A JURISPRUDENTIAL STUDY: PROVING WITCHCRAFT IN AFRICA.

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Tshepo Bogosiboile Mosaka
14301807

Supervised by: Professors Paul Roberts and John Jackson.

School of Law
University of Nottingham

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ABSTRACT

Widespread incidents of mob violence that are associated with witchcraft pose significant risks towards African criminal process. The need to address the extent to which these incidents threaten the overall institutional legitimacy of African criminal process constitutes the principal motivation behind the project of this thesis. This thesis identifies three major sets of challenges that are complained about by African communities. These pertain to (1) the relevant institutional practices that are to be followed in witchcraft cases (*institutional*); (2) the legal meaning of witchcraft (*material*); and (3) the evidential heuristics or processes of proof that are required to prove the direct crime of witchcraft (*probative*). These *institutional, material* and *probative* challenges are then summarised into a single overall thesis question: *how can the direct crime of witchcraft be proven in Africa*?

This thesis embarks upon an Afrocentric Jurisprudential (theoretical) study in order to develop heuristics for the evidential proof of witchcraft in criminal cases in Africa. The kind of Jurisprudence undertaken in this thesis constitutes a *prescriptive*, *middle-order* level of theorising in that the proof heuristics that are developed take the form of argumentation schemes that are to be applied in witchcraft trials in Africa. The overall answer given to the main thesis question takes the form of an argument, a defeasible *modus ponens*, that is underpinned by a broad conception of (evidential) proof. The argument is that: (1) Generally

speaking, if the relevant African institutional, material and probative (IMP) practices can be shown to be adhered to, then the *plausibility* of the evidential proof of the direct crime of witchcraft (P(w)) would have been established; (2) this thesis shows how the relevant IMP practices can be adhered to; (3) therefore, the *plausibility* of P(w) has been established by this thesis.

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This thesis is dedicated to the enduring memory of my grandparents (Matsatsi and Kedigoletse Mothulwe), Douglas Walton and, above all, Friedrich Nietzsche. I am also indebted to several people for their support and meaningful contributions towards the success of this project. My supervisors, Professors Paul Roberts and John Jackson, raised my own abilities and the quality of this thesis to a "Champions League standard." Professor Pamela-Jane Schwikkard consistently reminded me of how far I have come and how much she believed in me. Professor Dirk Van Zyl-Smit, and his wife Dr Betine Van Zyl-Smit, told me many fascinating stories over several wholesome dinners in Nottingham. Dr Sanele Sibanda built my intellectual foundations and interests in African decolonial scholarship. Professors Danwood Chirwa and Hugh Corder also deserve a special mention for their unrelenting support and encouragement at various points during the completion of this project.

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LIST OF FIGURES

TABLE OF CASES

Gomela v R [2019] TZCA 370.

Goodluck Oviefus v The State (1984) 10 S.C. 207.

Hyam v Director of Public Prosecutions [1975] A.C. 55.

Kievits kroon country estate (Pty) Ltd v Mmoledi 2014 (1) SA 585 (SCA).

Legalatladi v S [2019] ZANWHC 55.

Lenga Andrew v The People (2005) Criminal Appeal, No. BCA/4c/2004, unreported).

Mabaso v Felix 1981 (3) SA 865 (A).

Mabena v Letsoalo 1998 (2) SA 1068 (T).

Mabuza v Mbatha 2003 (4) SA 218 (C).

Mathias Tangawizi @ Lushinge v Republic [2019] TZCA 60.

Matula v R [1995] T.L.R 3.

Metal & Electrical Union of South Africa (obo Sibuyi) v Wireforce Steelbar (Pty) Ltd (2011) 32 ILJ 1481 (BCA).

Mhlekwa v Head of Tembuland regional authority; Feni v Head of Western Tembuland regional authority 2001 (1) SA 574 (Tk).

Ministère Publique & Mvondo c/N. Jacquèline Arrêt No. 335/COR of March 22, 1984, Bertuoa Court of Appeal.

R v Maposa 1943 S.R 194.

R v Mckenzie [1993] 1 W.L.R 453.

R v Miah (2018) EWCA Crim 563.

R v Miller [1954] 2 QB 282.

R v Myeni 1955 (4) SA 196 (A).

R v Ngang 1960 (3) SA 363 (T).

R v Nwaoke 1939 5 WACA 120.

R v Radebe 1915 AD 97.

R v Sacco 1958 (2) SA 349 (N).

R v Silas Magongo Onzere alia Frederick Namema [2017] eKLR.

R v Summers [1952] 1 All ER 1059, CCA.

R v Uko 20 N.L.R. 16.

R v Usiyeka 1912 NHC 107.

R v Woolin [1999] A.C. 82.

R v Yap Chuan Ching (1976) 63 Cr App Rep 7.

Republic v Alex Mwanzia Mutangili [2017] eKLR.

S v Alfeus 1979 (3) SA 145 (AD).

S v Basson 2005 (1) SA 171 (CC).

S v Buthelezi 1961 (1) SA 91 (N).

S v Chifadza [2018] ZWMSVHC 27.

S v Hamunakwadi 2015 (1) ZLR 392 (H).

S v Isolano 1985 (1) ZLR 62.

S v Jochoma 2014 (2) ZLR 553 (H).

S v Latha 2012 (2) SACR 30 (ECG).

S v Lin [2010] 1 All SA 358 (W).

S v Lukwha 1994 (1) SACR 53 (A).

S v Lubaxa 2001 (2) SACR 703 (SCA).

S v Malaza 1990 (1) SACR 357 (A).

S v Maluleke [2007] JOL 19283 (T).

S v Mapfumo [2018] ZWBHC 88.

S v Marange 1991 (2) ZLR 244 (S).

S v Masawi 1996 (2) ZLR 472 (S).

S v Matala 1993 (1) SACR 531 (A).

S v Mathoka 1992 (2) SACR 443 (NC).

S v Mavhungu 1981 (1) SA 56 (A).

S v Mbobi 2005 JDR 0016 (E).

S v Modisadife 1980 (3) SA 860 (A).

S v Mojapelo 1991 (1) SACR 257 (T).

S v Mokgethi 1990 1 SA 32 (A).

S v Mokonto 1971 (2) SA 319 (A).

S v Motsepa 1991 (2) SACR 462 (A).

S v Mpofu [2016] ZWCC 16.

S v Mtetwa [2015] ZWHHC 63.

S v Mugwanda 2002 (1) ZLR 574 (S).

S v Ncube 1978 (1) SA 1178 (E).

S v Netshiavha 1990 (2) SACR 331 (A).

S v Ndhlovu 1971 (1) SA 27 (RA).

S v Ngema 1992 (2) SACR 651 (D).

S v Ngubane 1980 (2) SA 741 (A).

S v Nxele 1973 (3) SA 753 (A).

S v Phama 1997 (1) SACR 485 (E).

TABLE OF STATUTES

Cameroun Code Pénal n° 67/LF/1.

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Code de Procédure Pénale (1958) (France).

Criminal Code Act [Cap 77 of the Laws of the Federation of Nigeria, 1916].

Criminal Code Ordinance [Cap 42 [of the Laws of the Federation of Nigeria, 1958].

Criminal Justice Act 1988 (England and Wales).

Criminal Justice and Public Order Act 1994 (England and Wales).

Criminal Law (Codification and Reform) Act of 2006.

Criminal Procedure Code, Law No. 2005/007 of 2005 (Cameroon).

Criminal Procedure Act 51 of 1977 (South Africa).

Criminal Procedure Act [Cap 20 of the Laws of the United Republic of Tanzania, 1985].

Criminal Procedure Code [Cap 75 of the Laws of the Republic of Kenya, 1930].

Criminal Procedure and Evidence Act [Cap 8:01 of the Laws of Malawi, 1968].

Criminal Procedure and Evidence Act [Cap 9:07, Laws of Zimbabwe, 1927].

Evidence Act [Cap 80 of the Laws of the Republic Kenya, 1963].

Evidence Act [Cap 6 of the Laws of the United Republic of Tanzania, 2002].

Evidence Act [Cap 112 of the Laws of the Federation of Nigeria, 2011].

Indian Evidence Act of 1872.

Magistrates' Courts Act 32 of 1944 (South Africa).

Magistrates' Courts Act [Cap 7:10, Laws of Zimbabwe, 2003].

Penal Code [Cap. 63 of the Laws of the Republic of Kenya, 1930].

Penal Code [Cap. 16 of the Laws of the United Republic of Tanzania, 1930].

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Police and Criminal Evidence Act of 1984 (England and Wales).

Witchcraft Act [Cap 67 of the Laws of the Republic of Kenya, 1925].

Witchcraft Act [Cap 18 of the Laws of the United Republic of Tanzania, 1928].

Witchcraft Suppression Act 3 of 1957 (South Africa).

Witchcraft Suppression Ordinance 14 of 1899 (Repealed, Zimbabwe).

CONTENTS

1. CHAPTER ONE: INTRODUCTION

Witchcraft, along with its associated incidents of mob violence, has been regarded perennially to be 'the outstanding problem of the lawgiver in Africa.'[1] This thesis approaches the evidential thread of the problem using jurisprudential methods. There is something fundamentally subversive about such theoretical projects operating in the 'ideosphere.'[2] This is the realm of 'ideas and forms';[3] 'the abstract kingdom'; 'the idea-space,'[4] where concepts and analysis are the primary methodological tools. 'Thought experiments' are paradigmatic instruments of analysis and the mind is the laboratory in such a world. The older sense of 'piety,' meaning 'submissiveness,' 'fittingness' or 'compliance,'[5] struggles to find resonance in this theoretical realm. Heidegger, rather glibly in the very last sentence of his essay on 'The question concerning technology,' turned this older conception on its head when he said that '*questioning* is the piety of thought.'[6] The subversiveness of this non-compliant, and therefore (im)pious, world is implied by this focus on *questioning*, paradox, apparent inconsistency

[1] Hailey W.M *An African Survey: A study of problems arising in Africa south of Sahara* (1938) 295-6, cited in Waller R.D 'Witchcraft and colonial law in Kenya' (2003) 180 *Past and Present* 241. Niehaus pertinently questions '[w]hat is to be done about witchcraft in the New South Africa?' (Niehaus I 'Witchcraft in the new South Africa: A critical overview of the Ralushai Commission Report' in Hund (ed) *Witchcraft violence and the law in South Africa* (2003) 93).

[2] Hofstadter D.R 'On viral sentences and self-replicating structures' in Hofstadter (ed) *Metamagical themas: Questing for the essence of mind and pattern* (1985) 49 at 49-50.

[3] Plato *Republic* Book X (translated A. Bloom) (1968) 596a-c.

[4] Hofstadter (note 2) 50.

[5] The Germans used the word *fügsam* and the ancient Greeks used *dikē*, see Britt W 'Sameness and difference in the piety of thought' (2020) 59 *Sophia* 285 at 287. The ancient Egyptians used the concept of *Maat*, see Asante M.K *The Egyptian philosophers: Ancient African voices from Imhotep to Akhenaten* (2000) 2-4; Obenga T *African philosophy* (2015) 33.

[6] Heidegger M 'The question concerning technology' in Lovitt (ed) *The Question Concerning Technology and other essays* (1977) 3 at 35. (my emphasis).

and 'interweaving [sameness and difference] in the right circumstances and holding them apart when appropriate.'[7]

It is under this subversive mood, in all these senses, that the project of this thesis is undertaken. This level of subversiveness is not to be confused with an irredeemable or nihilistic radical scepticism or a perverse form of relativism (for example, that "no truth can, nor should, be had in witchcraft trials in Africa").[8] To be sure, the aim of the flame of *questioning* is for it to 'burn;'[9] that is, to provoke re-interrogation and *rethinking*[10] of some of the theoretical (philosophical) foundations of Evidence scholarship. However, this is a Du Boisian *Black Flame* that 'burns for cleaning, not destroying.'[11] This kind of subversiveness is achieved in this thesis by using the flame of witchcraft to set Evidence scholarship alight. A major part of the 'cleaning' here involves widening the vista of a *northbound-gazing*[12] Evidence Scholarship, which largely

[7] This is Britt's philosophical account of piety, see Britt (note 5).

[8] For related postmodernist debates, see Nicolson D 'Truth, reason and justice: Epistemology and politics in evidence discourse' (1994) 57(5) *The Modern Law Review* 726 at 733 (Throughout history various forms of harmful and oppressive conduct have been legitimated by dominant groups through recourse to grand concepts such as 'Truth,' 'Reality,' 'Normality,' 'Human Nature,' etc. Moreover, the hegemony of their views are then defended by portraying relativism and scepticism as leading to a moral abyss…But this refuge is not only illusory - in that there are no absolute truths - it is also dangerous); Bennett and Scholtz 'Witchcraft: a problem of fault and causation' (1979) 12 *Comparative and International Law Journal of Southern Africa* 288 at 301 ('What is "reasonable" and "adequate knowledge" is culturally determined, much as the common lawyers might like to think that it is not'); Foucault M *Power/knowledge: Selected interviews and other writings, 1972-1977* (edited by and translated by C. Gordon *et al*) (1980) 131.

[9] Some of the imagery and language here is borrowed from the trilogy of novels by W.E.B Du Bois titled the *Black Flame*. In the first of these three novels, 'The ordeal of Mansart,' Manuel Mansart is referred to by his mother as a 'black flame' to underscore the hope and joy his birth brought under circumstances of apocalyptic mass violence in Atlanta (United States) in 1876, see Edwards B.H 'Introduction' in Gates Jr (ed) *The black flame trilogy (book one): The ordeal of Mansart* (2007) xxv at xxix-xxx.

[10] 'Rethinking' is part of the title of two prominent works in Evidence scholarship by William Twining, see Twining W *Rethinking evidence: Exploratory essays* (1994); Twining W *Rethinking Evidence: Exploratory essays* 2nd ed (2006).

[11] Edwards (note 9) xxx.

[12] See Ramose M.B '"African Renaissance": A northbound gaze' in Coetzee and Roux (eds) *The African Philosophy Reader* 2nd ed (2002) 600.

focuses on Europe and the United States, to include problems, methodologies and perspectives from 'southern voices.'[13] Further fuel to this flame of (im)pious subversiveness is added: by witchcraft being 'the outstanding problem of the lawgiver in Africa,'[14] while it is understood to be a 'social illusion' in most parts of Europe and the United States;[15] by witchcraft prosecutions continuing in Africa, yet witch trials are relics in the Euro-American world;[16] by Africans interpreting witchcraft in various ontological and epistemological senses,[17] while contemporary Euro-Americans use the term in metaphoric, historical or hermeneutic senses.[18] These antinomies brought about by the intersection of these

[13] The 'southern voices' trope is borrowed, and used in passing here, from the *Southern Criminology* movement that aims to widen the focus of critical criminology to include the 'Global South,' see Travers M 'The idea of Southern Criminology' (2019) 43(1) *International Journal of Comparative and Applied Criminal Justice* 1 ('Southern Criminology is another term for postcolonial criminology which was promoted by a few scholars in the 1980s and 1990s…The name coined by Australian critical criminologists such as Carrington et al. (2015) seems likely to stick'); Carrington K *et al* 'Southern criminology' (2016) 56 *British Journal of Criminology* 1 ('[W]e outline the case for the development of a more transnational criminology that is inclusive of the experiences and perspective of the Global South'); Carrington K *et al* 'Criminologies of the global south: Critical reflections' (2019) 27 *Critical Criminology* 163. See generally, Carrington K *et al* (eds) *The Palgrave handbook of criminology and the global south* (2018).

[14] Hailey W.M *An African Survey: A study of problems arising in Africa south of Sahara* (1938) 295-6, cited in Waller R.D 'Witchcraft and colonial law in Kenya' (2003) 180 *Past and Present* 241 at 241. The poses similar social problems in other non-African *southern voices,* see Skinner J 'Interning the serpent: Witchcraft, religion and the law on Montserrat in the 20th century' (2005) 16(2) *History and Anthropology* 143 (Caribbean countries); Mac-Machado R.G 'Witchcraft and witchcraft cleansing among the Vasava Bhils' (2010) 105(1) *Anthropos* 191 (India); Arvin H.L and Arvin A.H *The linear heritage of women* (2010) 69 (Middle eastern countries).

[15] Damaška M.R 'Truth in adjudication' (1998) 49 *Hastings Law Journal* 289 at 298-9; Spence S *Witchcraft accusations and persecutions as a mechanism for the marginalization of women* (2017) 25.

[16] The popular use of the concept of witchcraft in the Euro-American world ceased over three centuries ago with the Salem witch trials, between June and September of 1692 in Massachusetts, and the European witchcraze of the sixteenth and seventeenth centuries, see Boyer P and Nissenbaum S *The Salem witchcraft papers: Verbatim transcripts of the legal documents of the Salem witchcraft outbreak of 1692* vol I (1977) (United States); Martin L *The history of witchcraft* (2007) 92-116 (medieval Europe). Thayer recounts that the 'old forms of trials' used to find facts during this medieval period, for example: compurgation, ordeal and battle, were 'irrational,' see Thayer J.B *A preliminary treatise on evidence at common law* (1898) 8 and 16 and 17-46.

[17] See Evans-Pritchard E.E *Witchcraft, oracles and magic among the Azande* (1976); Gluckman M 'The logic of African science and witchcraft' in Marwick (ed) *Witchcraft and Sorcery* (1970) 321; Middleton J and Winter E.H *Witchcraft and sorcery in East Africa* (1963); Ajei M.O *The paranormal: An inquiry into some features of an African metaphysics and epistemology* (2014).

[18] For example, Walton uses the construct of a 'witch-hunt' to illustrate a number of logical fallacies, see Walton D 'The witch hunt as a structure of argumentation' (1996) 10(3) *Argumentation* 389.

contrasting worlds (Africa and Euro-America) give an introductory indication of the kind of (im)piety that characterises this research project.

Most Africans use the term "witchcraft" today to describe peculiar forms of misfortune or harm that are believed to be perpetrated by another person ('W-Beliefs'). For example, in Zimbabwe, witchcraft commonly is used as an explanation for, among other things, 'crop failure, livestock failing to reproduce and daughters failing to attract brideprice.'[19] In South Africa, certain social disagreements commonly are attributed to witchcraft,[20] whereas human flesh and magic potions (*mwakhwala*) are believed to be used to practice witchcraft in Malawi.[21] In the east, some Tanzanians are believed to be born with malevolent 'supernatural abilities' that enable them to cause harm to others (*muhai*)[22] and many Kenyan Christians are reported to have reconciled their religious beliefs with their W-Beliefs.[23] These nuances in the meanings given to witchcraft can generate vibrant historical and philosophical debates without having much direct

[19] Chireshe E *et al* 'Witchcraft and social life in Zimbabwe: Documenting the evidence' (2012) 10(2) *Studies of Tribes and Tribals* 163 at 167; Ndlovu-Gatsheni S.J '*Inkosi yinkosi ngabantu*: an interrogation of governance in precolonial Africa - the case of the Ndebele of Zimbabwe' (2008) 20(2) *Southern African Humanities* 375 at 386; *R v Maposa* 1943 S.R 194; Chavunduka G.L 'Witchcraft and the law in Zimbabwe' (1980) 8(2) *Zambezia* 129 at 129.

[20] Mutwa V.C *Indaba, my children* (1964) 657; Carstens P.A 'The cultural defence in criminal law: South African perspectives (2004) 37 *De Jure* 312 at 316.

[21] HelpAge International *Using the law to tackle accusations of witchcraft: HelpAge International's position* (2011) 20, available at: www.a4id.org (accessed: 23 October 2017); Mgbako C.A and Glenn K 'Witchcraft accusations and human rights: Case studies from Malawi' (2011) 43 *George Washington International Law Review* 381 at 391; Musopole A.C. 'Withcraft terminology, the bible and African Christian theology: An exercise in hermeneutics' (1993) 23(4) *Journal of Religion in Africa* 347 at 347-8.

[22] Beidelman T.O 'Witchcraft in Ukaguru' in Middleton and Winter (eds) *Witchcraft and Sorcery in East Africa* (1963) 57 at 61; Mesaki S 'Witchcraft and the law in Tanzania' (2009) 1(8) *International Journal of Sociology and Anthropology* 132 at 132-3.

[23] Cohan J.C 'The problem of witchcraft violence in Africa' (2011) (44) *Suffolk University Law Review* 803 at 808; HelpAge International (note 21) 18.

legal significance.[24] However, the existence of statutes prohibiting 'witchcraft practices' and the prevalence of witchcraft-related violence throughout the continent confronts lawyers with a plethora of problems.

This set of problems is neither simple or linear, nor are these problems capable of exhaustive elucidation in this thesis. They pose a serious challenge to the overall legitimacy of criminal justice in Africa,[25] part of which is derived from the moral rectitude of judicial findings.[26] This threat manifests increasingly in violent incidents of 'mob justice' in various parts of the continent.[27] The sentiment held by many locals was summarised by Seidman:

> The African who believes in witchcraft is thus faced by a fearful dilemma. He believes in witches to his bones. He knows that they can destroy his *kra* or *sunsum* in sundry mysterious ways, without chance for defence, so that both his physical being and his hope for earthly success are endangered, as much as by threatened blow of panga or spear or matchet. He sees nothing in the societal order to which he can appeal for protection. His tradition approves of capital punishment for witches. Faced by such dread forces, bereft of societal shield, terrified by the loss of the values at stake, some Africans not surprisingly have struck back in terror and in self-defence.[28]

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[24] Crawford J.R *Witchcraft and sorcery in Rhodesia* (1967); Gregor A.S *Witchcraft and magic; the supernatural world of primitive man* (1972); Mosley A 'Witchcraft, science and the paranormal in the contemporary African philosophy' in Brown (ed) *African Philosophy* (2004) 136.

[25] See the wide-ranging papers in Peršak N (ed) *Legitimacy and trust in criminal law, policy and justice: Norms, procedures and outcomes* (2014).

[26] Dennis I 'Reconstructing the law of criminal evidence' (1989) 42 *Current Legal Problems* 21 at 42. Dennis comments further that: 'the legitimacy of the verdict…is the ultimate goal' and 'truth-finding' has 'instrumental value' (at 38); Dennis I 'Rectitude rights and legitimacy: Reassessing and reforming the privilege against self-incrimination in English law' (1997) 31(1-3) *Israel Law Review* 24; Pardo M.S 'The political morality of Evidence law' (2007) 5(2) *International Commentary of Evidence* 1. In this regard, a similar concept to institutional legitimacy is *integrity*, which has been used to evaluate various components of the criminal justice system, see generally Roberts P *et al* 'Introduction: Re-examining criminal process through the lens of integrity' in Hunter *et al The Integrity of Criminal Process: From theory into practice* (2016).

[27] Hund J 'Witchcraft and Accusations of Witchcraft in South Africa: Ontological denial and the suppression of African justice' (2000) 33 *Comparative & International Journal of Southern Africa* 366 at 366.

[28] Seidman R.B 'Witch murder and *mens rea*: A problem of society under radical social change (1965) 28(1) *Modern Law Review* 46 at 47. (own emphasis).

Other examples of 'mob justice' on the continent include: Over 3000 elderly Tanzanian women suspected of witchcraft were killed between 2009 and 2015;[29] 44 suspected witches were killed and 8 elderly women were burnt to death in the Kenyan town of Kisii between July 1992 and 1993;[30] over 175 reported cases of children being banished from their homes and orphaned in Akwa Ibom state, Nigeria, because they were suspected of being used in the performance of malevolent witchcraft practices;[31] well over 600 suspected witches have been killed in the Limpopo province of South Africa between 1995 and 2001.[32] In the early-to-mid 20th century African colonial governments attempted to address this systemic threat to criminal justice by enacting statutes,[33] which remain on the statute books largely in their original form, to 'suppress'[34] indigenous beliefs in general. One colonial judge remarked:

> We must, of course, greatly deplore the fact, but that there is this universal belief in witchcraft by the vast majority of the Bantu people is beyond question. I am not sure that we Europeans are entitled, having regard to our own history, to give them unqualified condemnation for clinging to such a belief. One can only hope that the

[29] Onyulo T 'Witch hunts increase in Tanzania as albino deaths jump' (2015) *USA Today*, available at: https://www.usatoday.com (accessed: 11 December 2017)
[30] Mesaki (note 22) 18.
[31] It is reported that in approximately 250 cases that have been reported 70% of these children were orphans, see Secker E 'Witchcraft stigmatization in Nigeria: Challenges and successes in the implementation of child rights' (2012) 56(1) *International Social Work* 22.
[32] United Nations Children's Fund *Children accused of witchcraft: An anthropological study of contemporary practices in Africa* (2010) 12-3, available at: www.unicef.org (accessed: 12 December 2017).
[33] *Cameroun Code Pénal* n° 67/LF/1, article 310; Criminal Code Act [Cap 77 of the Laws of the Federation of Nigeria, 1916], section 210; Witchcraft Act [Cap 67 of the Republic of Kenya, 1925]; Witchcraft Act [Cap 18 of the Laws of the Republic of Tanzania, 1928], sections 3(a)-(d); Criminal Law (Codification and Reform) Act of 2006, section 98 (Zimbabwe); Witchcraft Suppression Act 3 of 1957 (South Africa).
[34] *S v Hamunakwadi* 2015 (1) ZLR 392 (H) 398A.

> influences of education, religion and science will gradually wear down this profound belief in the minds of the natives of these parts.[35]

It has become clear, however, that not only has this colonial policy been ineffective as recurring examples of 'mob justice' show, but it has posed even greater danger to the institutional legitimacy of criminal process on the continent at various theoretical, doctrinal and sociological levels. For one thing, approximately 55% of Africans in what is known by some as Sub-Saharan Africa hold W-Beliefs.[36] This demographic of people endures within the context of a modern and cosmopolitan Africa with over 362 million people having access to the internet, 5.2 million young Africans enrolled in universities and almost 700 public and private higher education institutions.[37] The number of holders of W-Beliefs consists of people across the spectrum of urban to rural residents.[38] According to Nwauche, the statutory prohibition and judicial denouncement of W-Beliefs as being 'unreasonable' has had very little impact on the number of holders of these beliefs in Nigeria.[39]

Further fuel to this threat to the institutional legitimacy of criminal justice in Africa is added by the fact that most witchcraft cases are heard in traditional

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[35] *R v Biyana* 1938 EDL 310 at 311 (*per* Landsdown JP).
[36] Tortora B 'Witchcraft believers in Sub-Saharan Africa rate lives worse', *GALLUP,* (25 August 2010), available at: https://news.gallup.com (accessed: 6 May 2019).
[37] We are Social *Digital in 2017: Global overview Report* (24 January 2017), available at: https://wearesocial.com (accessed: 15 March 2019); The African-America Institute *2017 state of education in Africa – Outcomes report* (16 January 2018) 10, available at: www.aaionline.org (accessed: 15 March 2019).
[38] Mesaki (note 22) 132.
[39] Nwauche E.S 'The search for justice through the occult and paranormal in Nigeria' Oguejiofor and Wendl (eds) *Exploring the occult and paranormal in West Africa* (2012) 64 at 77; Aremu L.O 'Criminal responsibility for homicide in Nigeria and supernatural beliefs' (1980) 29(1) *International & Comparative Law Quarterly* 112 at 113.

courts, yet such courts in most African jurisdictions lack *official* criminal jurisdiction to hear cases concerning breaches of state-level witchcraft statutes. With the exception of Cameroon's East province where witch trials in state courts are commonly conducted,[40] witchcraft prosecutions on the continent's state courts are uncommon. The institutional positioning of traditional courts and the nature and extent of their jurisdiction on the continent also remains widely controversial.[41] Notwithstanding this, approximately 90% of Sub-Saharan Africa's population litigates regularly in traditional courts that apply African customary law.[42] For most of the continent, therefore, the witchcraft statutes lie dormant while incidents of witchcraft-related violence soar. Meanwhile, ordinary holders of W-Beliefs either resort to 'self-help' or litigate in traditional courts:

[40] Tebbe N 'Witchcraft and statecraft: liberal democracy in Africa' (2007) 96 *Georgetown Law Journal* 183 at 232-3.

[41] These debates can be summarised into at least three salient aspects: (1) the criminal jurisdiction of traditional courts was abolished, along with the abolition of African customary criminal law, by the infamous colonial 'reception clauses' (section 17 of the East Africa Order in Council of 1897; Black Administration Act 38 of 1927, section 20(1); Cotran E 'The development and reform of the law in Kenya' (1983) 27(1) *Journal of African Law* 42); (2) African customary law makes no formal distinction between 'criminal' and 'civil' matters (Maime H.J.S *Ancient law* (1861) 379; Dundas C 'The organization and laws of the some Bantu tribes' (1915) 45 *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* 234 at 262; Labuschagne J.M.T and Van den Heever J.A 'Die oorsprong van en die onderskeid tussen die fenomene misdaad en delik in primigene regstelsels' (1991) *Obiter* 80; Labuschagne J.M.T and Van den Heever J.A 'Liability arising from the killing of a fellow human being in South African indigenous law' (1995) 28(3) *Comparative and International Law Journal of Southern Africa* 422 at 422; Bennett T.W 'Customary criminal law in the South African legal system' in Fenrich *et al* (eds) *The future of African customary law* 363 at 380-1); (3) African customary law does distinguish between crimes and private-law wrongs, although not in those precise terms, and traditional courts regularly hear all types of wrongs (Schapera I *A handbook of Tswana law and custom* 2nd ed (1955) 257; Mwansa K.T 'The status of African customary criminal law and justice under the received English criminal law in Zambia: A case for the integration of the two systems' (1986) 4 *Zimbabwe Law Review* 23 at 25; Mnisi-Weeks S 'Beyond the Traditional courts bill: Regulating customary courts in line with living customary law and the Constitution' (2011) 35 *South African Crime Quarterly* 31; Gasa N 'The Traditional courts bill: A silent coup?' (2011) 35 *South African Crime Quarterly* 23).

[42] Bwire B 'Integration of African customary legal concepts into modern law: Restorative justice – A Kenyan example' (2019) 9(1) *Societies* 17 at 19. A similar estimation was given in the 1960s too: Read J.S *Criminal law in the Africa of today and tomorrow* (1963) 7(1) *African Law Journal* 5 at 16. Cf. Mnisi-Weeks S *Access to justice and human security: Cultural contradictions in rural South Africa* (2018) 43-4, where an empirical study approximates that 42% of South Africa's population (between 16 and 21 million people) litigate in traditional courts.

> We have to work hard to wipe out this evil (witchcraft), but we cannot do our work effectively because the police arrest us…It seems there is a conflict with the Western way of settling things though. Whites don't believe someone can send lightning to kill - but we do, and we know it has been done for ages.[43]

It would exceed the scope of this thesis to address all of these challenges. The focus, for present purposes, is theoretical (more precisely, *jurisprudential*),[44] and particularly, on the concepts and heuristics of evidential proof that can be applied towards establishing witchcraft offences in state courts. A brief analysis of the facts of a historic incident on the continent usefully illustrates this approach. The people of Xhosaland (currently located in the South-East coast of South Africa's Eastern Cape province) were devastated by two droughts in 1850[45] and again during the summer of 1855-6[46] and a widespread epidemic called bovine pleuropneumonia, which first appeared in Europe in the 17th century, but was later spread to the Cape through a ship carrying Friesian bulls to Mossel Bay in 1853.[47] As a result, tens of thousands of cattle stopped grazing, their eyes were swollen, their nostrils were dilated and they suffered diarrhoea.[48] Unfortunately, 'no one knew the cause' of this disaster.[49] During this era, and in this particular

[43] This remark was made by a local southern African chief, see Dhlodhlo A.E.B 'Some Views on Belief in Witchcraft as a Mitigating Factor' 1984 *De Rebus* 409 at 410. The round bracket in the quotation is not my own interpolation.
[44] Jurisprudence, as the term is used here, simply denotes 'the theoretical part of law as a discipline' (see Twining W *General jurisprudence: Understanding law from a global perspective* (2009) xiii). A detailed explanation of why the project of this thesis is described as a jurisprudential study is outlined in Chapter 2.
[45] Peires J.B *The dead will arise: Nongqawuse and the great Xhosa cattle-killing movement of 1856-7* (1989) 7. The facts of this scenario are similar to an infamous Cameroonian case: *Affaire Medang Jacques & Mpome Moïse c/ Ministère Publique, Mpel Mathurin & Baba Denis. Arrêt* No. 8/COR du 04.10.1983
[46] Peires J.B 'The central beliefs of the Xhosa cattle-killing' (1987) 28(1) *The Journal of African History* 43 at 45.
[47] Ibid.
[48] Ibid 47.
[49] Ngqukaitobi T *The land is ours: South Africa's first black lawyers and the birth of constitutionalism* (2018) 11.

community, the 'philosopher kings'[50] were those who were believed to be endowed with the ability of 'smelling out' (through dreams and prophetic visions) the causes of various disasters in the community.[51] Three such 'seers,' Nxele, Mlanjeni and Nongqawuse, declared that the cause of the Xhosaland disaster was witchcraft and evil (*ubuthi*).[52] As a result, and on the advice of Nongqawuse, over 85% of adult males of Xhosaland slaughtered all their cattle during a period of 13 months (April 1856 – May 1857) in order to 'cleanse the community of witchcraft and all evil.'[53] Estimates of over 400 000 cattle were slaughtered and at least 40 000 people died of starvation.[54] However, Nongqawuse's prophecy of 'a new world' emerging for the Xhosa people upon them following her advice was never fulfilled. Rather, as at January 1857, the population size of this particular community plunged from 105 000 to 37 000.[55]

If this incident had occurred today,[56] there would be at least two statutory crimes[57] committed at state-law level: first, Nongqawuse's conduct of diagnosing the cause of the disaster and advising the community to slaughter its cattle would be an offence. Secondly, and more controversially, if Nongqawuse's diagnosis is to be believed, then any person practicing witchcraft would have committed an

[50] Plato (note 3) 473d.
[51] Peires (note 46) 171.
[52] Ibid 2.
[53] Ibid 160.
[54] Peires (note 46) 43.
[55] Ngqukaitobi (note 49) 18.
[56] Putting aside the fact that two droughts and bovine pleuropneumonia were the causes of the disaster, which is a fact only known to us today with the benefit of hindsight and not to the people of Xhosaland at the time.
[57] More about this will be said later in Chapter 2 below, but the first of these crimes is one of five *indirect crimes* of witchcraft that derive from a broader *direct crime* of witchcraft, which is the second of the two.

offence. The first general category of offence is a *per se* prohibition (or so-called 'conduct crime') in respect of which the consequences of Nongqawuse's advice would be irrelevant. Other related offences in this category include prohibitions against *accusations, solicitation* and the *possession* or *procurement* of instruments of witchcraft.[58] We coin these offences as being 'indirect' versions of the more general 'direct' crime of witchcraft general in Chapter 4. However, the prosecution of these indirect witchcraft offences does not attract as much theoretical controversy as the second category of 'direct' offence and thus, their consideration is not the main focus of this thesis. It is the second category of direct offence that is the main interest of this thesis. Specifically, the main question of this thesis is: *how* can the direct crime of witchcraft be proven in Africa? The full range of witchcraft-related crimes is explicated later in Chapter 4 where the following proposed definition of the direct crime of witchcraft will be elucidated:

> The *intentional commission* of an *action* that is *provocative in the indigenous sense* and *causes fear* in *another human being*.[59]

As we will see, the question is not whether or not convictions of the direct crime of witchcraft in fact occur, because they in fact do occur in both traditional

[58] Criminal Code Act [Cap 77 of the Laws of the Federation of Nigeria, 1916], section 210(a)-(d); Witchcraft Act [Cap 67 of the Republic of Kenya, 1925], section 2, 3, 5, 6 and 7; Witchcraft Act [Cap 18 of the Laws of the Republic of Tanzania, 1928], sections 3(a)-(d); Criminal Law (Codification and Reform) Act of 2006, section 98(2)-(4) (Zimbabwe); Witchcraft Suppression Act 3 of 1957, section 1(a)-(d) and (f) (South Africa).

[59] See generally, *Cameroun Code Pénal* n° 67/LF/1, article 310; Criminal Code Act [Cap 77 of the Laws of the Federation of Nigeria, 1916], section 210(e); Witchcraft Act [Cap 67 of the Republic of Kenya, 1925], section 4; Witchcraft Act [Cap 18 of the Laws of the United Republic of Tanzania, 1928], sections 3(e); Criminal Law (Codification and Reform) Act of 2006, section 98(1) (Zimbabwe); Witchcraft Suppression Act 3 of 1957, section 1(e) (South Africa).

and state courts throughout the continent. Rather, the questions that are of interest to this thesis concern *how* these convictions are possible, *how* we can we study such witchcraft trials and what challenges they pose for theorising about evidence and proof in general. It may be tempting to respond to these questions by saying that it is quite simply impossible for: (i) droughts and viral epidemics to be caused by witchcraft practices; (ii) 'seers' to diagnose these causes; (iii) or to prevent the spread or continuance of droughts and viral epidemics through cleansing ceremonies consisting in the slaughtering of cattle. However, (i), (ii) and (iii) portray a scepticism that would be difficult to justify given the doctrinal and empirical realities of contemporary African criminal process. Firstly, the mere existence of the statutory prohibition against conduct that purports to bring about or is connected to (i), (ii) and (iii) may be regarded as implying the legislature's recognition of the sociological existence of W-Beliefs within African communities. Secondly, witchcraft prosecutions are in fact occurring, as mentioned above, in both traditional courts and Cameroonian state courts. Therefore, the main question of this thesis, *how* the direct crime of witchcraft can be proven in Africa, is approached from an anti-sceptical standpoint by exploring theoretically how the proof of this particular crime in Africa can be understood. Flowing from this main question are three further subsidiary questions, which are unpacked in the next section where the specific problem that this thesis addresses is further elucidated and more precisely identified. A brief roadmap or overview

of the overall structure of the thesis comprised by the six chapters that follow is also set out towards the end of this chapter.

1.1 THREE SUB-QUESTIONS OF *INSTITUTIONAL CONTEXT, MATERIALITY* AND *PROBATIVE VALUE*

The three sub-questions that flow from the main question of this thesis represent the diversity in coverage of problems that typically are confronted in criminal trials. Trials have a 'multifarious character'[60] insofar as they involve empirical, evaluative and justificatory questions about 'who did what, to whom, when, and why.'[61] These questions, arising from substantive, procedural and evidential branches of the law, intertwine[62] through the participation of various institutional actors in the criminal process. Three sets of sub-questions can be derived from the multifaceted character of witchcraft trials in Africa:

(1) *How* can the direct crime of witchcraft be proven in Africa?

- (a) Institutional Condition: What is the institutional context within which witchcraft cases are heard in Africa?
  - (i) Which courts have jurisdiction to hear such cases?
  - (ii) Who are the institutional actors that participate in this criminal process?
  - (iii) What type of criminal procedure is applied?
- (b) Materiality Condition: What is witchcraft?

[60] Damaška (note 15) 299-301.
[61] Roberts P and Zuckerman A *Criminal evidence* 2nd ed (2010) 20.
[62] Stein A 'Evidential rules for criminal trials: Who should be in charge?' (1999) 1(1) *International Commentary on Evidence* 1.

(i) What is the legal meaning of witchcraft in Africa?

(ii) What are the *facta probanda* that must be proved for the direct crime of witchcraft?

(c) Probative Condition: What processes or heuristics of proof can be used to establish the elements of the direct crime of witchcraft?

Our three sub-questions are articulated using the language of 'conditions' (*institutional*, *material* and *probative*) for two reasons. Firstly, the main question of this thesis is approached from an anti-sceptical standpoint for largely pragmatic reasons that have to do with certain practical realities, such as the existence of witchcraft statutes, the widespread extent of W-Beliefs and the incidence of witchcraft convictions in criminal trials across the African continent. This approach suspends judgment completely on any epistemological or ontological questions about whether or not witchcraft exists.[63] Taking a position one way or another on this type of question, as many have done,[64] does not take the project of this thesis much further. Arguments, such as the one advanced by Mutungi,[65] that purport to show inconsistency between the denial of the existence of witchcraft at the level of case-law and government policy while implicitly

[63] Anyangwe likewise abandons this question: 'That inquiry is beyond the scope of this book and the competence of the writer', see Anyangwe C *Criminal law in Cameroon: Specific offences* (2011) 253.

[64] Chavunduka G.L 'Witchcraft and the law in Zimbabwe' (1980) 8(2) *Zambezia* 129 at 129; Mgbako C.A and Glenn K 'Witchcraft accusations and human rights: Case studies from Malawi' (2011) 43 *George Washington International Law Review* 381 at 396; Carstens P.A 'The cultural defence in criminal law: South African perspectives (2004) 37 *De Jure* 312 at 316; Nwakaeze-Ogugua I and Oduah C.I 'Witches: Existence, belief and rationality' (2015) 1(1) *Interdisciplinary Journal of African and Asian Studies* 1 at 3; Idowu E.B. 'The challenge of witchcraft' (1970) 4(1) *Oritia: Ibadan Journal of Religious Studies* 9 at 9; Oluwole S 'On the existence of witches' (1978) 2(182) *Second Order* 3.

[65] Mutungi O.K 'Witchcraft and the criminal law in East Africa' (1971) 5(3) *Valparaiso University Law Review* 524 at 529.

endorsing its existence by criminalising it, do not take us much further in addressing the problem of witchcraft violence. In any event, a suitable response to sceptics about the 'existence' of 'witches' or 'witchcraft' is that the mere existence of statutes prohibiting the perpetration of this phenomenon at least gives it a 'statutory existence' that allows us to be agnostic about any further ontological implications.

The second reason why our three sub-questions are articulated in conditional form is that the project of this thesis entails a middle-order form of theorising that is *prescriptive.*[66] The argumentation schemes that are developed in this thesis are examples of the kind of theories of proof that are proposed for witchcraft cases in Africa. At a broader level, our theoretical answer to the main question of this thesis, *how* do we prove the direct crime of witchcraft in Africa, proceeds by suggesting three *institutional, material* and *probative* conditions. The word 'prove' here clearly is given a wide definition because of its dependence on the institutional context of each African jurisdiction; the definitions provided by substantive criminal law; the heuristics and rules of Evidence Law. These three features are mutually conditioning and interdependent in giving meaning to the proof of the elements of a crime.

This thesis would not be the first in Evidence scholarship to use the language of conditions to ground its theorising about evidence and proof. For

[66] According to Twining, this type of theorising about evidence and proof is a version of jurisprudence, see Twining W 'Taking facts seriously' in Twining (ed) *Law in context: Enlarging a discipline* (1997) 89 at 112-3.

example, a similar approach is observable from Wigmore's discussion of his charting method. First, Wigmore identifies his problem as: 'The problem of collating a mass of evidence, so as to determine the net effect which it should have on one's belief'.[67] Subsequent to this, Wigmore articulates part of his approach in conditional terms:

> Three questions naturally arise. What is the object of such a scheme? What are the necessary conditions to be satisfied? What is the apparatus therefore?[68] (my emphasis)

Wigmore's second question implies a set of theoretical conditions on which his charting method is grounded. Wigmore then responds to this question by setting out a long list of 6 conditions that must be in place in order for his charting method to work.[69] For purposes of this thesis, the proof of the direct crime of witchcraft is hinged on three conditions, each of which is related to our three sub-questions: What is the institutional context within which witchcraft cases are heard in Africa (institutional condition)? What is witchcraft in law (material condition)? What processes or heuristics of proof can be used to establish the elements of the direct crime of witchcraft (probative condition)?

1.1.1 THE INSTITUTIONAL CONDITION

The core focus of this thesis is the evidential proof of the direct crime of witchcraft, but proof is context-dependent, relative (that is, implying a

[67] Wigmore J.H 'The Problem of Proof' (1913) 8 *Illinois Law Review* 77 at 79.
[68] Ibid.
[69] Ibid 80-2.

relationship with something else) and always question-begging (that is, in need of clearer guidelines or rules). It is proposed that evidential proof in witchcraft cases in Africa be conditioned upon the institutional, material and probative conditions. The first of these conditions requires us to place evidential proof within a particular geography, jurisdiction(s) and legal system(s). Moreover, we need to determine the nature of the participating institutional actors and rules of pleading through which evidential proof is to be manifested in African criminal process.

As we will see in Chapter 3, although African countries have much in common, their historical dissimilarities shape the present diversity of the continent. This diversity influences the meaning and operation of evidential proof in witchcraft cases in different parts of the continent. The part of the continent that is commonly known as 'Sub-Saharan Africa'[70] has about forty-six countries and no less than nineteen of these, mainly in the western and central parts, have Continental legal heritage (particularly, French, Belgian and Italian), whereas the remaining twenty-seven, mostly in eastern and southern Africa, have Common Law roots.[71] A further complication, already mentioned, is that approximately 90% of the population in this part of the continent regularly litigates in traditional courts.[72] Therefore, the operation, reasoning-criteria and quality of evidential

[70] More about this will be explained in Chapter 3, the term 'Nubian Africa' is preferred in this thesis.
[71] Wekerle A 'Modern African criminal law and procedure codes' (1978) 35(4) *The Quarterly Journal of the Library of Congress* 282; de Haldevang M 'Why do we still use the term "sub-saharan Africa"?', *Quartz Africa* (1 September 2016), see https://qz.com (accessed: 1 March 2019).
[72] See the references cited at note 42.

proof will vary between regions, countries, jurisdictions and courts on the continent. For example, prosecution teams in state courts in eastern and southern jurisdictions (including Nigeria) have to prove the direct crime of witchcraft *beyond a reasonable doubt*,[73] whereas no such external standard is required in western and central African jurisdictions. Instead, western and central African judges will only convict a person of the direct crime of witchcraft on the basis of their *intime conviction* (innermost conviction).[74]

It is on account of these jurisdictional variations that the first of our three sub-questions is framed in the form: *what is the institutional context within which witchcraft cases are heard in Africa*? Our first general answer, therefore, to the main question of this thesis is that we prove the direct crime of witchcraft

[73] *S v Schuping* 1983 (2) SA 119 (B) 120H – 121I, read with *S v Lubaxa* 2001 (2) SACR 703 (SCA); *Bhatt v Republic* [1957] EA 332 (C.A) 332-5; *Republic v Alex Mwanzia Mutangili* [2017] eKLR at 6; *Uganda v Twijukye* [2011] UGHC 123 at 3; *Director of Public Prosecutions v Peter Kibatala* [2019] TZCA 157 at 15-7; *Director of Public Prosecutions v Morgan Mailki*, Criminal Appeal no. 133 of 2013 (unreported); *Daboh v S* [1977] 5 SC 122 at 129; *Alhaji Iniwa Usman v Federal Republic of Nigeria* (2017) LPELR – 43016 (CA) 12-13. In England and Wales, the standard of 'reasonable doubt' is said to be susceptible to confuse jurors (R v Kritz (Abraham Barnett) [1950] 1.K.B 82 at 177 ('When once a Judge begins to use the words "reasonable doubt" and tries to explain what is a reasonable doubt and what is not, he is much more likely to confuse them'). Rather, the position currently is that 'the jury should be directed first, that the onus is always on the prosecution; secondly, that before they convict they must feel sure of the prisoner's guilt' (*R v Hepworth (George Alfred)* [1955] 2 Q.B. 600). See also, see *R v Summers* [1952] 1 All ER 1059, CCA; *Walters v R* [1969] 2 AC 26, PC; *R v Yap Chuan Ching* (1976) 63 Cr App Rep 7; *Ferguson v R* [1979] 1 WLR 94, PC; *R v Bracewell* (1979) 68 Cr App R 44, CA; *R v Derek William Bentley* [2001] 1 Cr App R 326 (CA); *R v Alikor* [2004] EWCA Crim 1646; *R v Majid* [2009] EWCA Crim 2563; *R v Miah* (2018) EWCA Crim 563. See also Judicial College, The Crown Court compendium – Jury and trial management and summing up (July 2019) 5-1 – 5-3, available at: judiciary.uk (accessed: 20 September 2019).

[74] Criminal Procedure Code, Law No. 2005/007 of 2005, section 310(1). For equivalent French trials involving *délits*, article 427 of the *Code de Procédure Pénale* (1958) provides that 'offences may be proved by any mode of evidence and the judge decides according to his innermost conviction [*intime conviction*]'. Continental jurisdictions under the *ancient régime* used to have standards of proof, rules of probative weight and corroboration rules, but owing to severe criticism during the French Revolution, these were abolished in favour of the prevailing ethos of 'free proof': 'The validity of proof was to be left to the legally unconstrained judgment of the trier of fact – to his *conviction intime*,' Damaška M.R 'Free proof and its detractors' (1995) 43(3) *The American Journal of Comparative Law* 343 at 343-4. See generally, Damaška M.R *Evaluation of evidence: Premodern and modern approaches* (2019).

evidentially within the appropriate *institutional context* depending where we are on the continent. This general answer is further explicated in Chapter 3.

1.1.2 THE MATERIAL CONDITION

The second of our three sub-questions, *what is witchcraft in law,* reveals the relativity of evidential proof. It gives meaning to the object of evidential proof. The evidential proof in this thesis is directed towards the direct crime of witchcraft. This crime must be defined and its *facta probanda* must be explained. These material elements are derived from the substantive branch of criminal law and it is in this way that evidential proof is *conditioned*, in the pertinent sense. Second to institutional context, our answer to the main question of this thesis is that we prove the direct crime of witchcraft evidentially by obtaining the (legal) *meanin*g of the concept of witchcraft that is suitable for criminal trial contexts in Africa. As will be shown later in Chapter 4, most of the statutes that criminalise witchcraft do not define this term, nor is the identification of the relevant *facta probanda* without controversy. The only arguable exception to this lies in Tanzania's statute offering the following non-exhaustive definition:

> "witchcraft" includes sorcery, enchantment, bewitching, the use of instruments of witchcraft, the purported exercise of any occult power and the purported possession of any occult knowledge.[75]

[75] Witchcraft Act [Cap 18 of the Laws of the United Republic of Tanzania, 1928], section 2.

However, this hardly is a satisfactory definition, as the terms 'sorcery', 'enchantment', 'bewitching', 'occult power' and 'occult knowledge' beg for further definition. In terms similar to those used in the Nigerian statute,[76] the phrase 'instrument of witchcraft' is defined to mean:

> [A]nything which is used or intended to be used or is commonly used, or which is represented or generally believed to possess the power, to prevent or delay any person from doing any act which he may lawfully do, or to compel any person to do any act which he may lawfully refrain from doing, or to discover the person guilty of any alleged crime or other act of which complaint is made, or to cause death, injury or disease to any person or damage to any property, or to put any person in fear, or by supernatural means to produce any natural phenomena, and includes charms and medicines commonly used for any of the purposes aforesaid.[77]

This is the most comprehensive of the various substantive conceptions of the witchcraft phenomenon on the continent. Despite the circularity of this particular definition, it is inaccurate to suggest that 'there is currently no legal definition of witchcraft.'[78] It is rather that this definition appears in only one African jurisdiction, and that it could be reformulated in far shorter terms and without its current circularity.

In addition to these obscurities, the concept of witchcraft has a fragmented history that has meant that it is not, and has not been historically, conceived of in the same way in each part of the world. The core distinction between historical

[76] Criminal Law Code [Cap 77 of the Laws of the Federation of Nigeria, 1916], section 210(c).
[77] Witchcraft Act [Cap 18 of the Laws of the United Republic of Tanzania, 1928], section 2.
[78] For example, Spence (note 15) 29. In fact, Spence does not refer to the Tanzanian definition of an 'instrument of witchcraft' at all.

and folk uses of the term in the Euro-American world and the more sinister, social and existential senses in which Africans use the term has already been noted at the beginning of this chapter. There are further nuances across the continent. The Kaguru tribe in Central Tanzania use the word *muhai* for someone with 'supernatural powers';[79] the Chewa people of Malawi use the word *ufiti* to describe a malevolent phenomenon that causes them great fear;[80] the term *obayi* is used to refer to a dangerous snake by the Ashanti people of Ghana;[81] to the Beti and Maka people of Cameroon *evu* or *djambe* is 'an invisible, voracious, carnivorous and powerful spirit that hates daylight.'[82]

At the core of the African conception of witchcraft lies the idea of misfortune or injury. Broedel describes *maleficiales* (witchcraft) as having to do with 'the perception…[of] certain kinds of recognisable injuries or misfortunes,'[83] whereas for Spence, witchcraft is an attempt to provide an explanation for one's misfortune.[84] Seidman holds the same view as Spence:

> [W]itchcraft is used to explain why something happens to a particular person at a particular time…A man is bitten by a snake. Although he realizes that the intense pain is due to the venom from the fangs of the snake, there remains the question of why the

[79] Beidelman (note 22) 61.
[80] Musopole (note 21) 347-8.
[81] Cimpric A 'Children accused of witchcraft: An anthropological study of contemporary practices in Africa' *UNICEF* (2010) 11, available at: https://www.unicef.org (accessed: 16 September 2018).
[82] Uzukwu E.E. *God, spirit and human wholeness: Appropriating faith and culture in West African style* (2012) 191; Fisiy C and Geschiere P 'Domesticating Personal violence: Witchcraft, courts and confessions in Cameroon' (1994) 64(3) *Journal of the International African Institute* 323 at 334-5.
[83] Broedel H.P *The Malleus Maleficarum and the construction of witchcraft: Theology and popular belief* (2003) 66 and 83.
[84] Spence (note 15) 32.

> snake bit him and not the man who was walking along the path directly in front of him. Witchcraft provides an answer.[85]

Typically, the kinds of injury that are purported to be explained through witchcraft are those for which, from the point of view of the injured African concerned, an explanation is not *readily* available.[86] Some examples are: certain illnesses,[87] the sudden death of family members,[88] successive failed attempts to attain employment,[89] natural disasters, car accidents, wild fires and the loss or destruction of property.[90]

The construct of witchcraft is what Africans holding W-Beliefs use to confront the existential crisis of everyday human adversity or tragedy. For purposes of the forensic context, this conceptual meaning is articulated through or distilled into unique *facta probanda*. However, the definition set out above from the Tanzanian witchcraft statute is circular and unsatisfactorily complicated. It does not generate any workable *facta probanda.* Spence pertinently points out that the absence of a clear definition disables us from being able to properly identify the phenomenon, which in turn renders the interpretation of the statutes difficult.[91] Chapter 4 provides an overview of the different types of witchcraft-

[85] Seidman R *A sourcebook of the criminal law of Africa* (1966) 6.
[86] Spence (note 15) ix.
[87] See *R v Magabeni* 1911 NHC 107; *R v Usiyeka* 1912 NHC 107; Gluckman M 'The logic of African science and witchcraft' in Marwick (ed) *Witchcraft and Sorcery* (1970) 321 at 327.
[88] *S v Latha* 2012 (2) SACR 30 (ECG); *S v Mbobi* 2005 JDR 0016 (E); *S v Phama* 1997 (1) SACR 485 (E); *R v Fundakubi* 1948 (3) SA 810 (A); *R v Biyana* 1938 EDL 310; *R v Radebe* 1915 AD 97.
[89] *S v Magoro* [1996] ZASCA 99 at 7.
[90] Spence (note 15) ix.
[91] Ibid 27.

related crimes on the continent and then proceeds to isolate the *direct* version addressed in this thesis. It analyses the direct crime of witchcraft in order to generate a set of plausible *facta probanda* to be proven for a criminal conviction. The generation of these *facta probanda* provides the appropriate legal meaning for the direct crime of witchcraft, which in turn provides an answer to the conceptual question as to *what* witchcraft is in law.

1.1.3 THE PROBATIVE CONDITION

The forensic term 'probative' is implicated by the third of our three sub-questions, *what processes or heuristics of proof can be used to establish the elements of the direct crime of witchcraft*. The etymology of the word probative is traceable back to the Latin *probare*, which means to 'prove,' 'to see out' or 'to trace out by sight.'[92] Building on from this, the third of our three conditions (after *materiality* and *institutional context*) is referred to as being 'probative' in two mutually reinforcing senses. The first sense has to do with proof being taken to mean (informal or unofficial) 'reasoning rules'[93] or heuristics that are *developed* to suit the institutional context of African criminal process in general. Probativeness in this first sense is what is commonly implicated by some sceptical African scholars who bemoan the impossibility of proving witchcraft:

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[92] Thayer (note 16) 387; Wills W *An essay on the principles of circumstantial evidence* 3rd ed (1858) 2; Williams J.D *An introduction to classical rhetoric: Essential readings* (2009) 296 (on classical Greek forensic rhetoric having the three aims of *probare, delectare* and *flectere*); Cicero M.T *De Oratore II* (translated by E.W Sutton) (1967) 331-4.

[93] Ho H.L *A philosophy of evidence law* (2008) 38.

> [O]ccult aggression…is undetectable by ordinary methods, is impossible to prove in any principled way.[94]

Probative challenges, according to the South African Law Reform Commission, are raised in witchcraft cases throughout the continent:

> Research presented in this paper, especially case law, has shown that in court cases where witchcraft is involved, witchcraft practice is seldom a source of dispute. The reason could be the difficulties inherent in proving that a person is indeed a practising witch.[95]

Once these reasoning heuristics have been *developed*, we need a complementary set of guidelines as to how they should be *applied* and *logically tested* in witchcraft cases. This is our second sense of probativeness, that is, as a logical framework through which our reasoning heuristics will be applied and tested with respect to each of the *facta probanda* of the direct crime of witchcraft in Africa. For example, Wigmore's *novum organum* can be read similarly in this twofold sense: with his charting method being his general reasoning heuristic,[96] in the first sense of "probativeness," and his elucidation of it using no less than seventeen American and British cases (and a further twenty-eight cases in the

[94] Tebbe (note 40) 233.

[95] South African Law Reform Commission *The Review of the Witchcraft Suppression Act 3 of 1957* (project 135, discussion paper 139) (2016) 85, available at: http://www.justice.gov.za (accessed: 23 October 2017). Hund J 'Witchcraft and Accusations of Witchcraft in South Africa: Ontological denial and the suppression of African justice' (2000) 33 *Comparative & International Journal of Southern Africa* 366 at 367-8. Hund also says: 'South African state courts are not equipped to convict people of an offence whose material element cannot be presented as hard evidence in a court of law,' at 367-8.

[96] Wigmore J.H *The principles of judicial proof as given by logic, psychology and general experience and illustrated in judicial trials* (1913) 747-760 ('The ensuing Problems may be used for thorough analysis and study, by the method expounded in No. 376, or merely for mental entertainment and stimulus as curious problems of fact.').

Appendix)[97] in the second sense.[98] This thesis updates and merges Wigmorean forensic argumentation with contemporary argumentation theory in two ways. Firstly, Chapter 5 draws from argumentation theory to generate basic legal and evidential argumentation schemes, and thereafter locates these schemes within the broad legacy of Wigmorean theorising about evidence and proof. These argumentation schemes represent the first of the two senses of "probativeness." In the second sense, these schemes are then contextualised, using Wigmore's taxonomy of propositions of fact, and applied within Walton's New-Dialectical framework,[99] comprising of the *identification* and *logical testing* (the latter is referred to as *evaluation* by Walton) stages of argumentation, to witchcraft cases in Africa. Therefore, the relationship between Chapters 5 and 6 corresponds to the two senses of "probativeness" as they vindicate the third *probative* condition of proving evidentially the direct crime of witchcraft in Africa.

1.2 INTRODUCTION SUMMARY

Three main aims have been pursued in this introductory chapter: (i) to break down the core problem or subject-matter of the thesis; (ii) to discuss the significance of attending to this problem; and (iii) to foreshadow the overall structure and shape of the thesis in the five chapters that follow. The subject-matter of this thesis has

[97] Ibid 1169-1171.
[98] Ibid 761-1168.
[99] Walton D *The new dialectic: Conversational contexts of argument* (1998).

been distilled into a single main question, *how can the direct crime of witchcraft be proven in Africa,* and this is broken down further into three sub-questions:

(1) *What is the institutional context within which witchcraft cases are heard in Africa*?

(2) *What is witchcraft in law*?

(3) *What probative processes or heuristics can be used to establish the elements of the direct crime of witchcraft*?

These three sub-questions are equivalently articulated as the three primary conditions, *institutional, material* and *probative*, through which the evidential proof of the direct crime of witchcraft may be interpreted. The answer to the main question, along with these three subsidiary questions, is *argument*. This argument takes the form of a *conditional defeasible modus ponens.*[100] The structure and content of the four main chapters (Chapters 3, 4, 5 and 6) of this thesis serve to explicate and vindicate its premises and conclusion. This is a summary of the argument:

> (1) If it is shown how the relevant African institutional, material and probative (IMP) practices can be complied with, then the *plausibility* of the evidential proof of the direct crime of witchcraft (P(w)) has been established.
>
> (2) This thesis has shown how the relevant IMP practices can be complied with.
>
> (3) ∴ The *plausibility* of P(w) has been established by this thesis.

[100] The name '*modus ponens*,' which translates into 'the method or mode of affirming the antecedent,' is of medieval origin when many argumentation forms were studied in Latin, see Salmon M.H *Introduction to logic and critical thinking* 6th ed (2013) 308.

The evidential proof of the direct crime of witchcraft, on this argument, depends on the affirmation of the antecedent (IMP) in the *plausibilistic* generalisation in Premise (1). In other words, generally speaking, if the prosecution approaches the correct forum with jurisdiction, follows the relevant pleading rules (*institutional* condition) and establishes the relevant *facta probanda* (*material* condition), using admissible evidence to the appropriate standard of proof (*probative* condition), then the crime concerned *plausibly* would have been proven. Plausibility here is meant to convey that although there may be occasions on which the prosecution satisfies these three *institutional, material* and *probative* conditions and still loses the case (for example, in deference to the judgment of a more superior court), the institutional realities of criminal trials are such that we can *defeasibly presume* such cases to be exceptional until new information emerges that requires us to revise our logical presumption.[101] Chapters 3, 4 and 5 vindicate Premise (2) by expounding these three conditions to show how they can be adhered to in witchcraft cases. Once Premise (1) and (2) are established, the evidential proof of the direct crime of witchcraft follows *defeasibly* through the application in Chapter 6 of the four argumentation schemes to each *factum probandum*.

[101] For more on plausibilistic logic, see Walton D.N *Abductive reasoning* (2005) 35 ('A plausible inference is one that can be drawn from the given apparent facts in a case suggesting a particular conclusion that seems to be true'); Rescher N *Plausible reasoning: An introduction to the theory and practice of plausibilistic inference* (1976); Josephson J.R and Josephson S *Abductive inference: Computation, philosophy, technology* (1996) Appendix B (pp. 266-272); Walton D.N *Argumentation schemes for presumptive reasoning* (1996) Ch 2.

As to the primary motivations behind the thesis project, reference was made to the persistence of witchcraft-related beliefs among the majority of Africans and the widespread reporting of incidents of witchcraft-related violence have been noted. It is suggested that these two factors pose significant dangers to the overall legitimacy of criminal justice in Africa. There are many practical problems related to the prosecution of witchcraft crimes on the continent, but this thesis approaches certain theoretical problems from the point of view of evidence and proof.

2. CHAPTER TWO: METHODOLOGY

Within legal scholarship,[1] and perhaps theoretical research in general,[2] discussions on methodology are rare. For example, in order to 'upgrade' his doctoral dissertation into a book, the methodology chapter of Hock Lai Ho's *A philosophy of Evidence law* was removed.[3] Part of the reason for this trend overall may be that the proverbial 'trinity' of research questions, on the research question, the method and the aims or hypothesis,[4] is better suited to empirical research than it is to theoretical projects. For many theoretical research projects, especially those in legal theory or philosophy, defining and demarcating the research question is itself (or partly) 'the problem,'[5] and thus requires the application of certain theoretical techniques to solve it. For purposes of this particular doctoral project, although from early on there was a rough and obscure idea of some of the types of methods that were going to be used to address the research question, this chapter could only sensibly be written *ex post facto* in reflective mode. For it was only much later, after reading, thinking and writing about 'the problem,' that the full scale of its size and complexity could be understood in any comprehensive way. More importantly, it was only at this stage that one could figure out what could possibly be achieved within the constraints

[1] Brownsword R 'Field, frame and focus: Methodological issues in the new legal world' in van Gestel *et al* (eds) *Rethinking legal scholarship: A transatlantic dialogue* (2017) 112 at 112.
[2] Regarding Humanities and Social sciences, see Smits J.M *The mind and method of the legal academic* (2012) 111.
[3] Ho H.L *A philosophy of Evidence law: Justice in the search of truth* (2008).
[4] Smits (note 2) 117-8.
[5] A good example is the forty-two-page preface used by Hegel to define and demarcate his problem, see Hegel G.W.F *The phenomenology of spirit* (translated and edited by T. Pinkard) (2018) 3 – 46.

of a doctoral project. Therefore, important questions such as: the jurisdictions and geographical regions to be focused upon, the extent of reliance on extra-legal sources; the precise definition of the problem; the nature and sequence of chapters; the branches of law that would be involved; the selection and deployment, if at all, of doctrinal material, could not be answered adequately *ab initio*.

