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**HUMAN RIGHTS IN BOTSWANA, LESOTHO AND SWAZILAND
A SURVEY OF THE BOLESWA COUNTRIES**

BY



K.A. MAOPE

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1. The Legal Systems of Botswana, Lesotho and Swaziland

The outstanding characteristic of the legal systems of the former High Commission Territories of Botswana (former Bechuanaland Protectorate), Lesotho (former Basutoland) and Swaziland, as is the case with most African States¹, is the "dual" nature of their laws, whereby the indigenous (customary) law exists side by side with the received or imposed foreign system of law. In the case of all three countries the received foreign law is the law of the former South African colony of the Cape (in the case of Botswana and Lesotho) and of the Transvaal (in the case of Swaziland). South Africa, by virtue of her economic power in Southern Africa, has continued to have influence in the affairs of these three countries, more so in legal and political affairs, including human rights matters.² It, therefore, becomes necessary to briefly trace the history of how the foreign law came to be the law of the three States.

1. Basutoland³

The former colony of Basutoland was the first to receive Cape law. This country first came under British rule in 1868 when its territory and inhabitants were declared British subjects. From that year up to 1871 the country was governed by the British High Commissioner for the Cape Colony who issued regulations for its good government. In 1871 Basutoland was annexed to the Cape. From that year up to 1883, Basutoland was ruled as part of the Cape Colony. However, since the annexation had been effected without the prior consent of the inhabitants, there was a lot of discontent against Cape rule. When the Cape government sought to disarm Africans throughout Southern Africa, the inhabitants of Basutoland refused to be disarmed, and this led to the "Gun War" (1880 - 1881) in which the Cape authorities were unable to achieve the disarmament of Basutoland's inhabitants. At the end of that war, the Cape handed Basutoland back to the British who formally took over its administration in 1884.

The fundamental law of the territory was laid down in the General Law Proclamation⁴ which provided that the law to be applied in Basutoland would be "the same as the law for the time being in the Colony of the Cape of Good Hope". The indigenous law might be applied in two instances, first, in matters concerning "natives", and secondly, in all matters in the "native courts". Commenting on this provision, Palmer and Poulter have this to say:

"It may therefore be stated categorically that so far as the African inhabitants of Lesotho are concerned, African law stands basically on an equal footing with the common law. In no sense is the customary law placed in a fundamentally inferior or subsidiary position as it is in some other African countries e.g. Botswana and Swaziland"⁵.

The above statement is not absolutely correct. At the original negotiations for the British "protection" of Basutoland prior to 1868, it was the wish of the inhabitants of Basutoland that internal matters within Basutoland would be governed by indigenous law. This wish persisted throughout the colonial period.⁶ The system of "indirect rule" assisted the application of customary law. At independence in 1966 the Constitution recognised "law" as including the customary law of the land. The result is that in Lesotho the customary law is a legal system, not just a system of rules to be applied occasionally. This does not, however, mean that the customary law is in competition with the received law. Together with the reception of Cape law was received the British system of government.⁷ English constitutional and administrative law consequently came to be the law of Basutoland. The institutional framework for the administration of justice and for the making of laws is based on English administrative concepts. The result is that the received law predominates, while the customary law operates within the terms of reference of the received law.

2. Bechuanaland Protectorate⁸

British "protection" of Bechuanaland (now Botswana) was first proclaimed in 1885 by an Order in Council of January 27, 1885. The government of the territory was provided for by another Order in Council of May 9, 1891 which came into force on June 4, 1891.⁹ This Order provided that the British High Commissioner for South Africa would be an administrator for the territory, that he could legislate through proclamation, that he could appoint such officers as he might from time to time think fit, to assist him in the administration of the territory. It was further provided that in issuing proclamations, the High Commissioner was to respect "any native laws or customs by which the civil relations of any native chiefs, tribes and populations" of the territory were regulated, except in so far as these laws and customs might be incompatible with the exercise of British power and jurisdiction. The customary law was, therefore, to be respected. In this sense it may be justified to conclude that in Lesotho customary law is given greater recognition than it is in Botswana. The judicial attitude in Botswana with regard to the applicable legal system is that the received law is applicable to all persons except in so far as its application may be excluded by statute:

"There were not two common laws in the Protectorate but, where practicable, effect was to be given in suits between Africans to their own law and custom".¹⁰

During the early years of British rule, colonial power was confined to external affairs; later years witnessed increasing interference in internal matters of the territory. By the High Commissioner's Proclamation of December 22, 1909¹¹ the fundamental law of the territory was finally settled as follows:

"subject to the provision of any Order in Council in force in the Bechuanaland Protectorate at the date of the taking effect of this Proclamation,..... the laws in force in the Colony of the Cape of Good Hope on the 16th day of June, 1891, shall mutadis mutandis and so far as not inapplicable be the laws in force and to be observed in the said Protectorate, but no statute of the Colony of the Cape of Good Hope, promulgated after the 10th day of June, 1891, shall be deemed to apply, or to have applied, to the said Protectorate unless specifically applied thereto by Proclamation".

In this way the law of the Cape Colony came to be the general law of Bechuanaland, and the English constitutional and administrative law came to apply to the country, just as was the case in Basutoland.

3. Swaziland¹²

In the latter half of the nineteenth century Swaziland was an area of conflict of interests between European settlers of British origin and those of Dutch origins. The British government was attempting to curb power and independence of the Dutch colonists in their efforts to establish independent republics in the interior of Southern Africa after fleeing from British rule in the Cape in 1834. Swaziland on the other hand found in the Europeans possible allies against Zulu power which threatened that country. The first penetration by Europeans into Swaziland took place in the early 1840's during the reign of Mswati (1840-1868). During the subsequent reign of Mbandzeni (from around 1874) numerous and reckless land concessions were granted by Swaziland to the Europeans. Mbandzeni himself had succeeded to the Swazi throne through the military assistance of the Transvaal Republic, one of the Dutch settlements in the interior. In this way the Transvaal obtained a foothold in the affairs of Swaziland. But then that republic was annexed by the British in 1877. That annexation was, however, soon rescinded

by the Pretoria Convention of 1881, and in it the British insisted on a clause providing for the independence of Swaziland. The provision for independence was subsequently re-enacted in the London Convention of 1884. However, since land concessions had already been granted to the Transvaal Republic as well as to individual Europeans, the influence of that republic on Swazi affairs continued, and the Swazi themselves did not resist it:

"On the contrary, it is clear that apart from the immediate profit from the sale of concessions, they welcomed the prospect of closer association with Europeans and the protection which they might afford against the Zulu or other powerful Native neighbours".

In the result, the Transvaal Republic flouted the provisions of the 1881 and 1884 Conventions concerning the independence of Swaziland; the European concession holders, both British and Dutch, disregarded the authority of the Swazi chiefs; there was constant friction between the two sections of Europeans over conflicting concessions; and some Europeans requested the Transvaal to take over the administration of the territory.

Meanwhile the law of the Transvaal had been applied informally to the Europeans in Swaziland. After the death of Mbandzeni in 1889, the British and the Transvaal government agreed by the Convention of 1890 on joint administration of Swaziland. This convention provided for a "Chief Court" to settle disputes amongst Europeans in Swaziland. The system of law to be applied was the Roman-Dutch law. The new government was to have no jurisdiction over the "Swazi Natives". This system of government did not last for long because it suffered from internal disagreements between the two European factions. And by the Convention of 1894, the British and the Transvaal agreed to the grant of "all rights and powers of protection. The rule of the Transvaal over Swaziland did not itself last, for the Anglo-Boer war soon broke out and, at its conclusion, the Transvaal was made a British colony together with Swaziland.

The British administration of Swaziland was provided for, first, by the Order in Council of the 25th June, 1903, by which the Governor of the Transvaal was to be the administrator of Swaziland. When in 1906 the Transvaal received self-government, the British High Commissioner for South Africa was made the administrator of Swaziland by virtue of the Swaziland Order in Council of December 1, 1906. The Commissioner was given similar powers to those given to him in respect of Bechuanaland.

The fundamental law of Swaziland was provided for by the High Commissioner's Proclamation of 1907¹⁴ which applied the laws of the Transvaal to Swaziland, and which further provided that the territory should be ruled as a district of the Transvaal. The Orders in Council of 1903 and 1906 had provided that the British Administrator, in making laws, should "respect any Native laws by which the civil relations of any Native Chiefs, tribes or populations are now regulated, except in so far as may be incompatible with the due exercise of His Majesty's power and jurisdiction or is clearly injurious to the welfare of the said Natives". It was therefore, provided in a Proclamation of 1907 that the Swazi King and chiefs would continue to adjudicate on matters concerning the African population, but only in civil disputes.

It is to be noticed that the position of the customary law in Swaziland in relation to the foreign law is similar to that of it in Botswana. Customary law is to be respected to the extent that there is no serious conflict between it and the received foreign law. It is also to be noted that, while in Botswana and Lesotho the received law is the legal system of the former Cape Colony, in Swaziland the law of the Transvaal was applied. This makes no difference however, since the Transvaal law originated from the Cape.

The legal tradition of the three countries with which we are dealing here is the same: the existence of two legal systems within a country, one such system being the so-called Roman-Dutch law, while the other is the customary. These two systems apply to the same people, or rather to the African inhabitants of these countries. The subjection of a people to two systems of law can easily lead to injustice and serious conflicts which may need the attention of the legislature.

4. Roman-Dutch Law in Holland¹⁵

The legal system which was introduced into the three countries was the law of the Cape and of the Transvaal. Brief attention should now be paid to the nature of that system of law as far as human rights are concerned.

The law of the Cape Colony originally came from Holland, a province of the Netherlands. It was introduced by the Dutch East India Company which established a refreshment station in 1652 at the southern tip of Africa. The law of Holland, (called Roman-Dutch Law) and not that of the Netherlands, was introduced because Holland was the most influential province in the affairs of the Dutch East India Company, and also because there was no common legal system for the Netherlands, since each province had its own legal system.¹⁶

The classical period of the Roman-Dutch law is the seventeenth and eighteenth centuries. Those centuries produced the greatest of the Dutch legal minds who succeeded in formulating a legal system for Holland out of the ancient Roman law and Germanic Customs.¹⁷ The seventeenth century was also a period of commercial prosperity for the Netherlands. "Her trade spanned the globe, her ships sailed the five oceans, and from all corners of the world riches poured into her great cities".¹⁸ But it was also a period of great political conflicts. Religious intolerance was very common, leading to bloody

wars. The Roman-Dutch system of law was shaped by the needs and circumstances of that time.

Roman-Dutch law provided for some of the basic freedoms as we understand them to-day. The question of the enforcement of the freedoms is of course another matter. Some of the guarantees against oppression may be stated here. The sovereign and law-maker was subject to the law in the sense that he did not possess arbitrary power. The sovereign, in making laws, must be guided by certain accepted ethical principles. Thus, laws must be just and reasonable, because a law "prescribes what is honourable and forbids what is base".¹⁹ Laws must apply equally to all citizens without discrimination. Roman-Dutch law recognised the principle of freedom of the person. "As regards persons, all human beings are with us free from birth, and slavery is wholly unknown to us and out of use....", wrote van Leeuwen in 1678.²⁰ An inquiry into the legality of a detained person could be undertaken through the procedure of the writ de homine libero exhibendo. This procedure is now considered practically the same as the English common law procedure of habeas corpus.²¹

There were within the Roman-Dutch legal system, however, shortcomings which must be considered serious by present day standards. Although human beings were born free, and slavery was forbidden these things were operative only at home in the Netherlands and not in the colonies. It is thus remarked by Professors Mahlo and Kahn:

"During the seventeenth and eighteenth centuries most Europeans accepted slavery as a perfectly legitimate institution, as long as it was applied to blacks, browns, and yellows, nor the canon law opposed to it ..."²²

Since Netherlands law forbade slavery, those slaves who entered Netherlands borders were automatically freed regardless of the wishes of their masters. Yet there was an important exception to this rule: fugitive slaves fleeing from the colonies could not be freed.²³ Dutch society, as did other European communities, tolerated slavery for economic reasons.

Roman-Dutch law did not pretend to confer equality of status on free males and females. Women were naturally inferior in intellect and tended to act contrary to their interests in the management of worldly affairs. Women thus needed the guardianship of men who must govern the "weaker sex".²⁴ As a result women were discriminated against both in matters of State government and family affairs. But even then it was realised that the Roman law, from which the Roman-Dutch law was derived, treated women better. The ancient Romans recognised the fact that "in many women the understanding is found to be superior, and in many men inferior, so that there are many women who surpass men in understanding, and the management of affairs".²⁵ Consequently Roman law permitted women who had attained majority, to manage both themselves and their property. Despite this reality, Roman-Dutch law, following Germanic customs, subjected women to the authority of men.²⁶ The political conditions of women have changed immensely today, but in family matters their condition is still that of subjection to male domination. The disabilities of women in family affairs were summarised by Grotius thus:

"By virtue of his guardianship, the husband appears for his wife in Court. He alienates and encumbers her property, even that which she has kept out of the community, at his pleasure and without requiring her consent.

If the husband contracts debts, the wife becomes liable for the same even against her will ..."²⁷

Religious intolerance was very common in Holland, as in the rest of Europe at that time. The Dutch Reformed Church was the only permissible faith. Roman Catholics suffered from very serious disabilities. This was to be the case at the Cape until the British brought about a change.²⁸

Just as the enslavement of black people was permissible in European societies of the seventeenth and eighteenth centuries, so was the practice of colonising the lands and countries of non-Europeans, throughout the world. Nationalism and self-determination were for Europe only, and not for "men of colour". All kinds of pretences were used to justify the taking over of whole continents. Either these foreign lands were uninhabited or were inhabited by roaming savages thus justifying the taking over of these lands. By reducing the indigenous people to the status of savages and "natives", Europeans reasoned that ordinary "civilised" legal rules protecting rights to property did not apply in the case of these sub-humans.²⁹ where there was a semblance of negotiations and agreement as to rights to property, there was no effort to negotiate from the point of view of rules as understood by the indigenous peoples, so that fraud on massive scales was practised against "natives". The artificial boundaries into which Africa was carved, the subsequent boundary disputes and the consequent refugee problems, are well known matters in Africa since the attainment of independence.

The above are some of the main features of the Roman-Dutch law which was imported into the Cape Colony in 1652. We proceed to examine its operation and development there.

5. Roman-Dutch Law at the Cape

The Cape of Good Hope was under the rule of the Dutch East India Company from 1652 to 1795. From 1803 there was a brief period of British rule. In the years 1803 to 1806 the Colony was under the administration of the Batavian Republic (Netherlands). From 1806 onwards the Cape was under British Administration.

Company rule at the Cape was high-handed. The administration of justice was unsatisfactory in that members of the judiciary had no legal training. The proceedings of the Court were not open to the public, and no reasons for decisions were given. The judges were often company officials, so that there was no independence of the judiciary from the executive. Criminal procedure was inquisitorial in form. Torture was commonly practised, especially against slaves, and against those sentenced to death, because it was necessary for the accused to confess his crime before being executed. Common forms of carrying out the death sentence were breaking on the wheel, impaling, strangling, burning, drowning and smothering. Other penalties included punishment, imprisonment and service in chains on Robben Island as a public slave for up to 10 or 12 years.³⁰

The first cargo of slaves was brought to the Cape in 1658.³¹ By 1708 and 1795 there were 1,147 and 18,000 slaves respectively.³² The indigenous population of Hottentots was subjected to a servile status, while slaves were imported from East Africa, Malaya, and the East Indies. Since the Roman-Dutch law did not recognise slavery, the ancient Roman law was applied together with local regulations for the prevention of cruelty to slaves.³³

The majority of the traditional liberties were unknown at the Cape. The Dutch Reformed Church was the only church allowed. Catholics were discriminated against and laboured under numerous disabilities.³⁴ There was no freedom of the press and of assembly.

The company had a monopoly of commerce with the East Indies. There was, therefore, no freedom of trade by the company servants and by the settlers who arrived later. The economic life of the settlement was strictly supervised, and trade with the indigenous inhabitants was forbidden or strictly controlled.³⁵ The discontent of the settlers against the company rule even led to rebellion in February, 1795, just before the British occupation of the Colony.³⁶

Company rule came to an end in 1795. There was a brief period of Dutch rule in the years 1803 to 1806, but this is an insignificant period for our purposes. In 1806 the British resumed their administration of the Colony. It was during the British administration that many changes were brought about in the legal system.³⁷ At first it was thought that the Roman-Dutch law should be replaced entirely by English law. This idea was abandoned when a Commission recommended gradual assimilation of the Colony's laws to the English legal system. However certain matters were given immediate attention.

The more barbarous punishments, such as breaking on the wheel, were abolished in 1797. From 1813 judicial proceedings were to be conducted in open court. Freedom of the press was established in 1829. Disabilities against Roman Catholics were removed in 1829. Slavery was abolished as from December 1, 1834 by a British Act of Parliament of 1833. The restrictive laws of 1809-19 against Hottentots were abolished and full rights

were given to the indigenous population and to peoples of mixed blood. Public meetings were allowed in 1884.³⁸

The most important change which British rule introduced into the law of the Cape was the British system of government. When in 1806 Britain took over the Cape and began to make major changes in the legal system of that Colony, two major principles of the British constitution - the rule of law and the supremacy of Parliament - were fully established. The doctrine of the supremacy of Parliament was first set forth by Blackstone in his Commentaries on the Laws of England published in 1765. Blackstone's philosophy was that Parliament was the supreme law-making body; it could make any law without limitation. This doctrine came to be fully accepted in Southern Africa. The second doctrine, that of the rule of law, was an earlier principle dating back to the thirteenth century.³⁹ According to Dicey, the doctrine had three meanings, namely, (1) the predominance of regular law in the running of state affairs as opposed to arbitrary power in the hands of officials, (2) the subjection of all classes of citizens to, and equality before, the law of the land, and (3) the acknowledgement that the English common law, together with the right of access to the courts of justice, was a sufficient guarantee of civil liberties. There was, therefore, no need for a bill of rights unlike in other countries. The rule of law together with political traditions and conventions of the constitution, were a control mechanism against the improper exercise of Parliamentary supremacy.⁴⁰

The reforms which the British brought about were not all acceptable at the Cape. Those which resulted in a proper judicial system were welcomed. But the egalitarian efforts in favour of Blacks were resented by the white settlers who had learned to enjoy the fruits of slavery and cheap labour. The freeing of slaves in 1834 led to the so-called "great trek" by settlers into

the interior of Southern Africa. Dugard informs us that by 1910 when the Union of South Africa was established, no attention was paid to a Bill of Rights even though Parliamentary supremacy was accepted, the rationale being that in Britain civil liberties were still well guaranteed even though there was no written Bill of Rights.⁴¹ This, Dugard proceeds, was to ignore the fact that British society was sufficiently homogeneous, there was a long tradition of respect for civil liberties. These factors were a strong barrier against arbitrary government.⁴² South African conditions were different. Dugard, commenting on the years following the formation of the Union of South Africa, concludes:

"Civil liberty and the Rule of law were sacrificed on the altar of parliamentary supremacy to the idol of apartheid. Many British institutions and traditions were discarded by the National Party..."⁴³

British influence of the Cape legal system took place by other indirect methods. Judges were employed from England, Scotland and Ireland; the training of Cape lawyers was done at British Universities; English was made the official and, therefore, legal language at the Cape, and English legal concepts were used in the drafting of laws. The independent republics which were established in the interior of Southern Africa by disgruntled white settlers did not escape this English influence, even before they became British territory.⁴⁴

The legal system which was received into Basutoland, Bechuanaland Protectorate and Swaziland was not pure Roman-Dutch law, but a "mixed" system of Roman-Dutch and English law. The name "Roman-Dutch law" is, therefore a mere description of a hybrid legal tradition that developed in Southern Africa.

It has already been pointed out ⁴⁵ that English constitutional and administrative law became part of the law of the Cape when the British took that colony under their rule. Human rights in the form of civil liberties as understood in English jurisprudence became part of the Cape law. Today such civil liberties form part of the legal systems of Botswana, Lesotho and Swaziland through the reception process.

11. The Effect of the European Convention on Human Rights and Fundamental Freedoms in Botswana, Lesotho and Swaziland

The constitutional development of the three former High Commission Territories from colonial status to independence is well known. What is perhaps not so well known is the effect, if any, on the three states of the British ratification of the European Convention on Human Rights and Fundamental Freedoms (the European Human Rights Convention). A word of explanation should now be said about such effect.

The European Human Rights Convention was signed in Rome on November 4, 1950. It entered into force on September 3, 1953. Britain had ratified the Convention earlier on March 8, 1951.⁴⁶ Most of the basic civil and political rights are contained in the Universal Declaration of Human Rights. It also sets up a unique enforcement machinery for the rights guaranteed.

Under Article 63 (the so-called "colonial" clause)⁴⁷ States party to the Convention may extend its application to any territories for whose international relations each such state is responsible. Pursuant to that provision several of her colonies including Basutoland, Bechuanaland and Swaziland.⁴⁸ In 1967, however, Britain informed the Secretary General of the Council of Europe that Britain would no longer be responsible in respect

of the Convention for Botswana as from September 30, 1966, and for Lesotho as from October 4, 1966.⁴⁹ The stated dates were the respective days on which independence would be achieved by both States. Swaziland became independent on September 6, 1968, and the Secretary General of the Council of Europe was duly informed about Britain's cessation of responsibility in respect of the Convention.⁵⁰

Article 66(1) of the Convention provides as follows:

"This Convention shall be open to the signature of the Members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe".

By virtue of the above provision the former High Commission Territories on attaining independence could not become party to the Convention which is confined to the Council of Europe. There is no question of the principles of State succession applying in the case of the Convention even though Britain had extended its application to the three States.⁵¹

That is not the end of the matter, however. The independence Constitutions of the three States incorporated Bills of Rights modelled along the lines of the European Human Rights Convention.⁵² In Lesotho and Swaziland these Constitutions were removed along with the Bills of Rights in 1970 and 1973 respectively.⁵³ Botswana retains her Constitution. It is reasonable to speculate that in Botswana the Convention will have a continuing influence on the jurisprudence of that country. The Courts of Botswana have so far relied on English common law in the interpretation of the civil and political rights as guaranteed under the Constitution.⁵⁴ Some rules of the English common law, on the other hand, have been

subject to interpretation by the European Commission and European Court, both of which are set up under the Convention, and such rules have been found wanting.⁵⁵ Such interpretations on the English law are likely to be followed in Botswana. A further possible development is this that, as Botswana lawyers become familiar with the European Convention itself, and as the literature on the jurisprudence under that Convention becomes readily available, the Courts will be easily persuaded to even follow some of the European decisions interpreting provisions which are similar to those in the Botswana Constitution.

In Lesotho and Swaziland, where the "Roman-Dutch law" is now the basis of civil rights, it may at first sight appear difficult to speculate with confidence that the same will happen as is being suggested for Botswana. When, however, it is realised that most of the guaranteed rights under the European Convention are to a large extent rights which are known to English common law, it will be seen that the European Convention may well have some influence in the long run. Rights such as the protection of life, the prohibiting of torture and inhuman or degrading treatment, the prohibition of slavery, servitude and compulsory labour, protection of liberty, and the security of the person, and access to justice, are known to the legal systems of Lesotho and Swaziland via the reception process. These rights are sometimes severely restricted by legislation, such as for example in the case of the right to liberty.⁵⁷ Where there are only reasonable restrictions "necessary in a democratic society", the European Convention is likely to have an effect, provided the legal profession is familiar with its provisions and the necessary literature is available.

Another source of influence by the European Convention which is likely to affect Lesotho and Swaziland is Botswana itself. The Court decisions of that country are now being published and are, therefore, being rendered available in Southern Africa. Already there are interesting decisions interpreting the content of the right to a fair trial within a reasonable time in criminal matters. It is pointed out in one case that a too hasty trial is permissible even though it does not afford the accused time to prepare for his defence;⁵⁶ other cases show that delay in prosecuting a criminal charge entitles the accused to either a complete acquittal⁵⁹ or a reduction in the sentence.⁶⁰ These latter cases are likely to be followed in Lesotho and Swaziland since they provide a remedy which is not available in common law jurisdictions.⁶¹

III. CONSTITUTIONAL GUARANTEES FOR CIVIL AND POLITICAL RIGHTS IN BOTSWANA, LESOTHO AND SWAZILAND

Botswana, Lesotho and Swaziland attained independence in 1966 (in the cases of Botswana and Lesotho) and 1968 (in the case of Swaziland). All three States had similar written Constitutions incorporating Bills of Rights. The Constitutions of Lesotho and Swaziland were abrogated in 1970 (Lesotho) and 1973 (Swaziland). In each case the electoral process and the Bills of Rights were jettisoned together with the Constitution; the law existing just before the coming into operation of the Constitutions was revived and/or continued.⁶²

When in the 1960's British colonies attained independence with written Constitutions, the debate was always whether or not Bills of Rights should be incorporated into these instruments. Some States rejected the Bills, notable examples being Ghana and Tanganyika. Other States, into whose Constitutions the Bills were incorporated subsequently rejected the Bills as part of a reaction against constitutional rule. In the case of Malawi, constitutional means were employed to remove an

effective Bill of Rights.⁶³ In Southern Africa today Botswana stands out as the only Black ruled state which has held onto its original constitution.

