and sentenced to death.

In what follows, I examine the phenomenon of witch-killing in Uganda, with a particular focus on the shortcomings of the law in dealing with this issue. I examine the four possible defenses available to individuals accused of killing witches, noting that these can be applied only in the cultural relativist paradigm that, by emphasizing the subjective belief of the accused, tends to downplay the harm done to the victim and their family. I conclude that, given the challenges involved in balancing the accused's often honestly held beliefs that they or a loved one was a victim of witchcraft against the victim's rights, the most pragmatic solution lies in reengaging with these widely held witchcraft beliefs to come up with ways of limiting the harm that flows from them.

## WITCHCRAFT BELIEF IN AFRICA

The African view of witches and witchcraft was summarized succinctly by the Zimbabwean judge, Hungwe J., who stated, "there is little redeeming about African witches who, through sheer malice, either consciously or sub-consciously employ magical means to inflict all manner of evil on their

15 Uganda v. Ujiga & 8 Others (Criminal Sessions Case No. 0014 of 2018) [2018] UGHCCRD 72. Unless otherwise indicated, cases are from Uganda. Ugandan case law can be located using the Uganda Legal Information Institute (ULII): https://ulii.org. Cases are cited following ULII's format, with the exception of cases cited to the official High Court Bulletin (H.C.B.), the Uganda Law Reports (U.L.R), the Kampala Law Reports (Ka.L.R.), East Africa Reports (E.A.) or East Africa Court of Appeal Reports (E.A.C.A). Where a paginated version of the opinion is available, the page number referenced is provided with an asterisk.

16 *Id.* at *1.



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fellow human beings."[17] As summarized below, Nelson Tebbe[18] puts forward three characteristics of witchcraft in Africa that are central to any meaningful legal analysis of witch-killing:

1. Witchcraft is practiced in secret.[19] Unlike western Satanism and Wicca, African witchcraft is not an openly professed faith or religion, rather, it is a dark art done secretly with malevolent intent.[20] The witch presents a public face of an upstanding community member while practicing his or her wickedness in secret. Anyone, however benign in appearance or manner, can be a witch.[21]
2. Witchcraft is a form of human rather than divine action; therefore, responsibility lies with other people who can be punished for their wicked acts, rather than an unreachable god.[22]
3. Witchcraft is invariably wicked motivated by jealousy or an inherent craving for causing harm.[23] Witches cause harm and destruction at every opportunity.

### *Witchcraft Belief in Uganda*

Belief in witchcraft persists in many parts of Uganda. A 2010 Pew Research Center report on religious beliefs in Africa noted that 20 percent of Ugandans believe in witchcraft.[24] Contemporary observers believe the number to be much higher.[25] In 2012, a survey among corporate workers by a leading newspaper found that 66 percent believed witchcraft to be a frequent practice at workplaces and one of the common means used to gain and maintain employment and promotions.[26] In 2014, it was reported that a number of public servants had taken to witchcraft to secure their employment.[27] In 2016, it was reported that staff at Ugandan embassies around the world had taken to practicing witchcraft to protect their jobs.[28] A number of politicians,[29] including the president,[30] have confessed to practicing witchcraft. Witchcraft beliefs can be found even among the

17 The State v. Shingirai Hamunakwad (2015) (HH 323-15 CRB No. 58/15) [2015] ZWHHC 323, at *5 (High Court of Zimbabwe) (accessed through the Zimbabwe Legal Information Institute, https://zimlii.org).

18 Nelson Tebbe, *Witchcraft and Statecraft: Liberal Democracy in Africa*, 97 Georgetown Law Journal 183 (2007), at 190–92.

19 "By definition, witchcraft is practiced in secret." Peter Geschiere, The Modernity of Witchcraft: Politics and the Occult in Postcolonial Africa 22 (1997).

20 Edwards Evans-Pritchard, Witchcraft, Oracles, and Magic among the Azande 58–59 (1976).

21 *Id.*

22 Adam Ashforth, Witchcraft, Violence, and Democracy in South Africa 70 (2015).

23 Evans-Pritchard, *supra* note 20, at 45.

24 Pew Forum on Religion and Public Life, Tolerance and Tension: Islam and Christianity in Sub-Saharan Africa 34 (2010).

25 Esther Oluka, *Witchcraft: Myth or Reality?*, Daily Monitor, January 15, 2016, http://www.monitor.co.ug/artsculture/Reviews/Witchcraft–Myth-or-reality-/691232-3033772-ryq5iz/index.html.

26 Francis Kagolo, *Ugandans Turn to Witchcraft to Keep Jobs*, New Vision, May 5, 2012, https://www.newvision.co.ug/new_vision/news/1301412/ugandans-witchcraft-jobs.

27 John Semakula & Faustine Odeke, *Witchcraft Creeps into Public Offices*, New Vision, July 21, 2014, https://www.newvision.co.ug/new_vision/news/1303216/witchcraft-creeps-public-offices.

28 Tabu Butagira, *Witchcraft Scare, Internal Fights Hit Uganda's Embassies Abroad*, Daily Monitor, January 10, 2016, http://www.monitor.co.ug/News/National/Witchcraft-scare–internal-fights-hit-Uganda-s-embassies/688334-3027068-oy2bi9z/index.html.

29 Harriet Nakitendde, *A Thin Line between Witchcraft and African Politics*, Sunrise, November 7, 2015, http://www.sunrise.ug/opinions/201511/a-thin-line-between-witchcraft-and-african-politics.html.

30 *I Did Witchcraft in The Bush, Says Museveni*, Observer, June 10, 2009, http://observer.ug/index.php?option=com_content&view=article&id=3761%3Ai-did-witchcraft-in-the-bush-says-museveni&Itemid=96.



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most educated people.[31] As Adam Ashforth notes, "there is no sign that the plausibility of witchcraft narratives is diminishing in contemporary Africa."[32]

Belief in witchcraft transforms random and senseless events that lead to human suffering into meaningful and purposeful malevolent harm attributed to an individual. The result is that witchcraft is seen to be as much of an injustice as physical violence. As R. B. Seidman puts it:

> The African who believes in witchcraft is thus faced by a fearful dilemma. He believes in witches to his bones . . . He knows that they can destroy . . . in sundry mysterious ways, without chance for defense, so that both his physical being and his hope for earthly success are endangered, as much as by threatened blow of panga or spear or machete.[33]

Witchcraft is distinguished from autochthonous spirit worship and herbalism, which prevailed in Africa prior to the conversion of many on the continent to Islam and Christianity and which still persists to this day.[34] People who practice this are often called "traditional healers," and in Uganda, their practices are regulated both by their association, the Uganda National Traditional Herbalists and Healers Association, and by municipal ordinances.[35] Some people practice Christianity or Islam alongside traditional spirit worship.[36] Traditional healers are opposed to witchcraft and claim to be able to deflect pernicious spiritual forces back onto the perpetrators.[37]

Witches are believed to use various methods to cause harm to their victims: they are believed to cause diseases, accidents, sexual impotence, and so on.[38] They are believed to be able to launch direct physical attacks on an individual albeit with a metaphysical twist, such as sucking blood out of the individual.[39] They are believed to be able to attack one's property by killing livestock and starting fires.[40] As one court put it,

> Witches or wizards are supposedly persons who engage in supernatural practices like surreptitiously killing people using all manner of weird means such as sending lightning on a clear day to strike at and kill a victim miles and miles away. Such persons are also renowned for going out at night, literally naked, and fly, for example, in a flat basket, to graveyards to dance and feast on human corpses.[41]

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31 James Onen, *How to Eradicate Witchcraft in Uganda*, Freethought Kampala, March 3, 2010, https://freethoughtkampala.wordpress.com/2010/03/03/how-to-eradicate-witchcraft-in-uganda/.

32 Adam Ashforth, *Witchcraft, Justice, and Human Rights in Africa: Cases from Malawi*, 58 African Studies Review 5, 7 (2015).

33 R. B. Seidman, *Witch Murder and Mens Rea: A Problem of Society under Radical Social Change*, 28 Modern Law Review 46, 47 (1965).

34 Just 0.1 percent of the Ugandan population identifies with traditional spirit worship. Uganda Bureau of Statistics, The National Population and Housing Census 2014—Main Report 19 (2016).

35 See, for example, The Local Governments (Kampala City Council) (Traditional Healers and Herbalists) Ordinance, XCVIX Uganda Gazette no. 74, supplement (2006).

36 Robert Mugagga, *Church in Morning, Witchcraft at Night*, Observer, February 8, 2012, https://www.observer.ug/component/content/article?id=17050:church-in-morning-witchcraft-at-night.

37 Davis Buyondo, *Rakai District Approves 300 Witch Doctors and Shrines*, New Vision, June 12, 2016, https://www.newvision.co.ug/new_vision/news/1426753/rakai-district-approves-300-witch-doctors-shrines.

38 Evans-Pritchard, *supra* note 20, at 51, 53.

39 Tim Allen, *Vigilantes, Witches, and Vampires: How Moral Populism Shapes Social Accountability in Northern Uganda*, 22 International Journal on Minority and Group Rights 360, 361 n.3 (2015).

40 In *Regina v. Magata* (1957) 1 E.A. 330, 331 (High Court for Uganda at Kampala), the accused believed that the deceased had caused the death of his livestock.

41 Banda v. Chikalamba (MSCA Civil Appeal No. 2 of 2001) [2001] MWSC 4, at *5 (Supreme Court of Malawi) (accessed through the Malawi Legal Information Institute, https://malawilii.org; filed under a misspelling of the respondent's name: Chakalamba).



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Witchcraft is believed to involve some bizarre activities on the part of the witch as a means of sealing the pact with the dark forces or casting a spell. It could involve such acts as eating or serving others feces,[42] dancing in the nude at night,[43] cannibalism,[44] and other activities that diverge from socially accepted behavior.

