

MALAWI LAW COMMISSION

WITCHCRAFT ACT REVIEW PROGRAMME

ISSUES PAPER

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Preface

The Witchcraft Act Cap 7:02 of the Laws of Malawi came into force on 12th May 1911. It is an Act that deals with trial by ordeal, witchcraft and the use of charms. Between 23rd October 2006 and 1st November 2008 the Commission received various submissions requesting it to review the Witchcraft Act. These written submissions came from individuals and organisations.

This Issues Paper has been prepared by the Malawi Law Commission to elicit responses from the general public and organizations. The responses shall, in addition to other relevant literature, serve as a basis for the Commission's deliberations. The views, conclusions and recommendations contained herein should not, at this stage, be regarded as the Commission's final views. The Issues Paper is published in full so as to provide persons and bodies who wish to comment or make suggestions for reform in this particular area of law with sufficient background information to enable them make focused submissions to the Commission.

It is expectation of the Law Commission that such an exercise would invigorate debate on the issues and therefore enrich the process of review by allowing wider public participation in the process thereby ensuring that the Commission's recommendations reflect and address the current societal aspirations and realities.

Respondents are requested to submit written comments, make representations or requests to the Commission by **30th day of June 2009** at the address appearing on the previous page.

This paper has been developed by Isaac Nkhono Songea, Assistant Law Reform Officer at the Law Commission.

1.0 INTRODUCTION

The Malawi Law Commission is a constitutional body established under section 132 of the Constitution. It has the mandate to develop new legislation, review all statutory and customary laws in Malawi for the purposes of their systematic development in order to ensure that they conform to both the Constitution and applicable international law. The Law Commission is specifically mandated to review and make recommendations regarding any matter pertaining to the Constitution.¹ It is further mandated to receive submissions from any person with regard to the Laws of Malawi or the Constitution. The findings and recommendations of the Commission are then compiled into reports and, where necessary, the reports include draft legislation and are submitted to Cabinet and Parliament through the Minister of Justice.

The Malawi Law Commission is headed by a Law Commissioner who is appointed by the State President on the recommendation of the Judicial Service Commission.² In the execution of a particular programme, the Law Commissioner in consultation with the Judicial Service Commission, empanels a special Law Commission. Individuals are appointed to serve as commissioners on the basis of their expertise of the subject matter under review.³

A special Law Commission is serviced by programme officers who provide professional legal research input into the activities of the Commission. They are also the coordinators for the special Law Commission.

To implement its mandate, the Malawi Law Commission is empowered to carry out public consultations regarding any law under review. The Law

¹ Section 135 (h) of the Constitution

² Section 133 (a) of the Constitution

³ Section 133 (b) of the Constitution. A special Law Commission for the review of the Witchcraft Act Programme is yet to be empanelled.

Commission can also consult and conduct research with any person⁴ and may even engage consultants for the purpose of furthering its mandate.⁵

This Paper seeks to highlight the areas of concern that the general public has submitted upon with a view to allowing the reader an opportunity to comment on those submissions. This is important for the reform of the law in question as it would enable more stakeholders to participate in the consultation process.

The issues and questions have been presented in order of thematic areas. However this order is not in any way reflecting the order of importance of the issues.

1.1 CALLS FOR REFORM OF THE WITCHCRAFT ACT

Over the years since 2006, there have been various calls for reform of various aspects of the Witchcraft Act. Some of the submissions are to the effect that the current Witchcraft Act is alien to the common beliefs of Malawians.⁶ The submissions indicate that the common belief in Malawi is that witchcraft exists contrary to the legal position in the said statute which assumes that witchcraft does not exist. Other stakeholders are of the view that witchcraft has been perpetuated by the absence of Traditional Courts that used to try suspected perpetrators and generally adjudicate on matters related thereto.⁷ Despite that some stakeholders appreciate that the Witchcraft Act is intended to protect Malawians from harmful practices by providing a legal mechanism through which the dangerous practice would disappear,⁸ however they argue that the law on witchcraft in Malawi is outdated. It has been argued that the Act does not address basic issues of witchcraft⁹ and therefore it has gaps that the Commission needs to address with urgency.¹⁰ It has been further argued

⁴ Section 7 (e) of the Law Commission Act, Cap 3:09 of the Laws of Malawi

⁵ Section 8 (e) of the Law Commission Act, Cap 3:09 of the Laws of Malawi

⁶ Submission from one of the traditional doctors in Malawi.