Nevertheless, a reflection on methodology at some point before the end of a research project is crucial, particularly when one crosses as many disciplinary and cultural boundaries as this thesis has had to do. This reflection assists us in avoiding category errors and methodological traps.[6] Furthermore, it reveals the 'closest [scholarly] associates,'[7] the overall purposes and objectives[8] and the motivations underlying some of the disciplinary choices of this thesis.[9] Ultimately, methodology is about critically reflecting, an act of 'self-consciousness,'[10] on 'what one is actually doing'[11] at every step of the way. To the extent that most research-related decisions have a *what* (subject-matter)*, why* (motivation) and *how* (method), a reflection on methodology also accounts for these 'mutually conditioning' questions with respect to each decision taken.[12]

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[6] Bird G *Philosophical tasks: An introduction to some aims and methods in recent philosophy* (1972) 12.
[7] Siems M.A and Sithigh D.M 'Why do we do what we do?: Comparing legal methods in five law schools through survey evidence' in van Gestel *et al* (eds) *Rethinking legal scholarship: A transatlantic dialogue* (2017) 31 at 39.
[8] Smits (note 2) 110-1.
[9] Ibid 114. According to Smit, 'this is a matter of transparency'.
[10] Bird (note 6) 12.
[11] See Royce J *Spirit of modern philosophy: An essay in the form of lectures* (1892) 1.
[12] Roberts P 'Interdisciplinarity in legal research' in McConville and Chui (eds) *Research Methods for Law* 2nd ed (2017) 90 at 100-3.

The range of questions that arise from the two broad areas of study, Evidence Law and witchcraft, that this thesis brings together fosters multi-disciplinary conversations at several levels. Many of the questions that arise in each of these areas have 'complex connections with other [subject matter],'[13] thereby rendering a measure of methodological discipline even more important for purposes of this thesis. Furthermore, witchcraft has been studied by a diverse set of scholars, each with a unique contribution. Classically, Evans-Pritchard, *Witchcraft, Oracles and Magic among the Azande* (1937), embarked on an anthropological study that describes the overall culture and witchcraft-related experiences of members of a community in central Africa.[14] Cyprian's sociological analyses of witchcraft cases in the eastern region of Cameroon is a popular method of studying witchcraft in Africa, particularly among historians, sociologists and other social scientists.[15] The conceptual analysis of witchcraft

[13] In Evidence Law, see Twining W 'Evidence and legal theory' (1984) 47(3) *Modern Law Review* 261 at 267; Twining W 'Evidence as a multi-disciplinary subject' (2003) 2 *Law, Probability and Risk* 91; Jackson J.D 'Modern trends in evidence scholarship: Is all rosy in the garden' (2003) 21 *Quinnipiac Law Review* 893 at 893-4; Friedman R.D '"E" is for eclectic: Multiple perspectives on evidence' (2001) 87 *Virginia Law Review* 2029; Murphy P.W 'Some reflection on evidence and proof' (1999) 40 *Texas Law Review* 327 at 328-30. In Witchcraft, see van Wyk I.W.C 'African witchcraft in theological perspective' (2004) 60(4) *HTS Theological Studies* 1201 at 1204; Spence S *Witchcraft accusations and persecutions as a mechanism for the marginalization of women* (2017) 26-7.

[14] Examples of other anthropological studies are: Middleton and Winter (eds) *Witchcraft and sorcery in East Africa* (1963); Ashforth A *Madumo: A bewitched* (2000).

[15] Fisiy C.F *Palm tree justice in the Bertoua Court of Appeal: The witchcraft cases* (1990); Fisiy C.F & Geschiere P 'Judges and witches, or how is the State to deal with witchcraft?' (1990) 30(118) *Cahiers d'Études Africaines* 135; Fisiy C and Geschiere P 'Domesticating Personal violence: Witchcraft, courts and confessions in Cameroon' (1994) 64(3) *Journal of the International African Institute* 323 at 323; Geschiere P 'Witchcraft and the limits of the law: Cameroon and South Africa' in Comaroff and Comaroff (eds) *Law and Disorder in the Postcolony* (2006) 219; Ashforth A 'Witchcraft, justice and Human Rights in Africa: Cases from Malawi' (2015) 58(1) *African Studies Review* 5; Brietzke P.H 'Witchcraft and law in Malawi' (1972) 8(1) *East African Law Journal* 1; Hund J 'Witchcraft and Accusations of Witchcraft in South Africa: Ontological denial and the suppression of African justice' (2000) 33 *Comparative & International Journal of Southern Africa* 366 at 67; Mesaki S 'Witchcraft and the law in Tanzania' (2009) 1(8) *International Journal of Sociology and Anthropology* 132 at 132; Chavunduka G.L 'Witchcraft and the law in Zimbabwe' (1980) 8(2) *Zambezia* 129 at 129.

and related phenomena has also attracted the attention of philosophers.[16] Given that a higher number of reported witchcraft-related incidents are historical, several historians have undertaken theoretical and empirical studies into witchcraft.[17] Katherin Luongo's book, *Witchcraft and colonial rule in Kenya, 1900 – 1955* (2011), which she developed from her doctoral dissertation on the history of witchcraft-related violence and the state's intervention in Kenya, including the infamous Wakamba Witch Trials of 1931-2, is one such example.

A small amount of lawyers have conducted doctrinal analyses of witchcraft-related cases in which criminal defences, such as: provocation, mistake and insanity, have been raised.[18] For example, Oladepo Aremu analyses the plausibility of these defences in witchcraft-related murders in Nigeria.[19] More recently, there have also been studies conducted by the 'law in books – law in action' socio-legal movement.[20] For example, Spence uses *feminist legal*

[16] Oluwole S 'On the existence of witches' (1978) 2(182) *Second Order* 3 at 3, also published as Oluwole S 'On the existence of witches' in Mosley (ed) *African Philosophy: Selected Readings* (1995) 161. Walton also uses the slightly different concept of a 'witch hunt' to analyse structurally the argumentation used in 'sham hearings' similar to the historical Salem witch trials, see Walton D 'The witch hunt as a structure of argumentation' (1996) 10(3) *Argumentation* 389.

[17] Waller W.D 'Witchcraft and colonial law in Kenya' (2003) 180 *Past & Present* 241; Gray N 'Witches, oracles and colonial law: Evolving anti-witchcraft practices in Ghana, 1927 – 1932' (2001) 34(2) *The International Journal of African Historical Studies* 339.

[18] Carstens P.A 'The cultural defence in criminal law: South African perspectives (2004) 37 *De Jure* 312 at 312; Seidman R.B 'Witch murder and *mens rea*: A problem of society under radical social change (1965) 28(1) *Modern Law Review* 46 at 46; Bennet T.W and Scholtz W.M 'Witchcraft: A problem of fault and causation' (1979) 12(3) *The Comparative and International Law Journal of Southern Africa* 288.

[19] Aremu L.O 'Criminal responsibility for homicide in Nigeria and supernatural beliefs' (1980) 29(1) *International & Comparative Law Quarterly* 112 at 112.

[20] See generally, Pound R 'Law in books and law in action' (1910) 44(1) *American Law Review* 12; Thomas P.A (ed) *Socio-legal studies* (1997); Nelken D 'Law in action or living law? Back to the beginning in sociology of law' (1984) 4(2) *Legal Studies* 157; Halperin J 'Law in books and law in action: The problem of legal change' (2011) 64(1) *Maine Law Review* 45.

methodology to analyse the social impact of witchcraft accusations against women.[21]

The diversity outlined above means that the subject-matter of this thesis, witchcraft, is neither entirely novel nor unique. For instance, the two broad fields, law and argumentation theory, involved in this thesis, as indicated above, have in some shape or form already visited the subject-matter of witchcraft. Therefore, the novelty of our project is in our *how* the question is approached. In summary, this thesis is a *Jurisprudential* study that develops *argumentation schemes* for the *direct crime of witchcraft* in *Nubian Africa*. For purposes of this chapter we characterise these emphasised concepts into two broad methods: *Legal theory*, as performing a 'jurisprudential job,' and *Afrocentrism*, which includes *applied comparative law method*.

2.1 A JURISPRUDENTIAL STUDY

For the purposes of this thesis, the terms 'jurisprudence' and 'legal theory' are used interchangeably[22] on the understanding that the former by definition simply is 'the theoretical part of law as a discipline.'[23] Both of these terms are

[21] Spence (note 13) xiv.

[22] For similar interchangeable uses, see Mcleod I *Legal theory* 6th ed (2012) 2; Twining W *General jurisprudence: Understanding law from a global perspective* (2009) 8; Twining W 'Some jobs for Jurisprudence' (1974) 1(2) *British Journal of Law and Society* 149 at 149. Some scholars have held the contrary view that 'jurisprudence' is a wider concept than 'legal theory', see Ratnapala S *Jurisprudence* 2nd ed (2013) 4; Wacks R *Understanding jurisprudence: An introduction to legal theory* 4th ed (2015) 1, n1.

[23] Twining (note 22) xiii. For further definitions, see Posner R *The problems of jurisprudence* (1990) xi; Hall J *Foundations of jurisprudence* (1973) 13-5; Cotterrell R 'The jurist's conscience: Reflections around Radbruch' in Del Mar and Michelon (eds) *The anxiety of the jurist: Legality, Exchange and Judgement* (2013) 13 at 13-5; Del Mar M and Michelon C 'Introduction' in Del Mar and Michelon (eds) *The anxiety of the jurist: Legality, Exchange and Judgement* (2013) 1 at 1-2; Freeman M.D.A 'Nature of jurisprudence' in Freeman (ed) *Lloyd's introduction to jurisprudence* 8th ed (2008) 1 at 3 and 10.

nonetheless wider than, and indeed encompass, what is known as 'legal philosophy'.[24] This distinction is appropriate because the forms of theoretical analysis conducted in this thesis are varied, ranging from philosophical argumentation to procedural commentary and analysis. The reference to this thesis as a 'jurisprudential study' reflects two primary methodological choices: first, the decision to deploy *theoretical concepts* and lines of reasoning,[25] as opposed to empirical interviews, surveys and other data sets, to study witchcraft. Secondly, the choice made to undertake this analysis in the *context* of forensic fact-finding makes it a study in *criminal jurisprudence* in particular.

2.1.1 CRIMINAL JURISPRUDENCE

The context in which the theorising described above is undertaken in this thesis is in relation to the finding of facts in criminal trials. The legal complexity of criminal trials is such that it involves the intersection of three branches of the law: substantive criminal law, from which we derive the *facta probanda* to be proven; criminal procedural rules that regulate the nature of criminal process as a whole; principles of criminal evidence that regulate, among other things, the admissibility and evaluation of evidence. Although across these three sub-contexts the method used in this thesis is theoretical, the type of theorising in each case is very different in important respects. In Chapter 4, on the materiality condition pertaining to the *legal meaning* of witchcraft, we generate the relevant

[24] Twining (note 13) 266.
[25] Bix B *Jurisprudence: Theory and context* 4th ed (2006) 12; Hall (note 23) 5 and 8.

facta probanda for the direct crime of witchcraft in Africa by using concepts from criminal law theory, such as: the construct of a 'General Part'; 'legally protectable interests' (connected to the element of harm);[26] 'intention'. A theoretical model (*tertium comparationis*)[27] of the key features of the overall criminal process in witchcraft cases across the continent is outlined in Chapter 3.

In all of the four main chapters of this thesis, the kind of criminal jurisprudence that is undertaken involves a 'middle-order' type of theorising[28] that is *descriptive* of substantive law concepts, including the concept of witchcraft itself, and *prescriptive* of working theories at the level of institutional procedural practices and of evidence and proof. Twining does not associate this level of theorising with 'legal philosophy,' although he does acknowledge that his list of 'jobs for jurisprudence' is 'incomplete' and that 'there are many overlaps.'[29] The type of middle-order jurisprudence undertaken in this thesis in fact does involve the conceptual robustness and rigour of philosophical analysis from the realm of argumentation theory. Specifically, argumentation theory is applied to the forensic fact-finding context.

[26] Our analysis here also draws on certain theoretically-rich existential concepts such as *Dasein,* see Heidegger M *Being and time* (translated by J. Macquarrie & E. Robinson) (1962) 170-1, 182H-I; More M.P 'Biko: Africana existentialist philosopher' in Mngxitama *et al* (eds) *Biko lives! Contesting legacies of Steve Biko* (2008) 45 at 46-8.
[27] See Örücü E 'Developing comparative law' in Örücü and Nelken (eds) *Comparative Law: A Handbook* (2007) 43 at 48.
[28] This is the third of Twining's 'five jobs' for jurisprudence, see Twining (note 13) 160; Twining (note 13) 265-6.
[29] Twining (note 13) 266.

2.1.2 FORENSIC ARGUMENTATION

The words 'forensic' and 'argumentation' are hardly ever used together. The closest alternatives are references to 'forensic evidence' by Walton,[30] 'forensic rhetoric' by Salako[31] and 'judicial argumentation' by van Eemeren *et al*.[32] 'Forensic,' derived from the Roman, *forensic*, simply means 'pertaining to or used in courts of law.'[33] The term performs a predicate function in so far as it defines the *context*, courts of law, within which theorising and argumentation takes place. Similarly, the term 'forensic science' means the employment of particular scientific techniques in the investigation and prosecution of offences in criminal courts.[34]

Argumentation theory in general has three main objectives, that is: to *identify* the structure and form of arguments, to *analyse* arguments in certain 'ordinary-language' institutional *contexts* and to develop universal or specialised criteria for *evaluating* the soundness of arguments.[35] The argumentation schemes

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[30] Walton D 'An argumentation model of forensic evidence in fine art attribution' (2013) 29(4) *AI & Society: Knowledge, Culture and Communication* 509.

[31] Salako S *Evidence, Proof and Justice: Legal Philosophy and the Provable in English Courts* (2010) 9, citing Buckley T *Aristotle's Treatise on rhetoric (with analysis by Thomas Hobbes)* (1846) 24.

[32] van Emeren F.H *et al Fundamentals of argumentation theory: A handbook of historical backgrounds and contemporary developments* (1996) 353.

[33] Blackburn R 'What *is* forensic psychology?' (1995) 1(1) *Legal and Criminological Psychology* 3 at 4.

[34] Hodgkinson T and James M *Expert evidence: Law and practice* 3rd ed (2010) 488. See also Olsson J and Luchjenbroers J *Forensic linguistics* (2014) 1 ('forensic linguistics' is 'the analysis of language that relates to the law, either as evidence or as legal discourse'); Blackburn R 'What *is* forensic psychology?' (1995) 1(1) *Legal and Criminological Psychology* 3 at 4 ('forensic psychology' as 'the application of psychological knowledge for the purposes of the courts').

[35] Feteris E.T *Fundamentals of legal argumentation: A survey of theories of theories on justification of judicial decisions* (1999) 2; Walton D.N *Fundamentals of critical argumentation* (2006) 1; van Emeren F.H *et al* (note 32) 12 and 22; Capaldi N and Smit M *The art of deception: An introduction to critical thinking* (revised) (2007) 23; van Eemeren F.H *et al Handbook of argumentation theory* (2014) 12.

developed in Chapter 6 incorporate these three elements. According to Feteris, legal argumentation is a subject matter that has only been seriously pursued by scholars since the 1970s.[36] Before then, the application of argumentation to theoretical questions in law was the preserve of Jurisprudence.[37] However, throughout its inception until now, legal argumentation, much like 'Jurisprudence', has been 'imperialistically hijacked,' to borrow a phrase from Twining,[38] by enthusiasts of "questions of law."[39] The suite of general research questions set out by Feteris is indicative of this:

> Which general and which specific standards of rationality must be met when justifying a legal decision? Is it enough that the judge mentions the facts of the case and the legal rules, or is he also expected to explain why the legal rules are applicable to the concrete case? How can the interpretation of a legal rule be justified in a rational way? What is, in the context of legal justification, the relation between legal rules, legal principles and general moral norms and values? And are there any special norms for the decision of a judge when compared with the justification of other legal standpoints?[40]

[36] Feteris (note 35) 250. Feteris refers to 1970 because that is the period within which the International Society of Legal and Social Philosophy (*Internationale Vereinigung für Rechts – un Sozialphilosophie, 'IVR'*), although founded in 1909, started to organise conferences under the central theme of 'legal argumentation' (see ivronlineblog.wordpress.com).

[37] Ibid. Feteris adds that extra-legal theorists commenting on 'legal logic,' 'legal methodology' or 'legal decision-making' in general also applied argumentation techniques.

[38] Twining W 'Narrative and generalisations in argumentation about questions of fact' (1999) 40 *South Texas Law Review* 351.

[39] Several seminal examples are: Horovitz J *Law and logic: A critical account of legal argument* (1972); Perelman C.H *Logique juridique. Nouvelle Rhétorique* ('Juridical logic. New rhetoric') (1976); Aarnio A *On legal reasoning* (1977); Krawietz W and Alexy R *Metatheorie juristischer argumentation* ('metatheory of legal argumentation) (1983); Peczenik A *The basis of legal justification* (1983); Alexy R *A theory of legal argumentation: The theory of rational discourse as theory of legal justification* (translated by R. Adler and N MacCormick) (1989); Soeteman A *Logic in law: Remarks on logic and rationality in normative reasoning, especially in law* (1989); MacCormick N *Rhetoric and the rule of law: A theory of legal reasoning* (2005); Feteris (note 35); Dahlman C and Feteris E (eds) *Legal argumentation theory: Cross-disciplinary perspectives* (2013).

[40] Feteris E.T 'A survey of 25 years of research on legal argumentation' (1997) 11(3) *Argumentation* 355 at 355-6; Rieke R.D 'Investigating legal argument as a field' in Ziegelmueller and Rhodes (eds) *Dimensions of argument: Proceedings of the second summer conference on argumentation* (1981) 152.

A common topic for this *juridical* variant of legal argumentation among theorists is the rationality or justification of (mostly, appellate) court decisions.[41] In a few exceptional cases, however, argumentation theorists have paid attention, although in a way that pales in comparison to Wigmore's theorising in the *Principles*:

> What is the point of arguing about facts in a trial? According to traditional wisdom, a trial aims to find out the truth about disputed facts: therefore, factual argumentation in a trial context is supposed to provide a true representation of the relevant facts. The facts have to be reconstructed on the basis of the evidence at disposal; one should give an accurate description of their features and a true explanation why they are so, providing arguments that support these claims.[42]

Therefore, there clearly are two separate strands of legal argumentation: one is *juridical* and the other is *factual*. For purposes of this thesis, the latter is what is meant by the reference to 'forensic argumentation.'

2.1.3 THE WIGMOREAN TRADITION OF EVIDENTIAL ARGUMENTATION

Following along the footsteps of his teacher, the 'Grandmaster,' James Bradley Thayer, Wigmore was part of what has been called 'the golden age of doctrinal scholarship,' that is, of 'Evidence Law.'[43] However, Wigmore's work by all

[41] Feteris (note 35) 250.

[42] Tuzet G 'Arguing on facts: Truth, trials and adversary procedures' in Dahlman and Feteris (eds) *Legal argumentation theory: Cross-disciplinary perspectives* (2013) 207 at 207. Another exceptional example is Walton D *Legal argumentation and evidence* (2002) xiv, where it is said that the book 'seeks to vindicate John H. Wigmore's theory that there is a science of reasoning underlying the law of evidence'. See also Michael J *The elements of legal controversy: An introduction to the study of adjective law* (1948) 6 (on 'contradicting propositions of fact').

[43] Park R.C 'Evidence scholarship, old and new' (1991) 75 *Minnesota Law Review* 849 at 854-5.

accounts was ahead of its time. It is no wonder that he sometimes is referred to as the 'Supreme Commander of the Law of Evidence.'[44] In fact, his work continues to reign supreme in both Evidence scholarship and legal practice. In this regard, Schum says: 'I know of no other studies of evidence that are as comprehensive as Wigmore's.'[45] About his *Treatise on the system of evidence in trials at Common Law* (1904),[46] one of his former teachers, Joseph Henry Beale, said: '[T]his is the most complete and exhaustive treatise on a single branch of our law that has ever been written.'[47] The 'Colonel', as he came to be known after the time he spent in the military, produced a plethora of works in Evidence, Tort, Constitutional law and even Japanese law, but his second most comprehensive and well-known text, after the *Treatise,* is *The principles of judicial proof as given by logic, psychology and general experience and illustrated in judicial trials* (1913).[48] The type of legal argumentation that Wigmore theorises about in the *Principles* is what this thesis applies to witchcraft cases in Africa, but more about this will be expounded upon in the second half of this chapter.

Wigmore's work may be characterised as having left two broad legacies following the trajectory of two his most well-known texts: the *Treatise* and the

[44] Twining W *Theories of evidence: Bentham and Wigmore* (1985) 110-1.
[45] Schum D *Evidential Foundations of Probabilistic Reasoning* (1994) 60.
[46] Initially, this work was produced in four volumes, but a supplement was added in 1908 and an extra volume in a revision in 1923. The last (third) edition published by Wigmore himself was in 1937 until Peter Tillers embarked upon the laborious task of revising all five volumes in 1983, see Wigmore J.H *Evidence in Trials at Common Law* (revised by Peter Tillers) (1983).
[47] Twining W *Theories of evidence: Bentham and Wigmore* (1985) 111.
[48] Wigmore published two editions of this work in 1913 and 1931 respectively. Subsequent to this, the third edition, for allegedly commercial or marketing-related reasons, was renamed from the *Principles* to the *Science* of proof, see Twining (note 44) viii and 119.

Principles. The *Treatise* legacy effectively consolidates the doctrinal Evidence Law scholarship that began to wane from the early 1970s when Sir Rupert Cross remarked that if the rules of evidence were to be abolished at that stage, there would be nothing left to study.[49] Wigmore was very candid about his expository ambitions and his common law standpoint for purposes of the *Treatise*:

> The particular aspiration of this Treatise is, first, to expound the Anglo-American law of Evidence as a system of reasoned principles and rules; secondly, to deal with the apparently warring mass of judicial precedents as the consistent product of these principles and rules; and, thirdly, to furnish all the materials for ascertaining the present state of the law in the half a hundred independent American jurisdictions.[50]

During Wigmore's lifetime, a total of 10 volumes and 3 editions were published of the *Treatise* from 1904 till 1940.[51] Subsequent to this, this 'encyclopedic account,'[52] was exported to various jurisdictions across the world, including in anglophone Africa,[53] and an innumerable number of revisions have been published posthumously.[54] One South African Evidence scholar, Andrew Paizes, refers to Wigmore as the 'master of the law of evidence' and the *Treatise* as a

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[49] Twining W *Rethinking evidence: Exploratory essays* (1994) 210; Murphy P.W 'Some reflections on evidence and proof' (1999) 40 *Texas Law Review* 327 at 327. Cross is quoted as having said: 'I look forward to the day when my subject is abolished,' see Twining W 'Goodbye to Lewis Elliot: The academic lawyer as scholar' (1980) 15 *Journal of the Society of Public Teachers of Law* 2 at 9.

[50] Wigmore J.H *A treatise on the system of evidence in trials at Common Law* vol 1 (1905) vii.

[51] Fishman J and Boston J 'John Henry Wigmore (1863 – 1943): A sesquicentennial appreciation' (2013) 6 *Unbound: An Annual Review of Legal History and Rare Books* 9 at 13.

[52] Schum (note 45) 60.

[53] Wigmore's *Treatise* is cited regularly in cases across all anglophones jurisdictions in Africa, see *Ataloye v The State* (2012) LPELR-19666 (CA) 33 (Nigeria); *R v Hassan Randu Nzioka* [2019] eKLR at 4 (Kenya); *Uganda v Longole* (Criminal session case No. 104 of 2014) [2016] UGHCCRD 18 (Uganda); *S v Lin* [2010] 1 All SA 358 (W) (South Africa); *S v Masawi* 1996 (2) ZLR 472 (S) 512-3 (Zimbabwe).

[54] A long list of posthumous revisions appears in Fishman and Boston (note 10) 13-4, n25. The most famous of these are by James Chadbourn (1970) and his research assistant, Peter Tillers (1983): Risinger D.M 'A tribute to Peter Tillers' (2017) 16 *Law, Probability and Risk* 5.

'magnus opus.'[55] He commented further that: 'We have been heavily influenced by the writings of many eminent Anglo-American scholars, most notably Wigmore but also, to a lesser extent, Bentham, Thayer, Phipson and Cross.'[56]

Although Evidence-law textbooks influenced by the *Treatise* continue to be published in Africa and elsewhere in the world, this brand of scholarship has been challenged by a cohort of interdisciplinary scholars that have been publishing work under the banner of 'New Evidence Scholarship' ('NES') since the 1960s.[57] Richard Lempert, who is credited with coining the term NES,[58] succinctly describes this transition:

> Evidence is being transformed from a field concerned with the articulation of rules to a field concerned with the process of proof. Wigmore's other great work is being rediscovered, and disciplines outside the law, like mathematics, psychology and philosophy, are being plumbed for the guidance they can give.[59] (footnotes omitted)

Wigmore's *Principles* has largely been ignored, but this is more so in Africa. If questions such as 'what does it mean to prove something so that a court will either order a person imprisoned or order a transfer of money or property'[60] and '[w]hat

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[55] Paizes A.P 'Book review: *Theories of evidence: Bentham and Wigmore*' (1986) 103(3) *South African Law Journal* 707 at 708).
[56] Zeffert D.T and Paizes A.P *The South African Law of Evidence* 2nd ed (2009) 35.
[57] For an overview of the explosion of scholarship under the "New Evidence Scholarship" banner, see Park R *et al* '"Bayes wars redivivus – An exchange"' (2010) 8(1) *International Commentary on Evidence* 1; Pardo M.S 'The nature and purpose of evidence theory' (2013) 2(3) *Vanderbilt Law Review* 547 at 553.
[58] Twining W 'The new evidence scholarship' (1999) 40 *South Texas Law Review* 351 at 352, n4.
[59] Lempert R 'The new evidence scholarship: Analysing the process of proof' (1986) 66(3) *Boston University Law Review* 439 at 439-440; Twining W 'Evidence as a multi-disciplinary subject' (2003) 2 *Law, Probability and Risk* 91 at 91; Haack S *Evidence matters: Science, Proof, and Truth in the law* (2014) 20, n91; Twining W 'The new evidence scholarship' (1991) 13 *Cardozo Law Review* 295 at 297; Dennis I *The law of evidence* 6th ed (2017) [129].
[60] This was a question posed as '[t]he central question in evidence' by the host of an historic NES conference held at Boston University held in 1985: Green E.D 'Forward' (1986) 66(3) *Boston University Law Review* 377 at 377 and 379.

constitute valid, cogent, and appropriate modes of reasoning about disputed questions of fact in adjudication'[61] lie at the heart of NES, then it is fair to say that African scholars, save for a few exceptions,[62] have not wrestled with this new brand of scholarship. This thesis attempts to revive Wigmore's *Principles* by applying some of its aspects to witchcraft cases in Africa.

2.2 AFROCENTRICITY

The last major methodological choice made in this thesis relates to the geographical focus of this thesis. This by no means was a foregone conclusion, as witchcraft incidents continue to be reported in various parts of the world, including: the Caribbean,[63] India[64] and parts of the Middle East.[65] However, the advantages that come with my own ethnic background being African, and thus having a far better understanding of that part of the world, as well as the volume of reported incidents on the continent were persuasive factors in the methodological choice to locate the project of this thesis in Africa. This particular choice gave raise to two further methodological issues: firstly, Africa's fifty-four countries, each with its own fairly distinct legal system, needed to be organised into some coherent analytic structure. This is particularly because one of the main

[61] Twining W 'The Boston symposium: A comment' (1986) 66(3) *Boston University Law Review* 391 at 391.
[62] For example: Abimbola K 'Abductive reasoning in law: Taxonomy and inference to the best explanation' (2001) 22 *Cardozo Law Review* 1683; Paizes A 'Must we have a theory of proof?' (2003) *Acta Juridica* 113. See also Paizes A 'The law of evidence: Seven wishes for the next twenty years' (2014) *South African Journal of Criminal Justice* 272 at 289.
[63] Skinner J 'Interning the serpent: Witchcraft, religion and the law on Montserrat in the 20th century' (2005) 16(2) *History and Anthropology* 143.
[64] Mac-Machado R.G 'Witchcraft and witchcraft cleansing among the Vasava Bhils' (2010) 105(1) *Anthropos* 191.
[65] Arvin H.L and Arvin A.H *The linear heritage of women* (2010) 69.

objectives of this thesis is to develop argumentation schemes with a scope of application that is sufficiently broad to apply across the continent. Once African jurisdictions have been segmented and organised, the second methodological issue that arose relates to the practical problem of *how to compare and analyse* these jurisdictions. This is further complicated by the colonial roots of African jurisdictions within the English Common law and French Civil law traditions. Nevertheless, these two comparative-law constructs are useful analytic tools for observing and analysing jurisdictions with similar features across the world. Therefore, the type of comparison made throughout this thesis is at two levels: firstly, between various jurisdictions *within* Africa ('intra-comparison') and secondly, between *northbound-gazing*, to borrow a phrase from Mogobe Ramose,[66] African jurisdictions and their European counterparts, particularly England and France ('inter-comparison').

The second main method, in addition to *legal theory*, used in this thesis is referred to as *Afrocentricity* because it uses particular theoretical constructs that seek to harmonise diverse African social and cultural institutions often by tracing their historical common heritage. Secondly, *Afrocentricity* is conceived in this thesis as being wide enough to encompass comparative law method. This is particularly because both *Afrocentricity* and comparative law method involve

[66] Ramose M.B '"African Renaissance": A northbound gaze' in Coetzee and Roux (eds) *The African Philosophy Reader* 2nd ed (2002) 600 at 600.

building *tertium comparationis*[67] for the purpose of synthesising and analysing social, cultural or legal diversity. Although he did not use the term himself, Afrocentric research originates from the work Senegalese historian, Cheikh Anta Diop.[68] Inspired by the decolonial urge for Africa to self-introspect and re-build itself, Molefe Kete Asante is credited with coining the term *Afrocentricity* in the 1980s initially as a sociological theory and philosophy.[69] However, scholars such as Revere later developed *Afrocentricity* into a research method in the social sciences.[70] To be fair, and much like comparative law in many respects, *Afrocentricity,* especially as a distinct research method is still struggling to find its own independent voice. For the purposes of this thesis, however, we use *Afrocentricity* in the broad sense to mean at least three things: firstly, we are studying a social phenomenon, witchcraft, as it occurs in Africa.[71] Secondly, we are using various historical theoretical constructs, for example the idea of 'Nubian Africa,' to organise, *compare* and harmonise various African jurisdictions into a coherent analytic structure.[72] Thirdly, we are adopting the 'frame of reference'[73]

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[67] Örücü (note 27) 48.

[68] Diop C.A *The African origin of civilisation: Myth or reality* (1974); Bangura A.K 'From Diop to Asante: Conceptualising and contextualising the Afrocentric paradigm' (2012) 5(1) *The Journal of Pan African Studies* 103 at 104.

[69] Asante M.K *Afrocentricity: The theory of social change* (1980) 2; Sono T 'Afrocentrism in South African social science: What has been done, how useful has it been?' in Mouton *et al* (eds) *Theory and Method in South African Human Sciences Research: Advances and Innovations* (1998) 67 at 69; Reviere R 'Toward an Afrocentric research methodology' (2001) 31(6) *Journal of black studies* 709 at 711.

[70] Reviere (note 69) 710.

[71] This is at the core of Afrocentricity, see Asante M.K 'Graduate studies in Africology: Challenges and prospects' (2010) 34(2) *The Western Journal of black Studies* 242 at 244; Asante M.K 'The Afrocentric idea in education' (1993) 60(2) *Journal of Negro Education* 170 at 171; Asante M.K *Malcolm X as cultural hero & other Afrocentric essays* (1993) 99.

[72] Asante M.K *The Egyptian philosophers: Ancient African voices from Imhotep to Akhenaten* (2000) 1-2.

[73] Poe Z 'The construction of an Africalogical method to examine Nkrumahism's contribution to Pan-African agency' (2001) 31(6) *Journal of Black Studies* 729 at 730; Keto C.T *An introduction to the Africa-centred perspective of history* (1989) vii.

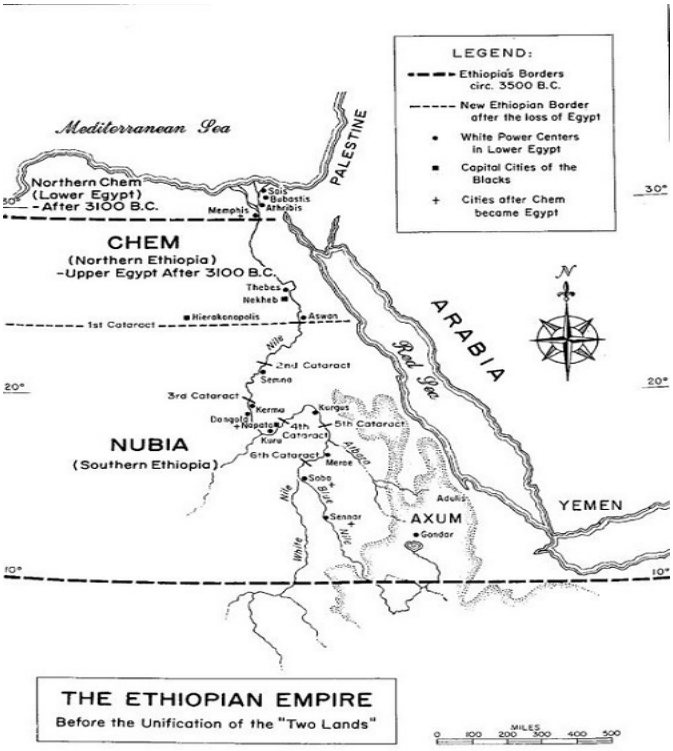
of ordinary Africans that believe in witchcraft phenomena to analyse it substantively.

2.2.1 NUBIAN AFRICA

2.2.1.1 GEOGRAPHIC DEMARCATION

It has already been mentioned that African legal systems, particularly within the realms of criminal law and procedure, have Common law and Civil law colonial roots.[74] Implicit in this is a methodological commitment to exclude what may be regarded as 'Islamic Africa,' for example: Northern Nigeria, Sudan, Ethiopia, Egypt, Morocco, Algeria, Niger and so forth, from the scope of this thesis. Geographically, this means that my area of focus is on the communities situated largely south of the Sahara desert. This region historically originates from the southern part, known as *Nubia*, while the northern part was *Chem* (and later 'Kemet'), of one of the earliest known civilisations (circa. 2000 B.C.) in Africa, *Bilal as Sudan* ('land of the Blacks').[75] Figure 1[76] below illustrates this historical geographic demarcation:

[74] Bringer P 'The aiding influence of English and French criminal law in one African country: Some remarks regarding the machinery of criminal justice in Cameroon' (1981) 25(1) *Journal of African Law* 1 at 1.
[75] Williams C *The destruction of black civilization* (1987) 21 and 44.
[76] Ibid 60.

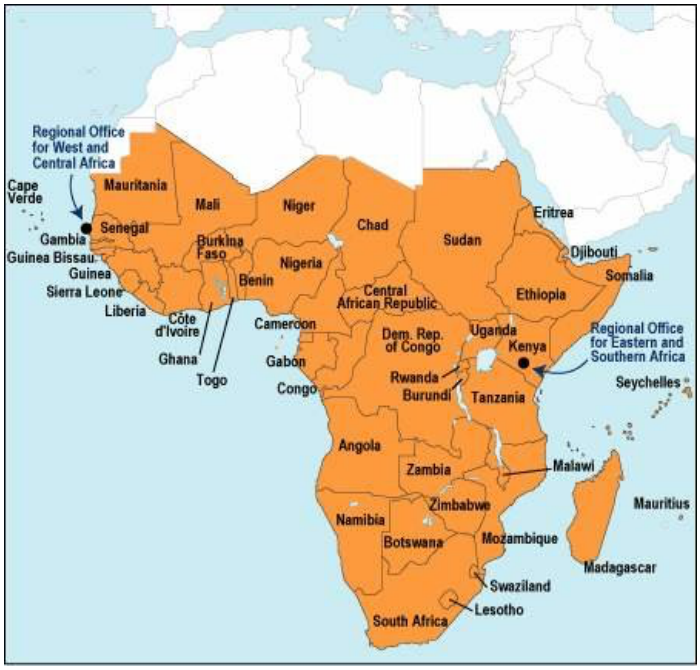


(Figure 1: A map of Ancient *Bilal as Sudan*)

Much later on, many of the Bantu tribes[77] located in ancient *Nubia* migrated towards the west, initially in the north-western regions of Cameroon, and thereafter towards the southern parts of Africa.[78] Currently, these communities are scattered, as shown in Figure 2 below, throughout the part of the continent that is below the Sahara desert:

[77] These 'Ba-Ntu' continue to be found throughout the part of the continent that is below the Sahara desert. They are identifiable by the 'Ba' prefix: Ba-Mileke, Ba-Mbara, Ba-Kongo, Ba-Ganda, Ba-Hutu, Ba-Luba, Ba-Tonka, Ba-Saka, Ba-Tswana, Ba-Kgalaka, Ba-Venda, Ba-Pedi, Ba-Sutu and Ba-Chopi, see Mutwa C *Indaba, my children* (1964) 558.

[78] Fowler I 'Kingdoms of Cameroon grassfields' (2011) 40(4) *Reviews in Anthropology* (2011) 293 at 293. The communities from ancient *Chem* migrated north towards what is today known as Egypt.



(Figure 2: A map of *Nubian* Africa)

The terms 'sub-Saharan,' 'Tropical' or 'Black Africa', for various reasons that are beyond the scope of this thesis, have become controversial.[79] For purposes of this thesis, our area of focus shown in Figure 2 is described rather using the Afrocentric construct of *Nubian* Africa. More specifically, the three main regions in this geography are: the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC).

2.2.1.2 SELECTED JURISDICTIONS

The geographic canvass described above is fairly broad and complicated, comprising about 46 African countries. A detailed exposition of each of these

[79] de Haldevang M 'Why do we still use the term "sub-saharan Africa"?', *Quartz Africa* (1 September 2016), see https://qz.com (accessed: 1 March 2019).

within the limited confines of this thesis is not at all possible. Therefore, although most of the claims made in this thesis are captured in sufficiently broad terms to apply throughout Nubian Africa, we will make specific reference and use illustrative examples from at least two jurisdictions from each of the SADC, ECOWAS and EAC regions. In the east, these are Kenya and Tanzania; Nigeria and Cameroon represent the west; the south is represented by Zimbabwe and South Africa.

Our representative of the Francophone jurisdictions, derives its name from the many shrimp found by the Portuguese explorer, Fernando Pó, in the 'River of Shrimp' (*Rio dos Camarões*) in 1472.[80] The extent of its representation of Francophone jurisdictions such as Senegal, Burkina Faso, Niger, Central African Republic and the Democratic Republic of Congo, however, is *partial* and complicated. As a result of the post-WWI division of the territory between France and England, as shown in Figure 3 below, Cameroon is described commonly as a 'bilingual' and 'bi-jural'[81] jurisdiction:

[80] Tadonkeng M.C 'Land law and polygamy in the Bamiléké tribe in Cameroon' in Serrão (eds) *Property rights, land and territory in the European overseas empires* (2014) 305 at 305.
[81] Smith J.A.C 'The Cameroon Penal Code: Practical comparative law' (1968) 17(3) *International & Comparative Law Quarterly* 651 at 651.

(Figure 3: A historical map of the colonial French and British Cameroons)[82]

For example, its Penal Code of 1966-7 has a stronger French influence, having been drafted by a three-person committee constituted by two French lawyers (Richard Gilg and Robert Parant) and one English lawyer (Clarence Smith) in the 1960s,[83] whereas its Criminal Procedure Code of 2005 was described by former Chief Justice Asuagbor of the Cameroonian Supreme Court as being '85% Anglophone':

> The new criminal procedure code was hailed as a success for the Anglophone jurisdiction because it is about 85% Anglophone – inspired…In as much as everybody will have to go to school in order to learn this new legislation, the Anglophone lawyers and magistrates will have less work to do than their Francophone counterparts who virtually have to go back to school in order to get used to the new system.[84]

[82] Global Security.Org, *British Cameroons* (3 May 2017).
[83] Anyangwe C *Criminal law in Cameroon: The General Part* (2015) 52-3; Smith (note 89) 651.
[84] Quoted in Sone A.E 'Criminal procedure in Cameroon: From dualism to a common code' in Sone (ed) *Readings in the Cameroon Criminal Procedure Code* (2007) 15 at 29, n 61. Similarly, former Supreme Court Judge Ayah described the Criminal Procedure Code as 'a revelation' for Francophone lawyers in Cameroon and that 'a good number of them will have to go back to school to be able to acquaint themselves with the new procedure' (at 29).

For purposes of this thesis, our focus on Cameroon, however, will extend to the Francophone parts of its legal system that it shares with the rest of Francophone Africa.

The second jurisdiction we focus on in west Africa is Nigeria,[85] which derives its name from the green Niger river.[86] Nigeria, having been invaded by the British in 1851, is important because it is the paradigmatic legislative source of substantive and procedural criminal law in most of Anglophone Africa.[87] It should be borne in mind, however, that the references to Nigeria throughout this thesis are to the states in the southern half, whereas the northern Islamic states are subject to the Sudanese-influenced[88] Penal and Procedural Codes. Figure 4 below is a map reflecting this geographic split.

[85] As indicated above, the Islamic parts of Africa fall beyond the scope of this thesis. Therefore, all references to 'Nigeria' here exclude the Islamic northern regions of the country.
[86] Burns A.C. *History of Nigeria* (1929) 24; Jeffreys M.D.W 'Niger: Origins of the word' (1964) 4(15) *Cahiers d'études africaines* 443 at 443-4.
[87] Morris H.F 'A history of the adoption of codes of criminal law and procedure in British colonial Africa' (1974) 18(1) *Journal of African Law* 6 at 23.
[88] Okonkwo C.O *Okonkwo and Naish on criminal law in Nigeria* 2nd ed (1980) 9-10. Apart from a few differences in certain specific offences (for example, drinking alcohol is a *per se* prohibition in the Islamic north, whereas it is not in the south), the substantive-law and procedural codes in the south are remarkably similar to those that apply in the north.

Figure 4: A map of Northern and Southern Nigeria

Nigeria's Criminal Code of 1904, which was based on the Australian Queensland Code of 1899,[89] and later re-enacted for the whole of Nigeria in 1916, was used to draft the penal codes of Kenya, Uganda, Tanzania and Malawi in 1930.[90] Moreover, the Tanzanian and Kenyan criminal codes respectively, were the models for the Zambian Code of 1931 and the Gambian Code of 1934. On the procedural side, the Gold Coast and Lagos Ordinance of 1876 was used to draft the Northern Nigeria Criminal Procedure Proclamation of 1903, which was later re-enacted for the whole of Nigeria in 1914, and the procedural codes for Kenya,

[89] Using Stephen's Draft English Code of 1878, the Italian Code of 1888 and the New York Penal Code, this code was drafted by former Chief Justice Sir Samuel Griffiths, see Mackenzie G 'An enduring influence: Sir Samuel Griffith and his contribution to criminal justice in Queensland' (2002) 2(1) *Queensland University of Technology Law and Justice Journal* 53 at 59.

[90] Ibid 22-3. South Africa and Zimbabwe are perennial anomalies compared to other Anglophone jurisdictions in Africa. The extent to which their legal systems have been influenced by the Common law tradition is *partial* and complicated.

Uganda, Tanzania and Malawi in 1930.[91] Similar to the trend in relation to the criminal codes, the Kenyan procedural code was then used to draft the codes for Zambia, the island of Zanzibar and Gambia in 1934.

Our selected representative jurisdictions in the east are coastal neighbours as shown in Figure 5 below:

Figure 5: A map of Tanzania and coastal neighbours

Similar to Nigeria, the legal systems of Kenya and Tanzania share strong similarities with other jurisdictions within the broader Common law tradition. Within the Anglophone east African region, Uganda, Tanzania and Kenya in particular, criminal law and procedure is strikingly similar.[92] All three of their

[91] Ibid.

[92] Chipeta B.D *A handbook for public prosecutors* 3rd ed (2009) x. Among the many social institutions that are created in mutual co-operation were the East African High Commission, the East African Airways Corporation, the East African Currency Board and the Court of Appeal for Eastern Africa, see Keto L.L 'The Court of Appeal for East Africa: From a colonial court to an international court' (1971) 7(1) *East African Law Journal* 1. The East African Court of Appeal, which had appellate jurisdiction over Kenya, Tanzania and Uganda, was abolished in 1977, see Mfalila L.M.S 'Twenty-five years of the Court of Appeal and the independence of the judiciary' in

codes of criminal law and procedure derive from the Common law-based Nigerian codes.[93]

Further down south, we place special focus on Zimbabwe and South Africa. Compared with one another, these jurisdictions have plenty in common, but in the context of the rest of Africa and the world, they represent anomalous mixtures of principles and rules from various legal systems, including English, Roman-Dutch, German and French. Describing the eclectic nature of South African law in general, Britain's 'Attorney-General of the Cape of Good Hope,' 1904-8, Victor Sampson said:

> To say that there is not a book of law in the whole civilized world which may not possibly be an authority in the Colonial Courts, is not to go beyond the truth…Using the word "authority" in the sense presently to be explained, we shall find references in the Colonial Law Reports to Roman, Dutch, English, American, Scotch, French, German and other authorities.[94]

The same applies to Zimbabwe in my view notwithstanding its Criminal Law (Codification and Reform) Act of 2006, which at any rate is regarded as a

Peter and Kijo-Bisimba (eds) *Law and Justice in Tanzania: Quarter a century of the Court of Appeal* (2007) 81 at 81-2.

[93] Before 1930 when the Nigerian-derived codes took effect, east African countries used the Indian Penal and Procedural codes, see Mapunda B.T *Criminal law and procedure: General principles of criminal liability* Part Two (1996) 33; Cotran E 'The development and reform of the law in Kenya' (1983) 27(1) *Journal of African Law* 42 at 44. However, the Indian Common law influence continues to be felt in the realm of criminal evidence. For example, consultants reviewing the Tanzanian Evidence Act of 1967 remarked that '90 percent' of this statute 'is a direct copy' of the Indian Evidence Act of 1872, which infamously was drafted by J.F Stephen, see Allen R.J 'Reforming the law of Evidence of Tanzania (Part One): The social and legal challenges' (2013) 31(2) *Boston University International Law Journal* 217 at 221. This includes the operation of the infamous common-law 'exclusionary rules' of Evidence, see Makulilo A.B 'the admissibility and authentication of digital evidence in Zanzibar under the new Evidence Act' (2018) 15 *Digital Evidence and Electronic Signature Law Review* 48.

[94] Sampson V 'Sources of Cape law' (1887) 4 *Cape Law Journal* 109 at 109-110. See also Burchell J *Principles of criminal law* 3rd ed (2005) 20, where it is noted that 'South African criminal law evolved out of a matrix of different legal systems.'

codification of 'all the major aspects of the common law.'[95] A further indication of this type of 'eclecticism'[96] is the fact that although section 3(1) of Zimbabwe's criminal code purports to abolish Roman-Dutch law as of 2006, judges and practitioners continue to use Continental concepts, such as *dolus eventualis*,[97] regularly in criminal cases. The explanation for this eclecticism in the case of South Africa is that different parts of the country were colonised, during varying periods,[98] by Britain and the Netherlands. In particular, the Western coastal region, formerly known as the Cape of Good Hope, was under British control, whereas large sections, particularly what was known as the 'Transvaal' and 'Orange Free State' regions, of the remainder of the country were under Dutch control (see Figure 6).[99]

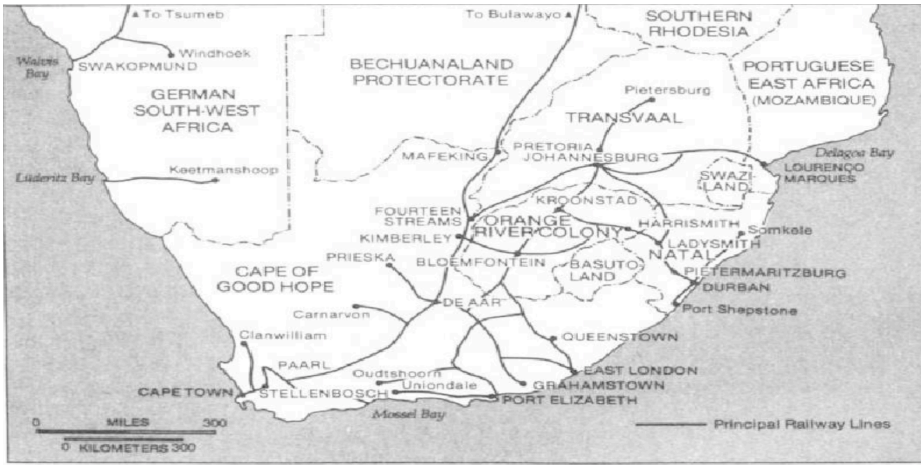


Figure 6: A map of early 19th century Union of South Africa

[95] Feltoe G *Commentary on the Criminal law (Codification and Reform) Act, 2004* (2006) 6.
[96] Burchell J 'South Africa' in Heller and Markus (eds) *The Handbook of Comparative Criminal Law* (2010) 455 at 456.
[97] See *S v Savanhu* [2015] ZWBHC 22; *S v Mpofu* [2016] ZWCC 16.
[98] Roman-Dutch law was exported in 17th century, whereas English law made significant inroads in the 19th century, see Burchell (note 103) 20.
[99] Thompson L *A history of South Africa (Revised edition)* (1996) 149.

Therefore, when South African lawyers refer to the 'common law' they do not mean the Anglo-American Common law tradition referred to above, at least not only this, but rather the diversity of German, French and Anglo-American rules and doctrines that have influenced their system historically. This mixture, however, is far more pronounced in substantive criminal law than it is in criminal procedure and evidence. For instance, although Zimbabwe[100] has codified its rules and South Africa[101] largely has not, the admissibility rules in both countries have the typical *exclusionary* character of all Common law jurisdictions.

In summary, Nigeria, together with the selected jurisdictions in east Africa, provide useful examples of typical English Common law models in Anglophone Africa, whereas the Francophone aspects of Cameroon represent certain paradigmatic aspects of the French Civil law tradition as it manifests in Francophone Africa. South Africa and Zimbabwe are the outliers that serve as complicated examples of mixtures of these two broad traditions.

2.2.2 *APPLIED* COMPARATIVE LAW METHOD

There are two important questions that need to be addressed in connection with how comparative-law method is used in this thesis: the first is about what *applied* comparative law is and why it is preferred in this thesis. The second question

[100] Criminal Procedure and Evidence [Cap 9:07, Laws of Zimbabwe, 2016], section 252-266A.
[101] The only codified admissibility rule in South Africa is in section 210 of the Criminal Procedure Act 51 of 1977, which provides: 'No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact in issue in criminal proceedings'. All the other exclusionary rules are unwritten and to be found in decided cases.

relates to our characterisation of applied comparative-law method, as used in this thesis, under the broader rubric of *Afrocentricity*. Our answers to each of these questions are precipitated by a much more general scepticism towards comparative law. Much like Afrocentricity, comparative law remains a comparatively nascent branch of law, despite its birth over a century ago.[102] As one would expect with any 'adolescent' branch of law, comparative law likewise is riddled with controversies and internal methodological insecurities at various levels.[103] These range from the diverse answers one receives to Watson's question about what comparative law is,[104] to whether it is a branch of law, discipline or method.[105] Furthermore, a mass of terminological clutter and confusion has arisen from various 'species' of comparative law such as: 'traditional comparative law;' 'mainstream comparative law;' 'conventional comparative law;' 'critical comparative law;' 'post-modern comparative law;' 'comparative legal

[102] Drawing from by the seminal text by Zweigert and Kötz, comparative law expositors often mark the World Exhibition in Paris in 1900 as a significant formative point of comparative law, see Zweigert K and Kötz H *An introduction to comparative law* 3rd ed (translated by T. Weir) (1998) 2. For example, Örücü says that 'comparative law, as we know it today, can be regarded as a child of the 19th century that had reached adolescence in the 20th,' see Örücü (note 27) 43-4. Cf. Grande E 'Comparative criminal justice' in Bussani and Mattei (eds) *The Cambridge Companion to Comparative Law* (2012) 191 at 195, where it is contended that '[c]omparative criminal law as the study of foreign laws can be traced back to Paul Johan Anselm von Feuerbach (1775 – 1833), the acknowledged founding father of the discipline, and to his interest in Islamic, European, east Asian, south Asian, Middle Eastern and US criminal law, for the very purpose of deriving a universal legal science.'

[103] Samuel G *An introduction to comparative law: Theory and method* (2014) 9. For example, Markesinis says: '[m]y own feelings about my subject were and are of great but unfulfilled expectations.' Markesinis continues to say: 'Comparative law is, I believe, still searching for an audience,' see Markesinis B 'Comparative law – A subject in search of an audience' (1990) 53(1) *Modern Law Review* 1 at 1; Legrand P 'How to compare now' (1996) 16(2) *Legal Studies* 232.

[104] Watson A *Legal transplants: An approach to comparative law* (1974) 1; Örücü (note 27) 44; Örücü E *The enigma of comparative law: Variations on a theme for the twenty-first century* (2004) 1.

[105] Samuel (note 103) 2. For example, de Cruz conceives of comparative law 'both as a science in its own right and as a method', see de Cruz P *Comparative law in a changing world* 3rd ed (2007) 3.

studies.'[106] There are many other controversies in comparative law that are beyond the scope of this thesis,[107] but a controversy that is pertinent to African jurisdictions is outlined by Baxi:

> The colonial juristic mind-set survives even as colonies have disappeared. The dominant tradition of doing comparative law still reproduces the binary contrasts between the 'common' – and 'civil' – law cultures or the 'bourgeois' and 'socialist' ideal-types, thus reducing the diversity of the world's legal systems to a common Euro-American measure. In every sphere, the 'modern' law remains the gift of the west to the rest. The large processes of 'westernisation', 'modernisation', 'development', and now 'globalisation' of law present the never-ending story of triumphant legal liberalism…[108]

This brings us to our answer to the second of the two questions posed above. Afrocentricism shares the methodological feature of 'comparison' with comparative law, but they differ in so far as the nature and place of the paradigms or traditions that are being compared. Whereas comparative law is dominated by scholarship related to dominant 'legal families' that often exclude Africa, Afrocentricism is inward-looking as it compares African jurisdictions that are indigenous, yet tempered by colonial influences. Applying comparative law methods, using an Afrocentric frame of reference, allows us to perform the dual 'intra' and 'inter-comparisons' described above. This delicate balance further

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[106] Örücü (note 27) 44 and 47. See also Legrand and Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (2002); Legrand P 'Comparative legal studies and commitment to theory' (1995) 58(2) *Modern Law Review* 262.

[107] Samuel (note 103) 9.

[108] Baxi U 'The colonialist heritage' in Legrand and Munday (eds) *Comparative Legal Studies: Transitions and transitions* (2003) 46 at 49. Similarly, Twining describes orthodox comparative law as follows: 'It focuses almost exclusively on Western capitalist societies in Europe and the United States, with little or no detailed consideration of 'the East' (former and surviving socialist countries, including China), the 'South' (poorer countries) and richer countries of the Pacific Basin (Japan, Asian tigers)', at Twining W *Globalisation and legal theory* (2000) 185.

helps us to escape the imprecision of churlishly observing, without more, that customary criminal law and procedure were abolished by the infamous 'reception clauses'[109] and replaced with two dominant traditions, Common law and Civil law, that continue to prevail today. In the generic and globular sense, this may have some truth to it, but African jurisdictions are imprecise, debased or complex iterations of these traditions at best. More importantly, comparing African jurisdictions *inter se* is a much more fruitful, like-for-like comparison than solely adopting the proverbial *northbound-gaze*. This is especially because, as many comparative law scholars remind us, comparative law entails comparisons between *distinct* legal systems or traditions.[110] Therefore, comparisons between different iterations of the same 'legal family,' for example comparing criminal justice systems in France and Belgium or Australia and England and Wales, seems to fall below the threshold of comparative law method.[111] Similarly, comparing, for example, Nigerian criminal process to England and Wales, will reveal no fundamental systemic differences.

[109] du Bois F and Visser D 'The influence of foreign law in South Africa' (2003) 13 *Transnational Law & Contemporary Problems* 593 at 599-600; Chanock M *The making of South African legal culture 1902 – 1936: Fear, favour and prejudice* (2000) 319; Bennett T.W 'Customary criminal law in the South African legal system' in Fenrich *et al* (eds) *The future of African customary law* 363 at 365; Read J.S 'Criminal law in the Africa of today and tomorrow' (1963) 7(1) *Journal of African Law* 5 at 5; Allot A.N 'The judicial ascertainment of customary law in British Africa' (1957) 20(3) *The Modern Law Review* 244 at 245; Allot A.N 'The extent of the operation of native customary law: Applicability and repugnancy' (1950) 2(3) *Journal of African Administration* 4; Taiwo E.A 'Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions – Some lessons for Nigeria' (2009) 34(1) *Journal for Juridical Science* 89.

[110] Zweigert and Kötz (note 102) 2.

[111] Ibid. See also Nelken D *Comparative criminal justice: Making sense of difference* (2010) 10. Cf. de Cruz (note 105) 20, where it is suggested that comparative method is possible between 'so-called developing countries' and 'Western or socialist law'.

As to the first of the two questions posed above, the type of comparative law method used in this thesis is tempered by Afrocentricism and by the specific purposes of this thesis. Comparison is undertaken here for the purposes of locating the type of theorising that occurs in this thesis within the correct context within the jurisdictional diversity of Africa. The argumentation schemes developed in Chapter 5 and applied in Chapter 6 are carefully crafted in qualified terms in relation to their application to various jurisdictions on the continent. Therefore, '[h]ere the comparison is not the central element of the comparative work.'[112] Comparative law method is rather deployed for instrumental purposes in this thesis. Örücü pertinently points out that '[t]he purposes or objectives of this method are what give comparative law meaning.'[113] An illustrative example here is Lacey's instrumental use of comparative law method for grander reform purposes.[114] Lacey's broader aim is to construct a link between the nature of the political economy of a country and the capacity, effectiveness and severity of its penal systems, yet she uses comparative method to analyse statistics of imprisonment rates in the United States and Europe in order to build her argument.[115]

[112] Örücü (note 27) 45.
[113] Ibid 46; Nelken (note 111) 9.
[114] See Lacey N *The prisoners' dilemma: Political economy and punishment in contemporary democracies* (2008).
[115] Ibid 115-6.

2.3 CONCLUSION

This chapter is a reflective discussion of the nature and motivations behind each of the methodological choices made in this thesis. These choices range from choosing theoretical over empirical methods; locating this theorising within the context of criminal trials; demarcating the particular regions and jurisdictions of Africa that will be focused upon, to deciding upon the nature of the intra- and inter comparisons made both within African jurisdictions and as compared to the French Civil law and English Common law traditions. The overall project of this thesis may be described as a *jurisprudential* study that develops *probative argumentation schemes* for the *direct crime* of witchcraft in *Nubian Africa*. Each of the emphasised phrases reflects a methodological choice or attitude that manifests in various ways in the remainder of the chapters of this thesis.

The reference to 'jurisprudence' implies that this project is *theoretical*, thereby distinguishing it from the many sociological and historical witchcraft-related studies that use empirical methods. Examples of such studies are mentioned in this chapter. Secondly, the kind of theorising that is undertaken in this thesis relates to the direct crime of witchcraft, and the evidence and proof of it in particular. This is why section 2.1.1 of this chapter is entitled '*criminal* jurisprudence.' Other theoretical features of this thesis include using models and concepts from argumentation theory, New Evidence Scholarship and criminal law theory, which includes moral philosophy.

The third methodological feature of the project of this thesis is its location within the complexity and diversity of African jurisdictions. To make sense of this at both procedural and substantive criminal law levels, an *Afrocentric* approach is adopted. This approach allows us to use indigenous concepts, for example, the notion of '*Nubian* Africa,' to demarcate our geographical focus. To the extent that there is jurisdictional diversity and complexity among the forty-six countries in this region we use applied comparative law method to enable us to use *tertium comparationis,* such as: our general model of criminal process in witchcraft trials (Chapter 3); qualified, yet generic, conceptions of intentionality and causation (Chapter 4); basic argumentation schemes that apply generally to legal proceedings and criminal trials (Chapters 5 and 6), to study witchcraft trials in a sensible way.

3. CHAPTER THREE: INSTITUTIONAL CONDITION – OVERVIEW OF AFRICAN CRIMINAL PROCESS

This chapter builds upon two methodological choices that were made in Chapter 2: firstly, that the project of this thesis would be geographically located in Nubian Africa and secondly, that the questions that this thesis grapples with fall within the broad and interdisciplinary subject area of criminal jurisprudence, incorporating both evidential and substantive law aspects. These two choices implicate a diverse array of legal and non-legal voices within a complex and multi-jurisdictional geography. In addition to this context-sensitive methodological milieu, further institutional complexity is brought about by the fact that the legal heritage of the forty-six countries in Nubian Africa is polarised in that at least sixteen, mainly in west and central Africa, have French legal heritage and about the same number of countries have Common law roots.[1] Therefore, the manner in which evidential proof is understood and applied in these varying contexts will be variable owing to the peculiar institutional features that are prevalent in each circumstance. It is to these institutional features that this chapter is addressed. In particular, the first of our three sub-questions flowing from the main thesis question: *what is the institutional context within which*

[1] Botswana, Gambia, Ghana, Kenya, Losotho, Liberia, Malawi, Malaysia, Mauritius, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe are examples of African countries with criminal procedural systems that originate from the Common Law tradition. Benin, Burkina Faso, Burundi, Central African Republic, Chad, Congo, Côte d'Ivoire, Gabon, Guinea-Bissau, Madagascar, Mali, Niger, Rwanda, Senegal and Togo are all examples of countries with French legal (procedural) heritage, See Mahoney P.G 'The Common law and economic growth: Hayek might be right' (2001) 30(2) *Journal of Legal Studies* 503 at 524 (Appendix A); Wekerle A 'Modern African criminal law and procedure codes' (1978) 35(4) *The Quarterly Journal of the Library of Congress* 282.

witchcraft cases are heard in Africa? The institutional diversity of African jurisdictions means that the answer to this question will be varied and complicated.

This institutional context is explained in two ways by this chapter: first, the procedural systems of Nubian African jurisdictions are collectively classified as being *sui generis*, as opposed to the conventional classifications between 'Common law' and 'Continental' (sometimes also referred to as 'adversarial' and 'inquisitorial'), and thereafter, a brief outline of the model procedure that is followed in witchcraft cases is set out. Secondly, the institutional practices that concern the admission, testing and evaluation of evidence in Africa's jurisdictions is analysed with a view of contending ultimately that theorising about evidence and proof using Wigmorean analysis generally is compatible with African jurisdictions despite some of their systemic differences. In this way, Chapter 3 contributes towards the overall argument made in this thesis by establishing the institutional component of the three-part antecedent upon the *plausibility* of which the evidential proof of the direct crime of witchcraft partly depends.

3.1 BROAD PROCEDURAL CLASSIFICATIONS

3.1.1 SUI GENERIS NUBIAN AFRICAN PROCEDURAL SYSTEMS

African scholars commonly describe their procedural systems as being either 'adversarial' (or 'Common law') or 'inquisitorial' (or 'Civil law') (collectively, 'A-I systems'):

> In most countries, including Rwanda, the administration of criminal justice follows one of two models: the accusatorial (also called adversarial) model and the inquisitorial model. While the former is the model of the Anglo-American countries, i.e. the Common Law world, the latter can be found on the European continent, i.e. Civil Law countries. As a result of colonisation, these two models of criminal procedure were also exported into Africa, Asia and South America.[2]

For purposes of this thesis, Nubian African jurisdictions are characterised currently as being *sui generis* as they continue to develop and eventually mature into a form that is not a mere replica of European practices. There are at least four problems that make these conventional classifications difficult to apply to contemporary African systems of procedure.

