



**Issue Paper 29**

**THE REVIEW OF THE WITCHCRAFT SUPPRESSION  
ACT 3 OF 1957**

**Project 135**

**Closing date for comment: 31 October 2014**

**9 SEPTEMBER 2014**

**ISBN: 978-0-621-43033-2**

## INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

Judge Mandisa Muriel Lindelwa Maya (Chairperson)  
Judge Narandran (Jody) Kollapen (Vice-Chairperson)  
Professor Vinodh Jaichand  
Mr Irvin Lawrence  
Advocate Mahlape Sello  
Ms Thina Siwendu

The Acting Secretary is Adv. JB Skosana. The Commission's offices are situated at 2007 Lenchen Avenue South, Centurion. Correspondence should be addressed to:

The Secretary  
South African Law Commission  
Private Bag X668  
PRETORIA  
0001

**Telephone: (012) 622-6336**

**Fax: (086) 266 1935**

E-mail: [jjoni@justice.gov.za](mailto:jjoni@justice.gov.za)

This document is also available on the Internet at [www.doj.gov.za/salrc//index.htm](http://www.doj.gov.za/salrc//index.htm)

## PREFACE

This Issue Paper has been prepared to serve as a basis for the Commission's deliberations, to elicit responses and suggestions from the relevant stakeholders, and to disseminate information about the review of the Witchcraft Suppression Act to the general public. Given these purposes, this Paper does not contain clearly defined recommendations for law reform. The views, conclusions and recommendations in this Paper are accordingly not to be regarded as the Commission's final views. The Issue Paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

Submissions on this Issue Paper, coupled with further intensive research, will form the basis for a subsequent Discussion Paper. The Discussion Paper will contain the Commission's preliminary proposals for law reform, comparative studies and draft legislation. The Discussion Paper will be circulated for general comments and extensive consultation with relevant role-players and members of the public will follow. The purpose of the consultation process will be to test public opinion on solutions identified by the Commission. Submissions on the Discussion Paper will form the basis for preparation of a Report. The Report will contain the Commission's final recommendations and will include the Commission's final proposals and draft legislation (where applicable), which will be submitted to the Minister of Justice and Constitutional Development for consideration. Should the Minister deem fit, he or she may then implement the Commission's recommendations by introducing the draft legislation in Parliament.

Respondents are requested to submit written comments, representations or requests to the Commission by **31 October 2014** at the address appearing on the previous page. Respondents are not restricted to the questions posed and issues raised in this Issue Paper, and are welcome to draw other relevant matters to the Commission's attention. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked "Confidential". Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

The project leader responsible for the project is Judge Mandisa Maya. The researcher allocated to this project, who may be contacted for further information, is Ms Jennifer Joni.

Introduction .....	ii
Preface.....	iii
Table of contents.....	iv

## CHAPTER 1

### ORIGIN OF INVESTIGATION AND BACKGROUND

<b>A</b>	<b>Origin and background to the investigation</b>	<b>1</b>
	1. Religious expression view by the South African Pagan's Rights Alliance	3
	2. Views of the Traditional Healers Organisation	5
	3. Inclusion of the investigation on the SALRC's programme	6

## CHAPTER 2

### OVERVIEW OF THE PRACTICE OF WITCHCRAFT

<b>A</b>	<b>INTRODUCTION</b>	<b>9</b>
<b>B</b>	<b>HISTORICAL CONTEXT OF THE PRACTICE OF WITCHCRAFT</b>	
	1. Origins of witchcraft	10
	2. Definition of witchcraft	12
<b>C</b>	<b>LEGAL FRAMEWORK</b>	<b>14</b>
	1.Domestic legal framework	
	a) Constitutional framework	15
	b) Witchcraft Suppression Act	20
	c) Other legislative developments	24
	d) Common law and customary law	26
	2.Developments in other jurisdictions	27
	3.International legal framework	28
<b>D</b>	<b>WITCHCRAFT IN CONTEMPORARY SOUTH AFRICA</b>	<b>29</b>
	1.Practice of witchcraft by indigenous communities	32
	2.Practice of witchcraft as a religious expression	38
	3.Abusive practices associated with witchcraft	41
	4.Reactions to the practice of witchcraft	42
	• Reactions by communities	42
	• Reactions by law enforcement agencies	43

<b>E</b>	<b>ISSUES FOR CONSIDERATION IN THE LAW REFORM PROCESS</b>	<b>44</b>
	<b>1. Constitutional challenges</b>	<b>45</b>
	<b>2. Questions for reflection</b>	<b>45</b>
	a) Regulation of witchcraft	46
	i) Definition of witchcraft	47
	ii) Prohibition of witchcraft	48
	b) Alternatives to regulation	49
	BIBLIOGRAPHY	50
	LIST OF CASES	50
	LIST OF LEGISLATION	51
	CONVENTIONS	51

## CHAPTER 1

### ORIGIN AND BACKGROUND TO THE INVESTIGATION

#### *A Origin and background of the investigation*

1.1 On 7 July 2008 the South African Law Reform Commission (SALRC or Commission) received a request from the South African Pagan Council (SAPC) to conduct an investigation into the constitutionality of the Witchcraft Suppression Act<sup>1</sup> (the Act) and the proposed Mpumalanga Witchcraft Suppression Bill.<sup>2</sup>

1.2 Upon receipt of the request from the SAPC, the SALRC convened a meeting of stakeholders on 4 September 2008 where the submission was discussed.<sup>3</sup> Following this meeting, on 14 November 2008, the Commission received a revised submission from the SAPC as well as a submission from the Traditional Healers Organisation (THO), both requesting the inclusion of the investigation in the SALRC's programme.

1.3 In its submission the SAPC proposes the repeal of the Act, on the ground that it criminalises witchcraft and self-defined witches such as Pagans. They further propose that there should be no legislation regulating witchcraft, and that misuse of witchcraft should be dealt with in terms of the common law. The basis of the proposal is that witchcraft is part of their recognised belief system and religion. The SAPC submission notes that the Act is problematic as it does not provide a definition of 'witch' or 'witchcraft'. The SAPC acknowledges that historically and in the South African context, the words 'witch' and 'witchcraft' have been used to describe evil or criminal practices associated with ritual killings and misfortune in general. They argue that members of the SAPC are self-defined witches and bear testimony to the existence of witchcraft, but that they are neither evil nor criminals. They further argue that the practice of witchcraft, magic and a plethora of

---

<sup>1</sup> Act 3 of 1957.

<sup>2</sup> The Bill was published in 2007.

<sup>3</sup> The South African Pagans Rights Alliance (SAPRA), THO and Lawyers for Human Rights (LHR) attended the meeting. The invitation had been extended to the THO at the request of the SAPRA. The THO was invited because this group is regarded as a relevant stakeholder with a vested interest in how the issues raised by the SAPC are resolved.

associated traditions and practices are an expression of their religion and fall comfortably within the category of 'Body, Mind and Soul' or 'Esoteric' in all leading bookstores. It is their view that to the extent that the Act provides for the suppression of witchcraft, an expression of their religion, it contradicts several provisions contained in Chapter 2 of the Constitution.<sup>4</sup> By prohibiting the practice of witchcraft, such laws deny citizens their constitutional rights to religious freedom (section 15); the right to freedom of expression (section 16); equality (section 9); human dignity (section 10); freedom and security of the person (section 12); and their right to choose their trade, occupation or profession freely within South Africa (section 22).

1.4 The view of the THO is that the Witchcraft Suppression Act should be repealed and replaced by a new Act. The THO submission argues that the new Act should address the problem of violence associated with witchcraft, and should provide a definition of *busakatsi* or witchcraft. The THO proposes that 'busakatsi' refers to witchcraft in an African context, and includes the use of harmful medicine; harmful magic; and other means or devices that may cause illness, misfortune or death to a person, or damage to property. The THO further argues that there is a need for legislation that will identify and control busakatsi practices. This would enable the courts not only to protect the many innocent people who are accused by others of busakatsi but also to punish people found guilty of practising busakatsi.

1.5 Clearly the two organisations that have requested this investigation espouse two divergent views on how the practice of witchcraft should be dealt with. On the one hand is the SAPC, which argues against the suppression of the practice of witchcraft and regulation or state interference. On the other hand is the THO, which argues for regulation because of the abuses associated with the practice of witchcraft.

1.6 Despite the possibility that many other views exist that are worth exploring in this investigation, this Issue Paper focuses only on the views that have been submitted to the SALRC by organisations, that is, SAPRA and THO. A brief reference will be made to the views of Traditional African Religions (TARs) to balance the religious views espoused by SAPRA. Furthermore, during the course of the investigation other views may be

---

<sup>4</sup> Constitution of the Republic of South Africa, 1996.

considered if this will assist in achieving an amicable resolution of the problems associated with the practice of witchcraft.

## **1. Views on religious expression: SA Pagan's Rights Alliance**

1.7 The SAPRA, represented by Lawyers for Human Rights (LHR),<sup>5</sup> presented a submission to the SALRC. The starting premise was that there should be no legislation regarding the religious beliefs of SAPRA members. They are of the opinion that any existing legislation regulating witchcraft should be repealed, and that issues that surround the abuse of the practice of witchcraft should be regulated by common law.

1.8 In its submission, SAPRA states that their national conference (held in 2007) voted in favour of abolishing the 1957 Witchcraft Act, and that SAPRA objects to the principles outlined in the Act. At its 2007 national conference the organisation promoted what is hereinafter referred to as 'the Melville mandate'. The motivation for the principles agreed on at the conference is based on the protection given to religious minorities by the Constitution.

1.9 The Melville mandate seeks to reclaim the terms 'witch' and 'witchcraft' so that they are understood within the modern Pagan context. The basis for this assertion is an acknowledgement that in South Africa 'witch' and 'witchcraft' have been used to describe 'evil or criminal practices associated with ritual killings, human mutilations and misfortune in general'.<sup>6</sup> The mandate further seeks to initiate a legislative process that will prevent any further or future unfair discrimination and prejudice against Pagans who are self-defined witches.

---

<sup>5</sup> See note 3 above

<sup>6</sup> The assertion by SAPC is supported by the definition of witchcraft that was provided by the Ralushai Commission and the definition contained in the Mpumalanga Witchcraft Suppression Bill. In the Ralushai Commission report, which will be referred to in this Issue Paper, a 'witch' is defined as a person who 'through sheer malice, either consciously or subconsciously, employs magical means to inflict all manner of evil on their fellow human beings. They destroy property, bring disease or misfortune and cause death, often entirely without provocation to satisfy their inherent craving for evil doing.' The Mpumalanga Witchcraft Suppression Bill defines 'witchcraft' as '...the secret use of muti, zombies, spells, spirits, magic powers, water, mixtures, etc, by any person with the purpose of causing harm, damage, sickness to others or their property.'

1.10 The SAPC alleges that the Act prohibits Pagans from practising their religion, by providing that any person who (amongst other things) professes to use any supernatural power, or witchcraft, or professes knowledge of witchcraft, shall be guilty of an offence. They claim that the prohibition in the Act, as it relates to Pagans, violates 'their constitutional rights to religious freedom, expression, equality, liberty, dignity, security and their right to choose and practice their occupation within South Africa.'

1.11 The SAPRA laments the definitions provided for witchcraft and witches, which it claims are stereotypical definitions. These definitions associate witchcraft and witches with something that is evil or associated with ritual killings, human mutilations and misfortune. Such definitions, claim SAPRA, injure the dignity of self-defined witches.