Why then were these Bills of Rights rejected? Governments and ruling elites have advanced numerous reasons why Bills of Rights are unacceptable, reasons which we need not go into here, since they amount to a basic desire by African leaders for a free hand in government.⁶⁴ The rejection of Westminster-type Constitutions is the rejection of limited government. Bills of rights, of course, form part of the structure of limited government, and must, of necessity, be jettisoned together with the written Constitutions. The British doctrine of Parliamentary supremacy has found a fertile ground in Africa. In its home ground Parliamentary supremacy is limited by a democratic legislature and a national ethic which does not tolerate dictatorship, except when practised against colonial peoples⁶⁵ and Northern Ireland. Even in Britain the capacity of the national ethic to deal with new social problems brought about by an increasing Black population is in doubt. In Africa governments are often not accountable to the citizens, and the legislative power is utilised without limits in the name of "national unity" and "development"⁶⁶. Although military take-overs of governments are often justified on the ground of preserving liberty, each coup tends to be followed by serious inroads into human rights.

In the 1980's all indications seem to support the view that Bills of Rights should still be incorporated into written Constitutions. Governments never admit that they deny human rights to their nationals, even though this is in fact the case. The international community has continued to produce standard setting codifications of human rights, with the OAU being the latest organization to produce a Convention on

human rights. Even in Britain, often described as the home of "true freedom", it is now realised that a new Bill of Rights is necessary, since the English legal system has been found wanting in Strasbourg.

The failure of human rights in Africa has produced many honest sceptics. What is the point of a written Bill of Rights which proves to be a paper tiger? Judges have been murdered⁶⁷ or dismissed for enforcing constitutions or for being too independent.⁶⁸ These are weighty reasons for which there are no ready answers, but they are besides the point. You do not abandon the prohibition against murder on the ground that killings continue to take place. A system of criminal justice operates through its failure. If there are no breaches, you do not need a catalogue of offences. To argue against Bills of Rights in this manner is to play into the hands of dictators.⁶⁹

Having made these remarks, we proceed to look into the operation of some of the civil and political rights as they operate in Botswana, Lesotho and Swaziland. This study is a survey which cannot pretend to be an in-depth examination of these rights.

1. Participation in Government

(i) Botswana

The Constitution of Botswana provides for a legislature consisting of the President of the Republic and the National Assembly,⁷⁰ both of which are elected. The franchise is open to citizens of the age of 21 or above who must either have been resident in Botswana for the last 12 months prior to their registration or, having been born in Botswana, are domiciled there.⁷¹ Women have the franchise, even though discrimination against them in respect of the protected fundamental rights is apparently not prohibited.⁷²

The population of Botswana is small in comparison to the land mass of the territory. It may be wondered whether it might not be more democratic to lower the age of voters. According to Mark D. Boman, a lot of countries have lowered the voter's age from 21 to 18 in the last 20 years or so.⁷³ The process of elections is an expensive one and should be made worthwhile. On the other hand you do not involve immature voters who may even be largely illiterate in the electoral process. The government of Botswana has actually rejected a motion to lower the voters age.⁷⁴

It has been said that in Africa, post-independence elections serve only to "confirm the existing order or to usher in a new order approved by the existing order;"⁷⁵ that once the ruling regime is threatened by an opposition party, the election results are frustrated. This is certainly true of Lesotho in 1970, and probably true as well for Swaziland after the 1972 post-independence elections. In Botswana, on the other hand, it is difficult to speculate on what would happen if there was an opposition party which threatened to bring about a change of government.

A major complaint about electoral processes has been the dominating position of the government in the running of elections. Electoral officers are appointed by the government; the printing of ballot boxes is done by the government, all these to the exclusion of the opposition parties. It has, therefore, been said that corruption can easily be practised under those circumstances.⁷⁶ Add to these the fact that government Ministers can and do use government opportunities to canvass and give out favours under the cover of official business. These are valid criticisms in all "democracies" of the world. As far as Botswana is concerned we are not able to say what the position is. But we should point out that the delimitation of constituencies is conducted by a Commission which is appointed by the Judicial Service Commission. The Chairperson of the Commission is a person who holds or held a high judicial office. The members of

the Commission shall not have been active politicians for the preceding five years, nor be members of the National Assembly, or public servants.⁷⁷ The supervision of elections to the National Assembly is the responsibility of the Supervisor of Elections appointed by the Public Service Commission from the public service. He also acts as a supervisor of Presidential elections. He may appoint assistants in the performance of his functions.⁷⁸

While it may be said that there is a larger measure of independence from the control of the Executive as far as the delimitation Commission is concerned, the same cannot be said of the Supervisor of Elections. Members of the judiciary invoke a sense of confidence on the part of the citizenry, while members of the Executive branch of government do so to a lesser extent. The issue of the supervision of elections is a cause of complaint throughout Africa. The African Experience is that all kinds of stratagems are employed through the office of the electoral officer to ensure the success of the governing party.⁷⁹

(ii) Lesotho

One major feature which was left unresolved by the independence Constitution of Lesotho was the question of the status of the King in the government. One opinion was that the King should have executive functions, including the control of the armed forces, while another was that he should be a Constitutional monarch.⁸⁰ The Constitution would appear to have provided for a compromise solution in that there were certain matters in which the King had discretion. But on the whole he was to be advised by a Cabinet of Ministers headed by a Prime Minister. This sharing of power between the King and the Prime Minister proved to be one mistake which would later lead to the overthrow of the Constitution. Another problem was, of course, the multi-party system of government. The idea of a possibility of an alternative party forming a government is a popular notion with African ruling elites.⁸¹

Lesotho attained independence in October, 1966 with a Constitution similar to that of Botswana except that the Head of Government was the King instead of a President. The legislature was composed of the King, the National Assembly and the Senate. The National Assembly was elective, while the Senate was drawn from the principal chiefs of Lesotho plus some appointees of the King. The franchise was open to all citizens, regardless of sex, aged 21 or over.

Pre-independence elections took place in April, 1965. The Basotho National Party (B.N.P.) was victorious by a narrow margin, after winning 31 out of a total of 60 constituencies. The B.N.P. was a minority government since the party had captured just over 41% of the popular vote.⁸² Its rule, therefore, became very difficult in the few years up to 1970. The government was always worried about acts of subversion and attempts to overthrow it. Laws which were apparently contrary to the Constitution were passed in order to suppress any possible break-down of law and order.⁸³ There was also a major change of policy on the part of the B.N.P. Before independence this party had supported the view that the King should have executive powers, including the control of the armed forces, while the opposition Basotho Congress Party (B.C.P.) held the view that the King should be a mere Constitutional monarch. After independence, the B.N.P. adopted the latter point of view and vigorously pursued it. The experience of power had taught the B.N.P. that absolute control of government was essential in order to remain in power particularly in contemporary Africa.⁸⁴

The first and last post independence elections took place in January, 1970. The government was in complete control of the electoral process. B.M. Khaketla⁸⁵ has made a record of the unfair practices of the electoral officers in the delimitation of constituencies, the registration of voters whereby others were left out deliberately, the employment of B.N.P. supporters and politically active B.N.P. partisans in the registration process, and the secretive manner in which nominations and registration took place. This author describes how the Electoral Act of 1968 was copied from South Africa and how it provided for a high sum of money as a deposit for electoral candidates when the realities of Lesotho made it very difficult for the poor candidates to raise the deposit. Lastly he mentions the fact that the Electoral Officer ignored complaints by opposition parties, and he concludes:

"... the scales had been heavily weighted against opposition parties in all respects. No wonder a top member of the B.N.P. remarked: 'How can we lose the match? The ball is ours; jerseys are ours; the field is ours; the linesmen are ours; and more important, the referee too, is ours! Never did a political party enter an election with as much confidence as the B.N.P.'⁸⁶"

The opposition B.C.P. won the elections with a comfortable majority of 36 seats as against 23 seats for the B.N.P. As the results were being publicly announced over the government radio, the Prime Minister declared a state of emergency and suspended the Constitution "pending the drafting of a new one".⁸⁷

The Prime Minister justified his action on the grounds that the elections were marked by acts of violence committed against the B.N.P. supporters. But on the second and third day of the elections he had announced that the elections were being "conducted in an atmosphere of peace and quiet throughout the country".⁸⁸ If there was violence against B.N.P. supporters, it is arguable that the criminal law should

have taken its course and election petitions against improper practices should have been lodged with the Courts. The Prime Minister however, went on to say that the action was taken in order to protect liberty and to prevent chaos. Again if all these justifications could have been dealt within a constitutional manner there was, therefore, no cogent explanation for the measure. But the actions of the government after the elections are significant. The Council of Ministers, which became the legislature, passed the Office of King Order 1970⁸⁹ which provided that the King would henceforth act according to the advice of the Prime Minister. If he failed to do any act in accordance with the Prime Minister's advice, the Prime Minister could perform that act which would be deemed to be the act of the King. The effect of this law is to take away all executive power from the King. The government proceeded to revive or continue all laws except the Constitution and therefore Chapter II which provided for fundamental rights. Emergency regulations which justified the change⁹⁰ together with the Indemnity Order 1970,⁹¹ which protected government agents against criminal charges and civil suits for unlawful acts, were passed.

From 1970 to 1973 Lesotho was ruled by the Council of Ministers (the former Cabinet) which was also the legislature. In 1973 this body passed a law, the Lesotho Order 1973,⁹² which constituted the Interim National Assembly as the legislature. The main function of this Assembly was to act as an interim measure in the process of leading the country back to Constitutional rule. The membership of this Assembly was as follows:

- 22 Principal Chiefs and Ward Chiefs;
- 60 persons nominated by the King acting on the advice of the Prime Minister after consulting such persons as in his opinion represent the various shades of political opinion in Lesotho;
- 11 persons nominated by the King acting on the advice of the Prime Minister after giving consideration to the desirability of nominating persons who have rendered distinguished service to Lesotho and who have knowledge of matters affecting various interests of the inhabitants of Lesotho.⁹³

Members of the Assembly must be citizens and be able to speak and read the English or the Sesotho language.

Political parties were not allowed to present their own nominees.⁹⁴ This led to disagreements, and some members of parties accepted nomination by the Prime Minister.

It is thus seen that, while in Swaziland there had been an effort to involve the electorate in the selection of law makers,⁹⁴ in Lesotho the selection was made by the Prime Minister, the assumption being that he knew what was best for the nation, an assumption which may well have been true, but which may just as well have been false. The executive authority was vested in the King who exercised it in accordance with the advice of a Cabinet headed by a Prime Minister. The Prime Minister was appointed by the King. Other Ministers of government were appointed by the King on the advice of the Prime Minister. Ministers need not be members of the Assembly. In his appointment of a Prime Minister, the King should select a person who appeared to him to be the leader of the political party which commanded the support of a majority of the members in the Assembly.⁹⁶

The whole arrangement favoured the B.N.P. Another noticeable feature was the considerable power which the Prime Minister wielded in making appointments. There was no requirement that he should act according to the directives of his own political party. He in practice appointed former civil servants and opposition party members to be Ministers. He also dismissed prominent party members from the Cabinet. The result was a highly unified Executive which was loyal to the Prime Minister, a state of affairs which presumably fostered an efficient government.

The electorate was not involved in all this. Elections were promised for many years; the latest announcement was that a date of elections would be set by the Interim National Assembly when it met in 1983.

The arrangement for the administration of Lesotho supported once more the theory that in Africa limited government was objectionable. The desire was always to have a large measure of freedom of action by the Executive branch of government. The process was similar in Lesotho and Swaziland, except that in Lesotho, power was held by a politician as against the traditional head of State, while in Swaziland the King has the power. In Lesotho there was a popular political party which was denied power; in Swaziland there was no such party, but the government felt threatened sufficiently to take drastic steps. In both cases no respect was shown to the electorate.

(iii) Swaziland

The history of the relations between Swaziland and the colonial authority was, throughout, characterised by the Swazi attitude that Swaziland was never a colony, but a protectorate. Since it was not a colony, the agreements between Swaziland and the protectorate authority must be respected unless altered by agreement. The various Conventions between Britain and the South African Republic (Transvaal) always recognised the independence of Swaziland, so it was argued. This attitude persisted throughout the colonial period, and it is still a guiding principle for Swaziland in its internal policies and international relations.

British colonial rule did not go along with this attitude. Swaziland was a colony of the Transvaal and therefore of Britain as a successor to the rights of the Transvaal. Swazi claims would be respected only to the extent of the limits of "indirect rule", Independence for Swaziland meant, in the view of the Swazi, the recovery of full sovereignty under a Swazi culture. A Westminster Constitution was regarded with suspicion as being foreign, imposed by a colonial power whose rule was characterised by lack of good faith. Pre-independence negotiations centred on a number of issues amongst which were (1) the return of land under foreign (mainly South African) ownership, (2) the adjustment of the international boundary with South Africa, and (3) the vesting of mineral rights under the King.⁹⁷ All these issues were, and still are, aspects of a larger issue of the process of reversing the legacy of colonial rule and the restoration of Swazi nationhood. The symbol of that nationhood is the King to whom every "Swazi must owe allegiance and show loyalty". Matters of human rights are subjected to the test of Swazi culture and if they fail to pass it, they are jettisoned. The recovery of land and of territory is a central policy of State to which matters such as citizenship and the struggle against apartheid in Southern Africa must be subjected.⁹⁸

Swaziland attained independence in September 1968. The written Constitution for Swaziland was basically similar to the Constitution of Botswana and Lesotho. The legislature was composed of the King and Parliament. Parliament consisted of a Senate and House of Assembly. The membership of the Assembly included popularly elected members and some appointees of the King. Some Senators were elected by the Assembly, while others were appointed by the King.⁹⁹

The franchise was open to citizens, regardless of sex, of or above the age of 21. The executive authority of government vested in the King who was to be advised by a Cabinet of Ministers headed by a Prime Minister. In this respect, therefore, the King was a Constitutional

monarch. The Constitution provided for a multi-party system of government, and the King had to appoint as Prime Minister the person who commanded the majority in the House of Assembly.

It will be noticed that as far as appointments to the legislature were concerned, the King had a lot of say. He could influence the composition of the Assembly and Senate to a high degree. The multi-party nature of the Constitution meant that the government might be led by a party which was not necessarily "loyal" to the King. Such a possibility proved to be a major weakness of the Constitution.

Pre-independence elections were held in April 1967. The Imbokodvo National Movement won all 24 elective seats in the Assembly. Since this party supported the King, the business of government worked smoothly with no opposition party to "obstruct" progress. The first post-independence elections were held in May, 1972. While the Imbokodvo National Movement won by an overwhelming majority, the opposition Ngwane National Liberatory Congress (N.N.L.C.) won three seats. One of the losers on the side of Imbokodvo was a Prince.¹⁰⁰ The presence in the legislature of an opposition party which was not necessarily "loyal" to the King, and therefore to the Swazi nation, was an unwelcome irritation. An elected member of the N.N.L.C. was deported to South Africa as a non-citizen.¹⁰¹ He managed to take the matter to Court, however, where he obtained a declaration that he was a citizen. A piece of legislation amending the immigration law so as to exclude the intervention of the Courts was declared unconstitutional by the Court of Appeal because the amendment purported to establish a tribunal to decide on issues of citizenship to the exclusion of the Courts. The Constitution, on the other hand, established the High Court as a body to interpret the Constitution. To exclude the Court by ordinary legislation would amount to an amendment of the Constitution which requires the joint sitting of both houses of Parliament.¹⁰²

The ability of the Courts to intervene effectively with legislative and executive functions proved to be another basic weakness of the Constitution. To an African government which desires a free hand in the running of the government, the powers of the Courts were intolerable, calling for drastic action. In April, 1973 the Assembly and senate each passed a resolution in which it was recommended to the King that the Constitution should be abrogated. By a Proclamation dated April 12, 1973 the Assembly and Senate each passed a resolution in which it was recommended to the King that the Constitution should be abrogated. By a Proclamation dated April 12, 1973 the King announced as follows:

TO ALL MY SUBJECTS - CITIZENS OF SWAZILAND¹⁰³

1. Whereas the House of Assembly and the Senate have passed the resolutions which have just been read to us.
2. And whereas I have given grave consideration to the extremely serious situation which has now arisen in our country and have come to the following conclusions:
 - (a) that the Constitution has indeed failed to provide the machinery for good government and for the maintenance of peace and order;
 - (b) that the Constitution is indeed the cause of growing unrest, insecurity, dissatisfaction with the state of affairs in our country and an impediment to free and progressive development in all spheres of life;
 - (c) that the Constitution has permitted the importation into our country of highly undesirable political practices alien to and incompatible with the way of life in our society and designed to disrupt and destroy our own peaceful and constructive and essentially democratic

methods of political activity; increasingly this element engenders hostility, bitterness and unrest in our peaceful society;

- (d) that there is no constitutional way of effecting the necessary amendments to the Constitution; the method prescribed by Constitution itself is wholly impracticable and will bring about that disorder which any constitution is meant to inhibit;
- (e) that I and all my people heartily desire at long last, after a long constitutional struggle, to achieve full freedom and independence under a constitution created by ourselves for ourselves in complete liberty without outside pressures; as a nation we desire to march forward progressively under our own constitution guaranteeing peace, order and good government and the happiness and welfare of all our people.

3. Now therefore I SOBHUZA II, King of Swaziland, hereby declare that, in collaboration with my Cabinet Ministers and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all Legislative, Executive and Judicial powers is vested in myself and shall, for the meantime, be exercised in collaboration with a Council constituted by my Cabinet Ministers. I further declare that, to ensure the continued maintenance of peace, order and good government, my Armed Forces in conjunction with the Swaziland Royal Police have been posted to all strategic places and have taken charge of all public services. I further declare that I, in collaboration with my Cabinet Ministers, hereby decree that:

- a. "The Constitution of the Kingdom of Swaziland which commenced on the 6th September, 1968, is hereby repealed;
- b. All laws with the exception of the Constitution hereby repealed, shall continue to operate with full force and effect and shall be construed with such

modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this and ensuing decrees".

While in Lesotho an analogous move as the one taken by the Swaziland government had led to discontent and repression, in Swaziland any discontent did not lead to bloodshed. One of the first decrees by the new regime provided for preventive detention.¹⁰⁴

The King ruled the country with the assistance of the Council of Ministers (the former Cabinet) until 1978 when a Parliament was introduced by the Establishment of the Parliament of Swaziland Order 1978¹⁰⁵ which commenced its operation in October, 1978. The law established a parliament which consisted of a Senate and a House of Assembly. The Senate was constituted by twenty members, ten of whom are appointed by the King acting on his discretion, while the other ten are elected by the House of Assembly. In making his appointments, the King would consult such bodies as may be considered appropriate in an endeavour to appoint such persons who are by reason of their special knowledge or practical experience able to represent economic, social, or cultural interests not already adequately represented in Parliament or who by reason of their special merit, are able to contribute substantially to the good government of Swaziland.

The House of Assembly consisted of about 51 members. Forty members were elected by an Electoral College; ten members were appointed by the King acting in his discretion.¹⁰⁷ In the exercise of this discretion he gave due consideration to unrepresented interests in the same way as he did in the appointment of Senators. The Attorney-General was a member of the Assembly, but he had no right to vote. If the speaker or the Deputy speaker was not a member of the Assembly, he assumed membership by virtue of holding that office. The Electoral College was restricted in its election of members of the Assembly.

Only citizens may be elected, a person who "has served sixty days or more under an order of Detention issued against him under the Detention Order 1978"¹⁰⁸ may not be elected.¹⁰⁹ Other disqualifications were the usual ones. While in other countries there is nothing strange in forbidding non-citizens from being elected to the legislature, in Swaziland the prohibition assumes a degrees of importance. The citizenship law gives wide discretionary powers to the Executive branch of government to decide on questions could find himself being declared a non-citizen and being thereby disqualified from the electoral process.¹¹⁰

The King in making appointments did not seem to be restricted to citizens. It is provided in section 34 of the Establishment of the Parliament of Swaziland Order 1978 that:

"Nothing in section 33 shall be construed as depriving the King of the right to appoint any additional members to the House as provided for in Part V hereof".

This would seem to imply that the King had a free hand in making appointments. Indeed there was no restriction placed upon the King in Part V of the Order except that he must make certain consultations.

Persons who have "served sixty days" in Detention may not be elected to the Assembly. This is formidable a weapon in the hands of the government against opponents: all that needs to be done is to detain a "troublesome" person for 60 or more days, and he is immediately disqualified from the Assembly. Some leaders of the N.N.L.C. were detained and they were therefore disqualified.¹¹¹

Members of the Electoral College were elected by popular vote organised into local communities called Inkhundla (plural Tinkhundla). All members of a given Inkhundla above the age of 18,¹¹² provided

they are citizens, are eligible to vote in the election of two members of the Electoral College. The two members constituted the Electoral College, but the number of the members was not clear.

The elections to the Electoral College were to be conducted "in accordance with the guidelines and directives laid down by the Electoral Committee" set up under the law.¹¹³

The first elections of the Electoral College were held in 1978. The Electoral Committees made nominations of candidates, but the names of nominees were kept secret until the day of voting. No political campaigning was allowed. Leaders of the N.N.L.C. were in detention during the elections.¹¹⁴ On election day voting was by public vote.¹¹⁵ The results were then announced. This manner of voting is supposed to be traditional.

It was specifically provided that the Electoral College should elect members of the Assembly by secret ballot.¹¹⁶ There was no such provision for secret ballot in the elections of the members of the Electoral College, yet these are crucial elections since the ordinary citizens are taking part.

Executive authority was vested in the King who may exercise his powers directly or through officers. While in Lesotho it was stressed that the King should be advised by the Prime Minister, in Swaziland there was no such requirement. The Swazi King may appoint and remove Ministers including the Prime Minister, but before removing them a report by a tribunal should be submitted to the King on the matter.¹¹⁷

The present Constitution of Swaziland as established by the Order of 1978 demonstrates a desire that Swaziland should be ruled according to the traditional culture of that country. The predominance of the power of the King is unmistakable; modern political parties,

which were prohibited and dissolved by Decree No. 9 of the 12 April, 1973, have no chance of reviving. The population has, however, been involved somehow in the business of government, unlike in Lesotho. The extent of the freedom felt by voters is, however, doubtful in the absence of secret ballot at the vital elections for the selection of the Electoral College.

In Botswana the electorate are fully involved in the selection of the rulers. In Swaziland the voters have been involved to some degree which does not appear to be quite satisfactory. In Lesotho the electorate were not involved at all.

2. The Right to Life

It has been said that the right to life is the foundation of all other rights, since dead persons need no rights.¹¹⁸ A distinction has to be made, however, between "the right to life" which is conveniently classified under civil and political rights, and "the right to live", which is a part of the economic, social and cultural rights.¹¹⁹ Our concern here is with the former right.

The nature and scope of the right to life are not an easy matter to determine. The Universal Declaration of Human Rights provides that "Everyone has the right to life" (Article 3). In this sense it would appear that the right is being conferred.¹²⁰ The European Convention on Human Rights on the other hand provides that "Everyone's right to life shall be protected by law" (Article 2(1)). It seems then that in the case of this Convention the right to life is inherent in the human being, but the mechanism for its protection is being laid down. The African Charter on Human and People's Rights provides as follows:

"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." (Article 4).

The matter is laid down admirably in the International Covenant on Civil and Political Rights, 1966:

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." (Article 6(1)).

The merit of the definition of the right to life as laid down by the International Covenant on Civil and Political Rights lies in its clarity: the right is inherent, but States parties are enjoined to protect it. It remains to look at the method adopted in Botswana, Lesotho and Swaziland.

In Botswana the Constitution follows the method adopted by the European Convention on Human Rights, though with a different wording. The right to life is assumed to exist, but the State is enjoined to protect it. Then follow exceptions to the enjoyment of the right.¹²¹

In Lesotho and Swaziland we have to look at the common law and relevant statutes to see whether the right to life exists. The common law prohibits the unlawful killing of human beings. There is in these countries virtually no difference in their law and that of Botswana as far as this right is concerned. We conclude, therefore, that in these States the right to life is regarded as inherent.

The next question is that of the scope of "life" itself. As pointed out by Jacobs, the best place at which to start examining the right to life is at the very beginning of life.¹²² When does life begin? Who is a human being? These are some of the questions which should be tackled.