Firstly, A-I systems, since their inception in 11th century Europe (much of which was then known as Germania), were never rigidly or inflexibly defined, nor were they easily and always distinguishable. Their broad classifications were understood as impure and idealised caricatures of systems that had many

[2] Kayitana E 'The accusatorial and inquisitorial models of criminal procedure: A historical and comparative approach' (2019) 3(2) *African Journal of Law and Human Rights* 187 at 187; Herrmann J 'Various Models of Criminal Proceedings' 2(1) *South African Journal of Criminal Law and Criminology* (1978) 3; Joireman S.F 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' (2001) 39(4) *The Journal of Modern African Studies* 571; Harms L.T.C 'Demystification of the inquisitorial system' (2011) 14(5) *Potchefstroom Electronic Law Journal* 1; Ogbuabor C.A 'Inquisitorial and adversarial process in Nigeria's criminal justice system: The dilemma of a colonized state' (2015) 38(2) *University of Western Australia Law Review* 175.

similarities and anomalies.[3] For example, even during the catalytic Norman Conquest of England in 1066, the Duke William of Normandy did not implement a wholesale substitution of Anglo-Saxon procedure for French (or, rather, Norman) procedure. He rather replaced trials by ordeal, after they had been banned by Pope Innocent III of the Fourth Lateran Council in 1215, with trials by battle.[4]

Secondly, traditional A-I systems in modern Europe are increasingly becoming antiquated (at least in their orthodox sense), as many procedural theorists have observed either that they are gradually *converging*[5] or that they are undergoing *realignment*.[6] These changes have been precipitated largely by the human rights jurisprudence of the European Court of Human Rights:

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[3] Goldstein A.S 'Reflections on two models: Inquisitorial themes in American criminal procedure' (1974) 26(5) *Stanford Law Review* 1009 at 1019. According to Damaška, '[i]n the twelfth century the dichotomy was already in use to distinguish a process that required the impetus of a private complainant to get under way (*processus per accusationem*) from a process that could be launched in his absence (*processus per inquisitorium*), see Damaška M.R *The faces of justice and state authority: A comparative approach to the legal process* (1986) 3.

[4] Jones M and Johnstone P *History of criminal justice* 5th ed (2015) 47-50. This particular era, together with these specific events, historically have been regarded as the 'progenitors' of the transition from a procedurally uniform ancient Germania to the split between the Civil law and Common law traditions, see Glendon M.A *et al Comparative legal traditions: Text, materials and cases on the Civil and Common law traditions, with special reference to French, German, English and European law* 2nd ed (1994) 438.

[5] Markesinis B.S 'Learning from Europe and learning in Europe' in Markesinis (ed) *The gradual convergence: Foreign ideas, foreign influences, and English law on the eve of the 21st century* (1994) 1 at 30; Hermida J 'Convergence of civil law and common law in the criminal theory realm' (2005) 13(1) *University of Miami International & Comparative Law Review* 163; Merryman J.H 'on the convergence (and divergence) of the Civil law and the Common law' (1981) 17(2) *Stanford Journal of International Law* 357. Cf. Legrand P 'European legal systems are not converging' (1996) 45(1) *International & Comparative Law Quarterly* 52; Damaška M 'The uncertain fate of evidentiary transplants: Anglo-American and Continental experiments' (1997) 45 *American Journal of Comparative Law* 839; Jackson J.D 'Common law Evidence and the Common law of Human Rights: Towards a harmonic convergence' (2019) 27(3) *William & Mary Bill of Rights Journal* 689.

[6] Jackson J.D 'The effect of Human Rights on criminal evidentiary processes: Towards convergence, divergence or realignment?' (2005) 68(5) *Modern Law Review* 737 at 739-740. On the hybridisation of Common Law and Continental procedural systems at public international law level, see Jackson J 'Transnational faces of justice: Two attempts to build common standards beyond national boundaries' in Jackson *et al* (eds) *Crime, procedure and evidence in a comparative and international context: Essays in honour of Professor Mirjan Damaška* (2008) 221; Delmas-Marty M 'Reflections on the hybridisation of criminal procedure' in Jackson *et al* (eds) *Crime, procedure and evidence in a comparative and international context: Essays in honour of Professor Mirjan Damaška* (2008) 251.

> An analysis of the case law of the European Commission and ECtHR and of the HRC shows that the human rights bodies have been steadily developing a model of proof which requires none of these traditionally adversarial features to be adopted. Although the ECtHR has referred to 'adversarial' rights, the model of proof that has been developed is better characterised as 'participatory' than 'adversarial' or 'inquisitorial'. Contracting parties are being forced to realign their processes and procedures, and indeed the attitudes of the professional actors concerned must adapt, to meet the standards of fairness that this model entails.[7]

Furthermore, the ECtHR has been critical of the predominance of professional judges in Continental trials, whereas the privatisation of fact-finding in the hands of the *contesting* litigants arguing before a passive fact-finder has also been problematised.[8] Continued references to African procedural systems using the traditional nomenclature of A-I systems despite them being criticised and regarded as being antiquated, at least in their traditional form, in contemporary Europe, at least calls for some stronger justification in my view.

The third reason why the characterisation of African procedural systems in the traditional form of A-I systems is problematic relates to the fact that most so-called adversarial jurisdictions, such as Nigeria, Kenya, Tanzania, Uganda, South Africa and Zimbabwe, do not have juries,[9] while so-called francophone

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[7] Jackson J.D and Summers S.J *The internationalization of criminal evidence: Beyond the common law and Civil law traditions* (2012) 131-2.

[8] Ibid 130.

[9] A few exceptions that continue to use juries in exceptional serious criminal cases only are Gambia, Ghana, Malawi and Mauritius. Some of the reasons for the abolishing of juries in Africa are inter-racial biases, certain cases being far too complicated for lay adjudication, excessive abuses of technical defences and objections by counsel and the danger of jurors being too easily corruptible outside court, see Knox-Mawer R 'The jury system in British colonial Africa' (1958) 2(3) *Journal of African Law* 160 at 160-1; Mittlebeeler E.V 'Race and jury in South Africa' (1968) 14 *Howard Law Journal* 90. More generally, see Gobert J *Justice, democracy and the jury* (1997) Ch 3; Jackson J.D 'Making juries accountable' (2002) 50 *The American Journal of Comparative Law* 477. Cf. Redmayne M 'Theorising jury reform' in Duff *et al* (eds) *Trial on Trial: Judgment and calling to account* vol 2 (2006) 99.

inquisitorial jurisdictions, Cameroon, Chad, Senegal, Benin and Burkina Faso, have no mixed benches incorporating either lay juries or assessors.[10] This is yet another indication that fact-finding in Africa does not fit neatly into the traditional classifications of A-I systems.

The fourth, and most important, reason why orthodox A-I classifications inaccurately capture contemporary Africa procedural systems has to do with the complicated prevalence of African customary law on the continent. Approximately 90% of Africa's population is reported to be regularly litigating in traditional courts that apply customary law.[11] Therefore, anybody that classifies African procedural systems using orthodox A-I classifications would be referring to about 10% of the continent. However, there are further complexities about African customary procedures themselves. Rakate[12] and Ludsin[13] describe them as resembling an 'inquisitorial' procedure that is

[10] Ramesh D *Trial by jury: Social and psychological dynamics* (1985) 18-9; Vidmar N 'Juries and lay assessors in the commonwealth: A contemporary survey' (2002) 13(4) *Criminal Law Forum* 385 at 392-6. Juries were initially introduced into African jurisdictions starting with Nigeria in 1865, see Vidmar N *World Jury Systems* (2000) 424-5; Jearey J.H 'Trial by jury and trial with the aid of assessors in the superior courts of British African territories: II' (1961) 5(1) *Journal of African Law* 36 at 38-43; Vogler R *A world view of criminal justice* (2005) 225; Spiller P.R 'The jury system in early Natal (1846 – 1874)' (1987) 8(2) *The Journal of Legal History* 129 at 129.

[11] Bwire B 'Integration of African customary legal concepts into modern law: Restorative justice – A Kenyan example' (2019) 9(1) *Societies* 17 at 19. A similar estimation was given in the 1960s too: Read J.S *Criminal law in the Africa of today and tomorrow* (1963) 7(1) *African Law Journal* 5 at 16. Cf. Mnisi-Weeks S *Access to justice and human security: Cultural contradictions in rural South Africa* (2018) 43-4, where an empirical study approximates that 42% of South Africa's population (between 16 and 21 million people) litigate in traditional courts.

[12] Rakate P.K 'The status of traditional courts under the final constitution' (1997) 30 *Comparative & International Law Journal of Southern Africa* 175 at 180.

[13] Ludsin H 'Cultural denial: What South Africa's treatment of witchcraft says for the future of its customary law' (2012) 21(1) *Berkeley Journal of International Law* 63 at 70-1. Similarly, Goredema characterises African customary criminal process as one of 'free proof' without any exclusionary rules or, quite frankly, any other formalities (for example, witnesses having to testify under oath) that are found in common law contexts: Goredema C 'Criminal justice and the truth in Zimbabwe: A necessary introspection' (1999) 12(2) *South African Journal of Criminal Justice* 155 at 177.

dominated by questioning from the presiding local chief or headman. This characterisation is problematic for three reasons: customary law does not, as A-I systems do, formally distinguish between criminal and civil cases,[14] and even if such distinction did exist informally,[15] criminal jurisdiction to a *very large extent* has been usurped from traditional courts by state courts.[16] However, because no formal distinction exists between criminal and civil matters at customary law, empirical studies have revealed that many traditional courts continue to hear matters that are otherwise characterised as being criminal.[17] Thirdly, the characterisation of African customary procedure as being 'inquisitorial' is problematic because fact-finders under such systems, unlike European

[14] Dundas C 'The organization and laws of the some Bantu tribes' (1915) 45 *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* 234 at 262; Labuschagne J.M.T and Van den Heever J.A 'Die oorsprong van en die onderskeid tussen die fenomene misdaad en delik in primigene regstelsels' (1991) *Obiter* 80; Labuschagne J.M.T and Van den Heever J.A 'Liability arising from the killing of a fellow human being in South African indigenous law' (1995) 28(3) *Comparative and International Law Journal of Southern Africa* 422 at 422; Bennett T.W 'Customary criminal law in the South African legal system' in Fenrich *et al* (eds) *The future of African customary law* 363 at 380-1.

[15] Gluckman M *The ideas in Barotse jurisprudence* (1965) 205 and 234; Rattray R.S *Ashanti law and constitution* (1929) 142; Schapera I *A handbook of Tswana law and custom* 2nd ed (1955) 257; Mwansa K.T 'The status of African customary criminal law and justice under the received English criminal law in Zambia: A case for the integration of the two systems' (1986) 4 *Zimbabwe Law Review* 23 at 25; Elias T.O *The nature of African customary law* (1956) 142.

[16] Ibidapo-Obe A 'The dilemma of African criminal law: Tradition versus modernity' (1992) 19(2) *Southern University Law Review* 327 at 352. For example, see *Aoko v Fagbemi* (1961) 1 All NLR 400; (Nigeria); *Omuju v Federal Republic of Nigeria* (2008) LPELR-264 (SC) 18 (Nigeria); Anyangwe C 'The whittling away of African legal and judicial system' (1998) *Zambia Law Journal* 46 at 54 (Francophone jurisdictions). Section 20(1) of the Black Administration Act 38 of 1927 limits the criminal jurisdiction of customary law courts, as conferred by the Minister of Justice and Constitutional Development, in South Africa to specified minor offences. Similarly, see *Kusema v Shamwa* 2003 (1) ZLR 395 (H) 398 (Zimbabwe); Goredema (note 13) 177 (Zimbabwe); *R v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR at 19 (Kenya); Bierwagen R.M and Peter C.M 'Administration of justice in Tanzania and Zanzibar' (1989) 38(2) *The International and Comparative Law Quarterly* 395 at 399-407.

[17] For example, in South Africa Mnisi-Weeks notes that '[i]n 2011, the Police recorded 47 murder cases, 31 attempts and eight cases of culpable homicide. In 2012, they recorded 29 cases of murder, 40 of attempts and 15 culpable homicides,' (Mnisi-Weeks S *Access to justice and human security: Cultural contradictions in rural South Africa* (2018) 92, n11). See also Mnisi-Weeks S 'Beyond the Traditional courts bill: Regulating customary courts in line with living customary law and the Constitution' (2011) 35 *South African Crime Quarterly* 31; Gasa N 'The Traditional courts bill: A silent coup?' (2011) 35 *South African Crime Quarterly* 23.

jurisdictions where fact-finders enjoy a particular form of structural independence, also perform executive and legislative functions.[18]

The four reasons indicated above present significant difficulties for the application of A-I classifications to contemporary African jurisdictions. It is also appreciated that the development of African procedural practices remains nascent compared to Europe and thus any general classification is likely to be premature. For purposes of this thesis, however, the African criminal procedure that is applicable to witchcraft cases is characterised for the moment as being *complex*, and therefore, *sui generis*, as it develops and attains its own unique identity.

3.1.2 A BRIEF MODEL OF NUBIAN AFRICAN CRIMINAL PROCESS IN WITCHCRAFT CASES

In the majority of cases, the criminal process is initiated through a complaint being laid at a local chief or headman.[19] These complaints may also be laid with state police officials for people that litigate in state courts, as opposed to traditional courts.[20] Depending on the seriousness of the facts surrounding the

[18] Rakate (note 12) 180. See also *Bangindawo v Head of the Nynada regional authority; Hlantlalala v Head of Western Tembuland regional authority* 1998 (3) SA 262 (Tk) 271-4; *Mhlekwa v Head of Tembuland regional authority; Feni v Head of Western Tembuland regional authority* 2001 (1) SA 574 (Tk) 616-7.

[19] Ludsin (note 13) 84; *S v Ndhlovu* 1971 (1) SA 27 (RA) 28E-F; *Patrick Tuva Mwanengu v Republic,* Cr. App. No. 272 of 2006 (Mombasa) 5.

[20] On the initiation of criminal process in general, see Campbell L *et al The criminal process* 5th ed (2019) 2-3; Roberts P *et al* 'Introduction: Re-examining criminal process through the lens of integrity' in Hunter *et al The Integrity of Criminal Process: From theory into practice* (2016) 1, where 'criminal process' is defined as 'roughly speaking, the institutions, procedures and practices constituting official responses to suspected criminal wrongdoing, encompassing criminal investigations, prosecutions, trials, appeals and extraordinary post-conviction procedures.' See also Sila M *Mondern law of criminal procedure in Kenya* (2014) 33; Joubert (ed) *Criminal Procedure Handbook* 10th ed (2011) 103ff. Cf. Yakubu J.A and Oyewo A.T *Criminal law and procedure in Nigeria* (2000) 218ff, where the criminal procedure section commences the discussion at the point of the charging of the accused.

witchcraft complaint, the nature of the evidence offered and the extent to which the accused is tied to the community concerned, an arrest may be effected either by the *gendarmerie* in francophone jurisdictions[21] or the state police in anglophone jurisdictions.[22] A preliminary investigation can take either one of two forms: the local chief or headman may convene a *Dare* or *Inkundla*[23] (preliminary hearing) within which they instruct a trusted traditional healer to conduct a village *Palaver*.[24] Once the traditional healer returns their findings, the suspect may be charged, if the said findings are against them, and asked to plead. The second form that this preliminary investigation may take is the conventional pre-trial procedure of state courts. For both francophone[25] and anglophone[26] jurisdictions,

[21] Bagayoko N 'Security systems in Francophone and Anglophone Africa' (2012) 43(4) *IDS Bulletin* 63 at 69. Cf. Vogler R *France: A guide to the French criminal justice system* (1989) 24; McKillop B *Anatomy of a French murder case* (1997) 4-5.

[22] Most anglophone jurisdictions in Africa have centralised police forces, see Bwonwong'a M *Procedures in criminal law in Kenya* (1994) 60; Auerbach J.N 'Police accountability in Kenya' (2003) 3(2) *African Human Rights Law Journal* 275 at 312; Ekpenyong R.A 'Nigeria' in Cole *et al* (eds) *Major Criminal Justice Systems: A comparative Survey* 2nd ed (1987) 71 at 76. By contrast, the dececentralised police force of England and Wales has about 43 separate local police forces, see White R.C.A 'The structure and organization of criminal justice in England and Wales: An overview' in McConville and Wilson (eds) *The Handbook of Criminal Justice Process* (2002) 5 at 7-8. For example, there is no single piece of legislation regulating the composition and functions of the police similar to the legislation in Anglophone African jurisdictions. Instead, various pieces of legislation regulate the investigative powers of the police: Part 1 and Code A of the Police and Criminal Evidence Act of 1984; section 139B of the Criminal Justice Act 1988; section 60 of the Criminal Justice and Public Order Act 1994. Furthermore, the Police Act of 1997 creates specialised crime fighting units such as the National Crime Squad and the National Criminal Information Service.

[23] Sibanda S 'An analysis of traditional leadership, customary law and access to justice in Zimbabwe's constitutional framework', *Final papers of the 2016 National symposium on the promise of the declaration of the right under the Constitution of Zimbabwe* (2016) 53 at 57, available at: zimlii.org (accessed: 28 October 2019); Chigwata T 'The role of traditional leaders in Zimbabwe: Are they still relevant?' (2016) 20 *Law, Democracy & Development* 70; Bennett T.W 'The application of customary law and the common law in Zimbabwe' (1981) 30(1) *The International and Comparative Law Quarterly* 59.

[24] Fisiy C.F *Palm tree justice in the Bertoua Court of Appeal: The witchcraft cases* (1990) 13. Ludsin refers to this as the 'divination procedure,' see Ludsin (note 13) 84.

[25] Tabetabe S 'A look at preliminary inquiry under the Cameroon Criminal Procedure Code' in Sone (ed) *Readings in the Cameroon Criminal Procedure Code* (2007) 49 at 54; Criminal Procedure Code, Law No. 2005/007, section 150(1). Dervieux says that the French *juge d'instruction* holds a 'double role', *qua* 'investigator' and 'judge', see Dervieux V 'The French system' in Delmas-Marty and Spencer (eds) *European Criminal Procedure* (2002) 218 at 229.

[26] Geldenhuys T 'Pre-trial examinations' in Joubert (ed) *Criminal Procedure Handbook* 10th ed (2011) 195 at 199. Orthodox Common law 'committal proceedings' have 'gradually declined' in England and Wales (Spencer J.R 'The English system' in Delmas-Marty and Spencer (eds) *European Criminal Procedure* (2002) 142 at 177) and

this formal pre-trial procedure performs the main functions of gathering and filtering evidence in order to distinguish cases that are ripe for trial from those that are not. In general, cases in state courts proceed to trial only if the prosecution's evidence is sufficient to make out a *prima facie* case.[27] This filtering process of cases is undertaken in customary-law *Dares* and state-court pre-trial proceedings. The only material difference is that traditional courts largely use traditional healers for a preliminary finding, whereas this type of witness typically is not used in state courts.

Once it is decided that the case is ripe for trial, traditional courts convene a second *Dare,*[28] whereas a *dossier*, containing the evidence adduced before the *juge d'instruction*, is delivered to the francophone trial judge[29] and the anglophone docket remains with the prosecution, who would have at least shared with the accused some of the evidence, including the list of witnesses, that is intended to be presented at trial. The question of jurisdiction usually does not arise in traditional courts because there is almost invariably one local chief or headman responsible for deciding all the cases in the community, whereas there

almost completely non-existent in Anglophone Africa. One of the main reasons for the latter is that the holding of a 'preparatory examination' is discretionary (section 123 of the Criminal Procedure Act 51 of 1977 (South Africa)) and thus there can be no 'committal' at the end of the proceedings. However, pre-trial procedure is not by any means uniform in Anglophone Africa. For example, Tanzania (sections 243-251 of the Criminal Procedure Act [Cap 20 of the Laws of the United Republic of Tanzania, 1985]) and Zimbabwe (section 65 of the Criminal Procedure and Evidence Act [Cap 9:07 of the Laws of Zimbabwe, 1927]) continue to have 'committal proceedings', whereas Kenya has since 2003 abolished sections 230-260, dealing with 'committal proceedings', of its Criminal Procedure Code (See Criminal Law (Amendment) Act, Act no. 5 of 2003).

[27] Tabetabe (note 25) 54-5.

[28] *Ndhlovu supra* 28E-F.

[29] Criminal Procedure Code, Law No. 2005/007 of 2005, section 256(5) (Cameroon). Cf. *Code de Procédure Pénale* (2005), art 175.

are many different state courts that exercise jurisdiction over different geographic areas of the continent. In general, subordinate courts equivalent to anglophone Magistrates' courts will have jurisdiction to hear matters involving the direct crime of witchcraft. The only exception to this is in east Africa where such cases may only be heard *a quo* by the High Court, which is the functional equivalent of the English Crown Court or the French *Cour d'Assises*.

In Cameroon the *tribunal de premiere instance* has jurisdiction to hear *contraventions* and *délits*, and may not impose a sentence exceeding a fine of 5 000 000 CFA francs and five years imprisonment.[30] The direct crime of witchcraft falls within this court's jurisdiction because it is a *délit* punishable by imprisonment of between two to ten years and a fine ranging between 5000 to 100 000 CFA francs.[31] The position in anglophone Africa is somewhat more obscure. In theory, the adjudicatory institution that is vested with jurisdiction to hear cases involving the direct crime of witchcraft is the colonial relic called the 'District Commissioner.' With the exception of Zimbabwe, all witchcraft statutes

[30] Time V.M 'Legal pluralism and harmonization of law: An examination of the process of reception and adoption of both civil law and common law in Cameroon and their coexistence with indigenous laws' (2000) 24(1) *International Journal of Comparative and Applied Criminal Justice* 19 at 22. For the jurisdiction of the equivalent criminal chambers (*Tribunal de police*, 'police tribunal', and *Tribunal correctionnel*, 'correctional tribunal') of the *Tribunaux d'instance* and *Tribunaux de grande instance* in France, see Kublicki N.M 'An overview of the French legal system from an American perspective' (1994) 12(1) *Boston University International Law Journal* 57 at 61.

[31] See *Cameroun Code Pénal* n° 67/LF/1, section 251 where the *délit* of witchcraft is punishable with imprisonment for a period between two to ten years and with a fine of an amount between five thousand and one hundred thousand Cameroonian francs. In general, *délits* are those offences that are punishable by imprisonment for not less than ten days and not more than ten years and/or fine of more than twenty-five thousand Cameroonian francs, see Anyangwe C *Criminal law in Cameroon: Specific offences* (2011) ix.

in anglophone jurisdictions were written by British colonial governments that vested District Commissioners with powers to decide witchcraft cases:

> When it is reported to a District Commissioner that a person is suspected of practising witchcraft, the District Commissioner, after due inquiry and having satisfied himself that the person so suspected causes or is likely to cause fear, annoyance or injury in mind, person or property to any other person by means of pretended witchcraft, may for reasons to be recorded order the person so suspected to reside in any locality within his district to be named by the District Commissioner, and alternatively or in addition to report at the office of the District Commissioner every seven days or at longer intervals until further orders.[32]

However, throughout the continent, District Commissioners have been abolished.[33] The default position in Kenya under these circumstances is for the High Court to assume jurisdiction,[34] but everywhere else in anglophone Africa Magistrates' Courts have jurisdiction to hear prosecutions of the direct crime of witchcraft.[35]

Trials in traditional courts are similar to those in francophone jurisdictions in west and central Africa in that they span a duration that is much shorter than

[32] Witchcraft Act [Cap 67, of the Laws of the Republic of Kenya, 1925], section 9(1). Section 8 obliges, under threat of punitive sanction, any local chief to 'forthwith report' any witchcraft practices suspected or alleged to the District Commissioner. This jurisdictional practice is found in other jurisdictions in east Africa too, see Witchcraft Act [Cap 18, Laws of the United Republic of Tanzania, 1928].

[33] Bienen H *Kenya: The politics of participation and control* (1974) 40, n25.

[34] Criminal Procedure [Cap. 75, Revised Laws of Kenya, 2012], section 5. The English equivalent of a High Court exercising criminal jurisdiction is the Crown Court, which exercises both original and appellate jurisdiction, see Joyce P *Criminal justice: An introduction to crime and the criminal justice system* 3rd ed (2017) 286-7.

[35] This is particularly because the maximum sentence for the direct crime of witchcraft is five years imprisonment, which is well within the jurisdiction of Magistrates' Courts at a regional or 'provincial magistrate' level, see Magistrates' Courts Act 32 of 1944, section 92(a) (South Africa); Magistrates' Courts Act [Cap 7:10, Laws of Zimbabwe, 2003], section 49(3)-(4) (Zimbabwe). For the relevant Magistrates' Courts statutes in the various states of Nigeria's Federation, see Mwalimu C *The Nigerian Legal System: Public Law* vol 1 (2005) 344-5. In England and Wales, Magistrates' Courts, although they can try both 'summary offences' and so-called 'either way offences, their sentencing jurisdiction is significantly far less than that of equivalent courts in Africa. Magistrates' Courts in this particular jurisdiction are limited to imposing a maximum term of 12 months' imprisonment, see Joyce (note 34) 285.

anglophone trials, which in some cases can run for months, or even years. This largely is because the types of formal rules and procedure, such as exclusionary rules, (cross- and re-) examinations of witnesses, generally lengthy judgments and dilatory special pleas or objections, are simply non-existent in traditional and francophone trials. In fact, these types of trials commonly are described as 'audits' of the investigation conducted during the preliminary hearing.[36] However, this seemingly simplified and flexible procedure may well foster, as it has in Cameroonian cases that are criticised as being instances of 'palm tree justice,'[37] gross and undetectable miscarriages of justice in witchcraft cases in Africa. For instance, instances of torture, police brutality, coerced confessions, extra-curial corporal punishment and illegal searches and seizure are reported to be rife in customary-law contexts[38] and state-law cases in francophone jurisdictions.[39] Under these particular circumstances, transparent rules and procedures, akin to those used in anglophone state courts, may be helpful in so far as they are able to regulate institutional actors in the criminal process so that they are publicly accountable for their exercise of public or penal power.

Once a verdict has been reached, and a sentence has been passed, the unsuccessful litigant in a traditional court may appeal the verdict or sentence (or

[36] See Damaška (note 3) 224; Fisiy C and Geschiere P 'Domesticating Personal violence: Witchcraft, courts and confessions in Cameroon' (1994) 64(3) *Journal of the International African Institute* 323 at 328.
[37] Fisiy (note 24) 14.
[38] Mnisi-Weeks (note 17) 101.
[39] Fisiy C.F & Geschiere P 'Judges and witches, or how is the State to deal with witchcraft?' (1990) 30(118) *Cahiers d'Études Africaines* 135 at 136.

both) to a state superior court (that is, a court that is above subordinate courts of *first instance*).[40] If the accused is found guilty and no such appeal is made, local chiefs and headman generally do not have police forces nor prisons and thus the sentence usually imposed would be either in the form of compensation or the accused being banished from the village concerned.[41] Francophone appeals from the *Tribunal de première instance* to the *Cours d'appel* may be made on either questions of law or fact,[42] whereas this distinction is strictly preserved in anglophone jurisdictions by limiting permissible appeals to those of questions of law.[43]

The types of argumentation schemes developed in Chapter 5 and the portion of Wigmore's project associated with this thesis in Chapter 6, as it will be shown, is fully compatible with this broad procedural outline. That is to say that the argumentation schemes developed in this thesis may be applied by prosecutions in both state courts and traditional courts. The only difference, as the discussion in this chapter shows, will relate to the institutional actors, the type of court, procedural rules that are applicable and the nature of fact-finding processes. In either context, however, logic and argumentation is perfectly applicable. We will round off this chapter with a discussion on the specific

[40] For example, see *S v Ndhlovu* 1971 (1) SA 27 (RA); *Patrick Tuva Mwanengu v Republic,* Cr. App. No. 272 of 2006 (Mombasa).
[41] Driberg J.H 'The African conception of law' (1934) 16 *Journal of Comparative Legislation and International Law* 230 at 236-8; Elias (note 15) 65.
[42] Anyangwe C *Cameroonian judicial system* (1987) 166. Cf. Kublicki (note 30) 63-4.
[43] Kiage P *Essentials of criminal procedure in Kenya* (2010) 8.

evidential institutional practices that are currently prevalent in Nubian African jurisdictions. These practices largely have to do with the manner in which evidence is admitted, tested and evaluated.

3.2 NARROW EVIDENTIAL CLASSIFICATIONS

Not much has been written about evidentiary practices at customary-law level and this may be due to a number of reasons, including: the fact that no formal distinctions in this area are made between criminal and civil matters, much less between procedural and substantive law; any evidential practices or rules that are used would be informal, unwritten and used on an *ad hoc* basis. Under these circumstances, it may be tempting to assume that no evidential practices of any form exist at customary law:

> [C]riminal proceedings in traditional courts in Transkei (as in most African countries) were inquisitorial and not adversarial in nature, and there were no exclusionary rules of evidence. Insofar as it can be said that there was a 'traditional' or 'customary' law of evidence, that law allowed all evidence tendered to be admitted, and it was for the tribunal to decide what weight, if any, should be attached to each item of evidence.[44]

It would be false, however, to make such an assumption, as traditional fact-finders do indeed test and evaluate evidence, although this may be through procedures that may be unfamiliar to jurists that are trained or participate in state-law practices. In general, the following practices have been observed in traditional court cases: witnesses testify under oath, no part of the proceedings, including the

[44] *S v Kwaza* 1992 (2) SACR 336 (Tk) 339C.

adduction of evidence, is written or documented; none of the parties are represented and traditional healers commonly testify as expert witnesses without any admissibility objections or challenges.[45]

The evidential practices of state-law courts, however, are comparatively far more sophisticated and complex than those at customary law. In general, they may be traced either to James Fitzjames Stephen in anglophone jurisdictions or to the Napoleonic codes of 1810 in francophone west and central Africa. The main historical authoritative source of anglophone evidential practices in Africa is Stephen's Indian Evidence Act of 1872:

> In other English-speaking jurisdictions there is the Indian Evidence Act of 1872 drafted by Sir James Fitzjames Stephen, with little amendment after more than 90 years, the law of evidence in India, Pakistan, Burma, Ceylon, Nigeria, Kenya, Uganda, and Grenada, countries representing one-quarter of the world's present population.[46]

Of the five Napoleonic codes, the evidential practices of francophone jurisdictions in Africa are traceable back to the *Code d'instruction criminelle* of 1810:

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[45] Koyana D.S *et al* 'Traditional authority courts' in Rautenbach *et al Introduction to Legal Pluralism* 3rd ed (2010) 171 at 179-180; Bekker J.C and Rautenbach C 'Nature and sphere of application of African customary law in South Africa' in Rautenbach *et al Introduction to Legal Pluralism* 3rd ed (2010) 15 at 29. For example, in *Mabuza v Mbatha* an expert witness was used to testify about the indigenous practice of *ukumekeza*: *Mabuza v Mbatha* 2003 (4) SA 218 (C).

[46] Miller H.B 'Beyond the law of evidence' (1966) 40(1) *Southern California Law Review* 1 at 3 (footnotes omitted); Massawe A.A.F *The burden of proof: How to defend yourself in criminal cases* (2000) 116; Allen R *et al* 'Reforming the law of evidence of Tanzania (Part one): The social and legal challenges' (2013) 31(1) *Boston University International Law Journal* 217; Morris H.F *Evidence in East Africa* (1968) 1 – 23; Aguda T.A *The law of evidence in Nigeria* 3rd ed (1989) 3; Adangor Z 'What is innovative in the Evidence Act, 2011?' (2015) 43 *Journal of Law, Policy and Globalisation* 34; Adah C.E *The Nigerian law of evidence* (1997) 3. South Africa's evidence statutes are traced back to the common law-inspired Cape Evidence Ordinance of 1830: Bellengère A *et al* (eds) *The law of evidence in South Africa* (2013) 5-6.

> The legal systems of nineteen sub-Saharan African countries are derived primarily from the continental or civil law system of the Napoleonic Codes that were introduced into former French, Belgian, and Italian territories and protectorates.[47]

From Stephen, there are three major common law inheritances that African anglophone jurisdictions received and continue to apply today. These are the classification of procedural law in bifurcated terms; a three-part classification of the Law of Evidence; and a trans-substantive Law of Evidence.

To take the first of these, Stephen articulated his conception of procedural law in bifurcated terms:

> The law of procedure includes, amongst others, two main branches – (1) the law of pleading, which determines what in particular cases are the questions in dispute between the parties, and (2) the law of evidence, which determines how the parties are to convince the court of the existence of that state of facts which, according to the provisions of substantive law, would establish the existence of the right or liability which they allege to exist.[48]

Procedural law is conceived of in similar bifurcated terms, distinguishing between a specialised discipline called the 'Law of Evidence' that is a subset of

[47] Wekerle A 'Modern African criminal law and procedure codes' (1978) 35(4) *The Quarterly Journal of the Library of Congress* 282 at 282. There are five 'Napoleonic Codes' (*Les Cinq Codes*): the *Code Civile* (1804), the *Code de procédure civile* (1807), the *Code de commerce* (1803), the *Code d'instruction criminelle* (1809), and the *Code pénal* (1811), see Gergen T 'The reception of the Code Civil (Napoléonic Code) of 1804: An example of "juridical migration"?' (2014) 1 *Journal of European History of Law* 26 at 27. The last of these two codes were initially introduced into Senegal, through the decree of 6 March 1877, and later extended on a piecemeal basis by passing several further decrees (1892 - 1924) to other francophone jurisdictions in west and central Africa, see Salacuse J.W *An introduction to law in French-speaking Africa* vol I (1969) 22-3; Fuashi N.T 'Statehood and the law-making process in Cameroon: From bifurcation to unification' (2012) 18(2) *Fundamina: A journal of Legal History* 59 at 67; Munzu S.A 'Cameroon's search for a uniform legal system: The example of criminal justice' (1989) 1(1) *African Journal of International and Comparative Law* 46 at 50; Tabetabe (note 25) 50, n3.

[48] Stephen J.F *The Indian Evidence Act (I of 1872): With an introduction on the principles of judicial evidence* (1872) 8.

a broader 'Procedural law,' in anglophone jurisdictions in Africa.[49] The fact that the Law of Evidence is an artefact of the common law often is unnoticeable until an anglophone lawyer spends time in a foreign jurisdiction:

> At once, when a man raises his eyes from the common-law system of evidence, and looks at foreign methods, he is struck with the fact that our system is radically peculiar. Here, a great mass of evidential matter, logically important and probative, is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else. English-speaking countries have what we call a "Law of Evidence;" but no other country has it; we alone have generated and evolved this large, elaborate, and difficult doctrine. We have done it, not by direct legislation, but, almost wholly, by the slowly accumulated rulings of judges, made in the trying of causes, during the last two or three centuries, — rulings which at first were not preserved in print, but in the practice and tradition of the trial courts; and only during the last half or two-thirds of this period have they been revised, reasoned upon, and generalized by the courts *in banc*.[50]

The Law of Evidence is offered invariably as a compulsory course at both undergraduate and vocational training levels throughout anglophone jurisdictions in Africa.[51] In contrast, the curricular of law schools in Senegal, Cameroon, Benin, Burkina Faso and other francophone jurisdictions does not contain a course called the 'Law of Evidence.' Although francophone lawyers indeed are

[49] For instance, Zimbabwe's Evidence statute is entitled 'Criminal Procedure *and* Evidence Act' [CAP 9:07]. On general 'Criminal Procedure,' see *Joubert JJ* (ed) *Criminal procedure handbook* 10th ed (2011); Reid R.J *Criminal procedure in Zimbabwe* (1997); Mchome S.E *Criminal law and procedure* (1995); Kiage (note 43); Osamor B *Fundamentals of criminal procedure law in Nigeria* (2004). On the more specialised, 'Law of Evidence,' see Mbobu K *The law and practice of evidence in Kenya* 2nd ed (2016); Tobi N *A case book on the law of evidence* (2002); Schwikkard P.J and Van der Merwe S.E *Principles of evidence* 4th ed (2016).

[50] Thayer J.B *Preliminary treatise on evidence at common law* (1898) 1-2.

[51] Manteaw S.O 'Legal education in Africa: What type of lawyer does Africa need?' (2008) 39(4) *McGeorge Law Review* 903; Ndulo M 'Legal education in Africa in the era of globalisation and structural adjustment' (2002) 20(3) *Pennsylvania State International Law Review* 487 at 491-2. By contrast, the Law of Evidence is no longer a compulsory course in law schools in England and Wales, see Roberts P 'The priority of procedure and the neglect of evidence and proof: Facing facts in international criminal law' (2015) 13 *International Journal of Criminal Justice* 479 at 481.

trained 'to sift evidence,' 'to assess the weight of conflicting evidence,' 'to elicit the facts of a case by examination and cross-examination,' and 'to marshall and present arguments,' this is all usually done at a post-university professional or vocational level as part of a general 'Procedural law' subject.[52] The same pedagogic point applies to most other law schools in 'Continental' jurisdictions.[53] In fact, it would be fair to say that something called the 'Law of Evidence,' including all the associated literature by Wigmore, Thayer, Stephen and others, largely is unfamiliar to most Civilian lawyers across the world.[54] However, as with African customary law, the non-existence of a subject called the 'Law of Evidence' in Civilian jurisdictions does not mean that there are no systematic procedures for the admission, testing and evaluation of evidence in these jurisdictions. What is closer to the truth is that there are such evidential practices, but that they are known under different terminology, analysed using different concepts and applied in somewhat different ways.[55]

The second common law inheritance from Stephen is a three-part classification of the Law of Evidence:

> Thus in general terms the law of evidence consists of provisions upon the following subjects:
>
> (1) The relevancy of facts.

[52] See Anyangwe C *The magistracy and the bar in Cameroon* (1989) 144, also 125-135 and 197-210.
[53] Nijboer J.F 'Common law tradition in Evidence scholarship observed from a Continental perspective' (1993) 41(2) *The American Journal of Comparative law* 299 at 316.
[54] Ibid 318.
[55] Damaška M.R 'Evidentiary barriers to conviction and two models of criminal procedure: A comparative study' (1973) 121(3) *University of Pennsylvania Law Review* 507 at 516.

(2) The proof of facts.

(3) The production of proof of relevant facts.

The foregoing observations show that this account of the matter is exhaustive. For if we assume that a fact is known to be relevant, and that its existence is duly proved, the Court is in a position to go on to say how it affects the existence, nature, or extent of the right or liability, the ascertainment of which is the ultimate object of the inquiry, and that is all that the Court has to do.[56]

Stephen's Digest is structured in virtually identical terms: articles 1 – 57 ('Relevancy'); 58 – 92 ('On proof'); and 93 – 143 ('Production and effect of evidence').[57] This three-part conception of this particular subject is commonly used in Evidence law textbooks in African anglophone jurisdictions. Civilian jurisdictions have roots in the classical Roman canon of legal proof, which had 'reasoning rules' that are similar to those in common law jurisdictions. However, this all changed after the French Revolution in the early 19th century.[58] From this period to date, Civilian jurisdictions follow a system of 'free proof,' and it is this particular system that was implanted, and continues to apply, in west and central Africa:

[56] Stephen (note 48) 9.

[57] Interestingly, notwithstanding his usage of potentially misleading titles for his headings, Stephen means something far more doctrinal under each heading: in Part I ('On Relevancy'), Stephen discusses rules of admissibility, including the infamous 'exclusionary rules' and 'relevance criterion'. Part II is titled 'On proof,' but it actually contains a discussion on formal mechanisms of adducing evidence, particularly rules on how to ensure the authenticity or credibility and reliability of documents and witness testimony. In the last part, Stephen gives a thorough exposition of burdens of proof and the applicable standard of proof used to assess the weight of admitted evidence.

[58] See Damaška M.R *Evaluation of evidence: Premodern and modern approaches* (2019) 125.

> The validity of proof was to be left to the legally unconstrained judgment of the trier of fact - to his *conviction intime*. Rules of weight, including rules of corroboration, were thus gradually eliminated from evidence law.[59]

The standard of proof is the only formal prescript that applies in a similar way in common law jurisdictions.[60] The *conviction intime* standard was developed originally by Cesare Beccaria (*An essay on crimes and punishments* (1764)), the Italian jurist, and then later reframed to be *conviction raisonnée* in Continental Europe.[61] Sometimes, 'the principle of freedom of evidence' is understood to mean that 'all forms of evidence are *a priori* admissible, with just a few exceptions,'[62] but this should not be taken too literally, or in any strong sense of 'free proof,' as the freedom of 'Continental' judges to evaluate evidence is circumscribed in a number of respects, including by statutory provisions that prohibit the drawing of certain inferences, the admission of certain types of evidence or the presentation of evidence in certain inappropriate ways.[63] An important constraint, for purposes of this thesis, on this "freedom of evaluation of evidence" that is enjoyed by francophone fact-finders is that they nevertheless

[59] Damaška (note 55) 344 and 515, n10 (footnotes omitted); Damaška M.R 'Free proof and its detractors' (1995) 43(3) *The American Journal of Comparative Law* 343 at 344. Cf. Cameroon Criminal Procedure Code of 2005, section 310; Sone A.E 'Examination of witnesses and joint trial under the Cameroon Criminal Procedure Code' in Sone (ed) *Readings in the Cameroon Criminal Procedure Code* 113 at 122. Cf. *Code de Procédure Pénale* (1958), article 427.

[60] Accoridng to Damaška, the difference between common law and continental standards of proof lie in the fact that the latter jurisdictions use *internal* or subjective yardsticks to evaluate evidence, whereas the yardsticks used in the former category of jurisdictions is *external*: Damaška (note 59) 347.

[61] Damaška (note 58) 127.

[62] Champod C and Vuille J 'Scientific evidence in Europe: Admissibility, evaluation and equality of arms' (2011) 9(1) *International Commentary on Evidence* 1 at 17.

[63] Damaška (note 58) 128-9. Similarly, Jackson and Summers explain: 'The doctrine of free proof should be understood in its historical context, not so much as allowing judges to determine freely the charge without regard to other principles or values, but rather in terms of freeing them from the strict hierarchical principles and restrictions on their assessment of the weight of the evidence.' (Jackson and Summers (note 7) 69).

are enjoined to assess all evidence 'critically and rationally,' 'in accordance with rules of logic' and 'in compliance with current scientific and technical knowledge.'[64]

The third and last inheritance that anglophone jurisdictions have received from Stephen relates to the orthodox conception of the Law of Evidence as a trans-substantive branch of law that applies indiscriminately to substantive law as a whole. This type of orthodox thinking is observable from Wigmore's conception of the subject:

> In considering the precise scope to be assigned to the subject of evidence, it is to be noted that the general process of vindicating or enforcing both public and private jural rights and duties falls naturally into five stages: (1) the procurement of the appearance of the parties before the tribunal by the use of process, understood narrowly; (2) the ascertainment of the subject of the dispute by pleading; (3) the attempt at demonstration by the parties of their respective positions at trial; (4) the determination of the dispute by the tribunal by verdict and judgment; and (5) the enforcement of the tribunal's decision by execution and the like. Clearly the present subject lies somewhere in the third stage.[65]

Wigmore here does not conceive of a sub-specialism of Evidence law that is unique to Criminal or Civil law. In other words, a term such as *Criminal Evidence*[66] would probably be unfamiliar to Wigmore, as the Law of Evidence in the orthodox Thayerite sense applies the same to all substantive law branches.

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[64] Vuille J 'Forensic science evidence in non-adversary criminal justice systems' in Roberts and Stockdale (eds) *Forensic Science Evidence and Expert Witness Testimony: Reliability through Reform* (2018) 354 at 365.
[65] Wigmore J.H *Evidence in trials at common* vol 1 (revised by Peter Tillers) (1983) 2. Similarly, Stephen understood the main objective of 'the law of evidence' as having to vindicate substantive law in trans-substantive terms: Stephen (note 48) 8-9.
[66] See Roberts P and Zuckerman A *Criminal evidence* 2nd ed (2010).

Similarly, most anglophone jurisdictions, such as Nigeria,[67] Kenya[68] and Tanzania,[69] on the continent have a single statute of Evidence that applies indiscriminately to all substantive law branches. The term *Criminal* Evidence, however, may be familiar to some in Southern African anglophone jurisdictions where the Evidence rules that are applicable to criminal and civil contexts respectively, are contained in separate statutes.[70] There is some support, although this is by no means universal, in Anglo-American jurisdictions around the world for a move away from Evidence law being a trans-substantive discipline and towards there being sub-specialisms called *Criminal Evidence* and *Civil Evidence*.[71] Although we have said that an independent subject called the 'Law of Evidence' is unfamiliar to most Continental lawyers, Procedural law is universally known and applied trans-substantively; that is, in the same way in the vindication of all substantive law rights and duties.[72]

These three inheritances from Stephen, along with their francophone counterparts, represent significant and fundamental borrowings that African

[67] Evidence Act [Cap 112 of the Laws of the Federation of Nigeria, 2011].
[68] Evidence Act [Cap 80 of the Laws of the Republic Kenya, 1963].
[69] Evidence Act 6 of 1967 (Republic of Tanzania).
[70] Criminal Procedure and Evidence [Cap 9:07 of the Laws of the Republic of Zimbabwe, 1927]. Most of South Africa's Evidence rules for the criminal context are contained in a broader Criminal Procedure Act 51 of 1977.
[71] Main T.O 'The procedural foundation of substantive law' (2003) 78 *Washington University Law Review* 801 at 822. This conception rightly may be understood as being a contemporary one despite having some roots in the work of the originator of the classical distinction between substantive and adjectival law. However, this conception was by no means a popular one in Bentham's time, nor was his elucidation of it entirely clear (for example, Bantham's rudimentary account of adjectival law included 'punishment'), see Bentham J 'Principles of judicial procedure with the outlines of a procedure code' in Bowring (ed) *The works of Jeremy Bentham* vol 2 (1843) 15; Postema G.J 'The principle of utility and the law of procedure: Bentham's theory of adjudication' (1977) 11 *Georgia Law Review* 1393 at 1397.
[72] Nijboer (note 53) 316.

jurisdictions have made from European evidential practices. However, relying on our argument about African jurisdictions being characterised as *sui generis* and *complex*, and that these *northbound-gazing*[73] borrowings apply only to a small minority of the African population that litigates in state courts, these inheritances should not be unduly exaggerated in so far as they are used to characterise African procedural or evidential practices in general. The practices used in Africa continue to develop and change, but they are yet to mature into their own distinct identity. For our purposes, these comparative features serve to provide greater institutional context to the kind of theorising that is done in the chapters that follow.

3.3 CONCLUSION

Chapter 3 discusses the first of the three conditions, *institutional, material* and *probative*, upon which the main argument of this this pertaining to the evidential proof of the direct crime of witchcraft in Africa is based. These three 'conditions of proof' both inform and constrain the *plausibility* of our argumentation schemes, developed and applied later in Chapters 5 and 6, as heuristics of evidential proof. It will be recalled that the overall defeasible argument of this thesis is that if the prosecution approaches the correct forum with jurisdiction, follows the relevant pleading rules (*institutional* condition) and establishes the

[73] This is a term used by South African philosopher, Mogobe Ramose, to describe the socio-cultural institutions that originate from Europe and currently define African life in so many fundamental ways, see Ramose M.B '"African Renaissance": A northbound gaze' in Coetzee and Roux (eds) *The African Philosophy Reader* 2nd ed (2002) 600 at 600.

relevant *facta probanda* (*material* condition), using admissible evidence to the appropriate standard of proof (*probative* condition), then the crime concerned *plausibly* would have been proven. This chapter has explicated the *institutional* component of this argument. This manner of theorising gives a robust understanding of both *plausibility* and evidential proof, as transcending various intersecting subject areas such as: Evidence Law, Criminal procedure, Argumentation theory and criminal jurisprudence.

Chapters 4, 5 and 6, which are much longer in length than this chapter, contain the core of the theorising about criminal law and evidence and proof in this thesis. The focus on this particular chapter has been much narrower than this. The main aim of Chapter 3 has been to contextualise the three subsequent main chapters within the complicated and vast procedural matrices of Nubian African jurisdictions. Chapter 3 achieves this aim firstly, by classifying Nubian African jurisdictions as being *sui generis*, as opposed to the conventional classifications between 'Common law' and 'Continental' (sometimes also referred to as 'adversarial' and 'inquisitorial') and secondly, by giving a brief outline of the model procedure that is followed in witchcraft cases in Africa. This institutional contextualisation is then rounded off with a discussion about the institutional practices that concern the admission, testing and evaluation of evidence in Africa's jurisdictions. In this regard, it is also contended that theorising about evidence and proof using the kind of Wigmorean analysis contained in Chapter 5

is compatible with African jurisdictions despite some of their systemic differences.

4. CHAPTER FOUR: THE MATERIAL CONDITION – THE CRIMINAL LAW OF WITCHCRAFT

The proposition contained in Premise (2) of the overall argument made in this thesis *affirms the antecedent*, which is the three-part conditional (composed of *institutional, material* and *probative* (IMP) conditions) in Premise (1). This thesis shows *how* this antecedent can be fulfilled in order to establish the *plausibility* of the heuristics developed later in Chapter 5 for the evidential proof of the direct crime of witchcraft (P(w)). The argument can be summarised as:

(1) IMP ⇒ P(w).

(2) IMP.

(3) ∴ P(w).[1]

Premise (1) makes it clear that evidential proof is as much a matter of *materiality* as it is of *probative* reasoning heuristics and *institutional* context. The *materiality* component of the antecedent, which is the focus of this chapter, implicates the subject-matter (*facta probanda*) towards which evidential proof is targeted. It has been mentioned so far that witchcraft crimes are the subject-matter of this thesis. Chapter 4 gives further detail on the nature of these crimes and how they can be proven evidentially.

Chapter 4 vindicates the material condition in Premise (2) firstly, by distinguishing the *direct* version of the crimes of witchcraft from the related

[1] The ⇒ sign identifies this argument as a nondeductive *modus ponens.*

indirect versions. Secondly, the bulk of the chapter focuses on generating a set of plausible *facta probanda* for the direct crime of witchcraft that will serve as comparative *tertium comparationis* across Nubian African jurisdictions. Achieving the second of these two objectives of this chapter takes up the bulk of this chapter because it concerns an aspect of this thesis (the material condition) that is itself bedevilled with many questions: What particular elements or requirements make up the direct crime of witchcraft? Do these elements exist universally across the continent? These questions determine the nature and scope of application of the *facta probanda* generated in the second part of this chapter, but first a broad overview of all the witchcraft-related crimes is provided.

4.1 OVERVIEW: STATUTORY CRIMES OF WITCHCRAFT IN NUBIAN AFRICA

Criminal prohibitions against witchcraft in African have two paradigmatic colonial forms. The first of these is found in separate statutes that typically are entitled "Witchcraft Suppression Act" (or sometimes just "Witchcraft Act").[2] The origins of this first variant is traceable back to an ordinance introduced by the British colonial government in the Cape of Good Hope on 9 July 1895,[3] but today it is commonly found in the anglophone eastern and southern regions of the

[2] Mgbako C.A and Glenn A 'Witchcraft accusations and human rights: Case studies from Malawi' (2011) 43(3) *George Washington International Law Review* 396; Katz L *Bad acts and guilty minds: Conundrums of the criminal law* (1987) 82-3.
[3] *S v Ndhlovu* 1971 (1) SA 27 (RA) 30D-E.

continent.[4] The second form appears in comprehensive criminal codes. Such codes are typical in west and central African jurisdictions.[5] Notable exceptions to these are anglophone Nigeria, which, being a former British colony, criminalises witchcraft in its Criminal Code of 1916, and, more recently, Zimbabwe, which overhauled and codified its criminal law in the form of the Criminal Law (Codification and Reform) Act of 2006. The witchcraft prohibitions are contained in Chapter 2 of Part IV of Zimbabwe's criminal law code.

In order to make sense of these wide-ranging prohibitions, a useful starting point, according to one of Zimbabwe's leading criminal law theorists, Geoff Feltoe, is to distinguish between 'witchcraft' and 'witch-finding practices.'[6] In other words, these statutory regimes aim to prohibit the practice of witchcraft itself, along with any conduct indirectly associated with it. For purposes of this thesis, the latter type of prohibition is designated as 'indirect' (or 'derivative') and the former as being 'direct.' Historically, colonial judges interpreted the direct crime of witchcraft as being too intimately connected with African belief systems for it to be criminally proscribed, and that at any rate it purported to proscribe (in the material or consequential sense) criminal consequences that were empirically impossible. The following remarks by Macdonald JP illustrate this:

[4] Examples of these jurisdictions include: Kenya, Uganda, Tanzania, South Africa, Malawi and Botswana, see Mgbako and Glenn (note 2) 396.
[5] Examples of these jurisdictions include: Cameroon, Benin, Chad, Mali, Mauritius, Gabon and Côte d'Ivoire, see Mgbako and Glenn (note 2) 396.
[6] Feltoe G *Commentary on the Criminal law (Codification and Reform) Act, 2004* (2006) 76.

> [T]he law of this country governing witchcraft - the Witchcraft Suppression Act, Chap. 50, which has remained unchanged since 1899 - does not unequivocally condemn the practice of witchcraft…It was believed at the end of the last century when these Acts were introduced that the belief among Africans in witchcraft was so profound that it would not be possible to enforce legislation which provided for its total prohibition and that it would be wiser to deal only with the more evil and harmful aspects of its practice.[7]

Macdonald JP continues:

> It is clear, therefore, that the law permits witchcraft to flourish without fear of punishment under the criminal law in a wide field of human affairs, and persons who become steeped in witchcraft under its almost benevolent attitude are not likely to be impressed when, at a late stage, the law steps in to punish them for taking their beliefs to a logical conclusion…In the present state of the law, the sentences imposed for offences such as those committed by the appellants must necessarily be to deter others not from indulging in witchcraft, because this is permitted under the law, but from committing the excesses to which such indulgence all too frequently leads. If the law were less equivocal in dealing with witchcraft, the task of deciding upon sentence would be a great deal easier.[8]

In conclusion:

> There are sound reasons for believing that the whole subject of witchcraft deserves to be looked at afresh. It is even possible that the progress made by Rhodesian Africans since the European arrived in this country would justify the introduction of the total prohibition of every aspect of the practice of witchcraft.[9]

There are several errors made by Macdonald JP in this regard and pointing out at least two of these will be illustrative of the distinction between direct and indirect crimes of witchcraft. One is conceptual and the other is doctrinal. Firstly,

[7] *Ndhlovu supra* 30D-F.
[8] *Ndhlovu supra* 30H – 31A.
[9] *Ndhlovu supra* 30G.

Macdonald JP, due seemingly to his unfamiliarity with African belief systems, confuses witchcraft practices, in the malevolent sense, with African traditional practices in general. This is similar to confusing a 'witchdoctor' (*moloi* or *umthakathi*) and a traditional healer or herbalist (*ngaka* or *sangoma*).[10] In the latter sense, millions of Africans consult traditional healers, especially in the alternative to medical doctors, all over the continent on a daily basis and none are being arrested for breaching the witchcraft statutes. They will be, however, if such consultations are for the purposes of directly or indirectly harming others.[11] It is plainly incorrect, therefore, to assert that Africans 'indulge in witchcraft' or that one can be 'steeped in witchcraft under its almost benevolent attitude.' For witchcraft is a social construct developed purely to describe *at least* certain practices that are perpetrated for malevolent purposes against others.

The second error by Macdonald JP is doctrinal and comes about *because* of this underlying conceptual confusion. Macdonald JP effectively considers there to be no direct crime of witchcraft in existence, and that the prohibitions contained in the witchcraft statutes are limited to the indirect versions of the crime. It is this analysis that leads Macdonald JP to make remarks such as: that the witchcraft statutes are 'equivocal'; that 'the law permits witchcraft to flourish without fear of punishment under the criminal law'; that the statutory prohibition

[10] See *National Sugar Refining and Allied Industries Union (obo Mngomezuulu) v Tongaat Hulett Sugar Ltd (Darnall)* [2016] 11 BALR 1172 (NBCSMRI) 125-8, where this distinction is discussed in some detail.
[11] See for example, *Legalatladi v S* [2019] ZANWHC 55, where the accused conspired with a witchdoctor to attempt to murder four persons using various witchcraft practices. The accused was convicted in the court *a quo*, but this conviction was quashed on appeal.

is not 'total.' The next section of this chapter will show that this doctrinal understanding of the statutes is difficult to reconcile both with the nature of African cultural beliefs and with the language used in the statutes themselves. A more plausible reading of the statutes is to view them as creating a single direct crime of witchcraft from which six indirect crimes are derived.[12] Figure 7 is a graphic representation of these two categories of crime as they currently exist:

Figure 7: A Table of the Direct and Derivative crimes of witchcraft

A substantial majority of the reported witchcraft cases in Nubian Africa relate to one or more of these indirect crimes. These crimes, however, may be conceived as ancillary incidents of a primary category of criminal sanction that prohibits the practice of witchcraft *directly*, that is, quite apart from the wide range of activities (*possession, accusations, solicitation of* or *supplying*

[12] It is also worth noting that various law reform initiatives in these jurisdictions are currently underway. For instance, the South African Law Reform Commission has proposed that the current 'Witchcraft Suppression Act 3 of 1957 be repealed and replaced by the proposed draft Prohibition of witchcraft practices associated with witchcraft beliefs Bill, see South African Law Reform Commission *The Review of the Witchcraft Suppression Act 3 of 1957* (project 135, discussion paper 139) (2016) 85, available at: http://www.justice.gov.za (accessed: 23 October 2017). This trend is observable in several other African jurisdictions, including: Malawi and Kenya. See Malawi Law Commission *Witchcraft Act review programme: Issue paper* (April 2009), available at: www.sdnp.org.mw (accessed: 11 December 2017); Kenya Law Reform Commission *Justification for review of witchcraft Act, Cap 67* (2014), available at: klrc.go.ke (accessed 23 October 2017).

instruments of witchcraft) associated with it. It is with this particular crime that this thesis is concerned. The derivative crimes are characterised in this way because the type of conduct that they target, 'accusations,' 'professing knowledge,' 'divination,' 'possession of instruments of witchcraft' and 'procurement of the services of a witchdoctor,' relates to conduct that is commonly associated with the practice of witchcraft, and not the practice itself.

4.2 THE *FACTA PROBANDA* OF THE DIRECT CRIME OF WITCHCRAFT

It was briefly mentioned in Chapter 1 that no adequate legal definition for witchcraft is offered on the continent. The only exception to this is in Tanzania where witchcraft is defined as including 'the use of *instruments of witchcraft*,' which in turn is defined to mean:

> [A]nything which is used or intended to be used or is commonly used, or which is represented or generally believed to possess the power, to prevent or delay any person from doing any act which he may lawfully do, or to compel any person to do any act which he may lawfully refrain from doing, or to discover the person guilty of any alleged crime or other act of which complaint is made, or to cause death, injury or disease to any person or damage to any property, or to put any person in fear, or by supernatural means to produce any natural phenomena, and includes charms and medicines commonly used for any of the purposes aforesaid.[13]

It has already been argued that this definition is too long and complicated to be of any practical use in the forensic context. For purposes of this thesis, the following revised *legal* definition is offered:

[13] Witchcraft Act [Cap 18 of the Laws of the Republic of Tanzania, 1928], section 2.

> Witchcraft is the *intentional commission* of an *action* that is *provocative in the indigenous sense* and *causes* a *real fear* in *another human being*.

This is what is here defined as the direct crime of witchcraft in Nubian Africa. It consists of four main elements, *intention*, an *action* that is *provocative in the indigenous sense*, *causation* and *fear*, that must be proven by the prosecution at the appropriate standard of proof, depending on the jurisdiction concerned, to secure a conviction. Each of these elements will now be discussed in turn.

4.2.1 AN ACTION THAT IS PROVOCATIVE IN THE INDIGENOUS SENSE (UNLAWFUL ACTION)

The direct crime of witchcraft involves an (i) 'action' 'committed' by the accused. As to the nature of this action, it must bear two qualities: it must be (ii) 'provocative,' as understood (iii) in the 'indigenous' sense. These requirements, (i), (ii) and (iii), may be classified into the categories of (a) *action* and (b) *surrounding circumstances.* Within the Common law world, categories (a) and (b) are known collectively as the *actus reus*,[14] whereas francophone Civilian jurists describe them as *l'élément legal* and *l'élément matériel*.[15] Williams

[14] Williams G *Criminal law: The general part* 2nd ed (1961) 16-7; Ormerod D and Laird K *Smith and Hogan's criminal law* 15th ed (2018) 28-9, where the *actus reus* is defined as all the elements of a crime, except the mental element. Alternatively, the term 'criminal conduct,' as a substitute to *actus reus*, has also been used: Lacey N 'In search of the responsible subject: History, philosophy and social sciences in criminal law' (2001) 64 *Modern Law Review* 350 at 353.

[15] Bell J 'Criminal law' in Bell *et al Principles of French Law* 2nd ed (2008) 201 at 204-5. The theoretical organization of the General Part in Civilian jurisdictions is not uniform. For example, the German *Tatbestand*, encompasses both the *actus reus* (*objektiver Tasbestand*) and *mens rea* (*subjektiver Tatbestand*) (Bohlander M *The German criminal code: A modern English translation* (2008) 6), whereas the term *corpus delicti* is given a meaning that is much wider than the Common law *actus reus* (Vedorale T 'The principle of *corpus delicti* and the evidence pertaining thereto' (1965) 39(1) *Temple Law Quarterly* 1; Zupančič B 'On legal formalism: The principle of legality in criminal law' (1961) 27(2) *Loyola Law Review* 369 at 438-9; Lipinsky D.A 'Comparative legal analysis of the objects of *corpus delicti* in the legislation of Russia and some other countries' (2016) 3(3)

describes (a) and (b) as the 'external ingredients of the crime.'[16] For Moore, (a) and (b) constitute respectively, the 'bodily-movement-caused-by-a-volition' and 'the properties required by some complex act description contained in some valid source of criminal law.'[17] For purposes of this thesis, (i) is classified into the action category and the surrounding circumstances category is reserved for (ii) and (iii).

The witchcraft statutes in Africa use language that is similar to what Moore refers to as 'complex descriptions'[18] that collapses categories (a) and (b) despite their purported separation above. In general, the following types of actions, (i) above, are prohibited: 'any act of *witchcraft*, *magic* or *divination*';[19] using, assisting or 'taking part in…using…any *juju*, *drug* or *charm*';[20] assisting with using or 'using *witch medicine*';[21] threatening to use or resorting to using of '*instruments of witchcraft*,' 'including *charms* and *medicines*';[22] engaging in any *practice* '*commonly associated with witchcraft*';[23] using or 'causing to be put into operation any *means or process which…is calculated to injure.*'[24] The emphasised portions of these complex descriptions imply that we are concerned

International Journal of Humanities and Cultural Studies 154; Marchuk I *The fundamental concept of crime in international criminal law: A comparative law analysis* (2014) 39-66).

[16] Williams (note 14) 19.

[17] Moore M.S *Act and crime: The philosophy of action and its implications for criminal law* (1993) 169.

[18] Ibid.

[19] *Cameroun Code Pénal* n° 67/LF/1, article 310.

[20] Criminal Code Act [Cap 77 of the Laws of the Federation of Nigeria, 1916], section 216(c).

[21] Witchcraft Act 23 of [Cap 67 of the Republic of Kenya, 1925], section 4 (Kenya).

[22] Witchcraft Act [Cap 18 of the Laws of the Republic of Tanzania, 1928], sections 3 and 3(e).

[23] Criminal Law (Codification and Reform) Act of 2006, section 98(1) (Zimbabwe).

[24] Witchcraft Suppression Act 3 of 1957, section 1(e) (South Africa).

here with *actions*, broadly understood as the outputs of persons 'who have and exercise the capacity to actualise the results of their practical reasoning in ways that make a difference to the world in which they live and the law operates.'[25] Therefore, this action requirement will be fulfilled if a person actualises the results of their practical reasoning in legally meaningful or material ways by 'taking part in,' 'threatening to use,' 'causing to be put into operation,' 'engaging' or 'using' *instruments of witchcraft*. These instruments of witchcraft are defined *numerus apertus* to include 'charms' and 'medicines' that acquire their meaning from category (b) (surrounding circumstances).