⁷ Submission from one of the associations of ethnomedical practitioners.

⁸ *Nyuzi v. Rep.* 4 MLR 249.

⁹ Note 7 above.

¹⁰ This was stated in the submission by one of the faith based NGO from Lilongwe.

that the consequences of witchcraft are sometimes fatal and that that it is generally regarded as a social evil that potentially retard development.

One of the stakeholders sponsored a phone-in programme on MBC Radio 1 where listeners gave their views on the issue.¹¹ It also conducted research on the issue within its area of operation¹² before making its submission to the Law Commission.

On the contrary other stakeholders have argued that witchcraft does not exist, that some people malafidely accuse and victimize innocent citizens by implicating them in treacherous witchcraft charges.¹³ This school of thought says that some parents brainwash their children to believe that witchcraft is real and coax them to accuse certain quarters of the community just to settle their personal vendetta with the victims.

1.2 OVERVIEW OF THE WITCHCRAFT ACT

As stated above this legislation was enacted on 12th May 1911 with the aim of eradicating what the colonialists referred to dangerous practices such as trial by ordeal, the use of charms and witchcraft itself. The Act assumes that witchcraft does not exist. It is therefore an offence to allege that someone practices witchcraft.¹⁴ Accordingly it is also an offence for one to claim that he practices witchcraft.¹⁵ In this case one is charged of pretending (to practise) witchcraft. However the courts have shown leniency where the act suspected of is approved by culture of the accused.¹⁶ However this is not the case where the court is of the opinion that the act suspected of is likely to delay disappearance of dangerous practices.¹⁷

Furthermore the profession of witchdoctor or witchfinder is an offence punishable by life imprisonment.¹⁸ However it has been argued that most

¹¹ Ibid. However the submission does not outline the issues that were raised during the radio programme.

¹² This comprises Lilongwe, Mchinji, Dowa, Nthisi, Salima, Nkhotakota and Kasungu.

¹³ For instance this was stated in the submission of a lady whose sister was allegedly a victim of witchcraft allegations in Mangochi.

¹⁴ Section 4 of the Witchcraft Act.

¹⁵ Section 6 of the Witchcraft Act.

¹⁶ See the case *Nyuzi v. Rep.* 4 MLR 249.

¹⁷ Ibid.

¹⁸ Section 8.

Malawians believe that witchdoctors are experts on witchcraft and that they alone are the ones who can protect people from the ills of the practice.¹⁹ Section 2 of the Act prohibits trials by ordeal while section 9 makes it an offence to use or assist in using any lot or charms with a view to the commission of any unlawful act.

¹⁹ Pilirani Semu-Banda; *Mob justice in Malawi: Accused of witchcraft, the elderly are rarely protected by the law*; http://pilirabvuto.blogspot.com/2008_05_01_archive.html.

ISSUES FOR CONSIDERATION

2.0 EXISTENCE OF WITCHCRAFT

The Act assumes that witchcraft does not exist. That is why it is an offence either to accuse someone of being a witch or wizard,²⁰ or to claim that you practise witchcraft²¹, or to conduct trials by ordeal²², or to administer charms for the purposes of committing any unlawful act.²³

However, some submissions in custody of the Law Commission indicate that some people in Malawi believe that witchcraft is real. With this belief some offences in the act, for instance, pretending to practice witchcraft, does not therefore make sense to them. This problem is compounded when the person suspected to practise witchcraft himself admits that he is a witch or a wizard. The other problem comes when children allege that a certain member of the community is teaching them witchcraft. The community in general and the parents or guardians in particular would like to protect the children by, among other things, punishing the alleged perpetrator of the malpractice. However the law enforcers sometimes arrest them for accusing someone of practising witchcraft.²⁴ Therefore those that believe that witchcraft exists perceive the law on witchcraft as foreign. To them this foreign law does not address the realities in their communities.²⁵

Furthermore others argue that the Act infringes people's constitutional right to freedom of opinion and belief. Others have gone to the extent of making an application before the Constitutional Court for an order declaring that some provisions in the Act are inconsistent with the Constitution and therefore invalid.²⁶

²⁰ See section 4 of the Act.

²¹ See section 6 of the Act.

²² See section 2 of the Act.

²³ See section 9 of the Act.

