Functional Psychosis and Witchcraft Fears

Excuses to Criminal Responsibility in East Africa

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The belief that serious or acute mental problems are only prevalent in urbanized and technologically advanced societies and absent in preindustrial, largely rural, African societies is an exaggeration (Milner, 1966). Mental disorder, however, is not a major concern of East African legal systems. The social fabric in East African societies is still closely knit and thus provides ways to treat or take care of the deviants. Large-scale industrial development, which enhances the likelihood of behavioral aberrations in the industrialized societies of Europe and America, has not yet taken place, and thus the peasants of East Africa have been spared its ill effects.

In this article, we shall attempt to investigate the reasons why the law treats differently two sets of phenomena which factually seem to be similar. These are fear of the effect of witchcraft practices and what psychiatrists have called functional psychosis.

Looking at it from a causative point of view, mental illness of a psychotic nature is classified into two types–one is organic; the other, functional

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(Manheim, 1965: 243). The former type of psychosis is due to organic infection or to a defect which can be pathologically explained. We are not primarily concerned with this type of psychotic mental illness, because we believe that, apart from population distribution, infant mortality, the types and amounts of food available, and life expectancy, neuropathology per se has no geographical boundary. Climatic conditions merely vary the prevalence and intensity of organic psychosis.

It is the latter, functional psychosis, that we are concerned with here. To understand this type of mental disorder, we shall take two typical psychoses—schizophrenia and paranoid schizophrenia—as our model. In an introductory book of psychiatry for the layman, we are told that "all types of schizophrenia may be characterized by hallucinations, delusions, aberrant ideas, bizarre behaviour, unpredictable movement, intellectual deterioration, orientation defects, etc. in varying combinations and degree" (Brussel, 1967: 62). Furthermore, it is stated that a paranoid schizophrenic is extraordinarily suspicious (Brussel, 1967: 63). The same author explains hallucinations as "sense perception not based on objective reality. One or more of the five senses may be involved: auditory, visual, gustatory, tactile, or olfactory hallucinations." When one has hallucinations, his intellect is deceived by the senses (Austin, 1964: 12). But is this hallucinatory perception similar in character to what may be experienced when sense perception is based on objective reality (Austin, 1964: 32)? Is it pure imagination or is it mistaken perception? On the other hand,

> a delusion arises without external stimulus and provides significant clues to the patient's problems. Delusions of persecution arise from inner threats of unworthy desires of troublesome and disturbed aspects of the personality, outwardly projected as hostility coming from the environment. [Brussel, 1967: 66-67]

Indeed, delusions are primarily a matter of grossly disordered beliefs which may very well have nothing to do with perception at all (Austin, 1964: 23).[1] It is thus clear, according to medical classification, that schizophrenics are characterized by impaired judgments and a disordered interpretation of persons and events; indeed, they distort events and take flight into their own world of fantasy. These, in brief, are the symptoms of the types of mental illnesses with which this article is concerned.

WHAT OF WITCHCRAFT FEARS?

Some Western Europeans, in their rather panoramic reviews, have gone to the extent of asserting that "witches and witchcraft do not of course exist" (Meek, 1935: 79). What do they intend to convey by such an expression? Do

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they mean or use the concept of existence in the same way as "God and the Holy Spirit do not of course exist"? If so, this is agreeable; if not, it is confessed that no difference can be maintained. Several instances are prevalent which show the existence of witchcraft, or at least strong beliefs in the practices and existence of the witches.

First, it is pertinent to note that in all the three East African countries there is what may be called anti-witchcraft legislation. This type of legislation was introduced or enacted by the colonial administrations and has not yet been revoked by the independent governments of these states, nor is there any hope that it will be revoked in the not-too-distant future, because it is not of high political importance.[2] It should not, however, be assumed that prior to the coming of the white man to East Africa there were no methods of dealing with bad effects of witchcraft practices. Several prosecuted cases, as we shall see later, indicate that there were effective traditional methods of dealing with suspected witches. This legislation provides that any person who proclaims himself a witchdoctor or a sorcerer in order to cause fear, annoyance, or injury to another, in person, mind, or property is guilty of an offense, as is a person who proclaims himself an expert in witchcraft, possessing the ability to help others practice such witchcraft on other people. Indeed, even possession of charms used in witch doctoring is an offense, as well as the use of witchcraft to name another person as a witch or as one who has done something wrong. This type of legislation, particularly the last mentioned category of offense, led at least one author to conclude that:

> where witchcraft beliefs prevail, their logical corollary is a belief in witch-finding techniques. Among the functions of a diviner, therefore, is usually that of detecting witchcraft and designating who is responsible. It was beliefs of this sort that led to the sharpest collision between traditional African beliefs and those of European administrators and missionaries in the colonial period. From their point of view, any accusation of witchcraft was by definition an empty one; it could however lead to harmful consequences such as assault against the person accused and, for that reason it was usual for the Witchcraft Ordinances to make it an offense to name a person a witch or to impute witchcraft. This contrasted sharply with the traditional African view of a witchfinder as essentially a friend, performing a valuable service on behalf of the whole community. [Goldthorpe, 1968: 175]

The purpose of this legislation is to eradicate witchcraft practices and to allay fears in witchcraft; but as we very well know, witchcraft, like belief in religion or racism, may not be eradicated by the stroke of the pen and fortuitous prosecutions. As it will be elaborated later, "the cure," if this is an appropriate expression, of all this, is the removal of ignorance through education of the masses by providing them with a scientific view of the world, just as the psychotherapist uses psychoanalysis to treat those schizophrenics who are treatable. Thus the very existence of anti-witchcraft legislation on the statute

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books of the East African states bears witness to the existence of belief in witchcraft activities.