1.12 The SAPRA asserts the existence of witchcraft and witches, which it argues are neither evil nor criminal. They claim their right to freedom of belief and religion.

1.13 In its submission SAPRA refers to a document developed by SAPC and authored by Dr Dale Wallace, a scholar of Comparative Religions. Dr Wallace mentions that the Act has its origins in colonial administration and administrators who were concerned about beliefs and superstition. Emphasis is made that the aim of the Act was to suppress the belief in witchcraft.

1.14 The absence of a definition of 'witchcraft' in the Act, which has led to the association of witchcraft with malicious practices such as the alleged inflicting of illness, misfortune and death, together with some of the conduct that is proscribed by the Act, have been identified as cause for concern. The provisions in subsections (d) and (f) of section 1 of the Act, which criminalise the conduct of a person who professes knowledge of witchcraft and who, for gain, pretends to exercise or use any supernatural power, are problematic as they target both the indigenous practices and practitioners.

1.15 The SAPC acknowledges the pervasive nature of witchcraft among African communities and the destruction it has caused within the same communities. They argue that perceptions about witchcraft have been changing since pre-colonial times, and continue to change.

1.16 The SAPC draws attention to the fact that in post-apartheid South Africa, conduct that is prohibited in the Witchcraft Suppression Act has to be viewed through the lens of the Constitution, which requires all religions to be treated equally. The SAPC submission mentions that magic and the use of charms, which is prohibited in subsections (d) and (f), is practised by various other religions, including but not limited to Hinduism. Limiting or criminalising such practices can amount to discrimination or be viewed as prejudicial.

1.17 The SAPC points to the failure by legislation that suppresses witchcraft to eradicate the belief in witchcraft and the associated violence in post-colonial African countries. Mention is made of African countries that have retained colonial-era witchcraft legislation but have not seen any successes attributed to such legislation. The SAPC comments that other factors must also be considered when dealing with witchcraft-related violence, in addition to legislation that suppresses witchcraft. The roles of various role-players are important.

## **2. Views of the Traditional Healers Organisation**

1.18 In its submission to the SALRC, the THO supports the view of SAPRA that the Act should be repealed. The THO further proposes that the current Act should be replaced with a new piece of legislation that should address problems associated with witchcraft-related violence and provide clarity on the definition of witchcraft. The THO calls for an approach that will strike a balance between protecting innocent people that are accused of witchcraft and punishing those found guilty of practising witchcraft.

1.19 The THO acknowledges that human rights play a role in how one deals with the beliefs of a particular group of people. They propose that the new Act should not be used to control the beliefs and morals of people.

1.20 The THO cautions against the use of labels that have been used in the past to define witchcraft, such as 'witchdoctor', 'witch', 'wizard', 'sorcery', '*muti*', 'supernatural power' and so forth, as these labels can be misleading.

1.21 The THO proposes that witchcraft should be treated like any other crime and that an *umsakatsi* should be treated as a criminal. They cite the example of a person who is found in possession of human tissue and state that such a person should be charged in terms of the Human Tissue Act of 1983.

1.22 The THO also proposes the use of defamation laws against people who, without sufficient evidence, accuse others of being witches. They further suggest mediation in cases where there are no legal grounds for proceeding with a charge of witchcraft.

### **3. Inclusion of the investigation on the SALRC programme**

1.23 Subsequent to the meeting referred to above (see paragraph 1.2) with SAPRA, LHR and THO, and after receiving revised submissions from these organisations, the SALRC conducted a preliminary investigation to assess the possibility of including the investigation in its programme.

1.24 At a meeting on 1 August 2009, the Commission approved the recommendations contained in a proposal paper, namely that a review of the Witchcraft Act should be included in the Commission's Programme. The proposal paper made various recommendations and suggested issues that the terms of reference for the investigation should include. These issues are as follows:

- a) Should the existence of witchcraft in both African and Western culture be acknowledged and if so, how should it be defined.
- b) How should witchcraft be incorporated in a legal framework. Should a distinction be made between the negative and positive potential of witchcraft. A distinction is sometimes drawn in African culture between good vs bad witches, the latter being referred to as *umsakatsi* (people practising *busakatsi*).
- c) Should the practice of witchcraft be criminalised or should ordinary criminal procedure deal with proven illegal practices such as murder, assault, defamation and possession of body parts.
- d) What is the origin of witchcraft violence, and what roles do the different parties involved, play.
- e) Is there sufficient regulation of the profession of traditional healers in terms of the newly enacted Traditional Health Practitioners Act 22 of 2007 in so far as witchcraft is concerned. Traditional Healers rely

heavily on witchcraft discourse in the communities within which they work, both for their status and for their income. The regulation of practices has been thwarted by the diverse communities within which they operate, and unemployment and the AIDS pandemic have both increased the incidence of charlatan, unregistered practitioners.

- f) How will the criminalisation of witchcraft impact on the rules of law of evidence and the integrity of the law. It has been argued that evidence in witchcraft-related cases usually depends on gossip and hearsay and lacks actual proof since it is based on belief and not evidence of a type normally required in court.
- g) Would the acknowledgement of the existence of witchcraft lead to the possibility of creating a so-called “cultural defence” in criminal law, and should this be encouraged.
- h) To what extent will the use of other remedies such as mediation and mediation forums be of assistance in addressing the problem of witchcraft violence. Any envisaged legislation aimed at controlling and suppressing witchcraft should perhaps take into account alternative forms of dispute resolution that once obtained in African traditional societies.
- i) Has the Human Tissue Act 65 of 1983 been successful in curbing muti murders and dealing with the offence of illegal possession of human body parts.
- j) The role of Traditional Leaders should be investigated.
- k) A review of witchcraft legislation should be undertaken in order to determine its constitutionality.
- l) How will the acknowledgement of the existence of witchcraft in South Africa influence the idea of South Africa as a modern country and its place in the global community.
- m) Role of education.

1.25 On 15 January 2010 the SALRC sent a memo to the Minister of Justice and Constitutional Development, requesting approval for the Commission’s recommendation (made on 1 August 2009) to include a review of the Witchcraft Suppression Act in the SALRC programme.

2.26 Shortly after the assignment of the investigation to the SALRC researcher, the SALRC received a letter from the Minister of Women, Children and People with Disabilities (dated 12 October 2011) requesting an investigation into muti killings. The Minister’s

request was motivated by prominent cases that had been reported in the media, involving children who had been killed allegedly for their body parts.<sup>7</sup>

1.26 At the Commission meeting on 22 October 2011 it was recommended that the request by the Minister should be included under the current investigation. On 24 October 2011 the SALRC sent a letter to the Minister advising her that her request for an investigation on muti killings would be incorporated into Project 135 of the SALRC programme. Project 135 is the current investigation dealing with the review of the Witchcraft Suppression Act.

---

<sup>7</sup> The cases that Minister Xingwana referred to involved the killing of a 10-year-old girl in Soshanguve, Gauteng, who was abducted and murdered on 31 December 2009 and her body parts removed. The other case involved a 3-year-old boy from Gugulethu in the Western Cape whose body was found in a suitcase with his throat slit.

## CHAPTER 2

# OVERVIEW OF THE PRACTICE OF WITCHCRAFT

### A Introduction

2.1 The practice of witchcraft is as old as humankind. It is alleged to have been practiced by most rural communities throughout the world. From early times witchcraft was associated with evil and was regarded as a rebellion against God or a rejection of the Christian religion.

2.2 In the South African context, before the Act was passed, tribal authorities dealt with witchcraft cases by mediating grievances and handing down punishment against people found guilty of witchcraft-related violence. When the Act was passed it was aimed at eradicating the belief in witchcraft by punishing people who acted on such beliefs. However, because of the conflict between the principles in the Act and the community's belief in witchcraft, the Act could not be properly enforced as it was difficult to secure witnesses in witchcraft cases.

2.3 Another form of witchcraft, which is practised by Pagans, dates back to medieval times. The difference between Pagan religion (and Pagan witchcraft) and the type of witchcraft referred to in the previous paragraph is that Pagans do not associate themselves with evil. Pagans claim that their practice of witchcraft is an expression of their religion, which should be protected like any other religion.

2.4 The practice of witchcraft in modern day South Africa is still rife and is a source of concern for most communities. In the context of indigenous communities the occurrence of witchcraft has two consequences: the killing of witches or people suspected of practising witchcraft; and incidents of muti murder.<sup>8</sup> In recent times a shift has reportedly occurred

---

<sup>8</sup> Muti murders are sometimes referred to as ritual murders, which some academics decry as a misnomer as they claim that there is nothing ritual about these murders. This is one of the criticisms raised by Dr Petrus in his thesis (see note 74). On page 35 of his thesis he asserts that the Ralushai Commission should not have been referred to as an inquiry into witchcraft violence and ritual murders, as there is a difference between ritual murders and muti murders. He notes that

from the killing of witches or people suspected of practising witchcraft to muti killings, which involve harvesting body parts for making muti.

2.5 Witchcraft killings have reportedly targeted older women. By contrast, newspaper reports (which will be referred to later in this Issue Paper) have revealed that the people targeted for muti killings are usually members of vulnerable groups, such as children.

2.6 Due to the challenges that witchcraft violence still poses within some communities, various proposals have been formulated on how to deal with the scourge. These proposals range from passing legislation that will punish not only those responsible for witchcraft killings and muti killings but also those who practise witchcraft, using existing mechanisms such as the common law and criminal laws dealing with murder and assault.

2.7 In recent times South African Pagans have claimed their place in the constitutional discourse and are demanding recognition like all other religions. South African Pagans oppose the regulation of witchcraft by law, as they regard such action as a violation of their constitutional rights.

## **B Historical context of the practice of witchcraft**

### **1 Origins of witchcraft in Europe**

2.8 In Europe, the practice of witchcraft had its origin in medieval times when Roman Christians persecuted people who worshipped pre-Christian gods. Those who did not follow the Christian religion were regarded as heathens or pagans.<sup>9</sup> The pagans practised ancient traditions such as those of the Roman, Greek and Egyptian religions, which were associated with nature (wind, waves, rain, and fertility).

---

'ritual killing' refers to ritualised killing and that 'muti murder' refers to the harvesting of body parts for muti.

<sup>9</sup> The word 'pagan' is derived from the Latin word *paganus*, which refers to a country-dweller or villager. The word is derived from the root *pagus*, which refers to country or rural areas.

2.9 Some commentators trace the origins of witchcraft and associated practices to tribal religions among numerous cultures, including Greek and Semitic.<sup>10</sup> Research that was conducted on European witchcraft killings confirms that these killings took place in the 14<sup>th</sup>, 15<sup>th</sup> and 17<sup>th</sup> centuries in Switzerland, and in Germany and Poland during the 18<sup>th</sup> century.<sup>11</sup> These witchcraft killings were not prevalent in most parts of Europe, only in rural areas of certain countries. In rural areas, people lived under poor economic conditions and there was a prevalence of superstition and idolatry.

2.10 The church saw the need to uproot witchcraft among these communities, and suggested the death penalty for witchcraft-related offenses.<sup>12</sup> Based on biblical scriptures (Exodus 22:17 and Deuteronomy 18:10) and Roman law, the church supported the persecution of people found guilty of witchcraft; the church regarded such practice as a rebellion against God and an aspect of evil.<sup>13</sup> In the 15<sup>th</sup> century, the church taught that witches and witchcraft were part of the doctrine of evil, specifically 'the devil'.<sup>14</sup>

2.11 Witchcraft was regarded not as an individual sin but as a collective sin committed by a group of people who had made a pact with the devil. In earlier times (eg during the 9<sup>th</sup> century<sup>15</sup>), the churches' teachings on witchcraft had been sanctioned by the Pope.

