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HUMAN RIGHTS IN BOTSWANA, LESOTHO AND SWAZILAND
IMPLICATIONS OF ADHERENCE TO INTERNATIONAL HUMAN RIGHTS TREATIES

BY

STEVEN NEFF

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EFFECT ON BOTSWANA, LESOTHO AND SWAZILAND OF INTERNATIONAL HUMAN RIGHTS NORMS

INTRODUCTION

The Banjul Charter on African and Peoples' Rights (adopted by the Organization of African Unity and submitted for ratification in 1981) is the world's third major regional system for the advancement of human rights. The first two were the European (i.e., Western European), based on the European Convention for the Preservation of Human Rights and Fundamental Freedoms[1] (in force since 1953), and the American, based on the American Convention of Human Rights[2] (in force since 1978). It would be difficult to deny that this incipient African system represents the boldest experiment of the three, since Africa, in sharp contrast to the two other regions, has so little in the way of a shared, unified cultural or juridical tradition and also, because of its colonial past, so little experience in democratic traditions. When one considers in addition the severe handicaps which result from poverty and under-development it requires some considerable effort to be optimistic about the development of a truly effective African human rights mechanism. Indeed, as the discussion below will bring out in more detail, the internal weaknesses of the Banjul Charter are such as to cast a still further pall on the prospects for the development of human rights in Africa.

Notwithstanding all of these considerations, however, it would be unwise to give in at this still-early stage to undue pessimism, for the Banjul Charter has its strengths as well as its weaknesses and the presently-existing juridical base on which the Charter will operate - i.e., the domestic legal systems of the various African states - may well be stronger, or potentially so, than many observers

currently appreciate. Such appears to be the case, in any event, with the three states which are the objects of this present survey: Botswana, Lesotho, and Swaziland. There appear to be shortcomings in the law of all three of these, which will require correction if they are to adhere to the Banjul Charter. In most cases though, the changes which are needed will not be fundamental ones - that is, they will not be ones that necessitate basic changes in the very legal fabric of the societies in question. They will be more in the nature of the correction of scattered shortcomings, as the following discussion will reveal in some detail.

The major exception to this last statement is the security legislation of the states of Lesotho and Swaziland, which do make substantial and unacceptable (from the standpoint of international human rights law) inroads into rights protected by the Banjul Charter. The most flagrant of these inroads, as the discussion below will indicate, are in the areas of arbitrary detention (in the case of both Lesotho and Swaziland) and presumption of innocence (in the case of Lesotho). Even in these matters, however, the changes required will not be ones that go to the very root of the legal systems in question. Basically, "all" that would be required would be the "simple" repeal of legislation which is superfluous anyway, in the sense that it sets up a special regime for certain specific types of crime which the ordinary criminal law, in principle, could cover. The barriers to reform in this area, in short, are political and not legal.

Before beginning the discussion of the impact of the Banjul Charter on these three countries, it will be necessary to give at least a very brief overview of the Charter itself, without any pretence of comprehensiveness. The discussion can then proceed to an article-by-article analysis of the substantive portion of the document.

A. General History and Structure of the Banjul Charter

The Banjul Charter on Human and Peoples' Rights can hardly be said to be the result of any upwelling of pressure from the masses of African people, even if those people are seen to be the ultimate beneficiaries of the system which the Charter sets up. Indeed, it is probable that at the present point in time, only the tiniest minority of the population of the continent has even so much as heard of the Charter. Rather, the impetus for the Charter came from the scholarly elite of Africa, perhaps inevitably so. During the 1960s there had been calls from various bodies of jurists for an African Human Rights Charter. Then, in 1969 began a series of seminars on various topics and conferences which eventually culminated in the drafting of the Banjul Charter as it now stands: the seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa (Cairo, 1969); the Conference of African Jurists on African Legal Process and The Individual (Addis Ababa, 1971); the United Nations Seminar on the Study of New Ways and Means for Promotion of Human Rights with Special Attention to the Problems and Needs of Africa (Dar-es-Salaam, 1973); the Colloquium on Economic Development and Human Rights in Francophone Africa (Butare, Rwanda, 1978); the Third Biennial Conference of the African Bar Association (Freetown, 1978); and the Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa (Dakar, 1979).

This last seminar was the first actual drafting session for the African Charter, the result of a decision of the Sixteenth Assembly of Heads of State and Government at Monrovia, in 1979. This effort was followed up in June 1980 by a ministerial Conference in Banjul which completed, the drafting. In the event, however, the Seventeenth Assembly of Heads of State and Government of the OAU, meeting later that summer in Freetown, did not adopt the draft, for reasons which

are not wholly clear. In any event, a second ministerial-level drafting session was necessary. It met and completed its work, again in Banjul, in 1981. The fruit of its work is the present Charter, which the Eighteenth Assembly of Heads of State and Government of the OAU adopted at Nairobi later that year, with essentially a change of name of the instrument (from "African Charter on Human and Peoples' Rights,' to 'Banjul Charter on Human and Peoples' Rights'). The Charter will come into force when it has received the ratifications of a simple majority of the OAU member states[3] (i.e., twenty-six). By 1 September 1982, thirteen states had ratified; Botswana, Lesotho, and Swaziland were not among them.

The substantive portions of the Charter may be said to fall into two categories which are quite familiar to anyone who has studied other international human rights instruments such as the two International Covenants of 1966 (the one on Economic, Social and Cultural Rights,[4] the other on Civil and Political Rights),[5] the European Convention on Human Rights, and the American Convention on Human Rights. The first part is an enumeration of the substantive rights which the convention is designed to protect; while the second sets up the machinery which will oversee the operation of the Charter generally. The present discussion will concentrate on the substantive rights, as they may one day interact with the legal systems of the three states in question. Nevertheless, it is imperative that the importance of the implementation machinery not be underestimated, for it is of the very essence of the Banjul Charter that what is being created is not merely a statement of principles, but also a continuous procedure for their realization. One can even make this point more strongly (anticipating in so doing some of the conclusions to be reached below) by stating that the defects of the Charter in the area of substantive rights are so serious that one must regard the implementation aspect as the boldest,

most innovative, and most promising part of this great experiment. In particular, the Banjul Charter provides for three basic mechanisms for the advancement of human rights: (a) the furnishing of advisory opinions on the provisions of the Charter (Article 45(3); (b) the resolutions of state-to-state complaints (Article 45-53); and, most important of all, the receiving of communications "other than those of States parties", i.e., from individuals and non-governmental organizations (Article 55-59).[6] Each of these tasks is to be carried out by an African Commission on Human and Peoples' Rights, a group of eleven experts who will sit in their personal capacities.

The substantive rights and duties which the Banjul Charter enumerates in Article 2 to 29 fall into four categories. First, in Article 2 to 14, are the traditional civil and political rights which are so familiar from the Western tradition of individual civil liberties. Second, in Article 15 to 18, are rights of an economic and social nature. These rights too are now familiar, even if they do not have quite so long a pedigree (at least in Western society) as the first group. The third category, Article 19 to 26, represents the most conspicuous departure from other human rights instruments which have come before the Charter - it is an enumeration of the rights of peoples, as opposed to individuals. The fourth part, Articles 27 to 29 (marked out as a separate chapter of the Charter) is a list of the duties of individuals.

Before proceeding to an article-by-article analysis of the Banju Charter as it may come to affect the legal systems of Botswana, Lesot and Swaziland, it is necessary to discuss briefly some of the more salient characteristics of the document as a whole.

B. Some General Points Concerning the Banjul Charter

(a) Concerning an African Law of Human Rights[8]

One of the most striking points about Banjul (originally African) Charter of Human and Peoples' Rights is that it contains so little that can be considered truly African. Still more surprisingly, it omits several matters which one would think are of especial concern in the African context. Each of these points requires a brief explanation.

First, concerning the 'African' nature, or lack of it, of the document. There are two senses in which a set of legal norms might be said to be peculiarly African in content. One is that it might contain principles derived from the customary and traditional law of Africa. The second is that it might contain matter relating to aspects of African history, society, economics, or politics which Africa does not share with other regions of the world. Problems concerning colonialism are an obvious example of this latter category.

Regarding the first of these aspects (the incorporation of principles from the customary or traditional law of Africa), the Banjul Charter contains nothing except the most token lip service. In the fourth preambular paragraph, for example, the states parties take into consideration "the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights." Then, in the tenth preambular paragraph,

the states parties take into account "the importance traditionally attached to (human and peoples') rights and freedom in Africa". In the Charter itself, however, these misty generalities find no expression.[9]

It is not difficult to understand why the Charter does not go beyond these vaguest of generalities. The variety which may be found in the traditional and customary law across the length and breadth of the continent is wide. It is true that anthropologists have shown a keen interest in these questions, but not with the intention of extracting from them principles of law which might be useful in these modern, and troubled, times. One might hazard a guess that there is a great deal to be discovered in these African systems of law which might prove to be of interest.[10] Unfortunately any discoveries which may be made in this area will have come too late for incorporation into the Banjul Charter.[11]

The other respect in which a body of law might be said to be 'African' in some meaningful sense is, as noted above that it might concern itself with matters that are particularly relevant to the contemporary social, economic and historical concerns of the African states. To be sure, there are portions of the Charter which are genuinely African in this sense. For example, the entire portion concerning peoples' rights might be said to fall into this category. The statement in Article 19 that "thing shall justify the domination of a people by another" clearly is a reference to the recent colonial experience of the OAU member states. There is also the concern in Article 21(5) with "foreign economic exploitation particularly that practised by international monopolies.....", as well

as the reference in Article 22(2) to "the exercise of the right to development". One could point out that problems of colonialism, the activities of multinational companies, and underdevelopment are not actually unique to Africa. That is true; but the fact remains that it is only the African states which so far have embodied their concerns about these issues into their regional human rights machinery.

When considered as a whole, however, it is difficult to conclude that the Banjul Charter has very much in it which is specifically African. It is the most sweeping and general portions of the Charter, such as those just quoted, which manifest a specifically African outlook. They are the Charter concerning which, for reasons to be explained in more detail below, there is likely to be little in the way of litigation before the African Commission on Human and Peoples' Rights. The more specific parts of the Charter (those relating to civil and political rights) together with the section on safeguard (i.e., the part concerning the structure and activities of the African Commission) are quite in keeping with the approach of international human rights law generally (that is to say, with the Western legal tradition).

One of the most curious things about the Banjul Charter is the number of matters which one would suppose to be of particular concern to Africans which do not appear in the document. For instance, with the obvious concern (quoted above) about the activities of multinational companies, one might have thought that the drafters would have been certain to include something expressly about the right to form and join trade unions. Curiously, they did not, contenting themselves instead with providing, in a general way, in Article 10, with a right of free association for individuals (provided, that is, that they "abide . . . by the law,"); The right to Trade Unions

is underdeveloped. Nor could this omission likely have been one merely of inadvertence, since the analogous provisions on free association in the Civil and Political Covenant, the European Human Rights Convention, and the American Human Rights Convention all expressly mention the right to form trade unions.[12]

Another matter which one might have thought would be in the minds of African drafters is the utterly indefensible restrictions in the Republic of South Africa on the inter-marriage between the various racial groups. Yet the Charter contains no express mention of any right to marry and found a family. Once again, all three of the instruments just cited contain such a right.

One might have thought as well that another matter strikingly relevant to the African context would be the rights of minorities, since so many African states, as a legacy of boundaries inherited from their colonial past, contain minority groups. Also, it would appear that in a document which lays a great stress, as will be discussed below in greater detail, on the rights of peoples, nothing could be more natural than to include provisions concerning minority groups.[13]

Yet another particularly African problem, again stemming from the colonial past, is the lack of deep-rooted, defined, traditions associated in the West with the guarantee of human rights (e.g., stable parliamentary democracy with periodic elections, and the like). Very early in the period of independence, many scholars appreciated that problems of executive rule during states of emergency would be an important issue for Africa. This concern found ample expression in the Law of Lagos of 1961.[14] It may be noted in passing - and with no small tinge of regret - that in terms of the development of a truly African law of human rights,

the Law of Lagos is a much more sophisticated and perceptive document than the Banjul Charter of twenty years later.

As a final example of what might be thought to be human rights concerns of a truly African nature, but which find no reflection in the Charter, one can turn to those human rights-related experiments and innovations which some African states have undertaken, the most notable (at least in the Southern African sub-region) being the ombudsman systems of Zambia[15] and Tanzania. The Charter contains no reference at all to such devices.

(b) Derogation from human rights standards under Banjul Charter

This topic is one which is so important as to merit a brief discussion on its own. One of the most critical weaknesses of the Charter lies in the fact that it makes no express provision for derogation from the rights provided for in case of an emergency. This omission is puzzling as well as unfortunate, since (as noted above) the drafters of the Law of Lagos as long ago as 1961 had given special attention to this problem.[16]

In the International Law of Human Rights, it is generally conceded that restrictions on normal rights are permitted when "a public emergency which threatens the life of the nation" (in the words of Article 4 of the Civil and Political Covenant) occurs. The danger, though, is very great that states will use the supposed existence of such an emergency to engage in a general crack-down on human rights. To guard against that possibility, human rights instruments like the Covenant on Civil and Political

Rights, the European Human Rights Convention, and the American Human Rights Convention contain certain safeguards. Article 4, for instance, of the Civil and Political Covenant requires that a state of emergency must be officially proclaimed, and that the government concerned must at the same time inform the Secretary-General of the UN, and all other states parties of the existence of the emergency. It also stipulates that derogations are allowed only "to the extent strictly required by the exigencies of the situation ...." Finally, and most important, it specifies a number of rights from which no derogation is permitted in any circumstances whatsoever.[17]

The absence of even such modest safeguards as these from the Banjul Charter is unfortunate enough in itself, but even more so in light of the fact (to be discussed below) that there is concrete evidence that serious abuses of human rights are in fact occurring in the state of Lesotho (and no doubt in many others in Africa as well) under the umbrella of the country's sweeping security legislation, the basic provisions of which have been set out above. It is to be greatly regretted that the drafters of the Banjul Charter apparently failed to appreciate that states of emergency and times of concern about internal security generally are the times when human rights stand most in need of protection.

C. Potential Implications for Botswana, Lesotho, and Swaziland of adherence to the Banjul Charter

Having discussed some of the more salient points concerning the Banjul Charter as a whole, it is now appropriate to begin the more detailed and specific exploration into the impact which the Charter might come to have on the state of human rights in the three Southern African states of Botswana, Lesotho, and Swaziland. There has already been a general description

of the legal - and particularly the statutory - state of affairs in each of these countries.[18] The approach in this discussion, therefore, will be to proceed through the Banjul Charter more or less article by article, discussing problems that might arise in any of the three states vis-a-vis each article. The discussion will then proceed to, and conclude with, a similar analysis of the implications for the three states of adherence to the two UN Covenants; - the one on civil and political rights, and the other on economic, social, and cultural rights.