This distinction between the types of actions performed within category (a) and their acquisition of meaning as a result of (b) is important because instruments of witchcraft are made commonly out of ordinary materials, sometimes even using human organs, and the meaning given to these materials is heavily context-dependent. For example, the accused in *S v Jochoma* broke an egg on two separate occasions at the entrance of a court precinct in Zimbabwe and was charged and convicted, albeit on the basis of a confession, with the direct crime of witchcraft,[26] whereas in *R v Nwaoke* the Opponent placed a wooden fetish amulet, known in that community as a *juju*, at the door of the separate house

[25] Duff R.A *Answering for crime: Responsibility and liability in criminal law* (2007) 100. Duff's *action requirement* is robust and offered in substitution of the traditional 'act requirement,' as 'willed bodily movement'. Many others have criticised this requirement, see *R v Antoine* [2001] 1 A.C. 340 at 353-4; Husak D.N *Philosophy of criminal law* (1987) 24-52 (where the traditional act doctrine is replaced with a *control requirement*); Husak D.N 'Rethinking the act requirement' (2007) 28(6) *Cardozo Law Review* 2437; Horder J *Ashworth's principles of criminal law* 9th ed (2019) 99 (where status offences are said to be anomalous to the traditional act doctrine). Cf. Sistare C.T *Responsibility and criminal liability* (1989) 45-64; Moore (note 17) 59.
[26] *S v Jochoma* 2014 (2) ZLR 553 (H).

in which his wife stayed and threatened that this object would bring about her death.[27] These particular objects, eggs and wooden fetish amulets, may be used for a variety of purposes and thus it is important, in the context of the direct crime of witchcraft, to consider the circumstances that surround any actions performed using these (potential) instruments of witchcraft. In the same way that the law does not use simple descriptions such as 'don't move your fingers,' but rather complex descriptions such as 'don't kill' and 'don't rape,'[28] the direct crime of witchcraft does not prohibit the breaking of eggs nor the placing of fetish amulets.

In addition to proving category (a), the prosecution is required to prove that the circumstances surrounding the accused's action meet the requirements of category (b). In particular, such action must be (i) *provocative* in the (ii) *indigenous sense*. These two features, (i) and (ii), turn category (a) actions into complex descriptions. They analogously distinguish 'tongue-moving' from *defamation*, 'flag-burning' from *treason* and 'touching' from a *sexual offence*.[29] The criminal quality of category (a) 'bodily-movements-caused-by-a-volition' is only revealed upon consideration of category (b). Some common law jurists at times say that it is category (b) that makes category (a), the *actus*, *reus*.[30]

[27] *R v Nwaoke* 1939 5 WACA 120.
[28] Moore (note 17) 169.
[29] Ibid.
[30] Williams (note 14) 16-7. Traditionally, that is, in terms of the maxim *actus non facit reum, nisi mens sit rea*, what made the *actus* to be *reus* was the prevalence of *mens rea*, but this conception has since been discredited (see *R v Antoine* [2001] 1 A.C. 340 at 360-1). Therefore, *mens rea* is a necessary, but not sufficient condition to make the *actus* to be *reus*.

Category (b) in the context of the direct crime of witchcraft, that is, whether the action concerned was *provocative in the indigenous sense,* is established through socio-epistemic criteria. There are at least two reasons for this: firstly, the witchcraft statutes explicitly require the proof of category (a) actions that are additionally proven to be 'commonly associated with witchcraft';[31] 'alleged or reported to possess the power of causing any natural phenomenon or any disease or epidemic';[32] 'represented or generally believed to possess the power…to cause death, injury or disease';[33] 'liable to disturb,'[34] all of which implicate general standards of societal beliefs. Secondly, the meaning of phenomena, such as witchcraft, that are defined at an indigenous level is ascertained commonly from an epistemic practice or source, *witness testimony,* that social epistemologists regard as having epistemic value under the appropriate veritistic conditions.[35] Indigenous knowledge in African communities is cultivated and shared by *indigenous experts* (usually elder members of the community, community leaders or traditional healers) through oral narratives from one generation to the next. One common indigenous expert that commonly participates in witchcraft cases is a traditional healer, who is referred to for purposes of this thesis using the Bantu

[31] Criminal Law (Codification and Reform) Act of 2006, section 98(1) (Zimbabwe).
[32] Criminal Code Act [Cap 77 of the Laws of the Federation of Nigeria, 1916], section 216(c).
[33] Witchcraft Act [Cap 18 of the Laws of the Republic of Tanzania, 1928], sections 3 and 3(e).
[34] *Cameroun Code Pénal* n° 67/LF/1, article 310.
[35] See generally, Goldman A.I *Knowledge in a social world* (1999) Ch 4; Kackey J 'Testimony: Acquiring knowledge from others' in Goldman and Whitcomb (eds) *Social epistemology: Essential readings* (2011) 71; Goldman A.I 'Experts: Which ones should you trust?' in Goldman and Whitcomb (eds) *Social epistemology: Essential readings* (2011) 109.

root word, *Nganga*.[36] In fact, it is said that prosecutors in Cameroon know well that without calling a *Nganga* as an expert witness to testify about the social meaning of the accused's action, an acquittal generally is inevitable,[37] while South Africa's statute explicitly requires that the accused's action be performed 'on the advice of any witchdoctor, witch-finder or other person' or 'on the ground of any pretended knowledge of witchcraft.'[38]

There are two features of the type of social epistemology through which category (b) is established that bear emphasis. The first is that it is distinguishable from traditional *individual* epistemology, which focuses on the mental states of a particular individual in so far as they are able to generate knowledge.[39] As we will see later in this chapter, this branch of epistemology is useful in relation to ascertaining the 'knowledge of surrounding circumstances' element required in the context of *mens rea*. Social epistemology, on the other hand, is far more collaborative and interactive in so far as it focuses on the epistemic practices, such as newspapers, broadcast media and internet search engines, from which knowledge is generated by groups of individuals.[40] To the extent that factual

[36] As indicated in Chapter 2, the Bantu communities have a common ancestral heritage and currently occupy most of the Nubian African geographic region. See generally, Bate S.C 'Method in contextual missiology' (1998) 26(2) *Missionalia: Southern African Journal of Mission Studies* 150 at 152, n2; Hund J 'Witchcraft and accusations of witchcraft in South Africa: Ontological denial and the suppression of African justice' (2000) 33(3) *Comparative and International Law Journal of Southern Africa* 366; Conco W.Z 'The African Bantu traditional practice of medicine: Some preliminary observations' (1967) 6(3) *Social Science & Medicine* 283.

[37] Fisiy C.F & Geschiere P 'Judges and witches, or how is the State to deal with witchcraft?' (1990) 30(118) *Cahiers d'Études Africaines* 135 at 150.

[38] Witchcraft Suppression Act 3 of 1957, section 1(e) (South Africa).

[39] See generally, Goldman A.I *Epistemology and cognition* (1986).

[40] See generally, see Fuller S 'The project of social epistemology and the elusive problem of knowledge in contemporary society' in Delanty and Strydom (eds) *Philosophies of Social Science: The Classic and Contemporary Readings* (2002) 428; Allen R.J and Leiter B 'Naturalised Epistemology and the Law of Evidence'

accuracy is a cornerstone of forensic fact-finding,[41] the evaluation of truth-generating procedures, especially the reliance on expert witnesses, used in that context, according to Goldman, is an appropriate task for social epistemology.[42] More about the veritistic capacity of the *Nganga* in witchcraft cases is discussed in the context of the *unlawful conduct* argumentation scheme in Chapter 6.

The second feature of the type of social epistemology through which category (b) is established is that the reference to knowledge is not in any strong sense. This type of knowledge is applied in both the contexts of *social* (relating to the unlawful conduct element) and *individual* (in relation to the fault element discussed later in this chapter) epistemology in this chapter. Goldman distinguishes between three senses of knowledge, *Super strong* (SS-knowledge), *Strong* (S-knowledge) and *Weak* (W-knowledge), and he prefers the weak sense for his social epistemology in *Knowledge in a social world* (1999).[43] Both SS-knowledge and S-knowledge are defined as *justified* true belief and the difference between the two lies in the degree of justification required. SS-knowledge is based on evidence that requires the logical exclusion of all rival hypotheses, whereas S-knowledge requires for the exclusion of a narrower range of 'serious'

(2001) 87(8) *Virginia Law Review* 1491; Goldman A.I 'Foundations of social epistemics' (1987) 73(1) *Synthese* 109; Craig E *Knowledge and the state of nature: An essay in conceptual synthesis* (1999); Schmitt F.F (ed) *Socialising epistemology: The social dimensions of knowledge* (1994); Goldman A.I and Whitcomb D (eds) *Social epistemology: Essential readings* (2011).

[41] Roberts P and Zuckerman A *Criminal evidence* 2nd ed (2010) 19.

[42] Goldman (note 35) 272; Allen and Leiter (note 40) 1493-1501; Damaška M.R 'Truth in adjudication' (1998) 49 *Hastings Law Journal* 289 at 291-3 and 297-302.

[43] Goldman (note 35) 24.

or 'realistic' rival hypotheses.[44] SS-knowledge is always vulnerable to the scepticism of the classical Cartesian evil demon, but S-knowledge is generally acceptable for external states of affairs (for example, knowledge of present and historical events and observable natural phenomena).[45] W-knowledge is distinguishable from SS- and S-knowledge in that what is required is only *true belief*.[46] Goldman here circumvents the 'intricate issues' surrounding the *justification* of true belief in order to explore the veritistic capacity of knowledge-generating social institutions.

A lot more than avoiding the *justification* requirement, however, will be required to apply Goldman's W-knowledge to witchcraft cases. This is because '[w]hat is required for W-knowledge,' according to Goldman, 'is that a person *actually believes* that a certain state of affairs obtains and it *does* obtain (it is true that it obtains).'[48] The latter veritistic requirement makes W-knowledge ill-suited for witchcraft cases because it inconsistent with the pragmatic approach adopted in *Kievits kroon country estate (Pty) Ltd v Mmoledi*, where a senior chef went on extended leave to undertake training to become a *Nganga.* The chef submitted a 'medical certificate' from the *Nganga* that was supervising her training, but this

[44] Ibid 23-4.
[45] Cf. Gettier E.L 'Is justified true belief knowledge?' (1963) 23(6) *Analysis* 121-3; Quine W.V *Ontological relativity and other essays* (1969) 69-90; Turri J 'Is knowledge justified true belief?' (2012) *Synthese* 247; Pardo M.S 'The field of evidence and the field of knowledge' (2005) 24(4) *Law and Philosophy* 321 at 332, n25, where it said that neither Philosophy nor Law need complicated accounts of truth. In particular, Pardo points out that we want to avoid 'accidentally true beliefs,' which are not knowledge (at 333).
[46] Goldman (note 35) 24. This conception often is attributed to Plato *Meno* (translated by B. Jowett) (2011); Cohen S.M *et al* (eds) *Readings in Ancient Greek Philosophy: From Thales to Aristotle* 4th ed (1985) 241-266.
[48] Goldman (note 35) 25. My emphasis. Goldman is well known for approaching social epistemology 'as a discipline that evaluates practices along *truth-linked* (veritistic) dimensions.' (at 69).

was not acceptable to her employer and she was thus dismissed.[49] After recognising that beliefs of this sort were common among 'significant sections' of South Africa's population,[50] Cachalia JA urged that a measure of judicial restraint should be applied in this regard: 'Secular authorities, including courts and tribunals, should avoid attempting to resolve civil disputes by applying reasoning that involves interpreting and weighing religious doctrine.'[51] As to his reasoning for this approach on the facts of this particular case:

> In contrast to the approach of conventional medicine which uses 'material causation' to understand and treat illness, traditional medicine generally looks towards the 'spiritual' origin, which includes communication with the ancestors, for this purpose. Their methods of diagnosis and treatment are completely different and understandably their respective adherents would each be sceptical if not completely dismissive of the other. Our courts are familiar with and equipped to deal with disputes arising from conventional medicine, which are governed by objective standards, whereas questions regarding religious doctrine or cultural practice are not. Courts are therefore unable and not permitted to evaluate the acceptability, logic, consistency or comprehensibility of the belief. They are concerned only with the sincerity of the adherent's belief, and whether it is being invoked for an ulterior purpose. This of necessity involves an investigation of the grounds advanced to demonstrate that the belief exists.[52]

This was a civil case, but this reasoning in my view supports the analysis of category (b) (surrounding circumstances) in witchcraft cases through the lens of *Super weak* (SW) knowledge.[53] This is because the legal meaning of category (a)

[49] *Kievits kroon country estate (Pty) Ltd v Mmoledi* 2014 (1) SA 585 (SCA) [1]-[12].
[50] *Mmoledi supra* [23]-[24].
[51] *Mmoledi supra* [32].
[52] *Mmoledi supra* [26]-[27].
[53] This category is not referred to by Goldman, but it is a useful adaptation suited to the kind of witchcraft cases that are analysed in this thesis.

(actions) is a function of the *actual* (not justified nor true in any strong epistemic sense) beliefs of the African community concerned. This is what is implied by statutory references to actions that are 'commonly associated,' 'generally believed,' 'reported,' 'represented' or 'alleged' as being connected with witchcraft. The statutes do not say that these actions *in fact are* or are *justifiably believed* to be associated with witchcraft. Using stronger senses of knowledge than SW-knowledge would make Mr Jochoma's conviction for breaking the egg and Mr Nwaoke's conviction (which was set aside on appeal) for placing the fetish amulet at his wife's door in the trial court, which was set aside on appeal, incomprehensible.

In summary, the direct crime of witchcraft may be committed through an *action*, broadly understood as having and exercising the capacity to actualise the results of one's practical reasoning (category (a)), that is *provocative in the indigenous sense*, as determined by the social epistemology of the particular African community concerned (category (b)). Category (b) is usually determined through the socio-epistemic practice of the *Nganga*, *qua* expert witness, and more will be said about the veritistic capacity of this particular practice in Chapter 6.

4.2.2 CAUSATION

Causal terminology, notwithstanding some common forms of scepticism about causation, is used in witchcraft legislation across Nubian Africa, although this is neither uniform nor easily identifiable in some cases. In particular, the two salient

complications in this regard are firstly, that some jurisdictions, notably Zimbabwe, Tanzania and Nigeria, use causal terminology in the strict or narrow sense, while others, for example, Kenya, Cameroon and South Africa, use it in a much wider sense and secondly, that all jurisdictions, except Zimbabwe, use causal language hypothetically as to obviate the need to establish any *actual* consequence at all. These two complications make theorising about causation in relation to the direct crime of witchcraft difficult, but not implausible as we argue in this chapter.

Regarding the variable usage of causal terminology, jurisdictions that use it in the strict or narrow sense commonly use the word 'causing' (or 'cause') followed by a specification of a certain prohibited consequence (for example, death, injury or disease). For example, Nigeria prohibits the 'causing' of 'any natural phenomena or any disease or epidemic';[54] Tanzania prohibits the 'causing' of 'death, injury or disease';[55] Zimbabwe prohibits the 'causing' of harm in the form of a 'real fear.'[56] However, the absence of the word 'cause' does not, without more, mean that causation is not required for a particular crime. Two other instances in which causation is implied in the wider sense of the term are (i) where Moore's 'causatives' (for example, 'kill,' 'penetrate,' 'abuse,' or 'appropriate') are used[57] and in instances where (ii) Hart and Honoré's 'causal

[54] Criminal Code Act [Cap 77 of the Laws of the Federation of Nigeria, 1916], section 216(e).
[55] Witchcraft Act [Cap 18 of the Laws of the Republic of Tanzania, 1928], sections 3 and 3(e).
[56] Criminal Law (Codification and Reform) Act of 2006, section 98(1) (Zimbabwe).
[57] Moore M.S *Causation and responsibility: An essay in law, morals and metaphysics* (2009) 5. Cf. at p.14, where Moore postulates that there are non-causative senses that verbs can be used outside of law in natural language (in

terminology' consisting of a prepositional phrase that is made up of a verb followed by the *to*-infinitive or a simple preposition (for example, 'due to,' 'owing to' or 'resultant from') is used.[58] Tanzania and Nigeria use similar causative words in their prohibition of actions that are 'reported' or 'generally believed': 'to *prevent* or delay any person from doing any act which he may lawfully do, or to *compel* any person to do any act which he may lawfully refrain from doing.'[59] The words 'prevent' and 'compel' are causative here. In the wider sense, the prepositional phrase 'liable to' is used in Cameroon, whereas the phrase 'calculated to' is used in Kenya and South Africa respectively.[60]

In all Nubian African jurisdictions, notwithstanding the variability highlighted above, there is a statutory basis for the inference that causation is required invariably in witchcraft cases across the continent. However, the second complication is that the majority of Nubian African jurisdictions, apart from Zimbabwe, use causal terminology in formal terms that postulate a hypothetical, but not *actual*, consequence. Before Zimbabwe codified its criminal law in 2005, this general trend of formalistic causation was universal on the continent. Zimbabwe's pre-2005 witchcraft prohibition was crafted in similar language to the South African statute:

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his case, English). See also Moore (note 57) 225 ('the *actus reus* requirements of all crimes have hidden causation requirements built into them').

[58] Hart H.L.A and Honoré T *Causation in law* 2nd ed (1985) 87.

[59] Witchcraft Act [Cap 18 of the Laws of the Republic of Tanzania, 1928], sections 3(e); Criminal Code Act [Cap 77 of the Laws of the Federation of Nigeria, 1916], section 216(c) (Nigeria). (my own emphasis)

[60] Witchcraft Act [Cap 67 of the Republic of Kenya, 1925], section 4; Witchcraft Suppression Act 3 of 1957, section 1(e) (South Africa).

> Whoever, on the advice of a witch doctor or witch finder or any person pretending to the knowledge of witchcraft or the use of charms, or in the exercise of any pretended knowledge of witchcraft or of the use of charms, uses or causes to be put into operation such means or processes as he may have been advised or may believe to be calculated to injure any person or any property, including animals, shall be guilty of an offence.[61]

References to 'injure,' 'person,' 'property' and 'animals' may imply forms of harm, but the actualisation of these consequences is not at all required because these are things that simply are 'calculated' by the accused on the basis of their own independent beliefs or advice they may have received.[62] This is made clearer *a fortiori* by the two references to 'pretended knowledge of witchcraft.' Elsewhere on the continent, a similar trend currently prevails in so far as witchcraft statutes contain several references to consequences that are 'generally believed,' 'liable to,' 'reported,' 'represented' or 'alleged,'[63] but not *actual* or have *in fact occurred*. This approach to causation is referred to as being *formal*, as opposed to being *material*,[64] because it prohibits the mere perpetration of an

[61] Witchcraft Suppression Ordinance 14 of 1899, section 7.
[62] South Africa and Kenya continue to use the same 'calculated to' prepositional phrase, see Witchcraft Act [Cap 67 of the Republic of Kenya, 1925], section 4; Witchcraft Suppression Act 3 of 1957, section 1(e) (South Africa).
[63] *Cameroun Code Pénal* n° 67/LF/1, article 310; Criminal Code Act [Cap 77 of the Laws of the Federation of Nigeria, 1916], section 216(c); Witchcraft Act [Cap 18 of the Laws of the Republic of Tanzania, 1928], sections 3 and 3(e).
[64] The theoretical distinction between 'formal' and 'material' definitions of crime has been traced back to 19th century German jurists who were reacting to classical formal definitions of crime as violations of 'Königsfriede' or 'Volksfriede,' that is, the equivalent of 'the King's peace' (Eser A 'Principle of harm in the concept of crime: A comparative anaylsis of the criminally protected legal interests' (1965) 4(3) *Duquesne University Law Review* 345 at 352; Brunner H *Deutsche Rechtsgeschichte* (1887) 42-8; Bouzat P *Traité théorique et pratique de droit penal* (1951) 57; Jones M and Johnstone P *History of criminal justice* 5th ed (2015) 43; Pollock F 'The King's peace in the middle ages' (1899) 13 *Harvard Law Review* 177; Dubber M.D 'Preventive justice: The quest for principle' in Ashworth and Zedner (eds) *Prevention and the Limits of the Criminal Law* (2013) 47 at 50). P.JA Feuerbach and J.M.F Birnbaum gave material definitions of crime respectively, as 'infringements of rights' (following Kant) and 'violations of legally protected interests' (*rechtsgut*): Feuerbach P.J.A *Textbook on the common penal law in force in Germany* 1st ed (1801) § 21, an excerpt is translated at Dubber M.D *Foundational texts in modern criminal law* (2014) Appendix A, 373 at 387; Vormbaum T *A modern history of German criminal law* (translated by M. Hiley) (2014) 47.

action that is *provocative in the indigenous sense* irrespective of the consequences it may give rise to.[65] It is in similar terms that prohibitions against so-called 'conduct crimes' at Common law[66] and the approach of the 'Goal-orientated school' in some Civilian jurisdictions[67] are understood. The contrast to this is often known as the category of 'result crimes' at Common law or the Continental 'Causalist school's' approach to causation.[68]

For example, the *formal* approach was applied in *S v Buthelezi*,[69] given South Africa's statutory reference to prohibited consequences that are merely 'calculated to' occur, whether or not they do in fact occur. There is a lot that is wrong about this judgment in my view. Firstly, the prosecution, in charging the accused, and the court, in convicting him, made the error, as Macdonald JP did in our discussion at the beginning of this chapter, of failing to distinguish between African customs and malevolent *actions* that are *provocative in the indigenous sense*. The accused worked for a registered herbalist and secretly consulted with

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[65] Snyman C.R *Criminal law in South Africa* 6th ed (2014) 80.

[66] See *Treacy v Director of Public Prosecutions* [1971] A.C. 537 at 543; Williams G 'The problem of reckless attempts' [1983] *Criminal Law Review* 365 at 366; Ormerod and Laird (note 14) 26; Sullivan B 'The conduct element of offences' in Chan *et al* (eds) *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (2011) 87 at 94; Whitney C 'The Fraud Act 2006 – Some early observations and comparisons with the former law' (2007) *The Journal of Criminal Law* 220 at 229; Gardner J 'Moore on complicity and causality' (2007) 156 *University of Pennsylvania Law Review* 432 at 433.

[67] Hermida J 'Convergence of Civil law and Common law in the criminal theory realm' (2005) 13(1) *University of Miami International & Comparative Law Review* 163 at 175-6; Gómez-Aller J.D 'Criminal Omissions: a European perspective' (2008) 11(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 419 at 433; Šepec M 'Slovenian criminal code and modern criminal law approach to computer-related fraud: A comparative legal analysis' (2012) 6(2) *International Journal of Cyber Criminology* 984 at 993. Compare this to the French distinction between *infractions formelles* ('formal crimes') and *infractions de prevention* ('preventative crimes'), see Pradel J 'Criminal law' in Berman and Picard (eds) *Introduction to French Law* (2008) 103 at 116.

[68] Cf. the distinction between *formal* and *material* definitions of crimes is understood in the same way in Africa, see Okonkwo C.O *Okonkwo and Naish on criminal law in Nigeria* 2nd ed (1980) 45; Anyangwe C *Criminal law in Cameroon: The General Part* (2015) 235; Mapunda B.T *Criminal law and procedure: General principles of criminal liability* Part Two (1996) 59; Situma F.D.P *Criminal law in Kenya* (2012) 40.

[69] *S v Buthelezi* 1961 (1) SA 91 (N).

patients using the usual procedures of a *Nganga*, even though he was neither trained nor registered for this purpose.[70] The accused, therefore, did not commit an *action* that was *provocative in the indigenous sense*. Rather, he was attempting to assist a patient that felt pain in her legs and neck in exchange for money.[71] There is nothing provocative about such conduct in the indigenous sense, and calling a *Nganga* as an expert witness would have made this clear to the court. The second error concerns the section in terms of which the accused was charged and convicted. Section 1(e) of South Africa's witchcraft statute stipulates the direct crime of witchcraft, whereas the indirect crime of *divination,* which was explained at the beginning of this chapter, is provided for in section 1(f). If the Opponent committed any offence at all, it may have been the latter divination crime in terms of section 1(f). The second error is attributable in my view to a mistaken conception of the direct crime of witchcraft in formal terms such that no causation is required to be proven at all. This is how Bizzel AJ conceived of the crime:

> In a charge under sec. 1 (e) of Act 3 of 1957 based, as this one was, upon the use of an article by an accused himself, I think it must be proved by the Crown that by his own use of it he pretended to exercise or use a kind of supernatural power or witchcraft.[72]

The formalism that purports to obviate the causation requirement lies in the reference to a 'pretended' prohibited consequence and that Bizzel AJ regarded it

[70] *Buthelezi supra* 91-2.
[71] *Buthelezi supra* 91H.
[72] *Buthelezi supra* 93A-B.

as unnecessary for the prosecution to prove the occurence of *harmful* consequences to come about from the accused's conduct.[73] It was enough that the accused simply 'claimed or represented by his words or conduct' that he could bring these consequences about.[74] On this type of analysis there is little room for a causation requirement.[75]

There are, however, at least three main problems with this type of formalism towards causation in cases involving the direct crime of witchcraft. Firstly, the obviation of a causation requirement simply amounts to a misinterpretation of the statutes of witchcraft in my view. It has already been shown in some detail above that the absence of the word 'cause' in a statute does not, without more, obviate a causation requirement and that all Nubian Africa jurisdictions at least use Moore's 'causatives' or Hart and Honoré's 'causal terminology.' Secondly, the formalism in the context of witchcraft offences in Africa is based historically on a colonial chauvinism that illegitimately purported to suppress indigenous beliefs and thereby committed multiple conceptual errors,[76] as Macdonald JP and Bizzel AJ did in our discussion above. The

[73] *Buthelezi supra* 93B.
[74] *Buthelezi supra* 93B-E.
[75] However, the causal phrase 'calculated to injure' has been interpreted in other contexts to refer to a 'likelihood,' see *R v Heyne* [1956] 3 All SA 435 (A) 445; *R v Kruse* 1946 AD 524 at 533. See also *R v Miller* [1954] 2 QB 282 at 292 where 'calculated to interfere with the health or comfort of the victim' was interpreted to mean 'likely'. See also *R v Davidson* [1972] 1 WLR 1540; *R v Aworinde* [1996] R.T.R. 66 at 69 where 'calculated to deceive' was held to mean 'likely to deceive'. Generally, see Jefferson M 'Offences against the person: Into the 21st century' (2012) 76(6) *Journal of Criminal Law* 472 at 480.
[76] See South African Law Reform Commission *The Review of the Witchcraft Suppression Act 3 of 1957* (project 135, discussion paper 139) (2016) 29, available at: http://www.justice.gov.za (accessed: 23 October 2017); Fisiy C.F 'Containing Occult Practices: Witchcraft Trials in Cameroon' (1998) 41(3) *African Studies Review* 143 at 146.

following remarks, even if they are made by sitting judges, that were typical during the colonial period simply will no longer be acceptable to African people[77] of the contemporary era:

> When is it to come that these natives are to learn that consulting diviners and committing murders will not be tolerated by the British Government?[78]

Landsdown JP:

> We must, of course, greatly deplore the fact, but that there is this universal belief in witchcraft by the vast majority of the Bantu people is beyond question. I am not sure that we Europeans are entitled, having regard to our own history, to give them unqualified condemnation for clinging to such a belief. One can only hope that the influences of education, religion and science will gradually wear down this profound belief in the minds of the natives of these parts.[79]

As indicated in Chapters 1 and 3 above, approximately 55% of Nubian Africa's population hold witchcraft-related beliefs and about 90% of continent's population uses traditional courts where such cases are heard regularly. Subjecting such a significant section of potential litigants to the form of colonial chauvinism that purports to suppress their beliefs is likely to threaten the legitimacy and stability of criminal justice on the continent.

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[77] For example, Zimbabwean Judge Hungwe deplored witchcraft legislation as purporting to use 'suppression tactics' in relation to African beliefs, see *S v Hamunakwadi* 2015 (1) ZLR 392 (H) 398A; Anyangwe C *Criminal law in Cameroon: Specific offences* (2011) 254 ('The conduct punishable under section 251 is a typical example of the lawmaker's pretended scepticism of the supernatural'). Cf. Bennett and Scholtz 'Witchcraft: a problem of fault and causation' (1979) 12 *Comparative and International Law Journal of Southern Africa* 288 at 298-9 ('common law tribunals refuse to accept the African belief in mystical causation'). See also Ajei M.O *The paranormal: An inquiry into some features of an African metaphysics and epistemology* (2014) 12; Mbiti J.S *African religion and philosophy* (1969) 194; Ashforth A 'Witchcraft Violence and Democracy in the New South Africa' (1998) 38(150) *Cahiers d'Études Africaines* 502 at 502.

[78] *R v Magabeni* 1911 NHC 107; *S v Mojapelo* 1991 (1) SACR 257 (T) 259.

[79] *R v Biyana* 1938 EDL 310 at 311.

The third problem with the formalistic approach comes from Moore and has much wider implications than the two problems discussed thus far. Moore's radical position is that crimes that are defined using complex descriptions all invariably have a causation requirement; that is to say that they require 'at least a causing of some state of affairs.'[80] Therefore, even crimes such as theft, that require no more than the intentional appropriation of property belonging to another,[81] or inchoate crimes such as *attempts* require causation.[82] In the latter case, Moore argues that an act must cause a state of affairs 'variously described as "beyond mere preparation," "in dangerous proximity to killing," "a substantial step."'[83] On this view, therefore, a formalistic approach to causation is inconsistent with Moore's conception of causation as requiring, at minimum, the causing of some state of affairs in the general sense. On the basis of these three problems, it is clear that the adoption of a formalistic approach to causation in the context of the direct crime of witchcraft is without justification. However, care must be taken to avoid two potential materialistic approaches that are fallacious.

On Moore's reasoning, crimes that are defined using complex descriptions all require the proof of the causing of at least some state of affairs. However, not all causal relations in relation to the direct crime of witchcraft are logically

[80] Moore (note 17) 14-5.
[81] Ibid 17.
[82] Ibid.
[83] Ibid 17-8.

plausible. Two common fallacies in this regard are the argument from ignorance and the *post hoc* fallacy.[84] Arguing that:

> There is no evidence for the cause of a particular illness, death or injury*, therefore,* it must be caused by the pertinent action that is provocative in the indigenous sense,

is a classic example of the fallacy of *argumentum ad ignorantiam*.[85] Similarly, a *post hoc* fallacy is committed when one argues that:

> A certain action that is provocative in the indigenous sense (A) is generally followed by the striking of a bolt of lightning or injury or death to a person (B), therefore, A is the cause of B.[86]

Formally, these fallacies are represented as follows:

> (1) ~Kxp ~p ['the agent does not know that P is false'].
>
> (2) Therefore, p.[87]

Regarding the *post hoc* fallacy:

> (1) A → B.
>
> (2) B.[88]

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[84] Oluwole S 'On the existence of witches' (1978) 2(182) *Second Order* 3 at 17-8, where five possible fallacies are listed.

[85] Woods and Walton point out that: '[t]ypical examples of *ad ignorantiam* have to do with ghosts, telepathy or other psychic phenomena, or religious argumentation, all contexts where questions regarding verifiability, testability-in-principle of hypotheses, naturally arise.' (Woods J.H and Walton D.N 'The fallacy "ad ignorantiam"' (1978) 32(2) *Dialectica* 87 at 96). See also Walton D 'The appeal to ignorance, or argumentum ad ignorantiam' (1999) 13 *Argumentation* 367 at 368; Hamblin C.L *Fallacies* (1970) 43; Walton D *Informal logic: A handbook for critical argumentation* (1989) 43-4; Copi I.M *et al Introduction to logic* 14th ed (2014) 131. Cf. Sober E 'Absence of evidence and evidence of absence: Evidential transitivity in connection with fossils, fishing, fine-tuning and firing squads' (2009) 143 *Philosophical Studies* 63.

[86] Sogolo G.S 'Logic and rationality' in Coetzee and Roux (eds) *The African philosophy reader* 2nd ed (2003) 244 at 258, where it is said: 'Take the Yoruba adage: 'There was the cry of the witch yesterday, and the child died this morning; who does not know that the witch caused the death of the child?'

[87] Woods J.H and Walton D.N 'The fallacy "ad ignorantiam"' (1978) 32(2) *Dialectica* 87 at 92.

[88] This fallacy looks similar to that of *affirming the consequent.*

The problem in the fallacy of arguing from ignorance is that it permits the prosecution to avoid discharging its burden of proving causation and impermissibly places that burden on the Opponent.[89] This is an impermissible move in logical argumentation in that it permits the prosecution to impermissibly shift the argumentative burden of persuasion: 'Can you prove that the victim was *not* killed by a deadly fairy? If not, then it is proven that the death was perpetrated by the deadly fairy.'[90] The problem with the *post hoc*-type of reasoning is that it discounts the possibility of coincidental correlation of two or more events by assuming a causal connection.[91] In other words, it consists in an 'over-hasty conclusion'[92] that may well be true, but currently is not established. Therefore, although a materialistic approach to causation is favoured in this thesis in relation to the direct crime of witchcraft, these variants of fallacious materialistic causal connections will be avoided.

The materialistic approach introduced by Zimbabwe when it reformed and codified its criminal law in 2005, however, is not susceptible to the fallacies of

[89] On the dialectical evaluation of the *argumentum ad ignorantiam*, see van Emeren F.H *et al Fundamentals of argumentation theory: A handbook of historical backgrounds and contemporary developments* (1996) 64; Walton (note 85) 368; Walton D 'The witch hunt as a structure of argumentation' (1996) 10(3) *Argumentation* 389 at 402; Walton D *The new dialectic: Conversational contexts of argument* (1998) 246. However, there are reformulated variants of the *argumentum ad ignorantiam* that are non-fallacious, see Walton D 'Nonfallacious arguments from ignorance' (1992) 29(4) *American Philosophical Quarterly* 381.

[90] Walton (note 85) 375, citing Krabbe E.C.W 'Appeal to ignorance' in Hansen and Pinto (eds) *Fallacies: Classical and contemporary readings* (1995) 251 at 256. Robinson points out that to the argument, 'we don't know that not-p, therefore p,' the answer with equal force is 'we don't know that p, therefore, not-p,' see Robinson R 'Arguing from ignorance' (1971) 21(83) *Philosophical Quarterly* 97 at 102. Hamblin referred to the fallacious *argumentum ad ignorantiam* as committing 'dialectical malpractice,' see Hamblin (note 82) 9 and 254. Woods and Walton described it as a form of 'dialectical deviancy,' see Woods and Walton (note 82) 94.

[91] Walton D.N *Informal fallacies: Towards a theory of argument criticisms* (1987) 206.

[92] Ibid.

arguing from ignorance and the *post hoc.* No longer are consequences hypothetical, that is, 'calculated,' 'reported,' 'alleged' or 'generally believed,' but Zimbabwe's present witchcraft legislation, contained in a comprehensive criminal law code, requires that an *action* that is *provocative in the indigenous sense* 'inspires,' which in my view is a causative verb, a 'real fear or belief that harm will occur' to a person or a member of their family.[93] Unlike other witchcraft statutes on the continent that continue the formalistic approach described above, Zimbabwe's current legislation requires the proof of an actual prohibited consequence, namely: a 'real fear' in another person. The proof of the causation of a fear does not produce the fallacious causal connections involving actions that are provocative in the indigenous sense and the striking of bolts of lightning or human injuries. It rather entails a similar enquiry to that involved in the crime of assault, in relation to which the existence of a causation requirement generally is not controversial. For instance, a form of assault in Zimbabwe involves conduct that inspires 'in the mind of the person threatened a reasonable fear or belief that force will immediately be used against' them.[94]

For example, the accused in *S v Chifadza* swung a 2.32-metre-long wooden log towards a person, whom he missed, and fatally struck another (deceased), the High Court of Zimbabwe convicted the accused of culpable homicide in relation

[93] Criminal Law (Codification and Reform) Act of 2006, section 98(1) (Zimbabwe).
[94] Criminal Law (Codification and Reform) Act of 2006, section 89(1)(b) (Zimbabwe).

to the deceased and of assault in relation to the original target.[95] With respect to the assault charge, Mafusire J not only found that causation was required, as it is with the crime of assault in general, but also that the accused's conduct was perpetrated with 'tremendous force'[96] and as a result, it instilled fear in his targeted victim,[97] who at some point during the brawl attempted to flee so fast that his sandals slipped off and were left at the scene. The type of fear that was found to have been caused by the swinging of the wooden log in this particular assault case in my view is analogous to the type of fear required in the context of the direct crime of witchcraft. In conclusion, therefore, the approach argued for in this thesis with respect to the *factum probandum* of causation is the materialistic conception described above. Although this approach has been adopted only recently by Zimbabwe in 2005, there is a basis for a similar reading in witchcraft statutes across the continent.

4.2.3 FEAR (HARM)

It was intimated in the previous section discussing causation that the particular prohibited state of affairs caused by actions that are provocative in the indigenous sense is the fear experienced by the person(s) against whom such actions are directed. This section of the thesis focuses on justifying and explaining this view much further. A justification is necessary because not all crimes are *harmful* in

[95] *S v Chifadza* [2018] ZWMSVHC 27 at 61.
[96] *Chifadza supra* [55].
[97] *Chifadza supra* [57].

the orthodox sense[98] (for example, drug possession, drunken and dangerous driving and practicing law without a licence),[99] nor is *harmfulness* the only justification for the criminalisation of wrongful conduct.[100] It was explained earlier that the direct crime of witchcraft proscribes a particular form of unlawful conduct, but nothing has been said thus far about whether it is *harmful* or if it is, whether it is on this ground that it is criminalised.[101] Moreover, the connection of the fear we have identified to harmfulness in general requires further explanation. In particular, the questions that confront us are why and in what sense is a fearful experience harmful for purposes of the criminal law of witchcraft.

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[98] Feinberg J *Harm to others* (1984) 34-5. See generally, Feinberg J *Harmless wrongdoing* (1988).

[99] Alldridge P 'Dealing with drug dealing' in Simester and Smith (eds) *Harm and Culpability* (1996) 239; Feinberg (note 98) 34; Fisse B and Frazer D 'Some antipodean skepticism about forfeiture and confiscation of proceeds of crime and money laundering offences' (1993) 44 *Alabama Law Review* 737 at 740-1; Duff (note 25) 125-6. Offences relating to the production, possession or supply of counterfeit currency, military or police uniforms and identification documents similarly are harmless offences in this sense, see *Reuben Sirya Thoya v Republic* [2018] eKLR (Kenya).

[100] Some of the grounds of criminalisation in liberal democracies are: to prevent others from being offended or hurt; to prohibit *per se* morally sinful or wrongful conduct (legal moralism); to prevent certain persons (for example, rape used to be defined as the unconsensual vaginal penetration of a woman by a man) from acting in certain ways, see Feinberg (note 98) ix. Feinberg defines 'liberalism' as the view that all the good reasons for criminalization may be characterised as falling either into his 'Offence principle' or Mill's Harm principle (at ix-x). Duff (note 25) 123-4.

[101] Criminalisation in Common law jurisdictions was justified traditionally on the basis of the 'Harm principle,' see Mill J.S *On liberty* (edited by D. Bromwich and G. Kateb) (2003) 76; Hart H.L.A *Law, liberty and morality* (1963) 4-5; Simester A.P and Smith A.T.H 'Criminalisation and the role of theory' in Simester and Smith (eds) *Harm and Culpability* (1996) 1 at 4. Cf. Smith S.D 'Is the harm principle illiberal?' (2006) 51 *American Journal of Jurisprudence* 1; Ripstein A 'Beyond the harm principle' (1999) 34 *Philosophy and Public Affairs* 215; Harcourt B.E 'The collapse of the harm principle' (1999) 90 *Journal of Criminal Law and Criminology* 109 at 113; Dan-Cohen M 'Defending dignity' in Dan-Cohen (ed) *Harmful Thoughts: Essays on Law, Self and Morality* (2002) 150; Dubber M.D *Victims in the War on Crime: The use and abuse of victims'* (2002). The Harm Principle has since been extended further to cover 'remote harm' (or 'long term risks of harm'), see von Hirsh A 'Extending the harm principle: 'Remote' harms and fair imputation' in Simester and Smith (eds) *Harm and Culpability* (1996) 259; Ashworth A.J 'Criminal attempts and the role of resulting harm' (1988) 19(3) *Rutgers Law Journal* 725 at 733-4 (on extending the harm principle to cover inchoate and preventive crimes). Functional equivalents deployed by Continental jurists include, the notion of 'legal goods' (*Rechtsgüter*), the principle of legality, the *ultimo ratio* doctrine and the 'proscribed consequence' principle, see Peršak N *Criminalising harmful conduct: The harm principle, its limits and continental counterparts* (2007) Ch V; Keiler J and Roef D 'Principles of criminalisation and the limits of criminal law' in Keiler and Roef (eds) *Comparative Concepts of Criminal Law* 3rd ed (2019) Ch II.

With the exception of Zimbabwe, witchcraft statutes elsewhere on the continent are historical artefacts from the colonial period. They were enacted by British and French colonial governments to suppress incidents of mob violence that were associated with witchcraft.[102] The remarks of colonial judges cited at the beginning of this chapter also make it clear that these beliefs were conceived of as being irrational and deserving of suppression. This is the full extent of the grounds of the prevailing criminalisation of witchcraft on the continent. In Zimbabwe, however, it is recognised that actions that are provocative in the indigenous sense may cause a 'real fear' in another person.[103] A similar type of fear is recognised as that involved in the crime of assault in the example of the case of *S v Chifadza* cited above. It has been argued at length throughout this chapter that the colonial policy of suppressing African beliefs is problematic in contemporary Nubian Africa. On the other hand, the 'real fear' recognised in Zimbabwean witchcraft and assault cases appears to be a form of harmfulness on the basis of which witchcraft may continue to be criminalised. The reason whether and if so, how this 'real fear' is harmful is what begs for further explanation.

Harm in the Feinbergian sense is the (i) 'thwarting, setting back or defeating' of (ii) an 'interest.'[104] Given the controversies surrounding this

[102] South African Law Reform Commission *The Review of the Witchcraft Suppression Act 3 of 1957* (project 135, discussion paper 139) (2016) 85, available at: www.justice.gov.za (accessed: 23 October 2017) 46.
[103] Feltoe (note 6) 130.
[104] Feinberg (note 98) above 33.

definition,[105] it is used here as a working definition that is expatiated in the remainder of this section of the chapter. Its two components, (i) and (ii), are given meanings that suit the purposes of this thesis, including to explain the reason why and the nature in which the fear caused by actions that are provocative in the indigenous sense is harmful. As to component (ii) of the Feinbergian definition, the two types of interests that are referred to explicitly in witchcraft statutes across the continent are those of *persons* and those in *property*.[106] However, the latter must somehow, by way of interpretation, be linked back to the former. This firstly is because it has already been explained in the context of the discussion on causation above that any causal links that are drawn between actions that are provocative in the indigenous sense and consequences other than the 'real fear' required in Zimbabwe are susceptible to the classical *post hoc* and *argumentum ad ignorantiam* reasoning errors (for example, actions that are provocative in the indigenous sense causing car accidents or lightning strikes against people's homes). Secondly, the manner in which we define 'interests' for purposes of the direct crime of witchcraft places an existential *Dasein* or *Ubuntu* at the centre.

The word 'interest' implies a peculiar type of subject-object relationship. In other words, we are concerned to know *who* the holder of such an interest is

[105] Duff (note 25) above 127-140. Duff is especially critical of the application of this definition to crimes the harmfulness of which is tied to their wrongfulness.
[106] *Cameroun Code Pénal* n° 67/LF/1, article 310; Witchcraft Act [Cap 18 of the Laws of the United Republic of Tanzania, 1928], sections 3 and 3(e); Criminal Code Act [Cap 77 of the Laws of the Federation of Nigeria, 1916], section 216(c); Criminal Law (Codification and Reform) Act of 2006, section 98(1) (Zimbabwe); Witchcraft Act [Cap 67 of the Republic of Kenya, 1925], section 4; Witchcraft Suppression Act 3 of 1957, section 1(e) (South Africa).

and in *what* does it vest. The involvement of both the former (subject) and the latter (object) is indispensable, especially in the context of criminal law, whenever the concept of 'interest' is deployed. On the one hand, in a case where A's car window is smashed by another person, we cannot speak of *harm* in the criminal sense to the window independently of A's participation. That is, without A being the owner, or holding some other property right in law, of the car, we can at best only refer to the window as being 'broken', 'damaged' or 'smashed', but never *harmed*.[107] This particularly is because criminal law addresses itself towards 'persons, not problems'.[108] On the other hand, where A dies there is no subject (except the legal fiction of A's deceased estate) to hold the interest in the car and thus no criminal *harm*. Similarly, if A's deceased body, *qua* object, is wounded *post mortem*, there can be no assault or any other form of criminal *harm* for that matter.[109]

Therefore, at the centre of the relationship implied by the term 'interest' is *us*, that is, each person beyond just their physical composition, which is what is meant by the reference to the 'subject' above. To have an interest in something is for one's (physical) person to have a particular relationship with an extended

[107] Feinberg (note 98) 32-3.
[108] Dubber M.D 'The historical analysis of criminal codes' (2000) 18(2) *Law and History Review* 433 at 436.
[109] However, the possession of a human head or skull in Cameroon within 6 months from the time that it was dislodged from the body gives rise to a rebuttable presumption that the possessor had the intention of using it to practice witchcraft (see Section 56 of Schedule III(B) of the *Cameroun Code Pénal* n° 67/LF/1). The tampering with corpses and the possession of body parts of other people was traditionally a crime at Common law (*R v Lynn* (1788) 2 TR 733; *R v Sharpe* (1856-7) Dears & Bell 160), but this has become controversial over the years (see Smith A.T.H 'Stealing the body and its parts' [1976] *Criminal Law Review* 622; Grubb A 'I, me, mine: Bodies, parts and property' (1998) 3 *Medical Law International* 299; Leiboff M 'A beautiful corpse' (2005) 19(2) *Continuum: Journal of Media and Cultural Studies* 221; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37).

tangible or intangible object. Feinberg says one must have a 'stake' in the latter object.[110] By this, he means that the former (subject) must be in a position of 'risk' to 'gain' or 'lose' from the latter (object).[111] This determination, of the prevalence of the risk and whether there is gain or loss, is a value judgement to be made by *us*. This *us* is similar to what Heidegger calls *Dasein*[112] or Ramose's *Ubuntu*[113] in its positioning between the subject and object referred to above. Although these two loaded concepts have much wider meanings, we use them here for the limited purpose of showing that the *us* that is definitive of the interests that are protected by the direct crime of witchcraft is not limited to the physical subject nor the extended object referred to above. This understanding of the meaning of the interests protected by criminal law with this *us* at the centre has important existentialist overtones:

> Man's place in nature is that of a uniquely dynamic creature among the inanimate and his dynamism springs from the fact that he is able to see everything around him as relative to his needs, his desires, his aversion and his fears.[114]

Similarly, this *us* is situated at the very centre of criminal law insofar as it gives meaning to the notional interests that are sought to be protected.

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[110] Feinberg (note 98) above 33-4.
[111] Ibid.
[112] Heidegger says: '*Dasein* is an entity which in each case I myself am. Mineness belongs to any existent *Dasein*, and belongs to it as the condition which makes authenticity and inauthenticity possible,' see Heidegger M *Being and time* (translated by J. Macquarrie and E. Robinson) (1962) 78/H52.
[113] Ramose M.B 'The philosophy of *ubuntu* and *ubuntu* as a philosophy' in Coetzee and Roux (eds) *The African philosophy reader* 2nd ed (2003) 230 at 237.
[114] Warnock M 'Introduction' in Sartre J.P *Being and nothingness: An essay on phenomenological ontology* (translated H.E Barnes) (2015) xi at xiii.

There is a conceptual distinction between the three concepts, the subject, object and *us*, which constitute the type of relationship implied by the term interest, but all three are connected by a wide spectrum of desires and goals that the *us* has.[115] Once the *us* develops a goal or desire, a peculiar relationship is formed between the subject, *qua* beneficiary, and the object. In a complicated,[116] and sometimes incorrect, sense, the *us* is identified as being the same as or constitutive of its desired objects:

> These interests, or perhaps more accurately, the things these interests are in, are distinguishable components of a person's well-being: he flourishes or languishes as they flourish or languish. What promotes them is to his advantage or in his interest; what thwarts them is to his detriment or against his interest.[117]

If taken too literally, these remarks by Feinberg obviate the role played by desires or goals as connecters of the *us* and the object. Figure 8 reflects the distinction between the *us*, subject and object.

[115] Feinberg (note 98) 55.
[116] For instance, Heidegger famously contended that *Dasein* 'has Being-in-the-World as its essential state' and that 'Being-in' means 'to reside,' 'to dwell,' 'to be accustomed' within the world, see Heidegger M *Being and time* (translated by J. Macquarrie & E. Robinson) (1962) 79-80. Similarly, the phrase 'son of the soil' is quite commonly used in Nubian Africa to underscore the value placed by Africans, among other things, to their land, organic food and the burial of their ancestors, see Sogolo G.S 'Logic and rationality' in Coetzee and Roux (eds) *The African philosophy reader* 2nd ed (2003) 244 at 246.
[117] Feinberg (note 98) 34.

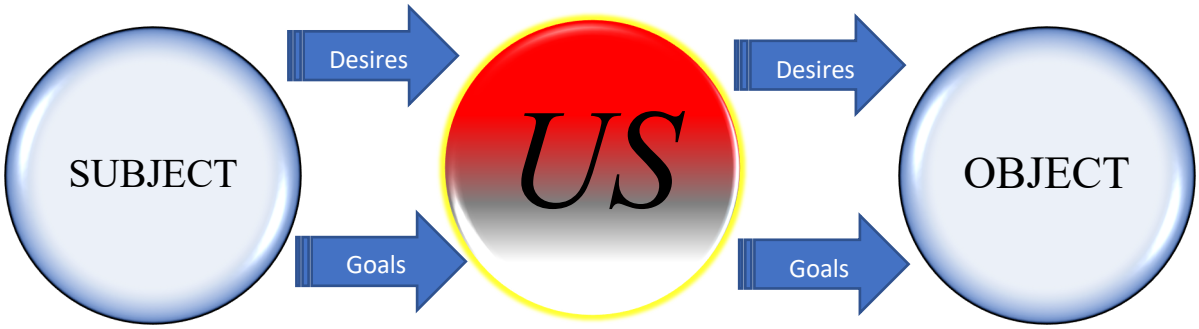

Figure 8: Flow diagram showing the distinction between the subject, *us* and object

The full spectrum of these goals and desires typically is referred to as a 'human interest network.'[118] There are at least five of these variants on this spectrum that are relevant here. Firstly, there are what Feinberg calls 'mere passing desires' or 'wants' in the strict sense.[119] An example of this is '[a] sudden craving for…ice cream…on a hot summer day when plenty of cold water is available.'[120] Secondly, there are 'instrumental wants', which ordinarily link up as means or necessary conditions towards the achievement of broader ulterior ends.[121] For example, the desire to arrive on time for a meeting usually is instrumental to a much broader end such as: to develop a personal habit of punctuality, to make a good impression on other attendees of the meeting or to be on time for other commitments after the meeting. Thirdly, Feinberg identifies

[118] Ibid 60 and 55-61.
[119] Ibid 55.
[120] Ibid.
[121] Ibid 56-7.

what he calls 'welfare interests' as being our desires and goals towards the attainment of the 'bare minima' of all human beings:

> Our interest in welfare, speaking quite generally, is an interest in achieving and maintaining that minimum level of physical and mental health, material resources, economic assets, and political liberty that is necessary if we are to have any chance at all of achieving our higher good or well-being, as determined by our more ulterior goals.[122]

Welfare interests similarly are 'instrumental' insofar as they link up with more ulterior ends, but they are more fundamental and generic than instrumental wants.[123] The fourth variant of the human interest network are ulterior goals. These are 'focal,' 'dominant' and 'specific' 'ends in themselves' that are pursued by a particular individual.[124] Examples of ulterior goals are:

> [P]roducing good novels or works of art, solving a crucial scientific problem, achieving high political office, successfully building a dream house, advancing a social cause, ameliorating human suffering, achieving spiritual grace.[125]

The last type of interest on the spectrum is what Feinberg calls 'inclusive ends.'[126] These have the dominance and ulteriority of ulterior ends, but are less specific to a particular individual. For instance, the pursuit of 'happiness' is an inclusive end common at least to most people,[127] whereas the teaching of Evidence and Proof is an ulterior goal for certain particular individuals. Figure 9 is a table showing examples illustrating the human interest network discussed above.

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[122] Ibid 57.
[123] Ibid 37.
[124] Ibid 59-60.
[125] Ibid 37.
[126] Ibid 56.
[127] Ibid.

PASSING WANTS	INSTRUMENTAL WANTS	WELFARE INTERESTS	ULTERIOR GOALS	INCLUSIVE ENDS
To eat an ice cream cone	To forego dessert	In physical health and vigour	Building a dream house.	The pursuit of happiness.
To go to a movie	To get exercise.	In the absence of obsessive pain.	Writing a book.	The development of compassion towards others.
	To start a savings account.	In the absence of grotesque disfigurement.	Winning fame or glory.	
	To go to bed early.	In intellectual competence.	Acquiring political power.	
	To work overtime.	In emotional stability.	Acquiring religious holiness.	
		In economic sufficiency.	Advancing a cause.	
		In a tolerable environment.	Solving a scientific problem.	
		In minimal political liberty.	Raising a family.	
			Achieving leisure.	

Figure 9: Table of human interest network

Feinberg pertinently points out that welfare interests are most relevant to criminal law,[128] as the remainder of the types of desires and goals on the human interest spectrum are for each individual, or social group, to protect, including through private-law remedies.

When associated with the adverse physical experience of a 'real fear' in witchcraft cases, the interests in the *person,* or in the *us*, delineated above may in turn be related to personality interests, which are known and theorised about by jurists in the context of the crime of assault. 'Offences against the person,' including sexual offences, are understood commonly as aiming to preserve an individual's bodily integrity.[129] Attacks in the form of actions that are provocative in the indigenous sense have a similar effect against their victims as typical threats

[128] Ibid 61-2.

[129] Fox R and Freilberg A 'Ranking offence seriousness in reviewing statutory maximum penalties' (1990) 23 *Australian and New Zealand Journal of Criminology* 165 at 168; Stone R *Offences against the person* (1999) 2; Anyangwe (note 77) 301.

of assault, for example: A points a gun at B and says 'be quiet or I will blow your brains out.'[130] In either case, there is a negative fear instilled in the victim that harm will occur. Anyangwe more generally refers to crimes that have such an impact as 'non-fatal psychic assaults.'[131]

The Zimbabwean statute pertinently qualifies the type of fear required as having to be 'real,' as opposed to 'reasonable' or 'justifiable.' This significantly narrows the scope of *harmful* actions that are provocative in the indigenous sense. For example, incidents involving a Cameroonian man wooing Miss Mbezele Ndi Mchilin by putting white 'magic powder' obtained from a local Hausa Marabout (a version of a *Nganga* consulted in Islamic parts of Cameroon and Nigeria) into her food[132] are in a different class to Mrs Nwaoke, who fell into severe depression and committed suicide six days after being threatened with death through the placement of a *juju* (fetish amulet) at her door.[133] Feinberg also defines 'injury' in the first component of his definition of harm to mean an 'invasion' by another human being acting singly or collaboratively with others.[134] Therefore, 'set backs' or 'invasions' caused by animals, natural disasters or viral pandemics generally are excluded for purposes of criminal sanction. Similarly, in *S v Netshiavha* the accused, while being under the impression that he was striking a

[130] For other similar examples of threats, see Anyangwe (note 77) 302.
[131] Ibid 303.
[132] Fisiy C.F 'Palm tree justice in Bertoua court of appeal: the witchcraft cases', *African Studies Centre,* (working papers No. 12) (1990) 15. A similar case is *Ministère Publique & Mvondo c/N. Jacquèline* Arrêt No. 335/COR of March 22, 1984, Bertuoa Court of Appeal.
[133] *R v Nwaoke* 1939 5 WACA 120 at 121.
[134] Feinberg (note 98) 34.

bat hanging from his roof while he was asleep in the middle of the night, fatally struck the head and neck of a person with an axe.[135] If the accused's target in fact was a bat, and not a human being, there would be no injury to his interests, as this would have been an invasion by an animal (and not by a criminally responsible human being). The only possible injury to the accused under these circumstances would have to be in the form of trespass by the deceased who was in the accused's home and hanging from his roof. The accused pleaded guilty to culpable homicide (non-intentional murder), but pleaded that he was frightened that the 'bat' would harm him. Goldstone JA accepted this belief:

> [T]here is no reason to reject the appellant's stated deep belief in witchcraft or his disavowal of an intention to kill the deceased…That belief was clearly and directly related to the attack on the deceased. Objectively speaking, the reasonable man so often postulated in our law does not believe in witchcraft. However, a subjective belief in witchcraft may be a factor which may, depending on the circumstances, have a material bearing upon the accused's blameworthiness…As such it may be a relevant mitigating factor to be taken into account in the determination of an appropriate sentence. In my opinion, it is a relevant factor in the present case and indeed it offers the only explanation for the appellant having killed the deceased.[136]

As a result, the Opponent's sentence was reduced from a 10-year term of imprisonment to 4 years.[137] This case also makes it clear that 'real' must be interpreted in a subjective sense that is similar to the kind of *Super weak* knowledge, *qua* true belief, described above in the context of the kind of social

[135] *S v Netshiavha* 1990 (2) SACR 331 (A) 332C-H.
[136] *Netshiavha supra* 333F-G.
[137] *Netshiavha supra* 334A.

epistemology used to determine the surrounding circumstances of actions that are provocative in the indigenous sense. In other words, the test is not whether a particular fear is 'reasonable' or 'justifiable,' but rather whether it is 'real' in the sense that it is *actually* and *subjectively* held by the particular accused concerned.

We have thus far shown that the commission of the direct crime of witchcraft involves an action that is provocative in the indigenous sense and that (materially) causes a 'real fear,' determined subjectively, in another person. What is now left is to discuss the type of mental state required on the part of the accused in the perpetration of the required action that was provocative in the indigenous sense.

4.2.4 INTENTION (FAULT)

The general definition set out at the beginning of this chapter of the direct crime of witchcraft being the *intentional* commission of an action that is provocative in the indigenous sense and that causes a real fear in another human being requires further qualification particularly because not all Nubian African jurisdictions require intention. According to Snyman, statutes that use words such as 'intentionally,' 'maliciously,' 'recklessly' or 'willfully' all 'clearly and expressly' require different forms of fault, but 'generally speaking,' those that use the phrase 'calculated to' involve crimes of strict liability.[138] If this is so,[139]

[138] Snyman (note 65) 238.

[139] There is some justification for this position given that the phrase 'calculated to injure' has been interpreted to refer to an objective 'likelihood' and not any form of fault, see *R v Heyne* [1956] 3 All SA 435 (A) 445; *R v Kruse* 1946 AD 524 at 533. See also *R v Miller* [1954] 2 QB 282 at 292 where 'calculated to interfere with the health or comfort of the victim' was interpreted to mean 'likely'. See also *R v Davidson* [1972] 1 WLR 1540; *R v Aworinde* [1996] R.T.R. 66 at 69 where 'calculated to deceive' was held to mean 'likely to deceive'. Generally, see Jefferson (note 75) 480. A similar trend is observable in civil cases and outside the continent, see Simester A.P 'Is strict

then the direct crime of witchcraft in about half of Nubian Africa, for example, in Nigeria, Tanzania and South Africa, is one of strict liability. Francophone jurisdictions such as Cameroon have statutes that also make no explicit reference to intention, but this requirement is implied by francophone-style legislative drafting that uses a general section of criminal responsibility that is applicable, in different ways, to all *crimes*, *délits* and *contraventions*.[140] Witchcraft is considered to be a *délit* in Cameroon because it is punishable by imprisonment for a period ranging between 2 to 10 years or a fine ranging between 5000 and 100 000 Cameroonian francs.[141] *Délits,* like *crimes*, typically are punished *ex dol* and *contraventions* are punished strictly in Francophone jurisdictions.[142] As to the remainder of Nubian African jurisdictions, for example, Zimbabwe and Kenya, intention is explicitly required in witchcraft statutes. To the extent that this thesis theorises about intentionality in relation to the direct of witchcraft, this excludes from the analysis the jurisdictions referred to above that punish actions that are provocative in the indigenous sense on the basis of strict liability.

A basic distinction is drawn in all Nubian African jurisdictions between certain prohibited forms of fault, usually in the form of intention, recklessness or

liability always wrong?' in Simester (ed) *Appraising Strict Liability* (2005) 21 at 42, where the words 'calculated to influence the vote of an elector' in section 55 of the New Zealand Local Elections and Polls Act of 1976 were interpreted to impose strict liability. The phrase 'calculated to' commonly is understood to impose strict liability in defamation cases in Africa, see *Daura v Danhauwa* (2009) LPELR-3714 (CA) 9E-G; *Boka enterprises (Pvt) Ltd v Manatse & Anor* 1989 (2) ZLR 117 (H) 130-1; *Bon Marché (Pvt) Ltd v Brazier* 1984 (2) ZLR 50 (S) 56; *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A) 953-4.

[140] *Cameroun Code Pénal* n° 67/LF/1, article 74. Cf. French *Code Pénal* of 1992, article 111-1.

[141] Anyangwe (note 77) ix.

[142] Spencer J.R and Pedain A 'Approaches to strict and constructive liability in Continental criminal law' in Simester (ed) *Appraising Strict Liability* (2005) 256; Elliot C 'The French law of intent and its influence on the development of international criminal law' (2000) 11(1) *Criminal Law Forum* 35 at 39.

negligence (or different variations of these) and the particular *circumstances* and *consequences* to which they relate.[143] The significance of the operation of both these aspects is illustrated by cases, for example, where the accused intends to bring about a particular prohibited result, but is mistaken as to the circumstances under which they are acting (for example, where the accused mistakenly appropriates property belonging to another person under the mistaken belief that it belongs to them (accused)).[144] Similarly, an accused that unknowingly assaults an undercover police officer must be charged with the crime of assault, which they intended, and not the offence of 'assaulting a police officer,' which is a more serious offence.[145] The accused is required to intend to commit each of the ingredients of the offence and this invariably requires knowledge that one's prohibited conduct may bring about the type of prohibited consequence concerned.[146] In the case of Zimbabwe, for example, the witchcraft statute explicitly requires that the accused commits an action 'knowing that it is commonly associated with witchcraft' (or 'provocative in the indigenous sense') within the particular community concerned.[147] With respect to the direct crime of witchcraft, however, requiring intention as to circumstances and consequences presents some complex problems: Why should the accused be held liable for

[143] Situma (note 68) 44; Okonkwo (note 68) 49-52; Anyangwe (note 68) 185; Mapunda (note 68) 43-5; Feltoe (note 6) 24-5; Snyman (note 65) 176; Burchell J *Principles of criminal law* 3rd ed (2005) 493; Badar M.E *The concept of mens rea in international criminal law: The case for a unified approach* (2013) 162 (on this distinction in francophone jurisdictions in general).
[144] Anyangwe (note 77) 186.
[145] Smith J.A.C 'The Cameroon Penal Code: Practical comparative law' (1968) 17(3) *International & Comparative Law Quarterly* 651 at 661.
[146] Anyangwe (note 77) 182-3.
[147] Criminal Law (Codification and Reform) Act of 2006, section 98(1).

having knowledge of circumstances that are impossible? If such knowledge is possible under some adulterated definition, should the accused be held liable for intending consequences that are impossible? If the answer to both is affirmative, then should the accused be held liable if their intended consequences are possible, on some expansive interpretation of causation, but his knowledge of the surrounding circumstances is impossible (or vice versa)? The remainder of the discussion of intention in this section will be focused on answering these questions.