## *The Law on Witchcraft in Uganda*

The main law dealing with witchcraft in Uganda is the Witchcraft Act of 1957. The Act recognizes witchcraft as a reality rather than a superstition.[45] This is in contrast with the laws of a number of other African countries that treat it as nonexistent.[46] The practice of witchcraft is an offence punishable with up to five years imprisonment.[47] The Act also originally provided for banishment from an area as a punishment for practicing witchcraft. However, this was found to be unconstitutional.[48] The law, in a nod to traditional African religions and herbalism, exempts "bona fide spirit worship" and the supply or sale of native medicines.[49] The Witchcraft Act makes imputation of witchcraft illegal except when the accusation is made to "a person in authority."[50] Who qualifies to be a person in authority, however, is unclear, as the phrase remains undefined in the Act. The law therefore criminalizes most witchcraft accusations. While witchcraft accusations as offenses are rarely, if ever, prosecuted in criminal courts, they have founded civil actions for defamation, as accusing someone of committing a crime is defamatory.[51] Despite this law, prosecutions for witchcraft are very rare.[52] This is because witch trials come with considerable evidentiary challenges given that the crime is intrinsically invisible.[53]

The Witchcraft Act is a colonial-era law that was maintained after independence. In *Attorney General v. Salvatori Abuki*,[54] the petitioner challenged the constitutionality of some provisions

42 K. Hassani v. Kithuku & Chali (1985) T.L.R. 212 (High Court of Tanzania) (accessed through the Tanzania Legal Information Institute, https://tanzlii.org/tz/judgment/high-court-tanzania/1983/34).

43 In *R. v. Kelementi Maganga*, (1943) 10 E.A.CA 49, 53 (Court of Appeal for Eastern Africa), the suspected witch was found dancing naked at night and killed.

44 Hope Mafaranga & Rogers Sunday, *Scary Cannibal Stories Exposed in Many Districts*, New Vision, September 23, 2013, https://www.newvision.co.ug/new_vision/news/1332290/scary-cannibal-stories-exposed-districts.

45 Witchcraft Act (1957), Cap. 124 § 2 (Uganda).

46 Witchcraft Act (1925), Cap. 67 § 3 (Kenya) (referring to "so-called witchcraft"); Witchcraft Suppression Act of 1957 § 1(b) (South Africa) (referring to acts in which the accused "professes or pretends" to use witchcraft); and Witchcraft Act (1911), Cap 7:02 §§ 4, 6 (Malawi).

47 Witchcraft Act (157), Cap. 124 § 2(3) (Uganda).

48 *Id.* § 7 (providing exclusionary orders used for banishment). For cases holding this provision unconstitutional, see *Salvatori Abuki & Another v. Attorney General* (Constitutional Case No. 2 of 1997) [1997] UGCC 10, and *Attorney General v. Salvatori Abuki* (Constitutional Appeal No. 1 of 1998) [1999] UGSC 7.

49 Witchcraft Act (1957), Cap. 124 § 1 (Uganda).

50 *Id.* § 3.

51 *See, e.g.,* Murama v. Abigaba (Civil Appeal No. 104 of 2014) [2017] UGHCCD 140. In *Maisha v. Madraa* (Civil Appeal No. 0031 of 2012) [2016] UGHCCD 66, at *5, where the appellant had accused the respondent of being a wizard, the judge stated, "There was no need to prove loss of reputation since the words complained of imputed that the respondent practiced witchcraft, which is a criminal offence and is therefore actionable *per se*."

52 *Has the Witchcraft Act of 1957 Outlived Its Usefulness?*, New Vision, September 7, 2011, https://www.newvision.co.ug/new_vision/news/1005708/witchcraft-act-1957-outlived-usefulness.

53 "And each subsequent law was ineffective in diminishing witchcraft because as elements of an evidentiary-based legal system, the ordinances required tangible evidence to prove the perpetration of a "crime" which was inherently invisible." Katherine Angela Luongo, *Motive Rather than Means: Legal Genealogies of Witch-Killing Cases in Kenya*, 189–90 Cahiers d'Études Africaines para. 20 (2008), https://journals.openedition.org/etudesafricaines/9622.

54 *Salvatori Abuki*, Constitutional Appeal No. 1 of 1998.



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of the Act. The petitioner had been convicted of the offense of practicing witchcraft under the Witchcraft Act and sentenced to twenty-two months imprisonment and banishment from his home for ten years upon release. He sought declarations that the offense of witchcraft and the banishment were unconstitutional. He claimed that the offense of witchcraft was vague and lacked precision. He also initially claimed that the offense violated his right to freedom of thought, conscience, and religion, but he abandoned this ground when the court pointed out that the Witchcraft Act specifically excludes bona fide spirit worship from its definition of witchcraft. He further claimed that the penalty of banishment contravened the constitutional provisions on dignity and protection from inhuman treatment.[55] At first instance, the Constitutional Court found that the offense of witchcraft was unconstitutional, as it was vague and lacking in precision because the word "witchcraft" is undefined in the Witchcraft Act. The banishment was also found to be unconstitutional.[56] At appeal, however, the Supreme Court found the offense of witchcraft to be constitutional, reasoning that witchcraft was defined by its exclusions such as bona fide spirit worship. The provisions on banishment were the only ones found to be unconstitutional.[57]

## WITCH-KILLING IN UGANDA

Witch-killings are prosecuted as regular murders under the Penal Code Act.[58] The offense of murder under the Penal Code Act has been interpreted as having the following ingredients: the death of the deceased, the cause of death was unlawful, there was malice aforethought, and the accused directly or indirectly caused the death.[59] The prosecution of suspects in witch-killings does not seem to have any deterrent effect on the violence, as killing of recalcitrant witches is seen as laudable in the eyes of many members of African communities.[60] This is especially true in scenarios where one or one's loved one is perceived as the victim of witchcraft. In that case, the killing of the witch is done as a form of self-defense,[61] to save the life of the loved one,[62] or as revenge.[63]

Witch-killing is a practice that dates back to precolonial times in Africa.[64] The practice of witch-killing seems to have been predicated on the belief that the witch's evil power was stronger than the witch's own willpower and, therefore, he or she could do harm irrespective of their good intentions. Those who still hold onto such beliefs today find themselves "in a position where no outside power [can] save them from witches. They [have] no alternative but to strike in terror and self-defence."[65] Witch-killings in Uganda tend to be brutal and vicious. Suspected witches have been

55 *See id.* at *2, for the facts of the case.

56 *Salvatori Abuki*, Constitutional Case No. 2 of 1997, at *45.

57 *Salvatori Abuki*, Constitutional Appeal No. 1 of 1998, at *18.

58 Penal Code Act (1950), Cap. 120 § 188 (Uganda).

59 Uganda v. Bosco Okello [1992–93] H.C.B. 68, 71 (High Court of Uganda at Jinja).

60 John Alan Cohan, *The Problem of Witchcraft Violence in Africa*, 44 Suffolk University Law Reiew 803, 804 (2011).

61 Onesimus K. Mutungi, *Witchcraft and the Criminal Law in East Africa*, 5 Valparaiso University Law Review 524, 537 (1971).

62 In *Uganda v. Osherura & Another* (HCT-05-CR-CSC-0114-2010) [2012] UGHC 79, at *2, a woman believed to be the witch responsible for the illness of the accused's wife was brutally murdered.

63 *See* Obedling & 3 Others v. Uganda (Criminal Appeal No. 167 of 2012) [2016] UGCA 17, at *2.

64 John Roscoe, in his 1911 study of the customs of the Baganda, the largest tribe in Uganda, noted their practice of burning condemned witches on wastelands. John Roscoe, The Baganda: An Account of Their Native Customs and Beliefs 289 (1911).

65 Mutungi, *supra* note 61, at 531.



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burned alive,[66] stoned,[67] beheaded,[68] hacked to death,[69] or sometimes brutally murdered in a grotesquely macabre combination of different modes of killing.[70] These disturbingly inhumane methods of killing seem to be adopted from the precolonial customs of dealing with witches that were meant to deter people from practicing witchcraft.[71] A survey of the reported incidents of witch-killings suggests that a disproportionate number of those suspected of witchcraft are women.[72] For example, all twenty-six victims of witch-killings reported in 2013 were women.[73]

It should, however, be noted that, despite widespread belief in witchcraft, assaults against witches are relatively rare. In many communities, people suspected to be practicing witchcraft are left unmolested.[74] This is attributed to a number of factors. First, although witchcraft is seen as a real and present danger, many people deplore violence and may choose not to retaliate.[75] Second, many who believe themselves to be victims of witchcraft are either too afraid to make a move against the purported witch or resort to other means of protection such as the use of charms from traditional healers[76] or prayers from religious leaders, especially evangelical and Pentecostal pastors.[77] Finally, the presence of "well-respected figures . . . able to speak with authority in a community"[78] can be useful in preventing mob justice against suspected witches.[79] It appears that witch-killings are more likely to occur where such figures are absent or have lost authority. This seemed to be the case in the murder of Francis Dramari, discussed above, where the cultural elders were unable to stop the rowdy youth from murdering him. Similar cases abound.[80] In one case, a mob was attacking a woman suspected of witchcraft because she was believed to have kept her deceased brother's witchcraft instruments. The village chief begged the mob not to punish her for her brother's wrong, but they refused to heed his advice and went ahead and killed her.[81] In another case, the suspected witch was set upon and forcefully evicted together with his family

66 *See* Uganda v. Seruga Yonasani & Ors (HCT-00-CR-SC-0198 of 2003) [2004] UGHC 44, *6; R. v. Kabateleine (1946) 13 E.A.C.A 164, 165 (Court of Appeal for Eastern Africa).

67 *See* Uganda v. Nyote (HCT-04-CR-SC-0043-2012) [2014] UGHCCRD 18, at *3.

68 In *Regina v. Magata* (1957) 1 E.A. 330 (High Court for Uganda at Kampala), a son beheaded his father, whom he suspected of witchcraft.

69 *See* Obedling & 3 Others v. Uganda (Criminal Appeal No. 167 of 2012) [2016] UGCA 17, at *2.

70 In *Uganda v. Munyirwa Laliyo & 6 Others* (HCT-00-CR-SC-0103 of 2004) [2005] UGHC 40, at *1, the victim was thrown into fire, and when he jumped out he was stoned to death.

71 Tim Allen & Kyla Reid, *Justice at the Margins: Witches, Poisoners, and Social Accountability in Northern Uganda*, 34 Medical Anthropology: Cross-Cultural Studies in Health and Illness 106–23, 114 (2015).

72 Fredrick Golooba-Mutebi, *Witchcraft, Social Cohesion and Participation in a South African Village*, 36 Development and Change 937, 940 (2005); Maakor Quarmyne, *Witchcraft: A Human Rights Conflict between Customary/Traditional Laws and the Legal Protection of Women in Contemporary Sub-Saharan Africa*, 17 William and Mary Journal of Women and the Law 475, 476 (2011).

73 Uganda Police, *supra* note 12, appendix X.

74 Ashforth, *supra* note 32, at 12.

75 *Id.* at 10–11.

76 *Id.* at 11.

77 Alan Tacca, *Is Pastor Kayanja Better than a Witchdoctor?*, Daily Monitor February 26, 2017, http://www.monitor.co.ug/OpEd/Commentary/Is-Pastor-Kayanja-better-than-a-witchdoctor-/689364-3827936-41mtgaz/index.html.

