A Historical and Comparative Study of Human Rights Violations In Criminal Investigations In Lesotho.

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By

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Dedication

To my father Letlala (Coming from World War II 1945) and mothers Mankoetla, ‘Matlelaka Lenka, and my own wives, ‘Masekake and ‘Maseapa Lenka, and of course to my own children, ‘Mampiti, Sekake, Mosothoane, Phalo, Majoele and Maletlala/Makoae Lenka who have been supportive throughout the difficult and turbulent times of my life of study from 2005 to 2010.

Declaration

I, the undersigned, hereby declare that the work contained in this study for the degree of Doctor of Laws at the University of the Free State is my own independent work and has not previously been submitted by me at another university.

Thamae Caswell Liphapang Lenka

Acknowledgements

I have been a student of Criminal Law for some time now. The subject has naturally given me a special interest in the question of Human Rights violations by the Police through the use of deadly force in effecting arrest in Lesotho. A further quest for study on this topic was increased by my current occupation as a Superintendent of Police and a Senior Police Officer in the Lesotho Mounted Police Service.

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I devote the entire support to Lesotho Student's Association for electing me their Secretary General in 2005 which position culminated into my election as a Legal and Constitutional Affairs Secretary for Student Representative Council in 2005/2006 at the University of the Free State and the first Student Court Judge in 2007 and a Sub-Warden for President Steyn Residence from 2007-2009 respectively.

A further vote of thanks and appreciation is forwarded to Ms Sandra Viljoen for having meticulously typed the thesis.

Acronyms

ADRD	American Declaration of the Rights and Duties of Man
AFCM	African Commission on Human Rights
AFR	African Charter on Human and People's Rights
All ER	All English Law Reports
AMR	American Convention on Human Rights
ANC	African National Congress
AU	African Union
BAC	Basutoland African Congress
BCP	Basutoland Congress Party
BNP	Basotho National Party
CAT	Convention Against Torture
CP&E	Lesotho Criminal Procedure and Evidence Act
DP	Democratic Party
ECHR	European Convention on Human Rights
EHRR	European Human Rights Report
HER	Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms
HR	Human Rights
IACM	Inter-American Commission on Human Rights
IACT	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICES	International Covenant on Economic, Social & Cultural Rights

ICJ	International Court of Human Rights
ILO	International Labour Organization
IPROP	International Optional Protocol to ICCPR
LCP	Lesotho Communist Party
LDF	Lesotho Defence Force
LLJ	Lesotho Law Journal
LLR	Lesotho Law Reports
LMPS	Lesotho Mounted Police Service
MFP	Marema Tlou Freedom Party
OAS	Organization of American States
OAU	Organization of African Unity
PA	Police Act
PAC	Pan-African Congress
PACE	Police and Criminal Procedure and Evidence
PMU	Police Mobile Unit
RSA	Republic of South Africa
SADC	Southern African Development Community
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPS	South African Police Service
SARPCCO	Southern African Regional Police Chiefs Co-operating Organization
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations

UNCH	United Nations Charter
UNGA	United Nations General Assembly
USA	United States of America

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Abstract

A Historical and Comparative Study of Human Rights Violations in Criminal Investigations in Lesotho

The issue of human rights violations in criminal investigation emerges as one of the much debated subjects amongst academics since the inception of the idea of the fundamental human rights all over the world. Human rights remain a center pillar and a pivot around which criminal justice system revolves.

In Lesotho, for example, the question of human rights has been critical in the light of the fact that, since independence on the 4th of October 1966, there was never a real and tangible instrument which guaranteed human rights. The 1966 Constitution which contained entrenched Bill of Rights was suspended in 1970.

From 1970 until 1993, Lesotho was governed undemocratically. There were no periodic elections as prescribed by the 1966 Constitution. The 1970 interim authority introduced orders which administered the country. Around that time, besides interim orders, the country was governed through military dictates, 90 days detention without trial and state of emergency laws and regulations.

Citizens were arrested, searched and charged arbitrarily by the governments of the day. The study, firstly, commences with a thorough investigation of the violation of the fundamental human rights. It gives a historical background of Lesotho political landscape, legal system, Lesotho mounted police service evolution, and practical human rights violations.

The study, secondly, draws a comparative scenario between Lesotho, the Republic of South Africa, the United States of America and the United Kingdom as far as human rights violations are concerned.

The question of police use of force, whether deadly or moderate, while conducting arrest, search or seizure, has been thoroughly investigated and discussed. Human rights material, documents and instruments internationally or locally have been identified, analyzed and discussed.

Based on the findings of the research, lessons and recommendations for Lesotho have been drawn. The study argues that generally speaking, there are no adequate control mechanisms put in place to regulate police powers in Lesotho compared to other jurisdictions. It further argues that, some jurisdictions, such as the United Kingdom, the Republic of South Africa and the United States of America have some advanced police intervention programmes aimed at improving and constantly checking police work.

The Republic of South Africa in particular, has moved away from the apartheid past tendencies and legacy which saw the police use repressive means in dealing with the public unrest. For example, the principle of Parliamentary Sovereignty encouraged them to abuse their power as illustrated in the decision of Sachs v Minister of Justice[1] where the Judge had this to say: "Arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon life, liberty and property of any individual subject to its sway, and that it is the function of the courts of law to enforce (Parliament's will)." However, this scenario changed with the introduction of the interim Constitution of 1993 which ushered in a democratic majority rule in 1994. The introduction of the 1993 interim Constitution brought with it a Constitutional State founded on the supremacy of the Constitution and the rule of law as opposed to a long practiced Parliamentary rule.[2]

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1 1934 AD 11,37

2 In this regard see Delille v Speaker of National Assembly 1998 (3) SA 430(C).

Abstrak

’n Geskiedkundige en vergelykende studie oor die skending van menseregte in kriminele ondersoeke in Lesotho

Sedert die wêreldwye instelling van die beginsel van basiese menseregte tree die kwessie van skending van menseregte in kriminele ondersoeke na vore as een van die mees bespreekte sake onder akademici. Menseregte bly die kern en spilpunt waarom die kriminele regstelsel wentel.

In Lesotho byvoorbeeld, was die kwessie van menseregte van besondere belang in die lig van die feit dat daar sedert onafhanklikheidswording op 4 Oktober 1966, nooit ’n reële en tasbare instrument was wat menseregte gewaarborg het nie. The 1966 het die Grondwet die Handves van Menseregte verskans, maar dit is in 1970 opgehef.

Van 1970 tot 1993 is Lesotho ondemokraties regeer. Daar was geen gereelde verkiesings soos deur die 1966 Grondwet voorgeskryf is nie. Die 1970 interim owerheid het maatreëls ingestel waarvolgens die land geadministreer is. Gedurende daardie tyd, benewens die interim reëlings, is die land deur militêre regulasies geregeer: 90 dae detensie sonder verhoor en volgens die wette en regulasies soos tydens ’n noodtoestand. Burgers is gearresteer, deursoek en arbitrêr aangekla deur die aktiewe regering.

Die studie neem ’n aanvang met ’n deeglike ondersoek na die skending van basiese menseregte. Dit verskaf geskiedkundige agtergrond van Lesotho se politieke omgewing, die regstelsel, die ontwikkeling van die Lesotho berede polisiemag en die aktiewe skending van menseregte.

Die studie vergelyk vervolgens die voorkoms van die skending van menseregte in Lesotho, die Republiek van Suid-Afrika, die Verenigde State van Amerika en die Verenigde Koninkryk.