Our starting point must be epistemic, as knowledge of circumstances in fact is the base of intentionality. The scepticism of the colonial drafters of witchcraft legislation is noted throughout this thesis. In relation to knowledge of circumstances, they regarded perpetrators of actions that are provocative in the indigenous sense as acting on 'pretended knowledge' with the intention of bringing about 'so-called witchcraft.'[148] On this antiquated version, the intention of bringing about consequences that are related to 'so-called witchcraft,' having the knowledge of the associated circumstances, simply is impossible, and thus intentionality would be impossible under these circumstances, yet many Nubian African jurisdictions continue to explicitly criminalise actions that are provocative in the indigenous sense committed *intentionally*.[149]

[148] Witchcraft Act [Cap 67 of the Republic of Kenya, 1925], section 4; Witchcraft Suppression Act 3 of 1957, section 1(e) (South Africa).
[149] For example, *Cameroun Code Pénal* n° 67/LF/1, article 310, read with article 74 ('intentionally commits each of the ingredient acts or omissions of an offence'); Criminal Law (Codification and Reform) Act of 2006, section

As we did regarding the *surrounding circumstances* of the prohibited types of *actions* earlier, a nuanced definition of knowledge is required in the context of intentionality too. The difference between these two contexts is that one involves the application of social epistemology (unlawful action), while individual epistemology is applied to the other (fault). It was also indicated earlier on that our preferred definition of knowledge for purposes of witchcraft cases is the *Super weak* sense of the term (*qua* '*actual* or *genuine* belief'). This applies *a fortiori* to the context of intentionality as well because a 'subjective test'[150] is expressly provided for in the context of the intentionality requirement across the continent.[151] For example, section 14 of Zimbabwe's criminal code provides that '[w]here knowledge is an element of any crime, the test is subjective and is whether or not the person whose conduct is in issue had knowledge of the relevant fact or circumstance.' Moreover, section 12 provides:

> For the purposes of this Part, a *subjective test* for a state of mind is a test whereby a court decides whether or not the person concerned *actually* possessed that state of mind at the relevant time, taking into account all relevant factors that may have influenced that person's state of mind.[152]

This is a radical change from the previously sceptical attitude of colonial legislators and judges. According to Duff, contemporary subjectivist approaches

98(1) ('having intended thereby to cause harm to any person') (Zimbabwe); Witchcraft Act [Cap 67 of the Republic of Kenya, 1925], section 4 ('intent to injure').

[150] The term subjective here is used not in any ontological sense, but merely for the pragmatic reason that the law applies particular institutionally-recognised tests and concepts, for example, to intentionality that it does not to negligence. On the fallacies surrounding the ontological usage of the concepts of 'internal' and 'external,' see Searle J.R *Intentionality: An essay in the philosophy of mind* (1983) 37.

[151] Situma (note 68) 44 (own emphasis); Anyangwe (note 77) 186.

[152] Criminal Law (Codification and Reform) Act of 2006, section 12.

to criminal responsibility typically come in two variants: *choice* or *character*.[153] Character theorists define criminal responsibility in terms of 'disposition, attitudes or motives,' while choice theorists, whom Duff regards as being dominant representatives of subjectivism, use 'intention and belief' to define criminal responsibility.[154] According to Duff, character theorists that focus on the accused's objective dangerousness 'will see reason to acquit [forms] of "impossible attempt" which do not show the agent to be dangerous,' whereas choice theorists might find it harder to acquit under these circumstances.[155] Our preference for the *Super weak* sense of knowledge, for the reasons set out above, renders character theories difficult to apply to witchcraft cases. However, even the way Duff defines 'beliefs' and 'intention' in the context of subjective approaches to criminal responsibility raises some problems for the witchcraft context. For instance, he says that one cannot intend for a consequence that is dependent on other factors that are either non-human or otherwise beyond one's control (for example, one cannot intend to throw a double six, unless they believe the dice are loaded).[156] Moreover, although he admits that 'belief' ought not to be equated with 'knowledge' or 'certainty' (for example, the accused does not have to know that it is particularly windy in an area where they are attempting to set a

[153] On the difference between objective and subjective approaches to criminal responsibility, see Duff R.A 'Subjectivism, objectivism and criminal attempts' in Simester and Smith (eds) *Harm and Culpability* (1996) 19 at 20-1. See also Duff R.A 'Choice, character and criminal liability' (1993) 12 *Law and Philosophy* 345 (on the debate between Choice *or* Character in subjective criminal liability); Ashworth A.J 'Belief, intent and criminal liability' in Eekelaar and Bell (eds) *Oxford Essays in Jurisprudence* (1987) 1 at 7.
[154] Duff (note 153) 20.
[155] Ibid 20-1, n6.
[156] Duff R.A *Intention, agency and criminal liability: Philosophy of action and the criminal law* (1990) 56-7.

particular house on fire),[157] Duff also says that such belief must be such that 'in point of possibility' there is a 'reasonable prospect' of bringing about the prohibited result.[158] These qualifications related to 'beliefs' and 'intention' introduce objective features that render subjectivism inconsistent with the kind of *Super weak* sense of knowledge required for witchcraft cases.

What we have in mind here is closer to what Searle referred to as *conscious experience*.[159] Searle begins by arguing, and thereby modifying Husserl's classical 'aboutness' definition,[160] that '[i]ntentionality cannot be an ordinary relation like sitting on top of something or hitting it with one's fist,' as it is possible to be in an intentional state without the object or state of affairs to which such a state is directed at even being in existence.[161] This explains why one can be *fearful* (intentional state) of vampires, werewolves and aliens and *hopeful* for things occurring in the future, all of which currently do not exist.[162] Similarly, one can have a *conscious experience* of a red car that derives from the visual perception of this particular object without such an object ever existing.[163] This is because the car could be under strong red lighting, and thus merely perceived

[157] Ibid 55.
[158] Ibid 56. However, Duff does also say: 'I can intend to do what is in fact impossible, if I believe it to be possible – to shoot Pat with a gun which is actually unloaded, if I believe it to be loaded; but I cannot intend to do what I believe to be impossible, even if it is in fact possible – to hit a target which I believe to be out of range, even if my belief is false and my shot does hit the target (I can intend to try to hit the target, to prove to you that it is out of range; but I cannot intend to hit it).' (Duff (note 156) 56). This description of 'belief,' as including even things that are impossible, seems to be closer to our *Super weak* sense of knowledge, but Duff once again retreats by qualifying that this is mere 'belief' and not 'knowledge' (at 55).
[159] Searle (note 150) 37.
[160] Moran D *Introduction to phenomenology* (2000) 16.
[161] Searle (note 150) 4.
[162] Ibid.
[163] Ibid 37.

to be red when it is in fact purple in colour (or the perceiver could simply be colourblind). Notwithstanding this visual error, the conscious experience, *qua* intentional state of mind, of a red car nevertheless will be had as a matter of fact.[164] The kind of subjectivism that is appropriate to witchcraft cases, in my view, employs knowledge of circumstances in the *Super* weak sense of the term and a mental state that is akin to Searle's conscious experience. In this way, this mental state is neither comingled with objective features, nor is it hindered by potentially impossible objective events. This understanding is at least consistent with several decided cases. For example, the Court of Appeal in *The people v Bongo Charles* found that the accused acted with intention when he buried *instruments of witchcraft* throughout the village with the intention of killing anybody who opposed his son-in-law in an upcoming election for the chieftainship of the Canton.[165] This finding was based on two factors: firstly, the accused solicited the advice of a local witch-doctor, who in turn confessed that he had harboured such malicious intentions and secondly, once the complainant attempted to challenge the accused's son-in-law for the chieftainship, he suddenly fell ill and testified that he feared for his life upon being exposed to the buried instruments of witchcraft.[166] Another example is the accused in *S v Jochoma*, where it was found that he had acted with intention, albeit on the basis of a confession, when he broke an egg at the precinct of a division of the High Court

[164] Ibid 37-8.
[165] *The People v Bongo Charles* Arrêt No. 151/COR of March 6, 1984, Bertoua Court of Appeal.
[166] Fisiy (note 132) 23.

of Zimbabwe with the intention of influencing the decisions taken in ongoing legal proceedings.[167]

Having established a peculiar subjectivist conception of knowledge required for intentionality in witchcraft cases, we now have to distinguish two variants of intention that are *direct* and *indirect* respectively. This distinction has been described using a plethora of concepts, including: 'direct' and 'oblique' intention;[168] 'intrinsic' and 'extrinsic desires';[169] 'ultimate *ends*' and the 'necessary *means* to one's ultimate ends';[170] 'immediate' and 'intermediate purposes';[171] 'intentionally doing something' and 'doing something with a further intention';[172] 'intended action' and 'intentional action';[173] *dol direct* and *dol indirect*.[174] A fairly wide and inclusive definition is offered by Williams:

> With one exception, an act is intentional as to a consequence if it is done with (motivated by) the wish, desire, purpose or aim (all synonyms in this context) of producing the result in question…The one type of case in which it is reasonable to say that an undesired consequence can be intended in law is in respect of known certainties. A person can be held (but will not always be held) to intend an undesired event that he knows for sure he is bringing about.[175]

[167] *S v Jochoma* 2014 (2) ZLR 553 (H) 558.
[168] Kugler I *Direct and oblique intention in the criminal law: An enquiry into degrees of blameworthiness* (2002).
[169] Duff (note 156) 54; Audi R 'Intending' (1973) 70(13) *Journal of Philosophy* 387 at 389.
[170] *Hyam v Director of Public Prosecutions* [1975] A.C. 55 at 74 (per Lord Hailsham).
[171] Kaveny C.M 'inferring intention from foresight' [2004] 120 *Law Quarterly Review* 81 at 96-7.
[172] Hart H.L.A *Punishment and responsibility: Essays in the philosophy of law* 2nd ed (2008) 117-8.
[173] Duff (note 156) 43.
[174] Spencer J.R 'Intentional killings in French law' in Horder (ed) *Homicide Law in Comparative Perspective* (2007) 39 at 43; Elliot C *French criminal law* (2001) 66-7; Badar (note 143) 161; Bell (note 15) 222; Anyangwe (note 68) 186.
[175] Williams G 'Oblique intention' (1987) 46(3) *Cambridge Law Journal* 417 at 418 (footnotes omitted).

The first basic form of intention, *qua* desire, purpose or aim (which we call here 'direct') is relatively not as controversial as the second enlarged version (indirect). Furthermore, the classical scenario of the bomber of a plane without the desire, purpose or aim of killing a particular person (or maybe even with the alternative purpose of receiving an insurance pay out) typically is used to justify enlarging the basic, direct form of intention does not also seem to be controversial.[176] The controversy lies, however, with the coining of this enlarged mental state, its substantive content, its relationship with direct intention and its conceptual limits.[177] While it may be accepted that the accused, in *Netshiavha, desired* to strike and kill with his axe what he thought was a bat hanging from his roof, it may be controversial to argue that Mr Nwaoke intended for his wife, whom he threatened with death while pointing to a *juju* (fetish amulet), to commit suicide by hanging from a tree.

Direct intention is explained invariably in terms of 'desire' across Common law and Continental jurisdictions.[178] Even when the word 'purpose' is

[176] Ibid 423.

[177] This controversy has been ongoing since Bentham's coinage of the term 'oblique intention': Bentham J *Introduction to the principles of morals and legislation* (edited by J.H Burns and H.L.A Hart) (1970) 86-7; Duff R.A "The Obscure Intentions of the House of Lords" [1986] *Criminal Law Review* 771; Halpin A "Intended Consequences and Unintended Fallacies" (1987) 7 *Oxford Journal of Legal Studies* 104; Buxton R "Some Simple Thoughts on Intention" [1988] *Criminal Law Review* 484; Duff R.A "Intentions Legal and Philosophical" (1989) 9 *Oxford Journal of Legal Studies* 76; Norrie A "Oblique Intention and Legal Politics" [1989] *Criminal Law Review* 793; Duff R.A "The Politics of Intention: A Response to Norrie" [1990] *Criminal Law Review* 637; Norrie A "Intention: More Loose Talk" [1990] *Criminal Law Review* 642; Griffin G "Inferring the Requisite Intention to Kill" (1989) 139 *New Law Journal* 1637; Lacey N "A Clear Concept of Intention: Elusive or Illusory?" (1993) 56 *Modern Law Review* 621; Simester A.P and Chan W 'Intention thus far' [1997] *Criminal Law Review* 704.

[178] Other similar concepts such as 'aim' and 'object' are used on the continent, see Situma (note 68) 43; Feltoe (note 6) 4. See also, Spencer (note 174) 43; Anyangwe (note 68) above 186. Desire commonly is used synonymously with 'want,' see Duff (note 156) 52.

preferred,[179] desire is involved because, as Williams notes, an '"undesired purpose" is a contradiction in terms.'[180] Although direct intentions need not always involve 'a prior process of deliberation and decision,'[181] they may be explained in terms of having *reasons* for one's actions, that is: a possible answer to the question "why did you do that?" may be "in order to manifest my desires or to bring about an outcome that I desire."[182] For example, it was found that the headmaster of a school (Ndam Phillip Mbah) lacked the intention of committing an action that is provocative in the indigenous sense when he covered his yam crops with ash.[183] This particularly is because the crops had been previously stolen on the school farm and the headmaster desired to 'scare away the thieves.'[184]

On the enlarged definition of indirect intention indicated above, however, Ndam Phillip Mbah may be argued to have known, as a 'morally certain consequence' of his actions,[185] that somebody in that particular community might have the conscious experience (or a real fear) that this is an action that is provocative in the indigenous sense. It is in this regard that controversies surrounding 'foresight,' 'medial desires' and 'intermediate purposes' arise.[186] For

[179] Anyangwe (note 68) 186 ('fixed purpose').
[180] Williams (note 175) 418.
[181] Duff (note 156) 44-5.
[182] Ibid 47-8.
[183] *Ndam Phillip Mbah v The People* (1999) Bamenda Court of Appeal.
[184] This decision, however, has been criticised as a 'misstatement of the law' by Anyangwe (note 77) 257-8.
[185] Williams (note 175) 418. Cf. White A.R 'Intention, purpose, foresight and desire' (1976) 92 *Law Quarterly Review* 569 at 582. Duff (note 156) 53 (my duty to pay my debt conflicts with other desires of mine but I would be morally certain that it will be paid if I instruct my bank to make the payment).
[186] Anyangwe (note 68) 186. This is similar to Kaveny's *immediate* and *intermediate* 'purposes,' see Kaveny (note 171) 93: '[P]urposes are generally nested: an agent's immediate purpose contributes to an intermediate

our purposes, there are two questions that are relevant to address: (1) Does indirect intention apply in relation to crimes against the causing of non-physical consequences (for example, non-fatal psychic (or 'emotional') assaults)? (2) Should an accused that has a possible or plausible indirect ultimate purpose (for example, to bring about the death or illness of another person), but is using implausible means (for example, an egg or fetish amulet), be held to have acted with intention?

As to the first of these questions, it will be recalled from our discussion of the *S v Chifadza* case earlier in this chapter that indirect intention (which is understood as being part of 'actual intention' in Zimbabwe)[187] was found on the part of the accused who swung a 2.32-metre-long wooden log towards a person, whom he missed, and fatally struck another (deceased). As against the deceased, the accused was convicted of culpable homicide (nonintentional killing), but against the 'original target,' in whom he had only managed to 'inspire a real fear,' he was found to have acted with intention (in the indirect sense, for our purposes). Williams, on the other hand, is far more sceptical of applying indirect intention

purpose which contributes to a more remote purpose.' Despite the controversies surrounding 'foresight,' many commentators on the continent continue to use the term in its orthodox form, see Situma (note 68) 42 ('*Mens rea*…connotes foresight of the consequences of an act or omission'); Feltoe (note 6) 24 ('X would have actual intention if he or she set out to cause the consequence or X engaged in conduct which he or she foresaw was certain or substantially certain to cause that consequence.'

[187] Unlike other southern African jurisdictions, Zimbabwe has two forms of intention, *actual* and *legal* intention. The German-derived *dolus indirectus* has no application in Zimbabwe, at least not under that terminology. Instead, what we have referred to as *direct* and *indirect* intention in this thesis is subsumed under the broad term of *actual intention*, see); Feltoe (note 6) 24; Feltoe G *A guide to the Criminal law of Zimbabwe* 3rd ed (2004) 10; *S v Mugwanda* 2002 (1) ZLR 574 (S) 581D-E; *S v Mazhambe* [2016] ZWHHC 161 at 7; *S v Mapfumo* [2018] ZWBHC 88 at 3-4. Cf. This terminology, *dolus indirectus*, commonly is used, however, in defamation cases, see *Garwe v Zimind Publishers (Pt) Ltd* 2007 (2) ZLR 207 (H) 235; *Sanangura v Econet Wireless (Pvt) Ltd* 2012 (2) ZLR 304 (H) 313.

to 'offences of causing stress, annoyance, etc.'[188] His primary worry is that 'if the intent to annoy were construed to include oblique intent it would have virtually no limit.'[189] Williams has the case of *Sinnasamy Selvanayagam v R*[190] in mind where the accused was charged with the statutory offence of 'a tenant remaining in occupation with the intent to annoy the owner' despite claiming that his desire simply was to retain his home, but not to annoy the owner. Williams is of the view that extending indirect intention to such circumstances would mean that 'all squatting in dwelling houses annoys the owner as soon as he comes to know of it.'[191] Quite apart from Williams's reasoning being relatively thin in this regard, as he does not indicate what particularly is wrong with this purportedly exaggerated postulation, but more importantly, such cases rarely amount to criminal violations in Africa. At any rate, Williams's view is inconsistent with the *Chifadza* decision discussed above where the accused was held to have acted with indirect intention in 'inspiring a real fear' in his 'original target.'

The second of the two questions outlined above implicates what Fletcher refers to as 'the problem of the superstitious attempt.'[192] That is to say a person attempting 'to achieve a criminal objective…by a method which is widely

[188] Williams (note 175) 436.
[189] Ibid.
[190] *Sinnasamy Selvanayagam v R* [1951] A.C. 83.
[191] Williams (note 175) 436.
[192] Fletcher G.P *Rethinking criminal law* (2000) 173-4.

regarded as unreal and superstitious.'[193] According to Fletcher, Opponents under these circumstances should be acquitted because they are simply not dangerous:

> The consensus in Western legal systems is that there ought to be an exemption from punishment for attempts both in cases of superstitious attempts.[194]

Westen, on the other hand, proposes a 'stealth requirement,' in terms of which 'a person is guilty of an attempt to commit offense X if and only if he reveals himself to have been a threat to the interests that offense X seeks to protect.'[195] As to the determination of such a threat:

> The third requirement ['over and above the two requirements of a bad act and guilty mind'] is that an actor not be punished unless citizens of the jurisdiction that enacted the criminal statute at issue regard the actor's conduct as a threat to interests that the statute seeks to prevent. Whether conduct is a "threat" is a matter of citizen psychology. An attempt to commit offense X is a "threat" if, and only if, citizens of the jurisdiction that enacted the statute making X a crime perceive it as such. In turn, citizens regard conduct as such a threat when they are convinced that an actor would have committed offense X under counterfactual circumstances that they fear could have obtained-or, more accurately, when they fear its commission sufficiently to feel he should be punished for his guilty mind and willingness to act on it.[196]

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[193] Ashworth A.J 'Criminal attempts and the role of resulting harm' (1988) 19(3) *Rutgers Law Journal* 725 at 763.
[194] Fletcher (note 192) 175; Shavell S 'Deterrence and the punishment of attempts' (1990) 19 *Journal of Legal Studies* 435 at 451 (arguing that when the probability of social harm is zero, there is no reason for society to bear the costs of punishing someone whose act could never cause a harm). This view is by no means universal or uncontested, see Smith J.C 'Attempts, impossibility and the test of rational motivation' (1984) *Auckland Law Review* 25 at 37 (arguing that the impossibility of the result should be irrelevant if the actor has a criminal objective in view); Kessler K.D 'The role of luck in the criminal law' (1994) 142(6) *University of Pennsylvania Law Review* 2183 at 2227 (arguing that the manifested willingness to act on one's evil intentions is sufficient for punishment, despite the impossibility of the prohibited result); Friedman D.D 'Impossibility, subjective probability and punishment for attempts' (1991) 20 *Journal of Legal Studies* 179 at 180-3 (arguing that the attempter of impossibility may continue trying to cause the prohibited result by subsequently trying alternative methods and thus punishing them may does serve as a deterrent).
[195] Westen P 'Impossibility attempts: A speculative thesis' (2008) 5(2) *Ohio State Journal of Criminal Law* 523 at 546.
[196] Ibid 560.

At the heart of Westen's stealth requirement, therefore, is the 'psychology of threats,'[197] which is variable from one community to the next:

> [T]he psychology of threats explains why people often possess conflicting intuitions about whether impossibility attempts are culpable. Thus, just as people differ from age to age and from culture to culture in their assessments of retrospective threats, people within common cultures can differ, too, in the way they assess retrospective risks. ' They differ because they differ about how much they fear that counterfactual circumstances could have obtained, and about how fearful they must be in order to adjudge actors culpable of criminal attempt.[198]

In the context of a hypothetical 'Midwestern Voodoo' case involving a 'gullible, fifty-five-year-old house-bound woman' (named Mildred), who performs a 'Haitian-origin Voodoo ritual' using strands of her ex-husband's hair in order to harm him, Westen concludes:

> Mildred the voodooist did not threaten the state's interest in life because, given the public's view of voodoo and its knowledge of Mildred's motivations in resorting to voodoo, no one is likely to believe she would have killed her ex-husband under any counterfactual circumstances they fear could have obtained.[199]

This context-sensitive variability of Westen's 'psychology of threats' allows for a different conclusion to be reached under similar circumstances, but in a different community where such beliefs are widely held. For example, the accused's father in the case of *S v Ndhlovu desired,* or had the ultimate end of, killing him through a lightning strike, whereas it is plausible that he would have expected for the

[197] Ibid.
[198] Ibid 561.
[199] Ibid 549.

accused to grow fearful from the utterance of this threat to harm him. [200] In this regard, the court held:

> In the circumstances, his threat that he would cause the appellants to be struck by lightning and die in an empty sack would be unlikely to fall on deaf ears. In view of all that had gone before, the coincidental destruction of the first appellant's grain hut, supposedly or actually by lightning, must have served to convince the appellants that the deceased possessed supernatural power and, by its use, intended to kill them.[201]

As to the plausibility of this threat within the community concerned, the court relied primarily on two factors: firstly, the Opponent's familial background being 'steeped in witchcraft and its evil practices.'[202] According to Macdonald JP, the Opponent 'believed implicitly in the power of witches and wizards intentionally to cause physical harm to others by the use of supernatural means.'[203] His father raised him in the community concerned and instilled this type of belief from an early age.[204] Secondly, the accused ended up consulting different *Nganga*, often in the presence of his father, on at least seven different occasions for assistance and he was told on each occasion that his father was practicing witchcraft to his detriment.[205] The accused ultimately reported the matter to the local chief, who then convened hearings (*Dare*) on two separate occasions in the local traditional court where it was once again found that the

[200] *S v Ndhlovu* 1971 (1) SA 27 (RA) 28H.
[201] *Ndhlovu supra* 29H.
[202] *Ndhlovu supra* 29E.
[203] *Ndhlovu supra* 29E.
[204] *Ndhlovu supra* 29G.
[205] *Ndhlovu supra* 28A-F - 29E-F.

accused's father's actions were provocative in the indigenous sense.[206] This case in many ways represents the type of break down of criminal justice that this thesis aims to avoid. The accused ultimately resorted to taking the law into his own hands, given that he felt that the relevant criminal justice institutions had not come to his aid, by he and his brother fatally attacking their father with a hoe and an axe.[207] One of the central aims of this thesis is to address many of the theoretical problems that make it difficult for African fact-finders to do justice under these circumstances. The ultimate hope is that accused persons such as those in *Ndhlovu* will be encouraged rather to report such matters to the relevant institutions so that they may better deal with such cases without some of the innumerable theoretical issues that presently surround them.

In summary, accused persons that commit actions that are provocative in the indigenous sense will have acted with intention if the causing of a 'real fear' in another person either is their *desire* or poses a threat, understood within the context of the community concerned, against the physical integrity of the latter person.[208]

4.3 CONCLUSION

The materiality component of the antecedent of the overall argument of this thesis has been established in three ways in this chapter: firstly, the various types of

[206] *Ndhlovu supra* 29E and 28G.
[207] *Ndhlovu supra* 29B-C.
[208] *Ndhlovu supra* 32B-C.

crimes of witchcraft in Africa were identified and analysed. This theorising culminated in the isolation and explication of the *direct* version of the witchcraft offences as the main focus on this thesis. The second and third ways are semantic in that they implicate the *legal meaning* of the direct crime of witchcraft. On the one hand, Chapter 4 provides the following formal definition of this particular crime:

> The *intentional commission* of an action that is *provocative in the indigenous sense* and that *causes fear* in *another human being.*

This definition is a general theorised abstraction from the language used in the relevant witchcraft statutes from the various African jurisdictions concerned. It is then from this formal definition that the set of four plausible *facta probanda*, an *action* that is *provocative in the indigenous sense*, *causation, fear* and *intention* are identified as general theoretical models (*tertium comparationis*) that are applicable across Nubian African jurisdictions. In this way, this chapter continues the *applied* comparative-law analysis that was begun in Chapter 3, although this time this is at a *material* substantive criminal law level.

5. CHAPTER FIVE: THE PROBATIVE CONDITION I – DEVELOPING GENERAL FORENSIC ARGUMENTATION ARGUMENTATION SCHEMES

The overall argument made thus far has been that the plausibility of the evidential proof of the direct crime of witchcraft in Africa is conditional upon certain *institutional* and *material* practices being adhered to in African criminal process. Specifically, these practices are that the prosecution must approach the *appropriate forum* with jurisdiction, using the *appropriate procedure* (both *institutional*) and directing its evidence and arguments towards the relevant *facta probanda* (*material*). The last leg of this overall argument concerns the *probative* component, which is the preoccupation of this chapter and the next. These three *institutional, material* and *probative* (IMP) components form part of the antecedent in the first premise of the overall argument. This IMP antecedent is subsequently *affirmed* in the second premise to complete the *defeasible modus ponens* that makes up the overall argument.

The question to which our probative component is responding pertains to *the processes or heuristics of proof that can be used to establish the elements of the direct crime of witchcraft* ('Q3'). This is the third of the three sub-questions flowing from the main question of this thesis being, *how can the direct crime of witchcraft be proven in Africa*? These heuristics, as applied under the *institutional*

and *material* conditions that are applicable to witchcraft cases in Africa, are what this thesis offers as the answer to this main question. There are many other subsidiary questions flowing from Q3 that need to be addressed in Chapters 5 and 6 to explicate the probative component of the overall argument. These questions include: what is a heuristic of evidential proof? How many such heuristics have been developed previously in New Evidence Scholarship? Which heuristic is preferred in this thesis, and why? Are there any interdisciplinary or cross-jurisdictional problems that may impact the development or application of these heuristics?

Questions such as these are the main focus of this chapter, as it provides the necessary theoretical foundation for the subsequent discussion taken up in Chapter 6 about the *application* of these heuristics to witchcraft cases in Africa. Therefore, there is a clear division of labour between the two chapters because this chapter is responsible primarily for the *development* of these basic heuristics, whereas Chapter 6 *applies* them to witchcraft cases in Africa. Chapter 5 performs this overall *developmental* task by connecting Wigmorean analysis with contemporary Argumentation theory. In particular, Wigmore's conceptual machinery of basic concepts, such as his taxonomy of propositions of fact, is used to contextualise the argumentation schemes developed by Bart Verheij and Douglas Walton within Walton's New-Dialectic framework of analysis.

5.1 FORENSIC ARGUMENTATION

John Henry Wigmore's most prominent contributions to Evidence Scholarship are the *Treatise on the system of evidence in trials at Common Law* (1904)[1] and the *Principles of judicial proof as given by logic, psychology and general experience and illustrated in judicial trials* (1913).[2] Where the *Principles* has been influential after Wigmore's lifetime, its legacy may be characterised into at least four pathways of scholarship related to: (i) the psychological analysis of the credibility of witnesses ('Psychology pathway');[3] (ii) the development of practical fact-management systems ('Structural pathway');[4] (iii) 'force-related theories' of evaluating the probative value of evidence ('Force-related pathway');[5] and (iv) forensic argumentation ('Argumentation pathway'). The focus of this thesis will be on the fourth Argumentation pathway.

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[1] Initially, this work was produced in four volumes, but a supplement was added in 1908 and an extra volume in a revision in 1923. The last (third) edition published by Wigmore himself was in 1937 until Peter Tillers embarked upon the laborious task of revising two of the five volumes in 1983, see Wigmore J.H *Evidence in Trials at Common Law* (revised by Peter Tillers) (1983).

[2] Wigmore published two editions of this work in 1913 and 1931 respectively. Subsequent to this, the third edition, for allegedly commercial or marketing-related reasons, was renamed from the *Principles* to the *Science* of proof, see Twining W *Theories of evidence: Bentham and Wigmore* (1985) viii and 119.

[3] For a contemporary example of this line of work, see Redmayne M *Character in the criminal trial* (2015) 12-4.

[4] See Anderson T *et al Analysis of evidence* 2nd ed (2005) 112. Wigmore's 'working method' is designed to address 'the problem of collating a mass of evidence,' see Wigmore J.H *The principles of judicial proof as given by logic, psychology and general experience and illustrated in judicial trials* (1913) 747. See also Anderson *et al* (note 4) 112-3 ('method of recording and organising data'). Examples of purely structural theories include: MacCormick N *Legal reasoning and legal theory* (1978) 88 and 90 (coherentist theory).

[5] Cohen L.J *The probable and the provable* (1977) 27-8 (probability as the 'proper terminology for grading and evaluating the soundness of proof-rules'); Cohen L.J 'The logic of proof' [1980] *Criminal Law Review* 91. However, many 'Neo-Wigmoreans' and others have developed probative heuristics within this tradition that incorporate both Structural and Force-related features. For example: Haack S *Evidence matters: Science, Proof, and Truth in the law* (2014) 12-5 (foundherentist theory); Robertson B and Vignaux G.A 'Taking fact analysis seriously' (1993) 91(6) *Michigan Law Review* 1442 at 1456-9; Biedermann A and Taroni F 'Bayesian networks for evaluating forensic DNA profiling evidence: A review and guide to literature' (2012) 6(2) *Forensic Science International: Genetics* 147 at 149; Fenton N *et al* 'A general structure for legal arguments about evidence using

5.1.1 JURIDICAL AND FORENSIC ARGUMENTATION

The distinction made in Chapter 2 between *juridical*[6] and Wigmorean *factual*[7] (or 'forensic') argumentation is rooted in a more fundamental distinction between questions of fact and law. The latter distinction, however, does not denote two separate ontological categories, but it is rather *functional* and *pragmatic* in so far as it implicates the performance of various institutional tasks in the broader criminal process.[8] This distinction is the institutional hallmark of the Common law tradition than it is in Continental jurisdictions. In Common law contexts, this distinction is not only symmetrical to the distinctive functions performed by judges and juries, which can be traced as far back as 1554,[9] or judges and

Bayesian Networks' (2013) 37 *Cognitive Science* 61 at 62. See generally, Aitken G.G and Taroni F *Statistics and the evaluation of evidence for forensic scientists* 2nd ed (2004).

[6] Several seminal examples are: Horovitz J *Law and logic: A critical account of legal argument* (1972); Perelman C.H *Logique juridique. Nouvelle Rhétorique* ('Juridical logic. New rhetoric') (1976); Aarnio A *On legal reasoning* (1977); Krawietz W and Alexy R *Metatheorie juristischer argumentation* ('metatheory of legal argumentation) (1983); Peczenik A *The basis of legal justification* (1983); Alexy R *A theory of legal argumentation: The theory of rational discourse as theory of legal justification* (translated by R. Adler and N MacCormick) (1989); Soeteman A *Logic in law: Remarks on logic and rationality in normative reasoning, especially in law* (1989); MacCormick N *Rhetoric and the rule of law: A theory of legal reasoning* (2005); Feteris (note 1); Dahlman C and Feteris E (eds) *Legal argumentation theory: Cross-disciplinary perspectives* (2013).

[7] Tuzet G 'Arguing on facts: Truth, trials and adversary procedures' in Dahlman and Feteris (eds) *Legal argumentation theory: Cross-disciplinary perspectives* (2013) 207 at 207. Another exceptional example is Walton D *Legal argumentation and evidence* (2002) xiv, where it is said that the book 'seeks to vindicate John H. Wigmore's theory that there is a science of reasoning underlying the law of evidence'. See also Michael J *The elements of legal controversy: An introduction to the study of adjective law* (1948) 6 (on 'contradicting propositions of fact').

[8] See Allen R.J and Pardo M.S 'The myth of the law-fact distinction' (2003) *Northwestern University Law Review* 1769 at 1770; Kirgis P.F 'Questions of fact in the practice of law: A response to Allen and Pardo's "facts in law and facts of law"' (2004) 8(1) *The International Journal of Evidence & Proof* 47 at 48; Zuckerman A.A.S 'Law, fact or justice' (1986) 66(4) *Boston University Law Review* 487; Scheppele K.L 'Facing facts in legal interpretation' (1990) 30 *Representations* 42; Endicott T.A.O 'Questions of law' [1998] 114 *Law Quarterly Review* 292; Ho H.L *A philosophy of Evidence law: Justice in the search of truth* (2008) 1-2.

[9] Plowden E *The Commentaries of Edmund Plowden* Part I (1816) 114a, citing Townsend's case (K.B. 1554). See also Coke E *The reports of Sir Edward Coke* Part IV (1777) 42, citing Heydon's case (K.B. 1614); Antham's case (K.B. 1610); Dowman's case (K.B. 1585); Abbott of Strata Mercella's case (K.B. 1591); Coventry T *A readable edition of Coke upon Littleton* (1830) 227a; Thayer J.B *Preliminary treatise on evidence at common law* (1898) 193; Broom H *Selection of legal maxims, classified and illustrated* 3rd (1852) 77; Farley R.J 'Instructions to juries-their role in the judicial process' (1932) 42(2) *Yale Law Journal* 194 at 198.

assessors in anglophone Africa,[10] but it is also relevant to the distinction between appeals and reviews. In francophone African jurisdictions, by contrast, the fact-law distinction has far less pronounced implications. In particular, judges or juries (or assessors) sitting in the *Cour d'Assises* indiscriminately decide both factual and legal questions and the same applies to the *Cour d'Appel*.[11] However, this is not to say that francophone legal theorists do not routinely make *conceptual* distinctions between factual and legal questions, because they do,[12] but only that such distinctions have no institutional implications.

It is no wonder that the 'taking facts seriously' mantra was championed by a scholar from within the Common law tradition. William Twining summarises the core of his thesis as follows:

> The problem might be stated as follows: at least since the time of Jerome Frank it has been widely acknowledged that an imbalance exists between the amount of attention devoted to disputed questions of law in upper courts and the amount devoted to disputed questions of fact in trials at first instance, in other tribunals, and in legal processes generally.[13]

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[10] Madhuku L *An introduction to Zimbabwean law* (2010) 65; Aguda T.A *The law of evidence in Nigeria* (1974) 12-9; Zeffert D.T and Paizes A.P *The South African Law of Evidence* 2nd ed (2009) 4-5; Sila M *Modern law of criminal procedure in Kenya* (2014) 19-20.

[11] Kerameus K.D 'A Civilian lawyer's look at Common law procedure' (1986) 47(3) *Louisiana Law Review* 493 at 506. For example, while the francophone apex court's jurisdiction is limited to questions of law (Ancel M 'Case law in France' (1943) 16(Parts 1 and 2) *Journal of Comparative Legislation and International Law* 1 at 16; Troper M and Grzegorczyk C 'Precedent in France' in MacCormick and Summers (eds) *Interpreting Precedent: A comparative study* (1997) 103 at 103-4), trial court fact-finders make no functional distinction between law and fact, nor between the merits and sentencing stages, see Damaška M.R 'Structures of authority and comparative criminal procedure' (1975) 84(3) *Yale Law Journal* 480 at 490; Dervieux 'The French system' in Delmas-Marty and Spencer (eds) *European Criminal Procedure* (2002) 218 at 248.

[12] Marty G *La distinction du fait et du droit* (1929); Foriers P 'La distinction du fait et du droit devant la Cour de Cassation de Belgique' (1961) 15(3) *Dialectica* 383.

[13] Twining W 'Taking facts seriously' in Twining (ed) *Rethinking Evidence: Exploratory essays* 2nd ed (2009) 14 at 15. Twining took up this 'daunting task', with largely pedagogical motivations, of 'taking facts seriously' in

Twining adds that:

> My thesis was that the subject of evidence, proof and fact-finding (EPF) deserves a more salient place in the discipline of law. The gist of the argument was that fact investigation, fact management, and argumentation about disputed questions of fact in legal contexts (not just in court) are as worthy of attention and as intellectually demanding as issues of interpretation and reasoning about questions of law. It was an argument about the importance of the study of facts in legal education and it was addressed to a general legal audience.[14]

In one sense, therefore, this thesis brings together two distinct strands of scholarship that involve theorising about forensic proof. The one concerns legal argumentation and the other is about the Wigmorean pathway of forensic argumentation. Both these strands address broader questions that are common and relevant across anglophone and francophone jurisdictions:

> What is truth? What is proof? What part can reason play in adjudication? Is judicial process really concerned with truth?[15]

5.1.2 PROPOSITIONS OF FACT

The argumentation schemes *developed* in this chapter, and *applied* to the direct crime of witchcraft in Chapter 6, operate under two theoretical constraints. The

earnest in 1982 (Twining W 'Taking facts seriously' in Gold (ed) *Essays on Legal Education* (1982) 51, but regretfully later acknowledged that his clarion call had 'failed to persuade' (Twining W 'Taking facts seriously - Again' in Twining (ed) *Rethinking Evidence: Exploratory essays* 2nd ed (2009) 417).

[14] Twining (note 13) 417. The insistence on trial courts and 'factual questions', as opposed to appellate 'legal questions', has strong roots in the *skeptical* American Realist movement, see Llewellyn K 'A realistic jurisprudence – the next step' (1930) 3(4) *Columbia Law Review* 431; Llewellyn K.N 'Some realism about realism – responding to dean Pound' (1931) 44 *Harvard Law Review* 1222; Frank J *Law and the modern mind* (1930); Frank J 'Why not a clinical lawyer-school?' (1933) 81(8) *University of Pennsylvania Law Review and American Law Register* 907; Twining W *Karl Llewellyn and the realist movement* 2nd ed (2012).

[15] Twining (note 13) 27-8.

first has to do with Wigmore's insistence that theorising about forensic proof should not be embarked upon in general or abstract terms, but that it must be focused upon particular *facta probanda* (the 'FP constraint'),[16] while the other concerns being sensitive to the variations in the nature and the inferential analysis involved with each type of *factum probandum* (the 'variability constraint'). The FP constraint is imposed on our argumentation schemes in order to avoid the kinds of errors associated with the substantive blindness later in this chapter.[17] Forensic fact-finding involves an innumerable number of types of propositions of fact[18] and *facta probanda* are specialised versions of these types that are given particular institutional meanings in the forensic context. In one of the widest possible senses of the term, Hage defines at least seven different types of facts: 'facts that exist "objectively"'; 'facts that depend on recognition'; 'facts that are the results of rules or the use of reason'; 'facts that are independent of all other facts'; 'facts that "supervene" on other facts'; '"neutral" facts'; 'facts involving evaluation'; '"inert" facts'; 'facts that motivate or guide behavior.'[19] Developing

[16] Wigmore (note 4) 30; Wigmore (note 1) 1138-9.

[17] For example, Cohen (note 5) 56-7 and 246 (where institutional features such as *facta probanda* are expressly excluded); Balding D.J 'Interpreting DNA evidence: Can probability theory help?' in Gastwirth (ed) *Statistical Science in the Courtroom* (2000) 51 at 52 (where the proof of the source of DNA is treated, without more, as being equivalent to proving guilty). The term 'substantive blindness' was coined by Schum in his attempt to redefine the definition of 'evidence' to exclude the orthodox classifications of the types of evidence into testimonial, documentary and 'real,' see Schum D *Evidential Foundations of Probabilistic Reasoning* (1994) 66, 114-20 and 484; Twining W 'Evidence as a multi-disciplinary subject' (2003) 2 *Law, Probability and Risk* 91 at 97.

[18] Damaška M.R 'Truth in adjudication' (1998) 49 *Hastings Law Journal* 289 at 299 ('a jumbled mixture of matters of unequal ontological status with an unequal degree of accessibility to our cognitive apparatus').

[19] Hage J 'Of norms' in Bongiovanni *et al* (eds) *Handbook of Legal Reasoning and Argumentation* (2018) loc 3581 at loc 3839 (kindle numbering). Legal norms are types of fact that 'motivate or guide behaviour.'

a heuristic of forensic proof that applies indiscriminately to all these types of facts is bound to result in errors being committed.

From an evidential point of view, Common law lawyers instead typically conceive of 'facts' using far more generic and straightforward terms, that is, as consisting of an 'event' that can *occur* or a 'state of things' that can *exist.*[20] On this analysis, therefore, the event of an action that is provocative in the indigenous sense *occurring* is as much of a fact as the *existence*, *qua* 'state of things,' of the intentionality with which it was committed.[21] Montrose also distinguishes 'brute facts' from 'propositions.'[22] What we have been describing as facts thus far would fall into the former category. Propositions are slightly more complicated phenomena but to be sure, when Bentham originally drew the distinction between 'principal facts' and 'evidentiary facts' he was talking about 'propositions of fact,'[23] which are a combination of 'brute facts,' *qua* 'events' or 'states of things,' that are articulated using (logical) 'propositions.' It may well be that this familiar hybrid term, 'propositions of fact,' is considered to be tautologous because

[20] Bentham J *Rationale of judicial evidence* vol 1 (edited by J.S Mill) (1827) 21; Schum (note 17) 18 (on 'fact' as an 'event'); Montrose J 'Basic concepts of the law of evidence' (1954) 70 *Law Quarterly Review* 527 at 534 (on 'facts' as 'discriminated parts of the totality of existence,' 'sections of history' or 'empirical phenomena').
[21] Cf. *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459 at 483 ('The state of a man's mind is as much a fact as the state of his digestion'); *R v Antoine* [2001] 1 A.C. 340 at 353 ('The requisite *mens rea* is a matter of fact just as much as is the relevant *actus reus*'); Thayer (note 9) 191 ('things invisible, mere thoughts, intentions, fancies of the mind, when conceived of as existing or being true, are conceived of as facts').
[22] Montrose (note 20) 534.
[23] Bentham J 'An introductory view of the rationale of evidence; for the use of non- lawyers as well as lawyers' in Bowring (ed) *The works of Jeremy Bentham* vol 6 (1843) 15; Bentham (note 20) 19-20; Stephen J.F *A Digest on the Law of Evidence* (1887) art 1 ('any two facts…so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other'); Thayer (note 9) 263 ('a matter of fact which is to be used as a basis of inference to another matter of fact'); Wigmore (note 4) 13-20 ('*factum probandum'* and '*facta probans*').

propositions by definition are statements or assertions containing factual predicates.[24] However, unlike 'brute facts,' which are defined for pragmatic and functional purposes in the forensic context, the factual predicates contained in propositions in general are empirical in that they have truth values such that they are either true or false in the empirical sense.[25] For example, a proposition will be true just in case its factual predicate is also true in the empirical sense, whether anybody has knowledge of this or not.[26].

Understanding propositions of fact in the same way as propositions in general is likely to lead to sceptical quagmires, in my view, about facts being (empirically) 'true' before or despite being found as such by a fact-finder. Therefore, it appears that the familiar term of 'propositions of fact' plays an important institutional role in the forensic context by combining pragmatically-defined 'brute facts' with logical assertions or statements. The value of this combination lies mainly in the fact that it is easier to construct arguments using speech acts such as assertions or statements that are associated to certain factual

[24] Roberts P and Aitken C *The logic of forensic proof: Inferential reasoning in criminal evidence and forensic science* (Practitioner Guide No. 3) (2014) 30. For contemporary purposes, the usage of propositions, at least under the name in its modern meaning, is traced back to Gottlob Frege: Frege G 'The thought: A logical inquiry' in Strawson (ed) *Philosophical Logic* (1967) 20. See also Frege G '*Begriffsschrift'* in Geach and Black (eds) *Translations from the philosophical writings of Gottlob Frege* (1952) 1-21. More recently, see Vanderveken D *Meaning and speech acts* 78 (1990) ('propositions have *truth values* because they represent *states of affairs* which either exist or do not exist in the world'); Copi I.M *et al Introduction to logic* 14th ed (2014) 2; Woods J and Walton D *Argument: The logic of the fallacies* (1982) 1-2 (the premises and conclusion of an argument are two variants of propositions).

[25] Roberts and Aitken (note 24) 30-1.

[26] Ibid.

predicates than it is with simply using 'brute facts.'[27] The form and structures of propositions help us to avoid immaterial linguistic and terminological nuances when constructing and analysing arguments. For example, the sentences, 'the accused committed witchcraft,' 'witchcraft has been committed by the accused,' 'the commission of witchcraft was perpetrated by the accused' and 'the perpetration of witchcraft was something committed by the accused' are all the same proposition.[28]

Turning now to the second (the variability constraint) of the two theoretical constraints under which our argumentation schemes operate, it is important to take into account the variations in the types of propositions of fact as well as the kinds of inferential reasoning that each involves. Roberts and Aitken give examples of six general types of propositions, 'It is raining outside' (P1), 'I don't like cheese' (P2), 'D murdered Y' (P3), 'A bachelor is unmarried' (P4), '2 + 2 = 4' (P5) and 'It is immoral to tell lies' (P6), and argue that propositions typically used in criminal trials are either of the 'empirical type' (P1 and P2) or the 'institutional type' (P3 and P4).[29] Empirical propositions, according to Damaška,

[27] Tillers P 'Mapping inferential domains' (1986) 66(4) *Boston University Law Review* 883 at 900, where it is asserted that no evidence 'speaks for itself' (*res ipsa loquitur*) and that all evidence, and facts, require *theory*, that is, all evidence must be interpreted or evaluated.
[28] Cf. Copi I.M *et al* (note 24) 4; Roberts and Aitken (note 24) 32-3.
[29] Roberts and Aitken (note 24) 30. On Montrose's elementary distinction between 'general' (related to 'scientific laws') and 'particular' propositions of fact, these propositions all fall into the latter category, see Montrose (note 42) 534. Propositions may also be classified as being 'simple' and 'compound' and compound propositions as being 'conjunctive' or 'disjunctive,' see Copi I.M *et al* (note 24) 4-5.

are concerned with 'what happened,' whereas institutional propositions 'consist of complex social evaluations.'[30] Damaška explains further that:

> Establishing that somebody died is much less dependent on changing social views than establishing that he was engaged in provocative or life-threatening behavior at the time of his death. A stronger conception of objectivity can thus be applied in the former than in the latter case. Observe that the varying grain of knowability leaves its marks on fact-finding practice.[31]

Tillers echoes a similar message:

> There is no point in exaggerating the empirical flavour of inquiries into the meaning of law. It is, after all, quite clear that investigations of legal problems do involve theoretical and normative commitments that are not dictated in any unique or straightforward way by things that are indubitably taken as authentic evidence, and it also seems clear that in many instances choices are being made among theoretical and normative perspectives that cannot easily be explained as the product of factual beliefs or evidence. My primary aim here is to remind everyone that the presence of such relatively free theoretical and normative choices does not in itself eliminate the factual character of an inquiry.[32]

Therefore, Tillers further adds, 'there must be not one, but various models of inference.'[33] It is essentially for this reason that the four argumentation schemes that are applied in Chapter 6 cannot be reduced to a single scheme.

At a general level, there are at least two patterns of inferential analysis involved in evidential argumentation about propositions of fact. They may be

[30] Damaška M.R 'Truth in adjudication' (1998) 49 *Hastings Law Journal* 289 at 299-300.
[31] Ibid 300.
[32] Tillers P 'The value of evidence in law' (1988) 39(2) *Northern Ireland Legal Quarterly* 175.
[33] Ibid 894.

described as being *evaluative* in so far as they proceed from extra-legal (social or moral) norms to propositions of fact (N-to-PF) or *descriptive* to the extent that they involve the inference of a proposition of fact from a 'brute fact' (F-to-PF). This distinction may be usefully illustrated through a shopping analogy: Suppose that an elderly woman (G) sends her grandson (S) to a grocery store with a list of items and some money to pay for them. For our purposes, the analysis conducted by each of these two people takes the N-to-PF (evaluative) and F-to-PF (descriptive) forms respectively. G merely has to check that the items bought by S match those on the list that she handed to him, which purely is an empirical analysis involving the comparison of one proposition against another (or the propositions on the list against the evidence of what S actually bought). This is a F-to-PF pattern of inferential reasoning. S, on the other hand, has to perform an analysis that is much more complex. He has to interpret the items on the list, which can be understood as the 'norms' from the 'authority of the household,' and compare them against the items that are in stock at the grocery store.[34]

An example, of the kinds of extra-legal norms that are involved in the latter kind of evaluative inferential reasoning (N-to-PF) in criminal trials often consists of community standards against which *facta probanda* such as negligence are

[34] This analogy is a reformulation of that originally used by Anscombe to illustrate linguistic 'directions of fit,' namely: 'word-to-world' and 'world-to-word' (Anscombe G.E.M *Intention* 2nd ed (1976) 56; Searle J *Expression and meaning: Studies in the theory of speech acts* (1979) 1-27). Hage also reformulated this analogy for his own purposes, see Hage (note 19) loc 3581 at loc 3839 (kindle numbering).

evaluated.[35] There are at least three instances of evaluative inferential reasoning in cases involving the direct crime of witchcraft. Firstly, the determination of what makes an action a provocative one in the indigenous sense (surrounding circumstances) involves comparing the 'brute fact' of the occurrence of the action against the indigenous norms of the community concerned. In other words, these indigenous norms tell us what types of actions within the community in question are considered generally to be actions of witchcraft and this analysis thereafter is applied to the type of action allegedly committed by the accused (N-to-PF). The source of these types of indigenous norms in Nubian Africa is African customary law, which is unwritten and explicated by the *Nganga* or other experts in the field.[36] Although customary law regularly is applied in traditional courts across the continent, when it is used as a source of determining indigenous norms at the level of state courts, it assumes a role that is analogous to foreign law that must be adduced through an expert witness.[37] The second and third examples of N-to-

[35] Allen R.J and Pardo M.S 'Facts in law and facts of law' (2003) 7 *The International Journal of Evidence & Proof* 153 at 157.

[36] Nhlapo T 'Customary law in post-apartheid South Africa: Constitutional confrontations in culture, gender and 'living law' (2017) 33(1) *South African Journal on Human Rights* 1 at 1, n1; Mqeke R.B *Basic approaches to problem solving in customary law: A study of cultures in Southern Africa* (1997) 188 (arguing that statutes enacted by Parliaments across Southern Africa represent 'European culture,' whereas 'indigenous culture' is represented by African customary law); Ludsin H 'Cultural denial: What South Africa's treatment of witchcraft says for the future of its customary law' (2012) 21(1) *Berkeley Journal of International Law* 63 at 70 ('Traditional courts derive customary law from an oral tradition').

[37] Bekker J.C and Rautenbach C 'Nature and sphere of application of African customary law in South Africa' in Rautenbach *et al Introduction to Legal Pluralism* 3rd ed (2010) 15 at 29. For example, in *Mabuza v Mbatha* an expert witness was used to testify about the indigenous practice of *ukumekeza*: *Mabuza v Mbatha* 2003 (4) SA 218 (C). Historically, although this still continues in certain instances, evidence related to the existence or content of African customary norms was admitted through *judicial notice*: See South African Law of Evidence Amendment Act 45 of 1988, section 1(1). Similar provisions apply in Ghana and Nigeria, see sections 122(2)(l) and 70 of the Nigerian Evidence Act, 2011; *Nsirim v Nsirim* (2002) 3 NWLR (Pt. 755) 697 at 17; *Osadebe v Osadebe* (2012) LPELR-9788 (CA) 22-3; Akanki O 'Proof of customary law in Nigerian courts' (1970) 4 *Nigerian Law Journal* 20. The taking of judicial notice of customary law has likewise been rejected elsewhere on

PF inferential analyses involve similar patterns of reasoning as that in the first example cited above: the one involves comparing the accused's own beliefs against those of the community in determining the accused's knowledge of the pertinent surrounding circumstances and indirect intention and the other involves a similar comparison but with respect to the victim's beliefs to determine whether they experienced a 'real fear.'

The comprehensive taxonomy of propositions of fact that Wigmore offers is also relevant to the current discussion. From the taxonomies of propositions of fact that have been offered by scholars, one comes from forensic science and the other is by Wigmore. An influential hierarchy of propositions of fact among forensic scientists entails: Source, Activity and Offence.[38] Wigmore's taxonomy operates at two analytical dimensions. On the one hand, he classifies general *facta probanda* into four groups: 'Events, qualities, or conditions of physical (inanimate) nature' ('external conditions'); 'the identity of a thing or person' ('identity'); 'a quality or condition of a human being' ('human quality or

the continent, see Ochich G.O 'The withering province of customary law in Kenya: A case of design or indifference' in Fenrich *et al* (eds) *The Future of African Customary Law* (2011) 103 at 123-4. One of the main reasons for this rejection is that it relegates African customary law to a status similar to that of foreign law, see Oba A.A 'The future of customary law in Africa' in Fenrich *et al* (eds) *The Future of African Customary Law* (2011) 58 at 63-4. Furthermore, it is worth bearing in mind that the admission of evidence through judicial notice is steeped in the colonial heritage of 'repugnancy clauses' on the continent, see Anyangwe C 'The whittling away of African indigenous legal and judicial system' (1998) *Zambia Law Journal* 46 at 59-60.

[38] Evett I.W, Jackson G, Jones P.J and Lambert J.A 'A hierarchy of propositions: Deciding which level to address in casework' (1998) 38(4) *Scientific & Justice* 231 at 232. Aitken *et al* add 'sub-source' propositions to this hierarchy: Aitken C *et al Fundamentals of probability and statistical evidence in criminal proceedings (Practitioner guide no. 1*) (2010) 55.

condition'); and 'the doing of a human act' ('human act').[39] Wigmore simultaneously conceives of each category of these propositions of fact as operating at three temporal perspectives. From the *prospectant* perspective (that is, before the occurrence of a crime), 'the evidentiary facts of character, plan or design, motive (human qualities or conditions), point forward to a future act.'[40] The second perspective is *concomitant* with the time at which the crime occurred: 'evidentiary circumstances such as family relationships, the need of money, and the like' (external conditions)[41] and 'outward exhibitions of conduct' (human qualities and conditions) may be used as '*a priori* indications' of the relevant *facta probanda*.[42] From the third perspective, the *retrospectant* perspective (that is, after the crime has occurred), propositions falling into the categories of human acts (for example, 'hiding or running away after the event'), external conditions (for example, possession of items connected with the crime) and human qualities or conditions (for example, 'consciousness of guilt') have '*a posteriori* value' as showing 'the probable sources' of the relevant *facta probanda*.[43]

Wigmore is the first to admit that his taxonomy of propositions is not without overlaps or complications:

[39] Wigmore (note 4) 30. Cf. Wigmore (note 1) 1139, where Wigmore initially had made a three-fold classification: 'I. A Human Act; II. A Human Quality, Condition, or State; III. A fact or condition of External Nature'.
[40] Wigmore (note 1) 1140. Cf. Wigmore (note 4) 30.
[41] Wigmore also offers examples of 'conditions of an external nature' such as the physical properties and geographic location of crime scenes: Wigmore (note 1) 1140-1.
[42] Ibid.
[43] Ibid; Wigmore (note 4) 30.

> The propositions which come to be proved before tribunals of justice embrace every sort of fact in life, and no classification not purely arbitrary can divide them for practical purposes into classes always absolutely distinct.[44]

However, this is not to say that this taxonomy is without any usefulness at all. The usefulness of Wigmore's taxonomy is justified by two features that also make it distinct from the account offered by some forensic scientists: Firstly, Wigmore makes temporal distinctions, *prospectant, concomitant* and *retrospectant*, ('PCR') that forensic scientists do not make. Secondly, Wigmore breaks down his four-fold content-based categorisation scheme further into various subdivisions of propositions. A comprehensive representation of these sets of propositions and sub-propositions is provided by the table in Figure 11 below. As will be shown below, there is plenty of scope for overlap between these sets of propositions and sub-propositions.

Depending on the nature of the type of *factum probandum* to be proved, the content of the PCR propositions will vary from one case to the next. Furthermore, in cases involving the kind of N-to-PF pattern of inferential reasoning referred to above, these PCR propositions will have to be supplemented further by a proposition referring to expert testimony, EXP_{SC}, in order to elucidate the indigenous norms from which the proof of the relevant *factum probandum* is being inferred. In many ways, these re-adjustments make no new substantive

[44] Wigmore (note 4) 31.

contributions, but they rather purport to formalise evidential reasoning by introducing structural heuristics that associate common propositions of fact in forensic fact-finding.

	EXTERNAL CONDITIONS	IDENTITY	HUMAN QUALITY OR CONDITION	HUMAN CONDUCT
PROSPECTANT	1. Victim's valuable possessions (e.g. insurance policy). 2. Accused's prior relationship with the victim.	1. A particular person's Opportunity to commit the crime. 2. A particular person's Motive to commit the crime.	1. Plan or Design 2. Previous display of character traits/Habits. 3. Awareness of future commission of crime. 4. Physical or mental capacity.	1. Possession of items (Means) connected to crime scene.
CONCOMITTANT	1. Physical properties of crime scene. 2. Geographic location of crime scene.		1. Displays of ongoing dispositional traits. 2. Knowledge of circumstances of crime (e.g. eye-witness testimony). 3. Exhibitions of emotions (e.g. rage/fear).	1. Outwardly exhibited actions (e.g. loud screams from victim).
RETROSPECTANT	1. Location of items taken from crime scene. 2. Contaminated crime scene. 3. Professional investigative findings.	1. Nature of forensic *trace*/*transfer* evidence (e.g. blood, fingerprints, glass fragments, fibres)	1. Marks on the victim/accused (or their property) showing the commission of crime. 2. Exhibitions of emotions (e.g. accused's weeping/laughing)	1. Hiding or running from crime scene. 2. Testimonial inconsistencies. 3. Interfering with ongoing investigations. 4. Admissions and confessions.

Figure 11: Table of Wigmorean propositions of fact.[45]

[45] This is a revised version, both in structure and content, of the diagram developed by Tillers, see Wigmore (note 1) 1139-1041. Cf. Wigmore (note 4) 30 and 89-90 and 143.

5.2 THE HEURISTIC OF (CRIMINAL) EVIDENTIAL ARGUMENTATION?

In this last section of this chapter some basic schemes of legal argumentation will be introduced in order to provide a theoretical foundation for their subsequent application in Chapter 6. First, we will begin with some basic and general schemes of legal argumentation and thereafter proceed to forensic argumentation that has to do with fact-finding in particular.

5.2.1 BASIC ARGUMENTATION SCHEMES

If the functional and pragmatic distinction between law and fact that was described earlier holds, a general scheme of legal argumentation will include three components: '[S]omething called "law,"' 'something called "fact"' and 'when the two meet there is something called "the application of law to fact."'[46] A formal deductive iteration of this has been offered by MacCormick:

(1) $p \supset q$

(2) p

(3) $\therefore q$.[47]

[46] Kirgis (note 8) 50; Hart Jr H.M and Sacks A.M *The legal process: Basic problems in the making and application of law* (1994) 350-1 (on the adjudicative process consisting of 'law declaration,' 'fact identification' and 'law application'). Cf. Rather than this 'three-step' adjudicative process, Kirgis prefers one involving two steps, that is: the presentation of data by the parties followed by submissions about the data (at 51).

[47] MacCormick (note 4) 28-9. This format of arguing has been frequently associated with Civilian lawyers, who, it is alleged, begin with the applicable rule of law in the major premise followed by the factual proposition in the minor premise. Conversely, it is alleged that Common law lawyers follow these two steps in reverse, see Nijboer (note 22) 320; Cooper T.M 'The Common and the Civil law. A Scot's view' (1950) 63(3) *Harvard Law Review* 468 at 471.

The hook or horseshoe sign, ⊃, symbolises *material implication* in formal logical notation. Therefore, if premisses (1) and (2) are true, then (3) *necessarily* follows.[48] An argument with this type of structure, that is, a *modus ponens*, arrives at its conclusion by *affirming the antecedent* (*p*).[49] It can also be expressed in natural language:

(1) In any case, if *p* then *q*.

(2) In the instant case, *p.*

(3) ∴ in the instant case, *q*.[50]

MacCormick uses deductive reasoning here to give structural justification for judicial decisions.[51] However, the inherent uncertainty of premise (2) in all forensic fact-finding renders the application of Aristotelian deductive syllogisms to forensic argumentation to be of limited utility. In disputes concerning premise (2) under the "Rationalist tradition" of Evidence scholarship,[52] fact-finding does not produce certainty of facts that are awaiting discovery:

[48] MacCormick (note 4) 24.
[49] Ibid.
[50] Ibid. See also MacCormick (note 6) Ch 3; Guest A.G 'Logic in the law' in Guest (ed) *Oxford Essays in Jurisprudence* (1961) 176; Burton S.J *An introduction to law and legal reasoning* (1985) Ch 3. Cf. Michael J and Adler M.J 'The trial of an issue of fact (part 1)' (1934) 34(7) *Columbia Law Review* 1224 at 1241-2; Anderson *et al* (note 4) 60-1, where *q* is regarded as the legal conclusion or verdict (on the merits) and *p* as the *ultimate probandum*.
[51] MacCormick (note 4) 26.
[52] Twining W 'The rationalist tradition of evidence scholarship' in Waller and Campbell (eds) *Well and Truly Tried: Essays in Honour of Sir Richard Eggleston* (1982) 211; Twining W *Rethinking evidence: exploratory essays* (1994) 184-5 and 346; Twining W *Rethinking evidence: exploratory essays* 2nd ed (2006) Ch 3; Jackson J.D 'Theories of truth finding in criminal procedure: An evolutionary approach' (1988) 10 *Cardozo Law Review* 475 at 500. Cf. Nicolson D 'Truth, reason and justice: Epistemology and politics in evidence discourse' (1994) 57(5) *The Modern Law Review* 726 at 727 and 733-6.

> In that tradition, it is axiomatic that all knowledge of facts is merely probable and always uncertain. We believe that the law of evidence may reduce the frequency of errors in factfinding, but we also believe that factual certainty is unattainable and that no matter how much evidence we have or how careful we are, we can always make mistakes about the facts. I believe that certainty about anything is unattainable.[53]

Under these circumstances, factual findings concerning premise (2) are always *defeasible*, and not *deductively* established one way or the other. In contrast to MacCormick's syllogistic representation of the basic scheme of legal argumentation, argumentation theorists have developed alternative defeasible accounts:

> (1) Generally, if this case fits established rule R then the decision of what to do in this case should follow what is stated by R.
>
> (2) This case fits established rule R.
>
> (3) ∴ The decision of what to do in this case should follow what is stated by R.[54]

There are two features about this account that distinguish it from MacCormick's deductive syllogism. Firstly, a plausibilistic qualifier, 'generally' or ⇒, as opposed to the horseshoe, ⊃, symbolising *material implication*, is used which means that if premisses (1) and (2) are true, (3) *generally* (not necessarily) follows, but subject to certain exceptions. Secondly, this version is not justified on epistemic grounds, but rather on the basis of practical reason that has to do

[53] Tillers P 'The value of evidence in law' (1988) 39(2) *Northern Ireland Legal Quarterly* 168.

[54] This argument is also known as the argument from an established rule, see Walton D 'Legal reasoning and argumentation' in Bongiovanni *et al* (eds) *Handbook of Legal Reasoning and Argumentation* (2018) 47 at 49; Walton D *Legal argumentation and evidence* (2002) 328; Walton D *Burden of proof, presumption and argumentation* (2014) 87.

with the performance of *actions* instead of the holding of *beliefs*.[55] Another example of a defeasible account of legal argumentation is given by Verheij:

> (1) As a rule, if Peter has violated a property right, then Peter has committed a tort.
>
> (2) There is an exception to the rule that if Peter has violated a property right, then Peter has committed a tort.
>
> (3) ∴ It is not the case that the exception applies to the rule that if Peter has violated a property right, then Peter has committed a tort.[56]

The main difference between these two defeasible accounts given by Walton and Verheij is that the latter focuses on excluding the exceptional cases, whereas the former uses the plausibilistic qualifier, *generally,* with no mention of the exceptions to this generalisation. These appear to be two sides to the same coin of defeasibility, particularly because they are both defeasible versions of the classical *modus ponens*.