²⁴ Section 4 of the Act. This issue was also raised in the submission referred to in note 10 above.

²⁵ Submissions by an interested citizen from Rumphu and the traditional doctor referred to in note 6 and reports attached to submission from the faith based organization.

²⁶ See the case of *Medson Gibson Kachilika vs. the Attorney General* Constitutional Case No. 5 of 2007 (Lilongwe District Registry). See also note 51 onwards below.

However it has also been submitted that witchcraft does not exist at all.²⁷ It has been argued that people make these allegations against each other to settle personal vendetta.²⁸

Assuming the law is amended to recognize that witchcraft exists and thereby criminalize the practice, there would be a taxing issue of evidence. Under that new regime of law on witchcraft, persons suspected of practicing witchcraft would face criminal charges. It is trite law that for one to be convicted of a criminal offence the prosecution must have proven its case beyond reasonable doubt. However those who believe in witchcraft allege that it involves use of supernatural or non-natural²⁹ powers. Therefore proving the allegations would be very difficult. It has been argued that some witchcraft offences³⁰ ought to be offences of strict liability. However the court does not subscribe thereto. Justice Chikopa observed that in the present constitutional dispensation section 42 (2) (f) (ii) obliges those charging accused persons to inform them of the charges against them with sufficient particularity.³¹ He observed further that:

“In this constitutional day and age the court should, we strongly believe, be slow very slow in our humble view, to criminalize human behaviour on the basis of strict liability. They should always insist on finding evidence of an intention on the part of the accused to do that which is by law prohibited.”

He continued:

*“It will also be a sad day for our criminal justice system when we start throwing persons into gaol merely because they have exaggerated view of their physical prowess...Long gone are the days, we are sure, when accused persons had to prove themselves not guilty. See the case of **Jumbe and Mvula v Attorney General Constitutional Case Number 1 and 2 of 2005** and section 42(2)(f) regarding fair trials.”*

²⁷ See note 13.

²⁸ Ibid.

²⁹ See the wording in the Criminal Law (Codification and Reform) Act of Zimbabwe.

³⁰ For instance section 6 of the Witchcraft Act.

³¹ *The Republic -v- Cuthbert Hara*, Confirmation Case Number 492 of 2007.

2.1 Regional Perspective

Zambia

Under the Witchcraft Act of Zambia³² it is an offence there under to name or impute that someone practices witchcraft.³³ It is also an offence to profess knowledge of witchcraft in Zambia.³⁴ However, on the other hand, it appears the Zambian legislation assumes that witchcraft exists. For instance it in its interpretation clause it outlines acts that constitute act of witchcraft,³⁵ creates an offence for alleged acts of witchcraft practices and stipulates an offence for chiefs who encourage witchcraft.³⁶ Therefore it has been argued that the Witchcraft Act of Zambia is controversial in that in one vein it gives the impression that witchcraft does not go beyond one's belief yet in the other, it stipulates penalties for the practice of witchcraft.³⁷ It has been argued further that the law on witchcraft in Zambia should be scraped off because that practice exists and that chiefs should help to explain that proposition to the Zambian nation.³⁸

Uganda

In Uganda they have the Witchcraft Act that was enacted in 1957³⁹ Its long title says that it is an Act to make provision for the prevention of witchcraft and the punishment of persons practising witchcraft. The Act assumes that witchcraft exists. It goes further to stipulate that it is an offence to threaten to cause disease or harm or any physical harm to any person or livestock or property, to practise or hold yourself to practise witchcraft and to hire another

³² Chapter 90 of the Laws of Zambia. This law was enacted on 9th May 1914.

³³ See section 3 of the Witchcraft Act of Zambia.

³⁴ See section 5 of the Witchcraft Act of Zambia.

³⁵ See section 2 of the Witchcraft Act of Zambia.

³⁶ See section 6 of the Witchcraft Act of Zambia.

³⁷ Mulenga N, *Divining the Flaws of the Witchcraft Act (Zambia)*;
http://www.witchvox.com/vn/vn_detail/dt_wn.html?a=zaxx&id=7171.

³⁸ Times of Zambia; *Witchcraft Exists, Admits Chief Munyumbwe of Gwembe District*;
<http://www.times.co.za/news/viewnews.cgi?category=10&id=1084501299>.