Die vraag na die gebruik van geweld deur die polisie, hetsy of dit tot die dood lei of gematig is, by gebruik tydens arrestasies, deursoeking en inhegtenisnemings is deeglik ondersoek en bespreek. Bronne aangaande menseregte, insluitende dokumente en ander instrumente, internasionaal of plaaslik, is geïdentifiseer, geanaliseer en bespreek.

Gegrond op hierdie gevolgtrekkings en bevindings wat die navorsing aan die lig gebring het, is aanbevelings vir Lesotho opgestel. Die studie kom tot die gevolgtrekking dat algemeen gesproke, daar in vergelyking met ander jurisdiksies, nie genoegsame beheermaatreëls in plek is om die polisie se magte te reguleer nie. Daar word verder aangevoer dat sommige jurisdiksies, soos die Verenigde Koninkryk, die Republiek van Suid-Afrika en die Verenigde State van Amerika gevorderde programme vir polisie-intervensie het wat op die verbetering en konstante monitering van polisiewerk, gemik is.

Die Republiek van Suid-Afrika in besonder, het wegbeweeg van die apartheidsera waar die neiging was dat die polisie onderdrukkende metodes gebruik het in hulle hantering van openbare onluste. Die beginsel van Parlementêre Soewereiniteit byvoorbeeld, het hulle aangemoedig om hulle magte te misbruik, soos geïllustreer deur die besluit van Sachs v Minister of Justice[3] waar die Regter die volgende gesê het: ”Arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachments it chooses upon life, liberty and property of any individual subject to its sway, and that it is the function of the courts of law to enforce (Parliament’s will).” Hierdie beginsel het egter verander met die instelling van die interim Grondwet van 1993 wat die voorloper was van die demokratiese meerderheidsregering in 1994. Die instelling van die 1993 interim Grondwet het ’n konstitusionele staat, gegrond op die oppergesag van die Grondwet en die regsorde teenoor die lank gebruikte parlementêre wetgewing, ten gevolg gehad. [4]

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[3] 1934 AD 11,37

[4] In hierdie verband sien Delille v Speaker van die Nasionale Vergadering 1998 (3) SA 430(C).

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Chapter 1

1.1 AIM OF THE STUDY

The aim of this study on Historical and Comparative Human Rights Violations in Criminal Investigations in Lesotho is twofold:

Firstly, the study aims to determine to what degree criminal investigators violate human rights of suspects during criminal investigations, either in effecting arrest, search, seizure or detention in conducting investigation of an offence. Towards this end, the study investigates confessions obtained in evidence as well as incidences of police brutality on the suspects of crime. In other words, the aim is to investigate any police abuse of power in human rights during criminal investigations.

Secondly, the study aims to analyze the measures of control established to end police violating the human rights of suspects of crime. It further determines measures taken to upgrade the skills and knowledge intended to create awareness and sensitivity in relation to promoting the Human Rights of suspects of crime. Finally, the study aims to determine whether laws, regulations, and remedies are in accordance with international policing standards.

1.2 NECESSITY OF THE RESEARCH

The importance of the topic becomes of essence in highlighting the existence of human rights abuses and/or violations orchestrated by the police as state agents and machinery. This is more so when taking into account that Lesotho for some time did not have a Constitution which guaranteed the protection of Human

Rights. It was a one party state for sixteen years from 1970 to 1986. It was under the military rule for a period of seven years from 1986 to 1993.

The Independence order which came into operation immediately before October 1966, which guaranteed the fundamental Human Rights, was suspended in 1970.[1] During this period Lesotho was plunged into a bloody *coup de'tat* and incidences of several deaths in detention, detentions without trial, 60 day detentions, political disappearances, torture in detention centers. This was devastating, serious and rife nationwide in Lesotho. Political instability, declaration of the state of emergency and the subsequent suspension of the Independence Constitution were blamed for the situation.[2]

1.3 FOCUS OF THE RESEARCH

The study will discuss the abuse of power in criminal investigations by law enforcement officers in Lesotho between the different stages and types of governments from1966 up to 1993.The victims, political detainees, refugees, women and children, were mostly suspects of ordinary crime.

1.4 RESEARCH PROBLEM

Police have engaged in unjustified shootings resulting in killings, serious injuries to victims, severe beatings, torture or man-handling of suspects of crime while effecting an arrest. There were reported acts of choking and unnecessary rough

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1 Khaketla, 1970: 208.
The Basotho National Party (BNP) was headed by Dr. Leabua Jonathan, the first Prime Minister of Lesotho in 1965, who came into power during the first democratic dispensation after independence from Britain on 4th October 1966.He was now experiencing a defeat by the Basotho Congress Party (BCP), led by Dr. Ntsu Mokhehle, the then opposition leader in the post-independence era until 1970 when the 1966 Constitution was suspended. The state of emergency was declared, restricting the movement of opposition parties. The 1970 post-independence election stirred up serious instability following the annulment of the elections. This was the beginning of the political crisis in Lesotho.

2 Makoa, 1994:5.

treatment, insults, vulgar language and humiliation. All these were not in accordance with the contemporary Human Rights trends in the four selected jurisdictions.

1.5 RESEARCH METHODOLOGY

The thesis undertakes a rigorous theoretical research approach in the sense that emphasis is placed on contributions from the literature review, books, journals, articles, conference papers, newspapers, legal opinions, case laws or any other study related to the topic under review.

1.6 VALUE OF THE RESEARCH

The study will argue that the Lesotho Mounted Police Service does not have enough control measures, hence the devastating Human Rights abuses. It will further be argued that there is no professional, transparent and accountable Police administration in the Police service to prevent Police Human Rights abuses or torture. The thesis will argue that the persistent failures to investigate and punish officers who commit human rights violations are obvious obstacles in harnessing the malaise. It will further analyze and discuss any weaknesses and/or strengths, if there are any, and it will establish to what extent such can be enhanced towards the improvement of Human Rights. It will further determine what role other institutions, such as the courts, government, non-governmental organizations, and an ombudsman can play.

A comparative study is drawn between Lesotho, the Republic of South Africa, the United States of America and the United Kingdom. It will be recommended that the steps that police departments across jurisdictions may take, should include creating and strengthening civilian review agencies, putting early warning systems into place to identify police officers who are suspected of repeated

complaints. It will also discuss the idea of creating a special prosecution office to pursue cases against officers accused of criminal conduct.

Chapter 2
Introduction

This Chapter gives a historical background of Lesotho as an independent State. Lesotho emerged from the repressive and painful past, but today it is proud of its remarkable history. The country fought relentless, bloody and fierce wars in an attempt to secure and protect its people, land and animals. Despite those trying times, a special tribute is given to its founding father Moshoeshoe the Great, who not only displayed remarkable bravery, but also provided a wide range of wisdom, diplomacy, leadership and fighting techniques which were proven most advanced, long after his death. Moshoeshoe the Great had intelligence, political savvy and idealistic vision to overcome the legacy of war, as demonstrated by his ability to defeat his enemies. Lesotho is standing proud as a Country with no tainted image. It is one of the few countries which were never colonised in the true sense of the word. The Chapter presents a detailed and rich history from a wide range of perspectives, such as the geography, legal dualism, Constitutional developments, the legal system, political developments and the evolution of the Lesotho Mounted Police Force, now the Lesotho Mounted Police Service. The Chapter further draws a comparative perspective from the four selected jurisdictions as far as Human Rights are concerned. It exposes any malpractices, misconduct and Human Rights violations by law enforcement agencies, especially the police in the four designated areas of interest.