78 Ashforth, *supra* note 32, at 11.

79 See Norman Miller's account of how a village elder in rural Tanzania prevented a mob from attacking a woman suspected of witchcraft in Norman Miller, Encounters with Witchcraft: Field Notes from Africa 61–62 (2012).

80 *See, e.g.*, Sebankirya v. The Lukiko (1958) 1 E.A. 130 (High Court for Uganda at Kampala).

81 Watete v. Uganda (2000) 2 E.A. 559, 562 (Supreme Court of Uganda).



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by a riotous crowd that, in defiance of their cultural leaders, who opposed his eviction, burned thirteen of his houses and left him and his family in the open to die.[82]

Moreover, cultural leaders have themselves on occasion fanned the flames of witch-killing. In *Terensio v. Uganda*, the house and properties of the suspected witch were set on fire by villagers with support from the local leaders.[83] In *Watete v. Uganda*, the decision to hunt down and kill witches was taken by the local authorities and elders who then appointed young men to do it, and these young men proceeded to brutally kill the suspected witch.[84] In *Wanzama v. Uganda*, the village chief read a letter in public purportedly written by the president of Uganda, directing that all witches in the area should be killed. A team of five people then went and beat the suspected witch to death.[85]

## DEFENSES AVAILABLE FOR WITCH-KILLING

As stated above, four possible defenses for witch-killing exist in Ugandan law: mistake of fact, self-defense, insanity and diminished responsibility, and provocation by witchcraft. Below, I detail and discuss each in turn.

### *Mistake of Fact*

Section 9 of the Penal Code Act provides that an act committed "under an honest and reasonable, but mistaken, belief in the existence of any state of things" is not criminal.[86] Mistake of fact therefore prevents the prosecution from establishing that the defendant possessed the necessary *mens rea* at the time of the offense. The accused is liable only to the extent that the real state of things had been such as he or she believed to them to be.[87] Therefore, for it to work as a defense, courts must find that if the mistaken belief of the accused were true, then there would be justification to act as he or she did. The mistaken belief must be "honest and reasonable." Applied to witch-killing, the accused must have honestly and reasonably believed that the victim was a witch. This is where the classic English Common Law ceases to be common in African societies. Whereas the accused's belief in witchcraft would obviously be reasonable under the customs of most communities,[88] this may not be so under the English Common Law. The courts here have to consider the "reasonableness" of the accused's belief that his or her life was threatened by an act of witchcraft.[89] In other words, what matters is not what the defendant believed the facts to be or even what the facts objectively are but rather what he or she *reasonably* believed them to be.

Whereas the honesty of the belief in witchcraft seems readily acceptable to the courts,[90] the reasonableness of the belief has often been rejected when they choose to use the objective English

82 Sebankirya v. The Lukiko (1958) 1 E.A. 130, 133 (High Court for Uganda at Kampala).
83 Okae Terensio & 3 Others v. Uganda (Civil App. No. 7 of 2007) [2008] UGHC 107, at *2.
84 Watete v. Uganda (2000) 2 E.A. 559, 562 (Supreme Court of Uganda).
85 Stephen Wanzama & 4 Others v. Uganda (Criminal Appeal No. 69 of 1999) [1999] UGCA 14, at *3.
86 Penal Code Act (1950), Cap. 120 § 9 (Uganda).
87 Uganda v. Akuku (1994) I KA.L.R. 14, 23 (High Court of Uganda at Kampala).
88 Mutungi, *supra* note 61, at 531.
89 *Id.* at 535.
90 In the Tanzanian case of *Kasongi Yabisa v. The Republic* (1995) T.L.R. 28 (Tanzania Court of Appeal) (accessed from Tanzania Legal Information Institute, https://tanzlii.org/tz/judgment/court-appeal-tanzania/1994/22), the court noted that "There can be no doubt in this case that the appellant killed his sister, the deceased, in the honest



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Common Law standard.[91] An imagined reasonable person is placed in the defendant's circumstances with the defendant's evidence and facing the same background conditions. The court then determines whether the reasonable person would have done as the defendant did. If the defendant acted as the imagined reasonable person would have then the defendant was reasonable. Where the court considers that a reasonable person would not believe in witchcraft, the accused's actions cannot be considered reasonable. This was the approach adopted in *Rex v. Dominiko*,[92] where eleven Ugandans participated in the murder of an employee of the Ugandan Medical Service under the belief that Europeans kidnapped and ate natives. They put forward mistake of fact as a defense. The court, in rejecting the defense, tersely noted that though they honestly believed that the victim intended to cannibalize them, such a belief "could hardly be held to be reasonable."[93]

The reasonable person rule, it is argued, should involve some subjectification, that is, some characteristics of the defendant should be given to the imagined reasonable person in assessing how he or she would react.[94] In witch-killings it could be argued that the defendant's belief in witchcraft be taken into consideration to determine whether a reasonable person believing in witchcraft would in fact act as he or she did. This approach found support in at least one case. In *Yovan v. Uganda*, the court in considering provocation as a defense for witch-killing used a subjective approach adopting a definition of a reasonable person as "an ordinary person of the community to which the accused belongs."[95] The court further noted,

> What might be a deadly insult to a member of one community might be a mere triviality to members of another community. In this respect the opinion of the assessors with their local knowledge of the customs of the people of the community can be of the greatest assistance to the trial judge although, of course, evidence can, and should (if necessary) be led as to the nature and meaning of a particular wrongful act or insult and as to any relevant customs.[96]

The challenge with subjectification is that it could defeat the entire purpose of the reasonable person test. For instance, should the test for reasonableness also include the defendant's racist beliefs in a racially motivated murder?[97] Or, in a more African context, should the accused's belief in tribal or clan stereotypes be taken into consideration?[98] In the U.S. case of *People v. Goetz*,[99] the

belief that she was responsible, by reason of witchcraft, for the death of his daughter," but the court still convicted him of murder as the other ingredients of the defense of provocation, such as sudden shock, were absent. In the Kenyan case *Athuman v. Republic* (1967) E.A. 401, 402 (High Court of Kenya at Mombasa), the court entertained the existence of "strangely deluded witch-doctors . . . men who undertake the cure of ailments for reward and have an honest belief in the efficacy of rituals, incantations and the like."

91 It is noteworthy that in the United Kingdom, the requirement of reasonableness of the belief has been abandoned in at least some areas of the law. *See* DPP v. Morgan [1975] UKHL 3, [1976] 1 AC 182, 202–03 (appeal from England) (overruled by the Sexual Offences Act 2003, chapter 42); R. v. Williams [1987] 3 All ER 411, 413.

92 Rex v. Dominiko (1943) 10 E.A.C.A. 81 (Court of Appeal for Eastern Africa).

93 *Id.* at 87.

94 Stephen P. Garvey, *Racism, Unreasonable Belief, and Bernhard Goetz* (Cornell Law Faculty Working Papers, Working Paper No. 24, 2007).

95 Yovan v. Uganda (1970) 1 E.A. 405, 406 (Court of Appeal at Kampala).

96 *Id.*

97 Garvey, *supra* note 94, at 8.

98 In *Uganda v. Munguriek & Anor* (Criminal Sessions Case No. 0008 of 2017) [2018] UGHCCRD 92, at *7, there was evidence that the accused in a case of aggravated robbery targeted the victim because of his tribe although this was not proffered as exculpatory or mitigating evidence.

99 People v. Goetz, 497 N.E.2d 41, 43–44, 47–53 (N.Y. 1986).



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defendant, who had previously been robbed, shot and injured three young African American men who accosted him in the subway under the belief that they were attempting to rob him. The court rejected an entirely subjective test to determine whether he had used deadly physical force appropriately as every defendant who believed that his actions were reasonable, no matter how bizarre and unconscionable the rationale behind them might be, would qualify for an acquittal. The court explained that employing a different test of reasonableness for every single defendant claiming justification would be untenable.

However, belief in witchcraft in Africa is not as unreasonable as it might at first seem.[100] While an isolated individual's belief in witchcraft can justifiably seem unreasonable, the entire African belief system taken as a whole including the belief in witchcraft could be considered rational and logical. Witchcraft is a social reality in Africa and explains many otherwise unexplainable occurrences and is rational and logical within the society that believes it.[101] This view has however been attacked because although witches are a part of Africa's social reality they lack the ontological status of theoretical entities in scientific research and when the justification for belief in witchcraft is assessed by external objective standards it turns out to be insufficient.[102] In the Nigerian case of *Gadam v. Queen*, the accused had killed an old woman in order to destroy the spell that he believed she had placed on his wife who lay mortally ill.[103] Though the court acknowledged that the accused had killed the deceased because of a belief commonly held by members of his tribe, it rejected his defense of mistake of fact. The court noted that it would be "a dangerous precedent to recognize that because a superstition, which may lead to such a terrible result as is disclosed by the facts of this case, is generally prevalent among a community it is therefore reasonable."[104] The mere fact that a belief, however demonstrably absurd, is held by many people in a community would not thereby qualify it to be reasonable.

## *Self Defense*

Section 15 of the Penal Code Act provides that "criminal responsibility for the use of force in the defense of person and property . . . shall be determined according to the principles of English law."[105] Under English law, self-defense based on a mistake of fact is valid.[106] However, self-defense requires that the force used be both *necessary* and *proportionate*.[107] Whether or not one acted in self-defense is a question of fact, and each case must be considered and judged on its own merits.[108]

100 Polycarp Ikuenobe, *Cognitive Relativism, African Philosophy, and the Phenomenon of Witchcraft*, 26 JOURNAL OF SOCIAL PHILOSOPHY 143, 145 (1995).

101 *Id.* This is demonstrated by a district police commander who, in his farewell address, declared that he "had fought drug abuse, theft and burglary but he was on the verge of admitting defeat with regard to witchcraft," because it was too effective. Bernard Bakalu, *Can Witchcraft Fail Service Delivery?*, OBSERVER, February 18, 2014, https://www.observer.ug/component/content/article?id=30234:can-witchcraft-fail-service-delivery.

102 Heikki Saari, *On Believing in Witches*, 30 PHILOSOPHICAL PAPERS 307, 315–16 (2001).

103 Gadam v. Queen [1954] 14 SJWACA 442, 443 (West African Court of Appeal), https://lawnigeria.com/2018/01/muhammedu-gadam-v-the-queen/.