According to the Roman-Dutch law as practised in Holland, induced abortion was prohibited, but it was not regarded as murder. The degree of the maturity of the foetus was taken into account in assessing the appropriate punishment. Induced abortion was justifiable in only one instance: to save the life of the mother. The Roman-Dutch law never settled the question of when a foetus can be said to have a "life", or a "soul" as the influence of Christianity would have it.¹²³

The Roman-Dutch law as practised in Southern Africa has not advanced the position of the law any further. The position taken by the English common law that an offence is committed when the foetus moves in its mother has not been copied. What is certain in

modern law in Southern Africa is that the foetus must be alive for the crime of abortion to be committed by its deliberate killing.¹²⁴ The question of what a foetus is, nor when it can be said to be alive is controversial.¹²⁵ There is therefore no guide as to the beginning of life. The African Charter on Human and People's Rights does not throw any light on this matter. Other international instruments on human rights are silent. The only exception seems to be the American Convention on Human Rights which in Article 4(1) provides that the right to life shall be protected by law and, "in general, from the moment of conception".

Social and economic problems faced by nations today made a re-examination of matters of life and death necessary. Southern Africa is no exception. There is an increasing consciousness that birth control is an instrument of social betterment of life.¹²⁶ Methods of birth control are now being encouraged. But the effects of some methods amount to abortion, depending on the view one takes about the nature of a foetus.¹²⁷ It is in areas such as this that the law is unclear.

The legal systems of Botswana, Lesotho and Swaziland prohibit the unlawful killing of human beings. Killing is permissible in the following circumstances:

- in the execution of the sentence of death;
- in self-defence, the defence of any other person or in defence of property;
- for the purpose of effecting a lawful arrest or to prevent the escape of a person who is under lawful detention;
- in the keeping of law and order;
- if a death occurs as a result of a lawful act of war.

These are the only permissible exceptions to the prohibition against killing. Suicide is not prohibited. An accomplice of a suicide would however, be guilty of murder.

The law as described above leaves a number of outstanding problems. First, "mercy killing" (euthanasia) is prohibited, but it would appear that the scope of this is not clear. Does a medical doctor have a duty to keep alive a human vegetable? Does he do wrong if he abstains from assisting a fatally injured person? It may well be that according to medical ethics he does right or wrong, but the law is not clear on these matters.¹²⁸

Second, a basic question amongst Black people in Southern Africa is about the degree of freedom which expectant mothers or future parents have over the life and death of the foetus. There are various circumstances which could lead to a desire to terminate a pregnancy. Many married women get pregnant through illicit sexual relations because of the migratory labour system, and such pregnancies and births of illegitimate children are the cause of violence and family disunity. A pregnancy could occur through a crime such as rape. It could be the pregnancy of an imbecile or a lunatic. The future mother could be a girl of a tender age whose health and future welfare could be in jeopardy. Sometimes the welfare of the future child could be a bleak one, or there could be a risk of it being born deformed. It could be a pregnancy resulting from a failed contraceptive device. In all these cases the Roman-Dutch law does not permit the termination of the pregnancy, unless the mother's life is in danger.¹²⁹

The termination of pregnancy presents problems which face, not only the future mother or future parents, but the medical profession as well. A developed system of law should tackle them. The Roman-Dutch law permits a termination of a pregnancy only when there is a risk to the life of the mother. If she is agreeable to a termination of the pregnancy, the next question is whether she alone has the discretion to consent to that termination. If she is married the husband has an interest in the pregnancy, but he does not face the risk of death. Should he refuse his consent? If he does refuse, and a doctor performs the necessary operation, is the doctor liable in a suit for damages? The questions are being posed, not for the purpose of providing an answer to them, but in order to highlight the dilemma presented by matters of life and death, and to show that our countries' legal systems are backward, and there cannot be hope for the full enjoyment of human rights within the present state of affairs.

(i) Botswana

The Death Sentence

In Botswana the death sentence is not prohibited. It can be imposed in the case of murder without extenuating circumstances.¹³⁰ A convicted person can appeal to the President for pardon. The President exercises his powers of pardon through a Pardons Committee.¹³¹

There are, therefore, two techniques in the legal system for reducing the number of death sentences, namely the finding of extenuating circumstances and the appeal for mercy. Research still has to be done as to how effective these techniques are. It does appear that death sentences are rare. Pregnant women may not be executed.¹³² Infanticide does not normally carry a death sentence.¹³³ Abortion is not regarded as homicide.

Death sentences are ordered, supervised and carried out by human beings. Since the Constitution of Botswana forbids subjection to "torture or to inhuman or degrading punishment or treatment",¹³⁴ it may be asked whether it is perhaps subjecting the public officials who carry out death sentences to inhuman or degrading punishment by obliging them to carry out death sentences.

(ii) Lesotho

In Lesotho the death sentence is mandatory for the crime of murder without extenuating circumstances, and discretionary in cases of treason and rape.¹³⁵ Where there are aggravating circumstances in a conviction for murder, the extenuation may be ignored.

Death sentences have in practice been imposed for murder only, and not for treason or rape. In cases of treason convictions, which have become so common since 1970, the learned admonition of the Roman-Dutch writer, Johannes Van der Linden, has been followed. He wrote thus concerning sedition:

"As, however, the origin of this crime is often found in the different opinions respecting the measures of Government, especially when the latter has been affected by revolutions having taken place, there is hardly any crime in which greater caution is to be enjoined upon a judge, so as on the one hand to preserve the maintenance of peace and good order, and on the other hand not to render anyone the unfortunate victim of political dissensions by excessive severity."¹³⁶

The Courts of Lesotho have so maintained this attitude towards treason that a call for reform in the political situation in Lesotho was made in a recent conviction for treason:

"Are the Basotho to live with this kind of situation for a long time? Is the commission of High treason going to be allowed to occur with regularity until it becomes their normal way of life? ... In inflicting punishment the courts also look at the trouble because if that can be cured then the repetition of the commission of the crime in question will be nil. Those who have the power to regularise the situation had better, for the sake of the Basotho, consider what has been said above, urgently".¹³⁷

Rape cases are in practice tried by subordinate courts. Although there has never been a death sentence for rape, a judge of the High Court recently said that rape was on the increase that the time might soon come when rape cases would be tried by the High Court so as to protect the insecure women who are left by their menfolk who go to urban areas and South Africa in search of employment. And he warned that:

"Accused persons who are found guilty of this heinous crime must not expect any mercy from our Courts. Potential rapists have been warned. The courts mean to crush this menace."¹³⁸

Despite this well-intentioned aim, sentences for rape are on the whole lenient in Lesotho. In this very case in which Justice Mofokeng soundered a warning, a policeman who had committed rape on a nursing mother prisoner at a police station, had been sentenced to 2 years imprisonment which was confirmed by the judge.

In practice the death sentence for murder is not a common penalty. Courts have easily found the existence of extenuating circumstances; aggravation is rarely found to cancel extenuation. In Rex v. Kopo¹³⁹ the accused, a sergeant in the Police Mobile Unit, planned and executed the murder of the boyfriend of his cousin. Upon his conviction, it was

found that he was sterile and that this condition led to jealousy and envy for the deceased and his ability to procreate. Although the accused was a senior police officer who should have known better than to commit such a serious offence, his life was spared and he was sentenced to 14 years imprisonment. In the trial for murder of Lieutenant Colonel Phaloane the High Court found extenuation in the fact that the crime was not premeditated.¹⁴⁰ On appeal the Court of Appeal was highly critical of this finding, pointing out that there were in the case serious aggravating circumstances which should have led to the supreme penalty. The sentence was increased from 10 to 15 years imprisonment.¹⁴¹

Convicted murderers may appeal for clemency from the King who is advised by a Pardons Committee in taking decisions.¹⁴² The proceedings of the Committee are not public and their scrutiny is difficult. Yet the Committee performs an important function in the protection of the right to life. To a casual observer some decisions of this Committee are contradictory. Four recent decisions may serve to illustrate this opinion. In the two cases of Sello Lemohare and Others¹⁴³ and that of Thabang Mohlalisi and Others¹⁴⁴ the motive for the murder was robbery from a shop. In each case the night watchman was rendered helpless by tying him up with a piece of wire. In the first case the watchman died of strangling since the wire was tied recklessly around his neck so as to cause choking from the victim's struggles. In the second case a piece of cloth had been pushed into the mouth of the watchman and it caused his death. The accused were in each case sentenced to hang. Their appeals for clemency were turned down.¹⁴⁵

The second set of cases is that of Khoabane Sello¹⁴⁶ and that of Lekena Moshephi and Others.¹⁴⁷ In the former case the accused was a former employee in the postal services, and he was familiar with the procedures for the delivery of mail. He waylaid the postal courier,

who used to travel on horseback, and, after killing him, robbed him of the postal bag. Death was due to five stab wounds on the victims chest which penetrated the heart and lungs. The trial judge found that, "In all there were no less than eighteen stab wounds to his chest". The accused was sentenced to death. But on appeal to the King, his sentence was commuted to life imprisonment.¹⁴⁵

In the second case the victim set out on horseback from Matatiele in South Africa for Lesotho, in search of missing animals. He was invited by one of the accused to a cattlepost where he spent the night. During the night he was assaulted by two of the accused. A witness described a horrible attack on the deceased by the accused on the following day. The four accused were eventually convicted of murder and sentenced to death. Their pleas for mercy were accepted by the King.¹⁴⁵

Now the contradiction in the two sets of cases lies here: In the robbery cases, the desire of the accused persons was to disable the victim so that he did not interfere with their illegal acts. But death resulted because the accused were reckless as to whether the victim died or survived. There was never any prior plan to kill the victim. In the second set of cases, there was premeditation. Khoabane Sello laid his plans very well. (He claimed, but was not believed, that he was with an accomplice). In the second case a stranger arrived on the scene and a plan to kill him was immediately set into motion and executed with cruel brutality. If mercy was to be extended to any of these murderers, it should have been to the convicts in the first set of cases, or rather to all of them.

The impression created about Lesotho so far is that there is a reasonable respect for life. That impression is in fact not correct as is immediately shown. Most deaths in Lesotho occur during the preservation of the security of the State and in the suppression of disorder. From 1970 during the state of emergency and in 1974 many lives were lost at the hands of the police. One writer has said that

during these times the police tended to shoot first.¹⁴⁸ Over the years one notices the development of a certain cynicism towards the sanctity of life. Another development is the attitude of the government of bringing itself down to the level of criminals: since the enemies of the government kill, so the argument goes, the government shall do likewise. In other words "terrorism" shall be met with "state terror".¹⁴⁹ Governments who are worthy of the title do not act in that way.

The right to life implies that there is a duty on the State to protect life and to punish those who violate it, including the agents of the State. This right imposes on the State a duty to inquire into the death of every person, so that if anyone is responsible he should be punished. The inquest law provides the machinery for this purpose. Yet in Lesotho one noticed the progressive failure to comply with the provisions of the Inquest Proclamation.¹⁵⁰ One never heard of inquests into deaths occurring during security operations. Deaths were announced and bodies displayed to demonstrate the successes of the security forces, but no inquiries were ever instituted to determine the actual circumstances of death.¹⁵¹ In this way many murders could be committed. The possibility of homicide in the hands of the police may be illustrated by one recent example.

In August 1981 the popular blind South African singer, Steve Kekana, staged a concert in Lesotho. Apparently too many tickets were sold so as to exceed the capacity of the music hall. Tickets holders demanded to get in and some disorder developed. The police came upon the scene and threw teargas canisters into the hall. A stampede developed. When it was over, 17 young persons lay dead on the scene. Radio Lesotho suddenly defended the police action as being necessary to preserve law and order. The organiser of the concert held a

different view: he said the police action had been unnecessary and the police were responsible for the deaths.¹⁵² To someone who was not present at the scene, it would appear that it was most dangerous to explode teargas in a crowded hall; a sensible thing to do would have been to deal with the crowd outside the hall. The important thing however, is that an inquest should have been held to determine responsibility for the deaths. None was held. In some countries a tragedy such as this one would have been the subject of a commission of inquiry.

A number of mysterious deaths occurred in 1981. In June, Odilon Seheri, a prominent citizen vanished after attending a meeting. His burnt body was discovered about a week later in the mountains of Lesotho. On September 4, the home of Ben Masilo, a critic of the government, was attacked. He escaped, but his grandson was killed in the attack. Masilo later charged that his attackers were members of the Police Mobile Unit. On September 7, Edgar Motuba together with his visitors, Osiel Mohale and Lechesa Koeshe, were taken away by a group of men who said they were policemen. Their dead bodies were discovered the following day.¹⁵³ Edgar Motuba was the editor of Leselinyana La Lesotho, a church newspaper which was critical of the government. Other deaths subsequently took place.¹⁵⁴ Outstanding amongst these were the assassinations of Chakela, a prominent politician in July 1982,¹⁵⁵ and that of Jobo Rampeta, a government Minister, in August 1982.¹⁵⁶ At the scene of the killing of Jobo Rampeta an armed dead body was discovered, and the government named the person as the assassin of Chakela and Rampeta, but only after displaying him to the public for purposes of identity. It was not known how he had met his death, the government said.

Public interest demands that the cause of the deaths of these and other people must be established, so that those who are responsible can be dealt with according to law. So far only the inquest into the death of Odilon Seheri was conducted as from Monday 20 December, 1982. It is not as if inquests are useless. In the inquiry into the death of Bassie Mahase it was discovered that he had in fact been murdered¹⁵⁷ by a very senior police officer, Lieutenant Colonel Phaloane, head of

the Criminal Investigation Department, who was eventually convicted of the murder, despite attempts by the police to conceal the circumstances of the killing which had at first been labelled a killing in a road accident.¹⁵⁸

Deaths in Detention

In South Africa, a neighbour of Lesotho, deaths of political detainees are a common occurrence. Such deaths are in fact condoned by the State. In Lesotho such deaths had all along been unknown. In November 1981 the first death of a detainee under the Internal Security Law occurred. The victim was Setipa Mathaba.¹⁵⁹ No inquest into his death has been held as of December 1982.

The second death in detention occurred in September, 1982. This was the death of Sophie Makhele who allegedly shot herself to death with a police firearm left in her detention cell. No inquest was held, yet the circumstances of her death as related by the police were so simple. "Disappearances"

The phenomenon of "disappearance" is well known in regions such as Latin America and parts of Africa.¹⁶⁰ The nature and scope of "disappearance" is still to be defined. Not every person who vanishes can be said to have "disappeared." "Disappearances" invariably involve governments and their agents during the process of eliminating their political opponents by extra legal means. An Amnesty International report classifies the "disappeared" into four categories in respect of the Americas:

- (1) those released after a short time (from one day to 30 days).
The authorities never admit responsibility for this kind of short-term disappearance;
- (2) those transferred to an official prison after the initial period of disappearance;
- (3) those murdered, and whose bodies are found;
- (4) those who disappear indefinitely and are believed to be dead or in secret detention camps.¹⁶¹

The phenomenon of "disappearances" was all along unknown in Lesotho. When, however, Odilon Seheri vanished only to be found burned to death; when Edgar Motuba and his companions were abducted and re-appeared as dead bodies, one could observe the beginnings of the phenomenon of "disappearance". There was just one missing link: possible government involvement. Responsible citizens expected government to do something about the deaths, especially because, before his death, Edgar Motuba had given details of threats to his life by members of the Police Mobile Unit.¹⁶² And a High Court judge had sounded a warning in connection with the law providing for detention without trial in which relatives and lawyers were excluded from the detainee:

" ... this is what an ordinary Mosotho fears, namely, that he can vanish from the face of the earth at the whim of some petty police officer for reasons other than those stated in the Act. This again can easily happen when one remembers how many of these detainees are ever heard of in these Courts."¹⁶³

That was in February, 1980. Then in November 5, 1981 it happened. Jobo Khalane and his brother, Paseka, were arrested by members of the Police Mobile Unit and taken to the Roman Catholic Mission at Pontmain in Northern Lesotho.¹⁶⁴ At 4 p.m. the following day Paseka was driven away and left in the "middle of nowhere" to find his way home. Jobo remained; he has not been heard of ever since. In an application by his wife for his release, the government's reply was surprising for its simplicity and arrogance: Jobo was suspected of engaging in subversive activities; he was arrested; he requested to be accompanied by his brother, which request was granted; when the interrogation of the brother was over he was driven to a bus stop so that he could catch a bus home. Jobo himself remained because his interrogation was not complete. He was found not to have engaged in any subversive activities and released. He was driven to the same bus

stop at 6 p.m. to catch a bus home. Since he was not in police custody, the police could not produce Jobo Khalane. However, inquiries had been mounted to find Jobo, but without success.¹⁶⁵

The Court ordered the police to release Jobo. The order was not complied with.

In a recent report on Guatemala by Amnesty International there appears the testimony of a former conscript in the Guatemalan Army who was reported as saying:

"So what I mean is, you kill, then you return; you get dressed. You've maybe committed these crimes in army uniforms; if so, they tell you to get out of those clothes fast and put on civilian clothes or police clothes, then go out and look for whoever killed the person. But how are we supposed to find them if it was us who did it in the first place? ... They say "unknown persons" killed the student and that today they are being sought by the police; but how can they find them if the people who did it are the people going out to do the searching?"¹⁶⁶

The second case of "disappearance" is that of Nkau Matete who was fortunate enough to "re-appear" alive.¹⁶⁷

In September, 1982 a new Internal Security Act¹⁶⁸ came into effect. It facilitated arrests and detentions. This law, together with the indemnity legislation, provided for a fertile ground for torture, "disappearances" and secret detention centres.¹⁶⁹

(iii) Swaziland

Death Sentence

The law of Swaziland is basically similar to that of Lesotho on this matter. The death sentence is mandatory for murder without extenuating circumstances.¹⁷⁰ Infanticide is often treated as culpable homicide. Pregnant women may not be executed. Persons who are aged 18 or below when they commit the homicide are not to be sentenced to death.¹⁷¹

The sentence of death is discretionary for treason.¹⁷² There is no mention of the death sentence for rape.

It appears that death sentences have been imposed for ritual murders which are a problem in Swaziland. In July 1981 eight persons were executed for this crime.¹⁷³ Murder convicts were excluded from the amnesty granted in September 1981 to more than 650 prisoners.¹⁷⁴ On the whole it appears that the death sentence is in practice restricted to ritual murders so far.

It does not appear that there have been deaths in detention in Swaziland. "Disappearances" are not known, and the detention law does not facilitate such "disappearances" since it is in the nature of a preventive detention law.

3. Right to Personal Liberty

In all three countries under discussion the right to personal liberty is largely based on the English Common Law. Article 3 of the Constitution of Botswana provides guarantees against arbitrary arrest and detention, and sets out the conditions under which a person may be deprived of his liberty and sets out the rights of persons under detention. These guarantees are provided for in the Criminal Procedure ¹⁷⁵ laws of all three countries, which laws existed even before independence.

Deprivation of liberty may be divided into two categories:

- (1) legitimate or acceptable arrest and detention,
- (2) illegitimate or unjustified arrest and detention.

Depending on the values of each community, a State which engages in the second form of deprivation of liberty is regarded as oppressive. Legitimate forms of deprivation of liberty include arrests for bringing criminal suspects to justice and for punishing them; detentions for the purpose of educating minors; detentions for preventing the spread of infectious diseases, or for the treatment of lunatics; temporary detentions in the interests of State security and the maintenance of law and order; and arrests and detentions for the purpose of enforcing immigration and aliens control laws. In all these cases there should be a provision for access to justice and control by judicial or quasi-judicial bodies. Detentions which do not satisfy these conditions are regarded as illegitimate.

Legitimate detentions would not normally be a subject of critical discussion were it not for the fact that the powers for such detentions are often abused. Thus, for example, ordinary criminal detainees are often not taken to a judicial officer within the time limits laid down;

the power to detain has often been used for the purpose of torture and extraction of unlawful confessions. The abuse of power occurs not only in respect of legitimate arrests and detentions, but also in respect of the category of legislation for unjustified deprivation of liberty. In the discussion which follows we pay special attention to abuse of authority and to legislation for unjustified deprivation of liberty.

(i) Botswana

Detention Without Trial

There are not in Botswana laws for detention without trial such as are found in Lesotho and Swaziland. During a state of emergency however, measures, including the deprivation of liberty may be taken to deal with that situation. In the case of detention during a state of emergency the detainee has the following rights:

- (1) he shall, within 5 days, be furnished with written reasons for his detention;
- (2) the fact of his detention shall be published in the Gazette within 14 days, giving particulars of the provision of law under which the detention is authorised;
- (3) his case shall be reviewed regularly by an independent and impartial tribunal established by law and presided over by a lawyer appointed by the Chief Justice;
- (4) he shall be afforded reasonable facilities to consult and instruct a legal representative;
- (5) he shall be permitted to make written or oral representations or both to the tribunal either by himself or through a legal representative.

All detentions are subject to the remedy of habeas corpus. In the case of Mtewa v. Officer Commanding, State Prison, Lobatse, and Others,¹⁷⁷ the applicant, Mtewa, was for a long time the holder of a Botswana passport and he was resident there. The immigration authorities removed his passport from him, and then detained him as an alien pending his removal from Botswana. He petitioned the High Court which declared his detention unlawful since he had been allowed into Botswana even before independence. He could not be removed from there as a prohibited immigrant. In his judgement Mr. Justice Rooney had an opportunity to explain that the Roman-Dutch law remedy of the writ de homine libero exhibendo was similar to the English law writ of habeas corpus.

The remedy of habeas corpus is not a useful remedy against a determined government. Detained persons have no access to the Courts except with the permission of the authorities. Unless a detainee has a relative who is able and willing to take up the matter of the detention, the detainee could be prejudiced. The immigration law has been utilised for the purpose of holding refugees for long periods and for returning them to their country of origin. In 1971 several refugees from Rhodesia were held for some two years while arrangements were being made for their return to Rhodesia.¹⁷⁸ In March 1973 42 of them were forcibly repatriated to Rhodesia. Some of them were taken into custody by the Rhodesian authorities, while others escaped.¹⁷⁹ In January 1981 4 South African refugees were detained and forcibly returned to South Africa.¹⁸⁰ In both cases, and others, the detainees might have had a course of action based, for example, on Botswana's participation in the Convention Relating to the Status of Refugees and its Protocol. But since they were shut up in a strange country there was no hope for redress for them.

Pre-trial Detentions

The procedure for arrest and the bringing of suspects for trial is laid down in the procedure code. Arrested persons must be brought for trial as soon as possible.¹⁸¹ If not tried immediately they must either be released unconditionally or on bail, or else the Court must authorise their continued detention especially in respect of serious offences.

In Botswana there is a realization that arrest and detention amount to punishment. Time spent in custody is, therefore, taken into account in assessing sentence. There have been instances of prisoners being held in police custody longer than the permissible period of 48 hours as happened in The State v. David Modukwe.¹⁸²

(ii) Lesotho

Detention Without Trial

Prior to 1974, apart from emergency regulations, there was no law for detention without trial. In 1974 an amendment¹⁸³ to the Internal Security (General) Act 1967 provided for 60 days' detention for purposes of interrogation. That period could be renewed from time to time. This meant that the detention could be indefinite, even though the law was never meant to be a preventive detention measure. Detention was to be effected on the written authority of the Commissioner of Police; such order was to be displayed to the intended detainee.

In this law there was never a provision for the publication of the fact of detention; close relatives, friends or lawyers did not have to be informed of such a detention. In this way the law encouraged "disappearances". A person could be detained without anybody knowing about it. In addition access to the detainee, except by a Magistrate, was prohibited.

The provisions of the 1974 amendment were vigorously enforced. Several persons were detained, but their number or names were not published. The application of the law was characterised by abuse. By the end of the 1970's petitions concerning this law began to be filed with the Courts.¹⁸⁴ All along it had been thought that the jurisdiction of the Courts was completely ousted. This impression was, however, mistaken.

In the case of Sello v. The Commissioner of Police and Others¹⁸⁵ the detainee was severely assaulted within four days of her detention. She had to be taken to hospital where she spent most of the detention period. On a petition for her release, the Court explained the nature and scope of the detention provisions of the law. Among other things the Court held that the hospital was not a detention centre since the Commissioner had not designated it as such. The Court ordered the Magistrate to obtain a statement from the detainee. Although this statement was hearsay, it was accepted in evidence because the liberty of the citizen was at stake. The doctor who examined the detainee was asked to prepare a report which was accepted in evidence, something which the rules of evidence do not permit. But since liberty was in issue, it was accepted in evidence. The government argued that, since the doctor was not permitted access to a detainee, his report (being about a detainee) was illegally obtained. This argument was rejected. It was found that the Commissioner did not deliberate upon each and every detention, but that he signed cyclo-styled detention orders in blank. Some police officer would then fill in the name of an intended detainee. Commenting on this practice the judge said:

"I can only hope, therefore, that these presigned forms are not available at every charge office in this kingdom, and are not being used in connection with detaining persons for purposes other than those actually specified in the Act, for that would clearly be illegal".¹⁸⁷

From the hospital the detainee had been moved to a different detention centre. The Court found that the Commissioner had not deliberated upon this removal - a cyclostyled form had been filled in - and declared the detention illegal. Throughout the judgement the Court emphasised the fact that it had a right to test the legality of the detention, to see whether the provisions of the law had been observed.