2.1 GEOGRAPHY

Lesotho is a mountainous country covering an area of 30 335 square kilometers and wholly surrounded by the Republic of South Africa.[3] She lies between the

[3] Senaoana, 1991-2: 1.

Southern latitudes 28º and 31º and Eastern longitudes 27º and 30º.[4] Maseru, the capital of Lesotho, is located near the western border.[5] About a quarter of the total land area averaging 1 500 meters above sea level covers the lowlands in the western part of the country and constitutes the main agricultural zone.[6] The rest of the country is traversed by the Maluti Mountains which form part of the Drakensberg range.[7] The Maluti reach heights of more than 3 000 meters above sea level and are a reservoir of Lesotho's "white gold" (water), the only other resource besides human resources which Lesotho has in abundance.[8] Sengu (Orange River), one of the largest rivers of Southern Africa, has its origin in the Maluti Mountains.[9] Lesotho has an invigorating temperate climate. The four seasons are distinct, with spring, the planting season for summer crops, occurring in the months of August to October. Summer runs from November to January.[10] The most rainy seasons cover the months of February to April, while the winter months of May to July frequently bring heavy snow (typical of what we saw between the same months in August 2006) which caps the Maluti Mountains throughout the season.[11] In the lowlands, the temperature varies from a minimum of 2º or less in winter to a maximum of 32º or higher in summer.[12] The highlands experience lower range of temperatures.[13]

The major economic activities are agriculture, with arable land occupying some 13 percent of the total land area. Arable land continues to decline due to soil erosion and other factors.[14] The rest of the country is hilly, mountainous and hard to till and travel. Major parts of the countryside are reserved for grazing for sheep, goats, cattle, donkeys and other domestic animals which wander about in

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4 Senaoana, 1991-2: 1.
5 Senaoana, 1991-2: 1.
6 Senaoana, 1991-2: 1.
7 Senaoana, 1991-2: 1.
8 Senaoana, 1991-2: 1.
9 Lesotho Fifth Five Year Development Plan, 1991-2: 1.
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12 Lesotho Fifth Year Development Plan, 1991-2: 1-2.
13 Lesotho Fifth Five Year Development Plan, 1991-2: 1-2.
14 Lesotho Fifth Five Year Development Plan, 1991-2: 1-2.

the rich mountain tops. Wool, mohair, milk and meat are some of the products that are derived from these animals, although on a low scale.

2.2 LESOTHO LEGAL HISTORY

The Basotho, as the people of Lesotho are called, have their own traditions of government, which have survived in a modern form.[15] According to the custom, the family is central. A family includes an extended family as a central part of a nucleus of a clan.[16] Families who are descendants of a not-too-remote ancestor, have a common head of the family. This head is also subordinate to the head of a sub-clan, who, in turn, is responsible to the head of a clan.[17] Some clans are so large that they form tribes, while some tribes have so many people that they may be called nations.

Basotho were not always the single unified people they are today.[18] They were merely tribal fragments and groups of displaced refugees from other clans who were in the process of being built together into the present Basotho nation by their remarkable great leader and Paramount Chief, Moshoeshoe I.[19]

Poulter[20] quotes, with approval, *Thompson*,[21] who summarized the myriad problems that Moshoeshoe I faced at that time:

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15 See Maqutu,1990: 39-40.

16 See Maqutu,1990: 39-40.

17 See Maqutu,1990: 39-40.

18 See Poulter, 1981: 1. Note that according to Poulter, the underlying structure of the legal system of Lesotho really differs very little today from the arrangement established in 1884 immediately after the British Colony of Basutoland was removed from the direct administration of the Parliament of the Cape Colony of Good Hope and returned to a system of "indirect rule" administered by the British government.

19 See Poulter, 1981: 1.

20 See Poulter, 1981: 1-2.

21 See Thompson, 1975: vii.
The learned author refers to a period when under Moshoeshoe I his country was invaded by several intruders who were threatening his very existence, and these included armed coloured horsemen, French protestant missionaries, evangelizing British officials and Afrikaner pastoralists."During the middle portion of the nineteenth century a considerable amount of fighting went on in southern Africa-cattle raiding, skirmishes and a number of

> *"During his thirties, Africans who had been displaced from Natal by Shaka invaded his homeland and triggered a series of catastrophes that caused bloodshed, social, political disintegration and collapse of confidence. It was then that Moshoeshoe I emerged as a leader. Through moral influence as much as military prowess, he rallied the survivors of the wars and built a kingdom. He had scarcely begun to do so, however, when the western world impinged upon him, reaching out from the long established colony of the Cape of Good Hope".*[22]

By the late 1860's Moshoeshoe I and his Basotho people were exhausted as a result of their struggles and were on the brink of starvation.[23] They were also in imminent danger of total defeat at the hands of the Boers.[24] Then at the eleventh hour the British government stepped in and acceded to a long-standing request from Moshoeshoe I that Great Britain should protect the Basotho. This took place in 1868.[25] Having acted somewhat altruistically and realizing that the peaceful administration of Basutoland might well prove both frustrating and rather costly, the British quickly handed the territory over to the Cape legislature for it to administer.[26] This move soon proved to be disastrous, because firstly, the Cape authorities sought to intervene directly in the affairs of the Basotho, divesting the hereditary chiefs of their most important powers, prerogatives and interfering with the traditional principles of land tenure.[27] Secondly, they endeavoured to apply to

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full scale battles." "Much of this fighting took place between different African factions, but the Boers and the British were very deeply involved as well." See Thomson,1975:vii.

22 See Poulter, 1981: 1.

23 See Poulter, 1981: 2.

24 See Poulter, 1981: 2.

25 See Poulter, 1981: 2.

26 See Poulter, 1981: 2.He further stated that: "The combination of these measures, not unnaturally caused the greatest resentment among the Basotho, but it was sufficient to spark off the Gun War of 1880-81.The Basotho refused to be disarmed and refused to pay the licence fee imposed. It came as no surprise, therefore, when two years later, the Cape government asked to be relieved of the burden of administering Basutoland, as a result, Britain resumed full responsibility for running the territory through the British High Commissioner who was also vested with legislative powers in 1883."

27 See Poulter, 1981: 2.

the Basotho their general policy of disarming all Africans and attempted to register the customary marriages by law.[28]

2.3 LESOTHO LEGAL DUALISM

Regulation 12 of Proclamation No. 2B[29] issued by the High Commissioner on 29 May 1884 represented the foundation stone of legal dualism in Lesotho.[30] It provided firstly, for the continued operation in Basutoland (as Lesotho was then called) of the Cape Colonial common law which had been applied to the territory during the period of annexation to the Cape in 1871 up to 1883.[31] Secondly, it provided for the retention of the customary law as administered by the Chiefs. The General Law Proclamation section 2 read:

"In all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope; provided, however, that in any suits, actions, or proceedings in any Court, to which all parties are Africans, and in all suits, outcomes or proceedings whatsoever before any Basotho Courts, African law may be administered."

It provided further that the laws set out in the schedule hereto and Acts passed after the 29th day of September 1884, by the Parliament of the Cape Colony shall not apply to the said territory.[32]

The words, "for the time being" gave rise to disputes as to whether the reception was timeless or there was never a cut-off-date.[33] It could further mean the living law as it was then administered in the Cape of Good Hope.