Article 2 and 3 of the Banjul Charter are both quite reasonable and comprehensible when taken alone; but in combination they present something of a puzzle. Article 2 concerns, basically, non-discrimination in the enjoyment of the rights and freedoms (not the duties it might be noted) "recognized and guaranteed" in the Charter. Article 3 then goes on to provide for equality before the law and equal protection of the law generally. One would think that the Article 2 right would included within the Article 3 right, and that Article 2 accordingly would be unnecessary.[19] Be that as it may, Articles 2 and 3 provide very little guidance on the subject of how the law is to treat the bifurcated legal system which prevails in the three states, as discussed above.[20] Do these two articles mean that the customary court systems, to which the European-descended portions of the population do not have access, will have to be disbanded? In this connection, it might be recalled that the Law of Lagos did recommend the customary law of the African countries be administered by the ordinary courts, although it did not recommend that the substance of that customary law be abolished.[21]

In this connection, one wonders whether the Swaziland case of Ross-Spencer and Another v. Master of the High Court[22] would come out any differently if the standards of Article 3 applied to it. That case concerned the non-discrimination provision (section 15)

of the Swaziland constitution (in force at the relevant time). The Swaziland constitution, in contrast to the Banjul Charter, did not provide in an unqualified way for the right of equality before the law: it had an exception, in section 15(4), for laws which, even though they discriminated in some way, were "reasonably justifiable in a democratic society". The specific question in the case was whether a Swaziland statute which exempted the estates of Africans from death duties was so justifiable. The conclusion of the Court of Appeal (reversing the lower court) was that this differential treatment was justifiable in light of fact that the country comprised "classes or groups of people living under different social or economic systems". In short, it was held not to be contrary to the ethos of a "democratic society" to treat differentially groups of people which in real sociological, cultural, and other respects truly were different. The law should not be blind to social realities.

It is submitted that a different result would not be called for under the Banjul Charter, notwithstanding the apparently more absolute character of the norm concerned. The reason for so supposing is that the Banjul Charter, it must be recalled, emphasises the inter-relation between civil and political rights on the one hand, and economic, social, and cultural rights, on the other hand. The precise nature of this inter-relationship will be discussed more fully below.[23] Here, it need only be pointed out that the intersection between the two does not consist, as many scholars appear to suppose, of two sets of rights battling one another for supremacy. It is more fruitful to view the economic and social sides of issues, as in this case, not as a rival set of rights to the civil and political rights, but rather as an aspect of the factual substratum to which the civil and political rights are applied. What is at stake in this case is not so much the "right" of Africans to be treated differently from Europeans in the area of taxation, as the reasonableness of allowing certain socio-economic facts to express themselves in legal terms in the way in which they did in this case (i.e., as tax exemption for Africans).

Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (Article 5)

In terms of written law (i.e., statutes and, in the case of Botswana, the constitution), the three states under consideration would have no changes to make in order to conform to Article 5. In the area of case law, though, the position should be different. There is no question at all that it is wrong for state officials to engage in practices of the kind named in Article 5. There is some question, however, as to how the state should react to cases where such conduct on the part of its officials does occur. In particular, the question arises with some frequency of what to do about evidence or information which the police have gained by the use of excessively harsh interrogation techniques.

The basic approach of the Criminal Procedure and Evidence Proclamation of 1983 (which, applied to all three territories and continued in force in each after independence) is a good one. It clearly states, in section 223, that when confessions, of defendants are sought to be admitted as evidence in criminal prosecutions the state must as a matter of course prove beyond a reasonable doubt that the confession was made freely and voluntarily.[24] If the defendant can so much as raise a reasonable doubt on that subject, then the judge hearing the case must exclude the confession from consideration.[25]

Unfortunately, the protection provided for persons in police custody is far from total. For one thing, there is an exception to this rule spelled out in the Proclamation itself: that if a defendant points out or reveals the whereabouts of something as part of a statement which is otherwise not admissible as evidence in court, then evidence of that pointing out may still be used in court.[26]

A more serious problem is that the protection which is afforded to defendants by section 223 of the 1938 Proclamation does not extend far enough beyond the bounds of the courtroom and its own procedures, as was made abundantly clear in the case of Botswana by the case of State V. Bitsang Bagwasi and Others.[27] The defendant in that case was charged with murder. He alleged that he had been assaulted by the police. The court did not believe that claim, although it did find that the police had used undue influence. In the course of its judgement, however, the court noted that it was permissible for the police to make use of all of the "tricks of the trade", including the use of prolonged interrogation, for the purpose of investigating the crime, even though the evidence so obtained could be admitted in courtroom proceedings.

It is submitted that this approach is excessively cautious in light of the fact that the torturing and mistreatment of persons in detention is one of the most serious of all human rights abuses. The extent to which it occurs in the three countries is, not surpisingly, a matter of considerable uncertainty; but there is no question that it has occurred. Lesotho would appear to be most culpable of the three states in this respect, if one judges by the number of cases in which allegations of mistreatment and undue influence have been made and established (established, to the extent of warranting the exclusion of evidence gained by the police). It has also been Lesotho, though, in which the judges have taken it upon themselves to make suggestions to the police on how to deal with the problem.[28] The police have not yet availed themselves of the advice. As a matter of fact, the position of detainees in Lesotho is now more precarious than ever, with the introduction of the Internal Security (General) Act 1982.[29] The older security legislation entitled magistrates to visit detainees at least once a week, thus providing a means (not very frequently used in practice, it would appear) of ascertaining the health of persons in detention. Under the new law, however, this function has been

given instead to a different group of persons known as "advisers", who are not part of the independent judiciary but rather are the appointees of the minister of the government responsible for internal security.

It is submitted that in order to give full and effective implementation to the Article 5 prohibition of torture and other forms of cruel, inhuman, and degrading treatment, states parties to the Banjul Charter should be required to ensure that effective mechanisms exist whereby the treatment of persons in detention is made subject to impartial observation. On that test, the provisions in the 1982 Lesotho security legislation for "advisers" would be inconsistent with the Charter.

Similarly, the Botswana law as set forth in the Bitsang Bagwasi case should be deemed to fall short of the Charter requirement, to the extent that it deems "high-pressure" police interrogation techniques, such as prolonged interrogation, to be lawful, even if inadmissible in courtroom proceedings.

The law of Swaziland, too, must be held to fall short in this respect. One should take note here of the case of Rex V. Jabulani Shiba,[30] concerning the admissibility of statements which the defendant in a murder trial made to a Senior District Officer. The statements were made after a prolonged interrogation over some two or three days. The court did not believe that there had been any undue influence exerted on the defendant and admitted the statements into evidence. If only for the purpose of guarding against possible undue influence or mistreatment by the police, the fruits of such prolonged interrogation should be excluded.

Another indication that the courts in Swaziland sometimes have had a relaxed attitude towards this kind of case may be found in the

rather peculiar case of Rex V. Sibbosane and Another,[31] in which a defendant alleged that he had been assaulted by the police while in detention before making his statement to a magistrate. In the course of a separate hearing into the admissibility of the statement, the defendant admitted that the statement which he had made was true, even though (according to him) it had been coerced by the police. The court held that this last statement was admissible, thereby rendering it unnecessary to rule one way or the other on the admissibility of the original statement - a question "best not put"; the court concluded. The basic issue here is whether evidence gained (or allegedy gained)[32] as a consequence of police pressure should be excluded if it comes to the attention of the court indirectly (as in this case), as well as if it comes directly (i.e., if the statement is given to a magistrate immediately following, and as a direct consequence of, the police tactics). It is submitted that, again in the interest of fully and effectively protecting the rights of individuals under Article 5 of the Banjul Charter, such indirect fruits of police pressure should be excluded from evidence in court.

Perhaps the ultimate examples of cruel and inhuman treatment of detainees at the hands of the police are deaths in detention and disappearances of persons from police custody. Deaths in detention in questionable circumstances are reliably known to have occurred in Lesotho, but there have been no formal court proceedings concerning them. The legal provisions for the holdings of inquests in such cases in Lesotho appears to be frozen. In 1982, however, there was a noted case concerning a disappearance, Mary Khalane V. Commissioner in Charge of Police, Minister in Charge of Police and Solicitor-General.[33] The disappeared person had last been seen in police custody. The police claimed to have released him, although the court did not find their evidence credible and ordered them to produce the person. They never did so. So far, the victim has still not been found; but at least the police in Lesotho are now on

notice that the courts are not afraid to be fiercely critical - and rightly so - in cases of this kind.

Another area in which possible infringements of Article 5 of the Charter might arise is in the sentencing of convicted persons, especially the infliction of corporal punishment, which has been held to be in contravention of the European Convention on Human Rights.[34] The three states under analysis presently have nothing to compare with the so-called "Islamic punishments" of stoning or amputation; but they do all have provision for the infliction of strokes for certain offences. In this regard, the courts of the three countries have displayed a curious blend of firmness and leniency. On the side of firmness, there is the Botswana case of State V. Keakitse,[35] concerning the sentencing of a fourteen-year old boy who had been convicted at first instance of theft and sentences to two strokes with a light cane. The appellate judge thought that in the circumstances, a sentence of six strokes was more appropriate, because it was important to impress upon the minds of such young people as the defendant that the law was not something to be trifled with.[36]

That case, however, was exceptional. In other instances, courts have been concerned not so much to increase the severity of a sentence as to ensure that it be carried out promptly. The justification given in one Lesotho case for this policy was that corporal punishment could not be an effective deterrent unless it was administered promptly.[37] One might also note, though, that punishment which is promptly administered has the advantage for the recipient of avoiding any psychological stress which may be caused by anticipating the punishment for a long period of time.[38]

On the side of leniency, it should be noted that the courts of Lesotho and Swaziland at least, have introduced a number of judicial

restrictions into the use of corporal punishment. In Lesotho, the courts have placed extra-statutory restrictions on the subjection of persons over thirty to whipping.[39] In Swaziland, it has been held in one case that the number of strokes should not usually exceed six.[40] Another case has held that strokes should not be administered on more than two occasions to any one person.[41] Another case has stated firmly that strokes are never an appropriate punishment for a minor traffic offence.[42]

The question to be answered in this area is whether this line of prevailing case law is generally adequate in terms of the letter and spirit of Article 5 of the Banjul Charter, or whether the Charter will, or should, require the total abolition of judicial corporal punishment, as the European Human Rights Convention effectively has done. In this respect, though, it must not be forgotten that the Banjul Charter is an African Charter of human rights, and that the ideas of Europe may well be different in such an area as this from those of Africa. One must, of course, always be careful that such an assertion not be allowed to degenerate into a mere platitude which will serve as an automatic excuse for the violation of rights which could not otherwise be justified. Here, however, such may not be the case. It should be borne in mind that the state of under-development of many African states is such that they are unable to afford the kinds of services (such as supervised probation) which are part of the stock in trade of the criminal courts of the developed Western world. There can be little question that in an ideal world, there would be no place for judicial corporal punishment. In the present circumstances, though, it is submitted that it cannot be dogmatically said that judicial corporal punishment per se violates Article 5 of the Banjul Charter. The better approach would be to hold that it would so violate the Charter if it were given with any other purpose in mind than the rehabilitation of the recipient. It would also be desirable to establish the principle that only in the most exceptional circumstances should corporal punishment be administered to an adult.

The Right to Liberty and Security and Freedom From Arbitrary Arrest and Detention (Article 6)

Three principal types of detention exist in the laws of the three countries being considered: detention under the ordinary criminal law, which under the law of all three states (deriving from the Criminal Procedure and Evidence Proclamation of 1983) may last for no more than forty-eight hours; detention under the internal security legislation of Lesotho for up to forty-two days on suspicion by the police of involvement in subversive activities; and detention in Swaziland, under the 1978 detention order, for up to sixty days (renewable indefinitely) on order of the Prime Minister. Clearly, there is great scope under these last two pieces of legislation for the governments of the two states concerned to subject their citizens to arbitrary arrest and detention.[43]

It is greatly to the credit of the courts of both of those states, that even in the face of very restrictive legislation and in the absence of written constitutions, they have continued to insist that they have a role to play in the safeguarding of the rights of individual detainees. One device which the courts in both countries have used is the rigorous scrutiny of the process of the delegation of authority under the security legislation. In the Swaziland case of Walker and Forbes V. Commissioner of Police, Attorney-General and Superintendent of Matsapha Central Prison,[44] the court upheld the lawfulness of the detention, but at the same time it strongly asserted its right to pass on the legality of any alleged delegation of the power to order detentions. The basic principle that it announced was that any duty "which in the nature of the subject matter and the language of the section (i.e. of the King's Order-in Council No.1 of 1973) can only be properly exercised in a judicial spirit" cannot be delegated, in the absence of an express authority so allowing (no such authority being present in this case). Subordinate persons, on the other hand, could be

entrusted with the task of executing detention decisions made by the proper authorities.

The subject of the delegation of powers also figured in the Lesotho case of Mpiti Sekake V. Rex,[45] which concerned the validity of orders restricting a person under the Emergency Regulations of Legal Notice No.5 of 1970. Here, there was no doubt that the minister could delegate his power to detain, the question being whether in fact he had done so. The court found no mention of any such delegation in the Government Gazette, so it set aside the detention order.[46]

The landmark case in Lesotho, however concerning the powers of courts to supervise the detention process is Sello V. Commissioner of Police and Another.[47] The detainee in that case had been arrested for the purpose of interrogation concerning some subversive activities about which the police believed that she had some knowledge. After approximately two days of periodic interrogation, she fainted and collapsed and was removed to hospital (still under police custody). After her discharge, she was placed back in detention. The case in question concerned a petition asking the respondents to show cause why the detainee should not be released, or to establish that they had not assaulted her, or that they had not interrogated her during her stay in the hospital. The petition also sought a private interview with the detainee, and a medical report.

The respondents' contention was that the court had no jurisdiction to order the release of the detainee. They also claimed that the two documents which the court had before it - a medical certificate from the hospital, and a statement obtained by a magistrate - were not admissible in the proceedings, on the ground that they had been obtained in contravention of the then-prevailing security

legislation. On the admissibility of the documents, the courts held against the respondents: concerning the statement given to the magistrate, on the ground that the magistrate's interview with the detainee had been perfectly lawful and that it was quite natural that he would take notes during it; concerning the hospital report, on the ground that during her stay in the hospital, the person was not in detention within the meaning of the legislation and that the police had consented to access to her by the hospital staff.

Concerning its jurisdiction to order the release of the detainee, the court firmly held that the security legislation had not established any presumption of the lawfulness of a detention, that the onus was on the police to establish on a balance of probabilities, that the arrest and detention were lawful. It also held that the legislation had not taken away the right of detainees to contest the lawfulness of their detention; nor had it purported to take away the right of the courts to pass on that legality. "Unless .... parliament says so in clear and explicit language, there is never a presumption in favour of invading the individual's rights."[48] In bold and ringing language, the court announced its attitude towards infringements on the rights of individuals:

> It is the main function of the Courts in our Kingdom to protect the rights of an individual. It is equally the function of Parliament. If these rights are infringed or curtailed, however slightly, . . . our Courts will jealously guard against such an erosion of the individual's rights. Any person who infringes or takes away the rights of an individual must show a legal right to do so. The rights of an individual being infringed or taken away, even if a legal right is shown, needs the Courts to scrutinize such legal right very closely. If it is an Act of Parliament, the Courts will give it the usual strict interpretation in order to see whether the provisions of the said Act have been strictly observed. If the Courts come to the conclusion that the provisions of an Act are not being strictly observed then the detention of the detainee would be illegal and the Courts will not hesitate to say so. 49

In cases which have been handed down in Lesotho since Sello, the courts have continued to condemn police methods which have unduly infringed the human rights of citizens. Even more, they have shown themselves willing to look behind the tactics of the police to ensure that police action which nominally was within the law was not being used in fact to circumvent that law. In the case of Mahlasi Letsie V. Commissioner of Police and Solicitor-General,[50] concerning the repeated detention and release of a person. The court in effect accused the police of playing a cat-and-mouse game, of releasing the detainee as soon as legal proceedings appeared imminent, in order to avoid having to pay damages to detainees whose treatment had been in violation of the procedures set down in the security laws.