104 *Id.*

105 Penal Code Act (1950), Cap. 120 § 15 (Uganda).

106 R. v. Williams (1987) 3 All ER 411, 415.

107 Obote v. Uganda (Criminal Appeal No. 12 of 2014) [2017] UGSC 2, at *10.

108 Wandera Fred & 2 Others v. Uganda (Civil Appeal No. 113 of 1999) [2002] UGCA 3, at *4.



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### Necessity of Action

The necessity of the violent action in self-defense can be determined by the imminence of the threat. The accused will be justified only in reacting to a threat that is imminent. While this does not require the defendant to first suffer physical harm before striking, it does mean that there must be some immediacy about the threat.[109] With witchcraft, there is hardly ever a clear immediate threat to the victim, as it is often believed to be performed remotely.[110] The immediacy that would justify a witch-killing is therefore usually lacking. In *Uganda v. Adima*, the accused beat the deceased to death believing that the deceased had used witchcraft to bring about the death of his cousin and was plotting his death as well.[111] Self-defense was rejected because of the absence of any immediate threat.[112]

Moreover, alternative remedies exist. As seen above, the Witchcraft Act provides that one can report a suspected witch to a person of authority, and the witch can then be prosecuted.[113] In many local communities, dispute settlement by village elders or local councils regarding witchcraft is also possible.[114] This is relevant because, although the law does not require an attempt to retreat when one is under threat of violence or a felony, in all other cases it requires the individual to do "all that is necessary in the circumstances to retreat or avoid a fight or disengage from the fight."[115] Self-defense against a witchcraft-related assault would therefore apply only where no other alternative exists. With witch-killing, there will likely always be an alternative available but unexplored.

### Proportionate Force

Self-defense law also requires that the would-be victim prove that the force he or she used in resisting the attack was neither excessive nor unreasonable under the circumstances.[116] Under common law the test for proportionality of the force is an objective one therefore even if the accused believed that he or she was using proportionate force, what matters is whether it was objectively proportionate.[117] Thus, any force or means resorted to must be proportionate to the force and means used by the assailant. The assailant may use his or her fists, sticks, bows and arrows, a gun, and so on, and the self-defense must be of equal measure.[118]

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109 Catherine Elliot & Frances Quinn, Criminal Law 349 (8th ed., 2010). The more verifiable harms likely to be caused by people purporting to practice witchcraft, such as creating a climate of fear thereby damaging social relations, cannot be covered here. However, I do note one peculiar case, in Luweero district, in the central region, in which a practicing witch confessed to the police that he had been hired by the district chief finance officer, who had paid him UGX 20 million (USD 5700) to cause the death of two district councilors by bewitching them. In return for the money, the witch gave the official some fetishes, which, however, failed to fulfil their purposes. The official then demanded that the witch refund the money and had him arrested for fraud. The police arrested both men and informed the would-be victims. The victims and the entire district administration staff declared that they were now all living in fear and distrusted each other. Bakalu, *supra* note 101.

110 John Middleton, *Witchcraft and Sorcery in Lugbara*, in Middleton & Winter, *supra* note 7, at 267.

111 Uganda v. Adima & 5 Others (Criminal Case No. 0226 of 2014) [2017] UGHCCRD 19, at *2.

112 *Id.* at 10.

113 Witchcraft Act (1957), Cap 124, § 3 (Uganda).

114 Diane Ciekawy, *Witchcraft in Statecraft: Five Technologies of Power in Colonial and Post-Colonial Coastal Kenya*, *in* 6 New Perspectives on Witchcraft, Magic, and Demonology: Witchcraft in the Modern World 377, 383 (Brian P. Levack ed., 2001).

115 Wandera Fred & 2 Others v. Uganda (Civil Appeal No. 113 of 1999) [2002] UGCA 3, at *4.

116 Bahemuka William & Another v. Uganda (Criminal Appeal No. 4 of 2003) [2010] UGCA 51, at *5.

117 Elliot & Quinn, *supra* note 109, at 353.

118 *Id.*



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However, such tangible weapons can hardly be accepted as appropriate and proportionate in self-defense against witchcraft. Given the supernatural nature of the witchcraft assault, imagined or otherwise, perhaps resorting to a supernatural power in one's self-defense[119] would be the only proportionate means of self-defense.[120] There is no shortage of potential supernatural defenses in Uganda. Many evangelical and Pentecostal churches claim to be able to protect their congregations from witchcraft by the relatively benign means of God's supernatural protection.[121] Traditional healers also claim to offer protection,[122] which, in most cases, can be classified as bona-fide spirit worship, which is legal.[123] The only limitation seems to be that if one resorted to retaliatory witchcraft as a means of self-defense, one would fall foul of the Witchcraft Act and be liable to prosecution for practicing witchcraft.[124] This would still be a more desirable outcome than would being prosecuted for murder.

## Discussion on Self-Defense

For use of violence to amount to self-defense, the accused must have had "an honest belief based on reasonable grounds that it was necessary and the violence attempted by or apprehended from the attack is really serious."[125] The belief in the threat posed by witchcraft is often honest, for, to most witch-killers, "there is no essential ontological difference between the violence perpetrated by witches and the ordinary forms of violence perpetrated by physical means."[126] However, as already noted, it is doubtful that violent actions based on a belief in witchcraft can be considered objectively reasonable. In *Galikuwa v. Rex*,[127] a self-proclaimed witch was demanding payment from the appellant. The appellant claimed to have previously witnessed a goat and chicken die as if by magic without the witch touching them, and the appellant claimed to have started hearing voices from the witch's "spirits" saying they would eat him if he did not pay. Perceiving the situation as a threat to his life, he killed the witch to save his own life.[128] A plea of self-defense was rejected as untenable because "it is difficult to see how an act of witchcraft unaccompanied by some physical attack could be brought within the principles of English Common Law."[129]

119 A 2012 study of violence against suspected witches in Malawi found that most people who believe themselves or love ones to be victims of witchcraft seek help from traditional healers and pastors in evangelical and Pentecostal churches. CHARLES CHILIMAMPUNGA & GEORGE THINDWA, THE EXTENT AND NATURE OF WITCHCRAFT-BASED VIOLENCE AGAINST CHILDREN, WOMEN AND THE ELDERLY IN MALAWI (2012).

120 Mutungi, *supra* note 61, at 538.

121 Koen Stroeken, *Witchcraft Simplex: Experiences of Globalised Pentecostalism in Central and Northwestern Tanzania*, *in* PENTECOSTALISM AND WITCHCRAFT: SPIRITUAL WARFARE IN AFRICA AND MELANESIA 257, 260 (Knut Rio, et al. eds., 2017).

122 Kagolo, *supra* note 26.

123 Witchcraft Act (1957) Cap. 124 § 1 (Uganda).

124 *Id.* § 2(3).

125 Wandera Fred & 2 Others v. Uganda (Civil Appeal No. 113 of 1999) [2002] UGCA 3, at *4.

126 Ashforth, *supra* note 32, at 10.

127 Galikuwa v. Rex (1951) 18 E.A.C.A. 175 (Court of Appeal for Eastern Africa).

128 *Id.* at 175 (reciting the facts of the case).

129 *Id.* at 78.



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## *Insanity and Diminished Responsibility*

### Defense of Insanity

The majority of English speaking countries in Africa follow the rules of the insanity defense set up in *Daniel M'naghten's Case*.[130] Section 11 of the Ugandan Penal Code Act contains an almost pristine version of the *M'naghten* rules laid out in that famous case.[131] Insanity refers to the cognitive capability of the accused to distinguish between right and wrong. There are two alternatives open to an accused, either he or she does not understand the nature of the act or does not understand that the act is wrong. Insanity has generally been interpreted broadly to include all kinds of mental conditions, including neurosis and low IQ, as long as they could be identified as the cause for the accused's inability to understand the difference between right and wrong.[132] Crucially, the key term "wrong" in the *M'naghten* rules has been held to mean contrary to law not contrary to morality.[133] Thus, where the accused performs an act that he or she considers to be morally justified but knows to be legally wrong, the defense would not apply. The burden of proof for the defense of insanity lies with the defendant, and the standard of proof is the balance of probabilities.[134]

The defense of insanity has been accepted in at least one Ugandan witch-killing case. In *Regina v. Magata*, the accused believed that his father had bewitched and killed his wife and two sons and was now bewitching him as well, so the accused attacked his father and beheaded him.[135] In his defense he claimed, "Because I was bewitched my head was not right; even my ears were affected; when I have sexual connections with my wife, my penis burns."[136] The court held that he was guilty of murder but insane at the time. He had held those thoughts that his father was bewitching him for a long time, and this had affected his mind. The court noted, "an African living far away in the bush may become so obsessed with the idea that he is being bewitched that the balance of his mind may be disturbed to such an extent that it may be described as a disease of mind."[137] A defense that combines both mental illness and cultural considerations has been accepted in at least one other jurisdiction.[138]

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130 Michael L. Perlin, *The Insanity Defense in English-Speaking African Countries*, 2 JOURNAL OF LEGAL PLURALISM & UNOFFICIAL LAW 73–92 (1969); Daniel M'naghten's Case [1843] UKHL J16, 8 Eng. Rep. 718, 719 (England), where the House of Lords stated as follows:

> every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

131 Penal Code Act (1950), Cap. 120 § 11 (Uganda) states, "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he or she is through any disease affecting his or her mind incapable of understanding what he or she is doing or of knowing that he or she ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his or her mind is affected by disease, if that disease does not in fact produce upon his or her mind one or other of the effects mentioned in this section in reference to that act or omission."

132 GABRIEL HALLEVY, THE MATRIX OF INSANITY IN MODERN CRIMINAL LAW 11 (2015).

133 R. v. Windle [1952] 2 QB 826, 833 (England).

134 Uganda v. Afeku (Criminal Case No. 0098 of 2014) [2017] UGHCCRD 30, at *9.

135 Regina v. Magata (1957) E.A. 330, 330 (High Court for Uganda at Kampala).

136 *Id.* at 331.