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28 See Poulter, 1981: 2.
29 See Proclamation No. 2B Regulation 12 of 1884.
30 See Poulter, 1981: 2-3.
31 See Poulter, 1981: 3.
32 See Poulter, 1981: 3.He further observed that: "It will be noticed that the received law is referred to as the 'law for the time being in force' in the Cape Colony. In 1884 this undoubtedly meant the Roman-Dutch common law."
33 See Sanders, 1985: 48.

Provisos were, however, added retaining the customary law in suits between Africans and specifying the extent to which the Cape Colony legislation was to apply in Basutoland.[34] The provisos provided that where the nature of the disputes affected Africans, then the customary law must apply to such disputes.
The Independence Order in Council section 4(1) provided as follows:

"The existing laws should as from the appointed day be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Lesotho Independence Act 1966 and this Order".[35]

The provisions of section 4(1) of Lesotho's Independence Order in Council[36] provided for the protection of the fundamental Human Rights and Freedoms. It becomes clear, therefore, that Lesotho's legal dualism is comprised of what is now referred to as Roman Dutch law and Sesotho customary law.

2.4 LESOTHO LEGAL SYSTEM

2.4.1 The Constitutional advance and the 1965 Elections

The 1961 Constitutional Review Commission, appointed by Moshoeshoe II, came out with its final report in 1963.[37] The Commission had been charged with the task of drawing up a draft Constitution which would come into force just prior to independence.[38] Having canvassed the opinions of a wide spectrum of the public, the Commission recommended that the Westminister style of two chamber parliament be used to govern Lesotho.[39] This Constitutional model

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34 Africans: was the term used to depict black people.
35 See Order No.1172 of 1966.
36 See Order No.1172 of 1966.
37 See Gill, 1993:214.
38 See Gill, 1993:214.
39 See Gill, 1993:214.

enjoyed widespread public support.[40] The upper house, or senate, would be appointed and consists of 22 Principal Chiefs as well as 11 members chosen by the King.[41] It had limited powers to delay legislation, but real power would lie with the lower house.[42] The lower house was to be directly elected from 60 constituencies, and it was from this body that the prime minister and his cabinet were to be chosen.[43]

The first Constitution came into being in 1960.[44] The Constitutional conference was held in London from April to May 1964. It resulted in a new transitional Constitution being approved by Royal decree in January 1965.[45] The control over defence, foreign affairs, finance and public service was left in the hands of Great Britain.[46]

In 1965, Lesotho held the first general elections, which brought about universal suffrage for Basotho who were preparing themselves for independence from Britain in 1966. The 1966 Constitution[47] provided for periodic elections to be held every five years. It also provided for the King as a Constitutional monarch without political authority, which was vested in an elected parliament. The head of government was the prime minister.

In January 1970, the 1966 Constitution was suspended by the then ruling Basutoland National Party. Democracy was restored in 1993 ushering in the 1993 Constitution which left the king without any executive authority and preventing him from engaging in political affairs. Chapter II of the Lesotho

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40 See Gill, 1993: 214.
41 See Gill, 1993: 214.
42 See Gill, 1993: 214.
43 See Gill, 1993: 214.
44 See Khaketla, 1971: 10.
45 See Khaketla, 1971: 10.
46 See Khaketla, 1971: 10.
47 See Lesotho Independence Order 1966:1.

Independence Order 1966 section 4(1)[48] provided for the fundamental Human Rights and Freedoms including, but not limited to: (a) the right to life, (b) the right to personal liberty, (c) freedom from inhuman treatment, (d) freedom of movement and residence, (e) freedom from slavery and forced labour, (f) freedom from arbitrary search or entry, (g) right to fair trial, (h) freedom of expression, (i) freedom of peaceful assembly, (j) freedom of association and many others. The 1993[49] Constitution is the embodiment of the Human Rights Act[50] which has since been repealed when the Constitution came into being. The 1993 Constitution is a replica of the 1966 Constitution in most respects.

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48 1966: 4(1). The reason for the suspension of the Constitution was that the then ruling Basutoland National Party was defeated by the then Basutoland Congress Party which had gained an overwhelming majority of votes in the 1970 elections.
The question of the King in Lesotho has been a thorny issue from time immemorial since prior to independence. The main reason was that the Basutoland National Party (BNP) argued that the King as the constitutional monarch without executive powers would not be appropriate because he was the head of state, while on the other hand the Basutoland Congress Party (BCP) contended that the King with executive powers would be used for political purposes since at the time the office of the King was identified with the BNP, the churches and white people who were not supported by the BCP.

49 Lesotho Constitution 1993: 14.

50 Human Rights Act No. 24 of 1983.
In 1983 the Human Rights Act was enacted for the first time after the 1966 Constitution had been suspended in 1970 which had a Bill of Rights which guaranteed and safeguarded the rights of individuals. When the 1993 Constitution came into place in 1993, it incorporated provisions of the 1966 Constitution together with the 1983 Human Rights Act provisions as far as the following were concerned:

(a) The right to life;
(b) The right to personal liberty;
(c) Freedom of movement and residence;
(d) Freedom from inhuman treatment;
(e) Freedom from slavery and forced labour;
(f) Freedom from arbitrary search and entry;
(g) The right to respect for private and family life;
(h) The right to fair trial of criminal charges against him and to a fair determination of his civil rights and obligations;
(i) Freedom of conscience;
(j) Freedom of expression;
(k) Freedom of assembly and association;
(l) Freedom from arbitrary seizure of property;
(m) Freedom from discrimination; and
(n) The right to equality before the law and the equal protection of the law.

See section 4(1) of 1966 Constitution No. 1172.

The advent of Independence on October 4th 1966 did not affect any momentous change in the basic content of the laws of the country.[51]

Thus:

"The newly independent state of Lesotho took over the existing laws that had previously been in force in Basutoland, though they were in future to be construed with any modifications, adaptations, qualifications and exceptions required to bring them into conformity with the independence legislation, namely the Constitution and the order in council to which it was scheduled".[52]

2.4.2 Courts

2.4.2.1 Customary Law Courts

The customary law Courts arrangement for Lesotho was governed by the following Proclamations:

(i) *Subordinate Court Proclamation*[53]

(ii) *Native Court's Proclamation*[54]

(iii) *High Court Proclamation*[55]

In terms of section 9 of the Native Court's Proclamation,[56] it was provided that the application thereof should not be repugnant to justice, morality and

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51 Palmer and Poulter, 1972: 41.

52 Palmer and Poulter, 1972: 41 See Cape Act No.12 of 1871.

53 Subordinate Court Proclamation No. 58 of 1938.
This legislation provided for the criminal law and procedure for Basutoland at the time. The main features were provisions for prosecution at public instance, section 7.
Private prosecutions, section 14. Prescription of offences, section 24. Arrests, section 25 and search warrants, section 50 etc. Note that the Criminal Procedure and Evidence Act No. 9 of 1981 is a carbon copy of the 1938 one in many respects, such as those mentioned.

54 Native Court Proclamation No. 62 of 1938.

55 High Court Proclamation No. 57 of 1938.
This proclamation provided for the establishment of the High Court for the Territory of Basutoland and note that this legislation was later incorporated into the 1978 High Court Act.