> Faced with this difficulty the court said the respondents simply release the detainee and virtually say that the applicant should be satisfied for, after all, that is what he wanted to achieve viz. the release of the detainee from detention. But in bringing about the release of the detainee resort had to be had to the due process of the law and in that process costs were incurred. 51

The court went on to award costs to the applicant.

Another important Lesotho case concerning detention under the security laws was Lebenya Makakole V Commissioner of Police and Solicitor-General,[52] which afforded a classic example of the extreme powers of the police in the security area "spilling over" into the investigation of really what were ordinary criminal offences (suspected car theft, in this case). The court had this to say on the matter:

> I think we are here witnessing a classic example of an abdication of powers .... and chaos taking over. What an ordinary citizens fears most is in fact taking place: an abuse of the law is now at work. The law is being used, not for what it was meant but for something

> else. Ordinary police investigating methods which of necessity are difficult and tiresome have been abandoned and the much fearsome sick detention law is being readily substituted. Citizens are detained, not because they have committed or are about to commit offences relating to the security of the State . . . but because a citizen is suspected of being a petty car thief. 53

Boldness may not be enough, however, because the courts do not at present have at their disposal any external standard against which the "lawfulness" of a statute itself can be tested. Also, the possibility is not to be excluded that, with the example of the Terrorism Act of South Africa before them, the governments of Lesotho or Swaziland might some day act to deprive the courts even of the ability to decide upon the legality of action taken under the security legislation.[54] Lesotho has not (yet) gone so far but it is of some interest to note that in two respects the new security legislation of 1982 reverses the Sello decision. First, (as noted above),[55] it precludes there being any magistrate's statement to rely upon, since the role of the magistrate has been replaced by that of the adviser, who is appointed by the minister in charge of security.[55] The second change, for the worse, made by the 1982 legislation is section 40(4), which states that a person who is sent to a hospital while under either an interim custody order or a detention order shall be deemed to be still in custody.

Another device which the Lesotho courts have used to attempt to temper the rigours of the security legislation is to take the fact of detention into account in assessing the credibility of any evidence which the detainee might eventually give. An example of this approach may be found in Rex V. Tumelo Sising and Others,[56] in which the court stated somewhat cryptically: "It would be unreal for any court in Lesotho to pretend that it was unaware of the political

situation as it is at present". The court then went on to note:

> Persons detained under this legislation cannot hope for release unless they satisfy the police that they have given all the information required. It cannot be a pleasant experience for anyone to be so detained and such a person may well wish to avoid its recurrence. A court must take into account, in evaluating the testimony of witnesses, that all or any of these factors may be present in their minds when they give evidence.

As for the question of whether the adherence of Lesotho or Swaziland to the Banjul Charter will make very much real difference, the answer must be, at this stage at least, that it probably would not, for the reason that the Charter itself is unfortunately rather weak in this area. To state, as Article 6 does, that "no one may be arbitrarily arrested or detained" is a fair start in the protection of the human rights of detainees.

As for the question of whether the adherence of Lesotho or Swaziland to the Banjul Charter will make very much real difference, the answer is that it might, depending on what kind of interpretation eventually emerges to some unhappily cryptic language in the Charter. The bare statement in Article 6 that "no one may be arbitrarily arrested or detained" is certainly a step in the right direction, but possibly no more than that. At the risk of jumping slightly ahead in the Charter, we might note that in Article 7, there is at least a possibility of something more hopeful. Article 7(1) gives to every individual the right "to have his cause heard." It then goes on to enumerate (as the discussion below will set out in more detail) a number of rights which are obviously relevant to criminal trials. Yet the word "cause" might envisage something broader than an ordinary criminal prosecution. Support for such a thesis is found by comparing Article 7 with the corresponding provisions of the Civil and Political Covenant of the UN, the European Human Rights Convention, and the American Human Rights Convention, each of which

expressly refers to criminal proceedings. Surely, it would be argued, a person who is detained under the Lesotho legislation for being "concerned in subversive activity" has a "cause" to be heard, even if he is not a defendant in an ordinary criminal proceeding.

If such an interpretation were to be given to Article 7(1), then the ratification of the Banjul Charter by Lesotho might indeed make a substantial difference to persons detained. It would give them the right not merely, as presently, to contest the legality of their detention - i.e., to test whether their detention was in compliance with the legislation (however harsh it may happen to be); it would give them the additional, and invaluable right to contest the substantive question of whether their detention was or was not <u>really</u> necessary for the protection of national security.[57] It is submitted that only by adopting such an interpretation of Article 7(1) can a truly effective safeguard of the Article 6 right to be free from arbitrary imprisonment be achieved. It is to be deeply regretted that so important a right is effectively hidden away in such murky phraseology.

Rights of Defendants in Criminal Proceeding (Article 7)

Right to be Presumed Innocent (Article 7(1)(b)

In the law of all three states under study, there are difficulties concerning this most fundamental of rights of accused persons. The right was enshrined in all three of the independence constitutions, although always with the proviso that there might still fall upon defendants an onus of proving "particular facts" thence. It is sometimes no easy matter where the proving of "particular facts" ends and where the proving of innocence <u>per se</u> begins.

The most common area in which this tender problem arises is that of stock theft, a matter of considerable importance in these three countries whose rural economies continue to have a significant pastoral element. The three countries have all inherited as one of their legacies from the period of British rule the Stock Theft Proclamation of 1921, which provides that if a person is found to be in possession of stock which may reasonably be suspected to have been stolen, then that person is guilty of an offence if he is unable to provide a satisfactory explanation of how he came about such possession. The position is that first, the prosecution must prove beyond a reasonable doubt that the possession was unlawful (in the sense just described); if it is successful, then there arises on the part of the defendant the onus of establishing, on a balance of the probabilities, that he came about his possession by lawful means. Does this onus on the defendant amount to a violation of the presumption of innocence?

There are two general lines of argument that may be advanced to the effect that it does not. The first would hold that the general requirement of a presumption of innocence does not preclude requiring defendants to prove certain facts on a balance of probabilities (never beyond a reasonable doubt), especially facts which are uniquely within the knowledge of the defendant, such as how he came into the possession of some head of cattle. For some express support of this position, one need turn no further than the three constitutions of the countries under consideration - all three contain express guarantees of the presumption of innocence; and all three also provide explicitly that that guarantee does not preclude a defendant's being obligated to prove "particular facts". While it is true that a principle of this kind could eat away the major principle of presumption of innocence if courts and legislatures do not prove sufficiently watchful, the limitation is that this burden of proving "particular facts" must not be allowed to extend to the point that it substantially relieves the prosecution of its basic duty of proving its entire case beyond a reasonable doubt.

The second line of argument to the effect that this kind of onus on defendants is not inconsistent with a presumption of innocence is a good deal more subtle, but it is worth considering because it is the one which the courts of Botswana and Lesotho have relied upon (the Swaziland courts not having had the occasion, apparently, to consider the question squarely). This approach draws a distinction between two kinds of presumptions: on the one hand, that which causes upon a defendant the burden of establishing some fact; and, on the other hand, that which serves to create a substantive legal offence. The former type, it is conceded, does entail the risk of transgressing the principle of the presumption of innocence. The latter does not.

A number of cases in both Botswana and Lesotho have arrived at the conclusion that that the provision in question of the Stock Theft Proclamation does not create a presumption of theft on the part of the defendant, but rather creates, in the words of one Botswana case, "a subjective offence".[58] A Lesotho case stated the same basic conclusion in slightly different words by stating that the provision in question "does not set out a mere rule of evidence but constitutes a special category of theft".[59] Put at its simplest, what the Stock Theft Proclamation section does is to transmute the substance of the offence itself - such that the gravamen of the offence becomes no longer theft as such, but rather the failure to provide a satisfactory explanation for unlawful possession.

It is submitted that both of these lines of argument should be rejected, the first on grounds of vagueness, and the second on grounds of sophistry. It is true that it is possible to make an intellectual distinction between presumptions which operate purely on the factual side and those which create substantive offences. The similarity between the two types, though, would appear to be of decidedly greater

importance than their difference, since both operate in fact to place a burden of proof on defendants on a crucial point in the prosecution's case. In any event, the creation of substantive criminal offences by presumption rather than by direct legislation would seem to be something that should be avoided.

The Right to Defence (Article 7(1)(c))

There appears to be no difficulty in any of the three countries under study with this provision, provided of course one assumes that a trial does in fact take place. Problems in this area lie not in the denial of the right to a defence at a trial which does occur. The problem lies rather in the refusal of the government to hold a trial at all in cases relating to internal security. As this matter has already been discussed under Article 6 above, there is no need for further analysis here.

The Right to be tried within a reasonable time (Article 7(1)(d))

The right of defendants to be tried without "undue delay" is one which appeared in all of the independence constitutions of the states presently under consideration. The right continues to enjoy constitutional protection in Botswana, although it might be noted that it has been held in that country (in the case of State V. Merriweather Seboni)[60] that a defendant whose right has been violated is not thereby entitled to have the proceedings in his case declared null and void.

In Lesotho, even though the constitution has been suspended, the judiciary has shown concern on a number of occasions about inordinate delays both in bringing defendants to trial in first

instance and in the hearing of appeals. So it is apparent that the right to be tried within a reasonable time still is in existence there, even though the basic machinery of protection is not the written constitution but rather the inherent power of the courts to ensure the general fairness.

For a striking illustration of how unfair it can be on defendants to have to prove "particular facts" of a certain kind, one could turn to Part II of Lesotho's Internal Security (General) Act 1982. The offences which are created by that portion of the act do have an element of mens rea to them: that is, they require some degree of knowledge or belief or intention on the part of the defendant, in addition to the physical performance of some activity. Under the statute, however, this mens rea element typically is presumed to be satisfied unless the defendant proves the contrary. In some instances, though, the presumptions in the prosecution's favour extend to the commission of the act itself. Section 12 on sabotage, for example, states that "In a prosecution for an offense under this section, it shall be presumed, unless the contrary is proved, that the accused wilfully acted or omitted to act as alleged against him." A provision more flagrantly contrary to the normal human right of presumption of innocence could scarcely be imagined. Similarly, in section 20, concerning unauthorised entry or presence in a protected place, the accused person is presumed, unless the contrary is proved, to have had no permission to do the act alleged.

In this area, then, it is probable in the case of all three countries - and certainly in the case of Lesotho - that changes will have to be made in various domestic laws in order to conform to the Banjul Charter.

In Swaziland, the position appears to be basically the same as in Lesotho, although there is less case law on the subject. One might note in passing the case of Rex V. Twala,[61] which held that

a delay of five months between the commission of the offence in question and the trial of the defendant was not unreasonable.

The law of the three countries, then, is basically in accord with the Article 7(1)(d) requirement of trial within a reasonable time although there is no doubt that the actual practice of the judicial machinery sometimes falls short of what the domestic law requires. There will, then, be room in principle for claims against the three states under this Article of the Charter. There is unlikely to be any great rush of claims, though, in light of the requirement of Article 56(5) of the Charter that domestic remedies first be exhausted before filing a communication with the African Commission. Domestic remedies do exist, even if only in the form of reducing sentences in cases of inordinate delay in bringing defendants to trial.[62]

Right to trial by an impartial court of tribunal (Article 7(1)(d))

In none of the three countries being considered has there been any serious allegation of unfairness on the part of the courts. Threats to the independence of the judiciary do exist in the countries, as the discussion below will indicate.[63] There is no indication, however, that these threats have led to any bias in the actual trial of cases.

Trial and punishment under retroactive laws (Article 7(2)

There has not been a difficulty in this area in any of the three states under consideration. Therefore, ratification of the Charter should pose no difficulties on this count.

Punishment to be personal only (Article 7(2))

There are indeed problems in this regard in all three countries - problems, in fact, which raise questions about the Charter which are of the very highest importance.

It is clear that one purpose of this article is to rule out collective punishment - i.e., the punishment of a group of persons for an offence committed by one or more (but not all) of its members. That subject presents no great problem. There is, however, much difficulty in determining whether exemplary punishments are caught by this section.

It is possible, and, it is contended, (necessary as well) to distinguish two different issues here: one which might be termed problems of general deterrence, and the other which might be labelled specific deterrence. General deterrence would refer to the practice of giving out particularly heavy sentences for those crimes which are on the increase, in order to warn potential future offenders that a dire fate awaits them if they are caught doing the same thing, the clear implication being that otherwise the defendant would have received a lighter sentence. What has been termed specific deterrence, on the other hand, is punishment which is oriented towards the protection of some specific activity which is deemed to be particularly worthy of protection by the courts irrespective (within broad limits at least) of how prevalent offences against that protected activity might be.

There is a reason for making this distinction, which might appear at first glance to be an excessively fine one. The essential difference lies in the predictability for the potential wrongdoers of the consequences of their actions. In the case of specific

deterrence, the sensitive activities would be identified and known to the defendant before he embarked on his career of crime. Such would not be the case in matters of general deterrence, however, defendants would be incurring the risk that, at the time of sentencing (not even at the time of the commission of the offerce) there might be an increase in the type of crime which he has committed). Or what would amount in effect to the same thing, that there might be perceived or believed to be such an increase over which the defendant had no control and which he could not possibly have foreseen.

This distinction is perceptible in the case law of both Botswana and Lesotho, but not Swaziland. It is only in Botswana, though - and even there only recently - that courts have indicated that they might be prepared to treat the two types of exemplary sentence differently. The recent case of Jaba V. State[64] may prove to be of some importance in this regard. The defendant in that case was convicted of the offence of concealing a birth and was given a harsh sentence for the reason, as expressed by the magistrate who heard the case, that "offences of this nature are becoming far too prevalent". The appellate court noted that the magistrate did not reveal his source of information on this point and reversed the sentence downwards. It gave as the reason that it was not fair to a defendant to rely on the frequency of commission of an offence as a basis for punishment without revealing one's source of information. It is difficult, though, to see how the unfairness to the defendant could really lie in the failure of the magistrate to reveal his source of information. Surely the unfairness to the defendant really lies in the fact that he is being exposed to sentencing on the basis of information which may not ever have been available to him. Even if such information was available to him, he would have had no reliable way of knowing that a court would rely on it when sentencing him. The potential importance of the case lies, then, not in the quality of its reasoning,

but rather in the fact that it does recognise, if somewhat clumsily, the awkwardness of sentencing defendants on the basis of facts that might well have been utterly irrelevant to the defendant's own actions.