In all three cases, the major premise, that is, the conditional, constitutes a rule, derived *ex lege* or *ex logos* (or both),[57] that is composed of an antecedent fact that is *generally* (or *necessarily*, in the case of MacCormick's deductive syllogism) followed by a consequent fact. MacCormick refers to these antecedent and consequent facts as 'operative facts.'[58] There are at least three ways to attack

[55] See generally Walton D.N *Practical reasoning: Goal-driven, knowledge-based, action-guiding argumentation* (1990).
[56] Verheij B 'Logic, context and valid inference or: Can there be a logic of law?' in van den Henrik *et al* (eds) *Legal knowledge-based systems: JURIX 1999: The Twelfth Conference* (1999) 109 at 112.
[57] More about this will be said in the following section on evidential argumentation in criminal trials.
[58] MacCormick (note 4) 45.

the major premise and one way to refute the minor premise. In the latter instance, the existence of the antecedent could simply be denied or negated with a countervailing proposition (~ *p*).[59] On the other hand, the three ways that the major premise may be refuted are that the mere logical or legal existence of the conditional may be denied;[60] if its existence is accepted, its meaning, particularly the specific types of antecedents (*p*) and consequents (*q*) required in each case may be disputed;[61] or the general association of the particular consequent with the antecedent may be challenged on the ground that there are simply too many exceptions for this to be a rule in any sense of the word.[62]

5.2.2 EVIDENTIAL ARGUMENTATION IN CRIMINAL TRIALS

Argumentation having to do with facts has been described above as *forensic* argumentation, distinguishable from *juridical* argumentation, but the phrase 'evidential argumentation' used by Bex is slightly more descriptive.[63] This is particularly because it indicates that the type of intellectual exercise that we are interested in within the context of fact-finding is that of reasoning inferentially

[59] MacCormick refers to this as the 'Problem of proof,' see MacCormick (note 4) 36; MacCormick (note 6) 43; Michael and Adler (note 50) 1242 ('Do particular instances of the factual conditions, upon which the desired legal action depends, exist?').
[60] MacCormick (note 4) 43. Elsewhere, Dworkin referred to this as an 'empirical disagreement,' contrasted with a 'theoretical disagreement' about the meaning or extent of application of a norm, see Dworkin R *Law's empire* (1986) 4-5.
[61] MacCormick refers to this as the 'Problem of interpretation,' see MacCormick (note 4) 43. On Dworkin's 'theoretical disagreements,' see Dworkin (note 82) 4-5, 11 and 87; Dworkin R *Justice for hedgehogs* (2011) 126-7.
[62] MacCormick refers to this as the 'Problem of classification,' see MacCormick (note 4) 43; Walton (note 54) 327-8.
[63] Bex F.J *Arguments, stories and criminal evidence: A formal hybrid theory* (2011) 22. Bex actually uses the phrase 'evidential reasoning,' but the context in which he uses the phrase, that is, for purposes of discussing what Bex calls the 'argument-based approach' to evidential reasoning, makes it clear that he is discussing arguments.

from one fact to another. This section has a narrow focus towards the minor premise in the basic schemes of legal argumentation outlined in the previous section. One common way of attacking the minor premise is by denying or negating it through the assertion of a countervailing proposition has already been noted. Once this has happened, we would have a typical dispute of fact requiring evidential argumentation from the litigants. This section is divided into two: first we describe the general features of evidential argumentation followed by an analysis of evidential argumentation through Walton's 'new dialectic.'

(a) General features

There are at least four features that distinguish evidential argumentation from other types of argumentation and they all relate to the nature of the generalisation used in the conditional premise.[64] Firstly, the structure of evidential reasoning always takes the form, "E to F," where the antecedent is the *factum probans* and the consequent is the *factum probandum*.[65] The existence of the consequent is both conditioned by and inferred from the antecedent through a rule that is

[64] See Salmon M.H *Introduction to logic and critical thinking* 6th ed (2013) 301, where a conditional is defined as 'a compound sentence in which the truth of one of the clauses (the consequent) is conditional on the truth of the other (the antecedent). See also Anderson T.J 'On generalisations I: A preliminary exploration' (1999) 40(2) *Texas Law Review* 455 at 457, n.10, where a generalisation is defined as 'any proposition that can be framed as a premise and used in a logical argument to show that a claim of any kind is justified or warranted to some degree, be it a claim of fact, a claim of value, a claim of policy, or a hybrid claim. Anderson *et al* (note 4) 102 and 265.

[65] Bex (note 63) 56. See also Schum (note 17) 77-83, where reasoning from E^* (evidence) to H (Hypothesis) is discussed. Similarly, Bayesians often attempt to draw probabilistic conclusions about evidentiary facts belonging to a target class given their frequency in the corresponding reference class. (Dahlman C 'Unacceptable generalisations in arguments in legal evidence' (2017) 31 *Argumentation* 83 at 89). Cf. Story modellers reason from evidence to stories, structured in episodic components, generated from 'general world knowledge.' (Pennington N and Hastie R 'A cognitive theory of juror decision making: The story model' (1991)(2-3) *Cardozo Law Review* 519 at 523).

derived *ex lege* or *ex logos* (or both) (if E, then F). At a very rudimentary level, therefore, evidential argumentation having this type of structure may be represented in the following way:

(1) E ⇒ F.

(2) E.

(3) :. F.[66]

The second feature of the generalisation used in evidential argumentation is that it is a species of the broader category of causal reasoning. Walton *et al* characterise the following types of argumentation schemes under the broad heading of causation: 'argument from cause to effect,' 'argument from effect to cause,' 'argument from correlation to cause,' 'argumentation from consequences,' 'practical reasoning,' 'the causal slippery slope argument' and 'argument from waste.'[67] Generally, arguments that state that a causal relationships holds (or fails to hold) between two types of things or events are known as 'causal arguments.'[68] Some scholars have attempted to distinguish evidential reasoning from causal reasoning,[69] but this distinction either is immaterial or of no practical effect for the forensic context. Bex himself admits,

[66] See Michael and Adler (note 50) 1272-4. Alternatively, 'if this is such and such' (P) and 'such is to be so and so' (Q) 'then this is so and so' (R) (at 1273, n75 and 1274). According to Michael and Adler, '[w]ith few exceptions, every step of judicial proof is of this form.' (at 1274).
[67] Walton D *et al Argumentation schemes* (2008) 163; Hastings A.C *A reformulation of the modes of reasoning in argumentation,* unpublished PhD thesis (Northwestern University) (1962) 78-92.
[68] Salmon (note 64) 168.
[69] Bex (note 63) 27. Cf. Poole D *et al Computational intelligence: A logical approach* (1998) 334-342, for causal and evidential reasoning in artificial intelligence.

despite making this distinction, that: 'if we have a causal generalisation "c causes e" then we will usually also accept that "e is evidence for c."'[70] For example, a 'fire can cause visible smoke so the observation of smoke can be seen as evidence for the fact that there is a fire.'[71]

Thirdly, generalisations used in evidential argumentation for the most part are *explanatory*, as opposed to being *predictive*. According to Shanahan, predictive arguments project forwards from causes to effects, while explanatory arguments are backward-looking from effects to causes.[72] Walton, without specifying the distinction between scientific and forensic contexts, describes the 'Evidence to a Hypothesis' argumentation scheme as being predictive and having two basic forms (positive and negative).[73] Save for certain predictive analyses related to future dangerousness in sentencing and risks of flight in bail proceedings, forensic fact-finding on the merits largely is characterised by backward-looking explanation or reconstruction in my view.[74] Forensic fact-

[70] Bex (note 63) 27-8.
[71] Ibid.
[72] Shanahan M 'Prediction is deduction but explanation is abduction' (1989) 89 *Proceedings of the International Joint Conference on Artificial Intelligence* 1055 at 1055.
[73] Walton D.N *Argumentation schemes for presumptive reasoning* (1996) 66-9: 'If H is true, then B will be observed. B has been observed. Therefore, A is true.' (argument from verification of hypothesis) and 'If H is true, then B will be observed. B has been observed to be false. Therefore, A is false.' (argument from falsification of hypothesis).
[74] See Stein A 'The refoundation of Evidence law' (1996) 9 *Canadian Journal of Law & Jurisprudence* 279 at 309; Twining W 'Taking facts seriously' in Twining (ed) *Law in context: Enlarging a discipline* (1997) 89 at 96-7.

finding typically is tasked with ascertaining 'what happened,'[75] which is a question that is neither predictive nor forward-looking.

The fourth feature is that evidential argumentation uses *hedged* or defeasible generalisations. The three common types of generalisations,[76] which correspond to types of conditionals, are: *universal* or *absolute*, in that they refer to absolute classes ('all Es are F') or permit no exceptions ('if E, then F always follows');[77] *inductive,* in so far as they refer to probabilistic classes ('so many Es are F') or permit a certain statistical range of exceptions ('if E, then F follows in 30% of cases');[78] *plausibilistic* because the consequent is accepted tentatively and is subject to potential revision upon the receipt of further information ('*generally,* if E, then F follows').[79] The inherent uncertainty in forensic fact-finding renders absolute or universal generalisations to be of little use in this particular context.[80] There was plenty of enthusiasm towards inductive reasoning among evidence

[75] Bex (note 63) 23.
[76] Walton D *Abductive reasoning* (2005) 139-142; Walton (note 54) 164-5. Cf. Anderson *et al* (note 4) 102 and 266.
[77] Walton (note 76) 139 and 142. The universal conditional in deductive logic is expressed using the material conditional (hook) quantifier: $(\forall x)(Ex \supset Cx)$ (at 139-140).
[78] Ibid. Classically, Aristotle described induction as reasoning from 'particular cases to universal truths' (Aristotle *Posterior analytics* (translated by H. Tredennick) (1960) $81^a40 – 81^b/107$).
[79] Walton (note 76) 139. Walton gives the following example: '"If Tweety is a bird then Tweety flies." If the antecedent is accepted in a given case, then a weight of plausibility is shifted to the consequent's being rationally acceptable (other things being equal). But it must be emphasized that this kind of conditional is inherently open to default. If new information comes into the body of evidence in the case indicating strongly that Tweety is a penguin, the conditional no longer gives a reason for accepting the consequent, even if the antecedent is accepted.' (at 142).
[80] For the reason that deductive conclusions are analytically implied in, and therefore, do not they add anything new to the premises, Reichenbach comments that '[s]uch emptiness is the very essence of deductive inference and represents the price which we pay for the necessary truth of the conclusion,' see Reichenbach H *Rise of scientific philosophy* (1968) 81. Schum points out that '[w]hat we require in our daily lives are inferences whose conclusions go beyond evidential premises.' (Schum (note 17) 23).

scholars of the 20th century,[81] and there continues to be a place for inductive generalisations in certain instances of forensic fact-finding. For instance, the use of recidivism statistics to evaluate the probative value of character evidence[82] and the vast specialisms of forensic science, in crime scene examination, DNA profiling, fingerprinting, trace examination and drugs analysis,[83] are areas characterised by inductive logic. These clearly are specialised areas. For the most part, the kind of evidential argumentation that is of interest in this thesis is the type that involves plausibilistic generalisations[84] as analysed in the context of Walton's 'new dialectic' framework.

[81] Wigmore (note 1) 984; Cohen (note 5) 247-281. Cf. Michael and Adler (note 50) 1278, n82 ('all inference or proof is deduction or demonstration, whereas induction is the assertion of a general proposition without proof' and '[t]here are many meanings of "induction," but there is none in which judicial proof can be said to be inductive'); James G.F 'Relevancy, probability and the law' (1941) 29(6) *California Law Review* 689 at 689-700, where no commitment is made expressly as to whether judicial proof entirely is inductive or deductive, but James found value in testing evidential inferences against deductive generalisations. This rudimentary debate is both miscast and probably outdated by now, as most Evidence scholars appear to hold the view that no single reasoning process can be said to fully and exclusively characterise the process of forensic proof (Wigmore (note 1) 982, n1, 985-6, n5 and 987-8).

[82] Redmayne M 'The relevance of bad character' (2002) 61(3) *The Cambridge Law Journal* 684 at 691; Park R.C 'Character at the crossroads' (1998) 49 *Hastings Law Journal* 717 at 758-772; Inkwinkelried E.J 'Undertaking the task of reforming the American character evidence prohibition: The importance of getting the experiment off on the right foot' (1995) 22 *Fordham Urban Law Journal* 285; Baker K.K 'Once a rapist? Motivational evidence and relevancy in rape law' (1997) 110 *Harvard Law Review* 563; Monahan J *et al Rethinking risk assessment: The MacArthur study of mental disorder and violence* (2001) 44-5.

[83] Roberts P 'Making sense of forensic science evidence' in Roberts and Stockdale (eds) *Forensic Science Evidence and Expert Witness Testimony: Reliability Through Reform?* (2018) 27 at 62; Saks M.J 'Forensic identification: From a faith-based "science" to a scientific science' (2010) (1-3) *Forensic Science International* 14. Other examples of statistical evidence and inductive logic are cases of paternity, immigration, employment discrimination cases, see Aitken C.G.G and Taroni F *Statistics and the evaluation of evidence for forensic scientists* 2nd ed (2004) 312-8; Robertson B *et al Interpreting evidence: Evaluating forensic science in the courtroom* (2016) 35-8; Allen R.J 'Factual ambiguity and a theory of evidence' (1994) 88(2) *Northwestern University Law Review* 604 at 634-40.

[84] Walton refers to this class of generalisations interchangeably as 'abductive,' 'defeasibly,' or 'plausibilistically,' see Walton (note 76) 139.

(b) Introducing the (New) Dialectic of argumentation

Dialectical argumentation originates from the ancient Greeks who understood *dialektikos* to mean 'to discuss' in the context of a 'conversation' or 'dialogue.'[85] For Aristotle, reasoning is 'dialectic' if its starting premises are not 'demonstratively,' or 'analytically' true, but rather if they are 'generally accepted opinions' (*endoxa*).[86] Dialectical reasoning, although very popular with the ancient Greeks, gradually waned over the years while Formal Deductive Logic ('FDL') assumed supremacy status. Since the 1950s, however, a 'new dialectic' ('ND') has re-emerged as part of a long tradition of argumentation theorists breaking away from FDL and turning towards 'defeasible' and 'presumptive' 'everyday' argumentation.[87] Wigmore exhibits a preference for 'ordinary canons of reasoning' in the evaluation of evidence[88] and some contemporary Evidence scholars have articulated a similar rejection of FDL in the forensic context:

> We have seen that jury fact-finding in criminal adjudication proceeds on the basis of largely unarticulated 'common sense' inferences. The scope for formalizing the

[85] Walton D *Plausible argument in everyday conversation* (1992) 4; Kneale W and Kneale M *The development of logic* (1962) 7.
[86] Aristotle *Topics* (translated by W.A Pickard-Cambridge) (2005) Book 1, part 1; Aristotle *De Sophisticis Elenchis* (edited and translated by E.S Forster) (1955) 15.
[87] Ryle G *Dilemmas: The Tarner lectures* (1953) 116; Toulmin S.E *The uses of argument* (1958); Perelman C.H and Olbrechts-Tyteca L *The new rhetoric: A treatise on argumentation* (translated by John Wilkinson and Purcell Weaver) (1969); Perelman C *The idea of justice and the problem of arguments* (translated by John Petrie) (1963) 99, 101 and 104; Hamblin C.L *Fallacies* (1970); Kahane H *Logic and contemporary rhetoric: The use of reason in everyday life* (1971); Thomas S.N *Practical Reasoning in Natural Language* (1977); Perelman C 'Formal and informal logic' in Meyer (ed) *From Metaphysics to Rhetoric* (1989) 9; Johnson R.H 'Making sense of "informal logic"' (1999) 26(3) *Informal logic* 231 at 233; Walton D and Brinton A *Historical foundations of informal logic* (1997) ix-x.
[88] Wigmore (note 1) 94.

inferential process through deductive syllogisms or probabilistic calculations is limited and frowned on if overtly attempted in the courtroom.[89]

The ND is a framework of argumentation with four important characteristics. Firstly, new dialecticians typically use *argumentation schemes*, which are defined as 'forms of argument (structures of inference) that represent structures of common types of arguments used in everyday discourse, as well as in special contexts like those of legal argumentation.'[90] Secondly, argumentation is invariably *dialectical* and thus *nonmonotonic*, which is to say that argumentation occurs in a conversational or dialogic context between the prosecution and the accused, where the supplementation of new premises or information does have an impact on the overall validity of the argument.[91] Thirdly, ND argumentation is *pragmatic* in so far as the acceptability of arguments is measured against the extent to which each arguer discharges their burden of proof as they contribute towards the overall goal of the dialogue.[92] The fourth characteristic of argumentation within the ND framework is the consideration of a classically rhetorical feature of being sensitive to one's *audience*, and in our case to one's *institutional context*, in evaluating an argument.[93]

[89] Roberts P and Zuckerman A *Criminal evidence* 2nd ed (2010) 163. This view is shared by Walton (note 54) 209-210.
[90] Walton *et al* (note 67) 1. For example, in this particular book Walton *et al* analyse sixty-five different schemes.
[91] Walton D *Dialog theory for critical argumentation* (2007) 92.
[92] Walton (note 54) 248-250; Walton (note 91) 92-3.
[93] Walton (note 54) 92.

One implication of the fourth characteristic is that it avoids generic argumentation schemes that have no clearly defined standpoint;[94] that is to say, schemes that are unclear about which particular *factum probandum* they are being addressed towards. Walton's 'Plausibilistic theory'[95] and Cohen's Baconian Inductivism[96] are two examples of such generic schemes. It bears noting in this regard that the focus of the argumentation schemes developed in this chapter is on the *trial context* and from the *perspective of the arguers* (prosecution and defence) in criminal trials. This clarification is relevant because some projects or heuristics purport to apply to criminal trials as a whole without distinguishing between the various phases of criminal process,[97] whereas others adopt the perspective of an 'idealised trier of fact.'[98]

[94] The importance of clarifying one's standpoint has been underscored by Anderson *et al*: 'Clarify the standpoint of the analyst by giving clear and precise answers to four questions: Who am I? At what stage in what process am I? What materials are available for analysis? What am I trying to do?' (Anderson *et al* (note 4) 115).
[95] Walton (note 54) 291 and 321-2.
[96] Cohen (note 5) 56-7 and 246. Cf. Balding (note 17) 51 at 52, where the proof of the source of DNA is treated, without more, as being equivalent to proving guilty. Schum's substantive blindness of redefining the definition of 'evidence' to exclude the orthodox classifications of the types of evidence into testimonial, documentary and 'real' appears to be an attempt to remove institutional context and thus result in similar errors. See Schum (note 17) 66, 114-20 and 484; Twining (note 74) 97.
[97] Whereas Bex's formal hybrid theory combines arguments and stories in the contexts of the *investigative* and *trial stages* of the criminal process (Bex (note 63) 22, 83 and 141), Walton's 'Plausibilistic theory' is applied without discrimination between various phases of the criminal process (Walton (note 54) 200-1). Anderson *et al*'s 'seven step protocol' and Kadane and Schum's modelling of the Sacco and Vanzetti case are other similar examples that demarcate their scope of application, see Anderson *et al* (note 4) 114-5; Kadane J.B and Schum D.A *A probabilistic analysis of the Sacco and Vanzetti evidence* (1996) 33.
[98] For example: Lempert R.O 'Modelling relevance' (1977) 75 *Michigan Law Review* 1021 at 1023; Finkelstein M.O and Fairly W.B 'A Bayesian approach to identification evidence' (1970) 83(3) *Harvard Law Review* 489; Bergman P and Moore A.I 'Mistrial by likelihood rotation: Bayesian analysis meets the f-word' (1991) 13(2-3) *Cardozo Law Review* 589; Cohen L.J 'Should a jury say what it believes or what it accepts?' (1991) 13 *Cardozo Law Review* 465.

In general, the *identification*, *analysis* and *evaluation* of arguments are the three primary goals of argumentation within the ND framework.[99] For purposes of identifying arguments, ND argumentation is similar to classical FDL in so far as it identifies the 'illiative core'[100] (or 'gross anatomical structure'),[101] consisting of the premisses and conclusion, of an argument. The main differences between FDL and ND here are that FDL identifies arguments *only* in formal symbolic language, whereas ND uses *natural language* in addition to this in order to avoid language-related fallacies such as *equivocation* and *amphiboly*.[102] Moreover, arguments within the ND framework are identified and analysed with respect to the particular standpoints (in our case, the *facta probanda*) to which they are addressed and the implications of the institutional context within which such arguments are made.

At least three very similar general schemes of evidential argumentation are useful for fact-finding from the perspective of trial lawyers in the forensic context. The first account, called *Form* *, is offered by Walton and Krabbe:

(1) (Rule *n*:) $B_x \Rightarrow F_x$.

(2) B_t.

[99] These basic objectives are pursued by argumentation theorists in general too: Walton D.N *Fundamentals of critical argumentation* (2006) 1. These disciplinary objectives apply to argumentation theory in general, see van Emeren F.H *et al Fundamentals of argumentation theory: A handbook of historical backgrounds and contemporary developments* (1996) 12 and 22; Capaldi N and Smit M *The art of deception: An introduction to critical thinking* (revised) (2007) 23; van Eemeren F.H *et al Handbook of argumentation theory* (2014) 12.
[100] Johnson R.H *Manifest rationality* (2000) 160.
[101] Toulmin (note 87) 94.
[102] Walton (note 54) 249.

(3) Rule *n* applies to the present case.

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(4) Therefore, F_t.[103]

Premise (1) is a *plausibilistic conditional* that provides that if a fact, *x*, is shown to have the property B, then generally it will also have the property F. For example, if a blood-stained knife (*x*) bearing a person's fingerprint (B) is found at a crime scene at the relevant time, then generally she will have been in possession of the knife at some point (F). The second premise introduces a fact or circumstance (*t*) other than *x* that has the property B. That is to say, the fingerprint in our example is linked to Thandi (*t*). The next step is then to determine whether rule *n* having to do with the possession of the blood-stained knife applies to Thandi. Premise (1) is a *plausibilistic conditional* which means that it applies *generally,* but subject to certain exceptional cases. Thandi's case might be one such case; that is, the fingerprint matching process might have produced a false positive. Within the ND framework, rule *n* would be regarded as applying *presumptively* to Thandi unless it is refuted by her or by the discovery of new information. Therefore, if premises (1), (2) and (3) are established, that is to say if it is *plausible* that Thandi's fingerprints match with those found on the blood-stained knife, then the conclusion that she was in possession of the knife *plausibly* follows.

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[103] Walton D.N and Krabbe E.C.W *Commitment in dialogue: Basic concepts of interpersonal reasoning* (1995) 180.

The second scheme is the *Defeasible Modus Ponens* ('DMP') of evidential argumentation:

(1) Generally, but subject to future possible exceptions (if E then F).

(2) E.

(3) In this case, there is no exception known yet to the general rule that if E then F.

(4) ∴ F.[104]

The DMP is an equivalent iteration of Verheij's *Modus Non-excipiens* ('MN'):

(1) E ⇒ F.

(2) E.

(3) N-E.

(4) :. F.[105]

Unlike Form* which positively focuses on the presumptive application of its plausibilistic conditional, the DMP and MN schemes negatively focus on the presumptive exclusion of exceptions to the plausibilistic conditional under the circumstances. Once again, these are two sides of the same defeasible coin. They both recognise that the absolutism and universality of FDL is ill-suited for evidential argumentation given that absolute certainty in forensic fact-finding is unattainable.

[104] Walton (note 54) 151.
[105] Verheij (note 56) 113.

For all three argumentation schemes, Form*, DMP and MN, the plausibilistic conditional is a presumptive rule that is derived *ex lege* or *ex logos* (or both). Strictly speaking, there are no *ex logos* presumptions recognised in the forensic context because '[f]or reasoning there is no law other than the laws of thought.'[106] According to Thayer:

> To say, as sometimes happens, that in such cases there is "a rule of law that courts and judges shall draw a particular inference," is a loose and misleading expression; for it involves the misconception that the law has any rules at all for conducting the process of reasoning.[107]

In theory, therefore, there is no such thing as 'presumptions of fact' (*presumptions hominis*) in the forensic context.[108] Thayer here is reacting to Stephen who defined a presumption as a 'rule of law that Courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.'[109] According to Thayer, Stephen here is confusing 'rules of reasoning,' which he thinks have no official existence in the forensic context, and 'the law of evidence,' or so-called

[106] Thayer (note 9) 314.
[107] Ibid 316-7.
[108] Cf. *Tregea v Godart* 1939 AD 16 at 28; *Cold Storage Company Ltd v Rapid Discount House Ltd* [2003] ZWSC 64; Sopinka J *et al The law of evidence in Canada* 5th ed (2018) §4.1; Zeffert and Paizes (note 39) 182. See generally, Morgan E 'Presumptions' (1937) 12 *Washington Law Review and State Bar Journal* 255; Ashford H.A and Risinger D.M 'Presumptions, assumptions and due process in criminal cases: A theoretical overview' (1969) 79(2) *Yale Law Journal* 165; Nesson C.R 'Reasonable doubt and permissive inferences: The value of complexity' (1979) 92(6) *Harvard Law Review* 1187; Dlamini C.R.M 'Presumptions in the South African law of evidence (1)' (2001) 65 *Journal of Contemporary Roman-Dutch Law* 544; Dlamini C.R.M 'Presumptions in the South African law of evidence (2)' (2002) 64 *Journal of Contemporary Roman-Dutch Law* 3; Dlamini C.R.M 'Presumptions in the South African law of evidence (3)' (2002) 65 *Journal of Contemporary Roman-Dutch Law* 147.
[109] Stephen (note 23) 4.

'presumptions of law.'[110] For many complicated reasons, this distinction is not a neat one.[111] Thayer's attempt to explain this distinction is also thin because he says that the only differentiator between these two categories is that one is *official recognition* by a court, whereas the other is by a legislator.[112] There are two further complications with this distinction. Firstly, not all presumptions of law are justified or derived *ex logos*. The prevailing classes of presumptions of law in jurisdictions across the world constitute heterogenous sets with variegated meanings and justifications.[113] For instance, Thayer justified the presumption of ownership through prolonged and undisturbed possession on epistemic grounds,[114] whereas the presumption of innocence has been justified on a much wider set of normative grounds, including the fair trial of accused persons.[115] The

[110] Thayer (note 9) 313-4, n1.

[111] Ullman-Margalit E 'On presumption' (1983) 80(3) *The Journal of Philosophy* 143 at 145, 4 ('distinctions in the law concerning presumptions, notably...between presumptions of law and presumptions of fact…is commonly taken to be rather confused and confusing, a presumption of fact being perhaps an altogether redundant notion').

[112] Thayer accuses judges that recognise extra-legal presumptions, *qua* reasoning rules, in their judges with the aim of creating presumptions of law of brazenly 'legislating,' see Thayer (note 9) 316.

[113] Examples of these include: 'that a child born during lawful wedlock is legitimate; that a person who, without reasonable explanation, has not been heard from for at least seven years is dead; that a marriage regularly solemnized is valid; that a child under fourteen years of age has no criminal intention,' see Ullman-Margalit (note 111) 144-5. Many of these presumptions, and several others, are applied regularly in cases across Africa: *S v Chikandiwa* [2017] ZWHHC 281 (presumption of sanity); *Musa v S* (2013) LPELR-21866 (CA) 38F (the factual findings of a trial court are presumed to be correct on appeal); *R v J.O* [2015] eKLR (presumption of criminal incapacity in respect of children); In re: Application for presumption of death of *Danson Machaga* [2017] eKLR (presumption of death when a person has been missing for a period in excess of 7 years); *Ismail v Mkondo* [1984] TZHC 10 (presumption of marriage after cohabitation for a period in excess of 5 years); *George v Fairmead (Pty) Ltd* (1958) (2) SA 465 (A) 472 (contractual presumption of *caveat subscriptor*).

[114] Thayer (note 9) 317-8.

[115] Laufer W.S 'The rhetoric of innocence' (1995) 70(2) *Washington Law Review* 329 at 333-4. The precise meaning of the presumption of innocence remains controversial. Many have associated various *normative* objectives to it [Ferguson P.R 'The presumption of innocence and its role in the criminal process' (2016) 27 *Criminal Law Forum* 131 at 138 ('The presumption of innocence is not a predictor of anything. Rather…I contend that it is best viewed as a normative proposition, reflecting a policy decision that the State should treat its citizens in a particular way'); Lauden L 'The presumption of innocence: Material or probatory?' (2005) 11 *Legal Theory* 333 at 339-340 (juries do not make findings of 'innocence' but of 'not guilty'); Weigend T 'There is only one presumption of innocence' (2013) 42(3) *Netherlands Journal of Legal Philosophy* 193 at 193 ('The presumption of innocence is not a *presumption*, i.e. a conclusion drawn from a given set of facts'); Healy P 'Proof and policy:

second complication is that for that class of presumptions that are derived *ex logos,* but receive the requisite judicial or legislative recognition, such *official recognition* does not change their substance and function as 'rules of reasoning' that have been recognised as being appropriate through experience. Thayer himself recognises that this class of presumptions has an extra-legal genealogy, but then rather artificially argues that once officially recognised, these presumptions form part of substantive law and not the Law of Evidence.[116]

These complications make the distinction between *ex lege* and *ex logos* presumptions untidy and problematic, especially within the forensic context. However, we have to carve out at this stage of the discussion the class of presumptions that are legally justified on either purely normative grounds or complicated mixtures of normative and other extra-legal (epistemic or logical) grounds. We are here only concerned with presumptions that serve solely as 'reasoning rules.' We will call these *ex logos* presumptions.[117] Their official

No golden threads' [1987] *Criminal Law Review* 355 at 365; Rinat K 'Presuming innocence' (2002) 55(2) *Oklahoma Law Review* 257 at 271 ('assuming a factual basis to the presumption leads to difficulty in justifying the use of the presumption for certain groups who statistically commit a high number of crimes'); Schwikkard P.J 'The presumption of innocence: What is it?' (1999) 11(3) *South African Journal of Criminal Justice* 396 at 403-6; Ho H.L 'The presumption of innocence as a human right' in Roberts and Hunter (eds) *Criminal evidence and human rights: Reimagining Common law procedural traditions* (2012) 259], while others have attributed *epistemic* meaning to it: Lippke R.L *Taming the presumption of innocence* (2016) 8 ('I take literally the notion that the PI is a *presumption*); *Coffin v United States* 156 U.S. 432 (1895) 460 ('the presumption of innocence is evidence in favour of the accused introduced by the law on his behalf'); Duff R.A 'Who must presume whom to be innocent of what?' (2013) 42(3) *Netherlands Journal of Legal Philosophy* 170 at 170 ('The official body who is to reach the verdict (the judge(s), the jury) is to presume, of the defendant, that he is innocent of the offence for which he is being tried').

[116] Thayer J.B 'Presumption of innocence in criminal cases' (1897) 6 *Yale Law Journal* 185 ('Everybody knows that vast sections of our law have accumulated in this way.'). Thayer (note 9) 315 ('much of the substantive law is expressed presumptively, in the form of *prima facie* rules').

[117] Without this carve out, common errors in the treatment of presumptions involve impermissible contextual shifts between logic and law. For example, see Walton (note 54) 19 ('The notion of presumption also appears to

recognition or otherwise does not entail any material theoretical difference. Moreover, for a practising trial lawyer who regularly uses argumentation schemes such as arguments by analogy,[118] the distinction may have very little practical effect.

In the same way that plausibilistic conditionals combine antecedents (E) and consequents (F), *ex logos* presumptions combine, through evidential argumentation, *facta probantia* and *facta probanda*.[119] Within the N-D framework, *ex logos* presumptions serve as reasoning aids that enable the dialogue to move forward *defeasibly*, that is, subject to subsequent refutation or the posing of critical questions, from the prosecution's to the accused's move.[120] From the perspective of argumentation theory and pragmatics, *ex logos* presumptions can also be viewed as distinctive speech acts that lie somewhere between assertions and mere assumptions.[121] They are reasoning rules that have

be directly connected to what is called the presumption of innocence in the criminal trial') and 85 ('the fact to be proved is called "the fact presumed," and the fact to be established before this other fact is to be deemed true is called "the fact proved"'); Whately R *Elements of rhetoric* (1963) 171.

[118] See generally, Kaptein H and van der Velden B (eds) *Analogy and Exemplary Reasoning in Legal Discourse* (2017); Brewer S 'Exemplary reasoning: Semantics, pragmatics, and the rational force of legal argument by analogy' (1996) 109 *Harvard Law Review* 923; Kloosterhuis H 'Reconstructing complex analogy argumentation in judicial decisions: A pragma-dialectic perspective' (2005) 19 *Argumentation* 471.

[119] Thayer (note 9) 314.

[120] Walton (note 54) 19 and 28. Presumptive reasoning is characterised as being *nonmonotonic* in that the structural validity of presumptive arguments, by definition, is affected by the addition of any new premises once new information comes to light (at 21). Perelman and Olbrechts-Tyteca (note 87) 70 ('In addition to admitting facts and truths, all audiences admit presumptions. But…adherence to them falls short of being maximum, and hearers expect their adherence to be reinforced at a given moment by other elements') and ('[I]n most cases, presumptions are admitted straight away as a starting point for argumentation'); Ullman-Margalit (note 111) 143 ('an unquestioned taking for granted, but at the same time of some tentativeness, overturnability').

[121] Walton (note 95) 17. Although he considers it to be inappropriate to characterise presumptions as *assertive* speech acts, Walton admits that the prevailing taxonomies of speech acts leave us without a suitable alternative category (at 18). Cf. Searle J *Speech acts: An essay in the philosophy of language* (1969) 4-12; Vanderveken D *Meaning and speech acts* vol 1 (1990) Ch 6. Cf. Thayer (note 9) 315 ('Presumption, assumption, taking for granted, are simply so many names for an act or process which aids and shortens inquiry and argument').

acquired persuasive force by *institutional convention*.[122] It is presumed that certain consequents *normally, typically* or *ordinarily* follow certain antecedents, and yet the meaning of these very adverbs are themselves presumptions.[123] In the absence of absolute certainty, and subject to revision upon the receipt of new information, these presumptions, as plausibilistic inferences, are acceptable within the N-D framework. Once again, the institutional recognition of *ex logos* presumptions only implies a difference of degree in persuasiveness from a practical point of view, as compared to *ex logos* presumptions that are yet to receive such recognition.

In terms of the institutional recognition of *ex logos* presumptions, courts hardly ever recognise or apply these in terms other than specifically on the facts of each particular case. Therefore, while presumptions such as that 'the quality of an act reveals the quality of the person responsible for it'; 'any statement brought to our knowledge is supposed to be of interest to us'; credible and reliable testimony generally is true,[124] are all defeasibly acceptable as plausibilistic generalisations, these are only ever likely to be institutionally recognised by judges on a case-by-case basis. Similarly, the orthodox example of the presumption *ex logos* that 'John plausibly has left the house given that his hat and

[122] Perelman and Olbrechts-Tyteca (note 87) 70. Thayer regards presumptions as being akin, although not identical, to facts that are admitted by judicial notice, see Thayer (note 9) 314-5.
[123] Ibid 71.
[124] Perelman and Olbrechts-Tyteca (note 87) 70-1.

coat are not hung'[125] may be regarded as being very persuasive, but this is unlikely to be elevated, at least not until a prolonged passage of time and the accumulation of judicial experience, to a *rule of law* that is similar in status to the presumption of sanity.

Argumentation schemes may be applied to *ex logos* presumptions in order to afford them some identifiable structure that is linked to a set of critical questions.[126] Argumentation schemes are 'stereotypical ways of reasoning about which there is a consensus at least in the legal and philosophical community.'[127] Owing to what has been said above about institutional recognition in the forensic context, a useful argumentation scheme would be the argument from analogy (or precedent):

(1) Generally, case C_1 is similar to C_2.

(2) A is true (false) in case C_1.

(3) ∴ A is true (false) in case C_2.[128]

This scheme is relevant because if institutional recognition of *ex logos* presumptions is likely only to occur on a case-by-case basis, these presumptions will have to be gleaned from previously decided cases and then applied, by

[125] Walton (note 73) 17.
[126] Bex (note 63) 47; Bex F *et al* 'Towards a formal account of reasoning about evidence: Argumentation schemes and generalisations' (2003) 11 *Artificial Intelligence and Law* 125. Applying argumentation schemes to generalisations, while giving structure and coherence to the analysis, would necessitate longer argumentation chains, which are familiar to most Evidence scholars: Michael and Adler (note 50) 1274-5, n 79.
[127] Bex (note 63) 47.
[128] Walton (note 73) 77; Perelman and Olbrechts-Tyteca (note 87) 350-410; Walton (note 54) 36.

analogy, to future cases. Therefore, if a prosecutor insists that the commission of a provocative and intimidating act must be inferred *presumptively* from the motive and opportunity for the commission of such conduct, it would be useful to look at whether such an inference has been drawn in similar previously decided cases and then to argue by analogy that this presumption *ex logos* should apply to the current case.

As to the minor premise (2) that provides for the establishment of the antecedent (E), one must take care not to *affirm the consequent* (F):

(1) E ⇒ F.

(2) F.

(3) :. E.

This may look like a valid *modus ponens*, which *affirms the antecedent*, but it is rather the fallacy of *argumentum ad consequentiam*.[129] This is a fallacy because if F was true and E was false, both premisses would be true, given that E is only conditionally or hypothetically stated, and yet the conclusion would be false.[130] For example:

(1) If A shot the deceased, then A's fingerprint would be found on the gun.

(2) A's fingerprint is found on the gun.

[129] For a historical overview, see Walton D 'Historical origins of *Argumentum ad consequentiam*' (1999) 13 *Argumentation* 251.
[130] Salmon (note 64) 313.

(3) ∴ A shot the deceased.

The third premise of our argumentation scheme (Form 'MN' above) is the *non-excipiens* clause, to borrow the language used by Verheij.[131] This is the clause in terms of which the prosecution presumptively argues for *epistemic closure* in relation to the applicability of any exceptions to the plausibilistic conditional stated in the first premise.[132] This is acceptable under two conditions related to the *processes* of testing our *ex logos* presumptions: firstly, the more faith we place in the processes, through the dialectical posing of critical questions and rival arguments by the accused, that are tasked with *testing* our presumptions corresponds to their degree of acceptability. That is to say that the pragmatic move of epistemic closure would be more acceptable under circumstances where the accused's dialectical moves are sufficiently critical to test the cogency of the prosecution's moves. Secondly, our faith must also be placed in our processes of *investigating* the number, nature and extent of application of the exceptions to our *ex logos* presumptions. The stronger this investigative capacity is, the safer it will be to declare epistemic closure.

Consider the following example: A book is lost in a two-roomed flat.[133] There are only two possible bases upon which we can accept the presumption that

[131] Verheij (note 78) 114 and 118.
[132] Walton *et al* (note 67) 184.
[133] This example is an adapted version of the one used in De Morgan's discussion on the *argumentum ad ignorantiam* fallacy, see De Morgan A *Formal logic or the calculus of inference, necessary and probable* (1847) 261-2.

the book is *not* in room A. The first is if we find the book in room B. However, the second basis better illustrates epistemic closure being based on our faith in the evidential processes of testing and investigating our *ex logos* presumptions. A negative report from a lay or inexperienced investigator looking for the book in room A is unlikely, without more, to make the presumption that the book plausibly is *not* in the room acceptable. However, the deployment of an experienced investigative agency to search the room makes epistemic closure easier to justify under those circumstances.[134] Similarly, using thorough search engines that use artificial intelligence, for example: *Google*, to search for historical and social facts, such as the departure or arrival of flights or the results of sporting events, may be sufficient to declare epistemic closure.[135] In the forensic context, institutional processes such as: *cross-questioning*, either by judges or the parties themselves; the state's deployment of *state agencies with strong investigative capacity*; the involvement of *expert witnesses* on certain specialised areas; the *involvement of lay persons* in the fact-finding process; the *involvement of legal practitioners*, both on the bench and from the bar, who are trained in the analysis and presentation of facts within a trial setting, all contribute towards the safety of epistemic closure.

[134] See Copi I.M *Introduction to logic* 4th ed (1972) 77; Walton D 'The appeal to ignorance, or argumentum ad ignorantiam' (1999) 13 *Argumentation* 367 at 370-1; de Cornulier B '"Knowing whether", "knowing who", and epistemic closure' in Meyer (ed) *Questions and Questioning* (1988) 182 at 182; Copi *et al* (note 24) 132.
[135] Walton D *Appeal to expert opinion: Arguments from authority* (1992) 96-7; Walton D 'Nonfallacious arguments from ignorance' (1992) 29(4) *American Philosophical Quarterly* 381 at 382 and 385.

Proceeding now to the evaluative stage of our basic scheme of evidential argumentation, there are at least three possible sets of refutations that may be levelled by the accused. Firstly, the accused could attack the plausibilistic conditional by challenging its existence or institutional recognition either in logic or law;[136] by arguing that it is articulated in terms that are either too broad or too narrow for a heterogenous class of antecedents or consequents;[137] or by arguing that the association of a particular consequent with a particular antecedent is false invariably because the former never follows the latter in any context.[138] Secondly, the accused may attempt to have the evidence on which the antecedent proposition is based excluded on the grounds of it being logically irrelevant, inauthentic, unreliable or for some other institutionally recognised normative reason (for example, prejudice or unfairness).[139] The third set of refutations, against the *non-excipiens* clause, includes: arguing that there is a significant number of relevant exceptions to the plausibilistic conditional;[140] that the prosecution has neither stipulated nor pleaded the non-existence of these relevant exceptions; that the plausibilistic conditional should not apply for extrinsic non-epistemic or non-logical reasons under these particular circumstances (for

[136] Bex (note 63) 47.
[137] An analogous critique is levelled towards inductive generalisations, see Dahlman (note 65) 94 and 98.
[138] Bex (note 63) 47. Another way of attacking the consequent is by asking: 'Does the hypothesis (F) explain the circumstantial evidence (E),' see Hastings (note 67) 89.
[139] Hastings (note 67) 89.
[140] Bex (note 63) 47. More specifically, one could attempt to show that there are exceptions either to the antecedent ('is there contradictory evidence that nevertheless supports F under these circumstances?') or to the consequent ('is there a contradictory F_1 that follows from the evidence?), see Hastings (note 67) 90-1.

example, under circumstances where applying the plausibilistic conditional may result in inadvertent unfair discrimination against the person(s) concerned).[141] More will be said about the logical testing of the evaluative strength of evidential argumentation in Chapter 6.

5.3 CONCLUSION

The overall argument made in this thesis stresses that the *plausibility* of the evidential proof of the direct crime of witchcraft in Africa depends on the three-part *institutional, material* and *probative* antecedent. Focusing on the probative component of the antecedent, this chapter has developed a theoretical foundation for the heuristics that will be applied to the relevant *facta probanda* in Chapter 6 by combining the institutional tradition of Wigmorean analysis with the flexibility and robustness of contemporary argumentation techniques. The argumentation schemes applied in Chapter 6 are contextualised *applications* of the basic concepts and frameworks developed in the present chapter. These two chapters respond to the third sub-questions of this thesis about the meaning, nature and general form of the processes or heuristics of evidential proof for witchcraft cases.

[141] See Dahlman (note 65) 98, pointing out the danger of certain discriminatory generalisations, for example, against Somalian nationals resident in Denmark being involved in crime, inadvertently resulting in much wider and graver societal unfairness against these minority groups.

This question is answered in three sequential steps in this chapter. Firstly, various heuristics of evidential proof, such as Structural theories, Force-related theories and Psychological theories assessing witness credibility, have been identified within the context of Wigmore's expansive legacy of Evidence scholarship. Secondly, it has been indicated that the kind of heuristic that is of interest in this thesis is Wigmorean forensic argumentation. Thirdly, this chapter connects Wigmorean forensic argumentation to contemporary heuristics and analysis from argumentation theory, particularly Walton's New-Dialectic framework. These argumentation schemes and analysis will now be applied to each of the four *facta probanda* of the direct crime of witchcraft in the next chapter.

6. CHAPTER SIX – THE PROBATIVE CONDITION: *APPLYING* FORENSIC ARGUMENTATION SCHEMES TO WITCHCRAFT CASES

Questions about the general nature of heuristics of evidential proof, and schemes of evidential argumentation in particular, were addressed in Chapter 5. It is now time to turn to *contextual* questions about how these schemes apply to witchcraft cases in African criminal process. In particular, the general and basic argumentation schemes from the previous chapter must now engage with the four *facta probanda, unlawful conduct, causation, harm* and *intention,* of the direct crime of witchcraft (*materiality*) within the appropriate institutional context, which includes approaching the appropriate forum with jurisdiction and using the correct (legal) procedure (*institutional*). It is this particular form of *contextual application* that this chapter grapples with.

It will be recalled from Chapter 5, by way of background, that the basic scheme of evidential argumentation proposed by Bart Verheij and Douglas Walton takes the form of a *defeasible modus ponens*[1] ('B Model'):

(1) Generally, but subject to future possible exceptions (if E then F).

(2) E.

(3) In this case, there is no exception known yet to the general rule that if E then F.

[1] Walton D *Abductive reasoning* (2005) 151. Walton adapted this version from Verheij B 'Logic, context and valid inference or: Can there be a logic of law?' in van den Henrik *et al* (eds) *Legal knowledge-based systems: JURIX 1999: The Twelfth Conference* (1999) 109 at 113. In symbolic form: (1) E ⇒ F; (2) E; (3) *Non-Excipiens*; (4) therefore, F.

(4) :. F.

For the propositional inputs of this argumentation scheme, we use the Wigmorean taxonomy of propositions of fact discussed in Chapter 5. It will be recalled from Chapter 5 that Wigmore's taxonomy operates at two levels. Firstly, *facta probanda* are categorised into four groups: 'Events, qualities, or conditions of physical (inanimate) nature' ('external conditions'); 'the identity of a thing or person' ('identity'); 'a quality or condition of a human being' ('human quality or condition'); and 'the doing of a human act' ('human act').[2] Secondly, these groups of propositions of fact are analysed from *prospectant* (*before* the occurrence a crime), *concomitant* (*during* the occurrence of a crime) and *retrospectant* (*after* the occurrence of a crime) perspectives.[3] The incorporation of these aspects of Wigmore's taxonomy of propositions of fact gives us an adapted version of the B Model:

(1) PCR ⇒ F.

(2) PCR.

(3) *Non-Excipiens*.

(4) ∴ F.

The overall structure of this chapter is consistent with the general thrust, concerning the *identification, contextualisation* and *evaluation* (logical testing)

[2] Wigmore J.H *The principles of judicial proof as given by logic, psychology and general experience and illustrated in judicial trials* (1913) 30. Cf. Wigmore J.H *Evidence in Trials at Common Law* (revised by Peter Tillers) (1983) 1139, where Wigmore initially had made a three-fold classification: 'I. A Human Act; II. A Human Quality, Condition, or State; III. A fact or condition of External Nature'.
[3] Wigmore (note 2) 30. Cf. Wigmore (note 2) 1139-1141.

of argumentation, of Walton's (New) Dialectical ('N-D') framework that was introduced in Chapter 5. The first part of the chapter applies the B Model to witchcraft cases by structurally *identifying* and analysing its form with respect to each of the four *facta probanda* of the direct crime of witchcraft. The second part of Chapter 6 *evaluates* the B Model, as applied to witchcraft cases, at *micro* and *macro* levels in the context of the N-D framework. These two parts of the chapter build on the foundational concepts developed in Chapter 5 in answering the third of our three sub-questions that flow from the main thesis question: *What processes or heuristics of proof can be used to establish the elements of the direct crime of witchcraft?*

6.1 UNLAWFUL CONDUCT ARGUMENT

The first element of the direct crime of witchcraft was broken down into the two components of an (i) *action* that is (ii) *provocative in the indigenous sense* in chapter 4. The establishment of the first of these components is no different to any other *descriptive* proposition of fact to which the fact-to-proposition of fact ('F-to-PF') inferential pattern applies. The second component, on the other hand, is an *evaluative* proposition of fact that involves the inference of a proposition of fact from an extra-legal (social or moral) norm ('N-to-PF').[4] These two inferences

[4] The distinction between fact-to-proposition of fact (F-to-PF) and norm-to-proposition of fact (N-to-PF) inferential lines was explained at length in Chapter 5. Propositions derived using the N-to-PF inferential pattern were characterised as being *evaluative*, whereas those that involved the F-to-PF inferential pattern were referred to as *descriptive* propositions. For example, value-laden propositions of fact such as negligence typically are inferred from extra-legal community standards or norms (N-to-PF), whereas the identity or conduct of a perpetrator typically is inferred from another 'brute fact' (F-to-PF).

are then combined into an elongated chain of evidential argumentation that is based on the B Model.

The N-to-PF part of the chain is strengthened by the application of the argumentation scheme that appeals to expert opinion. This particularly is because, as the Zimbabwean statute reminds us, 'spoken or written words,' or any other action for that matter, without more, are insufficient to constitute an action that is provocative in the indigenous sense.[5] The social meaning of these actions must then be derived from the particular indigenous norms and standards of the particular community concerned.[6] In Nubian African jurisdictions, evidence of these norms is led through an expert witness, typically the *Nganga*. It is helpful, for purposes of conducting evidential analysis, that some of these norms have crystallised as 'living' customary-law prohibitions, which have been elucidated and/or pronounced upon in some cases in state courts.[7] With respect to the F-to-PF inferential pattern, we draw logical connections between at least five types of propositions of fact operating at Wigmorean *prospectant, concomitant* and *retrospectant* temporal perspectives. These include propositions of *motive* and *opportunity* (both from the *Identity* category of Wigmore's taxonomy of

[5] Criminal Law (Codification and Reform) Act of 2006, section 98.

[6] See Karibi-Whyte A.G. 'Cultural pluralism and the formulation of criminal policy' in Adeyemi (ed) *Nigerian criminal process* 9 at 9.

[7] *Sigcau v Sigcau* 1944 AD 67 at 76. See also *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) [87]; *Mabena v Letsoalo* 1998 (2) SA 1068 (T) 1074; *Oyewunmi v Ogunsesan* (1990) 1 NWLR (pt. 137) 182 at 207; Himonga C and Bosch C 'The application of African customary law under the Constitution of South Africa: Problems solved or just beginning' (2000) 117(2) *South African Law Journal* 306 at 318-336; Van Niekerk G.J 'Succession, living indigenous law and *ubuntu* in the Constitutional Court' (2005) *Obiter* 474. In a separate concurring judgment, Ogwuegbu JSC of the Nigerian Supreme Court held: 'One must know what customary law means to be able to determine in an appeal whether acquisition of customary law is involved', see *Dang Pam v Sale Dang Gwom* (2000) 2 NWLR (pt. 644) 322; (2000) 1 S.C 56.

propositions of fact) and of *plan or design* (from the human quality or condition category) from the prospectant perspective. Propositions of *exhibited actions* and *inculpatory possession* at the concomitant and retrospectant levels respectively, are also used.

The sum of the two chains of evidential argumentation, involving both F-to-PF and N-to-PF inferential patterns, is identified formally as:

> (1) If Prospectant Motive, Design and Opportunity propositions; and/or the Concomitant Exhibited Conduct proposition; and/or the Retrospectant Inculpatory Possession proposition [PCR(Mot)•(D)•(O)• (EC)•(IP)], is/are established and we have admissible Expert Testimony as to the relevant Surrounding Circumstances [EXP_{SC}], then an Action that is Provocative in the Indigenous sense plausibly is established [F(API)].
>
> (2) [PCR(Mot)•(D)•(O)• (EC)•(IP)].
>
> (3) [EXP_{SC}].
>
> (4) There is no applicable exception to rule (1) under the circumstances.
>
> (5) :. F(API).

This form ('Form UC') is an application of the B Model to the specific *factum probandum* of *unlawful conduct* of the direct crime of witchcraft. Form UC incorporates Wigmore's taxonomy of propositions of fact and includes an additional premise (EXP_{SC}) reflective of the N-to-PF inferential pattern established through the expert opinion of the *Nganga.* Proposition (1) is the defeasible compound conditional that includes both F-to-PF, constituted by the four PCR propositions, and N-to-PF, constituted by the EXP_{SC} propositions, inferential patterns. It will be recalled from Chapter 5 that conditionals of

evidential argumentation generally are institutionally recognised patterns of *ex logos presumptions*.[8] These inferential presumptions are extrapolated from other cases that were decided on similar facts.

Turning now to consider our five propositions of fact, PCR(Mot)•(D)•(O)•(EC)•(IP), that establish the *factum probandum* of an action that is provocative in the indigenous sense from prospectant, concomitant and retrospectant perspectives, we begin with the proposition of motive (Mot). According to Wigmore, propositions of motive reflect a 'state of mind,' an 'inward emotion, passion or feeling of the appropriate sort,' or inclination for the performance of an action.[9] Wigmore has examples such as 'anger, jealousy and the like,'[10] in mind here. This potentially is misleading as these 'emotions' may be understood as being mere consequences of other external conditions that constitute the motive. For example, the objective possibility of a pay-out with respect to an existing insurance policy on the death or injury of a particular victim may be understood as being a motive, *qua reason*, to commit an action, and not so much the 'greed, desperation and the like' that are felt by the accused (murderer). For present purposes, we use the term motive to refer to propositions of fact that concern identity-related external conditions from Wigmore's taxonomy of propositions of fact. A typical, but not invariable, example in

[8] Thayer J.B *Preliminary treatise on evidence at common law* (1898) 314-5 and 326-7; Perelman C.H and Olbrechts-Tyteca L *The new rhetoric: A treatise on argumentation* (translated by John Wilkinson and Purcell Weaver) (1969) 70.
[9] Wigmore (note 2) 94.
[10] Ibid 120.

witchcraft cases in particular is a 'prior expression of hostility' between the victim and the perpetrator.[11] However, motive often is held to be of insufficient probative value on its own.[12] For example, Mr Nwaoke's action of threatening his wife with harm by pointing at his *juju* (fetish amulet) was motivated by the fact that their marriage had broken down and Mrs Nwaoke had refused to accede to his request for the return of the brideprice (£1 10s) that he had paid upon marrying her.[13] A similar more recent illustration is *Tongaat Hulett Sugar Ltd*[14] where the perpetrator's action, of applying a slimy black substance on the wheels of a fellow employee's car, was motivated by a prior hostility (and altercation) between the two.[15]

The second and third propositions of fact, design and exhibited conduct, are similar to that of motive in that they relate to prospectant evidence that establishes the descriptive fact of an action that is provocative in the indigenous sense having been committed. Wigmore offers several examples to explain the types of propositions of fact that generally establish a design, including: 'the [prior] acquisition or possession of instruments, tools or other means of doing the act'; 'the [physical] presence of a person at a place or journey towards it';

[11] Bennet T.W and Scholtz W.M 'Witchcraft: A problem of fault and causation' (1979) 12(3) *The Comparative and International Law Journal of Southern Africa* 288 at 294-5.
[12] See Criminal Law (Codification and reform) Act [Chapter 9:23], section 13(2).
[13] *R v Nwaoke* 1939 5 WACA 120 at 120-1. Mr Nwaoke was eventually acquitted on appeal for want of the *factum probandum* of causation.
[14] *National Sugar Refining and Allied Industries Union (obo Mngomezuulu) v Tongaat Hulett Sugar Ltd (Darnall)* [2016] 11 BALR 1172 (NBCSMRI) 290. This is a civil arbitration cited purely for illustrative purposes given the overall paucity of the number of cases involving the direct crime of witchcraft.
[15] *Tongaat Hulett Sugar Ltd supra* 292.

'behaviour showing a desire for secrecy' (presumably because the existence of a criminal sanction for the development of criminal plans may be a reason to hide them); the making of preliminary enquiries or 'experimentation searches for knowledge.'[16] Another example of a proposition of fact showing design is the conspiracy between the accused and a witchdoctor to cause a fatal car accident involving one Zacheus Ngong in *Lenga Andrew v The People.*[17] The witchdoctor was paid an amount of 60 000 Cameroonian francs by the accused to fulfil this conspiracy, but she later recanted and confessed to the *gendarmerie*, after which the accused was charged and convicted of the direct crime of witchcraft.[18] On the other hand, substantial threats such as those made by the accused in *R v Jackson*[19] that his cousin 'would not see the sun rise tomorrow' are examples of prospectant exhibited conduct from which the descriptive fact of an action that is provocative in the indigenous sense having been committed may be inferred using the F-to-PF pattern.

Of our five descriptive propositions of fact, PCR(Mot)•(D)•(O)•(EC)•(IP), the remaining two generic propositions operate at concomitant and retrospectant perspectives to establish the fact of an action that is provocative in the indigenous

[16] Wigmore (note 2) 120-1.
[17] *Lenga Andrew v The People* (2005) Criminal Appeal, No. BCA/4c/2004, unreported).
[18] This case is discussed in some detail in Anyangwe C *Criminal law in Cameroon: Specific offences* (2011) 254. 60 000 CFA currently is equivalent to approximately £82.
[19] *R v Jackson* [1956] R & N.L.R 66 (High Court, Nyasaland). This particular inference was drawn by the High Court (*per* Spencer-Wilkinson JP) of what was then Nyasaland (Malawi), but on appeal Tredgold CJ decided to apply 'the Law of England' and overturned the Opponent's conviction on the reasoning that '[i]n the course of the last two centuries, all pains and penalties for witchcraft have disappeared from the English law.' This appellate decision has been criticised, see Mutungi O.K 'Witchcraft and the criminal law in East Africa' (1971) 5(3) *Valparaiso University Law Review* 524 at 536-7.

sense having been committed. The accused's concomitant opportunity in *Tongaat Hulett Sugar Ltd* was established through CCTV footage showing him to be the last person present at the scene of the incident, [20] whereas the accused's retrospectant inculpatory possession may be established through evidence of buried human organs that are believed to be used for witchcraft practices in certain communities. For example, the accused in *S v Malaza* fatally stabbed, mutilated and buried parts of the body of one Thabo Davey Maniet underneath his bed for 'good fortune'[21] and in *S v Mavhungu* the accused, for similar reasons of 'good fortune,' killed one Freddy Mboneni and buried his body under a pile of rocks on a mountain after removing some of his organs to perform certain witchcraft practices.[22] Quite apart from the murders in these two cases, the possession of 'the penis, index fingers, eyes, ears, and the forefront of the heart'[23] supports the plausibility of the action of witchcraft having been committed.

Proposition (3) of Form UC is the second evidential premise that establishes the particular social norms within which the types of prospectant, concomitant and retrospectant descriptive propositions from the first evidential premise are interpreted as being *provocative* in the *indigenous sense.* Here fact-finders typically rely on expert witnesses, especially the *Nganga,* who are familiar with the indigenous beliefs of a particular community. A useful way of

[20] *Tongaat Hulett Sugar Ltd supra* 63.
[21] *S v Malaza* 1990 (1) SACR 357 (A) 358F-H.
[22] *S v Mavhungu* 1981 (1) SA 56 (A) 60H-61C.
[23] *Mavhungu supra* 63B.

identifying and analysing arguments that *appeal to authority* is through argumentation schemes. One such fairly expanded argumentation scheme is identified by Govier:

(1) Expert X has asserted claim P.

(2) X is a reliable and credible person in this context.

(3) P falls within area of specialisation K.

(4) K is a genuine area of knowledge.

(5) X is an expert, or authority, in K.

(6) The experts in K agree about P.

(7) ∴ P is acceptable.[24]

The controversies of applying this argumentation scheme, or something like it, to the analysis of the expert testimony of the *Nganga* in witchcraft cases mostly surround propositions (4), (5) and (6). Propositions (4) and (5) raise general problems of 'junk science' and 'charlatanism,'[25] while proposition (6) may well give rise to the kind of dogmatic thinking embedded in some versions of post-structuralist theories that rely on consensus.[26] The first set of problems, related to propositions (4) and (5), may be gleaned from this summary by Roberts and Zuckerman:

[24] Govier T *A practical study of argument* 7th ed (2010) 125-6.
[25] These two elements may be characterised as items [1] ('Junk science') and [2] ('Charlatanism') of Roberts's 'top 20 countdown' of 'the problematic' or 'complexity' of forensic science, see Roberts P 'Making sense of forensic science evidence' in Roberts and Stockdale (ed) *Expert Evidence and Scientific Proof in Criminal Trials* (2014) 27 at 31-42. See also Huber P.W *Galileo's revenge: Junk science in the courtroom* (1991); Raum B.A 'A short primer on the admissibility of forensic science evidence in Tennessee: A checklist' (2010) 6(2) *Tennessee Journal of Law & Policy* 161 at 168, n27.
[26] Goldman A.I *Knowledge in a social world* (1999) 10-7 ('Not only does the truth of a proposition not require total consensus, it does not require anybody at all to believe it').

> There are two essential elements of legitimate expert evidence: (i) a genuine expert, (ii) with expertise in a genuine science, technology, practical skill, or field of learning. Mixing and matching these elements, one could have a fake expert in a genuine science, like a 'doctor' who never went to medical school; or a genuine expert in a fake science, somebody learned in the lore of alchemy, palmistry, astrology, witchcraft, etc. Neither is a good combination for the law. Only genuine experts in genuine fields of expertise can supply or contribute towards the epistemic warrant for a legitimate verdict in a criminal trial.[27]

With respect to the 'junk science' problem, the question that arises for purposes of this thesis is whether the field in which the *Nganga* is an expert is a 'genuine science.' The language used in their summary implies that Roberts and Zuckerman would respond in the negative to this question.[28] The junk science problem necessitates a deflationary move to be made with respect to the *Nganga* giving expert testimony in witchcraft cases. Although the *Nganga* typically describe their 'powers' in wide-ranging and controversial terms, it is not the full range of their capacities that is needed in witchcraft criminal trials. Section 98(4) of Zimbabwe's Criminal Code provides that their expertise is most relevant towards establishing 'practices most commonly associated with witchcraft.' The types of associations implied here between descriptive propositions of fact and social norms is suggestive of the N-to-PF inferential pattern. Tendering testimony about the existence, content and applications of these social norms by the *Nganga* need not be characterised as 'forensic science' in order to be admissible, in much

[27] Roberts P and Zuckerman A *Criminal evidence* 2nd ed (2010) 475.
[28] A similar view is held by Bekker J.C 'Book review: Witchcraft violence in South Africa' (2004) 1 *De Jure* 181 at 182.

the same way that expert testimony in anthropology or foreign law is admissible without necessarily being 'forensic science.' Expert testimony related to such social norms of African customary law is in fact treated as being analogous to foreign law for evidential purposes across anglophone jurisdictions on the continent.[29]

The second of the two issues summarised by Roberts and Zuckerman is that of 'charlatanism.' There have been complaints, particularly in francophone jurisdictions, that some of the *Nganga* who testify as 'officers of the court'[30] may be susceptible to having their credibility compromised:

> [T]he predominant role of the witch-doctor in establishing proof raises the question whether he cannot be manipulated by extraneous local circumstances to invent accusations. Is he really a reliable expert witness?[31]

The *Nganga* typically are trained in rigorous indigenous methods that completely detox their bodies; they are removed from their families and communities for a

[29] Evidence Act, [Cap 112 of the Laws of the Federation of Nigeria, 2011], section 68, read with sections 69 and 70. Similar provisions are found in East Africa. See, for example, Evidence Act [Cap 80, Revised Laws of Kenya, 2014], section 48; Evidence Act [Cap 6 of the Laws of the United Republic of Tanzania, 2002], section 47; Tabetabe S 'A look at preliminary inquiry under the Cameroon Criminal Procedure Code' in Sone (ed) *Readings in the Cameroon Criminal Procedure Code* (2007) 49 at 63. For example, in *Mabuza v Mbatha* an expert witness was used to testify about the indigenous practice of *ukumekeza*: *Mabuza v Mbatha* 2003 (4) SA 218 (E)). See also *Sigcau v Sigcau* 1944 AD 67 at 76. See also *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) [87]; *Mabena v Letsoalo* 1998 (2) SA 1068 (T) 1074; *Oyewunmi v Ogunsesan* (1990) 1 NWLR (pt. 137) 182 at 207; Himonga and Bosch (note 7) 318-336; Van Niekerk (note 7) 474. In a separate concurring judgment, Ogwuegbu JSC of the Nigerian Supreme Court held: 'One must know what customary law means to be able to determine in an appeal whether acquisition of customary law is involved', see *Dang Pam v Sale Dang Gwom* (2000) 2 NWLR (pt. 644) 322; (2000) 1 S.C 56.

[30] Spencer J.R 'Court experts and expert witnesses: Have we a lesson to learn from the French?' in Roberts (ed) *Expert Evidence and Scientific Proof in Criminal Trials* (2014) 569 at 581 and 586 and 588. Francophone experts are court-appointed by the *juge d'instruction*, or by the trial and appellate judges, see Criminal Procedure Code, Law No. 2005/007, section 203(1), whereas in Common law jurisdictions experts often participate in a partisan manner.