137 *Id.*

138 In the U.S. case of *People v. Kimura*, No. A-091133 (Los Angeles Superior Court 1985), six psychiatrists testified that Kimura, a Japanese immigrant to the United States, was suffering from temporary insanity after she



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## Defense of Diminished Responsibility

The defense of diminished responsibility is established by the Penal Code Act under section 194, and it applies when the accused commits the crime of murder but is "suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury, as substantially impaired his or her mental responsibility."[139] In these circumstances, the accused is guilty of murder, but with diminished responsibility. The burden of proving diminished responsibility lies with the defense[140] and the standard of evidence is the balance of probabilities.[141] The phrase "whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury" suggests that the intention of this provision was to restrict the scope of this defense to persons suffering from mental illnesses recognized by psychiatrists.[142] This has been the position taken by courts in Uganda.[143] It is therefore doubtful that this provision can be extended to cover a culturally based belief in witchcraft in the absence of a clearly recognized psychiatric disease of mind. In *Uganda v. Owor*, evidence was adduced and accepted that the accused was a "fearful man," "always drunk," "prone to violence," and "always aggressive."[144] In rejecting the defense of diminished responsibility, the court stated, "Strange as he (accused) may have been behaving, this did not mean he was a victim of diminished responsibility."[145]

## Discussion on the Defense of Insanity

It is questionable whether the defense of insanity can be readily applied to all cases of witch-killing. While it was acknowledged in *Regina v. Magata* that a disease of mind could arise out of an obsessive belief in witchcraft,[146] it is doubtful that every belief in witchcraft can be considered a disease of mind. Significantly, *Magata* considered "an African living far away in the bush."[147] It would be difficult to extend the reasoning in that case to educated Africans living in metropolitan cities and even many modernizing rural communities. Further, in a situation where the witch-killers are a large group of people, as is sometimes the case,[148] an insanity plea is unviable. Moreover, insanity exculpates the defendant when the defect is a function of mental disease and should not be brought into play due to mere defects in the training of the mind.[149] Witchcraft belief is usually a result of training, not a disease of mind.

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attempted suicide by drowning herself together with her children upon discovery of her husband's infidelity. Parent-child suicide was acceptable under these circumstances in Japanese culture. Through a plea bargain, her homicide charge was reduced to voluntary manslaughter. She was subsequently reunited with her husband. See discussion in Alison Dundes Renteln, The Cultural Defense 44–45 (2004).

139 Penal Code Act (1950), Cap. 120 § 194(1) (Uganda).

140 Bagatenda Peter v. Uganda (Criminal Appeal No. 10 of 2006) [2007] UGSC 15, at *9.

141 Uganda v. Owor Phillip (Criminal Case No. 67 of 2004) [2005] UGHC 76, at *5.

142 Explained in Lawrie Reznek, Evil or Ill? Justifying the Insanity Defense 24 (2005), considering a similar provision in the United Kingdom Homicide Act 1957, 5 & 6 Eliz. 2 c. 11.

143 *See, e.g.*, Nsabimana v. Uganda (Criminal Appeal No. 189 of 2013) [2016] UGCA 74; Kibirige Habibu v. Uganda (Criminal Appeal No. 130 of 2009) [2014] UGCA59.

144 *Owor*, Criminal Case No. 67 of 2004, at *8.

145 *Id.*

146 Regina v. Magata (1957) E.A. 330, 331 (High Court for Uganda at Kampala).

147 *Id.*

148 *See, e.g.*, Uganda v. Munyirwa Laliyo & 6 Others (HCT-00-CR-SC-0103 of 2004) [2005] UGHC 40.

149 Hotema v. United States, 186 U.S. 413, 420–21 (1902).



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Many obviously sane individuals do believe in witchcraft and cannot claim the insanity defense. The insanity plea was rejected in the Zimbabwean case of *The State v. Shingirai*, where the accused, who was having erotic dreams about his mother yet experiencing erectile dysfunction with other women, decided, on the advice of a witch, to murder her, believing that she had turned him into a spiritual husband.[150] Similarly, in the Kenyan case of *R. v. Muswi*,[151] the defendant killed his wife, with whom he had occasionally quarreled, by shooting her with an arrow as she sat in her kitchen. He believed she was practicing witchcraft against him. According to the testimony of a psychiatrist, there was a history of madness and epilepsy in the family, and the defendant was suffering from mild depression at the material time.[152] The court nonetheless rejected the insanity defense stating, "Even if [the defendant] believed that he was justified in killing his wife because she was practising witchcraft, there is again no evidence that such belief arose from any mental defect; it is a belief sometimes held by entirely sane Africans."[153]

### *Use of Executive Clemency*

Under the Constitution of Uganda, the president has the prerogative of mercy, which allows him to pardon anyone convicted of an offense.[154] Colonial judges in East and West Africa, faced with the peculiar cases where the defendant claimed to have killed a supposed witch in imagined self-defense against his or her diabolical craft, convicted and sentenced the defendant to death, yet in the same breath pleaded for executive clemency from the governor.[155] In *R. v. Mawala*, the accused murdered a relative believing him to be the witch responsible for the recent deaths in his family; the court convicted him of murder and sentenced him to death but pleaded for the colonial governor to use his prerogative of mercy.[156] In *R. v. Kumwaka*,[157] known more famously as the Wakamba Witch Trial, a group of seventy Kamba "natives" killed a woman whom they genuinely believed was a witch and had bewitched the wife of one of them, causing her to fall ill. The group seized the witch and compelled her to lift half the spell off the sick woman, but she attempted to escape before lifting the rest of the spell. The group ran after her and pounded her to death.[158] The group was sentenced to death; however, a plea for clemency from the governor was made by the court.[159] Reliance on executive clemency as a means of dealing with witch-killing does not appear to have continued in the postcolonial period.

Though executive clemency is not a defense against witch-killing, I include it in this discussion because it has the same effect as the traditional defenses: allowing the witch-killer to escape full penalty for his or her actions. Executive clemency has the advantage of maintaining the high standard of the law while also recognizing the obvious fact that a rigid application could be unfair. It also allows for a case-by-case analysis such that it can be applied only in particular cases where penalizing the witch-killer for murder would be patently unjust. However, it is a political tool, and

150 The State v. Shingirai Hamunakwadi [2015] ZWHHC 323, at *2 (High Court of Zimbabwe) (accessed through the Zimbabwe Legal Information Institute, https://zimlii.org).
151 R. v. Muswi (1956) 23 E.A.C.A 622 (Court of Appeal for Eastern Africa).
152 *Id.* at 622 (reciting the facts of the case).
153 *Id.* at 625.
154 Constitution of the Republic of Uganda 1995, article 121.
155 Seidman, *supra* note 33.
156 R. v. Mawala (1940) 7 E.A.CA 62, 64 (Court of Appeal for Eastern Africa).
157 R. v. Kumwaka (1932) 14 L.R.K. 137 (Kenya).
158 *Id.* at 138 (reciting the facts of the case).
159 *Id.* at 139.



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therefore might not be applied in some deserving cases where it is politically inexpedient to do so.[160] Further, a consistent almost institutionalized reliance on executive clemency obviously negates the deterrent effect of any penalties that the law puts in place. The courts' reliance on clemency simply underscores the inadequacy of judicial solutions to witch-killings.[161]

### *Provocation by Witchcraft*

Under section 192 of the Penal Code Act, a person who "unlawfully kills another . . . in the heat of passion caused by sudden provocation, and before there is time for his or her passion to cool,"[162] commits the crime of manslaughter. The Act defines provocation as any wrongful act that, when done to an ordinary person or to another person who is intimately close, is likely to deprive him or her of the power of self-control and to induce him or her to commit an assault.[163] The Act refers to an "ordinary person" as the standard that imports an objective test for provocation. However, in applying it to witch-killing, the courts have used a subjective test.[164] In any case, the defense revolves around the fact that the accused was in the heat of passion and had lost self-control.[165]

In *R. v. Fabiano*,[166] the defense of provocation was extended to perpetrators of witch-killings. In that case, the defendants caught the deceased naked, crawling about their compound at night. They believed the deceased had bewitched their relatives, and that they had caught him in the act of bewitching them. They forcibly inserted unripe bananas into his bowel through the anus, which was considered the traditional method for killing a witch.[167] The court found that the defendants genuinely believed, as would have other ordinary persons in the community, that the deceased was then and there practicing witchcraft against them, and it allowed a defense of provocation. The court emphasized that this was not the creation of a new rule but "merely a special application of the usual rule which reduces to manslaughter a killing done in a provoked passion."[168] The court in *Galikuwa v. Rex* subsequently summarized the requisite elements for the plea of provocation to succeed as follows:

a) The act causing the death must have been done in the heat of passion, i.e., in anger. Fear alone, even fear of immediate death, is not enough.
b) The victim must have been performing, in the actual presence of the accused, an act which the accused genuinely believed, 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.

160 Andrew B. Whitford & Holonna L. Ochs, *The Political Roots of Executive Clemency*, 34 American Politics Research 825 (2006).
161 Seidman, *supra* note 33.
162 Penal Code Act (1950), Cap. 120 § 192 (Uganda).
163 Penal Code Act (1950), Cap. 120 § 193(1) (Uganda).
164 *See, e.g.*, Yovan v. Uganda (1970) 1 E.A. 405 (Court of Appeal at Kampala). In *Uganda v. Nabwegere* (1972) U.L.R. 15, 23, Fuad, J., stated, "Judging the accused by the standard of a reasonable member of the unsophisticated community to which he belonged, legal provocation had been made out sufficient to reduce the terrible killing to manslaughter."
165 R. v. Ibrams & Gregory [1981] EWCA Crim 3, (1982) 74 Cr App R 154 (England) (accessed through the British and Irish Legal Information Institute, https://www.bailii.org/ew/cases/EWCA/Crim/1981/3.html).
166 R. v. Fabiano (1941) 8 E.A.C.A. 96 (Court of Appeal for East Africa).
167 *Id.* at 98–99 (reciting the facts of the case).
168 *Id.* at 101.