Things are otherwise, though, in the case of what has been labelled above as specific deterrence. In particular, and with the sanction of the constitution, the Botswana courts have been much more tolerant of exemplary sentencing for the protection of the country's diamond industry. The case of State V G. Ikanyeng,[65] concerning sentencing for unlawful diamond possession, held that "it is necessary for the court to show its disapproval of a course of conduct which would have the tendency of ruining the economy of the country".[66] For constitutional support, albeit only of an indirect kind, one could look to the concern for the diamond industry in the portion of the constitution relating to searches. Section 9 of the constitution allows some derogation from the normal rules regarding searches of persons, provided that the measures taken are "reasonably required in the interest of .. the development and utilization of mineral resources" and are also "reasonably justifiable in a democratic society".

The courts of Lesotho have been consistently tolerant of exemplary sentencing, having stated on several occasions that it is permissible for courts to take account of the prevalence of the offence in question when sentencing a convicted defendant.[67] So it should scarcely be surprising to find the courts looking with favour on harsh treatment of persons whose offences are damaging to the national economy. The following language from the case of Fano and Another V. Rex,[68] concerning the theft of government property, is instructive:

> It is the primary duty of every court in this land to mark their determination to discourage any idea that Government property can be stolen with impunity . . . . The courts therefore are determined to punish severely anyone who steals Government's

> propety. Lesotho is a poor country and has, of necessity to borrow money from donors. If the little help we receive is not used for the purpose for which it was meant but finds its way into the pockets of individual officers, then very soon this country will find it increasingly difficult to raise any loans. This is how serious the crime which the appellants have committed (sic). It is, therefore, the duty of the courts to put a stop to this menace before it brings about the serious consequences just alluded to. 69

The case law in Swaziland is rather scantier on this subject, although the general principle seems to be established that it is not wrong to pass sentences on individual defendants which are intended to have the effect of conveying a warning to society at large about the courts' attitude towards the offence in question.[70]

It remains to be decided how the Banjul Charter will treat this subject, whether it will adopt what might be termed the strong or the weak interpretation of Article 7(2) - the weak interpretation (from the traditional Western civil libertarian perspective, that is) being that Article 7(2) requires no more than that punishments should be inflicted solely on the persons who actually commit and are convicted of the offence in question; the strong interpretation being that Article 7(2) goes further and requires that any sentence which is passed on the defendant shall be no more than is thought reasonably necessary to deter that individual person, and not society at large, from committing the offence. When the issue is stated in this way, it becomes apparent that it represents a sharp clash between Western-style notions of civil liberties, with their powerful orientation towards the rights of individual persons; against an approach which many in the Third World and in the socialist countries would find more attractive i.e., that the interests of the society as a whole should be paramount.

The solution to this dilemma, if indeed there can ever be one, is more likely to emerge from the general sociological and juridical

milieu of the African countries than directly from the text of the Banjul Charter. The Charter does offer certain clues, however, chiefly in the clear indication afforded by Article 29 that the interests of the individual are subordinate to those of the state in a wide variety of fields. It is submitted that the best approach for the courts to take in this area would be that which has been foreshadowed by the courts in Botswana as outlined above: that exemplary sentencing not be allowed in circumstances in which defendants could not reasonably have been expected to foresee that it would be used, but that it should be allowed in certain types of offences in which the economic (or other) stakes for the country as a whole might be reasonably said to be high. One could take this line of reasoning slightly further and hold that the optimal solution would be for the government to state in the most conspicuous way possible, in advance, what areas exemplary sentencing would be permitted in. The most obvious mechanism would be to publish such announcements in the government Gazette. If the policy of the government were thus clearly set out, it could then be challenged more effectively than is presently the case, either through domestic constitutional procedures (as is still possible in the case of Botswana) or, it would be hoped, through the machinery of the Banjul Charter itself.

If this suggested approach were to be followed, then the law of Botswana would be broadly in line with the Charter. That of both Lesotho and Swaziland would require changes, although not (it is submitted) of a very fundamental nature. The present sentencing practices of the courts would have to undergo a modification; but the only legislative change that would be required would be the adoption of enabling legislation to allow the designation (subject, it is hoped, to challenge) of those areas deemed sensitive enough to allow of exemplary sentencing.

Freedom of conscience and religion (Article 8)

In this area, the three states under consideration have nothing to fear from ratification of the Banjul Charter. None has any undue restriction on the practicing or the profession of religion, nor have there been major incidents of religious persecution or discrimination in any of the three. None of the three is a one-party state (officially at least), and so there have been no problems with such groups as Jehovah's Witnesses, which refuse as a matter of the highest principle to take any part in secular political life and who accordingly have been the victims of persecution by some governments, notably those of Malawi[71] and Zambia.

The right to receive information and to express and disseminate opinions (Article 9)

This area of freedom of expression is another one in which the courts of the three countries have been vigorous champions of civil liberties, in the very face of some rather intimidating legislation. This point, taken in conjunction with the fact that the Banjul Charter is either, at best, poorly drafted or, at worst, useless, would lead one to conclude that ratification of the Charter is unlikely to have very much practical impact on the law of the three countries.

Firstly, concerning the Banjul Charter provision itself. Article 9(2) is something of a mystery in that it only provides for the right to express and disseminate opinions "within the law". It is submitted that this article simply cannot mean what its literal interpretation would seem to suggest - that individuals have the right to express their opinions only to the extent that "the law" (presumably the domestic law) allows. Such an interpretation would render the purported right completely illusory. It

would do no more than to "guarantee" that persons were entitled to do that which the domestic law allowed them to do, a "guarantee" for which there is precious little need for international protection.

The only reasonable interpretation of Article 9(2) is that "the law" which is referred to cannot be the domestic law of the country concerned, whatever that law might be. It must refer to laws which are reasonably necessary for the orderly regulation of the manner in which the right of expressing opinions is exercised. The reference, then, would be to such laws as those relating to the holding of public meetings, or to the expression of opinions in such a context that a breach of the peace would be a likely consequence.

There is always the danger, of course, that such laws as those just mentioned would be drafted so as to sweep too broadly. The problem here, however, is not really a legislative one, or at least not uniquely so, since it is impossible to imagine that a statute on this kind of subject matter could ever be drafted so precisely as to forsee and penalise all, but only, those activities in which, say, breaches of the peace were genuinely likely to occur as a result of a vigorous exercise of the right of liberty of expression. What is essential in this area is that a watchful and truly independent judiciary constantly guard this sensitive juridical outpost.

The three countries under consideration have had quite a fortunate history in this respect. In all three, the courts have shown great tolerance and understanding in dealing with cases relating to such matters as sedition and incitement to dissaffection and the like. The discussion will briefly point out some examples of the courts' approach in these areas, and then turn to the special area of contempt of court.

Botswana has several provisions of its penal code which make inroads into the unbridled expression of opinions, one of which is section 184, concerning the use of "insulting language". It was held in the cases of State V. Conde[72] and State V. Moswen[73] that in order to succeed in cases of this kind, the prosecution must establish that the language is likely to induce a breach of the peace. The court emphasised that the section is not to be used to deny freedom of expression or on a slightly more mundane level) to punish the use of vulgar expressions uttered for the relief of stress.

Another interesting Botswana case was State V. Bontshetse,[74] in which the defendant used insulting words against the President of the country and was then prosecuted for "offensive conduct conducive to breaches of the peace". He was acquitted, as the court found that in the circumstances there was in fact no such danger. The defendant had expressed his opinions in his own home before his guests, who became embarrassed and left without creating any disturbance. Another case which considered this general issue was State V. Lebuku,[75] concerning a defendant who, in the course of an election campaign in Botswana, made a number of vulgar and insulting comments about the state of morals of members of the ruling party. He was convicted at first instance of using "insulting language . . . likely to give such provocation to any person as to cause such a person to breach the peace . . ." On appeal, the conviction was reversed, on the ground that the defendant's diatribe had been merely annoying to those to whom it was directed. There had not in fact been any serious likelihood that it would provoke the listeners to commit a breach of the peace.

There have been prosecutions under this same section of the Botswana Penal Code for the stirring up of racial hatred.

The two major cases in this respect are State V. Violet O Connell[76] and State V. Arnold,[77] both concerning the use of the expression "kaffir". In both cases the defendant was convicted. The O'Connell court was prepared to take judicial notice of the special meaning which that word had come to assume, something which the Arnold court was not prepared to do. In the Arnold case, the court concluded that what it was really dealing with was a drunken incident in which it was not clear that any true insult was intended. It accordingly reduced the fine which the lower court had imposed, although it allowed the conviction to stand.

Similar cases under similar legislation, with similar results have come down from the courts in Lesotho. In Mpiti Sekake V. Rex,[78] the defendant was being prosecuted under the Internal Security Act 1967 for using language likely to provoke another person into breaching the peace. The defendant had delivered a vituperative speech criticising another person, comparing the instance to Eve in the Garden of Eden. In the course of holding that this activity would not actually be expected to provoke a breach of the peace, the court stated that "one should be careful not to fix a standard which would unduly limit freedom of speech and the right to criticise or to impose conditions or restrictions that are too narrow and which would make such charges convenient catch-all against speakers with unpopular views".[79]

In Swaziland, the record is somewhat more mixed, although there too the courts have generally inclined in favour of liberty of expression, interpreting potentially repressive legislation strictly and giving defendants the benefit of the doubt. One apt illustration of this approach is the case of Rex V. Gilbert Sikela Shabangu,[80] concerning a defendant who referred to the King of Swaziland as "excreta", thereby earning himself a prosecution under the Sedition and Subversive Activities Act of 1938. The Act

punished speech which brought the King into hatred or contempt or sought to incite dissaffection against him. Somewhat surprisingly, the language used by the defendant was held by the court to have done none of these things, although the outspoken gentleman was not so fortunate as to go entirely unpunished. He was found guilty of a lesser offence: the use of insulting or defamatory language, under the Crimes Act of 1889.

The Swaziland case of Kinnear V. Rex[81] was very similar. There, the defendant called the King a monkey and, like Shabangu, was prosecuted under the Sedition and Subversive Activities Act of 1938, for incitement to dissafection. The court held that he did not intend to incite to dissafection. It went on, however, to find that he did intend to bring the King into contempt, i.e., that he was guilty of sedition.

A final illustration of the approach of the Swaziland courts in these matters is the case of Akbar Badat V. Rex,[82] which was similar to the cases mentioned above from Botswana and Lesotho. The defendant was being prosecuted under the Urban Government Regulations of 1969 for calling another person a "bloody barking bitch" and a "fucking Bushman". Although the language used certainly was offensive in the extreme, the appellate court set aside the conviction at first instance, on the ground that there was no likelihood of a breach of the peace occurring, as the regulations required.

In conclusion, then, it is difficult at this stage to believe that the approach of the courts of any of the three states would need to change markedly in this area of liberty of expression, for two reasons. First, because the courts in all three states (perhaps Swaziland somewhat less than the other two) have proved themselves

to be willing to scrutinize with some care prosecutions and convictions which take place under legislation restricting free speech. Second, as noted above, it does not appear that the Banjul Charter itself offers very substantial protection in this area.

Before leaving this subject, it is worthwhile taking note of the special problem of contempt of court.[83]

In the area of contempt of court, there would appear to be some risk that Lesotho might fall afoul of the Banjul Charter, judging from the approach which the High Court adopted in the case of Maseru United Football Club V. Lesotho Sports Council and Others.[84] Some litigation had taken place, in which the losing party felt very aggrieved indeed, to the point that it wrote to the Foreign Minister and also to the press alleging bias and corruption on the part of the judges in language which the court held to be too virulent and intemperate to qualify as fair comment. What is remarkable about this case was the insistence of the courts that the truth or falsehood of the accusations made was of no relevance - that kind of criticism of the judiciary was simply wrong per se. The court held that the prime object of the contempt proceedings would be defeated if the court were compelled to embark on an investigation into the underlying facts. It may be the case, as the court held in its judgement, that the balance of authorities supported that approach. If so, then (it is submitted) the balance of authorities is inconsistent with the Banjul Charter. It is difficult to believe that the mere insulting of the judicial system from afar (i.e., in a context in which there is no substantial likelihood of interfering with the hearing of matters in progress) should not be the object of contempt of court proceedings. The judicial system should never set itself as being above criticism of even the most vigorous variety. And above all, there would seem to be no justification for courts' absolving themselves on principle from looking into the facts behind a matter before them.

The court in Botswana took a distinctly more relaxed view of the subject of contempt of court in the case of State V. Kynoch in regard Ipeeng,[85] concerning some remarks made by a disgruntled complainant in some litigation. He had stated at one point that "The law is not prepared to protect me and I might be killed". He was cited for contempt at first instance, but the citation was reversed on appeal, on the ground that the statement was a mere outburst from a person who was in an angry mood and averse to the reconciliation process. He was not necessarily making an allegation of partiality on the part of the judiciary with an intention to insult. This case, of course, concerned quite different circumstances from those in Maseru United Football Club. So the only conclusion (and necessarily a tentative one at that) is that the Botswana courts seem generally more willing to tolerate criticism than their Lesotho counterparts. The Botswana approach would seem to be more in harmony with the norm of liberty of expression generally than the Lesotho one, although it would be unwise to attempt to draw very firm conclusions from the scanty case law presently available on the subject.

The right of free association (Article 10)

It had been pointed out above that, although the general right of free association is protected in the Banjul Charter, there is no express mention of the right of persons to form or even to join trade unions. The general position in the three states under consideration regarding trade unions has been set out above and need not be repeated here.

There has been very little domestic litigation in any of the three countries concerning the right of freedom of association.

The nearest that the courts of any of the three have come, apparently, to dealing with the question is the Lesotho High Court case of Mokhahlane V. Minister in Charge of the Public Service and the Solicitor General,[86] concerning a civil servant who had been dismissed and was seeking re-instatement. The technical grounds for his dismissal were that he was unfit for his duties, and that the public interest required his dismissal. He alleged that the dismissal had been for reasons of suspected disloyalty and for alleged consorting with subversives. The plaintiff successfully won re-instatement although the grounds were technical ones relating to civil service discipline and dismissal procedures, rather than more substantive ones relating to freedom to associate with alleged subversives. So the case is of little assistance in the human rights area.

As none of the three states considered here is officially a one-party state, there has been no problem in any of them with compulsion to join an association, as provided for in Article 10(2). Accordingly, the reference in that article to "the obligation of solidarity" of Article 29 is of no obvious relevance.

The right of free assembly (Article 11)

As there has apparently been no case law development in this area, there is nothing further to add here.[87]

Freedom of movement (Article 12)

None of the three states in question has any significant restrictions on freedom of movement of their nationals, apart from restrictions on certain areas, such as military installations, for defence purposes.