[31] Fisiy C.F *Palm tree justice in the Bertoua Court of Appeal: The witchcraft cases* (1990) 10. See also Oluwole S 'On the existence of witches' (1978) 2(182) *Second Order* 3 at 11-3.

certain period; a strong ethos of service to local communities is instilled in them; virtues of self-discipline and sacrifice are fostered in them.[32] Once their training has been completed, the *Nganga* often later join an organised private association responsible for developing the overall training methods of these indigenous experts and preserving the integrity of the institution of traditional healing in general.[33] These measures are far from perfect, however. In fact, one of the major problems with them is that they often are not transparent to the general public nor have they been institutionally brought within the realm of formal criminal justice procedures. These questions of policy reform fall beyond the scope of the current essentially theoretical discussion. For purposes of this thesis, we can only stipulate at a general level that the second evidential proposition is only plausible and useful in Form UC if (i) the scope of the *Nganga*'s testimony is confined to the existence, content and application of the relevant African customary law norms, as a proxy for the general social beliefs of people in certain specified communities on the continent; and (ii) the methods and training programmes of

[32] Hall J *Sangoma: My odyssey into the spirit world of Africa* (1994) 29ff.

[33] There are several organised private associations already across the continent that are responsible, among other things, for preserving the legitimacy and quality control of the *Ngana*. Examples of these are: The African National Healers Association (ANHA), based in South Africa, has over 2000 members; Zimbabwe National Traditional Healers Association (ZINATHA) with approximately 28 000 members; Tanzania Traditional Health Practitioners Association (*Chama cha Waganga na Wakunga wa Tiba Asilia, CHAWATIATA*), see Chana H.S *et al* 'With an eye to good practice: Traditional healers in rural communities' (1994) 15 *World Health Forum* 144 at 145; Ngoma M.C 'Common mental disorders among those attending primary health clinics and traditional healers in urban Tanzania' (2003) 183 *British Journal of Psychiatry* 349. The *Nganga* that testified in *National Sugar Refining* likewise was trained and part of the Traditional Healers Council of Southern Africa (at [136] – [138]).

the *Nganga* are kept transparent, continually vetted and institutionally recognised as being suitable for the forensic context.[34]

Proposition (4) of Form UC is the penultimate *non-excipiens* clause. This particular proposition is one of the unique features that distinguishes Form UC from being an elongated version of a classical *modus ponens*, as conceived in Formal Deductive Logic (FDL). Arguments that have premises that are true in FDL have conclusions that follow *of necessity*. However, because Form UC is defeasible, it is recognised that there may well be instances where despite the conditional in proposition (1) and the establishing of its antecedents in propositions (2) and (3) being satisfied, the logical inference ought *not* to be drawn for other pragmatic reasons that are specific to particular contexts of argumentation.

Dahlman gives a useful example of inductive generalisations about the likelihood of Somali minorities in Sweden being perpetrators of certain crimes being inappropriate to draw, despite them being statistically defensible.[35] One of the extra-logical negative impacts of drawing such inferences is that their 'cumulative effect' may result in greater 'systematic disadvantage' within this particular minority group as compared to larger populations of the country

[34] For example, Francophone jurisdictions keep national and regional official lists of expert witnesses that are permitted to give evidence in court, see McKillop B 'Forensic science in Inquisitorial systems of criminal justice' in Roberts (ed) *Expert Evidence and Scientific Proof in Criminal Trials* (2014) 593 at 594; Spencer (note 30) 584-5. See also *Code de Procédure Pénale* (1958), article 157 (France); *Cameroun Code de Procédure Pénale* No. 2005/007, section 206.

[35] Dahlman C 'Unacceptable generalisations in arguments in legal evidence' (2017) 31 *Argumentation* 83 at 87 and 97.

concerned.[36] A similar caution needs to be taken with respect to vulnerable women and children in witchcraft cases, as they often endure violent and brutal accusations of witchcraft in many parts of the continent.[37] For example, at least 50 000 children in Kinshasa (Democratic Republic of Congo) and at least 15 000 children in Akwa Ibom state (Nigeria) have been stigmatised as 'child witches' and banished from their homes.[38] Similarly, approximately 1000 annual witchcraft-related mob killings in Tanzania involve elder women.[39] Part of the prosecutions' burden of establishing Form UC includes negating the application of these extrinsic factors that operate to prevent the application of the generalisation embedded in the conditional of proposition (1).

6.2 CAUSATION ARGUMENT

It will be recalled from Chapter 4 that causation was defined in terms that were narrow and material for purposes of this thesis. The antiquated formalistic definition that purported to obviate the causation requirement altogether in cases of the direct crime of witchcraft such as to effectively make it a 'conduct crime' was argued to be of no application to contemporary cases of the direct crime of witchcraft. The operation of the type of causation that resulted in the *post hoc* and

[36] Ibid 97.
[37] Cohan J.A 'The problem of witchcraft violence in Africa' (2011) 44(4) *Suffolk University Law Review* 803 at 862; Spence S *Witchcraft accusations and persecutions as a mechanism for the marginalization of women* (2017) 207.
[38] Naomi C 'Poor children: Child witches and child soldiers in Sub-Saharan Africa symposium' (2005) 3(2) *Ohio State Journal of Criminal Law* 413 at 414; Essia U 'The social economy of child witch labelling in Nigeria: The case of Akwa Ibom state' (2012) *Science Journal of Psychology* 289 at 290.
[39] Quarmyne M 'Witchcraft: A human rights conflict between customary/traditional laws and the legal protection of women in contemporary Sub-Saharan Africa' (2011) 17(2) *William & Mary Journal of Race, Gender and Social Justice* 475 at 481.

argumentum ad ignorantiam fallacies (for example, that human actions that are provocative in the indigenous sense can cause death by lightning strike) was also argued to be problematic in cases of the direct crime of witchcraft. Ultimately, it was argued that what is required is the proof of an action that is provocative in the indigenous sense causing a defined state of affairs, which in our case is a 'real fear' being experienced by another person. It is with respect to this particular conception of causation that the B Model of argumentation will be applied.

Wigmore's taxonomy of propositions, and his forensic argumentation theorising more generally, are useful in general terms, but causation presents unique and complex problems that require some adaptation. Our causation argument ('Form C')[40] similarly resembles the elongated defeasible *modus ponens* structure deployed throughout this chapter, but it is subject to some changes in the content of the propositions:

> (1) Generally, if the accused commits an Action that is Provocative in the Indigenous sense (*primary* necessary condition) [API(C_{Ness1})] against a victim who holds the relevant Superstitious Belief (SB) (*secondary* necessary condition) [SB(C_{Ness2})], then API(C_{Ness1}) and SB(C_{Ness2}) are the *necessary* and *sufficient* causes of the victim's real Fear (Harm) under these circumstances [F(C)].
>
> (2) API(C_{Ness1}).
>
> (3) SB(C_{Ness2}).
>
> (4) There is no applicable exception to rule (1) under the circumstances.

[40] This model is adapted from: Hastings A.C *A reformulation of the modes of reasoning in argumentation,* unpublished PhD thesis (Northwestern University) (1962) 65-8; Walton D.N *Argumentation schemes for presumptive reasoning* (1996) 66-9; Walton D *et al Argumentation schemes* (2008) 168.

(5) ∴ F(C).

Similar to Form UC in the previous section, Form C begins with a defeasible conditional that is constituted by a set of antecedents, API(C_{Ness1}) and SB(C_{Ness2}), and a consequent, F(C), that plausibly follows if the antecedents hold. Another similarity is that Form C also involves both F-to-PF and N-to-PF inferential reasoning patterns. The first component of the set of antecedents is the conclusion from Form UC, API(C_{Ness1}), and this is a hybrid or compound proposition that combines both descriptive, PCR(Mot)•(D)•(O)•(EC)•(IP), and evaluative, EXP_{SC}, features. However, for purposes of Form C, proposition API(C_{Ness1}) is considered only in its descriptive sense, that is, as whether or not it generally is a necessary cause of the prohibited consequence. Even in proposition (2), the establishment of this proposition of fact is not inferred using the N-to-PF pattern, nor using a combination of F-to-PF and N-to-PF patterns, but solely through the F-to-PF inferential pattern. Establishing an action that is provocative in the indigenous sense (API) is a necessary but not sufficient, *primary* cause (C_{Ness1}) for the prohibited consequence.

The second component of the set of antecedents, SB(C_{Ness2}), relates to the proposition that the victim holds the relevant type of superstitious belief being a *secondary* necessary cause (C_{Ness2}) of the prohibited consequence. It has been mentioned throughout this thesis that approximately 55% of the Nubian African population hold superstitious beliefs related to witchcraft. Therefore, the establishment of the API(C_{Ness1}) proposition against a victim falling within the

approximately 45% of "non-believers" will fail to meet the causation requirement because the SB(C_{Ness2}) condition will be lacking. Similarly, a superstitious victim who falls within the 55% (SB(C_{Ness2})) without an action that is provocative in the indigenous sense (API(C_{Ness1})) being a necessary *primary* cause will be insufficient. Therefore, the establishment of API(C_{Ness1}) and SB(C_{Ness2}) as primary and secondary necessary conditions fulfil the causation requirement, subject to the application of the *non-excipiens* in proposition (4) in the instant case.

Three institutional reasons support the structuring of proposition (1) of Form C into *necessity* and *sufficiency* components of causation. Firstly, the requirement of both necessary and sufficient conditions of causation is part of criminal law doctrine throughout the African continent.[41] Secondly, although this relates to cases other than those of the direct crime of witchcraft, actions that are provocative in the indigenous sense have been recognised, often as a factor mitigating sentence, as having the potential to cause fear or emotional distress for someone holding these superstitious beliefs.[42] The recognition of this particular causal link between actions that are provocative in the indigenous sense and a victim's underlying superstitious beliefs on the one hand, and the latter's fearful

[41] Criminal Law (Codification and reform) Act [Chapter 9:23], section 11; Feltoe G *Commentary on the Criminal law (Codification and Reform) Act, 2004* (2006) 7-8; Anyangwe C *Criminal law in Cameroon: The General Part* (2015) 235; Okonkwo C.O *Okonkwo and Naish on criminal law in Nigeria* 2nd ed (1980) 45; Mapunda B.T *Criminal law and procedure: General principles of criminal liability* Part Two (1996) 59-62; Burchell J *Principles of criminal law* 3rd ed (2005) 178; Snyman C.R *Criminal law in South Africa* 6th ed (2014).
[42] *S v Sibanda* 1975 (1) SA 966 (A) 967D-F.

emotional state on the other, is common in many murder cases where the victim resorts to protecting themselves by taking the law into their own hands.[43] Thirdly, a similar implied recognition has been made in murder cases where superstitious beliefs have been raised in support of the defence of provocation.

For example, during an argument with his father, the accused in *Chivatsi v R* testified that he heard his father threatening to kill his mother, uncle and everybody else in the neighbourhood through the practice of witchcraft.[44] After recalling that one of his brothers had committed suicide by taking poison as a result of his father's threats, the accused was provoked into fatally stabbing his father.[45] The accused was found guilty of murder by the trial court, but this conviction was reduced to manslaughter, accepting the accused's provocation defence, on appeal.[46] In accepting the finding that the accused in fact held superstitious beliefs, which were ignited by his father's threats of witchcraft, the Court of Appeal (sitting in Mombasa) reasoned that:

> There are communities in Kenya where the sort of threat which the deceased administered at the appellants would be treated as twiddletwaddle, as arrant nonsense.

[43] Where this recognition has been made, this has almost invariably resulted in a reduction of sentence, see *S v Ndhlovu* 1971 (1) SA 27 (RA) 32B-C (15 years imprisonment reduced to 10 years); *S v Netshiavha* 1990 (2) SACR 331 (A) (10 years imprisonment reduced to 4 years); *S v Mojapelo* 1991 (1) SACR 257 (T) (18 months of a sentence of 3 years imprisonment was suspended); *S v Magoro* [1996] ZASCA 99 (the first accused's death penalty was reduced to 20 years imprisonment, while the second accused's sentence was reduced from 10 years of imprisonment to 7 years); *S v Motsepa* 1991 (2) SACR 462 (A) 471A (the accused's death penalty was reduced to 22 years imprisonment); *S v Mathoka* 1992 (2) SACR 443 (NC) (5 years of a sentence of 8 years imprisonment was suspended); *R v Biyana* 1938 EDL 310; *R v Fundakubi* 1948 (3) SA 810 (A); *R v Kukubula* 1959 (1) SA 286 (FC). Cf. *S v Mbobi* 2005 JDR 0016 (E); *S v Phama* 1997 (1) SACR 485 (E); *R v Myeni* 1955 (4) SA 196 (A); *S v Nxele* 1973 (3) SA 753 (A); *S v Ngubane* 1980 (2) SA 741 (A), *S v Matala* 1993 (1) SACR 531 (A); *S v Lukwha* 1994 (1) SACR 53 (A); *R v Ncanana* 1948 (4) SA 399 (A); *S v Phokela* 1995 (1) PH H22 (A); *Legalatladi v S* [2019] ZANWHC 55 at [25].

[44] *Chivatsi v R* [1990] eKLR 529 at 1.

[45] *Chivatsi supra* 2.

[46] *Chivatsi supra* 3.

> Not so, however, in the community to which the appellants belong. It is not the business of this or any other court to moralize. It is yet a fact that belief in witchcraft is widespread in the community of the appellants. We take that community as we find them, having regard to the law.[47]

It is on account of these three institutional trends, reflecting the general societal *mores* of the communities concerned, that the conditional in proposition (1) is acceptable as an *ex logos* presumption.

The fulfilment of the causation requirement generally entails identifying causes that amount to 'something more than *de minimis*' in order to be *necessary*, but without necessarily being 'substantial,' 'major' or 'sole' causes to qualify as sufficient.[48] The *primary* and *secondary* necessary conditions in the first and second evidential premises employ basic and relatively wide criteria of identifying possible causes without which the prohibited consequence would not have ensued. The *primary* necessary condition identified in proposition (2) is the action that is provocative in the indigenous sense (API(C_{Ness1})), and proposition (3) provides for the *secondary* necessary condition (SB(C_{Ness2})) for purposes of

[47] *Chivatsi supra* 3. For examples of similar cases, see *R v Fabiano Kinene* 8 E.A.C.A 96 (Uganda, 1941) (Provocation); *R v Kumwaka wa Mulumbi* (1932) 14 K.L.R. 137 (Provocation defence recognised in principle, but the court was careful to admonish people that believe in witchcraft taking the law into their own hands); *S v Hamunakwadi* 2015 (1) ZLR 392 (H) (Provocation defence recognised in principle, but rejected on the particular facts of the case, at 399-400); *Patrick Tuva Mwanengu v Republic of Kenya* [2007] eKLR 1 (Provocation); *Sudan Government v Abdullah Mukhtar Nur* 1959 S.L.J.R 1 (Provocation); *S v Ngema* 1992 (2) SACR 651 (D) (the accused's fear of a 'Tikoloshe' excluded his intention, but he was nevertheless found guilty of culpable homicide); *R v Ngang* 1960 (3) SA 363 (T) (the accused's fear of a 'Tikoloshe' exonerated him entirely on an a charge of assault with intent to do grievous bodily harm); *S v Ncube* 1978 (1) SA 1178 (E) (the accused was acquitted on the charge of murdering his brother while sleep-walking).

[48] *R v Henningan* (1971) 55 Cr. App. R. 262 at 265; *R v L* [2011] R.T.R. 19 at [9]. Although these principles were laid down in dangerous driving cases, according to Ormerod and Laird, they are of application to causation problems in general, see Ormerod D and Laird K *Smith and Hogan's criminal law* 15th ed (2018) 92. These particular guidelines, among others, are also generally followed in South Africa, see *S v Mokgethi* 1990 1 SA 32 (A) 40-1.

Form C. SB(C_{Ness2}) typically follows on from API(C_{Ness1}) in incidents of witchcraft in Africa because, according to Hungwe J, '[w]hen a person has been provoked, anger and rage are the predominant emotions that are experienced.'[49] In order to limit these fairly wide criteria of identifying necessary causes, a second *sufficiency* condition is imposed by the *non-excipiens* in proposition (3). In addition to the actions that are provocative in the indigenous sense being connected to the strength or intensity of the victim's superstitious beliefs, the scope of identified necessary causes can be judicially controlled by the ascertainment of *logical* or *extra-logical* considerations that militate against the drawing of the causal generalisation in proposition (1). If no such considerations apply, API(C_{Ness1}) and SB(C_{Ness2}) *plausibly* will be *sufficient* in the instant case.

One such limiting consideration is that the manifestation or igniting of these superstitious beliefs must follow 'immediately' from the action that is provocative in the indigenous sense. This is to say that the manifestation of these beliefs must not be interrupted by an intervening cause or a long passage of time. The following two examples of actions that are provocative in the indigenous sense failed to meet this standard in order to make them sufficient causes: Mr Nwaoke's threat that he was going to cause the death of his wife by pointing at his *juju* (fetish amulet) was interrupted, according to the West African Court of Appeal, by Mrs Nwaoke suffering from depression and later committing

[49] *S v Hamunakwadi* 2015 (1) ZLR 392 (H) 399E.

suicide;[50] Mr Lushinge's fear that his child, who had incisions all over his body after a trip to see his grandmother, may have been bewitched manifested in retaliatory self-help almost a year after the eventual death of the child.[51]

A second, *extra-logical* consideration relating to the application of the *non-excipiens* clause relates to instances where African judges consider it appropriate to pursue deterrence policies, especially in communities where witchcraft accusations and mob violence are rife. Sentiments that encourage such mob violence from local community chiefs justify the need for such deterrence:

> You white men are destroying the community. The witches…are doing just what they please, because they know we can no longer kill them as we used to.[52]

A chief of a community in South Africa said:

> We have to work hard to wipe out this evil [witchcraft], but we cannot do our work effectively because the police arrest us…It seems there is a conflict with the Western way of settling things though. Whites don't believe someone can send lightning to kill - but we do, and we know it has been done for ages.[53]

This threat of vigilantism commonly emanates from victims of actions that are provocative in the indigenous sense, who believe either that state courts will refuse to identify the API(C_{Ness1}) and SB(C_{Ness2}) antecedents as necessary causes or if they make such findings, the maximum sentences in state courts (a maximum

[50] *R v Nwaoke* 1939 5 WACA 120 at 121-2. Cf. Aremu L.O 'Criminal responsibility for homicide in Nigeria and supernatural beliefs' (1980) 29(1) *International & Comparative Law Quarterly* 112 at 127; Karibi-Whyte (note 6) 17-8.
[51] *Mathias Tangawizi @ Lushinge v Republic* [2019] TZCA 60 at 3 and 14.
[52] This remark was made by a community chief in Kenya, see Roberts C.C *Tangled Justice* (1937) 3-4, cited in turn in Waller R.D 'Witchcraft and colonial law in Kenya' (2003) 180 *Past and Present* 241 at 244-5.
[53] See Dhlodhlo A.E.B 'Some Views on Belief in Witchcraft as a Mitigating Factor' 1984 *De Rebus* 409 at 410.

10 years of imprisonment) are inadequate compared to those in traditional courts.[54] Seidman captures this sentiment:

> The African who believes in witchcraft is thus faced by a fearful dilemma. He believes in witches to his bones? He knows that they can destroy his *kra* or *sunsum* in sundry mysterious ways, without chance for defence, so that both his physical being and his hope for earthly success are endangered, as much as by threatened blow of panga or spear or matchet. He sees nothing in the societal order to which he can appeal for protection. His tradition approves of capital punishment for witches. Faced by such dread forces, bereft of societal shield, terrified by the loss of the values at stake, some Africans not surprisingly have struck back in terror and in self-defence.[55]

It is in response to these circumstances that courts all over Africa have advanced a deterrence policy since at least 1932.[56] Adherence to this policy may trigger the *excipiens* foreshadowed in proposition (4) of Form C in that the accused's action that is provocative in the indigenous sense and the victim's superstitious beliefs may be established as necessary causes (API(C_{Ness1}) and SB(C_{Ness2})), but this inference may not be warranted in the kinds of communities where witchcraft accusations and mob violence are rife. The prosecution must therefore insist on the operation of the *non-excipiens* clause by arguing either that the number of incidents of witchcraft accusations or mob killings in the community concerned are relatively low or that drawing the inference contained

[54] The two jurisdictions that permit such a sentence at state court level are Cameroon and Kenya, see *Cameroun Code Pénal* n° 67/LF/1, article 251; Witchcraft Act [Cap 67 of the Republic of Kenya, 1925], section 3.
[55] Seidman R.B 'Witch murder and *mens rea:* A problem of society under radical social change' (1965) 28 *Modern Law Review* 46 at 47; Mutungi (note 19) 554 ('Suffice it to say that it seems illogical that any good law should stipulate that one must stand idle and allow his enemy to take his life without lifting a finger to protect himself.')
[56] *R v Kumwaka wa Mulumbi* (1932) 14 K.L.R. 137; *R v Gadam* (1952) 14 W.A.C.A. 442 at 443, citing *R v Ifereonwe* (1954) (unreported).

in the conditional in proposition (1) of Form C may well have the opposite consequence of encouraging more people to approach the courts for justice, rather than resorting to alternative 'self-help' remedies.

6.3 THE HARM ARGUMENT

The harm argument is similar to Form UC, which was developed in the context of the unlawful conduct *factum probandum*, in that it combines the F-to-PF and N-to-PF inferential patterns by requiring the proof of a group of descriptive antecedents and an evaluative proposition of fact. The difference between the harm and unlawful conduct arguments lies in the content of the propositions of fact. However, unlike the causation argument, the harm and unlawful conduct arguments incorporate Wigmore's taxonomy of propositions of fact.

The harm argument builds on and expands the B Model identified earlier in this chapter:

> (1) If Prospectant Knowledge, and/or Concomitant Opportunity, and/or Retrospectant Exhibited Conduct [PCR(K)•(O)• (EC)] is/are established and we have admissible expert testimony as to their contextual meaning [EXP_{CM}], then the victim's fear plausibly is established [F(H)].
>
> (2) PCR(K)•(O)• (EC).
>
> (3) EXP_{CM}.
>
> (4) There is no applicable exception to rule (1) under the circumstances.
>
> (5) :. F(H).

The *factum probandum* that this form ('Form H') proves is the fearfulness that a victim experiences when they are exposed to an action that is provocative in the indigenous sense and on condition that they hold the relevant superstitious beliefs. The two conditions related to the necessity and sufficiency of causes in Form C are important because Form H rests on the fulfilment of the causation requirement, which includes the identification of the API(C_{Ness1}) and SB(C_{Ness2}) as *primary* and *secondary* necessary causes and the application of the *non-excipiens* clause that makes them sufficient in the instant case. Form H builds on this by interrogating the types of propositions of fact that establish this particular emotional state.

The *ex logos* presumption (the equivalent of a common sense generalisation) in the defeasible conditional of proposition (1) was applied by Hungwe J, who said that '[w]hen a person has been provoked, anger and rage are the predominant emotions that are experienced.'[57] This *ex logos* presumption has the same defeasible force in Nubian Africa as elsewhere in the world. This is similar to the intentionality presumption in the philosophy of mind where conscious experience (the 'consciousness' or a mental picture of a perceived object) generally is understood to flow from perceptual experience (one's sensory encounter with object).[58] Any exceptions to this presumption require that it be

[57] *S v Hamunakwadi* 2015 (1) ZLR 392 (H) 399E.
[58] Searle J.R *Intentionality: An essay in the philosophy of mind* (1983) 4 and 37-8.

amended or withdrawn, but this does not take away from its ordinary pragmatic usefulness in various contexts.

The antecedents in proposition (1) are a set of three types of descriptive propositions of fact from Wigmore's taxonomy and the kind of evaluative proposition used to establish the surrounding circumstances of an action that is provocative in the indigenous sense under From UC. The three descriptive propositions of fact, PCR(K)•(O)•(EC), are the victim's prospectant *knowledge,* in the weak sense described in Chapter 4, concomitant *opportunity* and retrospectant *exhibited conduct*. These three propositions of fact establish the kind of emotional state ('real fear') required on the part of the victim. However, these descriptive propositions need further qualification in order to distinguish the type of emotional state that they establish from other ordinary forms of fearfulness. This is done through the expert testimony of the *Nganga*, EXP_{CM}, who then connects this particular emotional state to the relevant African customary-law norms that seek to protect members of communities against proscribed forms of threatening provocations.

The type of knowledge required in the first evidential proposition (proposition (2) of Form H) is that of prior incidents of witchcraft within the community concerned. It may be acquired through being directly exposed to prior actions that are provocative in the indigenous sense, and any fearfulness that ensued from them, or through the accused having a notorious reputation of

performing such actions.[59] Wigmore gives an analogous example of direct exposure involving an employer's knowledge of the harmfulness of certain equipment being inferred from a prior incident of such harm being communicated to the employer.[60] Another example of direct exposure is that of Mr Ndhlovu whose father uttered threats to him of harming him through the practice of witchcraft.[61] In *S v Mathoka,* the victim's knowledge was based not only on a direct exposure to threats of harm that were uttered, but also on their maker's well known reputation as 'an infamous wielder of supernatural powers.'[62] These prior incidents of witchcraft are supportive of the proposition of fact that the victim had prior knowledge of the possible fearfulness that may result from actions that are provocative in the indigenous sense.

Furthermore, the first evidential premise requires the establishment of *opportunity* and *exhibited conduct* from concomitant and retrospectant perspectives respectively. For example, the victim in *Tongaat Hulett Sugar Ltd* 'immediately started praying' after being exposed to the pertinent action of a black slimy substance being applied to the wheels of her car.[63] This type of retrospectant exhibited conduct is useful in establishing the fearfulness of the victim. On the other hand, the fact that Mr Ndhlovu attended both the traditional

[59] See Wigmore (note 2) 96.
[60] Ibid 132-3.
[61] *S v Ndhlovu* 1971 (1) SA 27 (RA) 28-29.
[62] *S v Mathoka* 1992 (2) SACR 443 (NC) 446B.
[63] *National Sugar Refining and Allied Industries Union (obo Mngomezuulu) v Tongaat Hulett Sugar Ltd (Darnall)* [2016] 11 BALR 1172 (NBCSMRI) [41]-[42].

court proceedings and the seven consultations with different *Nganga* across the community in the company of his father throughout gave the latter ample opportunity to utter the witchcraft-related threats of harm to him.[64] Once any of these three propositions of fact (knowledge, opportunity and exhibited conduct), or some acceptable combination of them, has been established from prospectant, concomitant or retrospectant perspectives, the *Nganga* may be called to give expert testimony that connects the emotional state established by these general propositions to the social beliefs of the particular community concerned. The arguments establishing the grounds and limitations of such expert testimony were made at length in the context of Form UC and need not be repeated here.

A possible *extra-logical* exception to the *ex logos* presumption contained in the conditional of proposition (1) of Form H relates to certain adverse effects of recognising witchcraft-related emotional states of fearfulness in the workplace. For example, on 2 September 2009 the workers of a company called Wireforce Steelbar went on strike and refused to continue working around a machine on which their co-worker (Sibuyi) had sprinkled white sand.[65] The workers genuinely believed that Sibuyi's action amounted to an action that was provocative in the indigenous sense. The workers went on strike for about two weeks and only returned to work once the employer had endorsed this belief by

[64] *Ndhlovu supra* 28-9.
[65] *Metal & Electrical Union of South Africa (obo Sibuyi) v Wireforce Steelbar (Pty) Ltd* (2011) 32 ILJ 1481 (BCA) 1483.

hiring a *Nganga* to perform a cleansing ritual on the machine and by firing Sibuyi for intentionally 'sabotaging the production' of the company.[66] A proliferation of incidents such as these may well result in fact-finders in some cases refusing to hold that the emotional state of fearfulness resulted from the descriptive, PCR(K)•(O)•(EC), and evaluative, EXP_{CM}, antecedents in the conditional of proposition (1). In fact, in this particular case Sibuyi had to be compensated twelve months' salary lest the workers go on strike again and halt production within the company. The risk of these adverse economic consequences may halt the operation of the *non-excipiens* clause in proposition (4). The prosecution would have to respond either by showing that this risk is minimal or that the protection of the physical integrity of victims of actions that are provocative in the indigenous sense through criminal sanction has a moral value that outweighs any adverse potential economic consequences that may ensue as a result. Depending on the type of litigation and jurisdiction concerned, different types of approaches may be adopted by the prosecution.

6.4 THE INTENTIONALITY ARGUMENT

It will be recalled from Chapter 4 that not all Nubian African jurisdictions require intention for a conviction of the direct crime of witchcraft. Nigeria, Tanzania and South Africa punish this particular crime on the basis of strict liability. The intentionality argument developed in this section, therefore, applies only to

[66] *Wireforce Steelbar supra* 1484.

jurisdictions such as Kenya, Zimbabwe and most francophone jurisdictions in western (including Cameroon) and central regions. From an evidential point of view, the propositions of fact that are directed towards proving intentionality can be divided into those proving the base, *knowledge,* and those proving the residuum, *motive*, *design, exhibited conduct* and *inculpatory possession*.[67] The propositions at base help distinguish having a criminal knowledge of prohibited circumstances from a complete unfamiliarity or mistake as to the prevalence of these circumstances. The residuum propositions then distinguish what Wigmore refers to as an 'innocent intent' (or 'inadvertence or accident') from the 'element of deliberateness.'[68] For example, in an incident involving a bullet whistling past A's head, we may forgive the shooter of the gun, B, as lacking the residuum element of deliberateness, but we will find it hard to justify that they lacked the knowledge that guns are dangerous and can cause harm to A.[69] Moreover, if the same thing happens again and the bullet strikes A, it will be even harder to negate the proposition that B had the residuum element of deliberateness.[70] Similarly, an error in the management accounts of a company may reveal an accident by the bookkeeper that prepared them, although the bookkeeper would have had knowledge that the exponential growth of her accounting firm may result in the

[67] Wigmore (note 2) 132.
[68] Ibid.
[69] Ibid 133.
[70] Ibid 133-4.

risk of such errors occurring at times.[71] However, if a pattern of repeated errors begins to emerge, it will be harder to exclude the element of deliberateness.[72]

It is also at the level of the residuum, for evidential purposes, that the distinction made in Chapter 4 between direct and indirect intentionality can be made. Indirect intention, being an enlarged version of direct intent, involves a form of deliberateness that is neither desirous nor equivalent to a mere knowledge of circumstances. The shooter in our examples must have *expected* the prohibited consequences from their actions. To expect something is stronger than having a general knowledge of remote possibilities, but not quite the same as having a desire or fixed purpose.

The intentionality argument follows the defeasible *modus ponens* B model. It involves the affirmation of a set of antecedents that are derived from Wigmore's taxonomy of propositions of fact:

> (1) If Prospectant Knowledge, Motive and Design; and/or Concomitant Exhibited Conduct; and/or Retrospectant Inculpatory Possession [PCR(K)•(Mot)•(D)•(EC)•(IP)] is/are established, then the accused's intentionality plausibly is established [F(I)].
>
> (2) [PCR(K)•(Mot)•(D)•(EC)•(IP)].
>
> (3) There is no applicable exception to rule (1) under the circumstances.
>
> (4) ∴ F(I).

[71] Ibid.

[72] As with classic "similar-fact" cases in anglophone jurisdictions, see *Makin v Attorney-General for New South Wales* [1894] AC 57 (PC); *Arije v Federal Republic of Nigeria* (2013) LPELR-22125 (CA) 20-1; *Wachira v Republic* [1979] eKLR at 2; *S v Banana* 1998 (2) ZLR 533 (H) 539; *R v Katz* AD 71 at 79.

This particular form ('Form I') is characterised as being *descriptive* because it follows the F-to-PF pattern of inference. In other words, we infer the accused's mental state at the relevant time from various evidential surrounding circumstances. None of these two categories (mental states and surrounding circumstances) of facts are norms in the African customary law sense of N-to-PF inferential patterns. Another feature distinguishing Form I from the other three forms is that it is not an elongated defeasible *modus ponens* that includes the proposition of expert testimony. The fact-finder in a witchcraft case would be fully capable of making a factual finding of intentionality without the aid of the expert testimony of the *Nganga* because the enquiry here generally does not involve a consideration of any African customary law norms.

The defeasible conditional in proposition (1) of Form I embodies an *ex logos* presumption that sometimes is difficult to articulate. For instance, Holmes JA accepts that the presumption that a person 'intends the reasonable and probable consequences of their actions' is too crude and that it is 'simpler to speak of inferences of fact than of presumptions.'[73] While he does accept that certain logical inferences of intentionality from one fact to another can be understood as being common, Holmes JA rejects that this stereotypical feature of inferential reasoning has any bearing on the onus of proof.[74] The better approach is the holistic one that entails a consideration of such an intentionality inference as

[73] *S v Sigwahla* 1967 (4) SA 566 (A) 569H.
[74] *Sigwahla supra* 569H.

being one small piece of 'the facts of the case taken as a whole.'[75] In whichever way one articulates this type of inferential reasoning, which is characterised here as an *ex logos* presumption for the reasons set out in Chapter 5, it is clear that we need a range of concepts to capture the various types of propositions of fact that can be used to prove intentionality.[76] Wigmore provides us with at least five common concepts: *knowledge*, *design* and *motive* from the prospectant perspective; *exhibited conduct* from the concomitant perspective; and *inculpatory possession* in the retrospectant sense.[77] We therefore defeasibly presume *ex logos*, that is, as a common sense generalisation derived from criminal trial practice, in proposition (1) that a person generally intends to bring about the consequences that they know, design and have motive to bring about and that such intention often is manifested through certain exhibited forms of conduct (for example, the inculpatory possession of an item from the crime scene).

The kind of knowledge required in the first evidential premise (proposition (2)) can be proven through the accused being exposed to prior incidents of the same (or similar) sort. For example, Mr Ndhlovu's father had attended at least 7 consultations with various *Nganga* and two traditional court hearings where he

[75] This holistic approach is similar to those proposed by Williams G 'Oblique intention' (1987) 46(3) *Cambridge Law Journal* 417 at 434-5 for England and Wales (*R v O'Neill, McMullen and Kelly* [1986] 1 WLUK 443). *R v Sacco* 1958 (2) SA 349 (N) 351H; *S v Mugwanda* 2002 (1) ZLR 574 (S) 579C-D. Therefore, the orthodox presumption, which is still applied in some African jurisdictions (for example, *Ukpong v S* (2019) LPELR-46427 (SC) 56; *Njoku v S* All FWLR (Pt.6890) 1083), that 'a person is presumed to intend the natural consequences of their actions' is considered to be far too crude to be of any evidential utility. This type of presumption is said to have some support in Francophone Civilian jurisdictions too, see Spencer J.R and Pedain A 'Approaches to strict and constructive liability in Continental criminal law' in Simester (ed) *Appraising Strict Liability* (2005) 258.
[76] Duff R.A *Intention, agency and criminal liability: Philosophy of action and the criminal law* (1990) 36.
[77] Wigmore (note 2) 131.

had been found on each occasion to have committed actions that are provocative in the indigenous sense against his son.[78] Therefore, when he eventually threatened his son with harm being inflicted upon him through the practice of witchcraft, his knowledge of the potential consequences of his actions could be inferred. This knowledge is prospectant because these seven consultations and traditional court hearings occurred before the threat was uttered and they point forward towards the base of Mr Ndhlovu's father's intentionality at the relevant time.

The next two descriptive and prospectant propositions of fact are motive and design. The motive for Mr Nwaoke's threat of harming his wife through his *juju* (fetish amulet) was that the marriage of the two had broken down and the latter had refused to return the brideprice paid by Mr Nwaoke.[79] The design of the accused in *Lenga Andrew v The People* was established by the confession of the witchdoctor whom he had hired to cause a fatal car accident involving Zacheus Ngong.[80] However, neither motive nor design should be construed to be *constitutive,* as opposed to being merely evidential, of intentionality.[81] This is the

[78] *S v Ndhlovu* 1971 (1) SA 27 (RA) 28-29.
[79] *R v Nwaoke* 1939 5 WACA 120 at 120-1.
[80] *Lenga Andrew v The People* (2005) Criminal Appeal, No. BCA/4c/2004, unreported).
[81] A similar debate with respect to the role of subjective foresight in proving intentionality has been raging on in the anglophone world, see Duff R.A 'Subjectivism, objectivism and criminal attempts' in Simester and Smith (eds) *Harm and Culpability* (1996) 19 at 21; Kaveny C.M 'inferring intention from foresight' [2004] 120 *Law Quarterly Review* 81 at 81, where this debate is characterised as a distinction between the "identity view" and the "inference view." See also Williams (note 75) 434: 'Basically, the trouble arises because the judges are mixing up two questions: the evidence that justifies a genuine inference of desire or purpose, and the evidence that compels an automatic conclusion of intention (irrespective of desire) as a matter of law (i.e. where the result was foreseen as certain)'; Smith J.C 'Comment on *Hancock and Shankland*' [1986] *Criminal Law Review* 181; Duff R.A 'The obscure intentions of the House of Lords' [1986] *Criminal Law Review* 771; *R v Woolin* [1999] A.C. 82 at 93.

case for two reasons: firstly, motive has been widely declared as being 'irrelevant' for determining *mens rea* across across Africa.[82] However, this can only be interpreted in the benign sense to mean that motive is not constitutive of intention, as courts all over the continent regularly accept propositions related to motive as evidencing intentionality.[83] Therefore, if Wigmore's statement that 'motive is a state of mind'[84] is taken in the strong sense that motive is *constitutive* of intentionality, then this view would be inconsistent with criminal law doctrine in Africa. Secondly, not all forms of intentionality are designed or desired. We have in mind here what we have classified as indirect intention in Chapter 4.

The only concomitant proposition of fact is that of an accused exhibiting their intentionality through conduct at the time of the incident. For example, the boarding of a train, the return of a lost purse and the making of a particular utterance all while performing a certain prohibited action are forms of conduct that exhibit the accused's intention at the time.[85] Bizzel AJ inferred the accused's intentionality of his 'pretended exercise or use of a kind of supernatural power or witchcraft' from his conduct of accepting payment from one Victoria Shembe and 'lifting and shaking a bottle of black liquid until a foam formed' in order to

[82] For francophone jurisdictions, see Badar M.E *The concept of mens rea in international criminal law: The case for a unified approach* (2013) 162, and for the anglophone regions of the continent an example is Zimbabwe's criminal code: 'Except as may be expressly provided in this Code or in the enactment concerned, the motive or underlying reason for a person's doing or omitting to do anything, or forming any intention, is immaterial to that person's criminal liability in terms of this Code or any other enactment.' (Criminal Law (Codification and reform) Act [Chapter 9:23], section 13(2).
[83] For example, *S v Hamunakwadi* 2015 (1) ZLR 392 (H) 400C; *S v Sibanda* 1975 (1) SA 966 (A) 967D-F.
[84] Wigmore (note 2) 94.
[85] Ibid 98.

diagnose the physical pains felt by her.[86] Notwithstanding the many problems, which are discussed in detail in Chapter 4, with this particular judgment, its factual matrix is a useful example of a person's intentionality represented by conduct.

An accused found to be in possession of 'a human head or skull within six months of the same having been separated from the body or skeleton' will be presumed to have the intentionality of committing an action that is provocative in the indigenous sense in Cameroon.[87] No such *ex lege* presumption exists among African anglophone jurisdictions. Retrospectant inculpatory possession in anglophone jurisdictions is proved in the ordinary way of establishing that the accused was in possession of instruments of witchcraft (for example, certain types of fetish amulets, buried human organs or 'black slimy substances') or that they attempted to destroy such evidence in the witchcraft case concerned.[88]

As to proposition (3), the *non-excipiens* clause, of Form I, the *extra-logical* considerations cited above with respect to the other three arguments also apply here. These include the risk of adverse economic consequences in the workplace, the judicial pursuit of deterrence policies in communities where witchcraft accusations and mob violence are rife, and the persecution of certain vulnerable members (for example, women and children) of certain communities.

[86] *S v Buthelezi* 1961 (1) SA 91 (N) 93B-E.
[87] Anyangwe (note 18) 258-9.
[88] Okonkwo (note 41) 54.

6.5 THE LOGICAL TESTING OF THE ARGUMENTS

The discussion now turns to the logical testing of the four arguments that were analysed in the first part of this chapter. The discussion in this section is complex because it is addressed to more than one audience, while making a few tentative remarks about evidential argumentation evaluation.[89] The predominant audiences to whom the discussion is addressed are lawyers preparing to deploy the arguments discussed in the previous section in witchcraft cases in Africa and theorists working in multi-disciplinary spaces of evidence and proof, and New Evidence Scholarship more generally. The aim of this section is to offer some tentative remarks about how these arguments can be logically tested within the institutional context of African criminal process.

In the forensic context, fact-finders typically evaluate evidential arguments against institutional norms such as corroboration rules and standards of proof. There are several debates about these institutional norms including: (i) the meaning to be given to the appropriate standard of proof (*beyond a reasonable a*

[89] The terms 'testing' and 'evaluation' are used interchangeably in this section.

doubt or *intime conviction*);[90] (ii) the "conjunction paradox";[91] and (iii) the translation of evaluation metrics or criteria into the appropriate standard of proof.

[90] An explosion of New Evidence Scholarship on evidential evaluations emerged from the historic Boston University Law Review Symposium in the mid-1980s: Green E.D 'Forward' (1986) 66(3) *Boston University Law Review* 377 ('The central question in evidence is, "what does it mean to prove something so that a court will either order a person imprisoned or order a transfer of money or property?"'); Cohen L.J 'The role of evidential weight in criminal proof' (1986) 66(4) *Boston University Law Review* 635 ('What is the legally correct way to judge proofs?'); Kaye D.H 'Do we need a calculus of weight to understand proof beyond a reasonable doubt?' (1986) 66(4) *Boston University Law Review* 657 ('How do we know whether the judge or jury has arrived at the correct value for p?'); Brilmayer L 'Second-order evidence and Bayesian logic' (1986) 66(4) *Boston University Law Review* 673 ('evaluating the weight of evidence is similar to characterising evidence as "naked statistics."); Friedman R.D 'A closer look at probative value' (1986) 66(4) *Boston University Law Review* 733 ('[T]o assess the probative value of a piece of evidence the judge must gauge the change the evidence causes in the probability of the disputed proposition'). See also Schum D.A 'Alternative views on argument construction from a mass of evidence' in MacCrimmon and Tillers (eds) *The Dynamics of Judicial Proof: Computation, logic and Common Sense* (2002) 145 at 147 ('we face the task of establishing the relevance, credibility, and probative (inferential) force credentials of a mass of existing evidence on some given *probandum* (or matter to be proven)') and 158-9 ('In some, but not all, of my studies I have adopted a Bayesian view of what the probative force or weight of evidence means'); Walker V.R 'Theories of uncertainty: Explaining the possible sources of error in inferences' in MacCrimmon and Tillers (eds) *The Dynamics of Judicial Proof: Computation, logic and Common Sense* (2002) 197 at 234 ('The warrant for an inference, or for an assessment of the probative value of evidence, consists of the reasons why the conclusion is probably true'); Laudan L *Truth, error and criminal law: An essay in legal epistemology* (2006) 120 ('I propose to explore how to formulate rules of evidence and procedure that would increase the likelihood that jurors' judgments about apparent guilt and innocence map onto the true state of affairs'); Nance D.A 'The weights of evidence' (2008) 5 *Episteme* 267 at 268 ('degrees of weight must be compared with something in order to reach decisions–compared either to degrees of weight favoring an alternative decision or to a standard that is independently specified, some critical level of weight'); Nance D.A *The burdens of proof: Discriminatory power, weight of evidence and tenacity of belief* (2016) ('what exactly does it means…to prove a criminal case "beyond a reasonable doubt"?').

[91] If we assume that the criminal standard of proof equals a probability ratio of 0.9 for example, the multiplication of the probability ratios of *independent facta probanda* produces a regression (0.9 x 0.9 = 0.81; 0.9 x 0.9 x 0.9 = 0.73), depending on the number of *facta probanda* that are in dispute, on each occasion. The net result of this is to unduly increase the Proponent's burden in order to make up for the probability shortfall resultant from the regression. The *conjunction paradox* was originally raised by Cohen L.J *The probable and the provable* (1977) 66-7, but discussed by many others since then: Nance (note 90) 74-6; Allen R.J 'The nature of juridical proof' (1991) 13(2-3) Cardozo Law Review 373 at 375; Pardo M.S 'The paradoxes of legal proof' (2019) 99(1) *Boston University Law Review* 233; Schwartz D.S and Sober E 'The conjunctions problem and the logic of jury findings' (2018) 59(2) *William & Mary Law Review* 619; Allen R.J 'Rationality, algorithms and juridical proof: A preliminary inquiry' (1997) 1 *International Journal of Evidence & Proof* 254; Allen R.J and Stein A 'Evidence, probability and burden of proof' (2013) 55(3) *Arizona Law Review* 557. Possible solutions offered include: (i) narrowing the number of *facta probanda* in dispute through the admissions of the accused (Pardo (note 91) 270; Cohen (note 91) 60); (ii) Accepting the quantification of individual elements, but denying their conjunction (Cohen (note 91) 66; Nance D.A 'A comment on the supposed paradoxes of a mathematical interpretation of the logic of trials' (1986) 66(4) *Boston University Law Review* 947 at 949, n5); (iii) Insisting on the quantification of individual elements being viewed as a *necessary condition*, but their conjunction as a *sufficient condition* (Nance (note 90) 75-7; Friedman R.D 'Infinite strands, infinitesimally thin: Storytelling, Bayesianism, hearsay and other evidence' (1992) 14(1) *Cardozo Law Review* 79 at 97, n48; Schwartz and Sober (note 91) 626-7); (iv) Avoiding the proof of individual elements and preferring rather to compare the parties' opposing standpoints/stories at a holistic level (Pardo (note 91) 280-1 and 279; Allen R.J and Jehl S.A 'Burdens of persuasion in civil cases: Algorithms v explanations' (2003) 4(4) *Michigan State Law Review* 893 at 936 and 938-9); (v) Avoiding the conjunction and preferring rather to adopt the ratio of the *factum probandum* that is the lowest in the set (Clermont K 'Conjunction of evidence and multivalent logic' in Glenn and Smith (eds) *Law and the New Logics* (2017) 32 at 55; Clermont K.M *Standards of decision in law: Psychological and logical bases for the standard of proof, here and abroad* (2013) 168-188); (vi) viewing conjunctions in terms of general distributions of probability ratios from a select class of cases, and not just a single case (Moran D.A 'Jury uncertainty, elemental independence and

These problems are complex and largely exceed the scope of this thesis. This latter section of the chapter has a narrower focus. The aim here is to offer one possible way that lawyers and theorists may critically test the four arguments made in the previous section within the New Dialectic framework.

(New) Dialecticians such as Walton characterise trials in general as taking the form either of a persuasion dialogue or a multiplicity of different kinds of dialogues, including the *persuasion dialogue*.[92] 'All good dialogue,' Walton says, 'has procedural rules.'[93] Overall, Walton identifies four different kinds of rules that regulate different aspects of the dialogue.[94] According to Walton, the 'strategic (win-loss) rules,' the fourth kind, 'determine what sequence of locutions constitutes fulfilment of the goal of the dialogue.'[95] The primary goal of all *persuasion dialogues,* which includes the kind conducted between the

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the conjunction paradox: A response to Allen and Jehl' (2003) 4(4) *Michigan State Law Review* 945 at 947-8 and 950).

[92] Walton D *Appeal to expert opinion: Arguments from authority* (1997) 194-5; Walton D *Burden of proof, presumption and argumentation* (2014) 88. Elsewhere, Walton describes the criminal process as complex phenomenon that involves many different types of dialogue, including: eristic, persuasion, negotiation, quarrel and investigative, see Walton D *The new dialectic: Conversational contexts of argument* (1998) 232-5. See also Bex F.J and Walton D.N 'Taking the dialectical stance in reasoning with evidence and proof' (2019) 23(1-2) *The international Journal of Evidence and Proof* 90 at 92 ('Here, we take the dialectical stance, viewing the process of proof as a dialectical process of critical discussion, asking critical questions and arguing for and against positions'); Prakken H 'Modelling reasoning about evidence in legal procedure' in Loui (ed) *ICAIL01: Proceedings of the 8th international conference on Artificial Intelligence and Law* (2001) 119 at 122-3, where 'reasoning about evidence in legal procedure' is modelled in a dialogue game of 'three players' (the opponent, proponent and fact-finder) involved in a dialectical process of 'turntaking.' See also Walton D *Dialog theory for critical argumentation* (2007) 92-3 (on the evaluation of argumentative moves in the 'conversational context' of a 'collaborative talk exchange between two [standpoints]'); Walton D.N *Argumentation schemes for presumptive reasoning* (1996) 19 (presumptive reasoning implies a dialogue with three features: 'a sequence of questions and answers in an extended chain of argumentation'; 'an order in the sequence'; 'a set of "possible or suspected objections" or critical questions').

[93] Walton D.N *Informal logic: A handbook for critical argumentation* (1989) 9.

[94] Walton's 'four kinds of dialogue rules' are 'locution rules,' 'locution rules,' 'commitment rules' and 'strategic (win-loss) rules.' (Ibid 10).

[95] Ibid; Walton (note 92) 30.

prosecution and accused in criminal trials, is to achieve *rational persuasion.*[96] Therefore, the aim is to use evidential argumentation, as opposed, for example, to employing *ordeals*,[97] to persuade human fact-finders in African witchcraft cases. It is proposed here that this goal be pursued by theorists and arguers in African witchcraft cases at two levels that are distinguished using Pardo's micro-macro dichotomy. Firstly, the testing of whether evidential argumentation achieves the goal of rational persuasion at a micro level using *critical questions* and using explanatory criteria such as *coherence, consistency, coverage, uniqueness* and *simplicity* at the macro level.

The distinction between micro and macro levels is borrowed from Pardo:

> The micro-macro distinction is meant simply as shorthand for proof issues that pertain to individual items of evidence (admissibility questions), on one hand, and those that pertain to the strength of evidence as a whole on particular issues (sufficiency questions), on the other. Nothing more elaborate is implied by the labels.[98]

These concepts, however, are not applied here in the exact same sense as Pardo, especially at the micro level. Although we will be evaluating *individual* arguments at the micro level and their *combination* at the macro level, we will not focus on *admissibility*, but rather on what Wigmore referred to as: 'Proof in

[96] Walton D *Legal argumentation and evidence* (2002) 156-7.
[97] *S v Zanhibe* 1954 (3) SA 597 (T) (on victim dying from third-degree burns sustained from an 'exorcism' conduct by a local traditional healer using 'hot medicinal water'); *S v Modisadife* 1980 (3) SA 860 (A) (on the accused, at the request of his brother, fatally strangling his 11-year-old stepchild in order to use the child's organs as 'medicinal muti'); *Ojenge v P.N Mashuru Limited* [2017] eKLR (on fact-finding through ordeals by fire and by poison in Kenyan communities).
[98] Pardo M.S 'The nature and purpose of evidence theory' (2013) 66(2) *Vanderbilt Law Review* 547 at 557, n36 (footnotes omitted). Pardo also discusses a third level of evaluation that integrates the micro and macro levels (at 568-9).

the general sense, the part concerned with the ratiocinative process of contentious persuasion, mind to mind, counsel to juror, each partisan seeking to move the mind of the tribunal.'[99] The two evaluation metrics used at the micro and macro levels respectively are the *critical questions*, pioneered by Arthur Hastings in 1962,[100] and the *explanatory criteria* championed by Allen and Pardo.[101]

The micro-macro dichotomy is understood as demarcating two levels of (logical) testing along the same continuum of evaluation matrics that are used to test arguments. First, a set of critical questions is used to test the probative value of each individual argument at a micro level.[102] The prosecution being unable to answer each of the critical questions posed by the accused to undermine each of

[99] Wigmore J.H 'The Problem of Proof' (1913) 8 *Illinois Law Review* 77 at 77. This remark is made with the qualification that relevancy assessments are part of the overall Proof process to the extent that they also involve logical inferential reasoning, albeit for *admissibility* purposes. Unlike the evaluation of the overall *weight* of evidence, relevancy assessments are constrained by other institutional doctrines such as the Common law exclusionary rules. Elsewhere, 'relevancy assessments' simply do not exist as such in Continental jurisdictions.

[100] Hastings (note 40). Godden D.M and Walton D 'Argument from expert opinion as legal evidence: Critical questions and admissibility criteria of expert testimony in the American legal system' (2006) 19(3) *Ratio Juris* 261 at 261 ('Critical questions were first introduced by Arthur Hastings as part of his analysis of presumptive argumentation schemes').

[101] Allen R.J and Pardo M.S 'Relative plausibility and its critics' (2019) 23(1-2) *The International Journal of Evidence & Proof* 5; Allen R.J and Pardo M.S 'Juridical proof and the best explanation' (2007) 27(3) *Law and Philosophy* 223; Allen R.J and Pardo M.S 'The problematic value of mathematical models of evidence' (2007) 36(1) *The Journal of Legal Studies* 107; Allen R.J 'Factual ambiguity and a theory of evidence' (1994) 88(2) *Northwestern Law Review* 604; Allen R.J 'The nature of juridical proof' (1991) 13(2-3) Cardozo Law Review 373; Allen R.J 'A reconceptualization of civil trials' (1986) 66(3) *Boston University Law Review* 401; Allen R.J 'Explanationism all the way down' (2008) 5(3) *Episteme* 320 at 321.

[102] Compare this to other theorists who engage in micro-level theorising in the same sense as Pardo uses that term to analyse 'individual items of evidence' at an admissibility level: Godden and Walton (note 109) 275-6; Walton D.N *Character evidence: An abductive theory* (2006) (on the application of abductive argumentation schemes to model and evaluate character judgments); Lempert R.O 'Modelling relevance' (1977) 75 *Michigan Law Review* 1021 (on the normative application of Bayes Theorem to relevancy assessments conducted by the ideal juror); Friedman R.D 'A close look at probative value' (1986) 66(4) *Boston University Law Review* 733 at 735 (on relevancy assessments entailing a comparison of Bayesian *prior* and *posterior* probabilities); Damaška M.R 'Propensity evidence in Continental legal systems' (1994) 70(1) *Chicago-Kent Law Review* 55; Lyon T.D and Koehler J.J 'The relevance ratio: Evaluating the probative value of expert testimony in child sexual abuse cases' (1996) 82(1) *Cornell Law Review* 43; Thompson W.C 'Evaluating the admissibility of new genetic identification tests: Lessons from the "DNA War"' (1993) 84(1) *Journal of Criminal Law & Criminology* 22; Kaye D.H 'The relevance of matching DNA: Is the window half open or half shut?' (1995) 85(3) *Journal of Criminal Law & Criminology* 676.

the former's individual argument will result in the latter being *discharged*. On the other hand, should the prosecution survive this micro-level of critical questioning, which may include more than one round of critical questions from the accused, the accused will be held *responsible* (distinguished from the broader concept of *liability*).[103]

The macro-level of evaluation arises once the accused has been held to be *responsible*. In order to meet the high standard of proof in criminal trials,[104] the surviving individual arguments are taken through another round of evaluation. This time, the sufficiency of the arguments is combined, or rather, is evaluated *holistically*.[105] Examples of macro level theorising include Haack's *Foundherentism* and Walton's *Plausibilistic* theory. *Foundherentism* combines 'fact-based' and 'story-based' approaches, while intermediating between 'foundationalist' and 'coherentist' epistemological theories, as it evaluates arguments on the basis of criteria such as *supportiveness, security* and

[103] Duff draws this distinction in the orthodox sense that caters for *justifications* and *excuses*, see Duff R.A *Answering for crime: Responsibility and liability in criminal law* (2007) 19-21 (on the distinction between *responsibility* and *liability*). However, the sense in which these concepts are used here is far narrower than Duff because of the multiple doctrinal problems referred to in Chapter 4 about applying *justifications* and *excuses* to cases involving the direct crime of witchcraft in Africa.

[104] Cf. Clermont K.M 'Standards of proof revisited' (2009) 33 *Vermont Law Review* 470 at 471 ('The surprising aspect is that civilians say they apply the same or a very similar standard in noncriminal cases as they do in criminal cases').

[105] See Pardo (note 98) 557-8; Malsch M and Freckelton I 'The evaluation of evidence: Differences between legal systems' in Prakken *et al* (eds) *Legal Evidence and Proof: Statistics, Stories, Logic* (2009) 117 ('Two broad types of evaluating evidence within criminal cases can be identified. One of them concerns a 'holistic' way of looking at various items of evidence…The use of stories, comparing different accounts of what happened, and looking at events as a whole, is central to this model…The other way in which evidence is evaluated is atomistic, whereby each item of evidence is weighed and scrutinised independently from other evidence'); Pardo M.S 'Judicial proof: Evidence, evidence and pragmatic meaning: Towards evidentiary holism' (2000) 95(1) *Northwestern University Law Review* 399 (arguing that constructing 'holistic theories,' as opposed to 'conventional atomistic' ones, 'makes evidence meaningful').

comprehensiveness.[106] Walton's *Plausibilistic theory* evaluates legal arguments at three stages called 'the basis of the evidence,' 'reasoning about the inferences drawn' and 'the pragmatic or dialectical aspect.'[107] The approach that will be adopted here will be theoretical and illustrative[108] in the sense that the explanatory evaluative criteria will be analysed using the facts of one exemplary witchcraft case.

6.5.1 MICRO LEVEL LOGICAL TESTING: CRITICAL QUESTIONS

It will be recalled from earlier in this chapter that the argument made for the actions that are provocative in the indigenous sense ('API') (unlawful conduct) *factum probandum* is that the required API is *plausibly* established by the specified prospectant (motive, design and opportunity) and/or concomitant (exhibited conduct) and/or retrospectant (inculpatory possession) propositions, coupled with the relevant expert testimony from the *Nganga* (Form UC). The *micro* evaluation of Form UC can be undertaken through the posing of critical

[106] Haack S *Evidence matters: Science, Proof, and Truth in the law* (2014) 20-1. Published originally as Haack S 'Epistemology legalized: Or, truth, justice and the American way' (2004) 49 *American Journal of Jurisprudence* 43. See also, Haack S 'Double-aspect of foundherentism: A new theory of empirical justification' (1993) 53(1) *Philosophy and Phenomenological Research* 113; Sosa E 'The raft and the pyramid: Coherence versus foundations in the theory of knowledge' (1980) 5(1) *Midwest Studies in Philosophy* 3. Other examples of macro-theorising are: Laudan L 'Strange bedfellows: Inference to the best explanation and the criminal standard of proof' (2007) 11 *International Journal of Evidence & Proof* 292 (criticising Allen and Pardo's Inference to the best explanation standard as being weaker than the standard of proof required in criminal cases); Allen and Pardo (note 108).

[107] Walton (note 96) 200-1.

[108] Compare this to Wigmore's introductory remarks about his Charting method, which is described as being 'a working scheme,' 'a mere provisional attempt' 'in tentative form only': 'If this will not work, try to devise some other, or try what success there is in getting along without any.' (Wigmore (note 2) 1-4).

questions or refutations within the N-D framework. The following critical questions test various propositions of Form UC:

> CQ_1: Are there *material* factual differences between the current case and the analogous case on which the *plausibility* of the Action that is Provocative in the Indigenous sense is based?
>
> CQ_2: Have the relevant *prospectant, concomitant* and *retrospectant* propositions been established to the relevant degree of proof?
>
> CQ_3: Are the social beliefs of the community concerned still consistent with African customary law and the knowledge of the *Nganga*?

CQ_1 is a critical question that is typical for the *arguing by analogy* argumentation scheme. Since the *ex logos* presumption in proposition (1) of Form UC is derived by analogy from a different case decided on similar facts, there will always be room to challenge the level of factual similarity between the two cases. The more comparatively dissimilar, the less warranted the *ex logos* presumption will be in the instant case. The second critical question challenges the sufficiency of the evidence that has been adduced to establish the descriptive, PCR(Mot)•(D)•(O)•(EC)•(IP), and evaluative, EXP_{SC}, propositions in the first and second evidential premises. A further challenge against the second evidential premise (related to the expert testimony of the *Nganga*) lies in CQ_3. This particular critical question challenges the consistency of the *Nganga*'s knowledge base with the dynamic nature of societal beliefs. Some of these critical questions may apply, with some modifications, to the other arguments. This list of critical questions is neither exhaustive nor exclusive to Form UC.

The next *factum probandum* to consider is that of causation. The argument in this regard, it will be recalled, is that the action that is provocative in the indigenous sense (API_{CNess1}) and the alleged victim holding a superstitious belief (SB_{CNess2}) are *primary* and *secondary necessary* causes of the alleged victim's fearfulness (harm) that become *sufficient* under circumstances where it is found, for various logical and extra-logical reasons, that there are no exceptions (*non-excipiens*) to this common sense generalisation (or *ex logos* presumption) (Form C). There are a number of ways through which Form C may be refuted and some of them overlap with those just considered to refute Form UC. The following set of critical questions challenges the prosecution's burden to establish Form C:

> CQ_4: Would the victim, because of some other condition, have grown fearful regardless of the action that is provocative in the indigenous sense?
>
> CQ_5: Was there an intervening cause between the necessary and sufficient causes and the eventual fearfulness of the victim?
>
> CQ_6: Do the victim's superstitious beliefs have the relevant qualities of genuineness and immediacy of manifestation?

Without an adequate response to these questions, the prosecution's argument will have to be retracted. The necessity of (API_{CNess1}) and (SB_{CNess2}) in the causal chain is challenged by CQ_4, while the remaining two critical questions, CQ_5 and CQ_6, challenge the sufficiency of the victim's superstitious beliefs as a cause of the prohibited consequence.

The third *factum probandum* of the direct crime of witchcraft is that of the alleged victim's fearfulness (harm) of the perpetrator's action that is provocative in the indigenous sense. Similar critical questions as those raised in the context of Form UC may be raised with respect to this particular *factum probandum* because both arguments have the same structure and both rely on the expert testimony of the *Nganga*. The only difference relates to the content of the *prospectant* (prior knowledge), *concomitant* (opportunity) and *retrospectant* (exhibited conduct) propositions. Therefore, similar refutations of 'junk science' and 'charlatanism' may be raised in relation to the expert testimony of the *Nganga*, EXP_{CM}, whereas the analogical (CQ_1) and evidential sufficiency-related (CQ_2) critical questions may be raised with respect to the establishment of the *prospectant*, *concomitant* and *retrospectant* propositions too. In addition, the following critical questions may be posed with respect to the Harm argument:

> CQ_7: Is there a prevalence of widespread witchcraft-related incidents, stories or African customary law norms within the community concerned that prohibit witchcraft practices?
>
> CQ_8: How strong is the membership of the particular victim and/or perpetrator concerned to this African community?
>
> CQ_9: Is there evidence of any prior hostilities between the parties concerned within this community?

The second and last of these critical questions (CQ_8 and CQ_9) challenge the grounds on which the prospectant proposition that the accused had some prior knowledge of the potential emotional dangers of witchcraft practices is based. In

particular, they are calculated to expose any potential errors in how such knowledge is derived from prior incidents. There could be errors in the victim's perceptual exposure to the prior incidents themselves or in so far as they are relatable to the present incident. The first critical question (CQ_7) challenges the *Nganga*'s expert testimony as to the existence and nature of any African customary law norms that prohibit witchcraft practices. As African communities continue to develop and change, some African customary norms become antiquated or amended by legislative reform efforts at state-law level. Therefore, evidence that a particular community no longer observes a prohibition against witchcraft-related practices would militate against the plausibility of a victim of an action that is provocative in the indigenous sense having *genuinely* held the belief that they were under threat of being harmed.

The third element of the direct crime of witchcraft concerns intentionality. The argument made in this regard was that the *plausibility* of the accused's intention was established by the specified *prospectant* (knowledge, motive and design), *concomitant* (exhibited conduct) and *retrospectant* (inculpatory possession) propositions, subject to there being no exception to this *ex logos* presumption (*non-excipiens*) (Form I). The proof of the evidential premise (concerning the *prospectant, concomitat* and *retrospectant* propositions) to the relevant degree of proof (CQ_2) and the interrogation of the analogous reasoning that underpins the *ex logos* presumption in proposition (1) (CQ_1) (both identified

with respect to Form UC above) are just two examples of critical questions that find equal application with respect to Form I. Although the critical questions posed with respect to each form are not identical, there are some that overlap. The accused may pose the following critical questions against the prosecution's intentionality argument:

> CQ_{10}: To what extent does the accused's prior knowledge of witchcraft incidents inform any inferences about their present knowledge under the circumstances?
>
> CQ_{11}: If the same form of exhibited conduct (for example, the shaking of a bottle containing a black liquid or uttering incoherent chants) can indicate different states of mind, how can the accused's exhibited conduct be linked to their intention to harm the victim by committing an action that is provocative in the indigenous sense?
>
> CQ_{12}: How can we exclude the fact that the accused may have been in inculpatory possession of instruments of witchcraft on behalf of somebody else?

