

THE RIGHTS OF THE WICKED: THE HURDLES OF PROTECTING WITCHCRAFT ACCUSATION & PERSECUTION VICTIMS WITHIN SOUTH AFRICA'S LEGAL SYSTEM*

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Abstract

In the 21st century, human race fail to realize that there are still problems emerging from ancient beliefs that have continued to be believed by various tribes in the world leading to persecution of children and other minorities who's associated with black magic and occult power. Cases like this often occur with no recognition by the wider community because of the "vigilante" culture with accusations that is related with black magic.

This article tries to give an idea of this phenomenon through various aspects (both social and legal) that hampered the State's ability to protect Accusation and Persecution (WAP) Victims. The discussion would be divided into parts that include 1) The beliefs of this concept held in Africa 2) The socio-economic factor that are believed to be stimulants for the occurrence of related phenomena and 3) Legal perspective (by using the example from South Africa) that include the conflict between customary law and codified laws that is both recognized within the South African Constitutions as well as the issue of cultural defense and extenuating circumstances in legal proceedings. Lastly, there's also a discussion of the role of African Court of Human Rights (ACHR) within this matter, and the writer hopes that this would enlighten the reader about the complexities of this particular human rights issue.

Intisari

Dalam abad ke 21, manusia gagal menyadari bahwa masih banyak permasalahan yang muncul dari kepercayaan kuno yang masih dipegang oleh berbagai suku bangsa di dunia yang memicu persekusi anak-anak serta kelompok minoritas lain yang berkaitan dengan ilmu hitam dan okultisme. Kasus semacam ini sering terjadi tanpa adanya kesadaran dari masyarakat luas akibat budaya "main hakim sendiri" atas tuduhan yang berhubungan dengan ilmu hitam.

Artikel ini mencoba untuk menjelaskan fenomena tersebut melalui beberapa aspek (baik sosial maupun legal) yang menghambat kemampuan Negara untuk melindungi Korban Tuduhan dan Persekusi (KTP). Pembahasan ini akan dibagi ke beberapa bagian termasuk 1) kepercayaan konsep tersebut di benua Afrika 2) Faktor sosio-ekonomi yang dipercaya menjadi stimulant terjadinya fenomena terkait dan 3) perspektif hukum (dengan menggunakan contoh dari Afrika Selatan) yang mencakup konflik antara hukum kebiasaan dan tertulis yang diakui dalam konstitusi Afrika Selatan serta masalah pembelaan budaya dan kondisi meringankan dalam proses peradilan yang harus ikut dipertimbangkan. Selain itu, ada pula diskusi mengenai peran Mahkamah Hak Asasi Manusia Africa (ACHR) atas hal ini, dan penulis berharap hal tersebut dapat menjelaskan kepada pembaca mengenai kompleksitas masalah HAM ini.

Keywords: Witchcraft accusations, Persecutions, ancient beliefs, tribes, black magic, human rights, Africa, African Court of Human Rights (ACHR), cultural defense

Kata Kunci: Tuduhan sihir, persekusi, kepercayaan kuno, suku, ilmu hitam, HAM, Afrika, Mahkamah HAM Afrika, pembelaan budaya

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A. Introduction

On the 10th March 2014, the UN Special Representative of the Secretary General, Martha Santos Pais includes a horrifying picture within her opening remarks in the Human Rights Council where she portrayed “A drawing which pictured a little boy with albinism tied to a tree, very far away from the village, being attacked by a lion... it’s an image I keep vividly in my mind” (Remarks, 2014).

Four years later, the UNHRC held the WHRIN: *The United Nations Expert Workshop on Witchcraft and Human Rights*. This workshop is groundbreaking; it was held by the UNHC that was attended by numerous professionals and human rights professionals as a direct measure to create a platform to address the issue of Witchcraft Accusations and Persecutions (“WAP”) as a violation to human rights. This conference also acted as a wakeup call for every stakeholder involved to finally acknowledge the reasoning and the structural factors that created the *raison d’être* behind this ongoing phenomenon (WHRIN, 2016).

This case is an example out of an abundant unsolved question from the past that created questions and legal issues in the modern world. The lack of actions would create further human rights violations to a minority group, especially to the *albinism* children that was included within the foresaid opening remarks. The phenomena has already been reported to happen in many parts of the world that includes Nepal, India, Indonesia, Pakistan, Papua New Guinea, Thailand, Mexico, Saudi Arabia, Iran, Syria, Bolivia, Guatemala and Haiti (Alston, 2009; Foxcroft, 2009; Schnoebelen, 2009). However, the writer chose to limit the focus on the witchcraft accusations that happened in the African Sub – Saharan region due to the fact that these accusations are deeply rooted in African Culture and in African Countries (Alston, 2009; Foxcroft, 2009; Schnoebelen, 2009).