56 See Proclamation No. 62 of 1938.

inconsistent with any law in the country. The Basotho court practice and procedural rules of 1961 provided that the proceedings in those courts should be the same as those in the magistrates' courts, which were known as subordinate courts.

These customary courts became the courts of record, keeping records of evidence in registers to which the public had access and could obtain this by paying a nominal fee.[57] There is also a Subordinate court's order,[58] legal notice (amendment) rules[59] followed by a Subordinate court (amendment) Order.[60]

2.4.2.2 High Court

Chapter XI of the Lesotho 1993 Constitution creates the Judiciary. The 1993 Constitution section 118 reads as follows:

"(1) The judicial power shall be vested in the Courts of Lesotho which shall consists of:

(a) A Court of Appeal

(b) A High Court

(c) Subordinate Courts and Court-Martial

(d) Such tribunals exercising a judicial function as may be established by Parliament.

(2) The Courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law".

The High Court has unlimited jurisdiction and was established by section 2(1) (a) of the High Court Act[61] which hears cases resulting from common law offences.

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57 See Lehohla, 2004: 6.

58 Subordinate Order No. 9 of 1988.

59 Legal Notice (Amendment) Rules No. 10 of 1980.

60 Subordinate Courts (Amendment) Order No. 6 of 1998.

61 See Act No. 5 of 1978.

Thus: *"Offences falling under the jurisdiction of High Court include, but not limited to murder, rape and treason".*[62]

The High Court therefore is the Superior Court of record. It is also an Appellate Court in criminal appeals from all subordinate courts including the Commissioner's Court. The High Court Act section 8 reads:

"(1) The High Court shall be a Court of Appeal from Subordinate Courts in Lesotho with full power:

(a) To reverse or vary all judgments, decisions and orders civil or criminal of any Subordinate Courts.

(b) To order new trial of any case heard or decided in the Subordinate Courts and to direct if necessary that such new trial shall be heard in the High Court.

(c) Impose such punishment as in its opinion ought to have been imposed at the trial".

2.4.2.3 Appeal Court

The highest court in Lesotho is the Court of Appeal. The Court of Appeal Act[63] section 3 reads:

"(1) The Court of Appeal for Lesotho shall continue to exist and shall have jurisdiction and powers as are conferred on it by this Act or any other law." Practically, the Court of Appeal is the highest Court which hears appeals from civil or criminal matters emanating from the High Court and other Subordinate Courts.

The Appeal Court Act section 9(3) provides that:[64]

"The Court should, if it allows an appeal against –

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62 See Lehohla 2004: 30.
63 See Act No.10 of 1978.
64 See Act No.8 of 1985: 1.

(a) The conviction, either quash the conviction or direct a judgment and verdict to be entered or if the interests of justice so require, order a new trial; and

(b) The acquittal, either reverse and vary judgment to a verdict of guilty and pass such sentence as provided by the law".[65]

2.5 HISTORICAL DEVELOPMENT OF THE LESOTHO MOUNTED POLICE SERVICE

The Basutoland Mounted Police Force was founded on the 11th of October 1872. When Lesotho attained independence in October 1966, the force retained the name Lesotho Mounted Police Force. In 1986[66], after the military *coup d'etat,* the force was renamed the Royal Lesotho Mounted Police Force.[67] Major General Metsing Lekhanya became head of Government while executive powers were vested in King Moshoeshoe II, as head of state. The force remained the Royal Lesotho Mounted Police Force until 1993 when Lesotho returned to civilian rule. The Basutoland Congress Party took power after 30 years of undemocratic governments in Lesotho. It was renamed the Lesotho Mounted Police Service later in1998 at the advent of the newly enacted Police Act.[68] The word 'force' was replaced by the word 'Service' in the same year. The Lesotho Mounted Police Service prior to 1986 and 1998 was governed by the Police Force Order[69] and the Lesotho Mounted Police Force Regulations.[70]

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65 See Appeal Court Act No. 8 of 1985.

66 See Mahao, 1991:16. At independence the departments that were in place administered by the white administration were finances, foreign affairs and defence, but it should be noted here that for Lesotho, then Basutoland, the Police Mobile Unit was used for the purposes of defence as there was no standing army in the modern formation.

67 See Lesotho Order No.1 of 1986.

68 See Act No.7 of 1998.

69 See Police Order No.26 of 1971.
Lesotho Mounted Police Regulations no.24 of 1972. Note that section 24 of the present Lesotho Mounted Police Service Act no.7 of 1998 is similar to section 7(1) (a) of Police Order of 1971 in that it provided that the police service shall be deployed in and throughout Lesotho to uphold the law, to preserve the peace, protect life and property, to detect and prevent crime, to apprehend offenders, bring them to justice and for associated purposes. Compare that with the South African position where section 206(3) of 1996 Constitution provides for political responsibilities of the Minister of Safety and

2.5.1 The Lesotho Mounted Police Order 1971[71] and the Powers of the Lesotho Mounted Police Force

The powers of the Lesotho Mounted Police force under the Police Order were governed by section 7 (1) (a) of the Order which provided that:

(a) *"The force shall be deployed in and throughout Lesotho for preserving the peace, for the prevention and detection of crime, and for the apprehension of offenders against peace, and for the performance of such duties and shall be entitled to carry arms.*

(b) *Members of the force shall have all the powers and duties which are conferred and imposed upon them by any law in Lesotho."*[72]

It is to be noted that there was no formal defence force as it is known today. The police duties prior to the enactment of the Police Order were exercised by the police mobile unit. Under the Police Order, the police were deployed by the minister in times of war or any other emergency in the defence of Lesotho, according to section 8 of the Police Order. Police Regulations' section 23 prohibited members of the force from being members of any political associations or any trade unions or any associations, the object of which is the control of or influence on pay, pensions or conditions of service of the force. The regulations mainly dealt with force discipline and the command of the force was vested in the commissioner of police according to section 5 of the Police Order of 1971.

The 1998 Police Act[73] has, however, retained most of the provisions of the 1971 Police Order and Police Regulation of 1972. Section 66(1) of the 1998 Police Act

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Security as amongst others, to monitor police conduct, to oversee the effectiveness and efficiency of the police service, to promote good relationships between the police and the community, to assess the effectiveness of visible policing. See also Reynecke and Fourie, 2001: 50.

71 See Police Order No. 26 of 1971.

72 See Police Order No. 26 of 1971.

prohibits police officers from being members of or affiliates to political parties or trade unions. There were no new police regulations for some time. This means that the Police Service relied on the 1971 regulations until they were repealed.

2.5.2 Prohibition of Party Politics / Trade Unionism under section 66(1) of the Lesotho Mounted Police Service Act[74]

The Lesotho Mounted Police Service Act[75] imposes several prohibitions in the following manner:

"A Police officer shall not be a member of, or affiliated to, any political party or any organization, club, association or group of a political nature.

Subject to subsection 3 of the Act, a police officer should not be a member of –

(a) Any trade union (whether registered, incorporated or not) or anybody associated or affiliated to a trade union;

(b) Any body or association, the object of which, or one of the objects of which, is to control or influence the conditions of service or employment of any trade or profession; and

(c) Any body or association the object of which, or one of the objects of which, is to control or influence the conditions of service of police officers."[76]

The Police Act, however, established an association for members of the police service through sub-section 68(1) with the sole object of considering questions

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73 See Act No. 7 of 1998. The new Police Staff Association was established in terms of section 66(3) of the Police Act. It was formally launched in 1999 by the then Minister of Home Affairs the late Honourable Mophsoatla Mabitle. Its first chairperson was Superintendent Thamae Caswell Liphapang Lenka.