The case of Sello led to others, and more abuses were revealed. In Nkau Matete v. Minister in Charge of Police and Others,¹⁸⁸ it was revealed that the detainee had been detained twice. In each case there was no detention order authorising his detention, and the Magistrate never visited him, and he was detained for more than 60 days. In short he was made to "disappear".

The law was also used for purposes other than those stated in its provisions. In Lebenya Makakole v. Commissioner of Police and Another¹⁸⁹ the detentions were for the theft of motor cars. In Jessy Ramakatane and Another v. Rex,¹⁹⁰ the detentions were for robbery. In other cases the detention centre was not specified, so that the police were able to move a detainee about.¹⁹¹ In other cases the detention orders were vague, not sufficiently informing the detainee about the reasons for his arrest.¹⁹²

The Internal Security (General) Act of 1967 was repealed in September 1982, and replaced by a new Act¹⁹³ with a similar name. Section 32 A of the repealed Act was not repealed.¹⁹⁴ This section provided for the immunity of government and its agents against criminal sanctions and civil suits for wrongful conduct in the protection of the state security. The outstanding features of the new measure may be summarised as follows:

- it created offences against subversion and sabotage and related offences directed against the State and persons. Knowledge of intended subversion and sabotage coupled with a failure to report, were made an offence,¹⁹⁵
- the application of the law was extra-territorial, covering acts which take place abroad. The Lesotho High Court was given the necessary jurisdiction to try such offences;¹⁹⁶
- it established the presumption of guilt against those who were charged with offences under it,¹⁹⁷
- the police were given wide powers to stop persons and search them, to enter homes and other places for a similar purpose. It was specifically provided that the police may stop and search a person to satisfy themselves as to his identity and that he was not carrying offensive weapons or substances etc. It was no longer necessary for the police to be suspicious.¹⁹⁸
- it provided for detention without trial for up to 42 days on one occasion while the detainee is being transferred from one official to another at 14 days' intervals for the purpose of investigating and prosecuting subversive activity;¹⁹⁹
- the re-arrest of the detainee may only be for a different cause.²⁰⁰
- the institution of "adviser" was established to advise the Minister on the need for the release or continued detention of a person during the detention. The "advisers" were appointed by the Minister in his discretion. The "adviser" had access once every week to the detainee.²⁰¹
- there was finally a provision for the banning and unbanning of organizations.²⁰²

Some observations can be made. Access to a detainee would be open to an "adviser", instead of a Magistrate. By December 1982 no such advisers had been appointed, yet the law came into force on September 10, 1982. There was a provision for continuity from the old law to the new one. Detainees who already existed were automatically taken over by the new law. But there was no provision that Magistrates will be "advisers". This would imply that all such detainees were being held illegally in the absence of "advisers". It was then reasonable to speculate that "advisers" be political appointees who lack the necessary independence to combat abuse.

Forty-two, not sixty, days was the maximum period of detention. This may seem to be an improvement on the law in favour of liberty. This was however, illusory. Detention was divided into 3 stages, namely

- stage 1: initial detention, which could be effected by any policeman regardless of rank;
- stage 2: interim custody on the orders of the Commissioner of Police;
- stage 3: detention order, i.e. detention on the orders of the Minister.

Each stage was for 14 days. Since this law was for interrogation purposes, the crucial stage was the initial detention. It was during this stage that deaths and torture could take place. It is to be noted that the detainee in the case of Sello was assaulted in the first four days of her detention.²⁰³ Available information suggests that Sophie Makhele "shot" herself very early in her detention. Past experience, therefore, supports the view that the early days of detention were used for purposes of interrogation, for torture and even death. Yet this was the time when the "adviser" could not have access to the detainee. The "adviser" comes in only at stage 2 onwards.²⁰⁴

Section 38(2) provided that a person who was in detention under an interim custody order (stage 2) and in respect of whom no detention order (stage 3) was made within 14 days should be freed. He may only be re-arrested for a fresh set of facts. This was to stop the harassment of a detainee. This, however, was partial protection. Policemen were able to harass detainees by means of initial detentions. All they had to do was to keep a detainee for, say, 10 days and release him. They could then arrest him on the same facts, since section 38(2) would not apply in that case.²⁰⁵

The new law did not specifically provide that the place of detention should be stated in the detention order. The old law did, and a number of Court decisions turned on this issue. A convenient practice then was for the police to move a detainee about from place to place, including a hospital. The Courts overruled this practice. The new law took account of past experience and built on it to legalise the very abuses which the Courts disapproved of. The inclusion of a hospital as a place of detention overruled the Sello case.²⁰⁶ According to the new law, the Minister may give directions as to the place of detention. The implications were serious. A fertile ground for "disappearances" and secret detention centres had been laid. It will be recalled that Jobo Khalane "disappeared" from a Roman Catholic Mission which was not known to be a detention centre.²⁰⁷ The moving about of detainees was sanctioned and it became difficult to trace them. Since the fact of detention need not be published, those detainees who were arrested in secret became easy victims of "disappearances".

One common abuse concerning the old law was for the police to simply fail to inform a Magistrate about the existence of a detainee.²⁰⁸ In the new law the "adviser" was substituted for the Magistrate, but there was no provision for ensuring that the "adviser" would in every case be advised of the existence of a detainee. But, as already stated, the initial detention for 14 days did not involve the "adviser", and this reduced the need to call him in.

The police are still protected against criminal and civil suits in terms of section 32A of the 1967 Act. What is puzzling is why section 32A was not incorporated into the new law.

Finally it should be mentioned that the police were given wide powers to stop and search persons, to enter homes and other places for a similar purpose. It was specifically provided that the police may stop and search without warrant any person to satisfy themselves as to his identity and that he was not carrying offensive weapons or substances. There was no need for the police to have suspicion, or reasonable suspicion. The initial detention may be effected "without warrant" but on reasonable suspicion by a member of the "police force". The term "police force" has a wide meaning in Lesotho, for it includes police volunteer reserves.²⁰⁹ A detainee can, therefore, be kept in detention for 14 days by the "peace corps"!

Pre-trial detentions

The Criminal Procedure and Evidence Act provided for the machinery for bringing suspected offenders to justice. Arrested persons were to be brought to a Magistrate within 48 hours of their arrest excluding the time spent on the journey to the Court. Otherwise they should be released. Arrests were generally to be effected on reasonable suspicion.

In practice the 48 hour time limit was ignored. Prisoners have been known to be held by the police for several weeks. The main reason seemed to be that arrests are made too early in the investigation process. The other reason was that the period in police custody was used in attempts to extract illegal confessions from detainees through the process of torture and ill-treatment. The cases of Rex v. Mphulenyane and Two Others²¹⁰ and Rex v. Faku and Others²¹¹ will serve to illustrate these abuses.

In the former case, one suspect was arrested by the police on January 20, 1977. The other two suspects were arrested on February 3, 1977. Only on February 25, were all three detainees taken to the Magistrate on a charge of murder, and this was only after the first suspect had made a "confession" the previous day. All three accused gave evidence during the trial that they had been severely assaulted by the police, and they were believed; the "confession" was rejected. In the latter case one accused was detained for 13 days during which time he was forced to admit guilt. Suddenly on the 13th day he "confessed". The "confession" was subsequently rejected by the Court.

All sorts of explanations were used by the police in attempts to justify illegal detentions and to avoid the provisions of the law. In the case of Mphulenyane referred to above, the police said the first detainee was not "arrested" on January 20; he was just "assisting" the police in the investigations. There passed a month before the detainee was taken to Court. This was explained on the ground that a Magistrate was not available, which was false because the trial Court ordered the production of the Magistrate's records which showed that there was a Magistrate throughout. The police then said they had not completed their "interrogations", hence the delay.²¹² The Swaziland case of Bartiles v.A. Nithiaradan²¹³ comes to mind at this juncture. That was a petition for the release of a witness in a murder investigation. The Attorney-General argued that the provisions of the procedure code did not apply because the witness had not been "arrested" but had been "detained", which was not forbidden by the law. This argument was rejected.

In Lesotho witnesses were also kept in police custody while investigations took place. An accomplice witness was held over a long period in the recent ritual murder trial in Rex v. Manamolela and Others.²¹⁴ Yet another practice was where suspects are "warned"

to report periodically at a police station, or to remain in their village. Although such an order was illegal, the victim of it dared not disobey it for fear of retaliation by the police.

Delay in bringing cases up for trial was a big problem in Lesotho. Many accused persons remain in custody for several months while awaiting trial. The average murder trial takes over one year to be disposed of.

(iii) Swaziland

Detention without Trial

Detention without trial was first introduced in Swaziland in April 1973. Immediately after the King announced that he was assuming supreme authority, he called upon the Attorney-General to read out "further decrees designed to provide for the continuance of administration, essential services and normal life in our country". Decree No. 2 read as follows:

"For a period of six months from date hereof, the King-in-Council may, whenever they deem necessary in the public interest, order the detention of any person subject to any conditions they may impose for any period of time not exceeding sixty days in respect of any one order. Any person released after such detention may again be detained as often as it may be deemed necessary in the public interest. No Court shall have power to enquire into or make any order in connection with any such detention."

The Decree was, therefore, in the nature of a preventive detention measure. Wide discretionary powers of determining the public interest were left to the Executive, to the exclusion of the Courts.

While in Lesotho the Courts came to pronounce upon the legality of detentions even though they were normally excluded from pronouncing upon the detention law, in Swaziland this does not seem to have occurred. It is difficult to explain the difference, except on the basis of the difference in the nature of the two laws. But it should also be remembered that in Lesotho for some years since 1974, it was thought that nothing could be done about such detentions. Then towards the end of the 1970's a breakthrough was made. It was realised that the judiciary were independent enough to pronounce upon the validity of detention orders. It may be that in Swaziland there is a need for such a breakthrough. But again it should be realised that in Lesotho the legal profession is not persecuted for appearing in politically sensitive matters. In Swaziland it is different. A defence lawyer was detained after vigorously defending some South African refugees. He was held on a succession of detention orders.²¹⁶

In March 1978 a new detention law, the Detention Order 1978,²¹⁷ came into force and superceded the Continuation of Period Order 1973.²¹⁸ by virtue of which all detentions under Decree No. 2 were continued. The new law provided for the detention of persons on the written order of the Prime Minister. Such detentions for 60 days, may be renewed, provided the Prime Minister informed the Council of Ministers about his intention to do so and placed before them relevant information including a report from the Commissioner of Prisons "on the condition and behaviour" of the detainee. Before any detention order was made, the Prime Minister was to inform the Council and place before them relevant information, provided that he may, if it was in the public interest, inform them after effecting the detention. "No order of detention made under subsection (1) shall be subject to any appeal to any court".²¹⁹ The fact of detention was to be published in the Government Gazette by the Attorney-General. Existing detention orders since 1973 were validated retrospectively. The Prime Minister was authorised to make regulations prescribing.

- conditions under which detainees are to be held,
- the privileges to be accorded to any detainee,
- the procedure for making representations to the King or the Prime Minister in regard to the detention or conditions or privileges relating to it.

The regulations so made would be binding even if they are not published in the Gazette.

In this new law the Prime Minister was given the wide discretionary power of determining when people should be detained. "Public interest" was not defined, and it could be anything. The detention of Musa Shongwe, who defended South African refugees, has already been mentioned. When Dr. Zwane escaped from prison to Mozambique, three workers who were on duty at the prison and one Longide Gamadze, a supporter of Dr. Zwane, who lived near where the prisoner crossed the border, were held in detention without trial, instead of being charged with offences.²²⁰ If they assisted a prisoner to escape, surely they had committed some offences? The point which is being made is that the meaning of public interest was sufficiently vague so as to enable the Prime Minister to punish people who may not be guilty of any offence.

The orders of detention are made by a sufficiently high official. This may be some form of protection against irresponsible petty officials who could use the law to settle their private grudges.

The law provides for the publication of detentions in the Gazette. In practice these publications are made only after the release of the detainee.²²¹ The purpose of publication was to permit public scrutiny of official actions. If no such publications are made during detention, no purpose was served, and the aim of the law was frustrated. Still, the provision for publication is better than none, because the working of the law could then be assessed for the purpose of critical comment. In Lesotho detentions were secret, thus facilitating "disappearances".

Those held under the Detention Order are usually citizens.²²² Foreigners, mostly refugees, are usually held in terms of the immigration laws. Just as in Botswana, refugees in Swaziland have been held in detention as "prohibited immigrants"²²³ and then sometimes involuntarily returned to their country of origin.²²⁴ The one strange instance was that of Phiri, a citizen of Malawi, who in March 1973 was charged with remaining in Swaziland illegally after being ordered to leave. He said he was willing to go but had no financial means nor a travel document to do so. He was kept in custody while officials debated his problem. Letters from one official to another got lost. The matter came to the High Court on review a year later in March 1974. That Court ordered the Chief Immigration Officer to arrange for the deportation of Phiri.²²⁵ This was a case of official incompetence leading to deprivation of liberty.

Pre-trial Detentions

The criminal procedure code of Swaziland makes provisions similar to those of Lesotho with regard to the bringing of suspected offenders trial. It appears, however, that the police in Swaziland seem to assume that they can hold a suspect or a possible witness for a long time if the investigations call for this action. The case of Barrtjies v. A Nithianandan,²²⁶ which has been referred to above, illustrates this attitude which was rejected by the Court. Accused persons are also kept in police custody for long periods.²²⁶

4. Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment

There is a consensus in the international community that torture should be prohibited, and that individuals should not be subjected to cruel, inhuman or degrading punishment or treatment. Governments deny that they engage in these practices. The denial is most emphatic in respect of torture. In practice people are subjected to torture and to cruel, degrading and inhuman practices. One problem which arises is that of definition. A State might justify its practices on the basis that they do not fall within the scope of the prohibition. The other problem is that of values. In an Africa which is conscious of the colonial past, there is always a resistance against foreign values. This, as pointed out²²⁷ could degenerate into a mere platitude which serves to justify repression.

Definitions by international instruments, therefore, become important. On December 9 1975 the U.N. General Assembly adopted the Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²²⁸ In it torture is defined as:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standards Minimum Rules for the Treatment of Prisoners". (Article 1(1)).

The Declaration went on to describe torture as an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment (Article 1(2)). It forbade torture and the other punishment and treatment as offences to human dignity and a denial of the purposes of the United Nations Charter and as a violation of the fundamental freedoms proclaimed in the Universal declaration of Human Rights. The African Charter on Human and People's Rights prohibits torture, cruel, inhuman or degrading treatment and punishment, but does not define them.²²⁹ In the Greek Case²³⁰ the European Commission on Human Rights defined the meaning of torture, cruel, inhuman and degrading punishment, and it is quite clear that the definition influenced the definition of torture in the Declaration by the UN General Assembly.

The Constitution of Botswana, in line with the European Convention on Human Rights, provides as follows:

"No person shall be subjected to torture or to inhuman or degrading punishment or other treatment" (Section 7(1)).

Having laid down the prohibition, the next provision (Section 7(2)) immediately explains that punishments which were lawful before independence shall not be held to be inconsistent with the prohibition. The Constitution does not define torture, and its meaning must be gathered from international instruments or from similar provisions in the legal systems of other countries.

In Lesotho and Swaziland, which have no written Constitutions, the Common Law and Statutes are the source from which we may gather information on rules concerning torture, inhuman or degrading treatment. As far as punishments which might be regarded as offending against the prohibition of torture (etc) are concerned, Botswana is no different from the other two States, since the Botswana Constitution preserved the status quo.

A controversial subject which arises as a result of African traditional cultures and modern ideas on human rights is that of the equality of the sexes. In the Constitution of Botswana, and in the repealed Constitutions of Lesotho and Swaziland, discrimination based on sex was not prohibited. Since the received Roman-Dutch law also discriminates on grounds of sex, women suffer from discrimination on the basis of the two legal systems which operate within the respective countries. In Botswana, most discriminatory laws can now be fought on the basis of the prohibition against inhuman and degrading treatment or punishment. This, however, is a subject which is best discussed under the topic of discrimination. In Lesotho and Swaziland there is no legal way of fighting discrimination except on the basis of statutory enactments.

(a) Torture

(i) Botswana

Torture has relatively not been a serious problem in Botswana. Allegations of torture have been made against the police, but they have not been proved. This, however, does not mean that torture does not take place. Police forces have a tendency to copy from each other. Most policemen in the former High Commission Territories are trained in Britain, where they learn torture techniques which were used during the colonial period, and are now used in places such as Northern Ireland. In the modern science of torture, the emphasis is on secrecy and the leaving of no traces of injury. If, however, former detainees complain of torture and describe the treatment which they suffered, and when such detainees are ordinary people who cannot be expected to have access to intimate details concerning the technology of torture, it is reasonable to conclude that they were indeed tortured.

In State v. Sindaba and Others²³¹ one of the accused had been taken out of prison where he was awaiting trial, and subjected to what was variously described as "intensive interrogation and" lengthy interrogation extending over several days". The issue was not the determination of the existence of torture, but the voluntariness of a "confession". But it is clear that the interrogation might possibly have amounted to torture, because one of the Courts' conclusion in rejecting the "confession" was:

"While it has not been proved that the police tortured their prisoner, the State has not established that the police did not apply physical and moral pressure to induce the First accused to confess. It is certainly the case that he was subjected to long interrogation while under the power and control of the police".²³²

In State v. Bitsang Bagwasi and Others,²³³ the accused alleged that he was assaulted by the police. Again the Court found the allegation not proved. In that case Justice Dendy Young made remarks which would appear to encourage torture.²³⁴

As long as the possibility exists that accused persons are subjected to ill-treatment in the hands of the police, the suspicion will always remain that torture exists in Botswana.

(ii) Lesotho

Amongst the three countries under discussion here, Lesotho has been perhaps the most outstanding for practising torture. The criminal law and the law of delict (torts) in Lesotho forbids the application of unlawful force to the human being. Torture, if proved, would be unlawful. Yet substantiated cases of torture

have occurred in Lesotho. Immediately following the political turmoil in 1970 and again following the attempted coup in 1974, serious cases of police brutality occurred.²³⁵

After 1970 the B.N.P. Youth League, the Young Pioneers, trained in Malawi, were set loose on the opposition party supporters. They were followed by the Police Mobile Unit. The home of a Minister of Government became a "torture centre". Horrible things happened there, and one can do no more than quote from the record of B.M. Khaketla. He reports that when one woman, a mother, denied any knowledge of the existence of weapons, "She was beaten up, kicked and told that ... she would be shot and her baby thrown over the precipice". She broke down and implicated her uncle, a minister of the Apostolic Faith, whose "long hair was pulled out by the roots, as also was his beard", all this in the presence of a Minister of Government, his mother and wife. A man was made to strip naked in front of his daughter for her to see where she came from. When he protested "he was ordered to have sexual intercourse with his daughter; but he told them that was the limit and requested them to shoot him outright. The daughter was then raped by one of the Youths in the presence of her father. ... When Nqamakele was finally released he was both mentally and physically affected; his body was a mess of wounds, as he had been pricked with a sharp instrument". Masechele Khaketla sent a letter of complaint to the Government listing terrible atrocities in it. The Prime Minister replied that he had no idea that these things were happening, and promised to take immediate action. The "torture centre" was dismantled soon thereafter, and we are told that there was a slight improvement in the treatment of detainees. But there was no stopping the Youth League. Together with the then Police Mobile Unit they went on a rampage in the rural areas.²³⁶

These things happened during a state of emergency. The events of 1974 were no different, except that no state of emergency was declared.

After 1973 although Lesotho was officially not under a state of emergency²³⁷ it was ruled like one. Detentions without trial were common. Although information concerning detainees was hard to come by, it was nonetheless not difficult to conclude that detainees were tortured. One detainee, on hearing of his impending re-arrest, committed suicide, saying he was not prepared to face another detention.²³⁸ Another detainee was made to read what purported to be his "confession" over Radio Lesotho, in which "confession" he denounced his connection with the Lesotho Liberation Army and Ntsu Mokhehle. The essence of the "confession" was a denunciation of his political beliefs.²³⁹ The "disappearance" of Jobo Khalane and the "suicide" of Sophie Makhele have been mentioned.²⁴⁰ The late Litsietsi Putsoa told an Amnesty International Mission to Lesotho that he was tortured while in detention.²⁴¹ One speaker at his funeral publicly related what Putsoa had told him about his experiences in detention. An Amnesty International Mission in December 1981 was allowed access to 45 known detainees. They all said they were tortured, and said this in the presence of a Magistrate and a senior police officer. They said they had been assaulted, denied knowledge about their whereabouts, held in solitary confinement and blind-folded whenever they were moved. The Mission reported that the detainees could not have concocted the story because, according to the authorities, they were kept separately.²⁴²

In the absence of a contrary inquest finding, Setipa Mathaba must have died in the process of torture. This applies to Sophie Makhele as well.²⁴⁵

Torture is not confined to security matters. It is an open secret in Lesotho that people are sometimes tortured in the process

of investigating ordinary crime. The situation has been accepted amongst ordinary people and has often been silently acknowledged in higher circles. Courts of law know about it and they have commented on it, but have done nothing about it. Prosecution authorities come across instances of torture all the time, but prosecutions are hardly ever instituted against those responsible. The police sometimes seem to be a law unto themselves when it comes to the practice of torture, and they laugh at and ignore statements of disapproval by the Courts. A few court cases will illustrate the phenomenon.

In 1975 a boy from the mountains of Lesotho was brought to a Magistrate, charged with rape. He pleaded guilty and was sentenced. He, however, appeared ill. It was then discovered that he had wounds all over his body from a whip. He was photographed and the pictures kept in the file. No further action was taken even though he said he had been assaulted by the police.²⁴⁴ The case should at least have been sent on review to the High Court so that an inquiry into his plea of guilt could be tested. He was brought to Court by the very policeman who was alleged to have committed the assault. So it was quite possible that he had been instructed to plead guilty or pay with more assaults.

In the case of Rex v. Mphulanyane and Others²⁴⁵ a one-legged man vanished without trace. His younger brother and two other villagers were charged with his murder by drowning in a flooded river. All accused persons described how they were tortured while in police custody. The wife of the brother described how one morning long after the arrest of her husband she was forced to listen to the "confession" of her husband who was kneeling in front of her in a dejected manner. The allegations of the accused were believed and the alleged confession was rejected, yet no action was ever taken against the responsible policemen, and the police know that no action will be taken.

Perhaps the worst case of torture ever to be related to a Court is that of Rex v. Molupe and Another.²⁴⁶ One accused, the victim

of the torture, was kept in police custody for 5 weeks without being taken to Court. During that time he underwent the most horrifying experience which was believed by the Court. His experiences were summarised by the Court thus:

- (1) He spent a week at the charge office without being asked a single question.
- (2) W/O Moletsane asked him if he knew about the death of the deceased and he denied any knowledge. That same evening he was handcuffed, undressed and made to undergo a horrible treatment referred to as Apollo. During this process, which he says was painful, he denied any knowledge of the murder under investigation.
- (3) The following morning Sekoane called him and told him that he was being taken before a representative of the King. He says that he later came to the person who posed as the representative of the King. He was one Tlokotsi - a member of "Lebotho la Khotso".²⁴⁷ However, when he appeared before Tlokotsi, he told him that the police were assaulting him saying that he should say that he knew about the death of the deceased. Tlokotsi did not do anything but merely said he would "speak to the police". Later that evening W/O Moletsane, in the presence of the other policemen (mentioned earlier in this judgement) asked him why he had told the representative of the King "shit". Apollo treatment was again accorded him. They told him what they knew about the case and told him that is what he had to tell. While he was being accorded this infamous treatment, Moletsane extracted his front upper tooth with a pair of pliers. Insults were hurled at him when blood from his mouth dropped on the floor. He was partially released to clean it and while doing so Sekoane hit him on the right

cheek with a fist that caused one of his molar teeth to break. Thereafter they asked him if he had heard what they had said and he answered in the affirmative. He was told that he would be taken before an Assistant District Commissioner where he would have to agree that he killed the deceased.

- (4) The following day, he was, instead taken to Sani Pass in order for the swelling on his body to subside.
- (5) On his return from Sani Pass he was asked if he still recalled what he had been told. He agreed. He was then handcuffed and asked to repeat that he had been told. He did and they appeared satisfied.
- (6) The following day he was taken to the Assistant Commissioner. He told this gentleman that he knew nothing about the death of the deceased. He informed him about the assaults on him by the police. He later came to know this gentleman as being one of the police officers at Mokhotlong charge-office.
- (7) Later that evening he was accorded the Apollo²⁴⁸ treatment because he had not said what he had been told. He said he had made a mistake. In addition to the usual Apollo treatment, his testicles were pressed by a pair of pliers. He screamed with pain. They then repeated to him what they had said to him on earlier occasions and he agreed he had done all those things i.e. how he and his co-accused had killed the deceased. It was said that the following day he would be taken to a magistrate to whom he was to repeat what they had told him.
- (8) The following morning, instead of going to the magistrate, he was again taken to Sani Pass in order that the swelling on his body should subside.