2.12 It was not only the church that sanctioned the killing of witches; ordinary people also played a role by identifying those accused of witchcraft.<sup>16</sup> During these times, older women who lived in poor areas and dressed differently or had a different 'look' were likely to be identified as witches.<sup>17</sup> Jealousy and hatred were some of the reasons for the witch killings.

2.13 Despite the role that the church played in witch killings, society blamed it for not helping to eradicate those killings.<sup>18</sup> Witch killings at the time were aimed at stamping out

---

<sup>10</sup> Russell 1987 416-417 in Van Wyk 2004 *HTS* 1205.

<sup>11</sup> Van Wyk 2004 *HTS* 1205-1206.

<sup>12</sup> *Ibid.*

<sup>13</sup> Van Wyk 2004 *HTC* 1206-1207.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Van Wyk 2004 *HTS* 1208.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

the belief in witchcraft. This notion was imported to most African countries by colonial administrators, and most of colonised Africa enacted statutes that regulate witchcraft. These statutes were, and in some countries still are, aimed at punishing those who pretend to use witchcraft or are accused of witch killings.

## 2 Definition of witchcraft

2.14 South African legislation, that is, the Act under review, does not provide a definition of 'witchcraft' or 'witch'. In the absence of these definitions, communities have had to use their own definitions based on their understanding of witchcraft. In many instances assistance in understanding the words has been sought from dictionaries and encyclopaedias.

2.15 Looking at sources such as dictionaries has not helped in obtaining a clear understanding or definition of witchcraft. For example, according to the *Oxford Advanced Learner's Dictionary*,<sup>19</sup> 'witch' means 'a woman who is believed to have magic powers, especially to do evil things', and 'witchcraft' is defined as 'the use of magic powers, especially evil ones...'. According to *Webster's New World Thesaurus*,<sup>20</sup> 'witch' means 'sorcerer, warlock, magician, enchantress, charmer, hag, crone', and 'witchcraft' is defined as 'sorcery, magic, black magic, necromancy, witchery, divination, devil worship, enchantment, spell, bewitchment, voodooism, shamanism, demonology'.

2.16 In the South African context, one of the first official attempts at defining witchcraft was made by the Ralushai Commission in 1996,<sup>21</sup> with a second attempt being made in 2007 by the Mpumalanga provincial government in its Mpumalanga Witchcraft Bill. The Ralushai Commission Report defines 'witch' as a person who:

---

<sup>19</sup> 'Witch' and 'witchcraft' *Oxford Advanced Learner's Dictionary* 6 ed Oxford University Press 2003.

<sup>20</sup> 'Witch' and 'witchcraft' *Webster's New World Thesaurus* Pocket Books 2003.

<sup>21</sup> Ralushai Commission of Inquiry (Chairperson Professor NV Ralushai) *Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of the Republic of South Africa* 1996. This Commission is referred to as 'the Ralushai Commission' in the current document and its report is referred to as 'the Ralushai Commission Report'. The Ralushai Commission was commissioned by the then Premier of the Northern Province (now Limpopo), Mr N. Ramatlhodi, in response to the high numbers of incidents of witchcraft violence that were recorded in the province.

...through sheer malice, either consciously or subconsciously, employs magical means to inflict all manner of evil on their fellow human beings. They destroy property, bring disease or misfortune and cause death, often entirely without provocation to satisfy their inherent craving for evil doing.

2.17 The Mpumalanga Witchcraft Suppression Bill defines 'witchcraft' as:

...the secret use of muti, zombies, spells, spirits, magic powers, water, mixtures, etc, by any person with the purpose of causing harm, damage, sickness to others or their property.

2.18 Self-defined witches as represented by SAPRA provide the following definition of 'witchcraft':

Witchcraft is an ancient religio-magical technique and modern Pagan spirituality that employs the use of divination, sympathetic magic and Pagan ritual practices.

2.19 Some scholars believe that the definition of witchcraft is evolving, and depends on the place, time and people.<sup>22</sup> These scholars have attempted to define 'witchcraft' and one such definition states that 'witchcraft is the practice of using the supernatural power for evil, in order to harm others or to help oneself at the expense of others.'<sup>23</sup> This definition implies that a witch is someone who uses supernatural powers for evil purposes – a definition that surely goes against what Pagans believe in or stand for; that is, that witchcraft should not have negative connotations.

2.20 Other scholars argue that witchcraft involves the manipulation of supernatural powers to cause harm and destruction. These scholars contend that witches are viewed as evil and filled with malice.<sup>24</sup>

2.21 The definitions and explanations offered by scholars and academics coincide with the submissions made by the requesters of this investigation. For example, SAPRA submits that witchcraft should not be associated with something that is evil, whereas the THO acknowledges that witchcraft has indeed been used to achieve evil deeds. The submission by the THO illustrates that witchcraft in that context deals with accusations or

---

<sup>22</sup> Tebbe in Bennett *Traditional African Religions* 160-161.

<sup>23</sup> Ibid.

<sup>24</sup> Masondo in Bennett *Traditional African Religions* 26-28, van Wyk 2004 HTS 1210.

suspicion that a person is a witch, and that such a person engages in the practice for a motive, sometimes to cause harm or misfortune. However, this is not the case with Pagans, who are self-defined witches. With Pagans there is nothing secret about what they do.

2.22 The varied definitions that have been provided for ‘witch’ and ‘witchcraft’ illustrate the complexity of the subject. These definitions also demonstrate the multi-dimensional nature of witchcraft, which straddles various disciplines including anthropology, sociology, theology, and psychology. The issues around the definition of witchcraft require that the investigation by the SALRC should recognise the existence of these various dimensions. There should be an acknowledgement of the existence of the practice by both indigenous communities and by Western Pagans – also known as Wiccans.

2.23 The point of departure in determining what constitutes witchcraft or a definition of witchcraft should take into account the views referred to earlier in this Paper. There needs to be a balance between defining witchcraft as evil and defining the practice of witchcraft without any negative connotations.

2.24 It might be easy to define witchcraft as practised by Pagans, since their practice is not secret. However, defining witchcraft as practised by indigenous African communities might pose a challenge since the practice is based on beliefs and superstition. Another source of contestation may arise because with indigenous witchcraft people are often accused or suspected of witchcraft, and those who practise it have never been upfront about what the practice entails.<sup>25</sup>

## **C Legal framework**

2.25 Of importance for this investigation is that the promulgation of the Act under review took place at a time when there was no recognition of human rights and freedoms in South Africa. It was a time when the administrators of colonies were concerned about beliefs and

---

<sup>25</sup> Tebbe in Bennett *Traditional African Religions* 161.

superstitions that prevailed. When the Act was passed the objective was specifically to deal with the belief in witchcraft.

2.26 This section will first look at the Constitution and the relevant rights and freedoms it guarantees. The jurisprudence of the Constitutional Court in dealing with religious rights, and the promotion and protection of the rights of religious minorities, will be outlined. Second, the section will look at the Act to interrogate the provisions that criminalise the conduct prescribed therein. This analysis is aimed at determining whether the Act violates the rights of religious minorities such as Pagans. Lastly, the section will briefly look at relevant legislative developments, developments in other jurisdictions, and the relevant international legal framework.

## **1. Domestic legal framework**

### **a) Constitutional framework**

2.27 The constitutional framework not only guarantees religious rights and freedoms but also protects the cultural rights of indigenous communities. The protection of religious rights is contained in section 9 (see footnote<sup>26</sup>) and section 15 (see footnote<sup>27</sup>), whereas cultural rights are protected in section 31 of the Constitution.<sup>28</sup>

2.28 The protection of religious rights under the Constitution is very generous. In its provision for equality before the law, section 9 implies that all religions should be treated equally. Section 15 goes beyond the protection of religious rights because it protects all rights associated with the right to religion, which includes conscience, thought, belief and opinion. The protection in section 31 permits people belonging to religious, cultural or

---

<sup>26</sup> Section 9 provides that everyone is equal before the law and deserves equal protection of the law. The section further prohibits unfair discrimination against anyone on the grounds of (among other things) religion, conscience and belief.

<sup>27</sup> Section 15 provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion.

<sup>28</sup> Section 31 provides for the protection of the rights of cultural, religious and linguistic communities.

linguistic communities to exercise their rights in community with other members of such groups.<sup>29</sup>

2.29 The protection of religious rights within the constitutional framework encompasses free exercise of the rights and equal treatment of all religions.<sup>30</sup> The absence of an 'establishment clause' means that the Constitution does not prevent the State from recognising or supporting religion in general. However, it does prevent the State from supporting one religion in preference to other religions.<sup>31</sup>

2.30 The rights referred to above can be limited in terms of section 36 or the internal limitation clauses<sup>32</sup> found in some sections of the Bill of Rights. The said limitation is justified if it is in terms of the law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

2.31 The Constitution protects the rights that are alleged to be violated through the prohibition of the practice of witchcraft. The SAPC alleges that the Act violates a number of constitutionally protected rights, such as freedom of religion, belief and opinion; expression; equality; liberty; dignity; freedom and security of the person; and the right to choose and practise one's occupation.

2.32 The Constitutional Court has had various opportunities to adjudicate cases dealing with the religious rights of minorities and to determine the reach of protection provided by the Constitution. Analyses of the Court's jurisprudence can be found in the cases of *Christian Education*<sup>33</sup>, *Prince*<sup>34</sup> and *Pillay*<sup>35</sup> and these cases will be dealt with in turn.

2.33 The *Christian Education*<sup>36</sup> case was the first 'freedom of religion' case decided by the Constitutional Court under the final Constitution. In that case the application was

---

<sup>29</sup> du Plessis in Bennett *Traditional African Religions* 91-92.

<sup>30</sup> De Waal, Currie, Erasmus *The Bill of Rights Handbook* 289.

<sup>31</sup> De Waal, Currie, Erasmus, *The Bill of Rights Handbook* 297.

<sup>32</sup> Section 31 contains such an internal limitation clause, as it provides for the exercise of freedom of religion, culture and language in a manner that is consistent with the Constitution.

<sup>33</sup> *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC).

<sup>34</sup> *Prince v President, Cape Law Society and Others* 2002 (3) BCLR 231 (CC) (Final judgment).

<sup>35</sup> *MEC Education: KwaZulu Natal and Others v Pillay and Others* 2008 (2) BCLR 99 (CC).

<sup>36</sup> Note 32.

brought by concerned parents of children attending a Christian school, who were challenging the constitutionality of section 10 of the Schools' Act, which they alleged violated their freedom of religion. Section 10 prohibits corporal punishment in both public and private schools.

2.34 It should be noted that when the Schools Act was debated in Parliament, the Appellants sought an exemption of their schools (private Christian schools) from the prohibition; their request was refused.<sup>37</sup> Such refusal was the basis of their application to the High Court to have section 10 declared unconstitutional.

2.35 The concerned parents claimed that the prohibition in section 10 of the School's Act violated their religious beliefs because corporal punishment was fundamental in the upbringing of their children. The High Court had dismissed the application. The Constitutional Court found that the limitation imposed by section 10 was reasonable and justifiable.