74 See Act No. 7 of 1998. Note that members of the Lesotho Mounted Police Service are not allowed to join any Union or federation like it is the case in South Africa and the United Kingdom.

75 See Act No.7 of 1998.

76 See Act No.7 of 1998.

relating to the terms and conditions of service of members of the police service. To establish procedures for dealing with any grievances of members of the police service. This is done in consultation with the Police Negotiating Council.

Section 4 of Lesotho Mounted Police Service Act[77] provides for duties and powers of the police service such as, maintenance of law and order, preservation of peace, protection of life and property, prevention of crime (a new phenomenon in modern democratic policing), detection of crime and apprehension of an offender and to bring them to court as stated above.

2.5.3 Police Authority[78]

Section 3 of the Police Act[79] provides for the establishment of the Police Authority which is a new institution in the Act. It was not provided for in the 1971 Police Order. The Police Authority is the Minister of Home Affairs who is charged with the responsibility to maintain an efficient and effective police service for Lesotho. The Police Authority maintains the efficiency of the police service through the Police Directorate.[80]

The Police Act introduces a number of changes which are geared towards improving service delivery to the public and accountability. Section 15 of the Act introduces the objectives for policing. The Police Authority and the Commissioner of Police are required to draw up these objectives at the beginning of each financial year. Section 16 calls for the development of the policing plan, spelling out priorities for policing for that year. Besides, the policing plan, section 17 of the Act[81] mandates the Commissioner of Police to compile and keep under

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77 See Act No.7 of 1998.

78 See section 3 of Police Act No.7 of 1998.

79 See Act No.7 of 1998.

80 See section 3(2) of Police Act No.7 of 1998.

81 See section 17 of Police Act 7/1998.
The principle of detection and prevention of crime introduces a pro-active style of policing nowadays as opposed to the old fashioned reactive policing which was a counter proactive style of policing. Further note that although the mention of arms is not there,

review a development plan whose aim is to set out the strategic needs of the police service over a five year period. Section 18 requires an annual report to be tabled before parliament.

2.5.4 The Lesotho Mounted Police Service Vision, Mission Statement and Values

2.5.4.1 The Lesotho Mounted Police Service Vision[82]

The police service has developed a vision which accords well with all the professional service organizations in the world. The current vision, as propounded by the present strategic plan reads:

"By 2016, the Lesotho Mounted Police Service shall be a professional and accountable police service, providing safety and security in partnership with the community with particular emphasis on crime prevention, reduction and detection".

2.5.4.2 The Lesotho Mounted Police Service Mission Statement

The Lesotho Mounted Police Service mission reads thus:

"We are committed to providing safety and security to all. In partnership with the community and other stakeholders, we prevent crime, reduce crime, disorder, fear of crime and enhance the rule of law, whilst respecting and protecting the human rights of all as fundamental to a professional police service. Both the vision and mission have been diversified to incorporate new innovations such as human rights, partnership with the community and other stakeholders and these

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the Lesotho Mounted Police Service, in order to execute the day to day operations and duties, still carry arms, especially while confronting violent crimes, such as robbery, theft, home-breaking and car theft, etc.

82 Lesotho Mounted Police service strategic plan 2006-2009: 9.

innovations accord well with the democratic centralism principle of community participation and consultation in developing strategic management and prevention of crime and its vestiges".[83]

The innovations in terms of vision and mission seem, by far, to surpass the original vision and mission statements which were falling short of prevention, accountability and protection of fundamental Human Rights. In fact, these concepts were conspicuously missing in both the 1971 and 1972 Police Order and Regulations.[84] It will be recommended that these commitments should not pay lip-service as is usually the case with most documents which tend to be gathering dust without implementation.

2.5.4.3 The Lesotho Mounted Police Service Values[85]

The Lesotho Mounted Police Service values read thus:

"We will recognize and appreciate the service by the Lesotho Mounted Police Service staff in the execution of police duties and the trust the community has

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83 Lesotho Mounted Police Service Mission Statement.

84 Note that these values were decided in September 2005 during the strategic planning process workshop held at the Lesotho Police Training College. It would seem that the main purpose of the strategic plan was to give effect to the strategies put in place for the efficient and effective service delivery to the Lesotho public at large. See Strategic Plan 2006-2009:3

85 Lesotho Mounted Police Service strategic plan 2006-2009:16. These values have been set by the Minister of Home Affairs in consultation with the Commissioner of police. They have been set in order to improve and enhance the good work, efficiency and effectiveness of the police service as a standard working charter which calls for amongst others, how to handle and treat victims of crime, respond to public reports, to ensure good standards, i.e. cleanliness, punctuality at work, scene of crime and emphasizes partnership with the community. The Lesotho Mounted Police Service changed from force to service in 1997, when the Lesotho government through the Ministry of Interior (now Home Affairs) came up with a white paper, the object of which was to identify three basic strategic goals for proper policing; reduction in crime, improvement of service to the public and local co-operation as well as maximizing an efficient management of police resources. The document further identifies police priorities in consultation with the public, such as the name change from force to service, from reactive policing style to pro-active policing style, which was a new strategy which was more preventative.

placed on us as the professional police service whilst guided by the following values:

1. *Trust: we promote an atmosphere of trust within and outside the Lesotho Mounted Police Service.*
2. *Accountability: we are accountable to the community we serve, led by value for money principles and shall be responsible for all our actions.*
3. *Ethical conduct: we shall be governed by the principle of Human Rights and ethical behaviour in the performance of duties.*
4. *Impartiality and fairness: we shall adhere to the policies and avoid elements of biasness.*
5. *Minimum force: we use only enough force to subdue a threat.*
6. *Honesty and integrity: we shall not engage in the acts of corruption, nor shall we conduct ourselves in a dubious manner, but we will treat our customers with compassion, loyalty and remain above reproach in all our actions.*
7. *Our professional reputation: strive to maintain a professional service, endeavour to train, develop and deploy our human resources properly and to serve every person impartially.*
8. *Openness and transparency: we give feedback to the community, we serve in all policing activities, are approachable and accept constructive criticism to maintain good practices.*
9. *An organizational climate of mutual trust and respect: create a climate of mutual trust and respect by working in partnership with the community.*
10. *Constitutional and Human Rights: we will protect the lives of people and property.*
11. *Community: we shall strive to do policing in consultation with the community".*[86]

These fundamental concepts of vision, mission and values are critical in modern policing which enhances democratic policing all over the world. They underpin

[86] Lesotho Mounted Police Service (LMPS) Strategic Plan 2006-2009:16-17.

the very essence and spirit of democracy, accountability and transparent police activity in the police handling of both suspects and victims of crime. It remains to be seen in the chapters ahead whether the Lesotho Mounted Police Service has lived up to what it has set out to do through these ideologies of strategic goals and objectives. We will determine whether crime, crowd management in times of riots, demonstrations, processions, industrial action of a major magnitude, the Lesotho Mounted Police Service has been ready to act in a proper manner. It is worth mentioning here that it is for the first time that the Lesotho Mounted Police Service developed a Service Charter[87] embracing the practical implications of vision, mission and values of the Police Service. The Service Charter reintegrates the mission and values, but adds standards in terms of quality police service to customers, crime prevention, reduction of fear of crime, public order and reassurance of public peace. The Lesotho Mounted Police Service commits itself to punctuality, cleanliness, rapid response to crime, dedication in attending scenes of crime and handling exhibits of correspondence, telephone records and other material.