In this respect, there is some potential for abuse, however. In Lesotho's Internal Security (General) Act of 1982, for instance, the minister in charge of public security has an apparently unrestricted right to designate any place in the country as a protected place. It would appear unlikely, though, that this power would be used to the extent of seriously restricting the right of the public to exercise their right of free movement around the country of the type which Article 12 envisages. The article seems directed against such phenomena as excessive or unreasonable restrictions on the right of persons, say, to move their place of residence from rural to urban areas. There are some states in Africa with restrictions of this sort which might be deemed violative of Article 12; but the three states under consideration here are not among them.

The part of Article 12 which has caused some difficulty, in Lesotho at least, is Article 12(3), giving to every individual "the right, when persecuted, to seek and obtain asylum in other countries in accordance with law of those countries and international conventions." As is the norm in international instruments relating to asylum, there is no positive obligation on the part of the receiving state to grant asylum, but merely a right on the part of the individual to seek it and to benefit from it if it is so granted. The obligations on the part of the state, if any, derive not from the Banjul Charter, but rather, (as Article 12(3) states) from its own domestic law and from any international obligations which it might have assumed other instruments.

The case in Lesotho, Joseph Molefi V. Government of Lesotho,[88] is a landmark case in the interpretation of the 1951 UN Convention on the Status of Refugees. It concerned the question of whether Mr. Molefi did or did not qualify as a refugee within the meaning of that convention. The plaintiff had left South Africa undoubtedly

for political reasons, in the early 1960s. The question was not whether he had the required "well-grounded fear of being persecuted" by the South Africans should he be returned there, but rather whether his departure had been "as a result of events occuring before 1 January 1951", as required by Article 1(A)(2) of that instrument. The plaintiff's contention was that even though his physical departure from South Africa had only taken place in the 1960s, still it was as a "result", within the meaning of the convention, of events before 1951 - the events being the early measures towards apartheid adopted by the National Party government consequent upon its assumption of power in 1948. The essence of the case was the question of how far back in the chain of causation of events the courts would be willing to go in their determination of causes and "results", the plaintiff's contention being that the courts should look to the entire web of events which causes a person to flee a country, and not only to the proximate causes. The courts in Lesotho disagreed, as did the Judicial Committee of the Privy Council in England, to which an appeal was taken in the matter.

It is hardly surprising that the courts were unable to take so broad a view of the question as the plaintiff would have liked. A more interesting issue for present purposes, though, is whether things might have been different in any important way had the plaintiff been able to rely upon the Banjul Charter. The question is really one of conflicts of laws between international instruments, a largely unexplored area of international law. The potential dilemma for a state like Lesotho is that it will find itself doubly bound, in a sense, to an instrument like the Convention on the Status of Refugees: once in terms of that convention itself, of course; and then, a second time, in terms of Article 12(3) of the Banjul Charter. Will there, then, be two bodies with the authority to decide upon the nature and extent of the obligations assumed under the Convention - i.e. the International Court of Justice

under Article 38 of the Convention, and also the African Commission on Human and Peoples' Rights, under the Banjul Charter? What will happen if the two bodies should disagree? Presumably the African Commission would defer to the International Court on the matter, not because the International Court is an intrinsically superior but rather because, in terms of the 1951 Convention itself, it is the body which is charged with the task of interpretation.

The risk, then, that states parties to the Banjul Charter might expose themselves to inconsistent obligations in the area of refugees and asylum is probably more theoretical than real.

The right to participate freely in the government of one's country (Article 13)

In this area, Botswana at least has little to worry about. Such is not the case, however, with the other two states under study. Lesotho at the present time does not have free elections, although it has had an interim parliament since 1973. The same situation broadly holds true in Swaziland, which has had a post-1973 coup parliament since 1978, although no true free elections.

It might be doubted, though, whether Article 13(1) truly requires free elections in the sense in which, say, Western Europeans or Americans would understand that term.[89] It is true that representatives, if such be the method of participation, must be "freely chosen", but it is also true that free choice is to be "in accordance with the provisions of the law".

The same considerations arise here as those which were considered in connection with liberty of expression in Article 9(2). It is submitted here, as there, that this qualification

cannot be interpreted so as to confer onto the state party an unrestricted right to enact any law which it pleases on the subject. The governments of the states parties are entitled to fix the procedures according to which the free choice will be exercised - and note that it need not be through Western-style formal elections. They cannot, however, take measures which will place undue limitations on that choice itself. A state, for instance, can decide on the qualifications of electors, but not in such a way as effectively to disenfranchise all who are likely to vote against the ruling party in an election. It is entitled to decide on the method of counting of votes, but not in such a way as to deprive opposition parties of any opportunity to scrutinise the fairness and honesty of the count.

In the case of Lesotho, it is said that the government has plans for the holding of an election. If so, then it may be that Lesotho will shortly be in compliance with Article 13 of the Banjul Charter. In Swaziland, the prospects for an early free election are unclear. In any event, as developments stand at the present time, both states will need to make substantial changes before they can be said to be in compliance with this portion of the Banjul Charter.

The right to property (Article 14)

This provision is in many ways the most remarkable in the entire Banjul Charter. It seems little short of extraordinary that in a continent which has ostensibly been so strongly influenced by socialist concepts, and so much the victim of an economic order based firmly on the rights of private property, this right would be so firmly provided for. This right does not appear at all in the UN Covenant on Civil and Political Rights. It is

present in both the European and the American Convention on Human Rights, although in each case in a rather less absolutist sounding form than appears here. The First Protocol of the European Convention, for instance, states, in Article 1, that each person is entitled to "the peaceful enjoyment of his possessions" - there being actually no mention of any "right of property" as such.[90] The American Convention does at least mention the word "property," in Article 21; but what it protects is not something called the "right of property" in the abstract butbut rather the slightly more down-to-earth-sounding "right to the use and enjoyment of . . . property."

What the African Commission on Human and Peoples' Rights will make of this provision in the course of its activities will be very interesting to observe. Nor is it likely that, once the Charter comes into force (assuming, of course, that it does), the Commission will be able to duck the issue for long, since it would seem quite likely that persons filing communications with the Commission will be able to seize upon this provision in a wide variety of contexts, most obviously to challenge nationalization and collectivization programmes of various kinds.

In all events, at the present time it would not appear that any of the three states being studied would need to make any substantial changes in their domestic laws to comply with this article.

The economic, social and cultural rights (Article 15 to 16)[91]

It is frequently said that whereas the developed Western states are principally concerned in the human rights area with civil

and political rights (broadly, of the type just discussed), the developing world is more interested in economic, social and cultural rights. If repetition alone could make allegations come true, then that proposition would long ago have become established in the firmest way. A study of the Banjul Charter, however, reveals surprisingly little support for this claim.

The economic, social, and cultural rights which find protection in the Charter, as a matter of fact, are essentially confined to four: the right to work; health (both physical and mental); education (including participation in the cultural life of one's community); and the protection of the family. With the exception of Article 17(1), on the basic right to an education, the rights which are provided for in these three articles are of a general enough nature that it would scarcely be possible to make a clear finding that a state had infringed them (or, to use what is perhaps a more appropriate expression, failed to provide them). This generality carries one important advantage and one disadvantage (which might or might not be perceived as important). The advantage is, in a word, realism. Most countries of the world, and almost all which are members of the OAU (and hence eligible to become parties to the Banjul Charter), are poor countries which are attempting to develop themselves under massive pressures and handicaps from all quarters - domestic and international (international concerns being particularly important for the states of Southern Africa which perforce must pass their entire existence under the influence of the Republic of South Africa), political and economic. To suppose that they are capable of granting the full array of economic and social rights at one fell swoop would be unrealistic. They can be expected to attempt, within the constraints under which they suffer, to achieve these rights progressively;

but it would be unrealistic to expect more. Article 16(1) provides an illustration of this realistic approach, in its provision not for physical and mental health in an absolute sense (if indeed any such thing exists, even for the wealthiest of countries), but instead for "the best attainable state of physical and mental health".

The disadvantage of this generalist, relativist approach to economics, social, and cultural rights is that it is almost impossible to say with any certainty if the rights are or not being granted. Is a state in which 40% of government spending is devoted to the military really doing the best it can provide for the health of its citizens? There is equal uncertainty on the procedural side. Is it to be expected that the African Commission on Human and Peoples' Rights actually will make judgements of the kind just referred to? Needless to say, the problems of enforcing any such findings by the Commission might prove very serious.

It would appear much more likely that the African Commission would take the approach that what the economic, social, and cultural provisions of the Charter require is that each state make a conscientious, good-faith effort to grant the rights in question, and that any applicant (whether it be another state party or an individual or group) alleging a violation on a state's part would have the burden of proving bad faith - a burden which would be virtually impossible to meet.

This approach would be quite a sensible one, although there may be some who would be disturbed at the fact that it would seem to amount in practice to the setting up of a kind of two-tier human rights system. The one tier would be the civil and political rights,

which would be the subject of litigation procedures before the African Commission quite similar in nature to those under the European and American Human Rights Conventions. The second tier would be the economic, social, and cultural rights, which would effectively not be subject to adjudication (save for the extremely limited exception just posited, of proving lack of a good-faith effort on the part of states parties) and therefore would remain as pious expressions of hopes for the future.

Such a state of affairs may not be intrinsically so undersirable. After all, it would have the virtue of reflecting in a realistic way the very different nature of political and civil rights on the one hand, as opposed to economic, social, and cultural rights on the other hand. The problem is, though, that people might begin to wonder what had become of the ringing assertion in the seventh preambular paragraph of the Charter, that "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". What the "African" Charter of Human and Peoples' Rights would then amount to would be only an imitation of the basic European pattern, in which civil and political rights were fully enforceable at law, and economic, social, and cultural rights not.

It is submitted that the true difficulty here lies in the tendency of many scholars to fall into the very traps which they purport to avoid: in this case, the error has been to assert the interdependence of the two classes of rights in one sense, while at the same time accepting, even assuming, the existence of a sharp dichotomy in another sense. This point requires a word of explanation. The seventh preambular paragraph states clearly enough that "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality . . . ." To hold, however firmly, though, that two things "cannot be dissociated" is at

the very same to assume the fact that those two things really do exist, and as separate things at that, in at least some sense.

The basic problem here is that the two things in question (the two categories of rights) are in reality only one thing. Or rather, two different aspects of one "thing". To think first of economic, social, and cultural rights as being different in kind from civil and political rights, and then to claim that the two cannot be dissociated comes perilously near to being a contradiction in terms. The more fruitful approach would be to insist, as the Western civil libertarian tradition has not always done, that the economic and social aspects of civil libertarian questions always receive their proper share of attention.

The courts of Southern Africa have already been adopting an approach something like this one, as the discussion above on exemplary sentencing indicated. One can find further instances of the sensitivity of the courts to social and economic issues within the broad framework of what would traditionally be labelled as civil and political issues. One interesting example in this respect is the Lesotho case of Raliqo Montši V. Rex,[92] which was a rape case, in which a very harsh sentence was being imposed upon the convicted defendant. The harshness of the sentence was justified on the following grounds:

> Consider the situation in this country. The majority of the men in this country go to the Republic of South Africa to seek employment. Due to circumstances not of their making, their wives remain behind. Again, most men come to the big centres such as Maseru to seek employment and due to sociological problems their wives remain behind. It is these women who are most vulnerable. They must be protected and the courts will do so with utmost vigour. Accused persons who are found guilty of this heinous crime must not expect any mercy from our courts ..... The courts mean to crush this menace[93]

Here, as in the case of exemplary sentencing discussed above, the problem is the extent to which the legal system should let its views of economic and social reality lead to the abridgement of what might other-wise be considered the fundamental rights of individuals. It is in cases like this one that the real inter-connection between civil and political rights on the one hand, and economic, social, and cultural rights on the other lies "hidden". Scholars have too long been entranced by the superficial picture of the two categories of rights arrayed against one another like conceptual armies doing glorious battle for the juridical soul of mankind. The way to a true appreciation and development of economic, social, and cultural rights does not lie in the expectation of a grand, cathartic duel between the two in the conference halls and seminar rooms of the scholars of law, sociology, economics, and no doubt many other disciplines as well, to grapple with the hard, specific issues as they emerge from the day-to-day lives of the people of Africa. The sweeping assertions of international conferences should be the last step in this difficult process, not the first.

The final observation that may be made in connection with the economic, social, and cultural rights is that the one area in which the states in this study clearly need to do more is in the area of discrimination against women. There has been practically no case law on the subject in any of the three states.[94]

The rights of peoples (Article 19 to 24)

As noted above, this is the portion of the Banjul Charter which differs most obviously from any other human rights instruments presently in existence. Unfortunately, the drafting has not been exactly a model of clarity.

The most obvious weakness is the lack of any attempt to explain just what is meant by the term "peoples." It is clear that the term is not synonymous with "states", but apart from that conclusion vagueness and uncertainty reign. The chief question which must be answered is. does the expression "peoples" refer to the population of a state, or can it refer to, say, an ethnic group, or a religious group, or a social class? In other words, is it correct to say that the population of, say, Zimbabwe constitutes a "people," but that the Shona do not? It appears that such is the case, although this conclusion is not advanced with any great confidence. The basic reason for supposing that the expression "people" refers to the people of a state is that if the term included, say, tribal groups, then Article 19 of the Charter particularly (which states that "All peoples shall be equal ...") might offer undue encouragement to secessionist movements. If indeed, all peoples are equal, and if the Tswana people have their own nation-state, why are not the Ibo people of Nigeria similarly entitled to their own nation-state?

It would seem preferable to regard this section of the Charter on peoples' rights as referring to the rights which belong to the population of nation-states en masse, rather than to individuals in specific cases. Government are viewed not as the holders of these peoples' rights, but rather the bodies which have the ability, the right, and (most important) the duty to see that these peoples' rights are exercised. For example, Article 22(2) expressly holds that "States shall have the duty . . . to ensure the exercise of the right to development" (a right which the Charter makes not the slightest effort to define).[95]

As far as human rights law is concerned, these peoples' rights present something of a difficulty. If they belong only to masses of people and not to individuals, then who has the right to take action if they are allegedly infringed? The answer, apparently,

is that any one can do so. The part of the Charter relating to "other communications" (i.e., communications other than those from states parties to the Charter) does not place any restriction on who may do the communicating (so long as the communication itself meets the criterion set forth in Article 56), or to what portion of the Charter the communication may relate.

The consequences of this part of the Charter, then, in conjunction with the right of communication of Articles 55 to 59, may be very far-reaching indeed. Consider, for instance, the requirement of Article 21 (5): "States parties . . . shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources". Suppose that a state enters into an agreement with a foreign oil company, whereby the company will search for oil, and in the event that it discovers it, will be given certain incentives and other concessions to exploit the find. Immediately upon the publication of the fact that such an agreement had been reached, some outraged members of the political opposition file a petition with the African Commission on Human and Peoples' Rights, alleging a violation of Article 21(5) on the part of the state. There could, of course, be no question of the petitioners' suing the oil company under the Banjul Charter, since the company is not a party thereto.

Such a petition would place the members of the African Commission in an interesting position. It would in effect transform them into arbitrators of a rather unusual sort. That is, they would be passing on the fairness or reasonableness of the oil concession agreement, although <u>not</u> in a dispute between the parties to that agreement. They would have no power to cancel or alter the terms of the concession in the event that they were

to deem it violative of Article 21(5). They could suggest to the state that it either cancel or renegotiate the agreement, although to do so might involve the state in a substantial damages claim from the company for repudiation.