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c) A belief in witchcraft per se does not constitute a circumstance of excuse or mitigation for killing a person believed to be a witch in absence of an immediate provocative act.
d) The provocative act must amount to a criminal offence under criminal law.[169]

Element (d) is peculiar as it makes witchcraft provocation distinct from the general law of provocation. The requirement that the provocative act must amount to a criminal offence is not generally part of criminal law.[170] Whereas adultery may not be a criminal offense any more,[171] if a man sees his wife in the act of adultery, he may be provoked even to commit murder, and the defense of provocation should nonetheless be available to him. The passion engendered by seeing a witch performing his or her rituals could cause one to lose self-control even if no law prohibits witchcraft. The Supreme Court of Uganda has reiterated what was stated in *Fabiano*—that the defense of provocation by witchcraft is just a mere extension of the ordinary defense of provocation.[172] Element (d) should therefore be excluded when determining what would constitute legal provocation in the case of a witch-killing.[173]

### Heat of Passion

The requirement of "heat of passion" means that the defense of provocation cannot apply where the murder has been planned and thought through over time.[174] In *Galikuwa v. Rex*, the appellant pleaded provocation and self-defense, claiming that he was being tormented by "spirit voices" that were threatening to kill him if he did not pay money to a self-proclaimed witch.[175] Regarding provocation, the court held that the requirement that the act causing death must be done in the heat of passion—that is, anger—was not complied with. The court concluded that the appellant was motivated by fear alone and not anger: "He struck, not in the heat of passion but in despair arising from his inability to raise the money and his hopeless fear of the consequences. He was not suddenly deprived of his self-control."[176] In *Kamiliango v. Republic*, four sisters hired a witchdoctor to murder their elder sister, whom they believed to be on a killing spree, attempting to wipe out their family by means of witchcraft. They had traveled across a lake to negotiate with the witchdoctor and then traveled back with him to guide him to their victim.[177] In convicting them, the court found that they had "calculated their move with cool minds and in full possession of their faculties."[178] In *Uganda v. Yuman*, the accused saw the deceased moving around naked at night on various occasions and, convinced that this was causing his impotence, subsequently poisoned the deceased.[179] The court, though accepting the evidence that the deceased was moving around naked, rejected

169 Galikuwa v. Rex (1951) 18 E.A.C.A. 175 (Court of Appeal for Eastern Africa) 181.
170 Mutungi, *supra* note 61.
171 Law Advocacy for Women in Uganda v. Attorney General (Constitutional Petitions Nos. 13/05 & 05/06) [2007] UGCC 1, found section 154 of the Penal Code, which created the offense of adultery, to be unconstitutional.
172 Magala Ramathan v. Uganda (Criminal Appeal No. 01 of 2014) [2017] UGSC 34, at *9.
173 Mutungi, *supra* note 61.
174 The State v. Shingirai Hamunakwadi [2015] ZWHHC 323 (Zimbabwe).
175 Galikuwa v. Rex (1951) 18 E.A.C.A. 175, 176 (Court of Appeal for Eastern Africa).
176 *Id.* at 178.
177 Kamiliango & 5 Others v. Republic, 1983 T.L.R. 186 (Tanzania Court of Appeal) (accessed through Tanzania Legal Information Institute, https://tanzlii.org/tz/judgment/court-appeal-tanzania/1984/5).
178 *Id.*
179 Uganda v. Yuman (Criminal Case No. 15 of 1994) [1995] UGHC 20, at *4.



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provocation by witchcraft as a defense as the accused had not killed the deceased immediately but rather had waited for a period during which he should have cooled down.[180]

### Physical Act of Witchcraft

To constitute a defense in a charge of murder, the belief in witchcraft must be founded on some physical, not metaphysical, act.[181] The mere suspicion or rumor that the deceased was a witch cannot avail the defense of provocation by witchcraft. The alleged witch must be seen performing an act believed to be witchcraft in the actual presence of the accused.[182] In *Uganda v. Munyirwa*, an angry mob attacked the deceased, set his house on fire, and threw him into the fire.[183] The defense of witchcraft provocation was not raised; however, the court stated, "The killing must have taken place against the background that the deceased was a notorious wizard. But that could not constitute any lawful defense under our law."[184] In *R. v. Kelement*, the accused strangled and killed the deceased, whom he found dancing naked in his compound.[185] Dancing naked in the accused's compound was held to satisfy the requirement for legal provocation.[186] In *Kutosi v. Uganda*,[187] the appellant said that he had hired the witchdoctor to heal his wife, who was suffering from asthma. When the witchdoctor came for payment, the appellant started beating him up. He said that the witchdoctor threatened him, saying, "if you beat me whereas you have refused to pay me I will plant a bean and you will die." He then got a knife and stabbed the witchdoctor to death.[188] The court held that since the appellant believed that he had just witnessed the witch heal his wife, his defense of provocation would be allowed.[189]

An apparent exception to the requirement of a physical act is a situation where a self-declared witch makes death threats.[190] In *Yovan v. Uganda*,[191] the accused confronted his stepmother believing her to be responsible for the deaths of his two children through witchcraft. She replied that he would die before he could bury his children. He got angry and cut her head, causing her to fall into her fireplace and burn to death.[192] The court, though finding that the words did not amount to sufficient provocation, did clarify that a threat to cause the death of the accused may amount to provocation, depending on the circumstances.[193] This was applied in *Uganda v. Bashaija*,[194] where the deceased told his son to go out with him and buy him alcohol so that he would stop bewitching him. However, even after buying the alcohol, the deceased declared that he would continue bewitching his son. This prompted the son to attack the father with a

180 *Id.* at 4.
181 R. v. Kauna (1945) 12 E.A.C.A. 104, 106 (Court of Appeal for Eastern Africa).
182 Charles Kayumba v. Uganda (Criminal Appeal No. 8 of 1981) [1986] UGSC 13, at *5.
183 Uganda v. Munyirwa Laliyo & 6 Others (HCT-00-CR-SC-0103 of 2004) [2005] UGHC 40, at *1.
184 *Id.* at *8.
185 R. v. Kelement (1943) 10 E.A.C.A. 49, 50 (Court of Appeal for Eastern Africa).
186 *Id.* at 51.
187 Francis Kutosi v. Uganda (Criminal Appeal No. 7 of 1978) [1978] UGCA 8.
188 *Id.* at *2 (reciting the facts of the case).
189 *Id.* at *3.
190 Mwanengu v. Republic (Criminal Appeal 272 of 2006) [2007] eK.L.R. (Kenya).
191 Yovan v. Uganda (1970) 1 E.A. 405 (Court of Appeal at Kampala).
192 *Id.* at 405 (reciting the facts of the case).
193 *Id.* at 407.
194 Uganda v. Bashaija (HCT-05-CR-SC-0198 of 2000) [2003] UGHC 32.



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machete, hacking him to death.[195] The defense of provocation was accepted in the circumstances despite absence of a physical act, and the son was convicted of manslaughter.[196]

### Mere Belief in Witchcraft Insufficient

The mere belief in witchcraft on its own is not sufficient to avail the defense of provocation.[197] In *Katiba v. Republic*,[198] a woman was brutally murdered by the deceased, who believed that she was a witch but offered no proof save for the village rumors. The court noted the absence of evidence such as illness of the accused or death or illness of close members of his family, which by reason of attribution to witchcraft by the deceased provoked him to lose self-control. His defense of provocation by witchcraft was rejected.

### Discussion on Defense of Provocation by Witchcraft

The provocation by witchcraft defense has been compared to the "nonviolent homosexual advance provocation defense" or "gay panic defense" in U.S. criminal law.[199] The gay panic defense rests on pervasive cultural beliefs that same-sex attraction is dangerous and undesirable. According to this defense, an advance by a person of the same gender itself provokes a loss of self-control and "incites uncontrollable homicidal rage in any reasonable person, regardless of homosexual tendencies," and "the reasonable and ordinary person provoked by a homosexual advance kills because the solicitation itself causes an understandable loss of normal self-control."[200] The rationale behind the provocation defense for witch-killing and the killing of LGBTQ people is basically the same: the criminal's belief that the victim was evil entitles the criminal to a lesser punishment.[201] One of the most famous applications of the defense was in *People v. Schmitz*,[202] where the victim declared that he had a "crush" on the accused, his close friend, on a television talk show. The accused was so "embarrassed" and "humiliated" that three days after the show he purchased a shotgun, drove to his friend's home, and shot the friend twice, killing him. In his defense, the accused claimed that he felt objectified by his friend's affections, and this led to the murder. The jury found him guilty of the lesser offense of second-degree murder, despite the fact that the prosecution tried him for first-degree murder.[203] Interestingly, in one Kenyan case the opportunity for a similar defense did arise but was rejected. In *R. v. Kibiegon Arap Bargutwa*, the son viciously murdered the father, claiming that he had made sexual advances on him and claimed the defense of insanity brought on by the shock of the father's advances. This was rejected by the court, which went on to convict him of murder.[204]

Both the witch provocation defense and the homosexual advance defense are based on strong cultural and religious beliefs that are empirically unfounded. LGBTQ persons are not inherently

195 *Id.* at *2–3 (reciting the facts of the case).
196 *Id.* at *17.
197 Mwanengu v. Republic (Criminal Appeal 272 of 2006) [2007] eK.L.R. (Kenya).
198 Katiba v. Republic (Criminal Appeal 123 of 2014) [2015] eK.L.R. (Kenya).
199 Jennifer Dumin, *Superstition-Based Injustice in Africa and the United States: The Use of Provocation as a Defense for Killing Witches and Homosexuals*, 21 Wisconsin Women's Law Journal 145 (2006).
200 *Id.*
201 *Id.*
202 People v. Schmitz, 231 Mich. App. 521 (1998).
203 *Id. at* 523–24 (reciting the facts of the case).
204 R. v. Kibiegon Arap Bargutwa (1939) 6 E.A.C.A. 142, 145 (Court of Appeal for Eastern Africa).



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evil, and witchcraft does not exist. These defenses are problematic because they appeal to stereotypes that portray minority groups as deviant and abnormal.[205] The outlandish beliefs in witchcraft and the evil of same-sex relations are used to justify violence against powerless and vulnerable groups and therefore should be neither excused nor tolerated regardless of how sincerely the accused holds such beliefs. The defense of provocation "provides tacit recognition that in certain communities killing a 'witch' is not merely explainable, or excusable but praise worthy."[206]

The provocation defense in common law was rooted in a desire to mitigate the harshness of the mandatory death penalty.[207] The death penalty for murder in Uganda is established under a provision drafted in mandatory terms.[208] However, in 2009, the Supreme Court of Uganda ruled that the mandatory death sentence was unconstitutional.[209] Sentencing guidelines issued in 2013 provide that the court may only pass a sentence of death in exceptional circumstances described as the "rarest of the rare" cases where alternatives are demonstrably inadequate.[210] The result of these measures limiting the application of the death penalty is that rather than issuing death sentences, long and life sentences are now preferred.[211] No execution has been carried out in Uganda since the Supreme Court decision.[212] In these circumstances, it can be argued that the original rationale for the provocation defense no longer holds, and therefore the defense can be done away with. The judge during the sentencing could then exercise his or her discretion in considering evidence indicating a loss of self-control and provocation as mitigating factors in sentencing.[213]

## CULTURAL RELATIVISM AND UNIVERSALISM

The application of possible defenses discussed above—mistake of fact, self-defense, insanity, executive clemency, and provocation—in effect calls for the appreciation of the cultural diversity in a heterogeneous country like Uganda.[214] It also acknowledges the fact that Africans in general and Ugandans in particular, despite adopting the laws of their former colonial masters, did not completely abandon their norms and beliefs and there is thus frequently a conflict between the two. Whereas the concept of *mens rea* is traditionally restricted to the objective intent to kill or

205 Joshua Dressler, *When Heterosexual Men Kill Homosexual Men: Reflections on Provocation Law, Sexual Advances, and the Reasonable Man Standard*, 85 Journal of Criminal Law and Criminology 726 (1995).