Secondly, several cases illustrate the existence of belief in witchcraft. A few examples from reported court judgments will suffice here. In one case, which took place at the start of the second decade of this century, 54 people were charged with the murder of 2 persons they had suspected of practicing witchcraft (black magic), which then brought evil to the whole Kikuyu tribe (Rex v. Karoga wa Githengi and 53 Others). C. J. Hamilton gives the facts of this interesting case in a way that merits extensive quotation from the judgment. He stated that:

> In August this year there was much sickness and death in the Kikuyu country owing to plague, cerebral spinal meningitis and pneumonia. As a consequence, the Kikuyu who are much given to the practice of witch doctoring not unnaturally suspected that their ills were due to the powers of evil of the witch doctor and . . . two men, Gunga and Katche, were denounced as being the cause of sixteen deaths. . . . The council found them guilty and [they] were in fact burnt in a hut in the presence of the Kiama and with their direct approval. . . . The Kiama acted according to native custom in trying and burning men accused of causing death by magic and do not consider that they have done anything but a meritorious act. [Rex v. Karoga wa Githengi and 53 Others: 51][3]

We see from this case that what a western-oriented judge regarded as a medically natural disease, the Kikuyu people of that time regarded as being caused by evil acts of witches. This is an extreme case of determinism not in any way dissimilar to that of Freudians and other psychoanalysts (Fincher, 1964: 37; Freud, 1966: 117-120; Bradley, 1962: I; Ryle, 1949: chs. I and III).

In another case, the appellant had certain medicines in calabashes on his farm in order to frighten trespassers (Rex v. Matolo). He warned one boy not to come on his farm without his permission, threatening that he would die because of the medicines. Subsequently the boy died. The appellant was prosecuted and convicted of having used witchcraft to kill the boy, but on appeal the conviction was quashed on the grounds that the appellant lacked the requisite mens rea, i.e., that he did not intend to kill the boy but to protect his farm.[4] The basis or rather the reason why this case was prosecuted in the first place was the common belief that the medicine in the calabashes had killed the boy. This sort of belief is not doubted by anyone with the same caliber of thinking–as well as standard of reference–as that possessed by rural Africans. As we have already seen, Freudians use the concept of libido as the main key to the understanding of emotional states of mind and conduct that is supposed to issue therefrom. In East Africa, where witchcraft, although apparently declining, has not yet been given up, it is the main key or cause to all evil that occurs. This is particularly the case because the new conditions

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are bringing about new anxieties which many East Africans are unable to cope with. Recently a sociologist has suggested that the use of magic charms or witchcraft is in fact on the increase because of modern developments like "getting and keeping employment, passing examinations, making profit in trade, etc." (Goldthorpe, 1968: 177).[5]

It must be realized that belief in witchcraft is not confined to suspicions that medicines are being used. In certain circumstances, words used by a person, whom others believe to be a witch, may cause just as much fear in those who believe in witchcraft as the threat of hellfire does to those who believe in life after death. This is clearly exemplified by a case (Rex v. Wa Mukwata) where the accused was charged with the murder of one Kasanya, who had the reputation of being a witch and whom the accused believed had caused the deaths of several of his relatives, including his son, by witchcraft. On the ill-fated day, the accused met Kasanya and implored her to stop practicing witchcraft, whereupon she said: "You are always accusing me of practicing witchcraft; you also will die of witchcraft." On hearing this the accused got infuriated and killed her. The assessors[6] in this case agreed that the victim acknowledged being a witch and intended to cause the death of the accused by witchcraft. The conclusion to be drawn is that witchcraft exists and is widely practiced. To deny such a proposition in the face of all the evidence tendered is to ignore reality and take flight to a world that is not East Africa.

ATTITUDES OF BELIEVERS

The main characteristic of belief in witchcraft is a feeling that all ills are supernaturally caused by the witch who pursues the victim fearing witchcraft. It is a belief caused by a distortion of facts, by using a preconceived interpretative hypothesis as a frame of reference.[7] To a person brought up in West-European-type culture and technological advancement, it is mere fantasy. In this group of people living in fantasy, we also find the "aborigine, the infants and the psychotic [all and] each concerned with an egocentric drive to satisfy his own desires in a ruthless and swift way which is said to be pragmatic in thinking and action" (Brussel, 1967: 59).

It may be concluded, therefore, that in both witchcraft fears and schizophrenia there is an element of distortion of the facts, plus suspicions of the surrounding environment. While these distortions and suspicions, which the particular legal system regards as anti-social, are responsible for the violent reactions by the people affected, the world of fantasy where these people mentally live provides them with rationalizations for their actions. Yet despite

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this similarity in manifestation, the criminal law of East Africa recognizes schizophrenia as an excuse to criminal responsibility while rejecting belief and fear in witchcraft.

The following case illustrates the attitudes of both the bench and the medical expert in relation to mental disorders like schizophrenia (Nyinge Suwatu v. Rex). In this case, the appellant had killed a police inspector and then surrendered himself at the police station, where he told the arresting constable that he came there to be killed. At his trial, the prosecution introduced medical evidence in the testimony of a psychiatric specialist that, although the accused knew what he was doing, he could hardly know that it was wrong.[8] The expert witness reached such a conclusion because he found that for a long time the accused had had persecutionary delusions that a gang, of which the victim was a member, had wanted to kill him; and thus he felt justified in killing the victim in order to stop the group from executing their plans. The judge rejected this opinion, saying that, "to relieve from criminal responsibility, however, insanity must be such that the accused did not know what he was doing (as a matter of fact) or did not know that what he was doing was legally wrong." The decision of the judge that the accused gave in court to the following question—"Did you know what you were doing was wrong—against the law?" The accused replied, "It was wrong, but they wanted to kill me." The judge took this to indicate both knowledge of the nature and quality of the act and knowledge that it was unlawful. He concluded, as a layman would, that a person who is that much oriented to reality is not insane for purposes of law.[9] Had the accused not given the above answer to the question, it is likely that the judge would have accepted the opinion of the psychiatrist.