Note that the example just chosen is a relatively simple one, because it involves making a decision on a relatively clear-cut issue. Suppose, however, that the petitioners had decided instead, or in addition, to proceed under Article 22(2) instead, and to allege that the state had violated its duty "to ensure the exercise of the right to develop". This is not the place to launch into an exhaustive discussion of what the right to development is or is not;[96] but for the purpose of pointing out some of the difficulties that might be caused by including it in the Banjul Charter in this way, it might be useful to note a characterisation (not a definition) provided by an African jurist. He stated that the right to development "envisages each person's quality of life in its totality, for an improvement that takes into account the choices and means of each individual and each nation".[97] It will be no easy matter deciding when a state has failed to ensure the exercise of that right!

The most probable "solution" to this problem will be, the same as that posited for the economic, social, and cultural rights of Article 15 to 18 above: that the states parties will be allowed a "margin of appreciation"[98] whose effect will be that any one alleging a violation of any of the peoples' rights will have the burden of proving bad faith on the part of the state, a burden which will be so difficult to meet as to render issues relating to such questions as the "elimination of all forms of foreign economic exploitation" or the right to development non-litigable.

It would be greatly desirable, although it is probably not now possible, for there to be some clarification of this point as soon as possible. The reason is that, as the Charter now stands, there is a vast uncertainty as to just what kind of obligations states might be assuming in ratifying the instrument, and as to what kind of claims might be made against them in the future under the communication procedure of Article 55 to 59. It would be tragic for the fate of the Charter and, more importantly, for the future of the people of Africa if large numbers of states declined to ratify the Charter because of fears, which might well utimately prove to have been groundless, about massive claims that might be made against them. Nor can there be any effective way of reassuring hesitant states. Since these provisions relating to peoples' rights are so utterly without precedent, even the world's foremost human rights experts can do no more than make educated guesses as to what effect they will have in practice.

A final matter which merits discussion in connection with the portion of the Banjul Charter on peoples' rights concerns the right of peoples "to free themselves from the bonds of domination by resorting to any means recognized by the international community" (Article 20(2). The Charter, in this area, is a bundle of contradictions. On the one hand, for example, Article 20(3) obligates states parties to assist peoples "in their liberation struggle against foreign domination, be it political, economic, or cultural". On the other hand, though, there is the duty on the part of states parties, in Article 23(2) to ensure that "any individual enjoying the right of asylum . . . shall not engage in subversive activities against his country of origin or any other State part to the present Charter." The use of the term "country of origin" is significant, because it would include South Africa (which, not being an OAU member, is not eligible to be a party to the Charter[99] and therefore could not fall under the rubric of state party).

One wonders in this connection whether the Swaziland case of Rex V Mngomezulu, Malinga, Mwelase and Zulu[100] would have come out any differently had the standards of the Banjul Charter, such as they are in this area, been applied to it. The defendants were charged with unlawful possession of arms of war and ammunition. Their defense was that they were members of the Pan African Congress (PAC), one of the South African liberation groups, in transit to South Africa. They claimed that the Swaziland government had authorised their possession, not directly but constructively as it were, through Swaziland's membership of the OAU, which officially favoured assisting the various liberation groups in their struggle against South Africa. Not surprisingly, the court rejected their argument and proceeded to find them guilty.

Assuming that these defendants were not at the time enjoying the right of asylum (and that therefore Article 23(2)(a) would not be applicable), would Swaziland have violated the Charter by dealing with these defendants as it did? If the provision were interpreted literally, then it would appear that the case was indeed inconsistent with the Charter. It would not be inordinately difficult, of course, for lawyers to devise a reasonably plausible argument that would support the Swazi decision; but there would probably have to be some subtle reasoning involved. Furthermore, it might look slightly odd to see the members of the African Commission on Human and Peoples' Rights engaging in legal casuistry for the purpose of weakening these provisions of the Charter for the benefit of South Africa. One would therefore have to conclude that, for the states of the Southern African region (including, of course, Botswana, Lesotho, and Swaziland), ratification of the Charter carries some risk of losing a certain autonomy over the operation of their ordinary criminal legislation while at the same time being dragged further than they might wish into the liberation struggle within South Africa.

This example provides an apt illustration of how great an error it can be to place sweeping phraseology which really is of basically a rhetorical nature into a formal legal document. Such a policy unnecessarily increases the risks and uncertainties facing potential states parties, thereby making ratification less likely than it otherwise would be and jeopardising one of the noblest experiments that humanity has ever launched.

The duties of individuals (Article 27-29)

There is nothing new about the proposition that humans have duties as well as rights. As long ago as 1948, the American states adopted the American Declaration of the Rights and Duties of Man,[101] which had a fairly extensive list of duties of various kinds. What is unusual about the approach of the Banjul Charter is the extent to which it has embodied a list of duties into what purports to be legally binding form. The American Convention on Human Rights has a chapter on the subject, but it consists of only a single article, which (in relevant part) holds in a very general way that "Every person has responsibilities to his family, his community, and mankind".[102]

The list of duties in the Banjul Charter is a great more extensive than that, although not always more precise. One might wonder, for instance, what the duty "To preserve and strengthen social and national solidarity, particularly when the latter is threatened" might mean.

More importantly, though, one might wonder what the legal effect of any of this portion of the Charter is. Clearly only states, and not individuals, are eligible to be parties to the Charter (Article 63(1), so that on general principles of international law the Charter cannot create legal liabilities binding on

individuals. In any event, there could be no question of states' complaining before the African Commission that individuals are not meeting their obligations under the Charter, since Article 47, on communications from states, envisages only complaints by states against other states.

It is suggested that Article 27 to 29 of the Charter are not, as one might think, altogether devoid of legal effect. It is still possible that they can have some impact on the standing of individuals to bring claims against states, i.e. the Commission may conclude that an individual who has been unduly neglecting his duties will be disqualified from filing communications under Articles 55 to 59.[103] This suggestion must be treated with great caution, since there is no support for it in those Articles. Also, one would certainly have to conclude that it is ineffective to leave important matters of standing to be gleaned from the text by guesswork rather than stating them directly. Nevertheless, it is difficult to see what other legal effect Articles 27 to 29 could have.

This portion of the Charter would not necessitate any legal changes on the part of Botswana, Lesotho, or Swaziland.

The promotion of the rights contained in the Charter (Article 25)

According to this article, states parties to the Charter are under the duty to "promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the . . . Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood." Each of the three states under consideration could perfectly easily enter upon this obligation without any change in domestic law.

The Independence of the Courts [104] (Article 26)

There can be few provisions of the Banjul Charter that are more important than this one. In the discussion above of the role of the courts in Lesotho and, to a lesser extent, of Swaziland in cases on detention, proof was given, if any was necessary, of the critical importance of a free and independent judiciary. In this respect, the drafters of the Banjul Charter are to be highly commended, as other international human rights instruments do not contain a provision analogous to this one. A forward stand on this issue may one day be regarded as Africa's most significant contribution to the evolution of the international law of human rights.

Although there is little actual litigation on this issue, it is worth taking note of the form in which threats to judicial independence might come. One important mechanism for the elimination of judges with dangerously independent views is the use of fixed-term contracts for judges who are non-nationals of the country concerned (a phenomenon that is far from rare in a continent where the after-effects of the colonial era may yet have a long life, in the form of legal systems which originally were imposed by colonial masters). In the case of expatriate judges, it is a fairly easy matter for the government to decide upon the non-renewal of a contract under the guise of some plausible-sounding excuse. It is no easy matter devising a strategy to meet this problem. Perhaps one day a judge whose contract is not renewed will take his own matter to the African Commission, although that possibility seems somewhat far-fetched. It is possible, though, that another body, such as a bar association or any interested human rights group could take up such a case before the Commission. In general, though, this important area is one in which constructive suggestions for concrete measures are anxiously awaited.

Having now completed the analysis of the impact which adherence to the Banjul Charter might have on the legal systems of the three states of Botswana, Lesotho, and Swaziland, it is now in order to turn to the two UN Covenants for the purpose of undertaking a similar analysis.

The Two International Covenants

The analysis here may be briefer than that just completed for the Banjul Charter. The principal reason is that, insofar as the two UN Covenants - the one on Economic, Social and Cultural Rights, and the other on Civil and Political Rights - overlap the Banjul Charter the analysis has already been undertaken and need not be repeated. It is only to the extent that the two Covenants contain rights not found in the Banjul Charter that further exploration is necessary.

(A) State of Ratification of UN Human Rights Conventions by Botswana, Lesotho, and Swaziland

The most important point to note for present purposes is that none of the three states being considered here is a party to either of the UN Covenants. In fact, Botswana and Swaziland both have rather poor records of ratification of UN human rights instruments. Lesotho's record is significantly better.

The following table lists the UN human rights instruments to which each of the three was a party as at 1 July 1981:

Botswana:

(1) International Convention on the Elimination of All Forms of Racial Discrimination (1966).

(2) Convention Relation to the Status of Refugees (1951).

(3) Protocol to (3) (1967).

(4) Convention Relating to the Status of Statesless Persons (1954).

Lesotho:

(1) Convention on the Prevention and Punishment of the Crime of Genocide (1948).

(2) International Convention on the Elimination of All Forms of Racial Discrimination (1966).

(3) Convention Relating to the Status of Refugees (1951).

(4) Protocol to (3) (1967).

(5) Convention on the Political Rights of Women (1953).

(6) Slavery Convention (1926).

(7) Protocol Amending (6) (1953).

(8) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

Swaziland:

(1) International Convention on the Elimination of All Forms of Racial Discrimination (1966).

(2) Protocol to the Convention Relating to the Status of Refugees (1967).

(3) Convention on the Political Rights of Women (1953).

In addition to the above information, it might be noted that Lesotho has signed, but not yet ratified, the International Convention on the Elimination of All Forms of Discrimination Against Women (1979).

(B) Implication for Botswana, Lesotho and Swaziland of adherence to the International Covenants

(a) International Covenant on Civil and Political Rights

The right to life

The Banjul Charter, as noted above, does provide protection for the life and integrity of the person. It does not, however, say anything expressly about the imposition of the death

penalty. This omission is somewhat surprising, in that this area of civil liberties law is one in which Third World countries have taken a leading role (most notably in Latin America) while the world's most (professedly) civil libertarian states, the United States, has been notably backward. It might have been thought that the death penalty is something that would have been of particular concern in Africa because of the fact that South Africa, the continent's perpetual paradigm of gross and persistent human rights violations, is one of the world's most lavish indulgers in the death penalty (inflicted overwhelmingly disproportionately on its black population). For some reason, however, the drafters of the Banjul Convention chose to let pass this opportunity to take the lead in an important area of civil liberties.

The protection which the UN Covenant on Civil and Political Rights affords in respect of the death penalty is itself rather modest. Article 6(2) provides that the death sentence may be imposed "only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . . . " There can be little doubt that the criterion of seriousness is to be judged not in accordance with the domestic law of the state concerned, but rather in terms of the Covenant's own standards.

In this area, the European Human Rights Convention affords less protection: like the Banjul Charter, it omits all express mention of the subject. The American Human Rights Convention, on the other hand, is more liberal than the Civil and Political Covenant. It provides, in Article 4(2), that the application of the death penalty "shall not be extended to crimes to which it does not presently apply."

Adherence to the Civil and Political Covenant by the three states under consideration would not impose any undue burdens in this area. All three states retain the death penalty, but only for crimes which would probably be deemed to fall into the "serious" category.

Forced Labour (Article 8 of the Civil and Political Covenant)

Here is another important omission from the Banjul Charter, surprising in light of the suffering to which many African peoples were exposed in this regard during the colonial period.[105] Article 8 of the Covenant is careful to state that there are certain forms of involuntary labour which shall not be deemed to be prohibited under this head: service performed by a person under detention, compulsory military service, services required during emergencies, and any work or service which forms part of "normal civil obligations." These same four exceptions are found in the European and the American Human Rights Conventions (Articles 4 and 6 respectively).

In the three states under study, there have been no significant reports of allegations of forced labour. This article therefore should pose no difficulties to the three states should they ratify the Covenant.

Deprivation of Liberty (Article 9 of the Civil and Political Covenant).

In this area, both the Banjul Charter and the states of Lesotho and Swaziland fall below the standards set by the Civil and Political Covenant. For one thing, Article 9(2) requires that a person who is arrested is entitled to be informed at the time of the reason for

the arrest. There is some uncertainty as to what this provision means, in the case of legislation like the security laws of either of those two states. Consider, for instance, section 32 of the Internal Security (General) Act 1982 of Lesotho, which authorises any member of the police force to arrest without warrant "a person whom he reasonably suspects to be . . . concerned in subversive activity." If Article 9(2) were to be followed, would the arresting officer, in order to comply, only have to inform the detainee that the detention was because of suspicion of concern in a subversive activity? Or would he have to go further and give the grounds of his suspicion? Similarly, in the case of Swaziland, would a person subject to preventive detention only have the right to be told that the Prime Minister deems it to be in the "public interest" to detain him, or would he be entitled to an explanation of how the minister came to be of that opinion?

Judging by the language of Article 9(2) alone, it would appear probable that detainees would have to be given no more than the proximate cause of their arrest i.e., to be told under what authority the arrest was taking place. In the ordinary course of investigation into criminal activity, it would perhaps seem to be placing a rather heavy burden on police forces to present the prosecution's case in miniature, as it were, each time that they made an arrest. It is necessary, though, particularly in the area of detention under security laws, to look beyond the mere proximate cause of the arrest. Where the domestic law allows detention for reasons that are so general as not to amount to reasons at all from the point of view of detainees - and such is the case with the security legislation of both Lesotho and Swaziland - then the spirit, if not the letter of Article 9(2) is being frustrated. States should not be allowed to flout their international obligations

in this way. Therefore, it is submitted, the requirement of Article 9(2) should be interpreted to mean that a person when being arrested must be informed in reasonable detail of the specific conduct in which he engaged which led to his arrest.

On this standard, the law of all three countries, as set forth in their respective constitutions, was once at least broadly in line with Article 9(2). In Lesotho and Swaziland, though, the constitutional protections are now no longer operative, so that no domestic legal safeguards remain against the rigour of the security laws. The security legislation would require amendment on the part of these two governments. In Botswana, in contrast, the constitutional guarantee of the right to be informed of the reasons for one's arrest is still outstanding. There has been no indication from the case law of that state that any change would have to be made in order to accord with Article 9(2) of the Covenant.

Another extremely important measure of protection for detainees which is present in the UN Covenant (in Article 9(4) but which is lacking in the Banjul Charter is the right of a detainee to test the lawfulness of his detention. What this principle entails, as was discussed above in connection with Article 7 of the Banjul Charter, is that a person would have the right to have an impartial tribunal determine whether his detention was or was not authorised by the law. Under this principle the law itself is not subject to challenge, the only question being whether the law has been followed, however harsh that law may be in substance.