The previous statement was based upon the local belief of the African society where they believed in the *dualism* idea of

the world where there is another world other than the one we live in. This world; is divided into the “*visible*” world (physical ones) and the “*invisible*” world of darkness. The latter is believed to be invasive of the former as they didn’t co-exist with each other, and the accusations of witchcraft are proof of the latter world extending to the physical world and this would eventually disrupt the harmony of the world that we live in (De Boeck, 2000). The local communities believed that this is the reason why there are existences of plagues, sickness that leads into death and famine. Eventually, this “*logic*” creates an urgency for the community to identify the witch, where it is assumed that they have caused “*harm*” that is suffered by the possible victims, who usually comes to the “*vulnerable*” members of the society that includes women, elderly, children or those “*who are somehow “different”, feared or disliked* (Alston, 2009).

The fact that based on WHRIN’s data that was presented in the year 2016, a total of 398 reports were documented from 49 countries, where witchcraft beliefs and practices were reported in every continent and were associated with high levels of violence. The highest number of reports came from the African continent clustered in particular regions or states including Nigeria (67 Cases), Zimbabwe (29 Cases) and South Africa (28 Cases), affirms the applicability of the theory that has already been presented above, and creates more urgencies in regards to the solutions for this matter.¹

B. Understanding the Motives

Other than the belief of the traditional community that has already been presented above, these polemics also has different reasons that can be explained through 1) **Social Factors** as

¹ Data gained from 2013 Global Report (A Report by Witchcraft and Human Rights Information Network (WHRIN) Presented at UN Human Rights Council Session 25 March 10 2014 (Accessed: https://www.whrin.org/wp-content/uploads/2014/03/WHRIN-UN-report_small-FINAL.pdf)

well as **2) Economic Factors**. The writer would like to suggest that these factors to be included within the discussion in order to analyze the background of the perpetuation of this human rights issue.

a. Social Factors

The reality is; the African society has experienced dramatic changes throughout the years. These changes include the urbanization of the rural population and the shift of traditional beliefs to *modernism*. These processes would eventually lead to one point; breakdown of traditional relationships. Flustered with political instability, civil wars and extreme poverty, it created layered problems/ multi-faceted conflict where these problems build up to a relatively tense social relations with no outlet to channel the tension and usually, this become a fertile breeding ground for witchcraft allegations (Foxcroft, 2009).

The aforesaid hotspot within Foxcroft theories is related to another concept: the concept of social capital where according to Robert Putnam (1993) witchcraft accusations and allegations are reserved as the “approved” outlet to channel the social tensions that are believed to have built a norm of reciprocity, trust and relates to elements that improve the efficiency of social organizations (Putnam, 2002). This is a pretty complex reality, where this belief is not only rooted within the locals’ way of living of African citizen but this is also used as a short-term solution of the problems that have been going on within the African society.

The fact that Africans have a relatively conservative belief and low level of education also acted as a stimulant towards the existence of this phenomenon. Research has shown even though most children who are accused of witchcraft does not have one single criterion, but they are children “different” than regular children, that includes children with disabilities or albinos – or because they are “difficult” – undisciplined or rowdy children. Other targeted groups include children with psychological disabilities or

epilepsy (Save the Children. 2006). This is the reason why Robert Putnam’s *Social Capital* theory can be applied within this setting: since the issue of witchcraft can also be taken as the available outlet to channel social tensions since the local community are ignorant towards the fact that even though these victims are different, doesn’t mean that they shall be associated with witchcraft practices.

Table 1- Signs of witchcraft in a child, according to pastors and families

Physical Signs	Strange appearance, ill-health, thinness, too small for their age, pot-bellied stomach or a mal-nourished look, scabies on their head, dirtiness, red lips or eyes, deafness, ugliness, young body but with an old face, epilepsy
Character	Aggressive, untidy, disobedient, sad, mentally retarded, impolite, full of hatred, mysterious, disrespectful, quick-tempered, unruly, liar, hypocrite, too nice, too wise, provocative, too open, courageous, jealous, too fearful, stubborn, incomprehensible, solitary, too clever, weak, naughty, violent, fearless, quiet, rude, mad, curious, incredulous, selfish, insensitive, lazy, inattentive, ruthless, wants to be superior, doesn’t like visitors, creative and full of initiative, ungrateful.
Behaviour	Steal, never look people in the eyes, transform themselves or their toys, do not sleep at night or sleep badly, eat a lot, practice sexual abandon, do not hear or do not listen to what is being said to them, have epileptic fits, wet the bed, defecate in their clothes, talk to themselves, sleepwalk, collect rubbish,