But what would have happened had the accused pleaded that the inspector was bewitching him? It is clear that such a plea, unless accompanied by other circumstances, would have constituted neither a justification, nor even a mitigating factor as to the offense charged.[10] One would have expected that western-trained administrators and judges would recognize belief in witchcraft as an indicator of mental illness, because the Jungian definition of "fantastic" thinking, common among the primitive races and infants, does fit these fears. The Europeans were well versed in the scientific view and regarded those not as well versed as primitive, and hence their thinking as psychotic.[11] Not surprisingly, this has not been so in regard to witchcraft; in fact the opposite view is held, that "perfectly sane Africans believed in witchcraft" (Muswi Musele v. Rex). If this is so, why is it not acknowledged that it is reasonable in such a society to believe in witchcraft? The western-oriented ruling elite has failed to realize that witchcraft is part of the *Weltanschauung* of the African people; just as Westerners believe in mental illness, which for want of a better term, we would call moral failure or problems in living (Szasz, 1963), so do the Africans believe in witchcraft.

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This has led Professor Seidman to remark that Africans living in a prescientific society have a world view which correspondingly is characterized as prescientific. Frequently they commit acts which are logical within the framework of their understanding of natural processes, but which the criminal laws of their respective countries, embodying as they do a completely different sort of understanding, characterize as criminal. The resulting problem involves a confusion of issues involving questions of mistake of fact, negligence, insanity, and absolute liability (Seidman, 1966: 1135, 1137).[12]

THE PRECEDENTS WHICH EXIST

It has been concluded above, in the main, that belief in witchcraft and the fears that follow it, and schizophrenia (which is manifested mainly in hallucinations and delusions) are members of the same kind of family. It has also been seen that functional psychosis is an excuse to criminal responsibility in East Africa insofar as it falls within the codified M'Naughten rules. Even if the McNaghten principles as statutorily given do not apply, there are provisions under which this type of mental disorder may be regarded as an excuse to a criminal charge, like "subject to the express provision of this code . . . , a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will" (Revised Laws, 1962);[13] also "a person who does or omits to do an act under an *honest* and reasonable but *mistaken belief* in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist" (Revised Laws, 1962; italics added).[14] First, on a casual inspection, one would have expected the judiciary at least to recognize that witchcraft fears can be so overpowering that a person may lose the independence of exercising his will just as it is prepared to recognize the effect of mental disorder on a person's exercise of will. Surprisingly, this has not been the case; in fact, some people have thought and have had the temerity to assert that fear of witchcraft is self-induced fear, and, as such, it should be treated as self-induced drunkenness. However, it is known that these two are not at all similar in etiology.

Secondly, the courts have refused to apply the defense of mistake of fact in relation to crimes committed under fear of witchcraft (Revised Laws, 1962).[15] The East African Court of Appeal, after quoting section 10(1) above, which by then was section 11, went on to say:

> Section 11, it will be seen, requires that the mistake, in order to fall within its scope, must have been a reasonable one. But a mistake induced by an insane delusion, that is to say, a delusion of one who (at least on the particular point) has lost his reason is ex hypothesi not a reasonable one. Hence the section quite apart from any operation of the last two lines of it can have no application in the case of such a mistake. [Nyinge Suwatu v. Rex]

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If the court refuses to recognize the fact that a delusion may lead to a reasonable mistake of fact, how is it to accord general ignorance the status of being an excuse?[16] Furthermore, the court seems to have engaged itself in futile and confused reasoning; the confusion centers around the use of the concept of the "reasonableness" of the mistake. The court identifies reasonableness, a standard (or valuation), with reasoning, a process of the intellect. Implicit in such reasoning is the assumption by the judge that a person who has insane delusions has a thinking disorder, and hence cannot act mistakenly though reasonably. This type of logic is very dangerous and misleading, for it ignores the fact that deluded persons do sometimes act reasonably according to the standard of their communities. In fact, it is difficult to imagine that the provision was intended to protect only sane people who make mistakes in their reasoning process. One would have expected the provisions to be applicable to the opposite case; recognizing that it is reasonable to expect people to be deluded. If a deluded person assumes a certain state of affairs to exist, when in fact it does not, then his mistakes are reasonable and should be accepted as a defense or excuse under the above-cited provision.

Apart from this mode of confused reasoning, some judges have refused to pronounce directly on the standard of reasonableness required, while others have given very ridiculous standards. To give an example of the first instance, in one case, the accused killed his father, whom he believed to be in the process of causing the death of his child by witchcraft (Rex v. Kajuna Mbake). The accused deliberately and without any sudden and grave provocation, stabbed his father to death. The trial judge convicted the accused of murder. In dismissing the appeal, the court stated:

> A mere belief founded on something metaphysical as opposed to something physical, that a person is causing the death of another by supernatural means, however honest that belief may be, has not so far as we are aware been regarded by this court as mitigating circumstances in law, though it is a matter which we believe is always considered by the executive. In short we should not be justified in accepting it as a reasonable belief. [Rex v. Kajuna Mbake: 105]

Implicit in this is a standard for reasonableness of mistake of fact. The judges applied, without mentioning it, the standard of science; that is, physical as opposed to metaphysical. The belief, to be considered reasonable, must be based on a scientific view of the world. It is this view which the court regarded as correct (Polanyi, 1966: 10, 11, 25). The point has forcefully been made by Professor Seidman (1966: 1139).