- (9) On his return from Sani Pass he was made to repeat what they had said to him. They said that if he spoke "shit" before the magistrate they would kill him. He was locked in a cell for three days without food.
- (10) He was then taken before the magistrate but first he was reminded as to what he should say to the magistrate.
- (11) He was also reminded that if he did not tell all, the magistrate would inform them. He was told that the magistrate would ask him questions and he should not deny anything. He agreed. W/O Moletsane said he would kill him if he did not do as they told him.
- (12) Sekoane took him to the magistrate where he repeated and answered questions as instructed.

Both the accused were acquitted. There was not even a suggestion that the alleged treatment of the accused should be investigated and those responsible brought to trial. The Crown Counsel himself could have reported the matter to the Solicitor-General for possible action, but he did not, nothing was done about the matter.

Sometimes the Courts seem to encourage the ill-treatment of detainees. In this same case of Rex v. Molupe and Others there was cited with approval the Botswana case of The State v. Bitsang Bogwasi and Others in which Mr. Justice Dendy Young is reported as having said:

"Now I wish to make it clear for the guidance of the police and all concerned that, in my judgement, even prolonged interrogation including all the techniques and tricks of the trade directed to obtaining a confession from an accused who is prepared to talk - even if the interrogation proceeds to the point of possibly disturbing the normal function of the mind - may be justified in the interests of the investigation of the crime".²⁴⁹

The learned justice is reported as having gone on to say that a statement obtained in that manner would not be admissible, although it might be useful for purposes of the investigation.

The priority of interests as expressed by Mr. Justice Dendy Young is a dangerous one and expresses approval of torture so long as the Court will not be asked to accept evidence extracted through that process. The statement, coming as it does from a high official of government, supports the view that in Botswana and apparently in Lesotho, torture is approved for certain purposes. Add to this the fact that in Lesotho no disciplinary or criminal charges are ever brought against torturers, that view appears to be well founded.

The Internal Security (General) Act of 1982 provides that a hospital shall be regarded as a detention centre if a detainee is being kept there.²⁵⁰ This seems to be an early attempt at involving the medical profession in the process of torture. In 1977 the Amnesty International Danish Medical Group reported that "a minority of doctors are involved in the practice of torture".²⁵¹ The role of the notorious Dr. Dimitrios Kofas, (dubbed "the orange juice doctor" by detainees) during Army rule in Greece, is well known.²⁵²

In Lesotho there are no Army or Police medical doctors. The ordinary medical practitioner in the government service could, therefore, find himself being "used" to assist in the process of torture, if he were not careful. The decision to collaborate, of course, rests with the individual doctor.

Government lawyers in Lesotho were also known to be under the pressure of the police to defend unlawful killings and acts of torture by the State. Sometimes ridiculous arguments have been presented in Court in the defence of illegal detentions.²⁵³ The failure of the inquest law was to a large part due to the inaction of the Crown lawyers who appear to be under the instructions of the

police as to whether an inquest should be held or not. The increased power of the police showed itself during the trial of Lieutenant Colonel Phaloane for the murder of Bassie Mahase. There were attempts to obstruct the inquest proceedings. Investigations of the offence were superficial. After the conviction and the loss of a subsequent appeal by the Colonel, the Crown Counsel who prosecuted was declared persona non grata in Lesotho,²⁵⁴ the contract of Justice Rooney, who convicted, was not renewed; the Solicitor-General, who authorised the prosecution, resigned, and the Colonel was released from prison on parole after serving a minimum of his sentence.²⁵⁵ He obtained all his employment benefits contrary to Public Service Regulations.

By these tactics the Government attempted to intimidate the legal profession into collaborating with its system of administration.

(iii) Swaziland

On the surface Swaziland does not appear to be guilty of torture, but its police force has not been above suspicion. The cases of Rex v. Zwane and Others²⁵⁶ involved allegations of assault in police custody. In both cases it was not proved that the assaults had indeed taken place, although in the second case the issue of the assault was left undecided because the accused declared that what he had told the police as a result of the assault was the truth. For this reason his statement was held admissible in his trial. The admission of that statement was, of course, not legally correct, it was submitted. The rule against self-discrimination would not allow this, and this is the point which Mr. Justice Young was at pains to explain in The State v. Bitsana Bagwasi and Others.²⁵⁸ Our concern here is that the attitude of the Court in admitting a true statement as evidence regardless of how it was obtained, encourages the police to use torture to extract confessions and statements. Such an attitude by the Courts

amounts to official approval of torture and ill-treatment of suspects.

It should be noted that torture consists of the infliction of severe pain which is physical or mental. The case of Baartjies v. Nithianandan,²⁵⁹ in which a prospective witness was kept in police custody for 9 months, might well be a case of torture, if not of inhuman or degrading treatment.

(b) Inhuman or Degrading Punishment or Treatment

(i) Botswana

Botswana did not outlaw punishments which were lawful before independence. Punishments which may be imposed in terms of the law are death, imprisonment, whipping and fines. The death sentence may not be imposed on persons who are 18 years old or under, nor on a pregnant woman. Corporal punishment may not be imposed on females nor on males who are aged 40 or above. Imprisonment may not be imposed on persons who are aged 14 or below.²⁶⁰

In Europe corporal punishment is considered a cruel, inhuman or degrading punishment. This is not so in Africa. The Courts in Botswana are, however, enjoined not to subject any person to torture, or to inhuman or degrading punishment. This presumably means that corporal punishment must be carried out according to specific rules.

In the Roman-Dutch law jurisdictions there exist the sentence of being declared a habitual criminal.²⁶¹ This means that the convict is kept in prison indefinitely, yet it is not life imprisonment. Botswana does not seem to have this form of punishment.

It appears that in Botswana complaints of ill-treatment in the hands of officials are investigated by the Attorney-General.²⁶² In

this way it appears that the state is not party to processes of torture and ill-treatment, regardless of whether such complaints are actually substantiated.

(ii) Lesotho and Swaziland

Criminal sentences which may be imposed by the Courts in Lesotho and Swaziland²⁶³ are generally similar to each other and basically the same as those for Botswana. The death sentence may not be imposed on persons who are 18 years old or under at the time of the commission of the offence, nor may the sentence be imposed on or executed against a pregnant woman, who may only be sentenced to imprisonment. Corporal punishment may not be imposed on females. There is, however, no age limit in the imposition of this punishment on males, thus differing from Botswana. Persons under 21 years in Lesotho and under 18 in Swaziland may only be sentenced to "moderate correction" with a light cane, and the number of strokes is limited to 15. Imprisonment may be with or without solitary confinement and spare diet where it is specifically so provided by any particular law in respect of the offence charged. Young persons may be sentenced to a juvenile training centre. Where a person is declared a habitual criminal in Lesotho, he shall not be released on probation unless he has served at least 9 years of that sentence.²⁶⁴ -In Swaziland he is detained at His Majesty's pleasure.²⁶⁵

On the whole the policy of the Courts is to impose corporal punishment on young persons, the reason being to avoid their imprisonment where they might be influenced by hardened criminals. There are no cases of imprisonment with solitary confinement or spare diet in Lesotho.

It has already been stated that in Lesotho the Government does not investigate complaints of the ill-treatment of detainees. There is no indication that Swaziland is any different.

It has already been stated that in Lesotho the Government does not investigate complaints of the ill-treatment of detainees. There is no indication that Swaziland is any different.

In Lesotho it appears that the crises over many years brought about by the political problems in the country resulted in an attitude of disregard for the inviolability of the human being. Matters of State security and of law and order are given undue priority over human rights. In the preservation of law and order, public officials acted with reckless over-zeal that often led to death and serious injury. In some cases the culprits were brought to trial and punished. In others, no trials follow.

In the case of Rex v. Ralinaleli Kalanyane²⁶⁶ the accused admitted his guilt to treason, was sentenced to 7 years, six of which were suspended for a period of certain conditions. The reasons for the light sentence included the fact that on his arrest he was severely beaten up by "villagers" who crippled him. His property was destroyed. He was lucky to have survived the assaults. The Court deplored the assumption by the "villagers" of its functions, but nothing more was done against them.

Early in November 1982 students at Christ The King High School, Roma, went on a rampage causing damage to school property amounting to several thousand Maloti. The head teacher is said to have been nearly killed. The Police Mobile Unit (later Lesotho Paramilitary Force) was called in. The riot was suppressed by means which went beyond what was necessary. The boys were indiscriminately chased about, brutally assaulted. Some of them had to go to hospital, while others were being cared for in their homes. Days after the disturbances the students were still being made to undergo strenuous exercises and being deprived of sleep. Some of them were mere boys who, when they complained of exhaustion, were brutally urged on since they did not get tired when they attempted to kill a head teacher. The conservative Catholic newspaper, Moeletsi oa

Basotho, reporting this event, condemned the students' action, but went on to deplore the manner in which the police suppressed the riot:

"Even though we applaud their (the police) action, on the other hand we must point out a mistake, if what is reported is true. At Christ The King, after the suppression of the riot, it is reported that those whom we correctly regard as the protectors of the people took the law into their hands. They lashed, kicked and used fists. A paper which is jealous of individual rights cannot keep quiet. Every person is not guilty until proved by interpreters of the law".²⁵⁷

In Rex v. Ramabitsa Motanyane and Others the accused were brought to trial. The facts were that a chief ordered the six accused to arrest a man who had assaulted his own sister-in-law. They severely assaulted the prisoner and were seen leading him away. The following day the prisoner was found dead in a ravine. The accused were convicted of culpable homicide and sentenced to terms of imprisonment ranging from four to seven years. In passing sentence Mr. Justice Cotran remarked:

"This is yet another case where a life has been lost quite unnecessarily. A very minor assault by the deceased on his sister-in-law ended up in his death at the hands of those responsible for law and order in the village. The first accused and the third accused were both men in authority. They are perhaps more blameworthy than the others".²⁶⁸

In Swaziland it was reported that a South African touring family was stopped by the Army who molested the mother in front of her children. The government denied these allegations. The Army on the other hand claimed to have apprehended five youths for stealing army uniforms and posing in them as soldiers. The youths were then publicly paraded in two towns until the Attorney-General stopped the spectacle.²⁶⁹ The Attorney-General's action may be an indication of government's policy not to be involved in inhuman or degrading treatment.

5. Citizenship

The Independence Constitutions of the three former British High Commission territories each included a chapter on citizenship. Except for a small change, the provisions for citizenship remain the same in Botswana. The present citizenship law in Swaziland is contained in the Citizenship Order of 1974,²⁷⁰ which repealed section 4 of the Citizenship Act of 1967.²⁷¹ In Lesotho citizenship is provided for in the Lesotho Citizenship Order 1971,²⁷² which repealed the Citizenship Act of 1967.²⁷³ Matters of immigration and deportation in Botswana are dealt with under the Immigration (Consolidation) Act of 1966.²⁷⁴ In Lesotho such matters are dealt with in terms of the Aliens Control Act 1966,²⁷⁵ while in Swaziland the governing law is the Immigration Act of 1964.²⁷⁶

In Botswana and Lesotho there are virtually no problems with regard to matters of citizenship. It is in Swaziland since the 1970's that major problems have arisen concerning statelessness. It should be pointed out, however, that the citizenship laws of all three countries are all outstanding for their discrimination against women in matters of citizenship. The consequence of that discrimination is, ironically, that men suffer as well even though the discrimination is the product of male-dominated societies. It is this question of discrimination to which we must now direct our attention. A discussion of Swaziland and statelessness will follow thereafter.

Citizenship and Discrimination

In the laws of the three countries there is a provision that a woman who marries a citizen shall be entitled on application to be registered as a citizen. This is partly an advantage to womenfolk. But it also has a great disadvantage in that a woman citizen who marries a non-citizen cannot confer her citizenship on her husband. The provisions as they are make sense according to African ideas of jurisprudence. The indigenous customary laws of the three countries provide that people

belong to families, and that family membership is acquired either through birth or marriage. Being patrilineal societies, the wife becomes a member of the husband's family on marriage. It therefore makes sense that the husband should confer citizenship on his wife. There is no indication, however, that account was taken of African ideas of family organization in the drafting of the citizenship provisions in the basic laws governing the subject. The language used expresses the values of individualist societies. Similar discriminatory provisions are found in European societies.

One other common discriminatory provision is that concerning citizenship by birth. Generally it is provided that a person who is born outside the relevant country to a father who is a citizen shall become a citizen. A citizen mother, therefore, is not able to confer citizenship on her child except where the birth takes place within the country. The repealed Swaziland constitution of 1968 had an admirable provision concerning illegitimate births, which read:

"Any reference ... to the father of a person shall, in relation to any person born out of wedlock, be construed as a reference to the mother of that person".²⁷⁷

This meant that "father" sometimes meant "mother". The new legislation of Swaziland does not include this provision. The law of Lesotho has a similar provision which is strangely worded:

"A reference in this Order to the birth of a person is construed as including both legitimate and illegitimate birth, and the expressions 'father' and 'parent' are construed accordingly".²⁷⁸

It does not appear that Botswana makes any provision for illegitimate births.

The Constitution of Botswana prohibits discrimination, but the position of sex discrimination is not clear. Article 3 reads as follows:

"Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following namely -

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest."

According to this Article, discrimination based on sex is prohibited. Article 15, on the other hand, reads as follows:

"15 (1) ... no law shall make any provision that is discriminatory either of itself or in its effect".

"(2)"

"(3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such descriptions are subjected to disabilities or restrictions to which persons of another such

description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

There is no mention of the category "sex". So, Article 15 does not prohibit sex discrimination. Both Article 3 and 15 appear in the same Chapter 2 entitled "Protection of Fundamental Rights and Freedoms of the Individual" in the Constitution. It would appear that there is a contradiction here. However, the point is that, although citizenship is a fundamental right, it is not included within the list of rights and freedoms in Chapter 2. The prohibition of discrimination does not, therefore, apply to citizenship matters, and hence the discrimination against women is not forbidden.

Citizenship in Swaziland

It has already been stated that the recovery of independence for Swaziland meant the recovery of the African heritage of Swaziland as expressed in the Swazi culture. According to indigenous Swazi law and customs a citizen is a person who has "khontad". This means that a person has been accepted as a Swazi in Swaziland. The procedure for "khonta" seems to be that an alien drives a number of beasts, about 3 head of cattle, to Lobamba, the administrative seat of the King (Nkwenyama). He reports himself on arrival and states his mission; he then waits, - he could wait for days - for the King to "see" him. After the period of waiting he is told that his request has been accepted and he is now a Swazi. The beasts are left at Lobamba,

The procedure of "khonta" is not in practice confined to the King. He performs this function through chiefs throughout the country. The person who is accepted as a Swazi is a subject of the chief who accepted his beasts.

When, during the independence negotiations, a provision appeared in the proposed Constitution that a person could be a Swazi citizen by

his mere birth in Swaziland or by his mere birth to a citizen of Swaziland who had not "khontad", this was unacceptable to traditional Swazis. It meant that you could have citizens who were not subject to a chief. In the colonial era this was possible and many people, especially the descendants of European settlers had not "khontad", and here they were occupying arable land, while the "true" Swazi settled on non-arable land. Through the process of defining who citizens were, it was possible to enhance the power of the government over the alien element which so dominated the economic affairs of Swaziland.²⁷⁹

The pre-independence Constitution provided for a compromise on citizenship. While its provisions had no international significance until after independence, it afforded those who desired to identify themselves with Swaziland an opportunity to become citizens. This Constitution, therefore, provided that the following category of persons would become citizens by operation of law:

- a person born in Swaziland before, on or after the prescribed date (i.e. the day on which self-government was attained);
- a person born outside Swaziland before the prescribed date who, immediately before that date, is a citizen of the United Kingdom and Colonies or a British protected person and whose father was born in Swaziland;
- a person born outside Swaziland and whose father is a citizen of Swaziland by virtue of other provisions.²⁸⁰

These provisions meant that many people who had never "khontad" were made citizens. The mere fact of birth within Swaziland also conferred the status of citizenship.

The Swaziland proposals during the negotiations for independence were as follows:

- the citizenship status of persons who acquired citizenship up to independence would be preserved;
- birth within Swaziland would not by itself be sufficient to confer citizenship. In addition the father should be a citizen;
- in the case of a birth which takes place outside Swaziland, it would not be sufficient that the father is a citizen of Swaziland. He would have to be also domiciled in Swaziland.²⁸¹

All three proposals were accepted and were included in the independence Constitution as Articles 20, 21 and 22. The matter stood there until 1973 when the 1968 Constitution was jettisoned mainly because of the citizenship issue.

In the first post-independence elections held in Swaziland in 1972, the Ngwane National Liberatory Congress won a single constituency, thus succeeding in returning three candidates to Parliament.²⁸² One of the three was Bhekindlela Thomas Ngwenya. He had been resident in Swaziland for some fifteen or more years prior to 1972. He had a farm and he was a politician who had been registered as a voter on several occasions and stood for elections in 1972. This meant that if he was born in Swaziland he was a citizen by operation of law. On May 25, 1972 Ngwenya was attending the King's meeting at Lobamba when he was arrested and served with a deportation order on the ground of being an alien in terms of the Immigration Act of 1964, and deported to South Africa. He managed to return to Swaziland and he petitioned the High Court for two orders, namely:

- an order setting aside his deportation order.
- a declaration order that he was a citizen.

His basic contention was that he was born in Swaziland and, therefore, he was a citizen by virtue of the law as it stood then. A judgement of the full Court (Sir Philip Pike C.J. and Johnson A.J.) found for him.²⁸³

It was proved that he was born at a place called Ntsalitshe in Swaziland. The main evidence against Ngwenya was that of a man called Strope Ngwenya who informed the government that the petitioner was not a citizen, but who declined to give evidence viva voce when called upon to do so by the Court. He was of the same age as Ngwenya and could only relate what he was told about the birth of the petitioner.

The government appealed and at the same time issued a new summons against Ngwenya on the ground that false evidence had been used in support of his case. At the same time Parliament amended the Immigration Act of 1964 by introducing a provision that, where there was a doubt about whether a person belonged to Swaziland, a special tribunal should determine that issue to the exclusion of the Courts.²⁸⁴ Meantime Sir Philip Pike's term of judicial office came to an end but his contract of employment was not renewed. Mr. Justice Hill took his position as Chief Justice. Charles Nathan, a South African, was appointed puisne judge.²⁸⁵

Immediately the new amendment to the Immigration Act was promulgated, Ngwenya petitioned the High Court for orders that:

- the amending law was inconsistent with the Constitution and therefore invalid,
- alternatively, that the amendment did not apply to him.

The Court (Hill, C.J.) found against Ngwenya.²⁸⁶ He appealed to the Court of Appeal. That Court found for him.²⁸⁷ The reasons were that the Constitution protected various rights of Swazi citizens; the Courts were expressly or impliedly empowered to decide on whether such rights had been infringed. In order to decide such issues the Court must first decide whether the person affected is a citizen. The rules about who citizens are appear in the Constitution. To exclude the Courts from deciding on questions of citizenship would amount to an amendment of the Constitution by a simple procedure of Parliament, whereas the Constitution can only be altered by a joint sitting of both Houses of parliament.

The Court went on to point out that, even if the new amendment could be said to be confined to matters of immigration only, a conflict between the Courts and the new tribunal would arise because the Court might decide that a person was a "citizen" for purposes of the electoral process, while the tribunal might decide that he was not a citizen for purposes of immigration. "It is inconceivable that in enacting the amending Act Parliament intended to leave this obvious source of conflict unresolved", said Justice Schreiner.²⁸⁸ For these reasons the amending law was declared beyond the powers of Parliament to enact by simple procedure.

This was on March 29, 1973. The Executive branch of government had been restrained by the Judiciary. The former were suddenly awakened rudely into a full appreciation of the meaning of limited government, and they did not like it. On April 12, the Constitution was abrogated.

The inconvenient Constitution having been moved out of the way, the King-in-Council enacted the Citizenship Order of 1974 whose application was made retrospective to April 12, 1973. Section 3 of the new law provided that:

"Any person who on the 12th of April, 1973 was legally a citizen of Swaziland shall, subject to section 7, be a citizen of Swaziland;

Provided that a person born in Swaziland before the 12th of April, 1973 shall not be a citizen of Swaziland if at the time of such person's birth his father was not a citizen of Swaziland, unless on application made by such person to the Minister he is registered as a citizen under section 6(1) (b):

And provided further that a person born outside Swaziland before the 12th of April, 1973, and whose father is or was a citizen of Swaziland but was not at the time of the birth of such person domiciled in Swaziland, shall not be registered as a citizen under section 6(1) (b).

The effect of the first proviso is that persons who were citizens before April 1973 and prior to 1968 (Independence) could find themselves being aliens, something which the leaders of Swaziland failed to achieve during the independence negotiations. Such "aliens" can apply to be registered as citizens in terms of section 6(1) (b). The second proviso also extended its application to the position prior to 1968, thus going contrary to the agreement contained in the independence Constitution. Persons who found themselves "aliens" by reason of this proviso could also apply to be registered in terms of section 6(1) (b).

Section 6(1) (b) provided that:

"subject to this section, any of the following persons may make written application to the Minister registered as a citizen of Swaziland -

- (a) ...
- (b) any person one of whose parents is or was at the death of such parent a citizen of Swaziland;
- (c) any person whom the Minister considers as worthy of being registered as a citizen of Swaziland".

Having caused a lot of damage by depriving persons of long-standing in Swaziland of their citizenship, an attempt was then made to repair some of that damage. If a person's mother was a citizen, say, in 1940 while his father was not, such a person could apply for registration as a citizen as long as he was born in Swaziland prior to April 1973. That seems to have been the meaning of the first proviso. The second proviso seems to mean that a person born outside Swaziland prior to April 1973 and whose father was a citizen but was not domiciled in Swaziland may apply for registration.

We are referring here to people who were most probably citizens prior to April 1973. When they apply they may well be registered as citizens except that the Minister has complete discretion in the matter.

In terms of section 6(1) (c) any person who is worthy may apply for citizenship and he may well have his application granted because the Minister has a discretion in the matter. It would have been judicious to have a system of priority as to who have a first right to citizenship. The complete discretion by the Minister could be a temptation to corruption.

The categories of persons who fall under the two provisos to section 3 are subjected to the process of registration if they desired to be citizens. Nationality by registration is of lesser value because of the risk of deprivation of citizenship. The Minister may deprive any citizen by registration of that citizenship if he is, inter alia, sentenced to imprisonment for at least twelve months in any country within 12 years of being registered, or he has at any time been convicted within Swaziland of an offence involving sedition or subversion since his acquisition of the citizenship of Swaziland. One other ground for deprivation is if:

"such person could but for the fact of his citizenship of Swaziland be deemed to be a Prohibited Immigrant under the provisions of the Immigration Act No. 32 of 1964".²⁸⁹

Section 9 of the Immigration Act of 1964 makes a list of persons who are prohibited from entering Swaziland. The list includes criminals of all kinds including traffickers in drugs, prostitutes and pimps, arms dealers and so on. There is a category of prohibited immigrant, namely, "a person who, in consequence of information received from a source considered reliable by the Minister is deemed by the Minister to be an undesirable inhabitant of, or visitor to, Swaziland". The word inhabitant is not defined anywhere. It appears that if a registered citizen is guilty of any of these matters listed in the Immigration Act he could be deprived of his citizenship.

The Citizenship Order is outstanding for the amount of discretion it gives to the government. Apart from the discretion, there are no

meaningful safeguards against the abuse of power. It should be recalled that for his decision on the deportation of Ngwenya, the Minister relied on hearsay evidence of a witness who was not willing to testify in Court. This is an example of the way unrestricted power may be exercised. In the 1968 Constitution it was provided that the mother of an illegitimate child would be regarded as its "father". This provision has not been enacted. In Lesotho it is provided that an abandoned baby shall be regarded as born in Lesotho and therefore a citizen.²⁹⁰ It is moreover provided that a person born in Lesotho does not automatically become a citizen unless he would be rendered stateless.²⁹¹ There are no similar provisions in Swaziland.

6. Refugees and their Treatment

An account of a conference on refugees in 1979 begins thus:

"Africa has the world's largest refugee problem. At the same time, African countries have been most generous in trying, within their limited resources, to provide hospitality for African refugees".²⁹²

Two main causes may be identifiable for the refugee problem in Africa. The first is the liberation struggle in Southern Africa. The second cause is the gross violation of human rights by some African States, thus burdening neighbours with the task of receiving refugees.²⁹³

There being so many millions of refugees in Africa the question of asylum becomes important. Each State has the sole discretion to grant asylum according to international laws; there is no right on the part of an alien to demand asylum. Yet many States in Africa do make provision in their legislation for the exercise of the right to asylum by refugees. It is this legislation that we shall examine in respect of Botswana, Lesotho and Swaziland.