2.36 Despite its dismissal of the appeal, the Constitutional Court was at pains to emphasise the importance of religious minorities. In this regard the court argued that –

There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake [sic] concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.<sup>38</sup>  
(Footnotes omitted)

---

<sup>37</sup> *Christian Education* paragraph 3.

<sup>38</sup> *Christian Education* paragraph 36.

2.37 In its final analysis the Court held that the limitation of religious rights – or rather the limitation on the free exercise of religious beliefs – by section 10 of the School's Act was constitutionally justified. The Court was of the view that the limitation imposed by section 10 of the Schools' Act related only to administering corporal punishment and not to the Christian belief as whole.

2.38 In the *Prince*<sup>39</sup> case the Constitutional Court was called upon to decide on the constitutionality of section 4 (b) of the Drugs and Drug Trafficking Act 40 of 1992 and section 22A (10) of the Medicines and Related Substances Control Act 101 of 1965.<sup>40</sup> The Appellant, an adherent of the Rastafari religion, contended that the impugned sections prohibit the possession and use of *dagga* (cannabis or marijuana) for religious purposes, or that the said sections fail to provide an exemption to people who need to possess or use dagga for religious purposes. Both the High Court application and the appeal to the Supreme Court of Appeal (SCA) had failed and he lodged an appeal to the Constitutional Court.

2.39 In deciding the case, the Constitutional Court went to great lengths to accommodate the concerns of the Rastafarians, a group the Court regarded as a vulnerable religious minority. In an extraordinary step the Court allowed the parties to adduce further evidence that had not been presented to either the High Court or the SCA. In this regard the Court argued the following:

[T]he appellant belongs to a minority group. The constitutional right asserted by the appellant goes beyond his own interest – it affects the Rastafari community. The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation. They are perceived as associated with drug abuse and their community is perceived as providing a haven for drug abusers and gangsters. During argument it was submitted on behalf of the A–G that if a religious exemption in favour of the Rastafari were to be

---

<sup>39</sup> Note 33.

<sup>40</sup> In the High Court application the Appellant had initially challenged the constitutionality of the Law Society's decision in refusing to register his contract for community service, a requirement in the Attorneys Act for admission as an attorney. The Law Society had refused to register his articles based on the convictions he had for possession of dagga in contravention of the Drugs and Drug Trafficking Act.

allowed this would lead to an influx of gangsters and other drug abusers into their community. The assumption which this submission makes demonstrates the vulnerability of this group. Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.<sup>41</sup> (Footnotes omitted)

2.40 The Court took extraordinary steps in this case in recognition of the need to protect religious minorities. After hearing the additional evidence, the Court dismissed the appeal as it was of the view that it would not be feasible for law enforcement agencies to police the use of dagga for religious purposes.

2.41 In the case of *Pillay*,<sup>42</sup> which is regarded as a landmark judgment on religious rights, the Court dealt with an appeal against a case that had been brought on behalf of a teenage learner, a student at a Durban girls' high school, who wanted to wear a nose stud for religious purposes. Wearing a nose stud contravened the school's code of conduct, which excluded the wearing of all jewellery including nose studs.

2.42 The parent of the learner insisted that her daughter should be allowed to wear a nose stud, saying that nose studs formed part of their Hindu religion. When the school refused to grant the learner an exemption to wear the nose stud, the parent challenged its refusal at the Equality Court, which dismissed the application. She then successfully appealed to the High Court and the school appealed to the Constitutional Court.

2.43 In deciding the appeal, the Constitutional Court argued that the school's code of conduct and its governing body's refusal to grant the learner an exemption resulted in discrimination against the learner. The Court further argued that one of the problems with the code of conduct was its failure to provide for an exemption. This, the Court argued, compromised the rights of people like the learner in the present case.

---

<sup>41</sup> *Prince v President, Cape Law Society and Others* 2001 (2) BCLR 133 (CC) (Interim judgment) paragraph 26.

<sup>42</sup> Note 34.

2.44 The Court found that reasonable accommodation was necessary to ensure a balance between the rights of people who want to exercise their religion and the hardship that such exercise would impose on others in the school. The Court described the notion of reasonable accommodation as follows:

At its core it is a notion that sometimes the community, whether it is the State, an employer or a school must take positive measure and possibly incur additional hardships or expense in order to allow all people to participate and enjoy the rights equally. It ensures that we do not relegate people to margins of society because they do not and cannot conform to certain social norms.<sup>43</sup>

2.45 The above three cases illustrate the Court's high regard for the rights of religious minorities, and establish the importance of balancing the interests of the individuals whose rights are affected. The cases also demonstrate the importance of accommodating religious minorities in the constitutional discourse.

## **b) Witchcraft Suppression Act 3 of 1957**

2.46 In South Africa, before witchcraft was regulated by law the practice was largely regulated and dealt with by the traditional courts. Traditional courts handed down sentences that ranged from beatings to the killing of people found guilty of practising witchcraft.<sup>44</sup> In some instances guilty parties were banished from the village or 'cured'.<sup>45</sup> After the promulgation of the Act, cases involving witchcraft were adjudicated by the courts.

2.47 The Act was amended in 1970 by the Witchcraft Suppression Amendment Act.<sup>46</sup> The amendment to the Act did not extend its content or attempt to clarify some of the

---

<sup>43</sup> *Pillay* paragraph 73

<sup>44</sup> Ralushai Commission Report 51.

<sup>45</sup> *Ibid.*

<sup>46</sup> Act 50 of 1970.

issues that are not dealt with adequately in the Act; it only dealt with the prescribed sentences for offences under the Act.<sup>47</sup>

2.48 The Act is very short as it has only four sections. One of the striking deficiencies is that it does not have a definition section, meaning that important terms such as ‘witchcraft’ and ‘witch’, the basis for the existence of the Act, are not defined.

2.49 Section 1, which is the biggest section in the Act, contains categories of conduct that is prohibited in terms of the Act. The section prescribes conduct that is prohibited and for which a person would be guilty of an offence and liable to a conviction. Section 1 of the Act provides as follows:

- 1) Offences relating to the practice of witchcraft and similar practices
- Any person who—
- a) imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;
  - b) in circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, imputes the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person;
  - c) employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard;
  - d) professes a knowledge of witchcraft, or the use of charms, and advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft;
  - e) on advice of any witchdoctor, witch-finder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means or process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing;
  - f) for gain pretends to exercise or uses any supernatural powers, witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill in or knowledge of occult science to discover where and in what manner anything supposed to have been stolen or lost may be found.
- shall be guilty of an offence and liable on conviction—
- ...

---

<sup>47</sup> For example, the amendments did not define witchcraft all they did was to clarify and extend some of the offences and sentences prescribed in the Act.

2.50 The offences created by section 1 of the Act proscribe conduct relating to the following: First, subsection (a) prohibits any person from accusing another person of using witchcraft to cause any disease or injury or damages to any person or thing, or who names or indicates that any person is a wizard. This prohibition covers instances of pointing out of witches or witch-hunts where individuals are accused of causing harm to others through witchcraft or the use of supernatural powers.

2.51 Second, subsection (b) prohibits any person from professing or pretending to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, to attribute the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person. This provision affects persons known as 'witchdoctors.' For there to be a violation of the provision the conduct of the 'witchdoctor' must result in the causing of harm such as death, disease, damage or disappearance of a person or thing.

2.52 Third, subsection (c) deals with situations where an individual employs or uses the services of a 'witchdoctor' or 'witch finder' or any other person to name or to 'sniff out' a witch or wizard. In this instance an offence is committed when a person employs the services of someone such as a witchdoctor to advise him or her of the identity of a witch.

2.53 Fourth, subsection (d) prohibits situations where a person who professes knowledge of witchcraft or the use of charms advises any other person on how to bewitch or injure any person or to damage a thing, or supplies any person with pretended means of witchcraft.

2.54 Fifth, subsection (e) prohibits the practice of witchcraft. What is prohibited are situations where any person, on the advice of any witchdoctor, witch-finder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means or process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing. What is prohibited is the independent practise of witchcraft, or witchcraft practised on the advice of another person (such as a witchdoctor or witch finder).

2.55 Lastly, the prohibition in subsection (f) covers those people who, for reward, pretend to use witchcraft or a pretended means of witchcraft or knowledge of supernatural

powers, to find or discover where and in what manner anything supposed to have been stolen or lost may be found.

2.56 In summary, the conduct that is proscribed in the Act can be divided into three categories:

- (a) Conduct related to witch finding and violence, which is found in subsections (a), (b) and (c). With regard to subsections (a) and (b) the sanction is a prescribed maximum sentence to death, whereas subsection (c) carries a fine of R500 or imprisonment not exceeding five years.
- (b) Conduct related to the practise of witchcraft, which is found in subsections (d) and (e). The sentence is a fee not exceeding R500 or imprisonment not exceeding five years, or both.
- (c) Other conduct relates to subsection (f) that deals with pretending to use witchcraft for gain. This last offence carries a sentence of imprisonment for a period not exceeding two years or a fine not exceeding R200.

2.57 On the face of things it can be argued that the prohibition of witchcraft-related practices in the Act is very broad, and that the Act outlaws every conduct associated with the practise of witchcraft or the use of supernatural powers. However, a closer reading of the provisions in section 1 (referred to above) may lead to a different conclusion.

2.58 For example, the prohibition in subsection (b) which is targeted at persons who profess to use supernatural powers, witchcraft and sorcery is not primarily aimed at prohibiting those persons from professing their knowledge of the use of supernatural powers. What seems to be prohibited is using such powers to achieve ulterior motives, such as accusing another person of causing death, injury or grief or other disastrous consequences. It is submitted that being a witchdoctor, wizard or sorcerer is *per se* not prohibited in the Act; what is prohibited is using such knowledge to achieve harmful or destructive results.

2.59 The same argument can be made with regard to the prohibition in subsection (d) of the Act, which is targeted at people who claim to have knowledge of witchcraft or the use of charms. The prohibition in this provision could be interpreted as being directed at the use of such knowledge to advise another person on how to bewitch or injure any person, or at supplying someone with the means of witchcraft.

2.60 The prohibition in subsection (f) can also be seen not to be targeted simply at an individual who, for gain, pretends to exercise or use any supernatural powers or witchcraft, but rather at those who go further and assist in the discovery of goods supposed to have been stolen or lost. It could be that such a person might be seen as responsible for the ill fate that will be faced by anyone accused of being in possession of the missing goods.

2.61 Consequently, it is submitted that the practice of witchcraft is not *per se* prohibited. What seems to be prohibited is conduct that leads to harm as a result of advice given by people who claim to have knowledge of witchcraft or the use of supernatural powers.

### **c) Other legislative developments**

2.62 Although the number of reported incidents of witchcraft violence in South Africa increased in the late 1980s and early 1990s, there were no developments on the legal front to curb the scourge. During this period there was a marked shift in the phenomenon of witchcraft violence from witchcraft-related killings to muti murders. Instances of muti murder attracted media attention and public sympathy because the victims tended to be predominantly children.

2.63 It was only in 2007 that Parliament passed the Criminal Law (Sentencing) Amendment Act 38 of 2007 (Sentencing Act), which was aimed at strengthening punishment for witchcraft-related murders and removal of body parts.