> His [a person in the accused's place] whole approach to the physical world is as we have suggested sharply at variance with that of the average Englishman. The difference is not simply a relativistic matter. One cannot assert dogmatically about custom that it is wrong. One can assert dogmatically that witchcraft is factually erroneous.

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Despite the fact that the court recognized the prevalence of witchcraft, it still refused to provide guidelines for dealing with the problem in the future. On the first page of its judgment, the court agreed that it would seem:

> the inhabitants of which large areas are soaked in witchcraft and imbued with a firm belief in evil spirits. . . . It would seem to turn on whether the accused's belief in his father's malevolent invocation of evil spirits in order to injure the child was not only honest but reasonable taking into account the fact that he is a primitive African. That is a difficult question bordering on metaphysics which I do not propose to discuss here.

One wonders whether the court would have regarded a diagnosis of schizophrenia as a difficult matter of metaphysics. It has been seen in one case (Nyinge Suwatu v. Rex) that the court thinks it is not a difficult matter to discuss a diagnosis of schizophrenia. What is the difference between the two? Is it the fact that on the one hand a medical expert is available to testify and give an opinion, while on the other hand the specialist witch doctor is not permitted to testify, and his specialization is regarded as unlawful? If a medical expert can testify in these matters, surely a traditional healer-witch doctor or jujuman should be given audience before the court to express his expert opinion.

As it was stated above, some judges have set up very ridiculous guidelines in evaluating the formulation of a desirable standard of reasonableness. In a case before the now defunct Central African Federation Federal Court from present day Malawi (Attorney General of Nyasaland v. Jackson), the court stated that belief in witchcraft is to be regarded as unreasonable and the standard of reasonableness is that of the common law as applied to a man on a Clapham Omnibus in England. This test is not only bad law, but also bad politics, in that it has no guidance value apart from encouraging assimilation rather than changing consciously the attitudes of the people affected.[17]

Another way of looking at fears in witchcraft as a reasonable belief has been the application of the mitigating factor of provocation. In Rex v. Petero Wabwire s/o Malemo, the accused found his wife with *bujule* (gourds), which he believed to contain witchcraft medicine. He asked her where she got the medicine, and when she did not reply, he killed her in the belief that she was practicing witchcraft on him. On trial, he was convicted of murder despite his plea of provocation. On appeal, the court said:

> The appellant has appeared at the hearing of this appeal. We are prepared to believe that *his intelligence is below that of the ordinary person of his race* and that a person of his mentality might in the circumstances which he alleges hastily but honestly believe that his wife intended either to bewitch or poison him. . . . We think that if the facts proved establish that the victim *was performing in the actual presence of the accused some act which the accused did genuinely believe and which an ordinary*

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> *person in the community to which he belongs would genuinely believe to be witchcraft* . . . he might be angered to such an extent as to be deprived of his power of self control and induced to assault the person doing the act of witchcraft. And if this be the case, a defense of grave and sudden provocation is open to him. [Italics added]

Recognition that witchcraft practices in certain situations may amount to provocation was a step forward, but in the wrong direction, because provocation is not an excuse to criminal responsibility. It is a mitigating factor, in that the original charge is dropped and a less serious charge and punishment ensue. It is not, in lawyers' language, a complete defense, as is the proof of schizophrenia or idiocy. Secondly, despite the fact that the court recognized that the accused in this case was of lower intelligence than a normal person in his community, it applied the normal standard in exempting him from a conviction of murder. It is submitted that as the court had stated the man was of lower than normal intelligence, it ought to have inquired into his sanity at the crucial time. One would think that if a psychiatrist testified that the accused had an IQ of below 40 or that he definitely was below the normal, another standard would have been used by the court—i.e., defect of the mind or disease of the mind—and this would have been a complete defense. The introduction of the claim to provocation was a way to evade pronouncing that belief in witchcraft fears are a symptom of mental illness.[18] But the trick was not well done.

ATTEMPTS AT CLARIFICATION

The above cases indicate that at last the courts have realized that the standard of reasonableness of belief must depend on the moral values of the locality where the accused lives. But even so, the claim to provocation is limited insofar as it is applied to belief in witchcraft. This is not to say that the judges have misapplied the factor, but that it is too restricted in application. In one case (Rex v. Akope Kamon and Another), the two accused admittedly killed the victim in the belief that through witchcraft he had killed the father of the first accused and the uncle of the second accused. The plea of provocation was ruled out and the killing was regarded as revenge. On appeal the court said:

> A mere belief that witchcraft has been or is being exercised may be an honest belief in an accused person's mind but when that belief is founded on nothing but suspicion of the person holding the belief, it cannot be said to be both reasonable and honest. To hold otherwise would be to supply a secure refuge for every scoundrel with homicidal tendencies. (Rex v. Akope Kamon and Another: 105)[19]

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One is bound to ask whether to hold that a person with persecutionary delusions is not criminally responsible for his acts is not then "supplying a secure refuge for every scoundrel with homicidal tendencies."

Why should Americans and Western Europeans regard schizophrenics and, in time, psychopaths, as victims of mental illness–thus encouraging a humanitarian attitude through the use by the medical profession of the label. But at the same time, their bequest to Africa has been very different: there the conventional wisdom has been to define witchcraft as a primitive belief which ought to be eradicated by the cane. Why do they regard *this* type of ignorance as self-induced and therefore punishable? To anticipate the conclusion, it will be argued that the reason lies in moral values, which in the area of schizophrenics have been identified with health values, while in the area of witchcraft have not (Szasz, 1963: 2).