It would appear that all three states in question do allow for the testing of the lawfulness of detention in this sense,

although there may be some doubt in the case of Swaziland. There certainly is no doubt regarding Botswana, where the principle is enshrined in the still-functioning constitution. Even in Lesotho, where the substantive law is much more harsh, the Sello case (discussed above)[106] firmly established that the then-existing security legislation did not purport to remove this right to test the lawfulness of detention. The 1982 legislation, even though it did reverse some aspects of the Sello decision, did not affect this vital principle.

In Swaziland, the position is rather less clear, although the Walker and Forbes[107] case provides a strong indication that the courts there will scrutinize the actions of the authorities to ensure that legislation is complied with. It would appear, then, that all three states meet the standard set by Article 9(4) of the Civil and Political Covenant, notwithstanding the wide disparities which exist in the substance of the laws which the courts scrutinise.

Article 9(5) of the Civil and Political Covenant provides, as again the Banjul Charter does not, that a person who has been arrested or detained unlawfully shall have an enforceable right to compensation. This guarantee also was placed into the independence constitutions of all three of the states being studied. It is still, therefore, the law in Botswana.

In Lesotho, it still clearly is possible to obtain damages for malicious arrest on the part of the police, notwithstanding the suspension of the constitution.[108] The common law survives in this area. It would seem that the same would be the case in Swaziland, although there is presently a lack of specific authority on the subject.

There is an ambiguity in Article 9(5) of the Civil and Political Covenant, in that it does not state against whom the enforceable right to compensation must lie. It is therefore uncertain whether it will be sufficient for compliance with the article if the action lies against only the officer who effects the arrest, or whether there must be a right of action against the government as well as in all cases in which an officer acts within the apparent scope of his authority. It is submitted that, in the interest of making Article 9(5) effective, an action must lie against the government in all such cases. On this principle, the Monare[109] case would have to be overturned either by decision or by statute in order to bring the Lesotho law into compliance with the Covenant.

In sum, the law of the three countries concerned requires some clarification, at a minimum, in this area if Article 9(5) is to be complied with. Once this clarification has been effected and the uncertainties concerning Article 9(5) itself resolved, it may well be that changes in the law of the countries will be necessary here.

Rights of prisoners (Article 10 of the Civil and Political Covenant)

This subject is one which receives no attention in either the Banjul Charter or the independence constitutions of the three states in question. The obligations under Article 10, however, are of only the most modest and general kind. Detainees, according to Article 10(1), must be "treated with humanity and with respect for the inherent dignity of the human person." It is also set down that the aim of the penitentiary system should be "reformation and social rehabilitation" (Article 10(3)). The only specific

requirements are the separation of juveniles from adults, and the separation (save in "exceptional circumstances") persons who were merely accused of crimes should be separated from those who had been convicted. Presumably, persons who were not even accused of crimes, but were detained either preventively (as is possible under the Swaziland legislation) or on mere suspicion of concern with subversive activities (as is possible in Lesotho) would be confined with persons accused rather than with persons convicted.

Imprisonment for breach of contract (Article 11 of the Civil and Political Covenant)

A provision to this effect is a standard item in human rights instruments, even though it does not appear in the Banjul Charter. None of the three countries being studied allows imprisonment on this ground, although all of them allow imprisonment for disobedience of lawful orders of courts. Ratification of the Civil and Political Covenant would therefore pose no difficulties in this respect.

Right to a fair trial (Article 14 of the Civil and Political Covenant)

It is distinctly odd that the Banjul Charter does not expressly provide for the right to a fair trial in general, but only for (as the discussion above noted) the right to have one's "cause heard" (Article 7(1)). In addition to this general point, it should be noted that there are a number of specific aspects of fair trials which are provided for in Article 14 but which a lacking in the Banjul Charter.

Article 14 of the UN Covenant also contains an express provision for a right to an interpreter, in the event that the defendant cannot speak or understand the language used in the court. The omission of this item from the Banjul Charter is puzzling. In light of the great variety of cultures and languages which often co-exist within African countries, one would have thought that a guarantee of the right to an interpreter would be particularly appropriate. Even in states as relatively ethnically homogenous as the three in question, the problem arises, because the language of the judicial system is English, which is not the vernacular language of any of the three states.

The problem which has arisen in this area in the three countries has not been so much the failure to provide an interpreter during the trial as the failure (often due to lack of of resources) to provide an impartial interpreter during the earlier stages of the inquiry. This difficulty has manifested itself in the case law of both Botswana and Lesotho. Botswana in particular has shown itself to be very sensitive to this problem. The case of Malatsi V. State[110] held very firmly that the constitutional right to an interpreter includes the the right to an unprejudiced interpreter. (In this case, one of the prosecution witnesses had done the interpreting). In light of that judgement, it is not clear what the status is of the earlier case of Mokwena V. State,[111] which concerned police acting as interpreters. The court in that case stated that such a practice was not desirable, but conceded that it was sometimes unavoidable. Even the Mokwena court, though, held that a police official who was involved in the particular case in question should not act as the interpreter. It appears probable, in light of this line of authority, that Botswana is basically in compliance with Article 14 of the Covenant in this respect.

In Lesotho, the position is basically the same. In the case of John Motloheloa V. Rex,[112] the prosecutor had done the translating before the magistrate. The court held that this procedure was wrong and quashed the conviction. The more recent case of Rex V. Moleleki is to much the same effect: that magistrates should never double as translators. It appears that Lesotho, like Botswana, is basically in compliance with the UN Covenant on this matter.

There is apparently no line of case law in Swaziland on the subject of the right to an interpreter. It is therefore not possible to say at this stage what changes in the law of that country, if any, might prove necessary to comply with the Article 14 right to an interpreter.

Article 14(3)(g) concerns a very fundamental right indeed for defendants in criminal proceedings - protection from self-incrimination. The American Human Rights Convention also contains this protection, although the European one does not, nor does the Banjul Charter. The protection did appear in the independence constitutions of the three states being considered.

Direct consideration of the question of the compelling of a defendant to provide evidence against himself has been very uncommon in the three countries. The Botswana case of State V. Modukwe,[114] however, did consider the issue in connection with a prosecution for unlawful possession of diamonds under the Precious Stones Industry Protection Act. The defendant in that case, upon his apprehension, swallowed the diamonds.

He was then held by the police for six days, without a warrant, and given a stomach purge, the purpose being to recover the diamonds when they emerged in the defendant's excrement. The court held that in the circumstances, the defendant had been compelled to give evidence against himself. This decision is consistent with the Article 14 guarantee against self-incrimination. It may even go further than Article 14 requires, although a decision one way or the other on that point should have no effect on the willingness or ability of Botswana to adhere to the Civil and Political Covenant.

Article 14(6) of the UN Covenant provides for a right of compensation in the case of a wrongful conviction. The American Human Rights Convention also provides for such a right, although neither the European Convention nor the Banjul Charter covers this question. None of the three states under consideration here provides for compensation in such a case. Therefore all three would have to make changes in their local law if they were to become parties to the Covenant.

The provision in the UN Covenant concerning double jeopardy is of some interest, in light of the Swaziland case of Rex V A.K. Hlatswayo.[115] The defendant in that case was charged with and convicted of assault. Some time after that, the victim died, whereupon the defendant was charged with culpable homicide (which is, basically, the Roman-Dutch law equivalent of manslaughter in the English common law). The court in Swaziland held that this second prosecution was permissible. The reason lay in the conception of double jeopardy as it was expressed in the Swaziland constitution (which, however, had been "repealed" before the case in question). Section 8(5) of the constitution had set out the basic requirement for double

jeopardy: it held that a person could not be tried for an offence of which he had already been acquitted "or for any other criminal offence of which he could have been convicted at the trial for that offence . . ." Since the victim of the assault had still been alive at the time of the first trial, the offence of culpable homicide (which required the death of the victim) was not an "offence of which he could have been convicted at the earlier trial . . ."

In terms of the Swaziland conception of what double jeopardy is, the decision would seem to be a correct, if rather harsh, one. It would also, apparently, be consistent with the UN Covenant provision on double jeopardy, which is actually more limited than the one in the Swaziland constitution: Article 14(7) of the Covenant provide no more than that a defendant cannot be tried or punished again "for an offence for which he has already been finally convicted. . ." A better approach toward the whole concept of double jeopardy would be to forbid a second prosecution for any offence based on the same set of facts which had formed the basis of a previous conviction. Such is not, however, the present state of international human rights law. Harsh though it may sometimes be, as in the Hlatshayo case, the Swaziland law on double jeopardy is consistent with the requirements of the Civil and Political Covenant.

In Botswana and Lesotho, there is not, apparently, any case law on this subject. Since the double jeopardy provisions of both constitutions are basically the same as that in Swaziland, it is reasonable to conclude that in those two states as well, there is no difficulty with ratification of the Covenant in this area.

Right of Privacy (Article 17 of the Civil and Political Covenant)

Neither the Banjul Charter nor the independence constitutions of the three countries being studied contains a right of privacy as such, although the three constitutions do contain protection against arbitrary search and entry. In Botswana, these guarantees still exist. In Lesotho, however, they have been gravely undermined by the security legislation, which confers the most sweeping powers of entry and search upon the police. Section 27(1) of the Internal Security (General) Act 1982 grants to any member of the police force of the rank of sergeant or above the right "without warrant (to) enter premises or any other place, including a dwelling house ... for the purpose of ascertaining" whether it contains arms or explosives. There is no requirement at all of any belief, reasonable or otherwise, on the part of the officer that such materials might be on the premises. Section 27(2) of the same act gives similarly unlimited powers to any member of the police force to search persons for arms or explosives. Again, there is no requirement that the police have the slightest suspicion that such might actually be the case. Clearly this Lesotho legislation is inconsistent with Article 17 of the UN Covenant, which protects people against "arbitrary . . . interference with . . . privacy, family, home or correspondence . . ."

Advocacy of racial hatred (Article 20(2) of the Civil and Political Covenant

It has been noted above that all three of the states under consideration are parties to the UN Convention on Racial Discrimination, and that all three have legislation forbidding the propagation of racial hatred. It has also been noted above

that the Banjul Charter does not require states, expressly at any rate, to legislate against the advocacy of racial hatred.

This provision of the Covenant should provide no difficulty for those states which might wish to ratify it.

The right to form trade unions (Article 22 of the Civil and Political Covenant)

While this right is accorded in all three states its full ramifications and implications are in practice not tolerated.[116]

The right to marry and found a family (Article 23 of the Civil and Political Covenant)

There are no obstacles here to the ratification of the Covenant on the part of the three countries being studied.

Right of the child (Article 24 of the Civil and Political Covenant)

The basic right, as set forth in Article 24(1) of the Covenant, is the right of every child to "such measures of protection as are required by his status as a minor on the part of his family, society and the state." The Covenant, hardly surprisingly, is not at all specific on how these three entities - the family, society, and the state - are to divide up the responsibilities towards children.

Until there is some case law on this subject under the Covenant, it will not be possible to say with any certainty precisely what changes might have to be made in the law of any of the three states being considered. For now, it would probably be safe to assume, in the absence of any evidence to the contrary, that the three countries are presently doing enough in this area to comply with the requirements of this article.

Rights of minorities (Article 27 of the Civil and Political Covenant)

The three countries being considered here are singularly fortunate in being very largely free of ethnic and tribal animosities of the kind that have tragically beset so many of the states of Africa. Accordingly, it would appear probable that none will have any difficulties with this article in the event of ratification of the Covenant.

The UN Covenant on Economic, Social and Cultural Rights

This discussion above, it may be recalled, concluded that by their very nature, economic, social, and cultural rights were not suitable for litigation on their own, separate and apart from civil and political rights, but that they properly formed a component of those human rights which commonly, but misleadingly, are called civil and political rights; as if to imply that even those rights could truly be viewed on their own, in isolation from the "real world". Insofar as an attempt is made, as it is to some extent in the Banjul Charter but even more so with the UN Covenant, to abstract the economic, social, and cultural element of human rights and treat it in isolation, the only truly legal obligation on the states concerned can be to make a good faith effort

progressively to advance the rights concerned. Consequently, the only issue in this area which is litigable in the traditional sense of that term, is the presence or absence on the part of the state of that good faith effort. The presence or absence of solid results cannot be decisive.

It is therefore the case that there can be practically no "risk" for the states which are the object of this study in the ratification of this instrument, if by "risk" one means a risk of having a claim successfully brought against it by another state party. Individuals have no standing under this Covenant, as they do under the Banjul Charter, to bring petitions against states. All this is not to say, of course, that the three states, in becoming parties to this Covenant, would not thereby be assuming legal obligations. They would be under the basic obligation - which is fully binding legally - set forth in Article 2(1) to "undertake . . . to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant by all appropriate means, including particularly the adoption of legislative measures." That may well be what the states are now doing, or in any event attempting to do. The important point is that, upon ratification of the Covenant, they will be legally bound under international law to continue in those efforts.

At this point, there remains only to go briefly through the UN Covenant and to point out the ways in which it goes beyond the Banjul Charter.

The right to work (Article 7 of the Economic, Social and Cultural Covenant)

This provision of the Economic, Social and Cultural Covenant is both more clearly drafted and more detailed than its counterpart

in the Banjul Charter 15). When the Banjul Charter holds that "Every individual shall have the right to work under equitable and satisfactory conditions . . . ." it is not clear whether there is intended to be a right to be employed, or merely a right to enjoy the stipulated conditions if one is employed. The Covenant seems to opt for the latter approach, with its guarantee of "just and favourable conditions of work".

The Covenant has provisions for fair remuneration, which the Banjul Charter does not. It also provides for a right to promotion on the basis of no other grounds than seniority and competence. It also makes a general provision for leisure time.

The right to form and join trade unions (Article 8 of the Covenant)

This subject has been touched upon before and need not be repeated here.

The right to social security (Article 9 of the Covenant)

The Banjul Charter contains nothing of this kind, possibly because so many of the member states of the OAU are very poor countries which in their present state of under-development cannot afford social security systems.

Rights pertaining to the family (Article 10 of the Covenant)

An interesting provision which the Covenant provides for is special protection for mothers for a reasonable period before

and after childbirth. It also contains a restriction on child labour which is absent from the Banjul Charter.

Right to an adequate standard of living (Article 11 of the Covenant)

A provision like this one is a rather conspicuous absentee from the Banjul Charter. One might have thought that such a right would be upper most in the minds of drafters with a special interest in economic and social rights. The Banjul Charter also lacks any provision analogous to the Article 11(2) provision on freedom from hunger.

Rights to an education (Article 13 and 14 of the Covenant)

Here again, the Covenant is the more detailed document, by a consideration margin. Particularly important is its explicit mention of the goal of making primary education both compulsory and free.

CONCLUSION

It would be wrong to contend that the Banjul Charter on Human and Peoples' Rights is one of the international community's more accomplished pieces of draftsmanship. Rather, it is a mix of caution and extravagance, of quite traditional common sense and wild bombast. In the months and years to come (assuming, that is, that the document does win the acceptance of the African states), it no doubt will often be said that the most significant fact about the Charter is that it exists at all. If there is any single lesson to be learned from this analysis of the Charter just undergone, it is that that kind of attitude is wrong. The mere existence of an African regional human rights machinery is not enough, not by a long shot. This analysis has uncovered that even Botswana, one of Africa's few havens of apparent liberal democracy, falls short in a number of respects of even the modest standards which the Banjul Charter sets in the civil and political field. As imperfect as it is, the Charter has something that it can teach to almost every state. To fail to do so would be a tragic waste.