2.64 Section 5 of the Sentencing Act, which amends Schedule 2 to the Criminal Law Amendment Act of 1997, provides as follows:

- (a) by the addition in Part 1 after paragraph (d) of the paragraphs setting out the categories of “murder”, of the following paragraphs:
- (e) the victim was killed in order to unlawfully remove any body part of the victim, or as a result of such unlawful removal of a body part of the victim;
- (f) the death of the victim resulted from, or is directly related to, any offence contemplated in section 1 (a) to (e) of the Witchcraft Suppression Act, 1957 (Act No3 of 1957); ...

2.65 The Sentencing Act is aimed at punishing the perpetrators of witchcraft violence rather than people who use body parts obtained through muti killings (that is, the 'end users'). Section 1 of the Sentencing Act makes provision for a discretionary minimum sentence to life imprisonment for murders aimed at removing body parts or for murders relating to violations of subsections (a) to (e) of the Witchcraft Suppression Act.<sup>48</sup>

2.66 Even after the passing of the Sentencing Act, calls continued to be made for government to focus on people who use muti made out of body parts, as they are seen to be creating the demand for such muti.<sup>49</sup> The then Minister of Women, Children and People with Disabilities had proposed even harsher punishments for muti murder and improved reporting of crimes related to muti murder.<sup>50</sup>

2.67 Also in 2007, Mpumalanga Province attempted to legislate the practice of witchcraft. It is not clear why that province sought to regulate witchcraft in addition to the national legislation dealing with witchcraft – that is, the Act and the Sentencing Act. Some argue that this move might have arisen through frustration with government's perceived delays in reviewing witchcraft legislation.

2.68 The Provincial Legislature proposed the Mpumalanga Witchcraft Suppression Bill of 2007, which it alleged was intended 'to provide for the suppression of witchcraft in the province, to set out the Code of Conduct for Traditional Healers, to provide for the responsibilities of the Traditional Leaders and to provide for matters incidental thereto.'

2.69 The Mpumalanga Witchcraft Suppression Bill was intended to criminalise both witch hunts and the act of accusing someone of witchcraft as well as pretending to practise witchcraft. The Bill further allowed for the more stringent regulation of 'traditional healers'.<sup>51</sup>

2.70 The THO and SAPRA opposed the Bill and made submissions to the Mpumalanga government. The THO's objection was based on the sentiment that the Bill was 'backward,

---

<sup>48</sup> Tebbe in Bennett *Traditional African Religions* 173.

<sup>49</sup> Tebbe in Bennett *Traditional African Religions* 158.

<sup>50</sup> Tebbe in Bennett *Traditional African Religions* 174.

<sup>51</sup> Tebbe in Bennett *Traditional African Religions* 158. With regard to the regulation of traditional healers the Bill proposed a requirement that Chiefs and Headmen have to discourage gatherings aimed at identifying witches.

racist, Christian, neo-liberal, [and] lacks respect for other religious beliefs...'. By contrast, SAPRA objected to the criminalising of their practices and the constitutional violation this would imply.<sup>52</sup>

2.71 The Bill was abandoned and was never passed into law by the provincial government. This might have been a result of the opposition to the Bill raised by the THO and SAPRA.

#### **d) Common law and customary law**

2.72 In addition to the Constitution and legislation, the law on religious rights and culture is also contained in the common law, especially criminal law. In early cases involving witchcraft, arguments were founded on culture and not religion.<sup>53</sup> This could have been because of the thin line between culture and religion. During this period the courts recognised the relationship between culture and criminal liability to the extent that they encouraged the tolerance of diverse cultural beliefs.<sup>54</sup>

2.73 With the advent of the Constitution and its progressive framework, which protects important cultural rights, the question arises whether the cultural defence can be incorporated into South African law. Criminal cases do exist where culture has been used as a defence, but it is not clear whether such a defence has been incorporated into our law. It is also not clear whether such a defence should be introduced as a new defence or should form part of pre-existing defences.<sup>55</sup>

2.74 Questions have been asked whether established elements of criminal liability, such as voluntary conduct, lawfulness, capacity and fault, can accommodate considerations of culture.<sup>56</sup> Some people have asserted that fault and capacity can accommodate the

---

<sup>52</sup> Ibid.

<sup>53</sup> Phelps in Bennett *Traditional African Religions* 136.

<sup>54</sup> Ibid.

<sup>55</sup> Phelps in Bennett (ed) *Traditional African Religions* 137.

<sup>56</sup> Phelps in Bennett (ed) *Traditional African Religions* 142.

defence of culture because the inquiry for determining criminal liability under those elements is subjective.

2.75 Affairs involving indigenous communities were regulated by customary law, which like common law was not codified. Customary law was – and in some communities still is – enforced by traditional leaders within those communities. Because the belief in witchcraft was based on a community’s cultural beliefs, interventions used by traditional leaders to resolve witchcraft-related disputes were based on customary law.

2.76 The relevant issue for consideration is whether customary law can be developed to deal with issues associated with witchcraft violence. Of importance is that issues related to witchcraft violence are typically informed by the customary beliefs held by a particular community. Therefore, traditional leaders, as the guardians of customs within a community, might be the best placed to deal with issues associated with witchcraft.

## **2 Developments in other jurisdictions**

2.77 Reference has already been made to the fact that most parts of Africa that were colonised have statutes that were (or still are) aimed at stamping out the belief in witchcraft. Some of these statutes date back to the late 19<sup>th</sup> century or mid 20<sup>th</sup> century. Since gaining independence, most ex-colonies have taken steps to deal with their witchcraft legislation, which they regard as being in conflict with the beliefs of the majority of the population in those communities.

2.78 One recent example of such a country is Malawi, which in April 2009 published an Issue Paper towards a review of that country’s witchcraft legislation.<sup>57</sup> The law reform process was necessitated by calls from members of the public for a review of the Witchcraft Act, which they alleged was foreign to the common beliefs of Malawians.<sup>58</sup> The Malawian Witchcraft Act assumes that witchcraft does not exist, but this is contrary to the common beliefs of Malawians.

---

<sup>57</sup> Malawi Law Commission *Issue Paper*.

<sup>58</sup> Malawi Law Commission *Issue Paper* 5.

2.79 Although there is appreciation that the Witchcraft Act is intended to protect people from dangerous practices associated with witchcraft, some people have argued that the Act is out-dated as it was passed in 1911.<sup>59</sup>

2.80 The Malawian Witchcraft Act is similar in many respects to the South African Witchcraft Suppression Act. It, too, prohibits witchcraft accusations, the pretence of using witchcraft, and the practices of witchdoctors or witch finders.

2.81 Other countries in southern Africa, including Zimbabwe, have reportedly been successful in repealing their old colonial witchcraft statutes.<sup>60</sup> In 2006, Zimbabwe passed the Criminal Law (Codification and Reform Act 2006) which replaces its 1899 Witchcraft Suppression Act. The new legislation in Zimbabwe recognises the existence of witchcraft and prohibits only those witchcraft practices that are harmful.<sup>61</sup>

2.82 Evidently South Africans can learn from events in other countries in the region. In the African context and among indigenous groups, it is a fallacy to deny that the belief in witchcraft and witchcraft practices that are harmful to others still exist. What is required is a balance between acknowledging traditional belief in witchcraft, on the one hand; and on the other hand, passing laws that regulate witchcraft.

### **3 International legal framework**

2.83 Various instruments of the United Nations (UN) recognise the right to religion. Two such instruments are the Universal Declaration of Human Rights<sup>62</sup> (UDHR) and the Convention on Civil and Political Rights<sup>63</sup> (ICCPR). Article 18 of the UDHR provides that –

Everyone has the right to freedom of thought, conscience and religion, this includes the right to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

---

<sup>59</sup> Malawi Law Commission *Issue Paper 6*.

<sup>60</sup> Malawi Law Commission *Issue Paper 9*.

<sup>61</sup> Malawi Law Commission *Issue Paper 10*.

<sup>62</sup> Universal Declaration of Human Rights (1948).

<sup>63</sup> Convention on Civil and Political Rights (1966).

2.84 Article 18 of the ICCPR, which provides for the protection of religious rights, provides as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually, or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subjected to coercion which would impair his freedom to have or adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their convictions.

2.85 International bodies such as the UN have also taken a keen interest on matters relating to witchcraft. To this end the UN has appointed various Special Rapporteurs to respond to witchcraft-related killings in Africa, as deaths resulting from witchcraft are regarded as a human rights violation.<sup>64</sup> The rights violations arise because most victims of witchcraft-related killings belong to vulnerable groups such as children, women and the elderly.

2.86 While messages from some of the UN agencies are positive the Special Rapporteur for extra-judicial killings has issued a warning against criminalising witchcraft.<sup>65</sup>

The reasons he provides for his warning relate to the following points:

- (1) difficulty defining the outlawed conduct with accuracy;
- (2) complexity of protecting other rights in the process, including rights of culture, speech, and religion; and
- (3) empirical evidence showing that official sanction has the effect of legitimating private, vigilante-like action against accused witches.

---

<sup>64</sup> Tebbe in Bennett *Traditional African Religions* 175.

<sup>65</sup> Tebbe in Bennett *Traditional African Religions* 176.

2.87 Regardless of the cautionary message from the Special Rapporteur, the attention that the UN is paying to witchcraft violence could have positive spinoffs, such as the development of international law on the issue.

## **D Witchcraft in contemporary South Africa**

2.88 The submissions made to the SALRC requesting this investigation illustrate that witchcraft in South Africa has to be understood in various contexts. The first is a viewpoint presented by SAPRA, which claims that the practice of witchcraft should be regarded as an expression of religious belief. What this view articulates is that there is no doubt that witchcraft is practised by people associated with the organisation (SAPRA). A contrary viewpoint is articulated by THO, which also confirms that witchcraft exists but suggests that the practice should be regulated because people have a tendency to abuse it.

2.89 In the 21<sup>st</sup> century – and 18 years after the advent of democracy – South African newspapers continue to report on instances of witchcraft in many communities. Heinous crimes are committed in some communities in the name of witchcraft. In addition to the witch-hunts and accusations of witchcraft that were seen before, modern South Africa is experiencing numerous incidents of muti killings, in which people – especially children – are killed for their body parts. One might have thought that in the 21<sup>st</sup> century and with the advent of democracy, witchcraft-related concerns would be less prominent than they were in the late 1980s and early 1990s.

2.90 Stories about witchcraft killings and witch hunts still dominate the news. The victims of these crimes remain predominantly older women. The North Gauteng High Court dealt with an appeal in which a man from Limpopo had attacked his elderly mother with an axe because he believed she was a witch. The man had accused his mother of being responsible for the death of his father (her husband) and siblings. The man was charged under the Witchcraft Suppression Act. The High Court reduced his sentence from three years to 18 months.<sup>66</sup>

---

<sup>66</sup> 'Witch's son reprieved' *Citizen Online* 20 June 2012 Web

2.91 In another story, an 86-year-old woman from Grahamstown in the Eastern Cape was brutally killed by two of her male grandchildren, who were cousins. One of the cousins had consulted a *sangoma* following a death in the family. The sangoma had indicated that their family was bewitched. Although the sangoma had not identified their grandmother as the witch, they believed that she was. They both were sentenced to 10 years in prison.<sup>67</sup>

2.92 In Giyani in Limpopo, seven people were accused of burning a 79-year-old man, whom they accused of practising witchcraft, to death. The group of seven was made up of four women and three men, all aged between 24 and 46 years. The group had torched the old man's house while he was inside with his 55-year-old sister. The old man died inside the house; his sister escaped the fire but was assaulted. The group was charged with murder, attempted murder, public violence and arson.<sup>68</sup>

2.93 In yet another gruesome story, an elderly couple were set alight in KwaZulu Natal because they were accused of practising witchcraft. The couple was accused by a mob of killing their granddaughter and burying her in their backyard. The mob set the couple's house alight in the early hours of the morning. The grandfather tried to escape from the burning house but was caught and 'necklaced'<sup>69</sup> by the mob.<sup>70</sup>

2.94 Stories involving muti killings are equally prevalent and heart-wrenching as they usually involve children. In December 2009 a 10-year-old girl was kidnapped and murdered, and her body parts were removed. During the trial of a man accused of killing her, the evidence presented to the court revealed that her womb and breast had been cut while she was still alive. Her body parts had been sold to a sangoma for R4 800. The man accused of killing the girl was sentenced to life imprisonment, plus six years for kidnapping her.<sup>71</sup>

2.95 The dreadful consequences and destruction caused by witchcraft violence are a challenge that South African society will grapple with until a lasting solution is found. While

---

<sup>67</sup> 'The darkest that won't go away' *The Daily Maverick* 30 May 2012.