It was stated above that the plea of provocation as a mitigating factor in these cases is severely restricted. An investigation into this plea involves, especially in homicidal cases, a discussion of mens rea, particularly malice aforethought. The question may be put thus–"Has a person killing a witch, whom he believes to be practicing witchcraft on him, the requisite mens rea or malice aforethought?" The courts, with possibly one reported exception, have answered the above question in the affirmative. For provocation to be established in cases of killing through or because of fear of witchcraft, it must amount to provocation as per the common law standard as such or as it has been codified in the respective East African jurisdictions. One interesting case is a story in itself (Rex v. Kumwaka Wa Mulumbi and 69 Others). Here, seventy people, ten of whom were children, were convicted of murder and sentenced to death because they beat a witch to death. Their main ground of appeal was that they had no malice aforethought to kill the witch but were just beating her. The facts of the case, briefly stated, were that:

> the deceased woman was believed to have been a witch and it is part of the Crown's case that the accused genuinely believed her to be a witch and to have bewitched the wife of the first accused so as to make her ill and unable to speak.

The first accused summoned the rest of the accused to where his wife was and then the witch was seized, brought and ordered to remove the spell. The accused said that she removed half of the spell in the night but was seen running away in the morning. She was seized, beaten, and later died. The court held that the accused knew that they were causing grievous bodily harm and this satisfied section 206 (b) of the Kenya Penal Code which defines malice aforethought, inter alia, to include intention to do grievous bodily harm. Later, the court went on to say:

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> The belief in witchcraft is of course widespread and is deeply ingrained in the nature and character. . . . The plea has frequently been put forward in murder cases that the deceased had bewitched or threatened to bewitch the accused, and that plea has been consistently rejected *except in cases where the accused has been put in such fear of immediate danger to his own life that the defense of grave and sudden provocation has been held proved.* For courts to adopt any other attitude to such cases would be to encourage the belief that an aggrieved party may take the law in his own hands and no belief could be more mischievous or fraught with great danger to public peace and tranquility. [Rex v. Kumwaka WaMulumbi; italics added][20]

Some judges have paid deference to such established precedent, while at the same time they have been implicitly skeptical of such extension of the plea of provocation. In Rex v. Mawalwa bin Nyangeweza, the appellant had killed his victim on the grounds that she had caused the death of many of his relatives by witchcraft. All of them had died the same way and a witch doctor had told the accused that the victim was the cause. After the latest death of one of his brothers, the accused decided to kill the supposed witch and did so. In coming to its conclusion the appeal court said:

> Accordingly we have no option but to dismiss the appeal. In so doing however, we would draw the attention of the Governor in Council to the extenuating features in this case that it would appear that the appellant genuinely, from the point of view of an African of his class, had reason to believe that the members of his family had died as a result of being bewitched by the deceased and took action immediately after the latest death.

Other judges have not only been content with being skeptical of the extension, but have also come out forcefully against such practices. They have realized that the concept of provocation has been panned and battered until it has become accepted in witchcraft cases. Justice Wilson has expressed great doubt about invoking provocation as understood in the common law to witchcraft cases (Rex v. Sitakimatata s/o Kimwange). He has severely attacked the passage from Kumwaka quoted above, because:

> the phraseology used in this passage seems to me, with respect, not entirely free from obscurity. It is rather difficult to discover from the concluding phrase what standard of fear is required to establish a defense[21] of provocation based on a belief in witchcraft, and the emotion of fear [which does not seem to me to have any place in the English doctrine of provocation] is confused with anger, which is, I think, the natural end product or result of provocation received. . . . I take it to mean that if I fancied that bewitchment or a threat of bewitchment induces in the victim [meaning the accused] such a degree of fear as to deprive him of self control and induce him to assault his provoker then the defense or provocation arising from a belief in the potency of witchcraft may be regarded as adequately established. In applying this doctrine however, I apprehend that it is necessary to remember the concurrent rule that provocation must not only be grave but [also] sudden. Perhaps this is the implication to be drawn from the otherwise rather obscure final phrase of the passage quoted above.

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On appeal the court was quick to point out that sections 201 and 202 of chapter 16 of Tanganyika Laws which define provocation to include both intensity and suddenness was the standard to be used whenever provocation was pleaded in witchcraft cases. Any interpolations from ordinary English common law were to be disregarded (Wallace Johnson v. the King).

Further clarification was later given in a case where the accused were charged, tried, and convicted of murder, but their convictions were quashed on appeal and a conviction of manslaughter entered (Rex v. Fabiano Kinene and Two Others). The accused had killed a village headman by pushing twenty green plantains through his rectum, causing death by shock. They contended they had caught him naked in their compound in the night practicing witchcraft on them, and they also believed he had previously caused the deaths of their relatives by witchcraft. The trial judge held that provocation was not proved because these people had in any case intended to kill their victim and were waiting for an appropriate opportunity to present itself. When the opportunity occurred they executed their intention. The Court of Appeal differed, holding that a provocation—i.e., anger and suddenness—is presumed to have been the immediate cause of killing the victim in the ordinary manner of the wizard. The court then went on to comment on the passage quoted from the Kumwaka case, saying:

> With reference to what was said in the case of Rex v. Kumwaka we desire to make it clear that where the court in that case refers to emotion of fear as founding a defense of grave and sudden provocation it must be implied that concurrently with a finding of the existence of that emotion, the court must hold that the accused did the act causing death *in the heat of passion*. [Italics added]

In other words, substitute "heat of passion" for "emotion of fear" and the plea is made. But this substitution is questionable. It is this type of substitution that is called punning. We thus see at least a glimpse of the rationale. It was word play intended to extenuate the charge of murder to manslaughter in witch killings.[22] The intention was honorable; the method, questionable.

Thus it has been found that, for provocation to be proved in cases of witchcraft, the witchcraft act must be physical, in the presence of the accused, and arouse so much anger that he loses his control and kills the witch suddenly. This test was laid down in clear terms by the Court of Appeal for East Africa in the case of Eria Galikuwa. The court said:

> (1) The act causing death must be proved to have been done in the heat of passion, i.e., anger; fear alone, even fear of immediate death, is not enough. Fear raises the plea of self-defense, not provocation. [This test is very idealistic in stating that fear alone is not enough to provoke one into action. Indeed, most of witch-killings arise very often out of fear and rarely out of sudden anger.]