The first and second of these three critical questions challenge the accused's knowledge and exhibited conduct from which their intention is inferred. They do so by raising doubts about the similarity of prior and present circumstances in respect of which the accused is said to have knowledge (CQ_{10}). Secondly, CQ_{11} raises the possibility that the conduct that the accused exhibited (e.g. shaking a bottle containing a black substance) may be related to an action other than an action that is provocative in the indigenous sense (e.g. innocuously shaking a bottle containing a black soft drink) so as to undermine the evidential premise. The last critical question (CQ_{12}) raises the possibility of the accused

being in incriminatory possession, but without any intention to do any harm himself in that such possession is on behalf of somebody else.

6.5.2 MACRO LEVEL LOGICAL TESTING: EXPLANATORY CRITERIA

The micro level testing of each of the four arguments discussed above challenge the *responsibility* of the accused.[109] Should the prosecution be able to answer adequately each set of critical questions that is associated with each of the four arguments, only then can the arguments be evaluated further at a holistic macro level. The aim at the macro level of (logical) testing is to ascertain whether the degree of *rational persuasion* reaches the appropriate standard. This standard is prescribed at an institutional level in the forensic context, although the precise interpretation of this has always been controversial both in Africa and elsewhere. To the question, '[w]hat exactly does *intime conviction* mean?' in Central and West African jurisdictions rooted within the francophone Continental tradition, the answer commonly given is that fact-finders must be 'very sure before upholding the burdened party's proof.'[110] In other words, it is said, 'the judicature hopes to approach the level of complete certainty as closely as possible' such that 'judges in [C]ontinental systems are more likely to acquit or dismiss a petition.'[111]

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[109] Cf. Duff R.A *Answering for crime: Responsibility and liability in criminal law* (2007) 19-21, where a distinction is drawn between *responsibility*, which corresponds to the establishment of the relevant *facta probanda*, and *liability*, which includes the additional negation of *justifications* and *excuses*. Owing to the doctrinal difficulties pointed out in Chapter 5 regarding the application of justifications and excuses to witchcraft cases in Africa, the *responsibility-liability* dichotomy is not used in the same sense in this chapter as Duff does. *Responsibility* refers to the state of affairs during which the prosecution's four arguments having passed micro-level testing. It is only after the second stage of macro-level testing will the accused be *Liable*.

[110] Clermont (note 104) 471.

[111] Bencze M 'A comparative approach to the evaluation of evidence from a "fair trial" perspective' in Badó (ed) *Fair trial and judicial independence: Hungarian perspectives* (2014) 163 at 166.

Anglophone jurisdictions similarly hold a very high standard by permitting only *reasonable* refutations to avoid a conviction.[112]

Some scholars, especially in Common law jurisdictions such as the United States, opt for even greater precision by interpreting the standard of proof in numerical terms as being equivalent to 0.9, 0.95 or 0.95+,[113] while others[114] resist this and rather prefer to describe the standard in theoretical or explanatory terms, for example: 'whether an explanation satisfies the standard of proof depends on the strength of the possible explanations supporting each side (and not only the party with the burden of proof).'[115] This issue remains widely controversial,[116]

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[112] See the authorities cited in note 56.

[113] *United States v Schipiani*, 289 F. Supp. 43 (E.D.N.Y. 1968) at 57 (the criminal standard as '95%+'); McCauliff C.M.A 'Burdens of proof: Degrees of belief, quanta of evidence, or constitutional guarantees' (1982) 35(6) *Vanderbilt Law Review* 1239 at 1325 (for a survey of 171 judges in the United States where 56 interpreted the standard to mean '90%,' 31 thought it meant '95%,' 21 said it was '100%' and 34 ranged between '80-85%'); Arkes H.R and Mellers B.A 'Do juries meet our expectations?' (2002) 26(6) *Law and Human Behaviour* 625 at 631 (the median response of 133 students surveyed at Ohio university was to interpret the standard to mean 95%); Williams G 'The mathematics of proof I' [1979] *Criminal Law Review* 297 at 305-6; Levmore S 'Conjunction and aggregation' (2001) 99(4) *Michigan State Law Review* 723 at 725-6.

[114] Tribe L.H 'Trial by mathematics: Precision and ritual in the legal process' (1971) 84(6) Harvard Law Review 1329 at 1375 ('The concept signifies not any mathematical measure of the precise degree of certitude we require of juries in criminal cases, but a subtle compromise between the knowledge, on the one hand, that we cannot realistically insist on acquittal whenever guilt is less than absolutely certain, and the realization, on the other hand, that the cost of spelling that out explicitly and with calculated precision in the trial itself would be too high'); Nesson C.R 'Reasonable doubt and permissive inferences: The value of complexity' (1979) 92(6) *Harvard Law Review* 1187 at 1196 ('[S]uch quantification seems to undercut a central feature of the concept of reasonable doubt…The concept of reasonable doubt speaks to the psychological need to forestall continued worry about the validity of guilty verdicts. As long as the concept is left ambiguous, members of the observing public may assume that they share jury members common notions of the kinds and degree of doubt that are unacceptable'); Allen R.J and Jehl S.A 'Burdens of persuasion in civil cases: Algorithms v explanations' (2003) 4(4) *Michigan State Law Review* 893 at 930 ('The meaning of a phrase such as "prove elements to a greater than .5 probability" is not self-evident. There are four standard interpretations…'); Cheng E 'Reconceptualising the burden of proof' (2013) 122(5) *Yale Law Journal* 1101 at 1276-7 ('Rather than work with absolute probabilities and a quantified threshold (in this case, 0.95), the better way to model factfinding in criminal cases is again as a likelihood ratio').

[115] Allen and Pardo (note 101) 15.

[116] Jackson J.D 'Probability and mathematics in court fact-finding' (1980) 31(3) *Northern Ireland Legal Quarterly* 239 at 253 ('The problem is, of course, that there is no agreement on what degree of probability is required before one can be satisfied "beyond reasonable doubt"'); Eggleston R *Evidence, proof and probability* 2nd ed (1983) 114 ('[I]t is impossible to specify any particular mathematical level of probability which must be achieved before a verdict of guilty can be returned in a criminal case'); Fienberg S.E and Schervish M.J 'The relevance of Bayesian inference for the presentation of statistical evidence and for legal decisionmaking' (1986) 66(4) *Boston University Law Review* 771 at 779 ('How does this standard get interpreted from the Bayesian decision-making perspective? There is general agreement among commentators that the meaning of the standard can vary with the crime as well

and tackling it here would far exceed the limits of this thesis. There are two brief points, however, that must be taken into account. Firstly, quantifying the criminal standard of proof in these precise terms has been received with a measure of hostility in practice on many parts of the African continent.[117] Zeffert and Paizes point out that unlike the standard in civil cases, which has a broader range and is much more comparative in the strict sense, the criminal standard of proof is more *fixed* or *categoric*.[118] In other words, while it makes sense to assume, by way of the complementation rule (P(x) + P(y) = 1), that the sum of the probability ratios of the respective claims of the prosecution and accused is equal to 1, it is more doubtful that the sum of the probability of the prosecution and defence cases can reflect the institutional bias of allowing the risk of no more than, say, one in twenty false positives.

An alternative approach is to articulate the appropriate standard of proof in terms of two layers of evaluative metrics: Firstly, the arguments were subjected to the accused's critical questions at a micro level and secondly, they will now be

as with other aspects of the trial, but there seems to be little discussion of whether the standard should be interpreted by all decionmakers in each trial in exactly the same manner').

[117] *The Shell Petroleum Development Company of Nigeria v Chief G.B.A. Tiebo* (2005) LPELR-3203 (SC) 21-3 ('it is impossible to prescribe the quantity and nature of evidence required in a given case…The important thing is that the evidence proffered must be qualitative and credible'); *S v Mavinini* 2009 1 SACR 523 (SCA) [26] ('subjective satisfaction' contrasted with 'mathematical or logical or "complete" certainty'). A similar trend is observable in the United States: Tillers P and Gottfried J 'Case comment – *United States v. Copeland,* 369 F. Supp. 2d 275 (E.D.N.Y. 2005): A collateral attack on the legal maxim that proof beyond a reasonable doubt is unquantifiable' (2006) 5 *Law, Probability and Risk* 135 at 135-6 ('Appellate courts have condemned such attempts at quantification of reasonable doubt whenever they have encountered them'); Cheng (note 124) 1275-6 ('[C]ourts have flatly rejected quantification in criminal cases. Courts have regularly disfavored the quantification of reasonable doubt as potentially unconstitutional, and with good reason, for, as we shall see, the criminal burden of proof arguably has nothing to do with getting the probabilities above 0.95').

[118] Zeffert D.T and Paizes A.P *The South African Law of Evidence* 2nd ed (2009) 56.

assessed against explanatory criteria, such as *simplicity, coherence, consistency, coverage* and *uniqueness*,[119] at the macro level. The exercise of integrating and comparing the four arguments using these criteria is in line with the trite judicial injunction to 'eschew piecemeal processes of reasoning' and to 'look at all the facts at the end of the case, and from that totality to ascertain whether the inference in question can be drawn.'[120] As a general methodological protocol, it might prove useful to apply these criteria, especially to cases with large masses of evidential facts, using Wigmore's Charting method[121] or Bayesian Networks.[122] Nonetheless, this type of diagramming is not embarked upon in this thesis. The paucity of reported cases involving the direct crime of witchcraft, coupled with the fact that in the small selection of cases that are available (mainly from Cameroon) fact-finders give insufficient detail in their exposition and

[119] Allen and Pardo (note 101) 15-6; Pennington N and Hastie R 'The story model for juror decision making' in Hastie (ed) *Inside the juror* (1993) 192 at 192-3 ('we call our theory the story model…[and] as part of the theory, we also propose four certainty principles – coverage, coherence, uniqueness and goodness-of-fit – that govern which story will be accepted, which decision will be selected, and the confidence or level of certainty with which a particular decision will be made'); Bex F.J *Arguments, stories and criminal evidence: A formal hybrid theory* (2011) 73 and 87 (applying evaluative criteria such as *consistency* and *coherence* to a hybrid model that combines stories and arguments); Pardo (note 105) 434-5 (drawing on W.V Quine's pragmatism to argue that the way to give the 'best' *meaning* to a narrative or statement is to evaluate it using criteria such as *coverage, coherence* and *uniqueness*).

[120] *S v Sigwahla* 1967 (4) SA 566 (A) 569H; *R v Sacco* 1958 (2) SA 349 (N) 351H; *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA) [34]; *S v Mugwanda* 2002 (1) ZLR 574 (S) 579C-D; *S v Mtetwa* [2015] ZWHHC 63 at 5; *Saidi Bakari v R,* Criminal Appeal no. 422 of 2013 CAT (unreported); *Mgowole v R* [2019] TZCA 341 at 18; *Okethi Okale v R* [1965] EA 558 at 559; *Nguku v R* [1985] eKLR at 4-5; Cf. Williams (note 75) 434-5.

[121] Wigmore (note 2) Part 3.

[122] Biedermann A *et al* 'The evaluation of evidence in the forensic investigation of fire incidents. Part I. An approach using Bayesian Networks' (2005) 147(1) *Forensic Science International* 49; Biedermann A *et al* 'The evaluation of evidence in the forensic investigation of fire incidents. Part II. Practical examples of the use of Bayesian Networks' (2005) 147(1) *Forensic Science International* 59; Biedermann A and Taroni F 'Bayesian networks for evaluating forensic DNA profiling evidence: A review and guide to literature' (2012) 6(2) *Forensic Science International: Genetics* 147 at 149; Keppens J 'Argument diagram extraction from Bayesian networks' (2012) 20 *Artifical Intelligence and Law* 109; Fenton N *et al* 'A general structure for legal arguments about evidence using Bayesian Networks' (2013) 37 *Cognitive Science* 61; Fenton N *et al* 'Analysing the Simonshaven case using Bayesian Networks' (2019) *Topics in Cognitive Science* 1.

evaluation of facts, militates against any comprehensive diagramming. Besides, most diagramming heuristics focus on large masses of evidence, whereas our methodological frame of reference is much narrower. We are here concerned with the *principal* arguments that are required for cases of the direct crime of witchcraft.

When an African fact-finder in the murder case of *S v Ndhlovu*, for example, observes from the mass of evidential facts, properly organised, that: (i) the accused and his family lived all their lives in a community 'steeped in witchcraft and its evil practices';[123] (ii) the accused consulted different local *Nganga* at least eight times with his father present and on each occasion he was told that the latter was bewitching him;[124] (iii) in two separate trials in the traditional court presided over by the local chief the accused's father was found guilty of practising witchcraft;[125] (iv) the accused's father openly threatened to cause him to be struck by lightning;[126] (v) the accused experiences a variety of misfortunes including his children and wife falling severely ill and his granary suddenly being ablaze,[127] the fact-finder is likely to observe *coherence* and *consistency* between these sets of fact. The fact-finder, after organising the four arguments together with the pieces of evidence that support them, would holistically determine, by simply observing and considering them, whether they

[123] *S v Ndhlovu* 1971 (1) SA 27 (RA) 29E and G.
[124] *Ndhlovu supra* 28-9.
[125] *Ndhlovu supra* 28E and G.
[126] *Ndhlovu supra* 28H.
[127] *Ndhlovu supra* 27-8.

meet the explanatory criteria of *coherence, consistency, coverage, uniqueness* and *simplicity.*[128]

An assumption is being made here about the combination of the critical questions and the explanatory criteria at the micro and macro levels respectively, properly approximating the criminal standard of proof. It has already been mentioned that precise probabilistic articulations (0.9, 0.95 or 0.95+) of the standard produce their own problems and are at any rate inconsistent with trial practice on many parts of the continent. The advantage, however, about the approach adopted to evaluate our four arguments is that it is flexible enough to allow additional criteria both at the micro level, by permitting multiple rounds of critical questioning by the accused, and by adding further explanatory criteria at the macro level.

6.6 CONCLUSION

This chapter completes the overall argument of this thesis by building on Chapter 5 in explicating the probative component of the *institutional, material* and *probative* (IMP) antecedent of the overall argument of this thesis. The probative component addresses the third sub-question, *what processes or heuristics of proof*

[128] Walton made similar remarks: 'Now that it has been shown how such arguments can be represented on an argument diagram, many questions are raised about how they should be analyzed and evaluated…How can an argument evaluator then weigh that evidence?...The argument diagram should show the ultimate conclusion to be proved in the dialogue by the proponent. The chaining of argumentation displayed in the diagram shows how the argumentation as a whole either moves or does not move forward to that single conclusion as its endpoint. Looking at the whole mass of argumentation represented by the diagram, an evaluator can weigh how plausible the argumentation is in support of the conclusion that is supposed to be proved in the dialogue.' (Walton (note 1) 49).

can be used to establish the elements of the direct crime of witchcraft, flowing from the main question of this thesis. This question has been addressed in two ways in this chapter. Firstly, Chapter 6 structurally identifies the schemes of evidential argumentation, which were designated as our preferred heuristics in Chapter 5, as they *apply* to each of the four *facta probanda* of the direct crime of witchcraft. These arguments are further *contextualised* within African criminal process by being explicated through the facts of various witchcraft cases. Secondly, this chapter has developed *micro* and *macro* levels of evaluative matrices in order to test these evidential arguments within the New-Dialectic framework. At a micro level, a set of critical questions is posed to the argument that is applied to each *factum probandum*, whereas a set of explanatory criteria, such as *coherence, consistency, coverage, uniqueness, simplicity* and *consistency*, are used at a *macro* level.

7. CHAPTER SEVEN: CONCLUSION

This thesis has responded to a specified portion of a much larger problem with multiple institutional and political implications for African criminal process. The phenomenon of witchcraft is associated with widespread incidents of mob violence against suspected 'witches' throughout the continent. The consternation of many African communities is rooted in various institutional, doctrinal and evidential problems related to the crimes of witchcraft in Africa.

This thesis has focused mainly on the evidential portion of these problems. In answer to the main thesis question, *how can the direct crime of witchcraft be proven in Africa,* the following *defeasible modus ponens* argument has been developed over the four main chapters of this thesis:

(1) IMP ⇒ P(w).
(2) IMP.
(3) ∴ P(w) is *plausible*.

The main argument of this thesis is that if the prosecution approaches the appropriate forum with jurisdiction, follows the relevant pleading rules (*institutional* condition – Chapter 3) and establishes the relevant *facta probanda* (*material* condition – Chapter 4), using admissible evidence to the appropriate standard of proof (*probative* condition – Chapters 5 and 6) (IMP), then the direct crime of witchcraft *plausibly* (indicated by the '⇒' sign) would have been proven (P(w)). Plausibility here is meant to convey that although there may well be occasions on which the prosecution satisfies these three *institutional, material*

and *probative* conditions and still loses the case, the institutional realities of criminal trials are such that we can *defeasibly presume* such cases to be exceptional until new information emerges that requires us to revise our (logical) presumption.

The application of logical argumentation schemes to debates about evidence and proof in Africa has proceeded with great complexity in this thesis. This largely is because of the radical contrast between the two implicated world-views: witchcraft is 'the outstanding problem of the lawgiver in Africa,'[1] whereas it is a relic of history in the Euro-American world. This contrast is further underscored by what has occurred recently in the world since the commencement of the project of this thesis. The entire human world has been plunged into turmoil as a result of the outbreak of the COVID-19 pandemic in December 2019.[2] Global responses to this pandemic are analogous to the kinds of antinomies described in Chapter 1 pertaining to the contrasting Euro-American and African worlds. The Oxford Vaccine Group is currently injecting thousands of volunteers with 5 x 10 viral particles and a vaccine called ChAdOx1 nCoV-19.[3] Meanwhile, in the belief that COVID-19 has been brought about by acts of witchcraft, Kenyan indigenous

[1] Hailey W.M *An African Survey: A study of problems arising in Africa south of Sahara* (1938) 295-6, cited in Waller R.D 'Witchcraft and colonial law in Kenya' (2003) 180 *Past and Present* 241. Niehaus pertinently questions '[w]hat is to be done about witchcraft in the New South Africa?' (Niehaus I 'Witchcraft in the new South Africa: A critical overview of the Ralushai Commission Report' in Hund (ed) *Witchcraft violence and the law in South Africa* (2003) 93).

[2] The World Health Organisation has reported over 1.2 million deaths globally, see: www.who.int (accessed: 11 November 2020).

[3] Sharpe H.R *et al* 'The early landscape of coronavirus disease 2019 vaccine development in the UK and the rest of the world' (2020) 160 *Immunology* 223 at 227.

experts gathered at the Renchoka sacred mountains (South western region) to perform rituals of intervention:

> We have been casting away diseases through these rituals. We have had many diseases around this place and we have managed to dispel them. We believe we will send coronavirus away too.[4]

Under circumstances in which the performance of such rituals culminates in a particular person being accused, for example, of causing the pandemic through the practice of witchcraft, extra-judicial acts of mob violence against such a suspect place the institutional legitimacy of African criminal process at great risk. One possible source of institutional mistrust that has contributed towards community members side-stepping the formal criminal process in this way is the uncertainty surrounding the processes of evidential proof regarding witchcraft offences:

> The escalation of witchcraft accusations has generated new forms of popular 'justice' in South Africa and whole communities of outcasts accused of being witches (along with their families) have been placed in hopeless situations under the protection of the police. What can be done? South African state courts are not equipped to convict people of an offence whose material element cannot be presented as hard evidence in a court of law. Anyone brought before the courts for practising witchcraft is set free for lack of concrete evidence. State prosecutors will not touch these cases.[5]

[4] Chacha B.K and Kungu J.N 'Religious concubinage COVID-19 and the moral economy of witchcraft in Kenya' (2020) 5(3) *European Journal of Social Sciences Studies* 86 at 94.

[5] Hund J 'African witchcraft and western law: psychological and cultural issues' (2004) 19(1) *Journal of Contemporary Religion* 67 at 68. Hund makes similar remarks about Cameroon: 'In Cameroon, post-colonial legislators were faced with a similar problem...A natural question that arises is how courts are able to establish proof-based convictions in witchcraft cases.' (at 68).

This thesis has focused on this specific part of the problem at a theoretical, or, more accurately, *jurisprudential,* level. As this concluding chapter later shows, jurisprudential theorising has important practical and institutional implications too. The overall aim of this thesis is for the theoretical arguments, and the subsequent brief indication of their practical implications, to contribute towards strengthening the institutional legitimacy of African criminal process.

Beyond its practical implications, the theorising in this thesis opens up a corridor of intellectual conversation about evidence and proof between two contrasting, and often opposed, sets of discussants, from Africa and the Euro-American world. The last time a scholar attempted to connect African scholarship about Evidence Law to the discussion about evidence and proof, currently taken up by the Euro-American New Evidence Scholarship movement, was almost two decades ago.[6] Although he did not use a problem as endemic to Africa as witchcraft to forge this connection, Paizes does this by quoting sceptical commentary against theorising about evidence and proof and he thereafter responds to them:

> "There is little to be gained by exposing what we do to penetrating analysis or by trying to construct sophisticated models that rely on metaphysical distinctions, synthetic metaphors or scientific precision, since most of the things we do when it comes to legal proof take place at a visceral level where everything rests on such unscientific and non-academic notions as intuition, experience, "gut-feeling" and observations on human

[6] Paizes A 'Must we have a theory of proof?' (2003) *Acta Juridica* 113. Paizes captured the last of his 'seven wishes for the next twenty years' of Evidence scholarship in South Africa: 'I wish that the courts would acknowledge the need to identify a particular theory or philosophy of proof, either in general or in particular cases.' (Paizes A 'The law of evidence: Seven wishes for the next twenty years' (2014) *South African Journal of Criminal Justice* 272 at 289).

> nature. It is of such things that the world of forensic fact-finding, the so-called real world, are made, and any attempt to contain them within a coherent scientific theory, while it may dignify the subject and lend it a certain intellectual veneer, are bound to be artificial, unhelpful and, as a result, tend toward sophistry." My purpose is to show that such views are harmful and wrong.[7]

At the time these remarks were made the New Evidence Scholarship movement had undergone at least five stages of development in the Euro-American world.[8] One of the principal aims of this thesis has been to bridge this disconnection of theoretical conversation by using the phenomenon of witchcraft in Africa to re-interrogate some of the philosophical foundations of theories of evidence and proof within this peculiar context.

7.1 THEORETICAL DEVELOPMENTS: EXPLORING WITCHCRAFT IN NEW EVIDENCE SCHOLARSHIP

Most doctoral projects aim, and in many instances they are required, to make an 'original contribution to knowledge.'[9] *Originality* in this sense, however, is riddled with ambiguity.[10] The contentious topic of witchcraft in Africa has been studied, albeit in different ways, by many scholars previously. Cyprian Fisiy's sociological analysis of witchcraft cases in the eastern region of Cameroon;[11]

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[7] Paizes (note 6) 113.
[8] Twining W 'The new evidence scholarship' (1999) 40 *South Texas Law Review* 351 at 352-6.
[9] Morris C and Murphy C.C *Getting a PhD in law* (2011) 43-8 ('This requirement (along with the length) is what distinguishes a PhD from other writing projects you might have engaged in in university – you are expected to go beyond the boundaries of existing knowledge and understanding and offer something new').
[10] Phillips E.M and Pugh D.S *How to get PhD: A handbook for students and their supervisors* 5th ed (2010) 69-70 (for at least 15 possible interpretations of *originality*).
[11] Fisiy C.F *Palm tree justice in the Bertoua Court of Appeal: The witchcraft cases* (1990); Fisiy C.F & Geschiere P 'Judges and witches, or how is the State to deal with witchcraft?' (1990) 30(118) *Cahiers d'Études Africaines* 135; Fisiy C and Geschiere P 'Domesticating Personal violence: Witchcraft, courts and confessions in Cameroon' (1994) 64(3) *Journal of the International African Institute* 323 at 323; Geschiere P 'Witchcraft and the limits of

Oladepo Aremu's study of criminal exculpations such as provocation, mistake and insanity in Nigerian witchcraft-related murders;[12] Spence's feminist legal analysis of the social impact of witchcraft accusations against women[13] are examples of prior studies.[14] The subject-matter of this thesis has been engaged by scholars from a large pool of disciplines including, law, sociology, anthropology and history. The distinctive aim of this thesis is to develop a heuristic of evidential proof for the direct crime of witchcraft in Africa, thereby connecting this project to another interdisciplinary body of scholarship commonly known as New Evidence Scholarship ('NES').[15]

The nascent nature of NES implies that it lacks the clarity and certainty, regarding its scope, limits and methods, that usually come with the maturity of institutionalisation. Twining[16] describes the historical development of NES in

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the law: Cameroon and South Africa' in Comaroff and Comaroff (eds) *Law and Disorder in the Postcolony* (2006) 219.

[12] Aremu L.O 'Criminal responsibility for homicide in Nigeria and supernatural beliefs' (1980) 29(1) *International & Comparative Law Quarterly* 112 at 112. See also Seidman R.B 'Witch murder and *mens rea*: A problem of society under radical social change (1965) 28(1) *Modern Law Review* 46; Seidman R.B '*Mens rea* and the reasonable Africa: The pre-scientific world-view and mistake of fact' (1966) 15(4) *The International and Comparative Law Quarterly* 1135.

[13] Spence S *Witchcraft accusations and persecutions as a mechanism for the marginalization of women* (2017).

[14] See Waller W.D 'Witchcraft and colonial law in Kenya' (2003) 180 *Past & Present* 241; Gray N 'Witches, oracles and colonial law: Evolving anti-witchcraft practices in Ghana, 1927 – 1932' (2001) 34(2) *The International Journal of African Historical Studies* 339; Hund J 'Witchcraft and Accusations of Witchcraft in South Africa: Ontological denial and the suppression of African justice' (2000) 33 *Comparative & International Journal of Southern Africa* 366; Mesaki S 'Witchcraft and the law in Tanzania' (2009) 1(8) *International Journal of Sociology and Anthropology* 132; Chavunduka G.L 'Witchcraft and the law in Zimbabwe' (1980) 8(2) *Zambezia* 129 at 129; Carstens P.A 'The cultural defence in criminal law: South African perspectives (2004) 37 *De Jure* 312.

[15] The term was coined originally by Richard Lempert at a symposium on *Probability and inference in the Law of Evidence* 1986 hosted Boston University School of Law in April 1986: Lempert R 'The new evidence scholarship: Analysing the process of proof' (1986) 66 *Boston University Law Review* 439. According to Twining, Lempert was the first to coin the phrase, see Twining (note 8) 352, n4. For the papers at that symposium, see Tillers P and Green E.D (eds) *Probability and inference in the Law of Evidence: The uses and limitations of Bayesianism* (1988).

[16] Twining (note 8) 352-6; Twining W 'The New Evidence Scholarship' (1991) 13 *Cardozo Law Review* 295.

four phases: (1) initial debates about probability and statistics in adjudication after *People v Collins* was decided in 1968;[17] (2) sceptics, such as Laurence Tribe[18] and Jonathan Cohen,[19] began to emerge against 'trial by mathematics' in preference for so-called 'Baconian' (or 'non-Pascalian') heuristics of evidential proof; (3) a further group of sceptics emerged that preferred story models and other explanatory theories of proof over probabilistic theories;[20] (4) story-modellers later spread to Continental scholars in the Netherlands.[21] These debates relate to a subject-matter, evidence and proof, that this thesis has in common with NES.[22]

From the *jurisprudential* theorising of this thesis, three main theoretical developments have emerged that pertain to ongoing debates in NES. Firstly, the

[17] *People v. Collins*, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968). In the same year, Kaplan J 'Decision theory and the factfinding process' (1968) 20 *Stanford Law Review* 497 was published. This decision stimulated further debates about applying probability theories, such as Bayes Theorem, in adjudication, see Finkelstein M.O and Fairly W.B 'A Bayesian approach to identification evidence' (1970) 83(3) *Harvard Law Review* 489 at 490; Lempert R.O 'Modelling relevance' (1977) 75 *Michigan Law Review* 1021.

[18] Tribe L.H 'Trial by mathematics: Precision and ritual in the legal process' (1971) 84 *Harvard Law Review* 1329.

[19] Cohen J *The Provable and the Probable* (1977).

[20] See Bennet L.W and Feldman M.S *Reconstructing reality in the courtroom* (1981); Hastie R *et al Inside the jury* (1983); Pennington N and Hastie R 'Evidence evaluation in complex decision making' (1986) 51(2) *Journal of Personality and Social Psychology* 242; Pennington N and Hastie R 'A cognitive theory of juror decision making: The story model' (1991)(2-3) *Cardozo Law Review* 519; Pennington N and Hastie R 'The story model for juror decision making' in Hastie (ed) *Inside the juror* (1993) 192. See also Allen R.J 'A reconceptualization of civil trials' (1986) 66(3) *Boston University Law Review* 401; Allen R.J 'Explanationism all the way down' (2008) 5(3) *Episteme* 320 at 321; Allen R.J and Pardo M.S 'The problematic value of mathematical models of evidence' (2007) 36(1) *The Journal of Legal Studies* 107; Allen R.J 'Rationality, algorithms and juridical proof: A preliminary inquiry' (1997) 1(5) *International Journal of Evidence and Proof* 254.

[21] See Wagenaar W.A *et al Anchored narratives: The Psychology of criminal evidence* (1993); Wagenaar W.A 'Anchored narratives: A theory of judicial reasoning and its consequences' in Davies *et al* (eds) *Psychology, Law and Criminal Justice: International Developments in research and practice* (1995) 267.

[22] In his opening remarks as host at the historic Boston University 1986 symposium, Eric Green remarked that New Evidence Scholarship principally is concerned with the following question: 'what does it mean to prove something so that a court will either order a person imprisoned or order a transfer of money or property?' (Green E.D 'Forward' (1986) 66(3) *Boston University Law Review* 377 at 377). Twining, at the same symposium, said: 'This symposium has ranged widely over a bewildering variety of issues. It has, however, focused primarily on a single question: What constitute valid, cogent, and appropriate modes of reasoning about disputed questions of fact in adjudication.' (Twining W 'The Boston symposium: A comment' (1986) 66(3) *Boston University Law Review* 391 at 391)

development and application of argumentation schemes as heuristics of the evidential proof of the direct crime of witchcraft (Chapter 6, read with 5) add to the debates about *theories of proof* in NES. This is the main theoretical development made in this thesis because these particular heuristics constitute the answer we give to the main question about how the direct crime of witchcraft can be proven evidentially. These argumentation schemes combine the conceptual machinery of Wigmore's taxonomy of propositions of fact with the *defeasible modus ponens* argument developed, among others, by Bart Verheij and Douglas Walton. These models are also very different from popular NES heuristics such as probabilistic and explanatory theories of evidence and proof. There are at least two pertinent differences to mention here. The first of these is that our heuristics deploy argumentation schemes and critical questions within Walton's New Dialectical framework to *identify, contextualise* and *evaluate* (logically test) evidential argumentation. The second major difference is that our heuristics "take facts seriously" by recognising the variations between different *facta probanda*, for example, *harm* (in the form of *fear* in our case) as distinguishable from *causation*, and having the required flexibility of application with respect to each.[23]

The second major theoretical development flows from the first. The evidential argumentation schemes are evaluated (logically tested) at *micro* and

[23] Several theories of evidence and proof are criticised in Chapter 5 for applying indiscriminately either to *all facta probanda* or to criminal trials in general.

macro levels[24] to achieve a closer approximation of the high standard of proof, *beyond a reasonable doubt* or *intime conviction,* in criminal cases.[25] These levels of theorising engage Hastings' critical questions,[26] Walton's 'four kinds of dialogue rules'[27] and Allen and Pardo's explanatory criteria of evaluation.[28] These are all types of evidential evaluation that are comparable to the combination of *micro* and *macro* levels of evaluation applied to the argumentation schemes discussed in Chapter 6.

The third theoretical development pertains to the analysis, reformulation and application of Wigmore's taxonomy of propositions to the evidential argumentation schemes for witchcraft cases in Chapter 6. Wigmore himself developed this taxonomy as part of the background to his Charting method.[29] This thesis revives this "peripheral" part of Wigmore's forgotten text. The more common invocations of Wigmore in NES relate to his Charting method in the last part of the *Principles.*[30] Wigmore in his discussion goes through a variety of

[24] This conceptual distinction was borrowed from Pardo M.S 'The nature and purpose of evidence theory' (2013) 66(2) *Vanderbilt Law Review* 547 at 557.
[25] This is in reaction to Laudan's criticism of Allen and Pardo's Inference to the best explanation standard as being weaker than the standard of proof required in criminal cases, see Laudan L 'Strange bedfellows: Inference to the best explanation and the criminal standard of proof' (2007) 11 *International Journal of Evidence & Proof* 292.
[26] Hastings A.C *A reformulation of the modes of reasoning in argumentation,* unpublished PhD thesis (Northwestern University) (1962), cited by Godden D.M and Walton D 'Argument from expert opinion as legal evidence: Critical questions and admissibility criteria of expert testimony in the American legal system' (2006) 19(3) *Ratio Juris* 261 at 261 ('Critical questions were first introduced by Arthur Hastings as part of his analysis of presumptive argumentation schemes').
[27] Walton D.N *Informal logic: A handbook for critical argumentation* (1989) 9-10.
[28] Most recently, see Allen R.J and Pardo M.S 'Relative plausibility and its critics' (2019) 23(1-2) *The International Journal of Evidence & Proof* 5.
[29] Wigmore theorises about this in Part 1, entitled 'Circumstantial evidence,' in Wigmore J.H *The principles of judicial proof as given by logic, psychology and general experience and illustrated in judicial trials* (1913) 30-311.
[30] Tillers P and Schum D 'Charting new territory in judicial proof: Beyond Wigmore' (1988) 9(3) *Cardozo Law Review* 907; Anderson T and Twining W *Analysis of evidence: How to do things with facts?* (1991); Schum D *Evidential Foundations of Probabilistic Reasoning* (1994); Kadane J.B and Schum D.A *A probabilistic analysis*

different propositions of fact in recognition of their variations, which is rarely done within NES. However, Wigmore preferred to apply his propositions of fact as inputs to his charts, whereas they were used as propositional inputs into the evidential argumentation schemes discussed in Chapter 6. Another notable difference is that a distinction is drawn, which is absent from Wigmore's work, between empirical ('Fact-to-Fact') and normative ('Norm-to-Fact') inferential lines of reasoning.

7.2 ADVANCING LAW REFORM

Statutory witchcraft prohibitions, usually in the form of a separate statute entitled "Witchcraft Suppression Act" (or sometimes just 'Witchcraft Act') in anglophone countries or as part of a comprehensive criminal law code in francophone Central and West Africa,[31] generally date back to the colonial early to mid-20th century. There is wide-ranging criticism levelled against these statutes throughout the continent.[32] In recognition that much has changed in Africa since the colonial period, several law reform initiatives currently are underway. Kenya's Law Reform Commission commenced a complete review of its

of the Sacco and Vanzetti evidence (1996); Praaken H 'Analysing reasoning about evidence with formal models of argumentation' (2004) 3 *Law, Probability and Risk* 33; Anderson T and Twining W *Analysis of evidence* 2nd ed (2005).

[31] Mgbako C.A and Glenn A 'Witchcraft accusations and human rights: Case studies from Malawi' (2011) 43(3) *George Washington International Law Review* 396; Katz L *Bad acts and guilty minds: Conundrums of the criminal law* (1987) 82-3.

[32] Tebbe N 'Witchcraft and statecraft: liberal democracy in Africa' (2007) 96 *Georgetown Law Journal* 183 at 230-3; Forsyth M 'The regulation of witchcraft and sorcery practices and beliefs' (2016) 12 *Annual Review of Law and Social Science* 331 at 339-345; HelpAge International *Using the law to tackle accusations of witchcraft: HelpAge International's position* (2011) 13, available at: www.a4id.org (accessed: 23 October 2017); Mgbako and Glenn (note 31) 381.

witchcraft legislation in December 2014;[33] the South African Law Reform Commission's review began about six years earlier in September 2008;[34] Malawi's Law Commission began its legislative reform efforts in October 2006.[35] At the time of writing this thesis, these reform initiatives remain ongoing.

The arguments made in Chapters 3 and 4, relating to the *institutional* and *material* conditions of the overall argument, have several procedural and doctrinal implications that are pertinent to the ongoing law reform initiatives. Firstly, it was argued in Chapter 3 that the orthodox 'Adversarial' or 'Inquisitorial' ('A-I') characterisations of criminal process in Africa have become anachronistic and plainly inaccurate.[36] Instead, African criminal process is described as being *complex* and *sui generis*, especially given that about 90% of the population in Africa uses traditional courts. The witchcraft statutes in most anglophone jurisdictions[37] confer the jurisdiction to hear witchcraft cases on the defunct colonial relic of the 'District Commissioner,' which applied an orthodox

[33] Kenya Law Reform Commission 'Justification for review of Witchcraft Act, CAP 67' *KLRC Blog* (23 January 2017), available at www.klrc.go.ke (accessed 23 October 2017).
[34] South African Law Reform Commission *The Review of the Witchcraft Suppression Act 3 of 1957* (project 135, discussion paper 139) (2016), available at: www.justice.gov.za (accessed: 23 October 2017).
[35] Malawi Law Commission *Witchcraft Act review problem issue paper* (April 2009), available at: www.sdnp.org.mw (accessed: 11 December 2017).
[36] Cf. Kayitana E 'The accusatorial and inquisitorial models of criminal procedure: A historical and comparative approach' (2019) 3(2) *African Journal of Law and Human Rights* 187 at 187; Herrmann J 'Various Models of Criminal Proceedings' (1978) 2(1) *South African Journal of Criminal Law and Criminology* 3; Joireman S.F 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' (2001) 39(4) *The Journal of Modern African Studies* 571; Harms L.T.C 'Demystification of the inquisitorial system' (2011) 14(5) *Potchefstroom Electronic Law Journal* 1; Ogbuabor C.A 'Inquisitorial and adversarial process in Nigeria's criminal justice system: The dilemma of a colonized state' (2015) 38(2) *University of Western Australia Law Review* 175.
[37] Witchcraft Act [Cap 67, of the Laws of the Republic of Kenya, 1925], section 9(1). Section 8 obliges, under threat of punitive sanction, any local chief to 'forthwith report' any witchcraft practices suspected or alleged to the District Commissioner. This jurisdictional practice is found in other jurisdictions in east Africa too, see Witchcraft Act [Cap 18, Laws of the United Republic of Tanzania, 1928]. As indicated in Chapter 3, the court with jurisdiction to hear witchcraft cases in francophone jurisdictions is the *tribunal de premiere instance.*

Common law adversarial procedure.[38] Whichever court is deemed suitable by law reformers as a replacement for the District Commissioner must avoid alienating the majority of litigants by applying orthodox A-I procedures that are the same as those applied in state courts where only approximately 10% of the Nubian African population litigate.

Secondly, it is argued in Chapters 3 and 6 that the *Nganga* ought to be afforded the role of an expert witness qualified to testify about the existence and content of indigenous norms of African communities in witchcraft cases[39] This role would be carefully circumscribed given the prevailing uncertainty regarding the nature of the practices of this popular local institution. It was argued in Chapter 6 that the determination of whether or not any conduct is understood to be *provocative* in the *indigenous* sense, or whether a particular victim in fact experienced *fear*, is strongly linked to the nature and content of the popular indigenous norms that are adhered to by local African communities. The *Nganga*'s expert knowledge in indigenous customs could be useful, in the same way as an anthropologist or foreign law expert, in this regard. The prevailing practice in cases involving the interpretation of customary law norms is to call a university-based professor of African customs, or African customary law, to give expert testimony.[40] This thesis argues that the *Nganga,* who is already regarded

[38] On the abolishing of the District Commissioner, see Bienen H *Kenya: The politics of participation and control* (1974) 40, n25.
[39] The *Nganga* is a regular participant in the only jurisdiction in Nubian Africa that regularly prosecutes people for the direct crime of witchcraft, see Geschiere (note 11) 230-9.
[40] Bekker J.C and Rautenbach C 'Nature and sphere of application of African customary law in South Africa' in Rautenbach *et al* (eds) *Introduction to Legal Pluralism* 3rd ed (2010) 15 at 29. For example, in *Mabuza v Mbatha*

as an expert by many African communities, must be added to the pool of experts in witchcraft cases.

A third implication for the reformers to consider is the legal definition of witchcraft proposed in Chapter 4:

> The *intentional commission* of an *action* that is *provocative in the indigenous sense* and *causes fear* in *another human being.*

Chapter 4 draws on the language used in various statutes across Africa to formulate a succinct and coherent legal definition of witchcraft. The only existing (legal) definition of witchcraft is found in section 2 of Tanzania's witchcraft statute. This definition was shown to be unsatisfactory because it contains several concepts (such as: "sorcery," "enchantment," "bewitching," "occult power" and "occult knowledge") that beg for further definition. The italicised elements in the proposed definition are technical, and thus require further elucidation, but at least the concepts used in this particular definition are familiar already in established criminal law doctrine. From an evidential point of view, these italicised elements also perform the role of being the *facta probanda* of the direct crime of witchcraft. Neither the Tanzanian statute, nor any other for that matter, indicates clearly what the relevant *facta probanda* of the direct crime of witchcraft are. These inputs of materiality, that is, the *facta probanda* of a crime, are indispensable for the operation of any heuristic of evidential proof. Generating a set of *facta probanda*

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an expert witness was used to testify about the indigenous practice of *ukumekeza*: *Mabuza v Mbatha* 2003 (4) SA 218 (C).

is helpful also because it clarifies a common error that emanates from colonial judges and administrators, but continues to persist across the continent, about the distinction between malevolent witchcraft-related practices ('M practices') and African traditional cultural practices ('C practices') in general. For example, many Africans consult with expert herbalists, traditional healers and other types of *Nganga* across the continent, but this in itself is not a contravention of the witchcraft statutes. Chapter 4 isolates *facta probanda* such as *intention*, the victim experiencing *fear* and the conduct in question being understood as being *provocative* within the *indigenous context* concerned, all of which distinguish C practices from M practices.

Fourthly, Chapter 4 clarifies the relationship between the many different types of witchcraft crimes by drawing a theoretical distinction between *direct* and *indirect* versions of the crime. It was explained in Chapter 4 that the witchcraft statutes across the continent create at least six types of offences, proscribing *accusations*, *solicitation, possession of instruments of witchcraft, divination, performing the functions of a witchdoctor* and *the practice of witchcraft itself*, but it has not been clarified as to how many such offences have been created, what relationship they have to each other and how they relate to and are distinguishable from traditional African cultural practices. The answers to these questions will have significant doctrinal implications for how these cases will be prosecuted throughout the continent. The theoretical distinction drawn between *direct* and

indirect crimes of witchcraft in this thesis is one way of resolving these problems, though there may be others that reformers might consider.[41]

The sixth implication arising from Chapter 4 relates to the proper conception of the element of harm with respect to the direct crime of witchcraft. The colonial legislators who passed the witchcraft statutes in Nubian African jurisdictions held the view that the practice of witchcraft was an impossibility, a symptom of irrationality. Therefore, the only plausible legislative objective in order to avert the incidents of witchcraft-related violence, was to *suppress* or eradicate traditional African beliefs altogether.[42] Zimbabwe's historic shift in 2005 was to accept that the commission of witchcraft offences was indeed possible, but that it was better to target the 'real fear' that such conduct 'inspires' in the pertinent targeted victims. This thesis uses Feinbergian analysis to expound the *harmfulness* of *fear* for purposes of criminal liability. Currently, unhelpful and confounding references such as "pretending to exercise witchcraft" and "supernatural power" appear on witchcraft statutes throughout the continent. It is suggested in this thesis that these phrases are meaningless and unhelpful, and that it is preferable for law reformers to adopt an approach inspired by Zimbabwe's model.

Legislative reform processes have long since commenced, but none has yet produced a draft bill. For as long as the majority of Nubian African communities

[41] Hund (note 14) 383-4; Tebbe (note 32) 183; Mesaki (note 14) 132.
[42] See Pantazis A 'Book review: *Witchcraft violence and the Law of South Africa* (edited by John Hund)' (2004) 121 *South African Law Journal* 926.

continue to hold witchcraft-related beliefs, and the incidents of violent "mob justice" persist, statutes prohibiting witchcraft practices remain important both for general crime control and to retain the institutional legitimacy of African criminal process.

7.3 LOOKING AHEAD: FUTURE RESEARCH DIRECTIONS

This summary of the thesis' theoretical developments, and its practical implications for ongoing law reform leads naturally into some concluding reflections on avenues for further research. Future research directions arise principally from questions that were bracketed in the preceding chapters as being beyond the ambit of this thesis and from the debates in existing bodies of scholarship to which this thesis is aligned. Some of the reasons for the bracketing of these questions include: the tangential nature of their relation to the main question of this thesis, *how the direct crime of witchcraft can be proven evidentially*; the resource constraints of my own personal expertise, time and word-limit; and their feasibility for a project conducted at doctoral level. This section of the chapter enumerates these prospective research directions and indicates their relation to NES and ongoing research in Africa.

Firstly, the question about whether a theoretical project about evidence and proof can be described as being *Jurisprudential* implicates the proper scope and limits of this branch of law. William Twining's work has been coloured by similar suspicions among Evidence Law teachers:

> [T]here is the suspicion that Twining, as a jurist, is intent on turning the Law of Evidence into a branch of Jurisprudence. That is not a project to which Evidence teachers could be expected to subscribe. Like the doctrinal lawyers first confronted with the challenge of socio-legal perspectives in the late 1970s and 1980s, they might cheerfully concede that sociology or philosophy are worthwhile forms of inquiry, but still insist that law teaching should be about the rules of law that are applied, argued over and developed in law courts, which in the present context means teaching the Law of Evidence as Thayer and Cross intended it.[43]

Roberts is sympathetic to Twining's approach to Evidence:

> In reality, it is preposterous to portray Twining as a kind of academic infiltrator intent on betraying the Law of Evidence to the expansionist ambitions of Jurisprudence. To the contrary, Twining's concentration on fact-finding and proof makes his approach to Evidence far more 'practical' than the traditional focus on exclusionary rules, since fact management is a feature of every case, for every participant and at every stage of forensic process, whereas points of law are comparatively localized and infrequent. Yet suspicions about Twining's motives and objectives may persist amongst the relatively uninitiated. For after all, he does not publish articles in the doctrinal Reviews, and there is little to suggest that he is particularly well-versed in the case law.[44]

The description, in the main title and throughout, of this thesis as a *Jurisprudential Study* is meant to convey no more than that the focus here is on a *theoretical* project in *law*. However, it is acknowledged in Chapter 2 that this characterisation remains contested among some scholars, not so much within the NES movement, but among Evidence Law scholars and teachers. The part of law that this thesis focuses on is characterised as being *criminal,* as opposed to being *civil* in the context of litigation proceedings, and yet, there is no institutionalised

[43] Roberts P 'Rethinking the law of evidence: A twenty-first century agenda for teaching and research' (2002) 55(1) *Current legal problems* 297 at 310.
[44] Ibid.

discipline called *criminal jurisprudence.*[45] By the same token, NES is not a discipline either. One important task that will contribute towards the maturity of these interdisciplinary areas is further self-conscious research into their peculiar methodologies and defined range of problems.

Secondly, apart from being a study in criminal jurisprudence, the project of this thesis was described in Chapter 2 as being *Afrocentric,* which continues to shrug off its sociological origins in order to find its independence as a general research method. Reviere uses *Afrocentricity* as a method and yet, the concept was developed originally as a sociological theory, which is the sense in which it continues to be used by some scholars.[46] This is another area for further research given the ongoing debates about decolonisation across the continent.[47] Many of these debates, however, extend well beyond the scope of this thesis.

Most of the bracketed questions in this thesis were raised in Chapter 3, which dealt with the institutional condition for the evidential proof of the direct crime of witchcraft in the overall argument. This is because African criminal

[45] Similar attempts to theorise about the substantive and procedural aspects of international criminal law are being debated currently, see Combs N.A 'International criminal jurisprudence comes of age: The substance and procedure of an emerging discipline' (2001) 42(2) *Harvard International Law Journal* 555 ('[I]f the jurisprudential field known as international criminal law may be considered new, the conduct that it seeks to punish and prevent is anything but.')

[46] Diop C.A *The African origin of civilisation: Myth or reality* (1974); Bangura A.K 'From Diop to Asante: Conceptualising and contextualising the Afrocentric paradigm' (2012) 5(1) *The Journal of Pan African Studies* 103; Verharen C 'Afrocentricity, ecocentrism and ecofeminism: New alliances for socialism' (2003) 17(2) *Socialism and Democracy* 73.

[47] See Agozino B 'Imperialism, crime and criminology: Towards the decolonisation of criminology' (2004) 41 *Crime, Law and Social Change* 343; Adebisi F.I 'Decolonising education in Africa: Implementing the right to education by re-appropriating culture and indigeneity' (2016) 67(4) *Northern Ireland Legal Quarterly* 433; Himonga C and Diallo F 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20(1) *Potschefstroom Electronic law Journal* 1; Himonga C 'The Constitutional Court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law' (2017) *Acta Juridica* 101.

process is bedevilled with many complicated institutional problems that could take up multiple research projects. Most pressingly, approximately 90% of Nubian Africa's population litigate in traditional courts that, depending on the part of the continent, generally have limited or no *official* criminal jurisdiction.[48] By all accounts, this is a substantial threat to the institutional legitimacy not only of these courts, but of African criminal process in general, especially in the context of violent incidents of self-help associated with witchcraft.[49] South Africa is in the process of passing a bill that confers both civil and criminal jurisdiction on its traditional courts to cater for approximately 40% of its population that regularly litigates in these courts.[50] However, the detailed criticism levelled against this bill is consistent with that which is levelled against traditional courts elsewhere on the continent.[51] This is an area that is ripe for further research.

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[48] The difference between 'civil' and 'criminal' cases in traditional courts is described as being 'not a pronounced one,' but 'we must not go so far as to say that customary law and, accordingly, the customary courts do not distinguish between civil and criminal cases,' see Koyana D.S 'Traditional courts in South Africa in the twenty-first century' in Fenrich *et al* (eds) *The future of African customary law* 227 at 239. The curtailed jurisdiction of Botswana's *dikgosi* is dependent on the consent of the litigants concerned, see Morapedi W.G 'Customary law and chieftainship in twenty-first-century Botswana' in Fenrich *et al* (eds) *The future of African customary law* 247 at 258. The adjudicative powers of Ghanaian traditional courts are limited to 'matters affecting chieftaincy,' see Abotsi E.K and Galizzi P 'Traditional institutions and governance in modern African democracies: History, challenges and opportunities in Ghana' in Fenrich *et al* (eds) *The future of African customary law* 266 at 280. The jurisdiction of Malawian traditional courts, which are also known as 'Local Courts,' is limited to 'civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament,' see Local Courts Act 9 of 2011, section 110(3); Ubink J 'Access vs Justice: Customary courts and political abuse – Lessons from Malawi's Local Courts Act' (2016) 64(3) *American Journal of Comparative Law* 745.

[49] See Nwauche E.S 'The right to freedom of religion and the search for justice through the occult and paranormal in Nigeria' (2008) 16(1) *African Journal of International and Comparative Law* 35 at 71; Bekker J.C 'Book review: Witchcraft violence in South Africa' (2004) 1 *De Jure* 181 at 183; Hund (note 14) 367-8; Ludsin H 'Cultural denial: what South Africa's treatment of witchcraft says for the future of its customary law' (2003) 21 *Berkeley Journal of International Law* 62 at 87;

[50] Traditional Courts Bill B1 – 2017, clause 4(2)(a), read with Schedule 2. For a detailed history of this bill, see South African Law Reform Commission's project 090: *Traditional courts and the judicial function or traditional leaders*, available at: justice.gov.za (accessed: 5 March 2020). See also Mnisi-Weeks S 'Traditional courts Bill: Access to justice or gender trap?' in Nhlapo *et al* (eds) *African Culture, Human Rights and Modern Constitutions* (2013) 23.

[51] Nanima R.D 'A missing link in the Traditional Courts Bill 2017' (2018) 65 *South African Crime Quarterly* 23; Mnisi-Weeks S 'Rgeulating vernacular dispute resolution forums: Controversy concerning the process, substance

The reclassification of African criminal process as being *complex* and *sui generis* charts a new path that leads Africa away from the anachronistic orthodox Adversarial-Inquisitorial binary.[52] African proceduralists will be able to join in ongoing debates about the reclassification of this orthodox binary in Europe. Trends of *convergence*[53] and *realignment*[54] of trial process in this part of the world have been prompted by the burgeoning human rights jurisprudence of the European Court of Human Rights.[55] Much of the prevailing African scholarship in this area, however, has held firmly on to the orthodox Adversarial-Inquisitorial binary despite, as pointed out in Chapter 3, the institutional threats this poses to African criminal process. There is room for further research on the reclassification, the redesign to cater for the majority of litigants and the strengthening to avoid possible abuses of power by institutional participants.

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and implications of South Africa's Traditional Court's Bill' (2012) 12(1) *Oxford University Commonwealth Journal* 133.

[52] See the sources cited in note 14.

[53] Markesinis B.S 'Learning from Europe and learning in Europe' in Markesinis (ed) *The gradual convergence: Foreign ideas, foreign influences, and English law on the eve of the 21st century* (1994) 1 at 30; Hermida J 'Convergence of civil law and common law in the criminal theory realm' (2005) 13(1) *University of Miami International & Comparative Law Review* 163; Merryman J.H 'on the convergence (and divergence) of the Civil law and the Common law' (1981) 17(2) *Stanford Journal of International Law* 357. Cf. Legrand P 'European legal systems are not converging' (1996) 45(1) *International & Comparative Law Quarterly* 52; Damaška M 'The uncertain fate of evidentiary transplants: Anglo-American and Continental experiments' (1997) 45 *American Journal of Comparative Law* 839; Jackson J.D 'Common law Evidence and the Common law of Human Rights: Towards a harmonic convergence' (2019) 27(3) *William & Mary Bill of Rights Journal* 689.

[54] Jackson J.D 'The effect of Human Rights on criminal evidentiary processes: Towards convergence, divergence or realignment?' (2005) 68(5) *Modern Law Review* 737 at 739-740. On the hybridisation of Common Law and Continental procedural systems at public international law level, see Jackson J 'Transnational faces of justice: Two attempts to build common standards beyond national boundaries' in Jackson *et al* (eds) *Crime, procedure and evidence in a comparative and international context: Essays in honour of Professor Mirjan Damaška* (2008) 221; Delmas-Marty M 'Reflections on the hybridisation of criminal procedure' in Jackson *et al* (eds) *Crime, procedure and evidence in a comparative and international context: Essays in honour of Professor Mirjan Damaška* (2008) 251.

[55] Jackson J.D and Summers S.J *The internationalization of criminal evidence: Beyond the common law and Civil law traditions* (2012) 131-2.

A fifth area that is ripe for further research concerns the institutional participation of the *Nganga* in witchcraft cases and African criminal process in general. As noted throughout, this indigenous expert is already a regular participant in informal and unreported traditional court trials. Moreover, many communities across the continent commonly consult the *Nganga* on various issues, including: the provision of herbal remedies for illnesses, the resolution of social conflicts of various kinds and to ascertain the content and meaning of African cultural history and prevailing norms. The foregoing narrative limited the participation of the *Nganga* in witchcraft cases to the giving of expert testimony on the existence and nature of African cultural norms in the same way, for example, an anthropologist would. The imposition of this limitation is owing largely to how little is known about the methods used by the *Nganga* as well as the nature of the field of indigenous knowledge as a whole. There are several voluntary private associations, such as the African National Healers Association (ANHA), which has over 2000 members; the Zimbabwe National Traditional Healers Association (ZINATHA) with approximately 28 000 members; the Tanzania Traditional Health Practitioners Association (Chama cha Waganga na Wakunga wa Tiba Asilia, CHAWATIATA),[56] but very little scholarly work has been done on the operations and methods employed by these institutions.

[56] Chana H.S *et al* 'With an eye to good practice: Traditional healers in rural communities' (1994) 15 *World Health Forum* 144 at 145; Ngoma M.C 'Common mental disorders among those attending primary health clinics and traditional healers in urban Tanzania' (2003) 183 *British Journal of Psychiatry* 349.

Sixthly, there is also room for further research regarding the statutory language that is to be used in witchcraft statutes. For example, some jurisdictions explicitly require 'intention,' whereas others require that the conduct concerned be 'calculated to' result in the proscribed consequence. We have interpreted the latter mental state in Chapter 4 to refer to strict liability, but there is little else, other than scholarly publications, to guide this interpretation. The expression of the fault requirement plainly as 'intention' is far less ambiguous and controversial in my view, but it is acknowledged in Chapter 4 that this particular requirement is not expressed uniformly by African jurisdictions currently.

Other areas for further research from Chapter 4 (our *materiality* condition) include: the obviation of a causation requirement by interpreting witchcraft as an ontological impossibility, and thus, reducing the direct crime of witchcraft to a 'conduct crime.' The arguments made in relation to these issues for purposes of this thesis are not exhaustive, and there certainly is room for further research in these areas.

The debates about adequate heuristics of evidential proof, both under the banner of NES and otherwise, have continued as Evidence Law forges forward with the revolution that was called for initially by Wigmore in 1913.[57] Expanding the rediscovery of Wigmore's *Principles* has also been ongoing for some time

[57] For an overview of the explosion of scholarship under the "New Evidence Scholarship" banner, see Park R *et al* '"Bayes wars redivivus – An exchange"' (2010) 8(1) *International Commentary on Evidence* 1; Pardo M.S 'The nature and purpose of evidence theory' (2013) 2(3) *Vanderbilt Law Review* 547.

now.[58] The neo-Wigmoreans' attraction mainly has been towards his Charting method in Part 3 of the *Principles*, and less about his (informal) forensic argumentation in Part 1. There are two specific areas of Wigmorean forensic argumentation that are ripe for further research in my opinion. Firstly, the only comparable taxonomy of propositions of fact divides propositions into Source, Activity and Offence levels in forensic science.[59] There is room for further research that improves and engages with Wigmore's taxonomy, which classifies propositions of fact at three temporal levels and into four substantive categories. Secondly, Wigmore models trials as involving four moves of argumentation, namely: *assertion, explanation, denial* and *rivalry*.[60] The only engagement with this particular theorising has been by Anderson, Twining and Schum, who reformulate Wigmore's model into a seven step protocol for contemporary interdisciplinary settings.[61]

Although there has been some work in developing formal logical tools using Artificial Intelligence systems for evidential reasoning,[62] there are even

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[58] Tillers P and Schum D 'Charting new territory in judicial proof: Beyond Wigmore' (1988) 9(3) *Cardozo Law Review* 907; Anderson T and Twining W *Analysis of evidence: How to do things with facts?* (1991); Schum D *Evidential Foundations of Probabilistic Reasoning* (1994); Kadane J.B and Schum D.A *A probabilistic analysis of the Sacco and Vanzetti evidence* (1996); Praaken H 'Analysing reasoning about evidence with formal models of argumentation' (2004) 3 *Law, Probability and Risk* 33; Anderson T and Twining W *Analysis of evidence* 2nd ed (2005).

[59] Evett I.W, Jackson G, Jones P.J and Lambert J.A 'A hierarchy of propositions: Deciding which level to address in casework' (1998) 38(4) *Scientific & Justice* 231 at 232. Aitken *et al* add 'sub-source' propositions to this hierarchy: Aitken C *et al Fundamentals of probability and statistical evidence in criminal proceedings (Practitioner guide no. 1*) (2010) 55.

[60] Wigmore J.H *The principles of judicial proof as given by logic, psychology and general experience and illustrated in judicial trials* (1913) 26.

[61] Anderson T, Schum D and Twining W *Analysis of Evidence* 2nd ed (2005) 114-5.

[62] Praaken H *Logical tools for modelling legal argument: A study of defeasible reasoning in Law* (1997); Nissan E and Rousseau D 'Towards AI formalisms for legal evidence' in Raś and Skowron (eds) *Foundations of Intelligent Systems* (1997) 328; Verheij B 'Dialectical argumentation as a heuristic for courtroom decision-making' in Koppen and Roos (eds) *Rationality, information and progress in Law and Psychology* (2000) 203;

fewer examples of applications of argumentation schemes to evidential argumentation in natural language, that is, in the informal (logical) sense.[63] The fusion of Wigmorean forensic argumentation and contemporary argumentation models is ripe for further research. This thesis has combined the sophistication of Wigmore's taxonomy of propositions of fact with the *defeasible modus ponens* models proposed by Verheij and Walton. The bulk of the informal models from argumentation theory are concerned either with 'questions of law' or with adjudication as a whole, and less with questions of evidence and proof.[64] There is room for further research in these areas.

A related concern pointed out in Chapter 5 is that most scholars in the NES movement develop models of evidential proof that pay insufficient attention to standpoint. This kind of problem is common in interdisciplinary debates, but it raises alarm when it produces the kinds of errors mentioned in Chapter 5. Wigmore's reminder is pertinent on this point: 'The first step is to state to ourselves, in words, precisely what the offered evidence is, and then precisely

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Verheij B 'Automated assistance for lawyers' in *ICAIL '99: Proceedings of the 7th International Conference on Artificial Intelligence and Law* (1999) 43; Walton D *Argumentation methods for Artificial Intelligence in Law* (2005).

[63] See Macagno F and Walton D 'Presumptions in legal argumentation' (2012) 25(3) *Ratio Juris* 271; Verheij B 'Dialectical argumentation with argumentation schemes: An approach to legal logic' (2003) 11 *Artificial Intelligence and Law* 167; Gordon T and Walton D 'Legal reasoning with argumentation schemes' in *ICAIL '09: Proceedings of the 12th International Conference on Artificial Intelligence and Law* (2009).

[64] For examples: Horovitz J *Law and logic: A critical account of legal argument* (1972); Perelman C.H *Logique juridique. Nouvelle Rhétorique* ('Juridical logic. New rhetoric') (1976); Aarnio A *On legal reasoning* (1977); Krawietz W and Alexy R *Metatheorie juristischer argumentation* ('metatheory of legal argumentation) (1983); Peczenik A *The basis of legal justification* (1983); Alexy R *A theory of legal argumentation: The theory of rational discourse as theory of legal justification* (translated by R. Adler and N MacCormick) (1989); Soeteman A *Logic in law: Remarks on logic and rationality in normative reasoning, especially in law* (1989); MacCormick N *Rhetoric and the rule of law: A theory of legal reasoning* (2005); Feteris (note 1); Dahlman and Feteris (note 34).

[64] Feteris E.T (note 34) 355-6; Rieke R.D 'Investigating legal argument as a field' in Ziegelmueller and Rhodes (eds) *Dimensions of argument: Proceedings of the second summer conference on argumentation* (1981) 152.

what is its supposed *Probandum*. Until this is done, it is useless to go further.'[65] Wigmore made this point repeatedly in his two main texts:

> In searching, then, for the true significance of a piece of evidence, it should always be remembered that the prime question serving as the key, not merely to this classification, but at all times to the use of evidence before the Courts, is: What particular proposition is the fact offered to prove? With the aid of this question, there will be little difficulty in discovering the specific problem which any particular kind of evidence involves.[66]

The kinds of errors that are common in NES often have to do with a conflation or disregard of the different kinds of inferential reasoning patterns, Fact-to-Fact or Norm-to-Fact, involved with each particularised proposition of fact. This shortcoming in NES is a live issue that requires further research involving interdisciplinary scholars that are not 'talking past each other.'[67] In the meantime, the evidential argumentation schemes developed and applied to witchcraft cases in this thesis demonstrate the kind of focus on standpoint and institutional context required to avoid these errors.

The most difficult part about the project of this thesis happens to be its most peculiar feature, which is its methodological pluralism and interdisciplinarity. A loaded and controversial phenomenon, witchcraft, is deliberately chosen and used to revive a number of complicated questions about evidence and proof; to connect sets of conversations that otherwise may have

[65] Wigmore J.H *The principles of judicial proof as given by logic, psychology and general experience and illustrated in judicial trials* (1913) 27.
[66] Wigmore J.H *Evidence in Trials at Common Law* (revised by Peter Tillers) (1983) 1142.
[67] Twining W 'Narrative and generalisation in argumentation about questions of fact' (1999) 40(2) *South Texas Law Review* 351.

remained separate (New Evidence Scholarship in Africa); to reintroduce two worlds that have a tortured and abominable history (Africa and the Euro-American world); to study a phenomenon using 'rational methods' (forensic argumentation) in a place where it is widely associated with 'irrationality' (United Kingdom); ultimately, to pick up the historic ruins of a fractured and complicated continent and contribute something, a small thing, towards its unity and progress.

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