2.5.5 Some Important Milestones in the History of the Lesotho Mounted Police Force

The Cape Colonial administration established the Basutoland Mounted Police Force in October 1872.[88]The force was comprised of Basotho and was headed by the Chiefs' sons.[89] Its main tasks were to maintain law and order. To help in the collection of tax.[90] These tasks were performed by the Chiefs and Magistrates.[91]

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87 Lesotho Mounted Police Service Charter 2001-2006.
Further note that the police service has a long standing working motto and slogan: A Policeman, A Helper and A Friend – translated to mean Lepolesa, Mothusi, Motsoalle in the Sesotho language.

88 See Lehlabaphiri, 1992: 5.

89 See Lehlabaphiri, 1992: 5.

90 See Lehlabaphiri, 1992: 5.

91 See Lehlabaphiri, 1992: 5.

1878 White Officers Commissioned into the Basutoland Mounted Police Force.

1879 Police were used in the war against Chief Moorosi.

1880 During this time, the police duties were increased to include the prevention of liquor abuse, its unlawful storage and trafficking.[92] They were used to patrol border posts for stock theft and vagrancy. To limit free movement of people from the Free State, Natal and Cape Province.[93] They were used in the Gun War.

1914/1939 Some members of the Basutoland Mounted Police were conscripted to fight in the two World Wars by the British Colonial administration.

1919 Force numerals were introduced in the force to constitute part of a member's identity besides his actual name. All the districts were issued with numbers in the following order:

Maseru	1	-	200
Leribe	201	-	350
Butha-Buthe	351	-	400
Peka	401	-	450
Berea	451	-	550
Mafeteng	551	-	700
Mohale's Hoek	701	-	850
Quthing	851	-	950
Qacha's Nek	951	-	1050

1929 The practice of issuing medals was institutionalized by the High Commissioner's Notice No. 2 of 1929.

1946 The Criminal Investigation Division (C.I.D.) was formed.

1946 A new Department of prisons was formed. Before then the responsibility to handle prisoners was in the hands of the Police.

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92 See Lehlabaphiri, 1992: 5.

93 See Lehlabaphiri, 1992: 5.

1950 A contingent of Basotho Police was sent to Botswana to intervene in a dispute over Chieftainship.

1953 A special branch, which became known as the Intelligence branch, was formed to deal with matters of a political nature.

1953 A Signal Branch was formed. The purpose of this branch was to bring about efficiency in communication among various police posts within the country.

1964 The Stock Theft Unit was formed.

1970 The Policewomen Department was formed. The first police women were enrolled on 1 August 1970.

1972 The Force was militarized so that civilian police ranks were abolished and military ranks adopted. This was per the Legal Notice No. 40 of 1972.

1974 The Police Community Relations Branch was formed.

1977 Both the Police Mobile Unit and Intelligence Branch separated to form the Lesotho Paramilitary Force and National Security Service respectively. The Lesotho Paramilitary Force was later to be known as the Lesotho Defence Force.

1992 The Community Services Department was formed. The following Units were to fall under this new Department:

a) Police Community Relations
b) Press Section
c) Crime Prevention Unit
d) Protocol

1993 The Force was reorganized so that it fell directly under the Ministry of Home Affairs. Prior to that, the Force fell under the Ministry of Defence.

1996 A new Department of Police was established within the Ministry of Home Affairs. The purpose of this Department was to assist the Minister of Home Affairs in all matters relating to policing in

Lesotho. It was a link between the Commissioner of Police and the Minister.

1998 Police Act No. 7 was enacted.

2.6 GROSS HUMAN RIGHTS VIOLATIONS IN THE POST-INDEPENDENT LESOTHO: THE PERIOD FROM 1965 TO 1970

Lesotho attained independence on the 4th of October 1966.[94] Lesotho had a written Constitution which incorporated a Bill of Rights from Great Britain.[95] The 1966 Constitution[96] was suspended in 1970. As a result, the electoral process and the Bill of Rights were rendered useless.

When British colonies attained independence with the written Constitution, in the 1960s, the debate was always whether or not a Bill of Rights should be incorporated into these instruments.[97] Some States rejected the Bill of Rights and notable examples were Ghana[98] and Tanzania (previously known as Tanganyika before its independence).[99] Ironically, some states into whose Constitution the Bill of Rights was incorporated, was subsequently rejected as part of a reaction to Constitutional rule.[100] In Malawi for example, Constitutional means were employed to remove an effective Bill of Rights and in Southern Africa today Botswana stands out as the only Black ruled state which has held onto its original Constitution.[101]

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94 See Maope, 1986: 18-19-23-24.
95 See Maope, 1986:18-19.
96 See Lesotho Independence Order No. 1172 of 1966.
97 See Maope, 1986: 18-19.
98 Ghana was one of the first African states which obtained independence from Britain and celebrated its 50th anniversary in March 2007.
99 See Maope, 1986: 18-19.
100 See Maope, 1986: 18-19.
101 See Maope, 1986: 19.

2.6.1.1 Participation in Government

Lesotho went to the polls on 29th April 1965.[102] The Country was divided into sixty constituencies.[103] The Basutoland National Party[104] (BNP), the Basutoland Congress Party[105] (BCP) and the Marema Tlou-Freedom Party[106] (MFP) which were the three parties involved in the preparation of the Lesotho Independence Constitution, contested for those sixty parliamentary seats. The elections results were won by the Basutoland National Party by a narrow margin of thirty-one seats, while the Basutoland Congress Party came close second with twenty-five seats and the Marema Tlou- Freedom Party got only four seats. The president of the Basutoland National Party, Leabua Jonathan, became the first prime minister of Lesotho.

2.6.1.2 Lesotho Political Party Structure and Ideology

The Political situation in party conflicts had shown a remarkable stability over time, both ideologically and with regard to the support given to them.[107] Since 1958, when party politics was first formally allowed, there have been two major power blocks opposing each other throughout Lesotho in almost every village.[108]

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102 See Khaketla, 1971: 11.

103 Since 1993 there were 80 constituencies, 79 of which were won by the Basutoland Congress Party and one by the Basutoland National Party after 29 years of undemocratic rule under the BNP. In 1998, the 1993 Constitution was amended to allow multi-party participation and introduced proportional representation. There are now 120 seats in all in Parliament.

104 The Basutoland National Party (BNP) was under the leadership of Chief Leabua Jonathan who was conservative, anti-communist and was pro-chieftainship. It was formed in 1958.

105 The Basutoland Congress Party, then the Basutoland African Congress in 1959, which changed at independence, was under the leadership of Ntsu Clement Mokhehle who was a radical, pro-communist activist, former member of the ANC and pan-African Congress of South Africa. He was against the chiefdom and its tendencies, anti-traders and anti-whites.

106 The Marema Tlou -Freedom Party was a merger between the Marema Tlou Party formed in 1957 and the Freedom Party formed in 1962 becoming Marema Tlou- Freedom Party, led by Edwin Leanya and Khaketla respectively (MFP). Mokhehle became prime minister in 1993, 29 years after the 1965 general elections.