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(2) The act of witchcraft must be performed by the victim in the presence of the accused and the standard to be used is that of honest and reasonable belief of the ordinary person in the community to which the accused belongs.

(3) A belief in witchcraft per se does not constitute a circumstance of excuse or mitigation for killing a person believed to be a witch or wizard when there is no immediate provactive act.

(4) The provocative act must be an offense under the relevant anti-witchcraft legislation.

(5) Provocation must be both grave and sudden.

(6) It is not necessary that the harm threatened be present; it may be a threat to cause harm in the future.

A conclusion has been reached that the plea of provocation has been extended to cover some instances which in English law it hardly covers. As already stated, this is a good sign that finally the problems involved in witchcraft are being understood, but the method of extension, based as it is on the undiluted common law view, is, to say the least, curious. Why is this so? One may hazard an answer that it is because both the administrators and the judges in East African courts have failed to face squarely the dilemma posed by the law which ignores differences in cultural evolution. It is a result of omnibus blind reception of English common law in East Africa. The courts have refused to recognize that fear caused by belief in witchcraft, like schizophrenia of the delusionary and hallucinatory type, is a mental illness in the sense that it creates problems in living. The rationales which are given for the killing of witches are similar if not identical to those given for the anti-social activity of psychotics including those whose psychosis is functional in cause. These rationales include:

(1) to prevent the witch from carrying out his intention; and

(2) to kill him, thereby preventing him from gaining anything by his own wrong; and probably

(3) to retaliate, due to anger, for what the witch has already done and thus put an end to his future actions.

It is clear that in witch-killings, the main reason is fear rather than anger, and to apply a doctrine based merely on sudden grave anger is to miss the mark of the whole problem. The extension of the concept of provocation to these situations is to use anger in the popular sense and then to extrapolate it into the legal arena. This game is not dissimilar to the one performed by the United States Supreme Court in Griswold v. Connecticut regarding the concept of privacy.[2 3]

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BELIEF IN WITCHCRAFT AS A MENTAL ILLNESS

Probably, belief in witchcraft is on its way to becoming a recognized syndrome of mental illness or disease of the mind (meaning problem in living). In Rex v. Magata Kachehakana, the accused was charged with murdering his father by a blow with a panga and it was both proved and admitted that the reason for the killing was that the accused believed his father to be Satan and that he had bewitched him. Magata had been examined by a Dr. Murphy and was found to be mentally normal. He admitted to having killed his father for the following reasons: the victim had bewitched him (his son); his first wife, his cows, and his goats had all died; and now he and his second wife were always ill, with the added fact that he had become impotent. The victim had demanded two pots of beer in order to cure the accused, but even after these were tendered, the accused got no better. The opinion of one of the assessors was:

> The accused killed his father because his head was not well—he was mad. He had those thoughts for a long time, that his father was bewitching him. This affected his mind. As [the] accused was coming from a burial of a child he thought of his own children and believed his father to have bewitched them. When he killed his father his mind was so affected that he did not know he was doing wrong.

The trial judge said that the case was not free from difficulties and continued:

> I have considered the words "diseases of the mind" in section 12 of the penal code. *I am of the opinion that an African living far away in the bush may become so obsessed with the idea that he is being bewitched that the balance of his mind may be disturbed to such an extent that it may be described as disease of the mind.* Here the killing is unexplained and in my opinion inexplicable except upon the basis that the accused did not know what he was doing. . . . I have come to the conclusion mainly upon the evidence adduced by the prosecution but also upon the accused's statement to the police that when [he] killed his father he did not know what he was doing and he did not know that he ought to have not done the act. [Italics added]

This type of case compared well with the case of a lady who had behaved so well in her trial that it seemed likely that psychiatric evidence claiming she was mentally ill was of dubious value, and then when the judge looked down she hurled something at him with no apparent reason or cause.[24]

The reasoning of the judge in the above case reflects a liberal acceptance of psychiatric views[25] although it is perfectly clear that the accused did know what he was doing, save that he thought he was doing a meritorious act. The judge did, however, throw out the window all previous judicial precedent. In fact, he based his finding on the fact that the particular crime was violent and inexplicable. The danger in making evaluations in these matters is that the

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verbalization or rationalization of the accused is taken at face value [i.e. that his father was Satan and bewitching him]. The question is whether we are entitled to accept this rationalization as a basis for investigation and evaluation of the presence or absence of a so-called disease of the mind. As we have already pointed out, most psychiatric problems are recognized by the fact that the so-called patient or accused did something which is not apparently or immediately explainable. This is especially so with regard to psychopaths.[26] The fact that one behaves in a bizarre manner is taken for mental illness and mental illness is inferred from bizarre anti-social behavior (Wootton, 1959: 250); there is no point at which to break the vicious circle.

Further, the judicial holding tends to equate fear of witchcraft to insanity, and the result is that the accused is sent to an asylum. Yet we have it on record that perfectly sane Africans believe in witchcraft (Muswi Musele v. Rex). Thus the holding in Magata Kachehakana is a mixed blessing, in that a person who believes in witchcraft, which under the test is equivalent to insanity, is incarcerated for an indefinite period while what he really needs is education to remove his ignorance so that he can abandon his prescientific view of the world. To hold otherwise, as the decision above implies, is to invoke a category of excuse not appropriate for the task at hand. Just as using the plea of provocation in witchcraft cases does not amount to an excuse, so the invocation of insanity has its bad side as well.