206 The State v. Shingirai Hamunakwadi [2015] ZWHHC 323, *5 (Hungwe, J.) (Zimbabwe).

207 Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 Journal of Criminal Law and Criminology 421, 422 (1982). It has also been argued that the defense is rooted in the "white Western notion of male honour" prevalent in the seventeenth century, when the defense was properly formulated: Kate Fitz-Gibbon, Homicide Law Reform, Gender and The Provocation Defense: A Comparative Perspective 25 (2014).

208 Penal Code Act (1950), Cap. 120 § 189 (Uganda), states, "Any person convicted of murder shall be sentenced to death."

209 Attorney General v. Susan Kigula (Constitutional Appeal No. 03 of 2006) [2009] UGSC 6, at *45.

210 Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) October 1, 2013, paragraph 17 (Uganda).

211 Augustine Obura, Presentation on the Situation of the Death Penalty in Uganda at The Parliamentary Round Table on the Abolition of the Death Penalty (October 7, 2015), http://www.pgaction.org/pdf/2015-10-07-Obura.pdf (slides).

212 *Uganda*, Death Penalty Database (last updated May 14, 2014) https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Uganda.

213 Extenuating circumstances may reduce moral blameworthiness and provide grounds for not imposing a death sentence. Uganda v. Mukasa (Criminal Sessions Case No. 0142 of 2015) [2018] UGHCCRD 28, at *3.

214 Uganda has fifty-six recognized tribes. Constitution of the Republic of Uganda 1995, third schedule.



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cause grievous bodily harm,[215] this approach introduces a subjective component to the concept. Objective *mens rea* works perfectly in a society in which the hypothetical reasonable person and the average person have little distinction, as there is little difference between moral and legal guilt. However, the *mens rea* used in former British colonies "was cut from African cloth, but shaped to British patterns,"[216] and thus the law's reasonable person and the country's average citizen are continents apart.

Criminal law is based on the presumption that all members of the community subject to it have knowledge of the community's norms and standards,[217] and therefore, when a member breaches the established norms, his or her actions can be rightly perceived to involve some quantum of moral turpitude because they are expected to know and fully appreciate that their conduct was offensive.[218] Indeed, as has been stated by Henry Hart, "If the legislature does a sound job of reflecting community attitudes and needs, actual knowledge of the wrongfulness of the prohibited consequences will exist."[219] Such knowledge can only serve as a barometer of one's moral culpability to the extent that it is reasonable to assume that one could have knowledge of the standard of conduct to which one is being held. However, where the defendant comes from a different community or culture that is unfamiliar with the norms of the society within which he or she is to be judged, attributing moral blameworthiness as part of criminal guilt becomes problematic.[220] To truly be considered justice, the punishment must be tailored to fit the degree of culpability. Imputation of knowledge of a particular law to a defendant is unfair in a situation where the defendant did not have the same opportunity to learn the law as have individuals raised in the cultural majority.[221] Violence against suspected witches cannot be curbed by policies that further undermine the possibilities of collective justice.[222]

Justice must not only be done, but it must be seen and appreciated by the community in which the law operates as having been done. On the one hand, from the rationalist point of view, the innocent victims of witchcraft accusations and violence—who often belong to vulnerable groups, such as women and the elderly—deserve justice, which would involve apprehending and punishing those who do them harm as a deterrence against such behavior again. On the other hand, for the millions living in fear of witchcraft, justice can be seen as having been done only when the perpetrators of witchcraft, who are perceived as dangerous and powerful figures, have been dealt with by the law. For them, "there is no essential ontological difference between the violence perpetrated by witches and the ordinary forms of violence perpetrated by physical means."[223] In their eyes, witches are perpetrators of an invisible criminal violence of which we see only the effects. It is therefore argued that the law should rightly consider the cultural backgrounds of the defendants in witch-killing trials.

215 Jonathan Herring, Criminal Law 152 (8th ed. 2011)

216 Seidman, *supra* note 33.

217 Hence the principle of *ignorantia juris non excusat* or ignorance of the law is no defense embodied in the Penal Codes of most common law jurisdictions, for example section 6 of Uganda's Penal Code Act (1950), Cap. 120.

218 Robert Leikind, *Regulating the Criminal Conduct of Morally Innocent Persons: The Problem of the Indigenous Defendant*, 6 Boston College Third World Law Journal 161 (1986).

219 Henry M. Hart, *The Aims of the Criminal Law*, 23 Law and Contemporary Problems 401, 413 (1958).

220 Leikind, *supra* note 218, at 162.

221 Carolyn Choi, *Application of a Cultural Defense in Criminal Proceedings*, 8 Pacific Basin Law Journal 80, 86 (1990).

222 Ashforth, *supra* note 32, at 6.

223 *Id.* at 10.



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While this approach is tempting, wholesale recognition of peculiar beliefs and cultures in criminal actions has been avoided by courts because to do so would result in judicial sanction of conduct destructive to the very laws and social order that the courts are intended to preserve.[224] To ensure social discipline, there must be an objective distinction between acceptable and unacceptable conduct. Allowing subjectively held cultural beliefs to override criminal liability would equate those beliefs to other defenses, such as immaturity or mental defect, and would very likely lead to patently erroneous judgments.[225] In the Wakamba Witch Trial, the court noted that such an approach would "encourage the belief that an aggrieved party may take the law into his own hands, and no belief could be more mischievous or fraught with greater danger to public peace and tranquility."[226]

The cultural relativist approach appears to have been rejected in many other applications of the law in Uganda. The objective uniform applicability of criminal law is the basis of the criminalization of actions such as female genital mutilation, which remains widely practiced in some parts of the country.[227] Female genital mutilation has no health benefits and can lead to severe pain and bleeding, infection, problems urinating, diminished sexual pleasure, problems in childbirth, and depression and other mental health problems.[228] In Uganda, the Prohibition of Female Genital Mutilation Act of 2010 (FGM Act) makes "all procedures involving partial or total removal of the external female genitalia for non-therapeutic reasons" illegal.[229] This is despite the widespread practice of the act among certain groups within the country who perceive female circumcision as the only means of achieving feminine beauty and cleanliness.[230] Customs and beliefs are recognized in Ugandan law only as long as they are not "repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law."[231] Cultural relativists, however, argue that because plastic surgeries that involve sex-change operations and breast implants, tattoos, and body-piercing are viewed as normal, therefore female genital mutilation should also be acceptable.[232] The president of Uganda has in fact pardoned people convicted under the FGM Act, noting that he has argued with his own daughters about ear-piercing.[233] The explicit criminalization of female circumcision, it is argued, may add little more to the existing law except more stigma to the groups that practice it.[234]

224 Leikind, *supra* note 218, at 177.

225 Choi, *supra* note 221, at 87.

226 R. v. Kumwaka (1932) 14 L.R.K. 137, 139 (Kenya).

227 Center for Health, Human Rights and Development (CEHURD), Protecting the Right to Health in the Campaign against Female Genital Mutilation: A Rapid Assessment of Stakeholder Interventions in Kapchorwa District, Eastern Uganda (2015), https://www.cehurd.org/wp-content/uploads/2015/11/FGM-response-and-R2H-1.pdf.

228 *Health Risks of Female Genital Mutilation (FGM)*, World Health Organization (2018), http://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/.

229 Prohibition of Female Genital Mutilation Act (2010), §§ 1–2.

230 Erika Sussman, *Contending with Culture: An Analysis of the Female Genital Mutilation Act of 1996*, 31 Cornell International Law Journal 193, 210 (1998).

231 Judicature Act (1996) Cap. 13, § 15.

232 Rachelle Cassman, *Fighting to Make the Cut: Female Genital Cutting Studied within the Context of Cultural Relativism*, 6 Northwestern Journal of International Human Rights 128, 129 (2008).

233 The president did, however, urge those who had been pardoned to become "anti-FGM ambassadors." Joan Chemitai, *Museveni Pardons FGM Convicts*, Daily Monitor, December 31, 2014, http://www.monitor.co.ug/News/National/Museveni-pardons-FGM-convicts/688334-2573664-wu91wrz/index.html.

234 Audrey Macklin, *The Double-Edged Sword: Using the Criminal Law against Female Genital Mutilation*, *in* Female Circumcision: Multicultural Perspectives 207, 212 (Rogaia Mustafa Abusharaf ed., 2006).



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These competing views were tested in *Law and Advocacy for Women in Uganda v. Attorney General*,[235] where the petitioner sought to declare female circumcision unconstitutional. The court acknowledged that the practice persisted among several tribes in the country. However, on the basis of the obvious potential harm that results from female circumcision—such as excruciating pain to the victim, death from excessive bleeding or sepsis, and disease and urinary incontinence from the use of crude implements thereby—the court found it to be unconstitutional, violating the provisions for the right to life and freedom from torture.[236] A cultural relativist approach would be untenable in these circumstances, as it would lead to the perpetuation of harm against the victim. A similar universalist approach underpins the setting of the age of consent at eighteen,[237] despite the fact that many communities in Uganda still view child marriage as acceptable.[238] Cultural relativism prevents normative judgment about harmful cultural practices like witch-killings, and it equates with culture what objectively are merely the views of some dominant social groups, thereby obscuring the underlying rationale behind their violence.[239] Simply because beliefs are sincerely held does not imbue them with moral validity. The people who perpetrated the genocide in Rwanda in 1994 might have sincerely believed that their victims deserved to die,[240] but this did not make their actions any less reprehensible nor less deserving of punishment.

Witch-killings go against the country's constitutional provisions, which are meant to have universal application across the country. The Ugandan Constitution specifically prohibits "cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status."[241] Women are the primary victims of witch-killings. Any approach that tolerates such violations makes a mockery of international efforts to end gender based discrimination and violence.[242] Attacks against suspected witches violate their fundamental rights such as the right to life, the right to hold property, the right to a fair trial, and the prohibition against torture.[243] Witch killings are frequently done by mobs.[244] Sometimes the entire village will take part in the witch-killing, with the reluctant participants compelled by threats or fear of being accused of the same.[245] Village mobs can be organized by communities for the express purpose of killing witches.[246] Suspected witches are often killed in front of their relatives and loved

235 Law and Advocacy for Women in Uganda v. Attorney General (Constitutional Petition No. 08 of 2007) [2010] UGCC 4.

236 *Id.* at *20.