The grant of asylum implies the principles of non-refoulement. In order to ensure the security of refugees this principle must be scrupulously observed. We shall have occasion in this part to see if the

record of the three States in their observance of this principle was incorporated into municipal legislation on refugees.

Some countries treat refugees as mere immigrants and as such they could be returned to their country of origin. The legislation of Swaziland is along these lines.

The refugees problem has an economic dimension. If a country offers asylum, it can expect some financial assistance from other countries on the basis of the principle of sharing the burden of refugees, or from international organizations. Greater benefit could be obtained by inflating the number of refugees granted asylum. In this way it becomes difficult for researchers to know the true state of affairs.

At six months' intervals the Refugee Advisory Committee reviews the case of refugees to discover if they still satisfy the requirements for refugee status and to discover their moral and economic needs. If the requirements for refugee status are no longer satisfied, the status of refugee may be lost and such refugees become ordinary aliens subject to the immigration laws, including liability to be removed from Botswana.

Section 9 of the Act provides that a refugees may at any time be removed from Botswana to any country other than a country where he might be persecuted. An amendment of 1967, however, qualified this rule by providing that on grounds of national security or public order or where the refugee has been convicted of a serious crime "which in the opinion of the Minister indicates that the recognised refugee constitutes a danger to the community", the refugee may be removed to any country whatsoever.²⁹⁹ In January 1981 four South African refugees were summarily removed to South Africa after being "de-recognised". They had refused to go to the refugee camp at Dukwe. According to reports, the Minister used their removal

as an example to those who would misbehave. It does appear that these four refugees were validly "de-recognised". On arrival in South Africa they were immediately detained.³⁰⁰ A valid "de-recognition" should have been after a review of their case by the Committee.

Botswana is bound by Article 33 of the Refugee Convention of 1951 which reads as follows:

1. No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country".

On the basis of this Article, Botswana could expel refugees to their countries of origin, but the decision has to be according to a process of law in terms of article 32 which is not binding on Botswana.³⁰¹

After the expulsion of the four refugees, Botswana reaffirmed its commitment to give asylum to refugees.³⁰²

Botswana has not undertaken to provide employment to refugees nor to allow them free movement or freedom to choose their residence. This country has not undertaken to facilitate the naturalization of refugees. Although Botswana has not undertaken not to prosecute refugees who enter the country illegally, such prosecutions are not brought against such illegal entrants.

Some refugees are members of the liberation movements in Southern Africa. One of the objectives of the Organization of African Unity is to liberate Africa, and member nations have undertaken to co-operate with the Organization in the achievement of this objective. Such fighters should therefore be granted facilities in the pursuit of the liberation struggle. Botswana does not allow its territory to be used as a staging post for attacks into neighbouring states.

The policy of the government is to protect refugees. When a refugee was abducted, the Court which tried the abductors recommended the raising of the penalties for this type of abduction to impress upon the minds of those criminals that this was a serious crime.³⁰³

(ii) Lesotho

Amongst the three States discussed here, Lesotho had least restrictions on refugees. Apart from the expulsions of refugees in the 1960's for allegedly engaging in local politics, there had been no wholesale forceful removal of refugees from this country.³⁰⁴ It is somewhat ironic that a country whose nationals are refugees elsewhere as a result of repressive policies,³⁰⁵ should be the least stringent in its refugee policies. It should be mentioned further that in Lesotho the legislative measures for the control of aliens are generally not vigorously enforced. Lesotho has been one of those countries where entry by aliens has been very easy.

There is no special law for the control of refugees in Lesotho. Two provisions of the Aliens Control Act of 1966, namely section 38 and the Fourth Schedule, govern the entry, sojourn and removal of refugees. Section 38(1) provides:

"If any international treaty or convention relating to refugees is or has been accepted by or on behalf of the Government of Lesotho, an alien who is a refugee within the meaning of such a treaty or convention shall not be refused entry into and sojourn in Lesotho, and shall not be expelled

from Lesotho in pursuance of the provisions of this Act except with his consent or except to the extent that is permitted by that treaty or convention, subject to any reservation that may be in force at the material time.

Lesotho is party to the UN Convention Relating to the Status of Refugees 1951 and to the Protocol Relating to the Status of Refugees, as well as the OUA Convention Governing the Specific Aspects of Refugee Problems in Africa 1969. The effect of section 38(1) is to make these Conventions part of the municipal law of Lesotho without any specific municipal legislation.

According to the Fourth Schedule of the Aliens Control Act, a person who arrives in Lesotho claiming to be a refugee reports himself to the authorities and applies for condonation of any contravention of the immigration law in respect of his entry or presence in Lesotho as the case may be. Provisional authority is then granted for him to stay in Lesotho for a period not exceeding a month subject to any conditions which may be attached. Such period of a stay may be extended from time to time until a final decision as to the status of the person is made. The provisional permission to stay is very important to refugees because it means that a refugee cannot be denied entry into Lesotho.

The claim of the refugee is then investigated by the Minister. If satisfied that the alien is indeed a refugee, he in consultation with the Solicitor-General, may direct that the person be allowed to stay in Lesotho on stated conditions and for a specified length of time. He may direct that the person be freed from any prosecution for infringing the immigration laws.

In case the alien should be dissatisfied with the decision of the Minister as to whether he is a refugee and as to whether Lesotho is party to an international treaty relating to refugees, the High Court has power to make the necessary declaration on the application of the alien. Unlike in Botswana and in Swaziland (as we shall see), the Minister in Lesotho has not got sole discretion to determine who a refugee is.

No restrictions as to residence are placed on the freedom of refugees. The policy and practice of Lesotho has been to permit refugees to settle amongst the ordinary inhabitants. There has been no indication, even after the December 1982 attack by South African forces into Lesotho, that there will be a change of policy on this matter.

No particular restrictions are applied against refugees in obtaining employment. Like every alien they need a work permit before being employed. The educational facilities of the country are open, not only to refugees but to most Black South Africans who have been forced to flee their country since the 1976 riots.

The Minister may withdraw without assigning any reason a provisional authority for an alien refugee to stay in Lesotho. The power is subject to the right of a refugee to apply to court for a declaration that he is a refugee.³⁰⁶ This is the only instance allowed under the Aliens Control Act whereby an alien claiming to be a refugee may be expelled. Lesotho has not made any reservations against the provisions of the 1951 Refugee Convention. This means that this country may not return refugees to countries where they could be persecuted. There has not been in recent years a case of a refouler on grounds of security and serious crime.

Refugees in Lesotho face three basic problems, namely, their personal safety, and secondly, the risk of expulsion on the basis of engaging in the local politics. The third problem is their economic welfare. The problem of personal safety to refugees was clearly demonstrated when on December 9, 1982 South African troops crossed the border into Lesotho and attacked refugees in their homes in Maseru, killing several of them as well as a number of Lesotho's nationals. The Lesotho Parliamentary force was paralyzed and took no apparent action against the

invaders who operated leisurely throughout the early morning. By 10 O'clock in the morning the invaders were reported to be still in Maseru.³⁰⁷

At the funeral of the dead refugees, the Prime Minister of Lesotho made startling remarks. He said Lesotho was infiltrated by South African spies. He went on to say that he knew of the impending attack, but did not know of the date when it would take place! Some people have asked that, if that was so, why were the refugees not warned? Why is it that our forces were not on alert? Why did the government not publicise this intended attack in international circles? Lesotho often condemned South Africa for that country's policies, yet here was an opportunity being missed of showing clearly the hostile intentions of that country.

The basic support of the welfare of refugees comes from the United Nations High Commissioner for Refugees. Apart from day to day subsistence of refugees, this institution has assisted in many respects in the building of institutions for assistance towards the welfare of refugees. The National University of Lesotho has benefitted a lot from the Commissioner in return for admitting refugees. This means that this country derives a benefit from the presence of refugees in the country.

Research into the refugee problem is hampered by the fact that the problem is covered by the Official Secrets Act of 1967. An amendment of 1978 made the "obtaining" of information concerning refugees an offence. The long title of the Act sets out the purpose of the law as being to provide for the prevention of espionage and the obtaining of information "prejudicial to the interests of Lesotho, its citizens and refugees therein".³⁰⁸

(iii) Swaziland

The operative law for the control of refugees is the Refugee Control Order of 1978.³⁰⁹ This law does not define a refugee. But since Swaziland is party to the Protocol Relating to the Status of Refugees, it may be assumed that the definition of a refugee there set out is the operative one in Swaziland. Refugees who enter Swaziland must within seven days of such entry obtain a permit for their stay in Swaziland from the Permanent Secretary who shall not refuse such permit if such a refusal means the return of the refugee to the country where he came from to be subjected to physical attack.³¹⁰ If there is no such fear the Permanent Secretary has complete discretion to refuse such a permit. A failure to obtain a permit makes the refugee's presence unlawful.

The Minister may declare any alien to be a refugee, and he may declare reception and refugee settlements and appoint somebody to be in charge of such places. Provision for the registration of refugees and the issue of identity cards to them as well as the maintenance of a register of refugees, are made.

Refugees are prohibited from possessing arms and ammunition, which articles they must surrender as soon as they enter Swaziland. Section 9(1) provides that:

"No vehicle in which a refugee enters Swaziland, or which is acquired by or comes into the possession of a refugee, while in Swaziland, shall be used by such refugee save with the permission of an authorised officer or otherwise than in accordance with the terms of such permission".

This prohibition against the use of vehicles led to a conviction and sentence in Shadrack Maphumulo v.R.³¹¹

The Permanent Secretary decides where refugees shall stay, whether in reception camps or other settlements. It is an offence to leave or attempt to leave such places, or to engage in conduct prejudicial to good order and discipline.

Section 17 provides for immunity from liability for things done in good faith under the law by public servants.

Refugees are subject to return to the country where they came from at any time on the orders of the Minister. A court convicting a refugee may also order his return. No such order shall be made, however, if in the opinion of the Minister or of the court, such a refugee may be tried, detained, restricted or punished without trial for an offence of a political nature after his arrival in that country, nor is he likely to be subjected to physical attack in such a country.³¹² There is, however, no provision that the Minister's opinion may be tested in a court of law.

Throughout the years, from the time of independence, refugees have never had an altogether easy time in Swaziland. Most of them came from South Africa and Mozambique. Since they belonged to one or other of the liberation movements they were regarded as being capable of toppling the government and they were seen as endangering Swaziland's relations with her neighbours. Another fear was that they would compete with the nationals over the meagre resources of the country. It was also feared that they would radicalise the normally conservative population of that country, especially the youth. This fear was intense following the 1976 riots in South Africa when many young persons came to Swaziland to seek asylum.

As far back as 1970 Swaziland's Foreign Minister defended his government's policies towards refugees before a United

Nations meeting in Lusaka by complaining that the refugees were endangering the security and the very existence of his country. He said that refugees therefore had to reform and abstain from indulging in politics. He went on to point out that if his country was invaded by the "big powers" (this being a reference to South Africa and Portuguese Mozambique), no one would come to Swaziland's rescue.³¹³

As a result, over the years several clampdowns on refugees have occurred. A recent example is the declaration in 1978 of several members of the Pan-Africanist Congress of Azania (South Africa) as prohibited immigrants when they were accused of attempting to set up a military base in Swaziland. They were detained pending the finding of a country willing to take them. Three of them were charged and two convicted of arms offences.³¹⁴ The defence lawyer, Musa Shongwe (a Swazi national) was subsequently detained without trial for a long time!³¹⁵

In 1979 the clampdown increased in intensity. More refugees were detained. They were held in camps and prisons throughout the country. Conditions under detention were poor, there being no medical facilities; visitors were not allowed to see them; there was no mail, nor access to legal representation.³¹⁶

Individual instances of the treatment of refugees may throw some light into Swaziland's policies. In 1971 Leonard Nikane was refused asylum after South Africa accused him of being implicated in an on-going trial for treason. He was not deported, but was detained pending the finding of a country of asylum willing to take him.³¹⁷ Phineas Nene was detained in July 1974 and released in January 1977.³¹⁸ Some refugees are held in terms of the Detention Order. Valakaya Shange

made a speech at the funeral of a youth leader of the N.W.L.C where Dr. Zwane, that party's leader, also spoke. Shongwe was afterwards detained and held under 60 days detention. In response to criticism the government responded by explaining that he had fomented a strike in 1966 and had broken his condition of asylum by engaging in politics. The explanation went on to say that he had earlier been ordered to leave Swaziland, but had refused to go.³¹⁹

Swaziland sometimes returns refugees to their country of origin. In June 1980 some 60 refugees were returned involuntarily to Mozambique. More refugees were believed to have been returned in this manner later in the year. Mozambique responded by deporting four Swazi refugees to Swaziland in August.³²⁰ There was also evidence that it was sometimes a practice of Swaziland to hand over South African refugees "already gagged and bound" to South African agents who came to fetch them from Swaziland.³²¹ Dhaya Pillay was abducted in February 1981 to South Africa by abductors from Mozambique and South Africa. These men were caught and charged. But their case was never proceeded with after they were granted bail in closed door proceedings.³²² This action or rather non-action indicates that Swaziland sometimes co-operates in the abduction of refugees.

Immediately after the South African raid into Lesotho against refugees, Swaziland detained many refugees. According to reports, these refugees are being held pending the finding of a new place of asylum. It is clear that Swaziland fears a similar attack against her. Even before the Lesotho attack, Swaziland passed a tough law against refugees who possess arms.³²³

It would appear from the foregoing discussion that Swaziland is reluctant, despite statements to the contrary, to provide asylum to refugees. It may well be that this attitude

is confined to South African refugees only. But it is open to speculation that Swaziland has other priorities over and above the objectives of the O.A.U. The tough measures taken against refugees from South Africa seem to be an attempt to impress upon that country the good faith of Swaziland as a peaceful neighbour. This may be because Swaziland fears and is heavily dependent on South Africa.

Swaziland has filed reservations to Article 22 and 34 of the 1951 Refugee Convention which deal with obligations to accord refugees the same treatment as nationals, with respect to primary education, and the same or better treatment as aliens with respect to post-primary education (Article 34). If these are the only reservations it would appear that Swaziland's refugee legislation is in certain respect inconsistent with her international obligations, especially as concerns the expulsion and return of refugees.

7. Free Association and Peaceful Assembly

In all three countries there are legislative measures for the regulation and conduct of public meetings and the right to form associations. Botswana seems to impose the minimum of restrictions, while in the other two countries there are severe restrictions of one kind or another. Even where there may be no specific law prohibiting gatherings of a given type the discretionary powers of officers may be such that such gatherings are effectively prevented or severely restricted.

In Botswana and Swaziland the laws regulating gathering were drafted more carefully than was the case in Lesotho. In Lesotho almost every gathering requires a permit, whereas in the other two countries some gatherings are exempted. In Lesotho the law is not strictly enforced in the manner in

which it is drafted, but the possibility is always there that unsuspecting persons could be trapped.

(1) Botswana

Article 13 of the Constitution guarantees the freedom of assembly and of association. Permissible limitations are those in the interest of defence, public safety, public order, public morality or public health, for protecting the rights of others and for imposing restrictions on public officers or teachers. Trade unions may also be regulated. These limitations must be reasonably justifiable in a democratic society.

Public meetings and processions are regulated by the Public Order Act of 1967.³²⁵ In terms of this law, gatherings are divided into two, viz, those which take place in controlled areas, and those in uncontrolled areas.³²⁶ The Minister may declare controlled areas, in the Gazette.³²⁷ These have usually been urban areas. Meetings which take place in controlled areas should be authorised by an official permit, while those in uncontrolled areas do not need such authority.

Certain meetings are exempt from the requirements of official authority. These are as follows:

- for religious, educational, recreational, sporting, social or charitable purposes;
- for the conduct of any agricultural or industrial show or for the sale of goods or cattle;
- for the purpose of reviewing or participating in any theatrical, cinematographic or fireworks displays;

- meetings of the "kgotla";
- by a town council or district;
- by or on behalf of a candidate for election in any Parliamentary or Town or District council election after the issue of the writ of election;
- by a representative of the government.³²⁸

It should be noted, however, that these exemptions are confined to meetings and they do not extend to processions. These two terms are defined separately and differently in the law.³²⁹ It should be noticed again that there is no specific exemption in favour of trade union activity. The failure to make such an exemption may greatly hamper the effective exercise of industrial rights.

Applications for permission to hold meetings and processions in controlled areas should be made to a Chief or to a District Commissioner. Permission will be granted if the official is satisfied that the gathering will not lead to a breach of the peace. Conditions may be attached to the permit. There is, however, no way in which an applicant could test the good faith of the official in refusing to issue a permit.

Unauthorized gatherings are illegal and may be stopped by the Police. Everyone who takes part in such a gathering is in breach of the law.³³⁰ The lack of knowledge of the illegality does not appear to be a defence. Gatherings in uncontrolled areas may be regulated by a Police Officer of or above the rank of Assistant Superintendent if he believes that the gathering may occasion serious public disorder, and he may thereby impose necessary and reasonable conditions.

The Public Order Act is a short piece of legislation containing nine sections. It does not purport to convert the guaranteed freedom into a privilege.

Trade Union activity is governed by the Trade Unions Act of 1969³³¹ and the Trade Disputes Act³³² of the same year. Trade Unions must register within 28 days of their formation. Unregistered unions are not to carry out their activities. The Trade Disputes Act establishes arbitration tribunals and boards of inquiry for the settlement of disputes. Strikes and lock-outs are regulated in such a way that they should be resorted to after a failure of the arbitration procedures.

In terms of the Essential Services (Arbitration) Act,³³³ only arbitration procedures may be resorted to if the industry involves essential services. The Minister has power to amend the list of essential services. In this way he could limit trade union action.

There have been occasional student demonstrations in which riots have resulted. But it appears that the Police have used restraint in suppressing such disorders. The demonstration in support of Sergeant Tswaipe who was being charged with the murder of three whites in the Tuli Block area might have passed without incident, but it was not allowed to go through a part of Gaborone. This led to a riot. According to Weisfelder, the refusal to permit the demonstration through the Mall in Gaborone was due to over-cautious officials.³³⁴ This underlines what was stated earlier that there is no legal way in which official decisions may be tested under the Public Order Act.

Organised labour is held to a strict discipline in its demand for higher wages. The policy of government is to prevent the emergence of a highly paid class compared to the rural population. On this ground strikes by mine workers have been discouraged. The policy, however, seems to fail because civil servants have been allowed higher wages. Trade union activity has also centred on the question of racial discrimination. In 1981 expatriate white mine workers were accused of calling Africans "kaffirs". A Parliamentary Standing Committee was established to keep watch over developments and to see to it that race relations legislation was enforced.³³⁵

(ii) Lesotho

In Rex. v. Tumelo Sesinyi and Others³³⁶ the defence had attempted to show that meetings of the Basutoland Congress Party are not permitted by the authorities in Lesotho. Commenting on this piece of evidence Mr. Justice Rooney said:

"I know of no law in Lesotho which proscribes political parties or political activities which are legitimate and do not impinge on the security of the State".³³⁷

This may be correct, if one takes a superficial view of these things. The reality is, however, different, as we shall attempt to show below.

Political activity has been severely restricted in Lesotho. The basic law governing meetings and processions is the Internal Security (Public Meetings and Processions) Act 1973.³³⁸ This Act applied to all meetings, and the term

"meeting" is defined as an assembly, concourse or gathering of persons pursuing a common purpose.³³⁹ It applied to all processions which were defined as a meeting moving from one place to another. These definitions were very wide. They included funerals, sports meetings, social and political gatherings.

Every meeting should be held on the authority of a policeman in command of a police station (in the case of urban areas) and of a Chief (in rural areas). Application to hold a meeting must first be made to a peace officer who may grant or refuse such permission. If he suspected upon reasonable grounds that the breach of the peace may occur at such a meeting he may refuse his permission. These rules applied to processions as well.³⁴⁰ Where permission was granted the peace officer may impose conditions if such a meeting or procession was to be held in a public place. Such conditions included a condition as to the time for the holding of the meeting or procession.³⁴¹

By virtue of these provisions, opposition political activity was effectively minimised if not banned. A political party which took an uncompromising stand against the government would either be refused permission or, if allowed to hold a meeting, would be subjected to harassment by the police. Regulation 5(1) of the regulations made under this law provided that:

"Any member of the Lesotho Mounted Police or a Headman may attend any meeting or procession and may take or cause to be taken any such steps as may be necessary or expedient to ensure orderly conduct and the safety of the public".³⁴²

The powers of the police are so wide that members of the para-military force on occasion attended a church service in uniform and fully armed.³⁴³

Immediately after the 1970 political turmoil the Prime Minister said he was sending politics on a holiday for five years to permit development without political interference.³⁴⁴ That policy was enforced through the discretionary powers contained in this law. Only meetings of the Basotho National Party or those in support of the government or in support of policies approved by the government were permitted.

Some funerals were used as an important forum for opposition politics. No funerals were ever banned, and prior permission was not required for having a funeral. The role of the police was confined to spying on the speakers at these funerals.

Institutions of higher learning are always a target of governments in Africa. The National University of Lesotho is no exception. In 1980 the police broke into a student meeting and attended it by force.³⁴⁵ Since the public are normally allowed on campus, the police appeared to have a right to be present. The matter was not sent to Court for a final judgement, but it is a good indication of how far Lesotho had moved in the direction of being a police state.

Lipuo Mokhachane is a middle aged man who believes that he is a prophet. He has got a following of believers who wear dark blankets. For many years he has preached repentance to Lesotho politicians and those in authority. He is, however, a target of the security police in Lesotho. From local press reports it appears that the police believe that he is in league with the Basutoland Congress Party of Ntsu Mokhehle

and that he is using religious meetings as a disguise for political activity. He has been subjected to harassment and detention without trial on several occasions. It appears that he has now finally left Lesotho. His religious movement is not approved by the government, but it has not been banned.

Trade union activity is allowed in Lesotho in terms of the Trade Unions and Trade Disputes Law 1964.³⁴⁶ Several trade unions have been registered in terms of this law. Union activity is, however, restricted. Strikes are harmful to the fragile economy of Lesotho. Demands for higher wages are discouraged.³⁴⁷ In fact, advertisements for investments state that labour in Lesotho is cheap. No strikes are allowed in respect of "essential services".³⁴⁸ The government can force workers back to work by declaring their industry "essential", as it recently did in respect of bank employees.³⁴⁹

(iii) Swaziland

In 1973 political parties were banned, including "similar bodies that cultivate and bring about disturbances and ill-feelings within the Nation (sic)", in terms of Decree No. 11 of the King's Proclamation of 12 April 1973. The new Constitution of 1978 did not repeal Decree No. 11. Political activity is therefore still prohibited in Swaziland to-day.

The basic law governing meetings and procession in the Public Order Act 1963.³⁵⁰ A "public meeting" is defined as a public gathering for any purpose of more than ten persons, but does not include:

- meetings by the King or Chiefs;
- meetings by local authorities;
- meetings of members of trade unions which are duly registered and which meetings have been called for a lawful purpose of such bodies;

- a gathering or assembly convened and held exclusively for social, cultural, charitable, recreational, religious, professional, commercial, and industrial purposes"³⁵¹

"Procession" means a meeting from one place to another.³⁵² This definition is much more sensible than the definition of a meeting in the law of Lesotho.

Prior permission must be obtained to advertise or hold a meeting or procession.³⁵³ A police officer may issue a licence if he is satisfied that the proposed meeting or procession is not likely to prejudice the maintenance of public order. He may refuse such permission if:

- any person involved or likely to be involved in the gathering has recently contravened this law;
- the gathering was advertised without the grant of a licence for that purpose;
- the application for a licence has been made less than seven clear days prior to the holding of the proposed gathering.³⁵⁴

According to this law a licence may be cancelled if the meeting or procession appears to be for unlawful or immoral purposes.³⁵⁵ The Commissioner of Police is empowered to stop any sporting events or entertainments of any kind if public order is likely to be endangered.³⁵⁶ Once more we see a wide discretion being conferred on an official who is empowered to decide on such controversial issues as morality. In a country such as Swaziland decisions to refuse permission for the holding of meetings will not usually be questioned through the judicial process because, first, people are not sophisticated and they do not have sufficient resources to pay for matters of principle. Secondly, it would be unwise

to enter into a contest with the government which has so many options, such as the citizenship, immigration and detention laws, at its disposal.

Political activity was prohibited in 1973. In the elections for the Electoral College in 1978, political canvassing was prohibited and the bulk of the N.N.L.C. leadership were in detention.³⁵⁷

Trade unions are permitted to operate in terms of the Trade Unions and Employers Organization Act of 1966³⁵⁸ and the Industrial, Conciliation and Settlement Act of 1963. These laws provided for the registration of trade unions and for the settlement of trade disputes.