CONCLUSION

The contention so far has been that functional psychosis of delusional and hallucinatory nature is not in any significant way different from fear caused by witchcraft. From this vantage point we have questioned the propriety of treating one as an illness, and therefore an excusing condition, while the other is not; regarding one as a medical problem, while the other is regarded as merely a penological one; and leaving the final decision in the one to the court aided by medical experts while leaving the other to the executive discretion in the exercise of prerogative of mercy. Before we suggest a reason for the difference in attitude, let us briefly restate the problems faced by the western mode of psychiatry in its application in forensic matters like the witch-killings discussed above.

There are many problems, but four of them merit specific attention here:

(1) In a culture where witchcraft is held as a common belief, how do you separate genuine witchcraft fears and beliefs from any other forms of hallucinations and delusions?[27]

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(2) The power of witchcraft lies in its capacity to frighten those who believe in it, and the law in East Africa must reconcile itself with this factor. To say, as Meek (1935) states, that witches and witchcraft don't exist, is to confound the language of one area with the facts of another. As Ryle (1949: 8) said, "A myth is, of course, not a fairy story. It is the presentation of facts belonging to one category in the idioms belonging to another. To explode a myth is accordingly not to deny the facts but to re-allocate them." It is submitted that this is the mistake made by those who deny the existence of witchcraft. The facts or experiences which are called witchcraft are there, but their supernatural power, i.e., the validity of the claim that witchcraft causes something to happen, is denied. Psychiatrists and other medical practitioners who may be called upon to give expert opinions in courts ought to recognize this.[28] The denial is as to causation and not as to empirical facts called witchcraft.

(3) There are still traditional healers who are doing a good job. Moreover, there are diseases or abnormalities that medical science has failed to treat or cannot recognize or detect which are still the domain of local healers.

(4) The M'Naghten rules in their codified form are the standards applicable to the defense of disease of the mind. While psychiatrists, beginning with Pinel down to Freud, are entitled to be humanitarians, they should not expect society to allow them to make moral value judgments on society's behalf. The attempt by psychiatry to make these moral judgments will be resisted by all enlightened citizens, not because psychiatry, where it is available, is doing a bad job, but simply because society realizes that the concept of illness expands continually at the expense of moral failure. (See Great Britain Committee on Sexual Offenses and Prostitution, 1963: para. 25.) Society is not ready to have these crucial decisions on moral values dictated to it by doctors who are no better in these matters than ordinary citizens. In fact, psychiatric claims will have to be more persuasive and scientifically grounded in order to persuade society to change its values.[29]

It is by now clear why functional psychosis is regarded in the common law world as an excusing condition, while witchcraft is not. The easiest indicator, that it is the attitude held by the judiciary in these cases, may be seen from the United States Supreme Court decision where it was stated:

> A delusion that the victim was a witch will only exculpate if it was the product of an insane mind but not if it were the product of a sane one.[30] The rule comports to the general notion that only physical incapacity of the mind will serve to bring the defendant under the umbrella of insanity; mere brutishness acquired through perverse upbringing will not. [Hofema v. U.S.]

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In America such a conclusion, or at least the reasoning behind it, is unlikely to be followed at the present when mental health legislation, covering as it does sociopaths (who in reality have failed to learn) is on the statute books.

But the same spirit is still the ruling creed in East Africa. Those who are deluded that the victim is a witch, unless they are insane, are regarded as being merely brutish, a character trait acquired through perverse upbringing. Such a standard is really ridiculous in East Africa. In a recent case in England the court held in regard to the M'Naghten rule that:

> it was not intended to apply to defects of reason caused simply by brutish stupidity without rational power. It was not intended that the defense should plead "although with a healthy mind he nevertheless had been brought up in such a way that he never learned to exercise his reason and therefore he is suffering from a defect of reason." [Rex v. Kemp]

Here we see that in England the attitude has not sufficiently changed, yet Professor Seidman (1966: 1152) was able to claim that "In England today a man who claimed that he had killed to defend himself against witchcraft would in all probability be committed for insanity *not* tried for murder" (italics added). There is more and more realization that, in trying to cope with modern life, problems in living are created, which ought to be taken into account in ascribing responsibility to people charged with criminal offenses. It is hoped that this same attitude will develop in East Africa, so that the courts may escape the dilemma of convicting witch-killers of murder, while at the same time and in the same breath recommending that the executive should use its clemency in these cases. It has also been seen that the existing exculpatory and mitigatory conditions of self-defense, mistake of fact, insanity, and provocation will not solve the problem. A new defense of diminished responsibility must be introduced, and a person brought to trial for witch-killing should neither be treated as though he were ill nor be punished, but he must instead be liberated from his ignorance by education. This will be a hard task. If psychiatry is to help in this area, it must be prepared to assume the role of a teacher and a secular spiritual guide rather than a doctor. Here psychologists are of more value than psychiatrists. There is no need for medical experts in this specific area. As Freud (1966: 103-111) said, properly trained nonmedical analysts are as good as any.

What has been attempted here is to show that functional disturbances are, like a belief in anything, without scientific basis and, as such, moral evaluation is inextricably and primarily involved. To identify such beliefs by calling them diseases of the mind, not diseases of the brain, is to engage in philosophical debates. Unfortunately, psychiatrists are not well equipped in this area of philosophy. In America, the medical profession and some legal scholars have failed to realize that psychiatry in this area is philosophizing, particularly

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making moral value judgments. If this were realized, it is hoped, it would better thinking[31] and research. Psychiatry will have to rehabilitate itself along these lines if it is not to lead itself and society to disaster. Informed attitudes are welcome in any society, but they should not be obligatory. They should rather come through persuasion. A good job is being done by psychiatry, but it may be destroyed by psychiatry claiming to be doing more than it is really doing.