<sup>68</sup> 'Seven appear for burning a man to death' *Citizen* 17 April 2012.

<sup>69</sup> *Necklacing* refers to when a car tyre is placed around a person's neck (usually a person accused of committing a crime) and they are doused in petrol and set alight.

<sup>70</sup> 'Mob sets elderly couple alight' *Pretoria News* 12 January 2012 Web

<sup>71</sup> 'Killer grins at muti murder sentence' *Independent online* 29 November 2011 Web

law-makers cannot ignore pleas for the repeal of the Act, the lived realities of people who are affected by witchcraft violence equally cannot be ignored. The picture painted by the media stories referred to above is something to which no society can be expected to close its eyes.

2.96 From the Constitutional Court jurisprudence outlined above, a case can be made for both arguments that were presented for this investigation. With regard to South African Pagans, an argument can be made that witchcraft forms an essential part of their religion, and any law that interferes with the practice of their religion may be unconstitutional. On the other hand, there is veracity in the argument that calls for legislation aimed at regulating witchcraft violence. Government purpose, which would be to protect the potential victims of witchcraft killings and muti killings and to curb the scourge of witchcraft violence, could be regarded as paramount and should withstand constitutional scrutiny.

2.97 This Issue Paper proposes that the Commission's investigation into witchcraft legislation should be based on the understanding that among South Africans, the belief that witchcraft exists is prevalent. That is, there is no need to determine whether the practice of witchcraft or a belief in it exists. The question is whether there is a need for regulation. The views held by the two organisations that have requested this investigation confirm a belief in the existence of two types of witchcraft: that practised in indigenous communities, and that practised by Pagans. The findings of studies conducted in two provinces of South Africa also confirm the existence of such beliefs, and will be referred to in the rest of this paper.

## **1. Witchcraft in indigenous communities**

2.98 As stated earlier in this paper, the practice of witchcraft by indigenous communities is associated with the ability to manipulate supernatural powers to cause harm to people and their property. The people most often accused of witchcraft are older women,<sup>72</sup>

---

<sup>72</sup> van Wyk 2004 *HTS* 1210.

whereas the perpetrators of witchcraft-related violence are usually younger men. People are believed to engage in witchcraft because of jealousy and envy.<sup>73</sup>

2.99 Witchcraft instils fear in people, and as a result people react to such practices, whether positively or negatively. Sometimes the first reaction is that people consult practitioners such as herbalists, diviners and traditional healers to counteract misfortune or to supposedly undo curses and destroy witchcraft.<sup>74</sup> The other way in which communities react to witchcraft is by taking the law into their own hands. In these cases, people affected by the harm caused by alleged witches retaliate – either individually or as a community – by killing or burning suspected witches or banishing them from their villages.

2.100 In the late 1980s and early 1990s there were numerous reported incidents of alleged witchcraft violence. South African government had never before intervened on witchcraft-related matters. For this reason, in 1995, at the dawn of democracy, the provincial government in Limpopo appointed a Commission of Inquiry into witchcraft violence and ritual murders in the Northern Province.<sup>75</sup> The Ralushai Commission was appointed to assist the government of that province in dealing with incidents of witchcraft violence that was reported at the time.

2.101 Although the work of the Ralushai Commission was conducted almost 20 years ago, its content remains relevant today as there have not been any drastic changes in how witchcraft violence is affecting communities. The Commission's findings may still have a bearing on the experiences of communities that bear the brunt of witchcraft violence.

2.102 This Issue Paper acknowledges the criticism put forward by Dr TS Petrus of the work and Report of the Ralushai Commission, as described in Dr Petrus's study on witchcraft-related crime in the Eastern Cape.<sup>76</sup> The Issue Paper has looked at the Ralushai Commission Report not to give credence to its shortcomings but to use the information that is useful for the purpose of this investigation.

---

<sup>73</sup> van Wyk 2004 HTS 1215.

<sup>74</sup> van Wyk 2004 HTS 1217.

<sup>75</sup> Note 20.

<sup>76</sup> Petrus TS Unpublished thesis 2009 30-48.

2.103 The Terms of Reference (TORs) of the Ralushai Commission were short and precise, and were presented as follows:

- To investigate deeply the causes of witchcraft violence and ritual murders in the Northern Province.
- To review all criminal cases related to witchcraft and ritual murder for the past ten years.
- To recommend legislative measures to combat witchcraft violence and killings.
- To recommend educational measures to be undertaken by government to combat commission of criminal acts related to witchcraft.<sup>77</sup>

2.104 After holding consultations and interviews in the Northern Province, the Ralushai Commission reported its various findings and recommendations. These will be dealt with here briefly in accordance with their relevance to the current investigation.

2.105 First, and with regard to the first TOR, the Ralushai Commission found that communities were divided as to the existence of or belief in witchcraft. Some people believed that witchcraft existed while others did not believe in witchcraft.<sup>78</sup> The Commission ascribed the belief in witchcraft to cultural, traditional and customary beliefs of Africans in South Africa.<sup>79</sup>

2.106 Mainstream churches spoke contemptuously of witchcraft but their members confirmed a belief in witchcraft. African Initiated Churches, such as Zionist churches, confirmed their belief in witchcraft and attributed their belief to the scriptures.<sup>80</sup>

2.107 Second, the Ralushai Commission found that witchcraft or the belief in witchcraft was not restricted to rural areas. The Commission reported that people in both rural and urban areas believed in witchcraft.<sup>81</sup>

2.108 Third, the Ralushai Commission found that traditional healers and leaders played a role in witchcraft practices in that province. Traditional healers played a role in the commission of crimes associated with witchcraft because they were consulted by people

---

<sup>77</sup> Ralushai Commission Report 1.

<sup>78</sup> Ralushai Commission Report 51.

<sup>79</sup> Ralushai Commission Report 57.

<sup>80</sup> Ralushai Commission Report 50-51.

<sup>81</sup> Ralushai Commission Report 58.

who wanted muti containing body parts, or people who required assistance with sniffing out witches. By contrast, traditional leaders played a role because in some instances they supervised and controlled community meetings where decisions about suspected witches were made.

2.109 Fourth, the Ralushai Commission found that perpetrators of witchcraft violence were usually militant young men, although women were occasionally involved. These young men exploited communities to assist financially, especially to sniff out witches in the community.<sup>82</sup> The flip side of the coin was that victims of witchcraft violence were predominantly old women.<sup>83</sup>

2.110 The above findings were accompanied by recommendations that the Ralushai Commission made to the provincial government for dealing with witchcraft violence and ritual murder. This Issue Paper discusses only those recommendations relevant to the current investigation, which relates to the law and law enforcement agencies.

2.111 The Ralushai Commission recognised the ineffectiveness of criminal laws aimed at punishing people involved in witchcraft violence. It recommended, in principle, criminal laws to deal with witchcraft violence, and proposed the replacement of the current Act (that is, the Act under review here) with the Witchcraft Control Act.<sup>84</sup>

2.112 The Witchcraft Control Act is similar in many respects to the current Act, but it adds certain offences that are not covered under the current Act. The additional offences concern the prohibition of the following: the practice of witchcraft, collecting of money to employ a witchdoctor or finder to name a person as a witch, and forcing a witchdoctor or finder to name people as witches.

2.113 With regard to law enforcement agencies such as the police, the Ralushai Commission recommended that government should ensure that people are able to report incidents of witchcraft violence to police stations. The Commission indicated that it was problematic when police allowed their personal beliefs to influence their investigations in

---

<sup>82</sup> Ralushai Commission Report 50.

<sup>83</sup> Ralushai Commission Report 58.

<sup>84</sup> Ralushai Commission Report pages 54-56.

witchcraft-related cases.<sup>85</sup> Lastly, the Ralushai Commission recommended a proper and accurate capturing of statistics for cases of witchcraft violence and ritual killings.<sup>86</sup>

2.114 Another study on witchcraft violence in South Africa was conducted by Dr Petrus,<sup>87</sup> amongst communities in Eastern Pondoland in the Eastern Cape Province. This study was conducted 13 years after the Ralushai Commission had concluded its work. Dr Petrus presented an in-depth analysis of the cosmology of witchcraft among the IsiXhosa-speaking community, the various role players and their roles, and the impact of witchcraft on that community.

2.115 Despite the differences between Dr Petrus's findings and those of the Ralushai Commission, there were commonalities between the two studies. They both confirmed – among other things – the existence of witchcraft and the belief in witchcraft, the role traditional leaders and healers play in witchcraft violence (whether positive or negative), the role of law enforcement agencies, and the need to review the current witchcraft legislation.

2.116 Firstly, in Dr Petrus' study of witchcraft in the Eastern Cape, the communities' belief in witchcraft was found to be based mostly on their traditional and cultural beliefs. A belief in witchcraft among these communities was used to explain misfortune, illness and death.<sup>88</sup> Some community members confirmed personal accounts of instances in which they had experienced witchcraft.<sup>89</sup>

2.117 The belief in witchcraft among the isiXhosa-speaking community was found to be inconsistent throughout the area of research, with some people not believing in witchcraft. Some of those who did not believe in witchcraft claimed to be Christians while others attributed their lack of belief in witchcraft to the lack of proof for its existence.<sup>90</sup>

---

<sup>85</sup> Ralushai Commission Report at pages 62- 63.

<sup>86</sup> Ralushai Commission Report at page 63.

<sup>87</sup> Dr Petrus is a scholar of anthropology and is based at the Nelson Mandel Metropolitan University. The study was conducted as part of his Doctoral Thesis.

<sup>88</sup> Petrus TS Unpublished thesis 2009 at page 77.

<sup>89</sup> Petrus TS Unpublished thesis 2009 at page 78.

<sup>90</sup> Petrus TS Unpublished thesis 2009 at page 81.

2.118 With regard to defining witchcraft, the study found that most people could not define witchcraft clearly.<sup>91</sup> Various definitions were provided, which described witchcraft as a) the use of evil forces to cause harm or death; b) the use of substances or medicine to cause harm or death; and c) the use of both evil forces and substances to cause harm or death.<sup>92</sup> The study found that from the definitions provided, what is central is the intention of the perpetrator rather than the method used.