Major strikes occurred in 1976. Railways workers demanded better conditions and benefits. They marched to Lobamba to present their grievances which were subsequently accepted. A Royal Commission was appointed and made recommendations which were accepted. Racial discriminatory practices were to cease.³⁶⁰ This strike was followed by the teachers strike to back up demands for higher wages. The police broke it up, but a dialogue followed. The teachers succeeded in obtaining pay increases.³⁶¹

Although trade union activity is permitted, such activity must not threaten what are considered national interests and the Swazi way of life. In 1977 the National Teachers Organisation was declared a political party and banned.³⁶²

8. Discrimination

(i) Race Discrimination

Being neighbours to apartheid South Africa, Botswana, Lesotho and Swaziland are naturally concerned about race discrimination. Such discrimination spills over into these

states in the form of expatriate South African whites who do business in or visit those countries. Migrant workers are affected by discrimination and they are conditioned by it. The colonial era has left a legacy of inferiority complexes on the part of Black people and normal human relationships are often difficult between black and white people.

Swaziland, with its huge European and Eurafrikan population, has the worst race relation problem. At independence an attempt to build a picture of harmonious race relations for outside consumption soon failed. Historically Europeans acquired the fertile land of Swaziland and behaved no differently from their kinsmen in South Africa towards Africans. Because of this economic superiority they were able to discriminate against blacks in economic and social matters. The blackman was dehumanised in order to justify his exploitation. It is not surprising then that in the 1980's a white woman dared to compose the derogatory poem which was the subject of a prosecution in Rex v. Dinah Shub.³⁶³

Botswana and Lesotho have smaller numbers of Europeans in their populations. While during the colonial period Africans suffered from European prejudice sustained by colonialism, after independence those countries have had a lesser task in prohibiting race discrimination.³⁶⁴

In Botswana race discrimination is prohibited in terms of the constitution and the Penal Code. Section 94 of the Penal Code makes it an offence for anyone to discriminate on grounds of colour, race, nationality and creed. The maximum penalty is P500 or 6 months imprisonment. This provision has to be read in the light of the constitutional

provisions permitting distinctions in favour of citizens against aliens. Every prosecution has to be with the consent of the Attorney-General.

What is surprising is that there appear to be no prosecutions for breach of the prohibition against race discrimination. This cannot be an indication of harmonious race relations, because labour disputes have centred around race discrimination. The reason for a lack of prosecutions may be the difficulty of proving race prejudice in concrete cases.

In Lesotho the operative law is the Race Relations Order of 1971.³⁶⁵ As is the case in Botswana this law prohibits racial discrimination, but only in respect of facilities or services of a public nature and in places of public resort. There is no mention of the prohibition applying in the area of employment.

The enforcement machinery is reconciliation. A complaint is made to a Minister who may order an investigation into it. If such a complaint is well founded he attempts to bring about reconciliation between the parties. If no voluntary agreement is reached he may apply to the High Court for an order compelling compliance.

Once more there have been no reported cases under this law. But it should be stated that official threats against discrimination have been issued. Complaints have come from employees against employers who more often than not are white. For example in the recent labour dispute involving banks, one of the complaints was the pay differentials in favour of expatriate whites.³⁶⁶

Swaziland attended to race discrimination even before independence. The Race Relations Act of 1962³⁶⁷ prohibits racial discrimination in certain listed premises, namely, banks, bars, cinemas, eating places, hotels, shops, tea rooms, and theatres. The enforcement machinery is similar to that of Lesotho except that if there is a failure at reconciliation, the court may impose penalties on the guilty party.

Race discrimination is an emotional issue in Swaziland. Its expression takes many forms, like citizenship. In 1971, for example, backbenchers in the National Assembly are said to have expressed concern at the ease with which South Africans obtained Swaziland's passports and nationality. The Deputy Prime Minister is said to have said that he was aware of this fact, and that what was annoying was the fact that it is the parents of the children who despise Swazi girls who are given passports, this being a reference to white girls who refuse to take part in Swazi cultural ceremonies.³⁶⁸ Again in 1970 the Prime Minister urged those discriminated against to report to District Commissioners, these being reconciliation officers under the race relations law. Strong objection has also been taken against white South Africans who cross the border into Swaziland for sex pleasures with Black women.³⁶⁹

Labour disputes have also centred around race discrimination and the government has even intervened.

In all three countries the internal race problems are a small part of the race question in Southern Africa. These countries have no way of fighting racism in South Africa, yet their inhabitants have to find work there. Racism in South Africa does not obey the international law rule that

aliens must be accorded an international standard of treatment. A Blackman is discriminated against and exploited in that country regardless of whether he is a citizen or not. The inhabitants of the three countries, therefore, suffer from racism despite their countries' efforts to prohibit the practice.

(ii) Discrimination and the Administration of Justice

It was pointed out in the introduction that one outstanding characteristic of the legal systems of Botswana, Lesotho and Swaziland is the "duality" of their laws. The received law applies to all inhabitants, while the indigenous law applies to the African populations as well. This duality is reflected in the systems of courts: one system administers the received law and all inhabitants are subject to the jurisdiction of that court system. Africans are in addition, subject to the jurisdiction of the "traditional" courts which administer the indigenous law. A question which arises is whether this arrangement is discriminatory or not.

The three countries give an answer of one kind or another for this question. In Botswana it is laid down in the Constitution that it is not discriminatory if a law makes provision for the application of customary law to members of a particular race, community or tribe in respect of any matter to the exclusion of any other law which is applicable to the other persons.³⁷⁰ In Lesotho and Swaziland the reception laws provided that indigenous laws could be applied to Africans. These reception laws have remained in force. It is therefore clear that this type of distinction based on ethnic origins is not prohibited. Any people would normally prefer their own law to a foreign legal system.

The other aspect of the matter is the administration of the indigenous law. Africans are subject to two systems of courts. This again has found acceptance in all three countries. But we should proceed to examine the quality of justice in these courts.

The customary courts in all three countries are empowered to administer the indigenous law, any written law which the court is authorised to administer, and other written laws which the government may specify. This means, therefore, that these courts are really not "traditional" courts, but are statutory courts of a special kind.

The presiding officers in these courts are men and women who are supposed to know the indigenous law. In Botswana the Customary Courts Act provides that the composition of these courts shall be according to customary law.³⁷¹ This in fact means that a Chief shall preside. In Lesotho presiding officers are appointed by the government. They need not be Chiefs. In Swaziland the constitution of the Court is according to customary law, and this, as in Botswana, means that Chiefs preside. While the presiding officers may be familiar with the indigenous law, they are not necessarily familiar with the statutory law. The trial of a person on a statutory offence before these courts may therefore lead to injustice. In Swaziland in 1977 the Crimes Act³⁷² was made to be administered by the customary courts in respect of offences of loitering for purposes of prostitution. From that time convictions for this crime increased, and it is reported by Nhlapho that a police report expressed satisfaction that these courts were helping to reduce this type of crime.

The rules of procedure and evidence followed by a court are very important in connection with the outcome of

a dispute. In all three countries the customary courts are to follow customary rules of procedure and evidence except if some other rules are laid down. In Lesotho the rules of procedure are laid down by statute and they are ordinary simplified accusatory rules. A problem which has arisen is that the African litigants, being used to some form of inquisitorial procedure, do not appreciate the change, and expect the presiding officer to do the necessary questioning of witnesses. This is not forthcoming and litigants lose cases they should not lose.³⁷⁴ Legal representation becomes necessary, but it is not allowed in respect of civil matters.

In the other two countries the consequences for a litigant or accused of following customary rules of procedure and evidence are that such a person may be better off before a Magistrates Court. Hearsay evidence, for example, could be perfectly admissible in a customary court, while not admissible before the other system of courts. In all matters, whether civil or criminal, before the customary courts in Botswana and Swaziland, legal representation is not allowed.

The liberty of the subject has been a matter of concern in connection with customary courts. In Lesotho and Botswana the court can grant bail. In Swaziland the Swazi Courts Act³⁷⁵ does not authorise the granting of bail. The High Court has, however, released accused persons appearing before customary courts on bail. These have been lucky persons who could afford the assistance of a lawyer.³⁷⁶

So far we have emphasized the absence of legal assistance as a major defect in the customary courts system. It should, however, be realized that even if such assistance was permitted, this would not necessarily lead to justice. Lawyers are scarce in the three countries. Even if they were available, not many litigants could afford their help. Lastly, representation by lawyers does not always lead to justice.

Lawyers are often more interested in winning cases than in the attainment of justice. There would always be the risk of misleading than assisting the Court. In Lesotho, however, it does not appear that this has been the case in criminal matters.

In conclusion it appears that the African is worse off appearing before customary courts than he would be if he appeared before the other system of courts. The problem is caused mainly by extending the jurisdiction of the courts to non-customary laws.

The customary courts system has advantages, however. First, there are no delays in the hearing of cases. Second, the system of law administered by these courts, apart from statutes, is generally understood by the litigants. This reduces the need for legal assistance. Third, the procedures are simple and encourage quick resolution of matters before the court.

The question then is, what kind of reform should be effected? It may well be that the training of presiding officers in both systems of law is desirable. The rules of evidence may have to be uniform to a greater extent. Judicial officers may have to be more alive to their duty to assist litigants through the modern complicated statutes.

(iii) Women and Discrimination

There is general agreement that throughout the world women are discriminated against. It is also arguable that where a particular race or ethnic group is subjected to discrimination, women tend to suffer more. What is not clear is the criteria used to determine the existence of

discrimination. Most studies on women's problems have been by Western writers. The conceptual frameworks within which these studies were done have been ethnocentric. The cultural factor is, therefore, one problem which faces those who study discrimination against women.

Colonialism has had a lasting impact on the cultures of the former colonised peoples. There is evidence, for example, which suggests that the modern authoritarian rulers of Africa have copied their ways from colonialists.³⁷⁶ In Europe, notions about the inferiority of women were and are common. As a result of such notions, the statute books and legal writings of Western countries are laden with "stereotyped distinctions between the sexes".³⁷⁷ This legal heritage has been taken over by the former colonies. Consequently women are discriminated against on the basis of the values of aliens. Researchers into discrimination against women have to make the necessary cultural distinction between received colonial values and the values of the indigenous culture.

The traditional African cultures may have been suitable in older times. This is no longer true. Economic relations have now changed because of the impact of colonialism. In Southern Africa racism provides a dimension which disrupts African social relations. African values operate in an abnormal environment and this leads to oppression against sections of the African population.

Africa has a diversity of cultures. The tendency in studying Africa has been to generalise without making the necessary distinctions. Anthropologists may be an exception in this regard, although their works have sometimes been ignored. If such distinctions are not made, there is bound to be confusion. We often read or are told that in Africa

girls have to herd animals while boys attend school. In Lesotho, on the other hand, the reverse is the case. We are told that women are left out of important decisions in the family; they are treated like children. But Lesotho women have simply too many responsibilities because the men migrate in huge numbers to South Africa where they contract diseases and die young, thus leaving women with family responsibilities. Ironically the migratory labour system seems to be a liberatory factor for women although it is an evil system.

A discussion of discrimination against women has to bear in mind all these factors, otherwise confusion is bound to arise. This survey does not attempt to formulate a theory of discrimination against women. A lot of research still has to be done on the matter. What we attempt to do is to highlight some of the problems which face African women today.

In practice discrimination against women takes two forms. One form is legal, while the other is mere practice motivated by stereotypical notions about women. These two forms interact. In the field of employment, for example, the assumption is that a woman employee is unstable; she will marry and follow her husband. It is therefore provided by legislation in Lesotho that a woman employee in the public service will be deemed to have resigned if she marries, but she may be employed on a daily basis.³⁷⁸ The implications are serious. The woman employee may be dismissed easily and she is not entitled to a pension. Such a pension constitutes family income, but it is being lost by the husband as well.

Women bear children. Yet this function is regarded as abnormal by employers, most of whom are western-

orientated. Preference is given to men in employment. If women are employed, the child-bearing function is made difficult by such techniques as maternity leave without pay, lack of child care facilities and dismissals.

The cultural factor may be pronounced. For example, in Botswana, Lesotho and Swaziland, the African family is patrilineal and patrilocal. Each family has a head who is a man.³⁷⁹ The head is a representative of the family in its dealings with the outside world. This means, therefore, that anything of importance which a woman does must be with the authority of the family head. Matters such as applying for a passport, including a child in the mother's passport, applying for credit, and seeking access to land, must all be done on the authority of a man. On this aspect the Roman-Dutch Law provides for similar rules. All these rules are oppressive to women. Women whose guardians or husbands are away as migrant workers must find it very difficult to run their lives. The African social organisation on the other hand recognises that a family must have a representative at all times. In practice, therefore, women do perform functions of men in the absence of the latter. This is especially the case in Lesotho. The Roman-Dutch Law does not seem to be so flexible.

It appears that in order to understand discrimination against women the problem must first be understood. African women must lead the inquiry, instead of being told about their problems by western-orientated writers.

N O T E S

1. Allot, A.N., New Essays in African Law, (London: Butterworths, 1970)
2. South African lawyers held high judicial and other public positions in the three countries. Until recently that country's legal practitioners constituted the majority of private practitioners in these States. After 1970 (Lesotho) and 1973 (Swaziland) top South African advisers were brought in. Various laws, notably those concerning security, have in the case of Lesotho, been copied from South Africa. South African textbooks and collections of court decisions are heavily relied upon in the teaching and practice of law.
3. See generally Lord Hailey, Native Administration in the British African Territories (Part V) - The High Commission Territories: Basutoland, The Bechuanaland Protectorate and Swaziland (London: H.M. G.O., 1953, esp. 44 - 58; Palmer and Poulter, The Legal System of Lesotho (Charlottesville, Virginia: Michie, 1972), 6 - 13, 44ff.
4. Proclamation 28 (Laws of Basutoland (1960 ed.), Vol. 1, 340). See also Hahlo and Kahn, The Union of South Africa - The Development of its Laws and Constitution (London and South Africa: Stevens, 1960, 27 - 28.
5. Palmer and Poulter, op. cit., 99 - 100
6. The fact that Basutoland was once a "colony" as opposed to a "protectorate" has never been accepted by ordinary Basotho.

7. See p. 10 below
8. See Lord Hailey, op. cit., 192 ff.
9. Laws of Bechuanaland Protectorate (1948 ed.), Vol. 1,5
10. Drawn from text on history of Botswana Law.
11. Proclamation 36 of 1909 (Orders-in-Council and Proclamations of Bechuanaland Protectorate, 1890 - 1929), 203; see also Hahlo and Kahn, op. cit., 27-28
12. Lord Hailey, op. cit., Chap. 3; especially Sections I and VI; Sonbuza v. Miller, 1926 - 53 H.C.T.L.R. 1 (P.C.)
13. Lord Hailey, op. cit., 362
14. Proclamation 4 of 1907 (Chap. 3: Laws of Swaziland); See also Hahlo and Kahn, op. cit., 27 - 28
15. For the history of the Roman-Dutch Law see: J.W. Wessels, History of the Roman-Dutch Law (Grahamstown, Cape Colony: African Book Co., 1908); Hahlo and Kahn, The South African Legal System and its Background. (Cape Town: Juta, 1968), Part II; W.J. Hosten, A.B. Edwards, Carmen Nathan and Francis Bosman, Introduction to South African Law and Legal Theory (Durban, South Africa: Butterworths, 1977), Chap. III.
16. Hahlo and Kahn, Legal System, 572
17. The most famous of these jurists is Hugo de Groot (Grotius), "that great genius of the Netherlands who may justly be described as the founder of modern international law and of the system of jurisprudence known as the Roman-Dutch Law. "(J.W. Wessels, History of the Roman-Dutch Law. 262)

18. Mahlo and Kahn, Union of South Africa, 2
19. Voet, 1.3.5. (Commentaries on the Pandects of Johannes Voet. Trans. P. Gane, 8 Vols, 1955 - 58)
20. Van Leeuwen 1.5.4. (Commentaries on the Roman-Dutch Law. Trans. J.G. Kotze, 2 Vols., 1st ed.: London, 1882 - 86; 2nd ed.: London, 1921 - 23)
21. Ntsetwa v. Officer Commanding State Prisons, Lobatse, and Others, 1976 B.L.R. 1,3.
22. Legal System, 527 note 12
23. id.
24. Van Leeuwen 1.6.3; Grotius 1.3.8. (Introduction to Dutch Jurisprudence. Trans. A.F.S. Maasdorp, 3 ed.: Cape Town, 1903)
25. Van Leeuwen, 1.6.4.
26. Van Leeuwen 1.6.5.
27. Grotius, 1.5.24
28. Mahlo and Kahn, Legal System, 586 note 11
29. This is the point which is made by Amoah concerning taking of land in Swaziland (Sobhuza v. Miller, 1926 - 53 H.C.T.L.R. 1 (P.C.), and the denial to a Black man of the remedy of habeas corpus in the Bechuanaland Protectorate (The King v. The Earl of Crew, ex parte Sekgoma, 1910 K.B. 576). P.K.A. Amoah, "The Courts and Democracy - Judicial Protection in Botswana, Lesotho and Swaziland", in Papers of the African Bar Association, July 27 -

30. Mahlo and Kahn, Legal System, 575 note 48; E.M. Burchell and P.M.A. Hunt, South African Criminal Law and Procedure, Volume I (Cape Town: Juta, 1970) 19
31. These particular slaves were captured in Angola and Guinea. C. Graham Botha, "Slavery at the Cape", 50 S.A.L.J. (1973) 4.
32. C.W. de Kiewiet, A History of South Africa - Social and Economic (London: Oxford U.S.)
By 1806 there were 29,861 slaves as against 26,568 Europeans at the Cape. C. Graham Botha, op.cit., 5
33. C. Graham Botha, op. cit., 5 - 12. Mahlo and Kahn, Legal System, 527
34. The law as it operated in the Netherlands was brought to the Cape. See Mahlo and Kahn, Legal System, 528, 568 note 11.
35. De Kiewiet, op. cit., 8ff
36. John Dugard, Human Rights and the South African Legal Order (Princeton, N.J.: Princeton U.P., 1978), 16-17
37. Burchell and Hunt, op. cit., 20 - 22
38. Mahlo and Kahn, Legal System, 575 - 7; Burchell and Hunt, ibid., 22
39. Wade and Philips Constitutional Law, (London: Longmans, 7 ed., 2nd impr. 1968), 68
40. See John Dugard, op. cit., 14ff.

41. Id.
42. Ibid., 36
43. Ibid., 28. It should be noted that through political authoritarianism, Lesotho and Swaziland had in effect rejected the rule of law and had elevated the status of legislative supremacy to a level which cannot be controlled by popular will.
44. J.W. Wessels, History, Chap. 35; Dugard, op. cit., 7ff.
45. Supra, 10
46. See list of Ratifications, Declarations and reservations in Yearbook of the European Convention on Human Rights 1970 (The Hague: Martinus Nijhoff, 1972) 26. Britain was the first State to ratify the Convention: R. Beddard, Human Rights and Europe - A study of the Machinery of Human Rights Protection of the Council of Europe (London: Sweet and Maxwell, 2 ed., 1980), 28
47. Jacobs F.G., The European Convention on Human Rights (London: Oxford U.P., 1975), 14
48. See letter dated 6 August, 1966 to the Secretary-General of the Council of Europe: Yearbook 1966, 22. Also S.A. de Smith, The New Commonwealth and its Constitutions (London: Stevens, 1964) 180
49. Letter dated 12 January, 1967 to the Secretary-General of the Council of Europe: Yearbook 1967, 46
50. Letter dated 12 June, 1969 to the Secretary-General of the Council of Europe: Yearbook 1969, 74

51. Jacobs, F.G., The European Convention on Human Rights (London: Oxford U.P., 1975) 15. Malawi, on attaining independence, was under the misapprehension that she was party to the Convention and, therefore, had to withdraw. See President Banda's letter to the Council of Europe: Yearbook 1968, 36

52. S.A. de Smith, op. cit., 178; Read J., "The Protection of Human Rights in Municipal Law", in C.F. Forsyth and J.E. Schiller, Human Rights: The Cape Town Conference on Human Rights in South Africa 22 - 26 January, 1979 (Cape Town: Juta, 1979) 156 at 160. See also the dissenting judgement of Kentridge, J.A., in the Attorney-General v. Moagi, CRI/A/28/1978 (Botswana Court of Appeal), (unreported) 71

53. Infra 18, 23 - 24

54. Mochele Pheto v. The State, CRI/A/170/1977 (Bots. H.C.) (unreported); S. v. Saloti, CRI/T/1/1979 (Bots. H.C.) (unreported); The Attorney-General v. Moagi, Supra; State v. Bathusi 1978 B.L.R. 20 (H.C.)

55. The law of contempt has been scrutinised in the Sunday Times Case (1979) by the European Court of Human Rights. According to Patricia Hewitt, the belief that the United Kingdom is a leader in human rights is a myth. Patricia Hewitt, The Abuse of Power - Civil Liberties in the United Kingdom (Oxford; Martin Robertson, 1982). Even now there is an ongoing debate whether the U.K. should adopt a Bill of Rights or not: Read J. op.cit., 159 - 160.

56. E.g. the Greek Case (Yearbook 1969) deals with several important issues on freedom of association and assembly, of expression, and the prohibition of torture, inhuman and degrading treatment. It is likely that this decision will in time influence the constitutional jurisprudence of Botswana.
57. Infra, 38ff
58. The Constitution of Botswana provides that an accused person shall be afforded a fair hearing within a reasonable time, (s.10(1)) and shall be permitted to defend himself in person or by a legal representative of his own choice, (s.10 (2) (d)) and shall be given adequate time and facilities to prepare for his defence (s.10 (2) (c)). In Kgomotso v. The State, CRI/A/74/1980 (Bots. H.C.) (unreported) an accused person was subjected to hours of interrogation and then taken to court by her interrogators in the afternoon. She pleaded guilty and was duly convicted and sentenced. On appeal to the High Court, it was held that what had happened was not contrary to the law! It is submitted that the case is wrongly decided.
59. Tanata Olefile v. State, CRI/A/118/1980 (Bots. H.C.) (unreported)
60. Chirambo Makwekwe v. State, CRI/A/118/180 (Bots. H.C.) (unreported). This case was decided on March 2, 1981, a few days after the decision in Tanata Olefile which was handed down on February 25, 1981. There is no explanation in principle why in one case there was an acquittal, while in another there was only a reduction in sentence.