237 Constitution of the Republic of Uganda 1995, article 31(1); Penal Code Act (2007), Cap. 120 § 129(1).

238 Anne Mugisa & Catherine Mwesigwa, *Uganda among the Worst in Child Marriages – Study*, New Vision, May 29, 2013, https://www.newvision.co.ug/news/1321344/uganda-worst-child-marriages-study.

239 Gülden Gürsoy Ataman, *Uses of Culture and 'Cultural Relativism' in Gender Violence Discussions*, 2013 Kadin Araştirmalari Dergisi 61.

240 Alette Smeulers & Lotte Hoex, *Studying the Microdynamics of the Rwandan Genocide*, 50 British Journal of Criminology 435, 442 (2010).

241 Constitution of the Republic of Uganda 1995, article 33(2).

242 Susan S. M. Edwards, *The Genocide and Terror of Witchcraft Accusation, Persecution and Related Violence: An Emergency Situation for International Human Rights and Domestic Law*, 2013 International Family Law 322.

243 Chi Adanna Mgbako & Katherine Glenn, *Witchcraft Accusations and Human Rights: Case Studies from Malawi*, 43 George Washington International Law Review 389, 393 (2011).

244 *See, e.g.*, Uganda v. Munyirwa Laliyo & 6 Others (HCT-00-CR-SC-0103 of 2004) [2005] UGHC 40; Uganda v. Maido Robert & 2 Others (HCT-03-CR-SC-0720 of 1999) [2000] UGHC 4. In the Kenyan case of *R. v. Kumwaka* (1932) 14 K.L.R. 137 (Kenya), seventy men were on trial for the killing of one witch.

245 *See, e.g.*, Uganda v. Maido Robert, HCT-03-CR-SC-0720 of 1999; Mohammed Tawa Kea & 2 Others v. Republic (Criminal Appeal 45 of 2015) [2016] eK.L.R. (Kenya).

246 *See, e.g.*, Watete v. Uganda (2000) 2 E.A. 559 (Supreme Court of Uganda).



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ones.[247] In one case, the suspected witch was murdered while she was preparing supper for her family.[248] In another case, the suspected witch was caught while he was with his brother and was dragged away to be hacked to death as he begged for mercy.[249] It is not uncommon for witch-killings to be done by close relatives.[250] In one case, a man beheaded his own father, whom he suspected of killing his wife and two sons through witchcraft.[251] In another, four sisters came together to kill their elder sister, whom they believed to be wiping out the family by means of witchcraft.[252] Although individuals are usually the victims, on occasion entire families can be victims.[253] Human rights violations like these, no matter how culturally justifiable, should be unequivocally condemned.

## CONCLUSION

Taking witchcraft beliefs into account under general defenses, such as mistake of fact, and considering such beliefs in mitigating sentences has the merit of offering a mild form of recognition of cultural beliefs while preserving the unity and stability of the rule of law.[254] Doing so retains the authority of the general legal framework and creates relatively little division among the citizenry.[255] However, this cultural relativist approach undermines the deterrent aspects of the law against murder in general and perpetuates manifest injustices. Moreover, it would involve treating patently absurd beliefs as reasonable in some instances, as some of the courts noted in the cases discussed when acknowledging such demonstrably irrational beliefs as reasonable.

A sustainable solution appears to still be wanting. The guiding principle should be victim-centered, such that the law should never "allow the killing of wizards like it does the killing of snakes and other prowling beasts."[256] In seeking to explain and understand why an individual killed another suspected of witchcraft, the rights of the deceased should not be overlooked. It is unlikely that a legislative formulation that adequately maintains the balance between these two competing interests can be put forward. In the end, the most pragmatic solution may be to do away with all these inadequate defenses and depend on judicial discretion at the point of sentencing to take into consideration all the facts and circumstances surrounding the murder and come up with what is deemed to be the most suitable penalty.

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247 *See, e.g.*, Uganda v. Munyirwa Laliyo, HCT-00-CR-SC-0103 of 2004; Uganda v. Kakubi & Another, (BUS-00O-CR-A-0214-2005) [2008] UGHC 172; Mwanengu v. Republic (Criminal Appeal 272 of 2006) [2007] eK.L.R. (Kenya).

248 *See Kakubi*, BUS-00-CR-A- 0214-2005, at *1–2.

249 Obedling & 3 Others v. Uganda (Criminal Appeal No. 167 of 2012) [2016] UGCA 17, at *7–8.

250 Yahudu Kitunzi, *Five Family Members Arrested for Allegedly Killing Father over Witchcraft*, Daily Monitor, September 15, 2017, http://www.monitor.co.ug/News/National/Five-family-members-arrested–killing-father-witchcraft/688334-4096988-format-xhtml-u7lgbrz/index.html. In *Uganda v. Marani & Another* (Criminal Session Case No, 33 of 2012) [2012] UGHCCRD 58, at *2, two men killed their stepmother, accusing her of witchcraft. In *Uganda v. Bashaija* (HCT-05-CR-SC-0198 of 2000) [2003] UGHC 32, at *8, a son hacked his own father to death after he claimed to be bewitching him.

251 Regina v. Magata (1957) E.A. 330, 330 (High Court for Uganda at Kampala).

252 Joseph v. Republic (1983) T.L.R. 186 (Tanzania Court of Appeal) (accessed through Tanzania Legal Information Institute, https://tanzlii.org/tz/judgment/court-appeal-tanzania/1984/5).

253 *See, e.g.*, Uganda v. Seruga Yonasani & Others (HCT-00-CR-SC-0198 of 2003) [2004] UGHC 44.

254 Tebbe, *supra* note 18, at 212.

255 *Id.*

256 Republic v. Juma (1974) E.A. 336, 338 (High Court of Tanzania at Mbeya) (Kwikima Ag, J.).



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The final solution must deal with the belief in witchcraft. A multifaceted approach involving education, religious leaders, politicians, and other influencers is necessary. Such an approach will emphasize an education that teaches a scientific explanation for what happens around us, encouraging free thought and scientific analysis of events that can help spread enlightenment and cause the fear of witchcraft to dissipate.[257] Henry Ford Miirima, a veteran journalist in Uganda spent ten years studying witchcraft in the country, and in *Unveiling Witchcraft in Uganda*,[258] he and Anatoli Wasswa expose it as a dangerous sham that perpetuates a delusion among many people. Through efforts such as this, it is possible that belief in witchcraft will eventually recede into distant history.

Influential religious leaders should be encouraged to take a stand against belief in witchcraft.[259] Claims that witchcraft is behind certain occurrences are often fueled by Pentecostal church leaders, who seem to profit from people's witchcraft fears, which lead them to give church offerings for prayers of protection and exorcism.[260] It is common in Pentecostal services for self-declared former witches to give dramatic testimonies.[261] As anthropologist Koen Stroeken has noted, "Witchcraft's reality becomes stronger with every witch they claim to have converted."[262] It is easy to see how this firm belief in witchcraft can lead to church-inspired, and sometimes even church-led, assaults on witches. In August 2017, the residents of Oyam district in northern Uganda, led by a Pentecostal church pastor and an Anglican Church priest, burned down a shrine and residence of a witchdoctor, accusing her of extortion and of causing mysterious accidents.[263] The early Christian church, which today's Pentecostal movement seeks to emulate,[264] believed the devil to be a defeated foe that was utterly powerless. Saint Augustine of Hippo, one of the most influential theologians of the early church, wrote in 420 CE that witchcraft was merely the "error of the pagans" who believed that there was "some other divine power than the one God."[265] This view was held by the medieval church, which felt little need to persecute or preach against witchcraft. Witch-trials and killings did not occur in Europe until the 1400s.[266] The Pentecostal movement would do well to adopt this more orthodox view rather than one that encourages fear. With a concerted effort, belief in witchcraft in Uganda and concomitantly, the necessity of witch-killing, can be done away with.

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257 Hassan Higenyi, *This Whole Witchcraft Thing Is a Big Sham*, Daily Monitor, March 6, 2011, https://www.monitor.co.ug/artsculture/Religion/689744-1119222-1000x66/index.html.

258 Anatoli Wasswa & Henry Ford Miirima, Unveiling Witchcraft in Uganda: Is It a Pack of Lies and Tricks, a Traditional Culture, Theft by Witch-Doctors, or a Traditional Religion? (2006).

259 These would primarily be Christian church leaders, as the 2014 census data indicates that 83 percent of the Ugandan population identifies as Christian. Uganda Bureau of Statistics, *supra*, note 34, at 19.

260 Cohan, *supra* note 58, at 836. One pastor warned his congregation, "Even if you're in New York where witchcraft is not seen, and you're in suits and ties, your ancestors' spirits will get to you." Cited in Sophie Elizabeth Bremner, Transforming Futures? Being Pentecostal in Kampala Uganda 211 (Feb. 2013) (unpublished Ph.D. dissertation, University of East Anglia), *available at* https://core.ac.uk/download/pdf/9839516.pdf.

261 Juliet Lukwago, *Former Witchdoctor Warns against Witchcraft*, New Vision, March 17, 2014, https://www.newvision.co.ug/new_vision/news/1338742/witchdoctor-warns-witchcraft.

262 Stroeken, *supra* note 121, at 260.

263 Tobbias Jolly Owiny, *Angry Locals Burn Witchdoctor's Shrine*, Daily Monitor, August 8, 2017, http://www.monitor.co.ug/News/National/Angry-locals-burn-witchdoctor-s-shrine/688334-4049510-mgoxw/index.html.

264 Brian Mutebi, *The Story of the First Pentecostal Church in Uganda*, Daily Monitor, September 23, 2012, http://www.monitor.co.ug/artsculture/Religion/The-story-of-the-first-Pentecostal-church-in-Uganda/689744-1514122-ydm6d1z/index.html.

265 Samantha Spence, Witchcraft Accusations and Persecutions as a Mechanism for the Marginalisation of Women 18 (2017).

266 Richard Kieckhefer, *The First Wave of Trials for Diabolical Witchcraft*, *in* The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America 164 (Brian P. Levack ed., 2013).



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Politicians should be encouraged to take a stand against belief in witchcraft. Local politicians have on occasion encouraged punitive action against suspected witches for their own self-interested reasons. When the community in Gulu town believed that they were under attack from a suspected witch, the district police commander and two members of Parliament visited the affected locations and encouraged local mobilization to deal with the threat. One MP even recommended that the suspected witch be dispossessed of his properties and lands.[267]

Entrenched beliefs such as those relating to witchcraft do not die easily. It is possible that such beliefs will always remain in some segment of the population. But this will probably be an increasingly smaller segment of the population as time goes by until the risk of killing of suspected witches eventually vanishes.

267 Allen, *supra* note 39, at 372.



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