³⁹ Chapter 124 of the Laws of Uganda.

person to practise witchcraft.⁴⁰ Furthermore, if one imputes use of witchcraft to another, and harm happens on that person as a result of the imputation, he commits an offence punishable by imprisonment for a period not exceeding five years. It is an offence in Uganda to be found in possession of articles used in practicing witchcraft.⁴¹ Interestingly, evidence may be adduced against a person charged of an offence under the Witchcraft Act, to show reputation of that person as a witch or a wizard.⁴² Formerly, an exclusion order for ten year would be issued against a person found guilty of an offence under the Witchcraft Act.⁴³ However, the Supreme Court of Uganda held in the case of *Attorney General vs. Salvatori Abuki and Richard Obunga*⁴⁴ that the provision that dealt with exclusion orders was unconstitutional.

Zimbabwe

Before 2006 Zimbabwe used to have Witchcraft Suppression Act.⁴⁵ This legislation assumed that witchcraft did not exist and therefore had provisions very similar to those in witchcraft legislations of Malawi and Zambia. However in 2006 there was drastic reform. The Witchcraft Suppression Act was repealed by coming into force of the Criminal Law (Codification and Reform Act of 2006).⁴⁶ Under the former legislation⁴⁷ witchcraft was entirely banished. It was illegal to accuse anyone of being a witchcraft practitioner.⁴⁸ However the reform recognizes existence of witchcraft and criminalizes only witchcraft practices that are harmful to others. One of the reasons behind this reform, it has been argued, is that to most Zimbabweans, especially those who grew up in the rural areas, it is absurd to say that the supernatural does not exist.⁴⁹ However

⁴⁰ See section 2 of the Witchcraft Act of Uganda.

⁴¹ Section 3 of the Witchcraft Act of Uganda.

⁴² Section 4 of the Witchcraft Act of Uganda.

⁴³ This was stipulated in the former section 7 of the Witchcraft Act of Uganda.

⁴⁴ Constitutional Case No. 2 of 1997 [1997] UGCC 5; also visit <http://www.saflii.org/ug/cases/UGCC/1997/5.html>.

⁴⁵ This Act was enacted in 1899.

⁴⁶ Visit http://www.chr.up.ac.za/undp/domestic/docs/legislation_57.pdf.

⁴⁷ Witchcraft Suppression Act of 1899.

⁴⁸ Also visit <http://www.wwrn.org/article.php?idd=21276&sec=39&cont=3>.

⁴⁹ Visit <http://news.bbc.co.uk/2/hi/africa/5134244.stm>

some critics have argued that the new law will be difficult to implement as the prosecutor will have to show that the accused uses supernatural powers to harm others.⁵⁰

2.2 Issues

- i. Does witchcraft exist?
- ii. Does the law need to change the legal assumption that witchcraft does not exist?
- iii. In case it needs to, does the Act need to criminalize witchcraft?
- iv. In case witchcraft is criminalized, how would the law deal with the issue of evidence?
- v. What “acts” should constitute witchcraft?
- vi. Should all acts of witchcraft be criminalized? Or may be only those that are harmful to society?
- vii. Should possession of articles purportedly used in witchcraft be criminalized? If yes, how can we distinguish articles used for witchcraft from other articles generally used by traditional doctors?
- viii. If the law recognises the existence of witchcraft, would it mean that the law is legitimizing witchcraft? How can these two be reconciled?

3.0 CONSTITUTIONALITY OF SECTION 6 OF THE WITCHCRAFT ACT

An attempt has been made to challenge constitutionality of section 6 of the Witchcraft Act.⁵¹ In the case of *Medson Gibson Kachilika vs. Attorney General*⁵² the plaintiff sought an order that section 6 of the Witchcraft Act be declared unconstitutional and therefore invalid to the

⁵⁰ Ibid.

⁵¹ See note 26 above.