One can state this last point somewhat more generally and point out that the mere existence of legal norms can never be sufficient. Until those norms can become part of the living law of the people they are meant to serve and benefit, they can hardly be hailed as a great service to mankind. In this area, more than in any other, there is cause for worry about the Charter. There is the fear that those parts of the Charter which are drafted in the most sweeping fashion may frighten some states away from ratification. The great experiment may yet be stillborn.

There is of course some danger in expecting the Charter to do too much, although the nature of that danger is often seriously

misunderstood. Clearly, it is unwise to expect the entry into force of the Charter, should such ever occur, to work an instant and profound transformation over the human rights landscape of Africa. But the most important concerns about the Charter are, one might say, ones of quality rather than of quantity. That is, the importance of the Charter lies not in the quantum of change which it might, or might not wreak, but rather in the kinds of attitudes which it succeeds, or fails to engender in the hearts and minds of government officials, lawyers, and ultimately, the common people of Africa. The scholars, lawyers, and people of Africa must not become fixated on the Charter as a kind of all encompassing human rights panacea. Rather, the Charter should become a mechanism whereby the various states and peoples of Africa constantly exchange experiences, ideas and hopes with one another.

We have observed in the course of this portion of the study that in some ways the laws of Botswana, Lesotho, and Swaziland have something to learn from the Banjul Charter; in other ways they have things to teach it. In any event, it is vital not to lose sight of the human rights process generally as one of constant teaching and learning in which the roles of teacher and learner are in a state of constant flux. This essay, of course, has been concerned with the extent to which the law of the states of Botswana, Lesotho, and Swaziland "measures up" to that of the Banjul Charter. With great frequency, though, the meaning of the Charter itself has been greatly in question. In such cases, where else is there to look for guidance than the experience of other regional systems and, just as importantly, principles that can be gleaned from the domestic laws of the states which may, or may not, be measuring up to the standards

of that. The African Charter will truly have succeeded when it stops being seen as a kind of overlord and begins to be viewed as an instrument, as a more or less efficient device for stimulating a constant flux or interplay of ideas about human rights which will gradually seep more and more into the daily lives of the people of Africa.

Ultimately, then, this study has not been about what the states of Botswana, Lesotho, and Swaziland can learn from the Banjul Charter. It has been about what all of us can learn about human rights generally from the interplay between those three countries and the African Charter. In the final analysis in the human rights field, all are learners and all are teachers.

FOOTNOTES

1. For the text of which, see BASIC DOCUMENTS ON HUMAN RIGHTS (I. Brownlie ed., 2nd ed. 1981), at 243-65.

2. For the text of which, see id. at 391-416.

3. See Article 63(3) of the Charter.

4. For the text of which, see BASIC DOCUMENTS ON HUMAN RIGHTS, supra note 1, at 118-27.

5. For the text of which, see id. at 128-45. This Covenant is accompanied by an Optional Protocol (for the text of which, see id. at 146-49) concerning the right of individual petition vis-a-vis states parties.

6. The Charter does not require, as the European Human Rights Convention does, that those who file communications must themselves claim to be victims of the violations which they point out. It is therefore possible, under the Banjul Charter, for individuals and non-governmental organizations to play a sort of ombudsman role.

7. The inclusion of rights of peoples in the Banjul Charter is not wholly without precedent. Both of the UN Covenants, for instance (see notes 4 and 5 supra), included the right of peoples to self-determination. What is unique about the Banjul Charter is the prominence which it accords to the concept of peoples' rights.

8. See generally E. KANNYO, HUMAN RIGHTS IN AFRICA: PROBLEMS AND PROSPECTS (1980); W. WEINSTEIN, AFRICAN PERSPECTIVES ON HUMAN RIGHTS (1980); W. CUBBERLEY, PROMOTION AND PROTECTION OF HUMAN RIGHTS IN AFRICA: REGIONAL ARRANGEMENTS (1980); and O. WELCH. The O.A.U. and Human Rights: Towards a New Definition, 19 J. MOA. AFF. STUD. 401 (1981).

9. It is true that in the section on interpretation of the Charter by the African Commission on Human and Peoples' Rights, Article 61 states that as a subsidiary measure to determine the principles of law to apply, the Commission should consider "African practices consistent with international norms on human and peoples' rights." The reference, however, appears to be to African state practice, and not to the customary law of the various indigenous African nations.

10. For example, it appears to be the case that in the area of the rights of women, some of the African customary law systems were more advanced than the Roman-Dutch law or the English common law.

11. It may be noted, however, that there is a mechanism for amending the Banjul Charter, set out in Article 68.

12. On the trade union movement in Africa generally, see W. ANANABA, THE TRADE UNION MOVEMENT IN AFRICA: PROMISE AND PERFORMANCE (1979).

13. On this subject generally, see ETHNICITY IN MODERN AFRICA (E. du Toit ed. 1978); and V. OLORUNSOLA, THE POLITICS OF CULTURAL SUBNATIONALISM IN AFRICA (1972).

14. See generally, INTERNATIONAL COMMON OF JURISTS, AFRICAN CONFERENCE ON THE RULE OF LAW, LAGOS, NIGERIA, JAN, 3-7, 1961: A REPORT ON THE PROCEEDINGS OF THE CONFERENCE (1961). For the text of the Law of Lagos, see BASIC DOCUMENTS ON HUMAN RIGHTS, supra note 1, at 426-34.

15. See Generally Martin, The Ombudsman in Zambia, 15 J. MOD. AFR. STUD. (1977).

16. See note 14 supra.

17. These are the following: The right to life; the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude; the right not to be imprisoned for failure to fulfill a contractual obligation; the right not to be convicted under retroactive criminal legislation; the right to recognition as a person before the law; and the right to freedom of thought, conscience, and religion.

18. Selection of the 3 countries due to general and frequent practice.

19. The European Human Rights Convention contains a provision corresponding to Article 2 of the Banjul, but not to Article 3. The American Human Rights Convention is just the opposite. It contains a provision analogous to Article 3, but not to Article 2.

20. Such structural dualism in legal systems is not uncommon in Africa.

21. See note 14 supra.

22. 1970-76 S.L.R. 58.

23. See the text at note 91 infra.

24. This understanding is crucial to any meaningful interpretation of the law.

25. See, for example, the unreported Lesotho case Rex V. Pesa Mokhope, CRI/T/19/76 (1976).

26. On the law relating to "pointing out" generally, see the Botswana case of State V. Lekgetho, Rev. Case No. 67 of 1982.

27. 1968-70 B.L.R. 129.

28. Sometimes the suggestions have been slightly bizarre, as in the case of Rex V. Majake Molupe and Others 1980 1 L.L.R. 112, in which the judge suggested that whenever a detainee indicated a desire to confess, he should be released immediately to the household of a "respectable and prominent member of the community" where he would wait until he had truly made up his mind as to whether he wished to proceed with the confession. One wonders how the "prominent and respectable members of the community" would take the inauguration of such a programme. For slightly more down-to-earth suggestions, relating to scrupulous medical attention to detainees, see Rex V. Faku, CRI/T/47/78.

29. Concerning this legislation generally, see Cross reference to Part A.

30. Case No. S.84/1979.

31. 2 COMP. & INT'L L. J. SOUTHERN AFRICA 348 (1969).

32. One must say "allegedly" in the context of this case, since the court never passed on the detainee's original claims of mistreatment.

33. CIV/APN/216/81.

34. See the case of Tyrer V. United Kingdom (Eur. Ct. Human Rights, 1978).

35. Rev. Case No.4 of 1982.

36. It should be noted here that the judge also expressed himself as opposed to punishment that were so excessively harsh as to render the recipient embittered and hardened.

37. Rex. V. David Nkofo and Augustinus Mokoteli 1967-70 L.L.R. 383.

38. A point which figured prominently in the Tyrer case, supra note 34.

39. Rex. V. Mohlouoa Tsehlana, Rev. Case No. 157/77 (1977).

40. Rex V. N.T. Zwane, Rev. Case No.8 of 1973.

41. Stephen Kunene V. Rex, CRI. Case No. 112/78 (1978).

42. Rex V. Vusi Nkambule, Crim. Case No. 21/81.

43. The potential threat this represents to free expression, and the fear it inculcates is considerable.

44. Cases Nos. 3/78 and 6/78 (1978).

45. 1971-73 L.L.R. 296.

46. In this connection, see also Lebenya Makakole V. Commissioner of Police and Solicitor-General, CIV/APN/54/82.

47. 1980 1 L.L.R. 158.

48. Id. at 172.

49. Id. at 169.

50. CIV/APN/32/82.

51. Id. at 4.

52. See note 46 supra.

53. Id. at 6-7.

54. For a comparison of the position under the Southern African Terrorism Act, as opposed to the Lesotho Legislation, see the Sello case, supra note 47, at 170-72.

55. This obviously represents a serious hindrance to open, unbiased and fair juridical practice.

56. CRI/T/20/80 (1981).

57. The Law of Lagos of 1961 favoured affording such a right to detainees, even if not necessarily through the ordinary court system. See note 14 supra.

58. State V. Moagi and Another 1968-70 B.L.R. 198.

59. Phenya Manyokho and Motlatsi Liphang V. Regina 1963-66 H.C.T.L.R. 30.

60. 1968-70 B.R.L. 158.

61. 4 COMP. & INT'L L. J. SOUTHERN AFRICAN 118 (1971).

62. As in the Botswana case of Makwekwe V. State, Crim. App. No. 104 (1981).

63. See the text at note 104 infra.

64. Crim. App. No. 47 of 1982.

65. 1974 1 B.L.R. 98.

66. Id.

67. See, for example, Joseph Jasone V. Rex, CRI/A/37/77 (1978); and Mahlala and Others V. Rex, CRI/A/19-21/82 (1982).

68. 1980 1 L.L.R. 146.

69. Id. at 148.

70. Rex V. A. M. Dlamini, S. 12/76.

71. On the difficulties which Jehovah's Witnesses have encountered in Malawi;see Amnesty International, "Persecution of Jehovan's Witnesses in Malawi" (1978).

72. H.C. Rev. Case No. 261/75.

73. H.C. Rev. Case No. 337/75.

74. H.C. Rev. Case No. 241/81.

75. 1975 1 B.L.R. 46.

76. 1972 1 B.L.R. 29.

77. 1975 1 B.L.R. 93.

78. 1967-70 L.L. 377.

79. Id. at 381-82.

80. 1970-76 S.L.R. 396.

81. 1963-69 S.L.R. 38.

82. 1970-76 S.L.R. 171.

For a landmark case in the European system on the treatment of contempt of court, see the Sunday Times Case (Eur. Ct. of Human Rights, 1979), the text of which is reproduced in BASIC DOCUMENTS IN HUMAN RIGHTS, supra note 1, at 266-300.

84. MISC/APN/1/81 and CIV/APN/34/81 (1981).

85. 1968-70 B.L.R. 115.

86. CIV/APN/21/81 (1982).

87. An area of relative dormancy in the legal systems of the 3 countries.

88. 1967-70 L.L.R. 237.

89. It should be noted, though, that the term "election" is not used in the Banjul Charter, in contrast to the European Human Rights Convention, Article 3 of the First Protocol of which requires states parties to "undertake to hold free elections at reasonable intervals by secret ballot . . ."

90. The second paragraph of the article does use the word "property," but not in connection with a right of property on the part of individuals. The reference is to the "right of a State to . . control the use of property . . . ."

91. See generally M. GANJI, THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROBLEMS, POLICY PROGRESS.

92. CRI/A/44/79 (1979).

93. Id.

94. Again an area of dormancy in spite of current global academic and popular interest in the subject.

95. On the right to development generally, see Mbaye, "Le Development et les Driots de l'Homme: Rapport Introductif," REV SENEGALAISE DE DROIT 19 de Kadt, Some Basic Questions on Human Rights and Development, 8 WORLD DEVELOPMENT 97 (1980); Chouraqui "Report of the Working Group of Governmental Experts on the Right

to Development," U.N. Doc. E/CN.4/1489 (1982); RAPPORT GENERAL DU COLLOQUE SUR LES DROITS DE L'HOMME ET DE DEVELOPMENT ECONOMIQUE EN AFRIQUE FRANCOPHONE (1978). See also the following papers given at the Seminar on Law and Human Rights and Development, May 24-28, Gaborone, Botswana: Alston & Eide, Discussion Paper Prepared for the African Seminar on Human Rights and Development; Dimitrijevic, Development as a Right; Kibola, Some Conceptual Aspects of Human Rights: The Basis for the Right to Development in Africa; Makoti, Law and Human Rights in National Development; Maope, Development and Legitimacy of Government in Lesotho; Nengwekhulu, The Meaning and Character of Development; Samson, Human Rights and Development: ILO Approaches; Seck, Relations between the Development and the Human Rights in Africa; Seidman, Human Rights, Law and Development; and Sharma, Compatibility of a Conciliatory Federal Political Framework and Development Planning: Some Tentative Formulations towards the Development of 'Conflict Model' and 'Harmony Model'

96. See note 95 supra.

97. Quoted from W. WEINSTEIN, supra note 8, at 57.

98. This expression is borrowed from the European Court of Human Rights case of Handyside V. United Kingdom (1976).

99. Article 63(1) of the Charter.

100. CRI.T.S.53/78 (1978).

101. For the text of which, see BASIC DOCUMENTS ON HUMAN RIGHTS, supra note 1, at 381-87.

102. Article 32(1) of the American Convention on Human Rights.

103. It is true that Article 56 of the Charter states that communications to the Commission shall be considered provided they meet the criteria set forth in that article. Those criteria, however, clearly relate to the necessary characteristics of the communication itself, not of the communicators.

104. The importance of this subject has been touched upon already. See the text at note 63 supra.

105. Considerable documentation on Forced Labour under colonialism exists.

106. See the text at note 47 supra.

107. See the text at note 44 supra.

108. See, for example, Tanki Fice V. Lebamang Ntisa, Phethang Merafo and Sehehere Mare, CIV/T/108/76 (1977), which was a successful civil action against several police officers (not against the government, however) for malicious arrest.

109. The case of None Monare V. Taylor and Government Secretary of Basutoland 1967-76 L.L.R. 13, which held that if the government did not control the police officer in the exercise of his discretion to effect the arrest, then only the officer and not the government would be liable. The case followed the Rhodesian precedent of British South Africa Co. V. Crickmore 1921 A.D. 107.

110 Crim. App. Case No. 50/81 (1981).

111 1975 1 B.L.R. 24.

112. 1967-70 L.L.R. 300.

113. CRI/T/25/81 (1982).

114. H.C. Rev. Case no. 117/80 (1981).

115. T.S. 12/77.

116. Generally a carrot and stick policy is employed to Trade Unions in Africa as a whole.