NOTES

1. For a further explanation of functional psychosis, see Herman Manheim (1965: 250-53).

2. Recently Radio Tanzania has begun a series of news commentary in Swahili. For one week the comments were devoted to informing the people of the dangers and deceit of witch doctors. It is hoped that much more effort along these lines may be used to educate the masses against abuse of this highly skillful technique.

3. Kiama is a council of elders which the British administration had recognized as a competent local authority to deal with petty matters in the locality. Among the matters that the Kiama had no authority to deal with were questions involving problems of alleged or suspected witchcraft.

4. The problem of mens rea being taken as a description of the existence of a particular state or group of states of affairs in the human body (brain or mind) is a very difficult one for many to comprehend. For a refutation of this view, see Heath and Passmore (1955) and Anscombe (1968: 147).

5. See also the quotation he gives on the same page from Marwick (1965).

6. In East Africa, mainly in capital offenses, two to four elders sit with a presiding judge to advise him both on fact as understood in the locality and on customary norms. Their opinions are not binding on the judge, which makes them different from jurors as understood in Western Europe and America.

7. Implicit in all personal thoughts, there is a hypothesis which governs interpretations and evaluations of perceptions. For a relation of facts and hypotheses, see Berlin (1962).

8. What type of wrong is meant here? Is it moral wrongfulness?

9. The judge tried to draw a distinction between legal insanity and medical insanity. He agreed that the accused may have been insane from the medical point of view but not from the legal point of view. The use of the adjectives legal and medical preceding insanity may bewitch the unwary. This type of language had led Mr. El Amin M. Tatai (1966) to say that insanity as a legal defense must be differentiated from mental illness in the sense that, "Insanity is the degree and quantity of mental disorder which relieves one from criminal responsibility for the acts committed."

10. For clarification of a mitigating factor, see Hart (1959-60: 12-23).

11. See also Carothers (1948: 204), where the Jungian definition is given.

12. The interesting thing is that Dr. Goldthorpe states that magical beliefs are against logic.

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13. See Kenya Penal Code, ch. 63, sec. 9(1). What is there meant by "exercise of his will"? Is it the vulgar, or rather the ordinary, man's view, or the philosopher's view?

14. See Kenya Penal Code, ch. 63, sec. 10(1). The law is the same on this topic in all the East African countries (i.e. Tanzania mainland, Kenya, and Uganda).

15. See Kenya Penal Code, ch. 63, sec. 10(1). The subsection codifies what is commonly referred to as mistake of fact.

16. The contention is that witchcraft fears are the result of holding a nonscientific view of the world and events, and, as such, from a scientific viewpoint, they may be regarded as general ignorance.

17. One wonders whether the court foresaw what Malawi politics were going to be. Indeed, the current leadership is geared to the policy of assimilation to the West.

18. This would have led the court to the very ridiculous conclusion of saying that in the accused's community, the majority of its members are mentally ill, a statement that is not dissimilar to that of some American authors of the mid-Manhattan study of mental disease that "81.5% of their mid-Manhattan population was in measurable degree mentally ill" (Hartung, 1965: 178).

19. There is an apparent contradiction here. Is a "mere" belief in witchcraft conjured up in the person's mind? Might there not be some events which lead one to suspect that witchcraft is being practiced? And is such a suspicion, if held honestly, not a reasonable one? I suspect that the court treats two different cases in the same way: one, where there is a substantial ground (e.g., some event) for holding the suspicion, and, two, where the person has no "hard" evidence to support such a suspicion.

20. This test of provocation has also been applied in Rex v. Kimutai Arap. Mursoi.

21. The word defense is used in a very loose and misleading way. Provocation is not a defense at all. It is neither an excuse nor a justification. It is merely some recognized factor, the existence of which permits courts to convict for a lesser offense than the one charged if the whole evidence warrants such a conviction.

22. This type of punning or language misuse is discussed by Gross (1967).

23. The test for this purpose has been applied where a victim was found practicing sorcery in the night in the compound of the accused (Rex v. Klemnti Maganga and Another). It has also been used to refuse to accord extenuation to a charge of murder where the victim had committed an act of witchcraft to the relative of the accused while the accused was away and that particular relative died (Rex v. Emilio Lumu). This same test has been used to reject a plea of provocation where the accused killed the victim in fear that the witch doctor would carry out his threat and kill the accused if he did not render the demanded payment (Eria Galikuwa v. Rex).

24. I am grateful for this example to Dr. Herman of Bellevue Hospital.

25. The integrative theory of the mind. This is the view that the three so-called faculties of the mind—cognitive, connative, and emotive—are interrelated. It goes against the compartmentalized theory under which the three faculties are assumed to be independent of one another.

26. For a fuller story about psychopaths, see McCord and McCord (1964).

27. This specific problem was raised over two decades ago by McKay (1948). Compare with Kagwa (1965).

28. As already stated, advances in biological (genetic) studies have never shown the cause of functional psychosis. Indeed, calling it functional is due to the fact that no one knows its causes apart from the working mechanism in the brain.

29. The writer holds the view that most social sciences are sciences in name only; there is nothing scientific about them. This is not merely a verbal argument, but a substantive one. See Popper (1965: 33-96; 1968: ch. 1, sec. 4 and 6, ch. 4).

30. Indeed, this reasoning is the reverse of that advanced by the court in Nyinge Suwatu v. Rex.

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31. Hart (1957) has suggested that one of the uses of analytical philosophy or "doing" philosophy is to help social scientists formulate concepts which are as clear as possible for their growing enterprise. Thus they will be supplied with better thinking tools than they would otherwise have had. This emphasis on clear language use as a vehicle to clear thinking has acutely been put by the late Professor J. L. Austin as "to use a sharpened awareness of words to sharpen our perception of the phenomena."

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