⁵² Ibid.

extent of its inconsistency with the Constitution. The said provision provides that it is an offence for any person, by his statements or actions, to represent himself to be a wizard or a witch or as having powers to exercise the power of witchcraft. The plaintiff asserted that he believes he is a wizard and that is able to teach the practice to others. He therefore argued that this provision contravenes his private belief that he is a wizard. He further argued that the provision therefore contravenes section 33 of the Constitution,⁵³ as well as Article 18 of the United Nations Universal Declaration on Human Rights,⁵⁴ Article 18 of the International Covenant on the Political and Civil Rights,⁵⁵ and Article 8 of the African Charter on Human and Peoples Rights.⁵⁶ It is the plaintiff's case that a person is free to hold his private belief that he practises or has powers to practise witchcraft. He argues that "it would be against the liberty of an individual to compel them not to believe what they have believed to be what they are. Equally it would be an infringement of the right promised by our Constitution under section 33 to compel a person not to express what he has believed to be true no matter how unreasonable that belief might be".⁵⁷ The plaintiff emphatically argued that right to freedom of belief is non-derogable as enshrined under section 44 (2) of the Constitution. He further stated that the right would only be derogated

⁵³ It states as follows: "Every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom."

⁵⁴ It states as follows: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom 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."

⁵⁵ It states as follows in part:

"1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to 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...

3. Freedom to manifest one's religion or beliefs 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"

⁵⁶ It provides as follows: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

⁵⁷ The plaintiff's skeleton arguments at page 4.

from if his actions were so grave as to constitute breach of other people's freedoms.⁵⁸ His view is that section 6 of the Witchcraft Act does not pursue the legitimate aim of protecting rights of others and that therefore it breaches his constitutional right under section 33 of the Constitution.

It was further argued that the provision contravenes the plaintiff's right to freedom of expression.⁵⁹ The plaintiff's case is that the provision infringes his right to freely express his belief that he is a wizard and his views on the practice of witchcraft.

The plaintiff finally argued that the provision unfairly discriminates against persons who genuinely believe that they practise or have powers to practise witchcraft.

This case is yet to be decided by the Constitutional Court. However the sentiments expressed in the case above seem to be in agreement with some of the reservations made in the submissions. For instance it has been submitted that it does not make sense for the police to arrest complainants of the perpetuation of witchcraft when in actual fact the suspect himself admits or confesses that he practises or has powers to practise witchcraft.⁶⁰ Furthermore, some stakeholders have express discontent when person who admit or confess to practise witchcraft are charged with pretending witchcraft. They would rather have them charged with offence of practicing witchcraft, an offence that does not exist in our statute. On this position Justice Kamwambe stated as follows:

“The short of it all is that the law does not reconsider existence of witchcraft. Therefore it cannot provide for a law against it, it only provides against proclaiming by word or actions its existence. It does not matter how strongly we believe in its existence, the law does not provide for it. This is in keeping with the need to maintain social order since

⁵⁸ See also the case of *Dibagula v The Republic of Tanzania* (Tanzanian Court of Appeal, 24th August 2001, in *The Commonwealth Human Rights Law Digest*, Winter 2004/Spring 2005 Issue 1, 5 CHRLD 1-177, at 160).

⁵⁹ See section 35 of the Constitution.

⁶⁰ See the submission of the faith based organization referred to in note 10.

*evidence of witchcraft would not lie in the ordinary world but in the unnatural world to which we do not belong despite the fact that we may be victims of the same at one time if not actual practitioners ourselves. Certainly not in our generation but many to come shall incorporate, may be witchcraft practising into law.*⁶¹

3.1 Regional Perspective

Zambia

Section 5 of the Witchcraft Act of Zambia stipulates that it is an offence to profess knowledge of witchcraft.⁶²

Uganda

Uganda does not have a crime of pretending witchcraft. Suffice to say that Witchcraft Act of Uganda recognizes the existence of witchcraft practises. As such an offence of pretending witchcraft would be inappropriate because those that profess to practise witchcraft are charged of offences in relation to witchcraft pursuant to section 2 of the said Act.

Zimbabwe

Zimbabwe criminalized witchcraft which is harmful to others.⁶³ It does not have an offence of pretending witchcraft.

3.2 Issues

- i. Does section 6 of the Witchcraft Act infringe the constitutional right of freedom of conscience and belief enshrined under section 33 of the Constitution?**

⁶¹ *Binzi Nunku and Loza Ninku vs. The Republic*, Criminal Appeal No. 28 of 2007 (HR) (PR) (Unrep).

⁶² The provision states as follows: “Any person who-

- (a) represents himself as able by supernatural means to cause fear, annoyance or injury to another in mind, person or property; or
 - (b) pretend to exercise any kind of supernatural power, witchcraft sorcery or enchantment calculated to cause such fear, annoyance or injury;
- shall be liable to a fine of not more than one thousand five hundred penalty units or to imprisonment ... for any term not exceeding two years.