61. In Lesotho and Swaziland the period spent in detention awaiting trial is taken into account in assessing sentence. Nothing is done in favour of those who are free but take a long time to be tried.
62. Theoretically if a Constitution, on which all other legal rules depend, is overthrown, all the other rules must go as well. In practice, however, the political will "revives" the laws without the Constitution. See the discussion of this matter by B.O. Nwabueze, Constitutionalism in the Emergent States (London: C. Hurst, 1973) 41 - 2; Judicialism in Commonwealth Africa (London: C. Hurst, 1977) Chap. VII
63. Read, J. op.cit., 161
64. Simbi v. Mubako, Fundamental Rights and Judicial Review (1979) (unpubld.), 6ff
65. The atrocities committed against the Kenyan nationalist in the 1950's come to mind.
66. For example, in Lesotho in 1970 the Prime Minister sent politics on "holiday" in the name of development, thus inhibiting the very development he was striving for: Roeland Van De Geer and Malcolm Wallis, Government and Development in Rural Lesotho (National University of Lesotho, Roma, Lesotho, 1982) passim
67. Read, J. op.cit., 157; Amnesty International, Human Rights in Uganda Report, June 1978, AFR 59/05/78, 5

68. Read, J., loc. cit. The non-renewal of the contracts of service of Sir Philip Pike in Swaziland and of Judge Rooney in Lesotho immediately after handing down judgements which were not pleasing to the government, must be viewed as a subtle form of undermining the independence of the judiciary. Infra, pp. 58, and 67
69. The Nigerian Constitutional Commission realised that a Bill of Rights served as a standard-setting instrument and recommended its adoption. The O.A.U. has also produced the African Charter on Human and People's Rights.
70. Constitution, s.57
71. Constitution, s.67
72. Infra, p.64 - 5
73. Mark D. Bomani, "Democratic Process and Elections", in Papers Presented at the Fourth Biennial Conference of the African Bar Association, July 27 - August 1, 1981 Nairobi, 4 - 5
74. The Parliamentarian, Vol. 58 (1977), 194
75. Pheroze Nowrojee, "The Democratic Process in Africa and Elections", in Papers of the African Bar Association, Nairobi, 1
76. Ibid., passim
77. Constitution, s.64;
78. Constitution, s.66; Electoral Law

79. Pheroze Nowrojee, op.cit., 3
80. B.M. Khaketla, Lesotho 1970 - An African Coup Under a Microscope (London: C. Hurst, 1971), Chapter 1
81. The fact that African ruling elites are irremovable from power except through force, calls for other ways, other than the electoral process, of ensuring protection of human rights, such as the provision for sanctions against outrageous behaviour by rulers: R. Hayfron - Benjamin, "The Courts and the Protection and Enforcement of Human Rights in Africa", 9 C.I.J.L. Bulletin (April 1982) 33 at 39 - 40.
82. Gabriele Winai Strom, Development and Dependence in Lesotho, the Enclave of South Africa, (The Scandinavian Institute of African Studies, Uppsala, 1978) 153 (Appendix I)
83. B.M. Khaketla, op.cit., 142 - 3
84. See R. Hayfron - Benjamin, loc. cit.
85. B.M. Khaketla, op.cit., chapter 12
86. Ibid., 206. The Electoral Officer, Johannes Pretorius, was borrowed from South Africa.
87. Ibid., 207
88. Ibid., 207
89. Order No. 51 of 1970 (Laws of Lesotho 1970, 416)
90. B.M. Khaketla, op.cit., Chapter 16

91. Order No. 16 of 1970 (Laws of Lesotho 1970, 280)
92. Order No. 16 of 1970 (Laws of Lesotho, 1973, 13)
93. Ibid., s.5
94. Winai Strom, op. cit. 51
95. Infra p.25 ff.
96. Order No. 13 of 1973, s.28. The King, of course, has not so far had occasion to appoint such a Prime Minister, the present incumbent having automatically continued as such.
97. Legum (ed.) Africa Contemporary Records 1968-69, 355
98. The recent clamp-down on refugees since December 1982 may well be a demonstration to South Africa of Swaziland's good faith in the land negotiations.
99. Constitution of Swaziland, 1968, ss. 38-42
100. Prince Mfanasibili who was nominated a Senator. Legum, A.C.R. 1972-73, 8427.
101. Thomas Ngwenya, who was deported a week after the elections.
102. The "Ngwenya affair" is dealt with more fully in following text.
103. The Proclamation is reproduced in Statutes of Swaziland, Volume I (Chapter on Constitutional Law)
104. Decree No. 2 of the King-in-Council announced on April

105. King's Order-in-Council 23 of 1978 (Statutes of Swaziland
Volume I (Constitutional Law))
106. s.38
107. s.40
108. King's Order-in-Council 1 of 1978 (Statutes of Swaziland,
Volume IV (Police and Public Order))
109. King's Order-in-Council 23 of 1978, s.33(f.)
110. Infra, pp.65ff
111. Amnesty International, Annual Report 1979, 35;
Annual Report 1980, 81
112. King's Order-in-Council 23 of 1978, s.16.
Note that even women as young as 18 may vote in
"traditional" Swaziland.
113. s.18
114. Amnesty International, Annual Report 1979, 35
115. Private information to the author
116. King's Order-in-Council 23 of 1978, s.24.
117. Ibid., s.71(2)
118. Franciszek Przetacznik, "The Right To Life as a Basic
Human Right", Human Rights Journal (1976), 385 at 387
119. Ibid, 385-7
120. But it might just be that the right is merely being

121. Constitution, s.4
122. Jacobs, F.G., The European Convention on Human Rights (London: Oxford U.P., 1975), 21ff.
123. P.M.A. Hunt, South African Criminal Law and Procedure, Volume II, Common Law Offences, (Cape Town: Juta, 2ed., 1982) 310-11
124. Ibid., 313
125. Ibid., 311
126. The population explosion and planned families are a matter of concern in Lesotho due to problems of poverty. This concern is generating studies such as: Poulter, McClain, Kaburise, Mugambwa and Milazi, Law and Population Growth in Lesotho - A Report of the Law and Population Project (Roma, Lesotho: Faculty of Law, National University of Lesotho, 1981); Report of the National Conference on Population Management as a Factor in Development, Including Family Planning, Maseru, Lesotho, 26 - 29 April, 1979 (Maseru, Lesotho; Ministry of Health and Social Welfare, undated)
127. P.M.A. Hunt, op.cit., 325 note 167
128. Cook and Dickens recognised the "gap" between the law of abortion and the social needs of individuals and actual practices concerning termination of pregnancies. See Report of a combined Medical-Legal Workshop, Barbados, 18 - 22 June, 1979 (London: Commonwealth Secretariat, 1979) 22; Medical Legal Issues - Report of a combined Medical-Legal Workshop, Malawi, 8-12 October, 1979, (London: Commonwealth Secretariat, 1979), 71

129. Combined Medical-Legal Workshop, Barbados, 74; Medical-Legal Issues, Malawi, 73
130. Penal Code, Cap.08:01, s.208 (Laws of Botswana, Vol. II, revised ed., 1973)
131. Constitution, s.54
132. But she is liable to life imprisonment, Criminal procedure and Evidence Act, Cap. 08.02, s.295(3) (Laws of Botswana, Vol. II)
133. Penal Code, s.213
134. Constitution, s.7
135. Criminal Procedure and Evidence Act 9 of 1981, s.297 (Supplement No. 1 to Gazette No. 4 of 5 February, 1982).
136. Van der Linden, 2.4.4.5. The Statement was quoted by de Villiers, J.A., in Rex. v. Jolly and Others, 1923 A.D. 176 at 183. See Rex v. Moerane and Others, 1974-5 L.L.R. at 250.
137. Rex. v. Kalanyane, CRI/T/39/81 (unreported)
138. Raliqo Montsi v. Rex. CRI/A/44/79 (unreported)
139. CRI/T/19/74 (unreported)
140. Rex v. Phaloane, 1980 (s) L.L.R. 260 (H.C.) at 300-1
141. Phaloane v. Rex
142. Criminal Procedure and Evidence Act 1981, s.s. 331, 332

143. C. of A. (CRI) No. 8-10 of 1979 (unreported). The High Court decision is reported in 1980 (1) L.L.R. 57
144. C. of A. (CRI) No. 1-3 of 1981 (unreported)
145. Information from the Registrar of the High Court and the Court of Appeal.
146. C. of A. (CRI) No. 5 of 1980
147. C. of A. (CRI) No. 8-11 of 1980
148. Richard F. Weisfelder, "The Decline of Human Rights in Lesotho: An Evaluation of Domestic and External Determinations", 6 Issue (No. 4) 22 at 29. The atrocities committed against members of the B.C.P. were told to the Court in Rex v. Moerane and Others, Supra 251
149. This is implicit in the warnings over Radio Lesotho by the Commissioner of Police to Ntsu Mokhehle that the latter should remember that his own relations could also be killed or harmed in retaliation against the activities of the Lesotho Liberation Army.
150. Proclamation 37 of 1954 (Laws of Basutoland, 1960 ed., 1028)
151. E.g. the display of several bodies alleged to be members of the Lesotho Liberation Army killed in Butha-Butha district in June 1980. Reporting on this affair, Leselinyana La Lesotho (Morija, Lesotho) June 13, 1980, showed how Radio Lesotho issued contradictory statements about the circumstances of the deaths.

153. About killings in Lesotho, see Amnesty International, Annual Report 1982, 49ff.
154. Some killings by the Lesotho Liberation Army are listed in Lesotho Weekly (Maseru, Lesotho), 5 February, 1982.
155. Lesotho Weekly (Maseru, Lesotho), 9 July, 1982; Rand Daily Mail (Johannesburg) 9 July, 1982.
156. Moeletsi oa Basotho (Mazenod, Lesotho) 22 August, 1982
157. Rex v. Phaloane, Supra.
158. Leselinyana La Lesotho, 14 December, 1979; 22nd February 1980.
159. Amnesty International, Annual Report 1982, 50
160. The phenomenon is reported and documented in various reports by such bodies as Amnesty International, the International League for Human Rights and the International Commission of Jurists. The Inter-American Commission on Human Rights has produced extensive reports on this problem. An attempt at a conceptual framework for the study of "disappearances" appears in Amnesty International (U.S.A.), Disappearances A Workbook (N.Y.: AI(U.S.A.), 1981).
161. Annual Report 1979, 45
162. Details of the threats to the life of Edgar Motuba by members of the Police Mobile Unit, including efforts by leaders of the Lesotho Evangelical Church to contact government Ministers in order to procure protection for the editor, are reported in Leselinyana La Lesotho. 12 December, 1980. The

details include the registration number (X 7029) of the vehicle in which the soldiers who threatened him travelled. Under the Internal Security (General) Act of 1967 (since repealed) the allegations against the soldiers amounted to offences.

163. Sello v. Commissioner of Police, 1980(1) L.L.R. 158 at 162A
167. Infra, p.42
168. Act No. 6 of 1982 (Supplement No. 1 to Gazette No. 36 of 10 September, 1982).
169. Infra, pp.43 - 46
170. Criminal Procedure and Evidence Act No. 67 of 1938, s.296
171. Id.
172. Id.
173. Amnesty International, Annual Report 1982, 85
174. Id.
175. (Botswana) Criminal Procedure and Evidence Act, Cap. 08:02, s.s. 36, 43;
(Lesotho) Criminal Procedure and Evidence Act 1981, s.s. 32, 38;
(Swaziland) Criminal Procedure and Evidence Act 1938, s.s. 30, 37.
176. Constitution, s.16(2)
177. 1976 B.L.R. 1 (H.C.)

178. Amnesty International, Annual Report 1971-72, 22
179. Amnesty International, Annual Report 1972-73, 29
180. Amnesty International, Annual Report 1981, 30
Annual Report 1982, 21
181. Supra, note 175. Note, however, that the requirement for a prompt trial can be used to deny an accused person a fair trial. Supra, p.14.
182. Review Case 117/1980, 14 Comparative and International Law of Southern Africa (C.I.L.S.A.) (1981), 347
183. Act No. 1 of 1974 (Laws of Lesotho, 1974)
184. The first case seems to be that of Sesnoohe v. The Commissioner of Police and Another. CIV/APN/175/79 (unreported) in which the detainee's wife alleged that he had not been visited by a Magistrate for several months and that he has been held for a period beyond the 60 days limit. The Commissioner did not oppose the application. See Sello v. Commissioner of Police and Another. 1980(1) L.L.R. 158 at 169.
185. 1980(1) L.L.R. 158
186. Ibid., 162A - 163
187. Ibid., 162A
188. CIV/APN/30/82 (unreported)
189. CIV/APN/54/82 (unreported)

190. -
191. Moloi v. Commissioner of Police and Another, CIV/APN/203/81 (unreported); Mahase v. Commissioner of Police and Another, CIV/APN/70/82 (unreported)
192. Mokoaleli v. Commissioner of Police and Another, CIV/APN/225/82
193. Internal Security (General) Act No. 6 of 1982 (Supplement No. 1 to Gazette No. 36 of 10 September, 1982)
194. s.52
195. Part II
196. s.43. Certain offences need to be authorised by the Director of Public Prosecutions (s.47)
197. See s.s. 7(1) 8(3), 9(2), 11, 46 and the First Schedule.
198. Part III
199. s.s. 32(2), 33, 35(1), 38(3)
200. s.38(2)
201. s.s. 34,35
202. s.6
203. Supra, p.42
204. See s.35(1)

205. Past experience shows that the police will release a detainee to frustrate judicial proceedings, only to re-detain immediately thereafter: Letsae v. Commissioner of Police and Another, CIV/APN/32/82 (unreported)
206. s.40
207. Supra. p.37
208. Nkau Matete v. Minister in Charge of the Police and Others, CIV/APN/30/82 (unreported)
209. Police Order 1971, s.2 (Laws of Lesotho, Vol. 16, 1971); Police Volunteer Reserve Order 1970, s.5 (Laws of Lesotho, Vol. 15, 1970)
210. CRI/T/10/77 (unreported)
211. CRI/T/47/78 (unreported)
212. In Nkholise v. Commissioner of Police and Another, CIV/APN/197/80 (unreported), the reason for keeping the detainee in police custody was that there was no prosecutor to remand him.
213. Case No. 312/81 (H.C.) (unreported)
214. CRI/T/32/81 (unreported). The witness was kept in police custody for about 5 or 6 months (See p.28 of cyclostyled judgement)
215. See the King's Proclamation to the Nation, 12 April, 1973

216. Musa Shongwe, who requested the South African-born judge to recuse himself for fear of bias against the South African refugees, and reminded Swaziland of its international responsibilities towards refugees and the liberation struggle. Amnesty International, Annual Report 1980, 81
217. King's Order-in-Council No. 1 of 1978 (Statutes of Swaziland, Vol. IV)
218. King's Order-in-Council No. 39 of 1973.
219. s.2(5)
220. Amnesty International, Annual Report 1980, 81-82
- 221.
222. There are exceptions to this statement, Infra, p.79
223. Amnesty International, Annual Report 1978, 85
224. Infra
225. See R. v. Phiri, 1970-76 S.L.R. 1982, (H.C.)
226. Supra, note 213
227. Part 8, p.
228. See Brownlie (ed.), Basic Documents on Human Rights (2ed., N.Y.: Oxford U.P., 1981):35
229. The African Charter on Human and People's Rights. Article 5.

230. See Yearbook of the European Convention on Human Rights 1969
231. 1976 B.L.R. 49 (H.C.)
232. Ibid, 53-4
233. 1968-70 B.L.R. 129
234. Infra,
235. B.M. Khaketla, op.cit., Chap. 16; Rex v. Moerane and Others, 1974-5 L.L.R. 212, at 2510
236. B.M. Khaketla, op.cit., 272-7
237. The state of emergency was revoked that year.
238. Leselinyana La Lesotho; The Friend (Bloemfontien) 23 July, 1982; Sunday Times (Johannesburg), 25 July 1982
239. This was MacDonald Mabote who was detained on 15 March and released on 15 April 1980 after signing a "confession" which he read over Radio Lesotho in which he said he had given financial support to Ntsu Mokhehle against Lesotho. Amnesty International, Annual Report 1980 53-4. If that was so, treason had been committed, and Mabote should have been brought to a judicial trial, instead of a trial over the air.
240. Supra, 36, 37.
241. Amnesty International, Annual Report 1982. 49

242. Ibid., 50-1
243. Supra, p.36
- 244.
245. CRI/T/10/77 (unreported)
246. 1980(1) L.L.R. 112
247. Police Volunteer Reservists - the "peace corps".
248. Former prisoners have often described the "Apollo" treatment, which seems to be a common torture technique learned by every police person.
249. 1968-70 B.L.R. 129 at 132
250. s.40(4)
251. Amnesty International, Evidence of Torture - Studies by the Amnesty International Danish Medical Group (London: Amnesty International, 1977) 5
252. Amnesty International, Torture in Greece - The First Tortures' Trial 1975 (London: Amnesty International, 1977) 18. He was called "the orange juice doctor" because he prescribed orange juice even for serious ailments.
253. E.g. the argument based on "state privilege" when reasons for a detention were being sought: Mokoaleli v. Commissioner of Police and Another, CIV/APN/225/82 (unreported)

254. This is Godfrey Mdhuli who was stateless after being stripped of his citizenship by Swaziland. When he left Lesotho he went to Swaziland where he was detained without trial, even though he had been given assurances to return. Amnesty International, Annual Report, 1982, 84-5
255. He was convicted on 11 August, 1980 and released on 19 March, 1982 pursuant to a release order signed by the Minister of Justice in blank on January 9, 1982. The Court of Appeal had increased the sentence from 10 to 15 years imprisonment.
256. 1970-76 S.L.R. 232 (H.C.)
257. 1963-69 S.L.R. 1 (H.C.)
258. 1968-70 B.L.R. 129
259. Case No. 312/81 (H.C.) (unreported)
260. Penal Code: Cap. 8:1, s.29(1)
261. (Lesotho) Criminal Procedure and Evidence Act 1981, s.303; (Swaziland) Criminal Procedure and Evidence Act 1938, s.302
262. U.S. Department of State, Country Reports on Human Rights Practices for 1981 (Washington, 1982), 26
263. See the respective Criminal Procedure codes.
264. Criminal Procedure and Evidence Act 1981, s.303(2)
265. Criminal Procedure and Evidence Act 1938, s.302(3)

266. CRI/T/39/81 (unreported)
267. Moeletsisi oa Basotho (Mazenod, Lesotho) 14 November, 1982
268. 1974-5 L.L.R. 37(H.C.) at 47D.
269. Legum, A.C.R. 1979-80, 8926-7
270. King's Order-in-Council 22 of 1974 (Statute, Vol. 2)
271. Act No. 36 of 1967 (Statutes, Vol. 2)
272. Order No. 16 of 1971 (Laws of Lesotho 1971)
273. Act No. 17 of 1967 (Gazette No. 15 of 19 May, 1967)
274. Cap. 25:4
275. Act No. 16 of 1966 (Laws of Lesotho 1966).
276. Act No. 30 of 1964 as amended by Act No. 22 of 1972
(Statutes, Vol. 2)
277. Constitution of Swaziland 1968, s.27 (1)
278. Lesotho Citizenship Order, s.2(9)
279. When introducing the Land Speculation Control Bill
in Parliament in 1971, the Prime Minister had
this to say: "No responsible Government will
continue to allow its entire land - its only
God-given asset - to be swallowed by foreigners,
and its nationals to be exploited by speculators".
Legum, A.C.R. 1971-72, 8394.

280. See the Constitution of 1967, ss. 127-130
281. White Paper on Proposals of the Swaziland Government Concerning the Constitution and other arrangements for Independence to be tabled in Both Houses of Parliament (Mbabane, Swaziland: Government Printer) Chapter 9; Swaziland Independence Conference, 1968, Annex B to the Report, Being Proposals of the Swaziland Government, Chap.9
282. Each constituency returned three candidates for the successful party in that constituency.
283. Ngwenya v. The Deputy Prime Minister, 1970-76 S.L.R.88 (H.C.)
284. Immigration (Amendment) Act 22 of 1972, s.10bis
285. Legum, A.C.R. 1972-73, 8430
286. Ngwenya v. The Deputy Prime Minister and Another, 1970-76 S.L.R. 119 (H.C.)
287. Ngwenya v. The Deputy Prime Minister and Another, 1970-76 S.L.R. 123 (C.A.)
288. Ibid., 126C.
289. The Citizenship Order 1974, s.7(2)(e)
290. Lesotho Citizenship Order 1971, s.2(6)
291. Ibid., s.4(3). Swaziland is not party to the Convention on the Reduction of Statelessness. See United Nations, Human Rights International Instruments: Signatures, Ratifications, Accessions 1 July, 1982, (ST/HR/4/Rev.4), 15

292. L-G. Erikson, G. Melander and P. Nobel (eds.)
An Analysing Account of the Conference on the
African Refugee Problem, Arusha, May 1979
(Scandinavian Institute of African Studies,
Uppsala 1981), 9
293. Another major cause is the conflict brought about by
ethnic rivalries within the modern African States
whose boundaries are the unnatural heritage of
the colonial era. See Merdard Rwelamira, Some
Reflections on O.A.U. Convention on Refugees:
Some Pending Issues (National University of Lesotho,
Faculty of Social Sciences Staff Seminar Paper
No. 37, 9 February 1983). 2-3
294. E.g. Lesotho: the Official Secrets (Amendment) Act
14 of 1978 makes it an offence to obtain information
for a purpose prejudicial to "the freedom, safety
and livelihood of its citizens or of refugees in
Lesotho".
295. Cap. 25:03
296. s.8
297. This was brought about by an amendment of 1967 which
became necessary when Botswana ratified the 1951
Refugee Convention and its Protocol.
298. s.15
299. s.9 as amended by Act 37 of 1967
300. Amnesty International, Annual Report 1981, 30;
Annual Report 1982, 21

301. Botswana has made a reservation in respect of Article 32.
302. Amnesty International, Annual Report 1982, 21
303. State v. Khoza and Others. Case No. 55/1982 (unreported). The maximum penalty for kidnapping is 7 years imprisonment. The Chief Justice, O'Brien-Quin, recommended a maximum of 14 years.
304. However, fifteen South African nationals were recently deported back to South Africa on the grounds that they were not genuine refugees but criminals. Four of them were charged with political offences. Amnesty International, Annual Report 1982, 51
305. Amnesty International, Annual Report 1980, 53; Leselinyana La Lesotho, 14 and 28 December, 1979.
306. The right to apply to the High Court has a limited value to a refugee who is in detention pending his removal. Supra, p.40
307. Joe Molefi over the S.B.C. "Focus on Africa", December 10, 1982.
308. Supra, note 294.
309. King's Order-in-Council No. 5 of 1978
310. ss.10(4), 11
311. Appeal Case No. 4/82 (Swaz. H.C.)
312. Refugee Control Order 1978, s.10
313. Legum. A.C.R. 1970-1, 8545ff.

314. Amnesty International, Annual Report 1978, 86;
Annual Report 1979, 35-36; Legum, A.C.R. 1978-79,
B961ff.
315. Amnesty International, Annual Report 1980, 81
316. Legum, loc.cit.
317. Legum, A.C.R. 1971-72, 8395
318. Amnesty International, Annual Report 1977, 104
319. Legum, A.C.R. 1974-75, 8489, 8493
320. Amnesty International, Annual Report 1981, 85-6;
Country Reports on Human Rights Practices for 1981, 275
321. A South African agent who had sought asylum in Sweden
confessed in 1979 that he and other agents often
crossed into Swaziland to collect wanted men who
were often handed over by Swazi officials.
Legum, A.C.R. 1978-79, 8961
322. Amnesty International, Annual Report 1981, 86
323. -
324. Country Reports for Human Rights Practices for 1981,
274-5
325. Cap. 22:02
326. s.4
327. Id.
328. s.7

329. s.2
330. s.6
331. Cap. 48:01
332. Cap. 48:02
333. Cap. 48:03
334. Richard F. Weisfelder, "Human Rights under Majority Rule in Southern Africa: The Mote in Thy Brother's Eye," in Claude E. Welch, Jr., and Ronald I. Meltzer, (eds.) Human Rights and Development in Africa: Domestic Regional and International Dilemmas (Albany: State University of New York Press Forthcoming 1983).
335. Africa South of the Sahara 1981-82 (Europa; 11 ed.) 192; Legum, A.C.R. 1975-76, 829; A.C.R. 1976-77, 8739, 8740
336. CRI/T/20/80 (H.C.) (unreported)
337. Ibid., 4
338. Act No. 15 of 1973 (Laws of Lesotho 1973)
339. s.2
340. s.7
341. s.8
342. Internal Security (Public Meetings and Processions) Regulations 1973 (Legal Notice No. 41 of 1973, Laws of Lesotho 1973, 339).

343. Leslinyana La Lesotho. 17 December, 1982
344. Thus hampering the very development process for which the government aspired: Van Der Geer and Wallis, Government and Development in Lesotho (Roma, Lesotho: National University of Lesotho, 1982) passim
345. A Professor of Law was asked for an opinion and he said the police were legally entitled to attend.
346. Law No. 11 of 1964 (Laws of Basutoland 1965, 278)
347. When workers at the C.J. Lai Brickworks picketed their factory the police attempted to force them to return to work. Twelve workers were subsequently charged with assaulting the police: Moeletsi oa Basotho 19 December, 1982.
348. In terms of the Essential Services Arbitration Act 1975, Act No. 34 of 1975 (Laws of Lesotho 1973)
349. Rand Daily Mail (Johannesburg); 17 July 1982; The Friend (Bloemfontein), 17 July 1982
350. Act No. 17 of 1963 (Statutes, Vol. 4)
351. s.2
352. Id.
353. s.3(3)
354. s.3(7)
355. s.3(8)

356. s.5(1)
357. Amnesty International, Annual Report 1979, 35
358. Act No. 12 of 1966 (Statutes, Vol. 5)
359. Act No. 12 of 1963 (Statutes, Vol. 5)
360. Legum, A.C.R. 1976-77, 8870
361. Id.
362. Legum, A.C.R. 1977-78
363. Case No. S/137/1981 (Swaz. H.C.) On reading the poem,
one feels that it is the product of a sick mind.
364. The development of mining in Botswana has, however,
led to strained race relations as a result of
prejudiced expatriate South Africans coming to work
there.
365. Order No. 40 of 1971 (Laws of Lesotho 1971)
366. -
367. Act No. 6 of 1962 (Statutes, Vol. 2)
368. Legum, A.C.R. 1971-72, 8395
369. Legum, A.C.R. 1970-71, 8543ff.
370. s.15(4)(d)
371. Cap. 04:05, s.7

372. Act No. 6 of 1889 (Statutes, Vol. 1)
- 373.
374. Palmer and Poulter, The Legal System of Lesotho, 497-8
375. Act No. 80 of 1950 (Statutes, Vol. 1)
376. Fix Gama v. R. 1970-76 S.L.R. 462 (H.C.) at 463
377. See e.g. Dunstan M. Wai, "Human Rights in Sub-Saharan Africa" in Adamantia Pollis and Peter Schwab, Human Rights - Cultural and Ideological Perspectives (New York: Praeger, 1980), 115ff.
378. Polyviou G. Polyviou, The Equal Protection of the Laws (London: Duckworth, 1980), 261, citing from Frontiero v. Richardson, 411 U.S. 677 (1973).
See also Supra, p.7-8
379. Public Service Order No. 21 of 1970, s.12(10) (Laws of Lesotho 1970)
380. In Lesotho it is possible for a widow to be head of a family.



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