	wander, don't study, go out even when they are ill.
Invisible Signs	They eat human flesh, they cast spells over their family, they have spiritual sex and this causes sterility, they are dangerous murderers and assassins at night, they go out at night to bewitch people, they have the power to go out even if they are shut in, they are behind natural disasters such as the destruction of roads and unemployment, no social life, cause road traffic accidents, epidemics.

The existence of "revivalist" church also acted as a factor that strengthens this belief on the local community, in a manner where there are religious beliefs that is included within this present matter. An assessment that is conducted in the year of 2016 documented case that shows there's an existence of "middlemen" who act as a conduit between those who carry out human rights violations and themselves, and they also use some form of belief in the supernatural to carry out the abuse (WHRIN, 2016).

The birth of Pastors, and "revivalist" churches is the main group who accuses children of witchcraft, and these actors have been preaching about child witchcraft and demonic possessions has led to a huge rise in accusations of witchcraft against children (Foxcroft, 2009). Following these accusations, the clueless victims parents would take their kids to these actors in order to "cleanse" their children by under an "exorcisms" phase where these children suffered from the most severe kinds of abuse that range from being confined the church grounds for months on end, often with little food and water; undergoing long, and sometimes violent, deliverance ceremonies; lack of access to basic sanitation; and being forced to drink dangerous substances in order to purge themselves of the perceived evil (WHRIN, 2016).

b. Economic Factors

Other than the myriads of Social factors that is believed to become the catalyst to the birth of WAP, lack of education and the resistance to understand Western medicine and health conditions is also proven to be one of the stimulants towards these kinds of accusations. The writer would like to opine that economic factor plays a huge role in this since an adequate fulfillment of economic rights would enable people to access adequate education, which later would enrich people's understanding of themselves and the world.

When being associated with the UNHRC data that has been presented in the previous part of this paper, the countries that have the highest number of reported cases of WAP suffers from the lack of education. In Nigeria, only 64% of the population has the ability to read while the rest are illiterate.² In Ghana, even though they have 84% enrollment rate, most of them do not benefit from quality education since based on UNICEF data, Only 16% of grade six students are proficient in mathematics and only 35% proficient in English.³ The fact that South Africa spends a bigger share of its GDP at education⁴ would only highlight the severity level of the present WAP issues that since it highlighted the fact that social reasons play a bigger role other than economic ones.

This is a barbaric phenomenon; that involved many actors within the process of accusations, executions and aftermath in which the victims are left in a devastating condition and unable to be reintegrated with the society due to the label that is embedded within their self. The validity of the main issues is not debated here due to the fact that the society already believe in

² Data gained from UNESCO Data in 2015 (can be accessed through: <http://uis.unesco.org/country/NG>)

³ Data gained from 2011 National Education Assessment (Can be accessed through <https://www.unicef.org/ghana/education.html>)

⁴ Data gained from UNICEF DATA (can be accessed through <https://www.unicef.org/southafrica/education.html>)

matter and these beliefs are being upheld by many individuals from various social strata; the wealthy, the poor, educated, old and also the young (Save the Children, 2006).

The sad reality also includes the fact the impact of these beliefs might resulted into violations of human rights standards, and that they don't have access to legal protections and adequate dispute settlement process due to legal vacuum within the African legal systems itself. This resulted in many alleged Witchcraft victims suffered from impunity within a society that operates with *centrifugal* logic and *vigilante* culture.

Therefore, this paper is not focused to analyze the long lists of factors on why this phenomenon keeps on happening in modern world civilizations, notwithstanding the aforementioned reasons that have been described above. However, this paper shall analyze the reason why is this phenomenon problematic, by using a legal perspective. The writer would like to opine that there needs to be a better solution in regards to the legalities aspects, in order to prevent future human rights violations and to protect these people from the suffering of cruel accusations.