⁶³ See section 98 of the Criminal Law (Codification and Reform) Act of Zimbabwe

- ii. Does section 6 of the Witchcraft Act infringe the constitutional right of freedom of expression enshrined under section 35 of the Constitution?
- iii. Does section 6 of the Witchcraft Act unfairly discriminate against persons who believe that they practise or have powers to practise witchcraft thereby infringing section 20 of the Constitution?
- iv. Suppose your answer to the above question is in the affirmative, would you maintain the answer if the law only criminalized witchcraft practices that are harmful to society? How would you define the word “witchcraft” and “harmful” (how would you ascertain harmful witchcraft practices?)

4.0 OUTCRY TO PROTECT CHILDREN AGAINST BEING TAUGHT WITCHCRAFT

With the belief that witchcraft exists, it has been submitted that witchcraft practitioners teach the practice to innocent children.⁶⁴ There have been numerous occasions and incidents where children claim that they were taught witchcraft by some members of their community. A number of prosecutions have been premised partly or wholly on such allegations both at formal⁶⁵ and informal levels.⁶⁶ Therefore it has been submitted that there is need to review the law with the aim of protecting children from being taught the practice.

It must be pointed out that the Constitution obliges the State to actively promote the welfare and development of the people of Malawi. To achieve this the Constitution mandates the State to progressively adopt and implement policies and legislation that would, among other things, encourage and promote achievement of conditions conducive to the full development of healthy, productive and responsible members of the

⁶⁴ See the reports attached to submission by the faith based organization for examples of such allegations.

⁶⁵ See the case of *Binzi Nunku and Loza Ninku vs. the Republic* Criminal Appeal No. 28 of 2007 (HC) (PR) (Unrep.).

⁶⁶ Ip cit.

society.⁶⁷ Furthermore, children are accorded constitutional protection against, as it is material, any treatment that is hazardous, interfere with their education or is harmful to their health or to their physical, mental or spiritual or social development.⁶⁸ International instruments oblige the State to make sure that the principle of best interest of a child is enshrined. This entails that this must be a primary consideration in all decisions or actions that affect the child or children as a group.⁶⁹

Allegations of witchcraft are often associated with stigma and other forms of victimization.⁷⁰ That is why it has been submitted that the law should be reviewed with an aim of protecting children.

4.1 Regional Perspective

Zambia

The Witchcraft Act of Zambia does not have an express provision aimed at protecting children against witchcraft practices. However there have been reports of chiefs being requested by government agencies to intervene in reported witchcraft practices at some public institutions.⁷¹ Particularly, chiefs have been asked to help to persuade parents to send children back to school where they withdrew due to alleged witchcraft practices.⁷²

⁶⁷ See section 13 of the Constitution

⁶⁸ See section 23 of the Constitution.

⁶⁹ See Article 3 of the CRC.

⁷⁰ For instance mob justice, exclusion orders as in case of Uganda before the Supreme Court intervention, neglect or evictions. Not so long ago it was reported in the media that a certain family was suspected to have burnt to death some children of the family in an alleged attempt to punish them because of alleged witchcraft practices.

⁷¹ Times of Zambia; *Witchcraft Exists, Admits Chief Munyumbwe of Gwembe District*; <http://www.times.co.za/news/viewnews.cgi?category=10&id=1084501299>.

⁷² Ibid.

Uganda

In Uganda it is an offence to procure another person to practise witchcraft.⁷³ This provision can be used to prosecute those who would allegedly teach the practice to children.

Zimbabwe

As already stated above, Zimbabwe criminalized witchcraft that is harmful to others.⁷⁴ Arguably, one may show that witchcraft is harmful to children, especially considering the psychological and social maltreatment that goes with the allegations of witchcraft.

4.2 Issues

- i. How would the law effectively protect children against the harms of witchcraft?
- ii. Should the law be reviewed to criminalize teaching witchcraft to innocent children?⁷⁵
- iii. How would the law protect children who allegedly practise witchcraft from the wrath of the community?
- iv. Or should teaching of the practice to children, assuming the law is reviewed to criminalize the practice, just be considered as an aggravating factor?

5.0 OUTCRY TO PROTECT INNOCENT VICTIMS OF ALLEGATIONS OF WITCHCRAFT

It has also been submitted that there is need to protect innocent victims of allegations of witchcraft practices. In most cases these are elderly people

⁷³ Section 2 of Witchcraft Act of Uganda.