2.119 Secondly, Dr Petrus' study found that traditional leaders played a significant role in witchcraft violence as witchcraft cases were often reported to them for mediation. However, some community members were dissatisfied by how the leaders were handling the cases and often accused them of favouring the accused persons. This happens when the leaders ask for proof of what the accused is suspected of.<sup>93</sup>

2.120 Thirdly, traditional healers also play a role in witchcraft cases in that they are often consulted by clients for witchcraft-related problems. The detrimental consequence of the role that traditional healers play within the community is that they indirectly confirm the existence of witchcraft through the 'diagnosis' that they give to clients – namely that the misfortune, illness or bereavement they had suffered were caused by witchcraft.

2.121 Fourthly, the study looked at the role of law enforcement agencies and found that they were also recipients of complaints relating to witchcraft. It was found that most of the cases referred to the police did not reach the courts but were often mediated by police officials instead.<sup>94</sup>

2.122 Fifthly, with regard to suspected witches or victims of witchcraft violence, the study found that the majority were elderly women.<sup>95</sup> The reason for this was that they were perceived as 'ugly', and because they might have a tendency for emotional outbursts and at such times would be unguarded in what they said.

---

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Petrus TS Unpublished thesis 2009 at page 82.

<sup>94</sup> Petrus TS Unpublished thesis 2009 82.

<sup>95</sup> Petrus TS Unpublished thesis 2009 87.

2.123 Lastly, the perpetrators of witchcraft-related violence were found to be mostly male youths, although adults and women could also be involved.

2.124 There was some overlap between the recommendations of the Ralushai Commission and those of Dr Petrus' study in the Eastern Cape. The full recommendations of the latter study are not dealt with in this Issue Paper but will be analysed during the course of the investigation.

2.125 Both studies referred to above confirmed that a belief in witchcraft exists among indigenous communities in Limpopo (then the Northern Province) and the Eastern Cape. One might assume that the rest of South Africa comprises indigenous population groups that do not differ substantially from the indigenous populations of Limpopo and the Eastern Cape with regard to sociological, cultural and religious variables. However, this assumption would require further investigation before firm conclusions can be drawn. Either way, the studies in Limpopo and the Eastern Cape have provided evidence that a belief in witchcraft among indigenous communities has continued since the Act was passed, despite the Act having been aimed at eradicating such belief.

2.126 In recent times there have been suggestions from various quarters that the law should not only focus on witchcraft violence, which includes witchcraft killings and muti killings, but also on punishing people who practise witchcraft.

2.127 The view expressed by the THO in its submission to the SALRC is that witchcraft can be dealt with by passing a new law that would protect innocent people accused of witchcraft and would also target and punish those who practise witchcraft. The provisions of the Sentencing Act (referred to in paragraphs 2.63 to 2.65 above) are capable of protecting innocent people accused of witchcraft, as the Act provides for the severe punishment of perpetrators of witchcraft violence. Since the THO does not provide guidance on how witchcraft can be defined, it is unclear how people who practise witchcraft can be identified so that they can be punished. It is also unclear how the THO proposes the law should deal with the lack of clarity about the supernatural powers that both witches and traditional healers are alleged to possess. The relevant question is whether the supernatural powers said to be possessed by witches can be distinguished from the powers said to be possessed by traditional healers.

2.128 The proposal by SAPRA that there is no need for legislation to regulate witchcraft does not provide concrete solutions. Whereas they acknowledge the harmful practices associated with witchcraft practised by indigenous communities, all they suggest is that common law should be used to address witchcraft violence. The common law has existed from time immemorial but has proved to be inadequate in dealing with witchcraft violence.

## **2. Witchcraft as religious expression**

2.129 Due to the protection afforded to religious minorities by the Constitution, South African Pagans allege that they must be recognised as a religious minority.<sup>96</sup> Pagans define their religion as a nature-venerating religion that believes that the Earth and its creatures are sacred. They embrace environmental awareness and conservation, and the worship of the Divine in its various forms.<sup>97</sup>

2.130 There are various recognised denominations within the Pagan religion; these include Witchcraft, Wicca, Streggharia, Druidry and Shamanism.

2.131 In September 2007, Pagans in South Africa converged to reclaim the terms 'witch' and 'witchcraft' within the Pagan context. The purpose of the reclamation by self-defined witches was to entrench their constitutionally protected rights and demand the repeal of the Act, which criminalises the practice of witchcraft in South Africa. The action by the Pagans acknowledges the generally negative perception of witchcraft in South Africa such that the term is widely associated with criminal or evil practices.<sup>98</sup>

2.132 First, the displeasure of the Pagans is directed at the definitions of 'witchcraft' which have so far been offered at various levels. In the Ralushai Commission Report, the definition of 'witch' provided by the Commission was 'a person who –

---

<sup>96</sup> Leef D, Fontleve M and Martin L A *Pagan Witches Touchstone Witchcraft and Witch hunts in South Africa* 5.

<sup>97</sup> *Ibid* at 52.

<sup>98</sup> Note 23 at page 52. It is alleged that in 2008 the department of home Affairs approved the designation of pagans as a religious organisation in accordance with the Civil Rights Union Act.

through sheer malice, either consciously or subconsciously, employs magical means to inflict all manner of evil on their fellow human beings. They destroy property, bring disease or misfortune and cause death, often entirely without provocation to satisfy their inherent craving for evil doing.'

Another definition that the Pagans refer to is contained in the Mpumalanga Witchcraft Suppression Bill, which defines 'witchcraft' as –

... the secret use of muti, zombies, spells, spirits, magic powers, water, mixtures, etc, by any person with the purpose of causing harm, damage, sickness to others or their property.

2.133 Second, the Pagans allege that these definitions that have been provided for 'witchcraft' are responsible for stereotyping witchcraft as a dangerous practice that warrants a criminal classification.

2.134 The Pagans believe that as practitioners of the religion and/or as self-defined witches, they should be responsible for defining the words 'witchcraft' and 'witches'. As such, the definition that they ascribe to their practice is as follows:

Witchcraft is an ancient religio-magical technique and modern pagan spirituality that employs the use of divination, sympathetic magic and pagan ritual practices.

2.135 While the Pagans acknowledge the dire consequences of the practice of witchcraft within certain communities, they fail to provide alternatives to deal with the scourge of witchcraft violence. The only proposal they advance is the use of common law to address the issues around witchcraft violence.

2.136 The views of communities practising Traditional African Religions (TAR) will be canvassed during the course of this investigation to determine their views on the practice of witchcraft. That exercise is necessary as the description of TAR comes very close to what Pagans do in the practice of their religion. To date, attempts to define TAR have indicated that it has three characteristics, including the belief in God; a belief in divinities, spirits and ancestors; the practice of magic; and medicine.<sup>99</sup> Certainly if the Act prohibits the use of magic, people who practice TAR may have an interest in knowing how that aspect of their

---

<sup>99</sup> Nyaundi in Bennett (ed) *Traditional African Religions* 6.

religion is curtailed by law. They may also make a contribution that could be instrumental in finding a solution to the issues under investigation.

2.137 The Constitutional Court jurisprudence that has thus far been established can be used to solidify the claim by SAPC that the Act violates their right to exercise their religion. Stating the claim would not be the end of the inquiry, as a determination would still need to be made on whether their exercise of religion would not cause hardship to other people; for example, those who are adversely affected by harmful witchcraft practices.

2.138 Dealing with the situation faced by Pagans would have been made easier had they indicated whether they would require an exemption from the prohibition of the practice of witchcraft found in the current legislation or any new legislation. It would be interesting to know whether it would make any difference to them if an exemption was granted in the Act allowing them to practice witchcraft, which they regard as their religion. This is mentioned since it is one of the considerations taken into account by the Constitutional Court in the religious freedom cases that were referred to earlier (see paragraphs 2.33 to 2.44).

2.139 In *Prince*, the Court, while acknowledging the rights of Rastafarians as a minority, held that making an exemption for them would be unworkable. By contrast, the decision in the *Pillay* judgment offers a different solution as the Court saw nothing wrong with allowing an exemption to ensure that people belonging to minority religions are able to exercise their right to practise their religion.

2.140 The recognition of religious minorities by the Constitutional Court implies that religious such as those of Pagans could be afforded the same status as all other mainstream religions.

### **3. Abusive practices associated with witchcraft**

2.141 As stated earlier in this Issue Paper, media reports have revealed many instances where harm has been caused to others for reasons associated with witchcraft. The South African media have brought to the fore stories of witchcraft as experienced by many communities, both urban and rural. Almost all the stories in the media describe instances where people have been killed and their bodies mutilated for purposes of producing muti.

In other instances, individuals have been accused of practising witchcraft and as a result they have been killed by their communities, who fear the victim's alleged ability to cause harm through the practice of witchcraft or use of supernatural powers. Most of these stories demonstrate how the scourge of witchcraft is ravaging many communities.

2.142 Cases of young children having been killed and their bodies mutilated for purposes of making muti have also featured prominently in news reports. Women and elderly people have been accused of witchcraft, which has led to some being killed or banished from their communities.

2.143 The THO complains about the absence of legislation to deal with abusive practices associated with witchcraft violence. They call for a new Act to protect innocent people accused of witchcraft and to punish those found guilty of practising witchcraft.

2.144 The first concern raised by the THO is addressed by the Sentencing Act, which gives the Court a discretion to hand down a sentence to life imprisonment for murder committed because of a belief in witchcraft. The second concern relating to punishing witches is also partially addressed in that the Sentencing Act deals with punishment for offences prescribed in section 1 (a) to (e) of the Witchcraft Suppression Act. The challenge that remains relates to obtaining proof that a person practises witchcraft without stumbling into the constitutional violations referred to above.

#### **4. Reactions to the practice of witchcraft**

2.145 The practice of witchcraft and the associated witchcraft violence has evoked various reactions from the communities within which it is experienced or prevalent. Some reactions tend to be unnatural while others display a challenging stance towards people from whom action is expected. This section will look at the reactions of various role-players as mentioned elsewhere in the Issue Paper, with a view to highlighting the challenges that witchcraft and witchcraft violence pose to various communities.

## 1. Reactions by communities

2.146 The research referred to in this Paper has shown that many communities have been threatened by the pervasive nature of witchcraft within those communities. In many instances, this has led to communities taking the law into their hands by engaging in actions such as burning or killing people accused of witchcraft, or banishing them from their villages.

2.147 A surge in muti killings among some communities has resulted in calls to punish people who practise witchcraft as well as the end users of muti made from harvested body parts.

2.148 The study conducted by Dr Petrus in the Eastern Cape found that communities reacted to witchcraft violence in various ways, including but not limited to the killing of alleged witches and the burning of homes of suspected witches or witches themselves.<sup>100</sup>

2.149 The study also found that in other instances, cases of witchcraft violence were reported to traditional leaders or the police.<sup>101</sup> The role that traditional leaders play in resolving witchcraft-related disputes is not prescribed by law, and that in itself may attract certain consequences for those leaders. Similarly, the role of the police is not without criticism as they do not always fulfil their mandate as a law enforcement agency. Police members have been accused of bringing into witchcraft investigations their own beliefs about witchcraft, action that has not gone down well with the affected communities. There are also challenges related to the under-reporting of witchcraft cases, which make dealing with the issue more difficult.

2.150 Dissatisfaction with how traditional leaders and the police handle witchcraft-related complaints has often led communities to take the law into their own hands, due to a lack of trust in other processes that are designed to address witchcraft violence.

---

<sup>100</sup>Petrus TS Unpublished thesis 2009 84.