C. Legality & Problems in Regards to Witchcraft Accusations & Persecutions (Analysis: South Africa Example)

Based on the research that has already been conducted by the writer, there are three crucial reasons as of to the human rights issue of WAP is very complex in terms of legalities. These factors are divided into three elements which consist of the **1) Conflict of Law that is used to adjudicate this matter** between the codified state law and the customary law since both of them are recognized under South African Law. Pursuant to the first argument, creates the rise to **2) the issue of Cultural Defenses** that is often implemented to "protect" the perpetrators of WAP cases and it also creates the urgency to analyze **3) the role of the**

African Court of Human Rights (ACHR) on this matter.

a. The Conflict of Law within South Africa's Legal System

Africa, is a state which has legal systems that originates from customary law that regulates various tribal and ethnic communities, and this would later result into a multi-faceted legal system in which would combine modern codified laws and customary practices. This is a product of colonization and western influence introduces new common law legal systems within the region (Bekker, 2005).

However, this colonization left the region with challenges when it comes to choices of law. Even though the western legal systems that have already been adapted there has already been mixed with customary law influences, there have been a number of views that would favor Africa into restoring their customary law and African culture. (Davies & Dagbanja, 2011) On the other hand, Witchcraft is considered as one of the customary beliefs in Africa and often, the act of killing a witch is seen as a chivalrous act. Therefore, the process of eradicating witchcraft accusations and persecutions in Africa are often faced with a certain level of a dilemma due to the fact that there is a conflict between state legal norms and norms underlying popular beliefs.

Ever since the region was first inhabited with people, customary law has already been exercised and it plays a huge role at constructing both norms and religious beliefs among African people, and it binds a certain branch of law that includes family law and social relationship. Due to their *uncodified* and adaptable characteristics, this law lives with the people, and prioritized the collective rights of the people other than individual one. (Oisthuizen, 1991) The importance of this law is being highlighted within the constitution of some region in Africa, and in South Africa constitutions itself, and in return this would create a jurisprudential hierarchy. For example, the African Constitutions states that, under Section 12, they acknowledge the notions of both

“traditional leaders” and recognizing customary law as a domestic Source of Law in South Africa. Section 211 (3) of South African constitution states that:

The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Hence, this part of the constitutions would further lead into the birth of two schools of thoughts when dealing with witchcraft related crime. First, it contends that witchcraft exists and deals with it accordingly. The second school contends to suppress beliefs and do not believe in the existence of this matter. *Traditional* courts belonged to the first one, while *formal* courts and legislators belong to the latter (Hund, 2003).

Both courts also have their own mechanism in dealing with this matter. Traditional courts resolved this problem in a time when misfortune happened through tribal courts and “*customary*” criminal law through a process of *dolosse* or “*throwing the bone*”. At the end of this process, the leader of the tribal meetings will decide the fate of the accused and most of the time, this is where the human rights violations occur as the type of punishment that usually include them being banished from their community, their property being confiscated and death penalty (Ralushai, 1996).

On the other hand, formal courts are also proven to be ineffective as well when dealing with this kind of matter. The law that governs WAP cases is the law that originates from the colonial era that is the South Africa’s Witchcraft Suppression Act No. 3 of 1957. However, after a study that involves 211 cases from court records, it showed that this law has been very ineffective since it shows that only a few people had been prosecuted in regards to this matter, and the sentencing was not strictly applied either. Therefore, this ineffective legislation remains in force and this vicious cycle remained until now. Despite the fact that there has been

measure in order to reform the aforesaid acts, the act has not been repealed (Niehaus, 2010).

b. “Cultural Defenses” within WAP Related Cases

Based on the research that has already been conducted, there are existences of several cases that include the elements of WAP within it. The horrifying results is that, some cases judgment reflects the idea that Witchcraft can be taken *extenuating circumstance* mitigating a murder sentence where the defendant honestly believed the deceased intended to use witchcraft to harm the defendant or his relations, or where the defendant believed he was acting in the public interest. (State v. *Lukhwa*, 1994, State v. *Motsepa*, 1991). This is what is usually being called as “*Cultural Defence*” or as “*act by a member of minority culture that is approved or accepted as normal within his/her own cultural group.*” (Van Broeck, 2001).

In most WAP cases formal proceedings, the judges apply this reasoning in order to adjudicate as a legal strategy that will enable a court to consider the cultural background of the accused determined the way they acted. In the case of State V. *Dikgale* (1965) states that “*Where accused are convicted of murder, and the only probable reason why they had so treated the deceased and committed the crime was that they believed that he was a bad and dangerous witch, then his must be an extenuating circumstance, even if the witch did not affect the accused or their near relations*”. After this case, the courts’ decisions to apply witchcraft as an extenuating circumstance in murder follows, and the positions was confirmed by the cases of *Biyana* and *Fundakubi* (R. V *Fundakubi* 1948, R V. *Biyana* 1938).