⁷⁴ See note 59 above.

⁷⁵ This is assuming that the law is amended to recognize existence of witchcraft.

especially women.⁷⁶ It has been submitted that other members of our society connive to make false allegations of witchcraft against some members of the community to settle personal vendetta.⁷⁷

It is an offence to allege that any person practises witchcraft.⁷⁸ It is also an offence to employ a witchfinder or to conduct trials by ordeal.⁷⁹ It seems the drafters of the legislation intended to protect innocent victims of wild witchcraft allegations. However the problem is that this legal position is premised on the assumption that witchcraft does not exist. Unfortunately a considerable proportion of the society does not subscribe to this school of thought. Knowing that they would be prosecuted for alleging witchcraft practices against someone, unfortunately sometimes people resort to mob justice. Some traditional leaders often execute very harsh sentences on their own.⁸⁰

5.1 Regional perspective

Zambia

In Zambia it is an offence to name or indicate or accuse another person that he practises witchcraft.⁸¹ So too is to impute that any person used non-natural means to cause death, injury damage or calamity.⁸² It is also an offence to engage in witch finding.⁸³ However there have also been concerns that so many innocent people had fallen victims of witch finding.⁸⁴ This shows that the prohibition of witch finding is sometimes observed in abeyance other than compliance.

⁷⁶ See the article of Pilirani Semu-Banda; *Mob justice in Malawi: Accused of witchcraft, the elderly are rarely protected by the law*; http://pilirabvuto.blogspot.com/2008_05_01_archive.html.

⁷⁷ See note 13 above.

⁷⁸ See section 4 of Witchcraft Act.

⁷⁹ See sections 5 and 2 of the Witchcraft Act respectively.

⁸⁰ See note 63.

⁸¹ Section 3 of the Witchcraft Act of Zambia.

⁸² Ibid.

⁸³ Section 4 of Witchcraft Act of Zambia.

⁸⁴ Times of Zambia; *Witchcraft Exists, Admits Chief Munyumbwe of Gwembe District*; <http://www.times.co.za/news/viewnews.cgi?category=10&id=1084501299>. This article alleges that witch finders are in a habit of implicating innocent people as long as they look old.

Uganda

The Witchcraft Act of Uganda does not have an express provision aimed at protecting persons against wild allegations of witchcraft practices. On the contrary, as already stated above, evidence of witchcraft can be adduced by showing reputation of the accused as a witch or wizard.⁸⁵ This seems to have a reverse effect on the cardinal legal principle of the onus of proof. However the provision expressly states that it operates notwithstanding the provisions of any law to the contrary.⁸⁶

Zimbabwe

In Zimbabwe it is an offence to groundlessly or by the purported use of non-natural means accuse another person of witchcraft.⁸⁷ However it is a defence to a charge alluded to above if the accused did not indulge in the purported use of non-natural means and that he had reasonable belief that the complainant was engaged in practices commonly associated with witchcraft.⁸⁸

5.2 Issues

- i. If the law is amended to recognize the existence of witchcraft, how would it then protect innocent victims of witchcraft allegations?**
- ii. How would the law best achieve this?**
- iii. There is a stark difference between what one would believe to be a fact and what the court would find to be so. How would the law protect those that are acquitted of charges under Witchcraft Act or had charges against them dropped for want of evidence, yet they are not welcome in their community because the community still believe that they practise witchcraft?**
- iv. How would the law protect the elderly who often fall victims of allegations of witchcraft?**

⁸⁵ See section 5 of the Witchcraft Act of Uganda.

⁸⁶ Ibid.

⁸⁷ See section 99 of the Criminal Law (Codification and Reform) Act of Zimbabwe.

⁸⁸ *ibid*

6.0 CONCLUSION

As indicated earlier on, this paper has been written to stimulate debate among stakeholders and the public as a whole on the legal position on witchcraft. Hence deliberate effort has been made to arrange the issues in such a way as to provoke debate. However the issues raised herein are not exhaustive and the Commission welcomes suggestions of other issues that should be included. The Commission is of the strong view that it is through this consultative process that a broader scope of stakeholders and the general public can constructively contribute towards addressing the short falls that the legal regime on witchcraft in Malawi has. Therefore all respondents are encouraged to express their views with regard to the issues and offer recommendations where possible.