<sup>101</sup>Petrus TS Unpublished thesis 2009 82-83

## 2. Reactions by law enforcement agencies

2.151 Law enforcement agencies, such as the police and court officials, have for a long time dealt with witchcraft-related issues. Cases that have been adjudicated by the courts relate to one of the following circumstances: a) an accused person killed another person because they feared the second person was a witch and would bewitch them; b) an accused was threatened with witchcraft and as a result caused harm to the complainant or his property; c) an accused had implicated another person as having causing injury or damage to any person by supernatural means or through the practice of witchcraft; and d) an accused is charged with killing another person for body parts to be used for muti.<sup>102</sup>

2.152 The starting point of the criminal cases referred to above is reporting a complaint to the police, who are then expected to conduct a proper investigation to secure the conviction of a person accused of witchcraft violence. Respondents that are mentioned in the reports of both the Ralushai Commission and the Eastern Cape study lamented the response of the police to witchcraft violence, in relation to their handing of investigations. The concerns expressed were that either the police became personally involved in the complaints or they did not conduct proper investigations.

2.153 The court system has also had its fair share of trouble in dealing with witchcraft violence. As mentioned earlier in this Issue Paper, in some instances the cultural defence has been used and accepted by the court when dealing with witchcraft-related cases. In other instances, courts have ignored issues of culture and have dealt with the crimes as presented by the facts of the case. For example, in the case of *S v Mokonto*<sup>103</sup> the Appellate division was called upon to decide on an appeal from a conviction where the accused person had killed the deceased who had allegedly threatened to kill him by using supernatural powers. The deceased had allegedly told the accused that 'You will not see the setting of the sun today.' The accused alleged that he had felt threatened by these utterances. He felt especially threatened because the deceased (a woman) had allegedly previously told the accused's brothers that she was going to kill them, and indeed they later died. The court in this case confirmed the conviction set by the lower court, as it was

---

<sup>102</sup> There have been reports of an increase in cases of muti killings. Young children and sometimes adults have been killed so that their body parts can be sold for purposed of making muti.

<sup>103</sup> 1971 (2) SA 310 (A); [1971] 2 All SA 530 (A).

of the view that even if the accused had been provoked by the utterances of the deceased, he had had a clear intention to kill her. The issue of whether or not he believed in witchcraft was not regarded as strong enough to overtake the intention he had to kill the deceased.

2.154 In *S v Phahlane*<sup>104</sup> the court was called upon to review the sentence of the accused who had been convicted by the court *a quo* for contravening section 1 (a) of the Witchcraft Suppression Act. This section prohibits accusing another person of causing injury or damage by supernatural means, or of being a witch. The court confirmed the conviction of the accused, since it was satisfied that the accused had indeed indicated that the complainant was a witch and that she had killed a villager through witchcraft.

## **E Issues to consider in the law reform process**

2.155 Although this investigation will be guided by the recommendations made in the Proposal Paper, this Issue Paper will also look at constitutional challenges that must be taken into account in developing recommendations for law reform. The Issue Paper will also pose some questions for reflection, responses to which would enrich the dialogue among interested parties.

### **1. Constitutional challenges**

2.156 The law reform process on issues of witchcraft is complex and poses various challenges. One such challenge is the constitutional framework that protects various rights, such as those implicated in this investigation. Some of the constitutional hurdles may be easy to overcome while others may not.

2.157 For example, it may be easy to justify not protecting or recognising a religious or cultural belief that involves the taking of human life. In this regard it may be permissible to

---

<sup>104</sup>[2005] JOL 14525 (T).

impose harsh punishment for people involved in witchcraft-related murders or mutilations.<sup>105</sup>

2.158 However, to justify a law that outlaws witchcraft per se may not be easy, as that would require government (through its court officials) to rely on the evidence of diviners to secure the conviction of alleged perpetrators. This would blur the lines because government is prohibited by the Constitution from involvement in religious affairs.<sup>106</sup>

2.159 The issue of pointing out witches, or witch hunting, raises a constitutional challenge related to freedom of expression.<sup>107</sup> Since the naming of a witch has negative consequences on others, the limitation of that form of expression can be justified.

## **2. Questions for reflection**

2.160 As outlined throughout this Issue Paper, witchcraft and witchcraft violence remain a challenge in most communities in South Africa. The law reform process needs to be cognisant of the necessity to balance the competing interests of people involved in the practice of witchcraft against those of the victims of witchcraft violence.

2.161 It is a constitutional imperative that the rights in the Bill of Rights are not absolute; they can be limited in line with the requirements in section 36 of the Constitution and internal limitation clauses found in some of the sections of the Bill of Rights. As a result, the exercise of the right to religion can be limited if such a limitation is reasonable and justified in an open and democratic society.

### **a) Regulation of witchcraft**

2.162 The first fundamental question is whether there is a need to regulate witchcraft, and the extent of such regulation should it be desirable. The second question is to what

---

<sup>105</sup> Tebbe in Bennette *Traditional African Religions* 177.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid at page 180.

extent existing laws should encroach on the rights of others in the free exercise of their religion.

2.163 This Issue Paper outlines the provisions of the Criminal Law (Sentencing) Amendment Act, which provides for stiff punishment for people who are accused of removing body parts from their victims and for people accused of crimes outlined in the Witchcraft Suppression Act. In the first instance, which prescribes the definition of murder to include removing body parts, the target is the person who kills a victim and removes the body parts; rather than the end user, who could be a witchdoctor or a client of the witchdoctor. Since the end users are responsible for creating the demand for body parts, they should also be held responsible for the murder. The same argument can be made about the Human Tissue Act, which prohibits possession of human tissue. In this instance the person who is likely to be apprehended is the person who caused the death of the victim, or the witchdoctor who wanted the human tissue to prepare medicine for his or her client. The client, who would not at any point have possessed the 'raw' body part but is the consumer of the end product, should also be held responsible for the tragedy.

2.164 The SAPC, who are the requesters of this investigation, allege that witchcraft is their religion and therefore needs to be protected as prescribed by the Constitution. The Constitutional Court's jurisprudence elaborated on in this Issue Paper demonstrates that there could be validity in the argument made by the SAPC that any law regulating witchcraft, their religion, could be found to violate their constitutional right.

1. Should there be a legislative regulation of the practice of witchcraft? This could be in the form of the current Witchcraft Suppression Act or a revised version of the Act.
2. There is currently a focus on witchcraft violence such as witchcraft killings and killings for body parts.
  - a) Should there be punishment for practising witchcraft?
  - b) Should those who demand and use muti made from body parts be punished?
3. Should any legislation regulating witchcraft take into account the existence of other forms of witchcraft, such as that practiced by Pagans? That is, should such legislation provide an exemption to people who practise witchcraft as part of their religion?

**i) Definition of witchcraft**

2.165 While the Act does not provide a definition of 'witchcraft', this Issue Paper has discussed various definitions suggested by role-players. However, the definitions of witchcraft referred to in this Paper are varied and sometimes very elusive. Some of the definitions are regarded as vague as they do not capture the essence of witchcraft as practised by indigenous communities. The definitions also fail to provide clarity on the elements of the crime of witchcraft and how it can be proved.

2.166 If consensus is gained on the need to regulate witchcraft, with a view to – among other things – punishing people who practise witchcraft, an accurate definition becomes critical. The proposed definition should be cognisant of the legal requirements and contain all the elements required to establish criminal liability in terms of the law.

1. Should witchcraft be defined?

a) If yes,

- What is the proposed definition of witchcraft?

b) If no,

- How should the issue of witchcraft be dealt with?

## ii) **Prohibition of witchcraft**

2.167 The reactions to the prohibition of witchcraft have been twofold in this investigation. On the one hand, the SAPC rejects the prohibition of witchcraft contained in the Act because such prohibition prevents them from practising their religion. On the other hand, a call has been made by various role-players, including the THO, for a prohibition of witchcraft to be incorporated in legislation.

2.168 It should be borne in mind that the Witchcraft Suppression Act has been in the statute books for over five decades and it has not been successful in preventing witchcraft violence. The same can be said about the Sentencing Act, which despite providing for a discretionary life sentence for people accused of murder associated with witchcraft has not stopped people from engaging in witchcraft violence. It is not clear how any other law might achieve what the laws referred to above have failed to achieve.

1. Considering that the Issue Paper has identified the positive and negative connotations in the practice of witchcraft;

a) Which parts of the practice should be prohibited?

b) Should the practice of witchcraft which is alleged not to be harmful or which has positive connotations be exempt or excluded from regulation?

## 2. Alternatives to regulation

2.170 Various suggestions have been made regarding alternatives to the regulation of witchcraft. These include using the common law, applying existing laws dealing with murder and assault in cases of witchcraft violence, using defamation laws against people who accuse others of witchcraft, and using mediation to resolve disputes relating to witchcraft.

2.171 The observation regarding some, if not all, of the above suggestions is that they deal only with perpetrators of witchcraft killings and muti killings, and do not provide solutions for dealing with people who practise witchcraft – including those who consume muti made from harvested body parts. If there is a need to step up the fight against witchcraft violence through (for example) punishing witches and people who use muti made from body parts, the proposals should be more specific and provide solutions for the specific instances.

1. Are there any alternatives to legislative regulation of witchcraft or witchcraft violence?

a) If yes,

Besides legislation referred to in this Issue Paper, what are the alternatives that can be looked at to deal with witchcraft violence?

b) If no,

How should the State deal with abusive practices such as witchcraft killings and muti killings?

**BIBLIOGRAPHY**

Bennett TW (ed) *Traditional African Religions in South African Law* UCT Press, Cape Town 2011

De Waal J, Currie I, Erasmus G *The Bill of Rights Handbook* 4 ed Juta, Cape Town Lansdowne 2001

Leef D, Fontleve M and Martin L A Pagan Witches Touchstone Witchcraft and Witch hunts in South Africa

Malawi Law Commission Issue Paper: *Witchcraft Act Review Programme* Lilongwe 2009

*Oxford Advanced Learner's Dictionary* 6 ed Oxford University Press 2003

Petrus TS 'An anthropological study of witchcraft-related crime in the Eastern Cape and its implications for law enforcement policy and practice' Unpublished thesis Nelson Mandela Metropolitan University, Port Elizabeth 2009

Ralushai Commission of Inquiry (Chairperson Professor NV Ralushai) *Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of the Republic of South Africa* 1996

Van Wyk IWC 'African Witchcraft in theological perspective' 2004 *Hervormde Teologiese Kollege* University of Pretoria 1201-1228

*Webster's New World Thesaurus* Pocket Books 2003.

**LIST OF CASES**

*Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC).

*MEC Education: KwaZulu Natal and Others v Pillay and Others* 2008 (2) BCLR 99 (CC).

*Prince v President, Cape Law Society and Others* 2001 (2) BCLR 133 (CC)

*Prince v President, Cape Law Society and Others* 2002 (3) BCLR 231 (CC).

*S v Mokonto* [1971] 2 All SA 530 (A).

*S v Phahlane* [2005] JOL 14525 (T).

## **LIST OF LEGISLATION**

Constitution of the Republic of South Africa Act, 1996

Criminal Law (Sentencing) Amendment Act 38 of 2007

Human Tissue Act 65 of 1983

Mpumalanga Witchcraft Suppression Bill 2007

Witchcraft Suppression Act 3 of 1957

Witchcraft Suppression Amendment Act 50 of 1970

## **CONVENTIONS**

Convention on Civil and Political Rights (1966)

Universal Declaration of Human Rights (1948)