In the later years, the court even comes up with the threshold of factors that should be used in WAP cases that would determine whether or not a belief in WAP is genuine in the case of *State V. Ndhlovu* (1971) thus could be used to mitigate the imposed sentences. These factors include 1)

the educations level of the accused and 2) whether or not this crime is conducted in a group. Further, in the case of *S V. Dikgale* (1965) the court also believed that mitigations could also be applied to a crime that one conducted in order not to protect another with family relations, but to “serve” the community with their actions that is aligned to African “communal life” perspective.

All of the examples above serve as an example that in the sense of criminal cases that have an element of culture, cultural defense is most likely to be exercised in order to prove that the accused are acting based on their beliefs. However, this “utilitarian” approach does not result into serving the best interests of the victim at hand. Therefore, this legal system needs to put a solution into this matter and turning cultural defense into a reason into not fulfilling the rights of the “minority” that is affected by the situations (Niehaus, 2010).

D. African Court of Human Rights: Ability to Provide Adequate Protection?

Therefore, after all of the part that has been written above, gives rise to a question on the positions of the African Court of Human Rights within this matter. The fact that African regions does have a regional human right court gives rise to an even bigger questions, since this court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights.

However, after realizing that the **ACHR** source of law is originated from the fact that they based their legal argument based on various African instruments on human and people’s rights. Thus, it brings the discussion back to Section 15(1) of South African Constitution 1996:

Everyone has the rights to the freedom of conscience, religion, thought, belief and opinion.

Thus, this created a complex situation where the belief in witchcraft is associated with the freedom of beliefs and conscience, and the attempt that can be taken would be against of this principle. However, direct and practical actions in regards to this action needs to be taken since based on the same documents, it is also stated that:

Everyone has the right to have any dispute that can be resolved through the application of the law decided in a fair public hearing or where appropriate, another independent and impartial tribunal or forum.” (Section 24)

The combinations of the two conflicting factors above creates another legal dilemma where on one hand, witchcraft is considered as a form of local beliefs and coming up with a precedent of restricting this belief would lead to a violation of Section 15 of the constitutions, where not doing anything will amounts to the violations of Section 24 of the same documents (Niehaus in Moore & Sanders, 2001).

Hence, a new and fresh approach must be implemented in order to effectively deal with this issue. Some legal scholars from Africa have been commenting to this issue needs to be tackled using the approach taking it as an “actual” and a non-absurd matter and at the same time, they also propose a change in policing, improving educations, counseling for victims, as well as community development as well as meditation procedures (Niehaus in Moore & Sanders, 2001).

E. Conclusion

Based on the thorough research that has already been conducted by combining an aspect of social and legal considerations in regards to WAP issue, the mixture between the strong customary belief and the flaw within the legal systems itself, creates a fertile breeding ground for this kind of issues to happen within African soil.

We cannot turn a blind eye to the fact that the issue of Witchcraft has been deeply rooted within Africa's way of live and thus, this created room for cultural defenses as well as negative consequences that includes *essentializing* culture, violating human rights and creating an impression that not everyone is equal before the law.

However, there are several important points of improvement that can be taken into considerations. First, the African government must acknowledge first the point that there are flaws within African legal systems. There need have to be measures by the country's judicative branch to come up with a unified standard that assimilates common and customary law standards in regards to WAP. This are done by cooperating with the relevant parties from the traditional community to evaluate the standards of what constituted as WAP when it comes to "traditional" standards. The writer is aware that this solution might be seen as a step that supports WAP but the writer would like to argue that, persecutions or informal trials would only resulted into the loss of the victims.

Furthermore, direct actions must be taken against perpetrators of persecutions based on the grounds of WAP. This measure usually includes public announcements and advocacy methods in regards to this matter, and many parties would eventually acts against accused witches are crimes. At the same time, relevant articles and HR treaties (ACRWC) as the basis to create campaigns, program and verdicts to WAP.

But all of the above, the effective measures are to pair local police and other relevant international and national organizations with local justice systems to promote and facilitate judicial and protective environments (e.g. police and courts) where victims feel comfortable and safe making statements against their perpetrators. Lastly, there needs to be a socialization that includes all stakeholders which consists of religious leaders, general community, academics and decision maker in order to acknowledge the notions that these persecutions, are against 21st century

human rights standards and at the same time, providing the society with objective lesson in order to expand knowledge in regards to the issue above.

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