107 See Strom, 1986: 39.

108 See Strom, 1986: 39.

The parties were the radical-oriented Basutoland Congress Party and the more conservative party, the Basutoland National Party and a liberal-oriented Marema Tlou Freedom Party, which was standing ideologically between the two main blocks.[109] Two minor parties worth mentioning, because of their importance in relation to the Basutoland Congress Party and the Basutoland National Party (BNP) at the time, were the Communist Party of Lesotho[110] (CPL), operating during 1961 to 1970 mainly within the Basutoland Congress Party (BCP) and the United Democratic Party[111] (UDP). The latter was formed in 1967 and made up a legally articulated opposition in the interim Parliament appointed by Leabua Jonathan in 1973.[112]

Ntsu Mokhehle, the then leader of BCP, was a staunch pan-African opposed to the British rule at the time.[113] He was accusing chiefs, white businessmen and white missionaries of forming and funding small political parties such as the Basutoland National Party and Marema-Tlou Freedom Party respectively. [114] The other point of controversy which was hotly debated at the time was the Constitutional power of the Monarch as against those of the Prime Minister.

The 1966 Independence Order, enshrined in it a Constitutional Monarch model, framed alongside the British Westminister Constitutional set up.

The contention about the then future King of Lesotho, King Moshoeshoe II who was young at the time, was whether he should become a Constitutional monarch without any executive powers or become an executive monarch,[115] exercising the functions in relation to the defence, public service or foreign affairs. Before independence, the BNP supported a view that the King must be given powers to

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109 See Strom, 1986: 39.
110 The Communist Party of Lesotho was under the leadership of Matje.
111 The United Democratic Party was under the leadership of Edwin Leanya.
112 See Strom, 1986:39.
113 See Machobane, 1990: 282.
114 See Machobane, 1990: 282.
115 The typical Monarch with executive powers is Mswati III while his prime minister is a mere administrative head, executing functions as handed down to him by the king.

control security forces. The BCP, on the other hand, advocated for the position that the King should be just a Constitutional Monarch with no executive powers and that such powers should be vested in the prime minister. The Marema-tluo Freedom party enjoyed the popularity of the young Paramount Chief, Moshoeshoe II.[116] Currently the king exercises no executive functions; he remains a Constitutional monarch and a head of state.[117]

2.6.1.3 The Suspension of the 1966 Constitution in 1970

As we have already seen, the Basutoland National Party was a minority government, since the party received a lower margin in the election results. As *Maope*[118] puts it, the BNP gained:

"Just over 41% of the popular vote… therefore, its rule became very difficult in the few years up to 1970. The government was always worried about acts of subversion and attempts to overthrow it and laws were passed in order to suppress any possible breakdown of law and order."[119]

The second post independence election was held in January 1970.[120] Basutoland Congress Party (which was an opposition party in 1965) won the elections with a comfortable majority of 36 seats. Basutoland National Party won 23.[121] As the results were being publicly announced over the government radio,

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116 See Strom, 1986: 41.

117 See Lesotho Constitution 1993 section 44(1).

118 See Maope, 1986: 23.
Maope is of the opinion that the Basotho National Party (BNP), which had advocated for a constitutional monarch in Lesotho, with the office of King having less executive powers including the control of the armed forces was now vigorously calling for the full fledged executive powers of the King. Unlike the Basutoland Congress Party which from the beginning called for the constitutional monarch who did not exercise any powers whatsoever. He attributes the BNP's new stance of change of policy to the fact that the BNP had realized that the experience of power had taught them that absolute control of government was essential in order to remain in power, particularly in contemporary Africa.

119 See Maope, 1986: 23.

120 See Maope, 1986: 24.

121 See Maope, 1986: 24.

the Prime Minister Leabua Jonathan declared a state of emergency and suspended the Constitution 'pending the drafting of a new one'.[122] The Prime Minister justified his action on the grounds that the elections were marred by acts of violence committed against the supporters of the BNP.[123] There emerged a Council of ministers which became the legislature. In the absence of an elected parliament, the Council passed the office of the King's Order of 1970.[124] The Order provided that the king would henceforth act according to the advice of the prime minister. If he failed to do so, the prime minister could perform that act which would be deemed to be the act of the king. The effect of the law was to take away all executive power from the King.[125]

From 1970 to 1973 Lesotho was ruled by the Council of Ministers that was in fact the former cabinet which was performing legislative functions.[126] In 1973 this body passed a law, the Lesotho Order 1973,[127] 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.[128]

The effect of the State of Emergency was that some opposition members were arrested and detained. Among them were Ntsu Mokhehle and Gerard Ramoreboli, BCP leader and deputy leader respectively. The allegations levelled against the opposition party, BCP, was that there was a communist plot to overthrow the government of Leabua Jonathan by force of arms and that there were acts of rape and arson committed by the BCP supporters during the election.

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122 See Maope, 1986: 24.
123 See Maope, 1986: 24.
124 See Act No. 51 of 1970.
125 Note that section 91(2)(4) of the 1993 Lesotho Constitution still requires the King to act in accordance with the advice of the Prime Minister.
126 See Maope, 1986: 25.
127 See Lesotho Order No.16 of 1970. Laws of Lesotho 1973:13.
128 See Maope, 1986: 25.

2.6.1.4 The Legal Implication of the Suspension of the 1966 Constitution

A clear analogy of the net effect of this issue is well extrapolated by *Mahao*[129] who observes that the abrogation of the Constitution and the subsequent seizure of power were clearly illegal acts. The Courts were seized with the matter in *Moerane and nineteen others v R*.[130]

In this decision, the appellants had been convicted by the High Court on charges of high treason. The state alleged that they had plotted to raid certain police stations in the country with the aim of seizing arms to overthrow the government. The appellants argued that the suspension of the Constitution and the subsequent illegal seizure of power by chief Leabua Jonathan on the 27th day of January 1970 was unlawful. They alleged that as a result, his government had no *Majestas.*[131]

Relying on the doctrine of efficacy, the court held that:
"The result of the 1970 decrees, accompanied by the government acting in accordance with them, was undoubtedly a revolution".

The Constitution of 1966 had therefore been replaced by the 1970 Order in terms of which the government had *Majestas*. The High Court conviction was therefore confirmed. The Moerane decision was followed by *Khaketla v The Prime Minister and others*[132] *and Mokotso & Others v King.*[133]

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129 Mahao, 1991:10.

130 Lesotho law reports 1974-75-LLR:212.

131 *Majestas* is a Latin word meaning legitimacy to govern or legal authority. See also R v Christian 1924 AD on page 135 Wessels J had this to say: "*Prima facie* a state which has the full and exclusive right to make laws for its subjects and inhabitants and enforce these laws, possesses internal *majestas* in relation to its subjects and inhabitants. It is by virtue of this *majestas* that it compels obedience to its laws and respect for its political authority." See also Hunt and Milton, 1970: 23.

132 See CIV/APN/187/85.

133 See CIV/APN/384/87.

In Mokotso v King, a notice of motion for a number of declarations and consequential orders was made. It petitioned the court to recognize the 1966 Constitution. The application pleaded for the restoration of government pursuant to the 1966 Constitution. The Court held that it was a notorious fact that the new military government was in effective control throughout Lesotho. Thus, the government had ruled for two years using the three limbs of government, namely, *the* executive, the legislature and the judiciary. It inherited all obligations and responsibilities from the previous government.

2.6.1.5 Incidences of Human Rights Violations in 1966 against Freedom of Peaceful Assembly and Gathering

Section 4(1) (k) of the 1966 Constitution provided for the freedom of peaceful assembly and gathering to every individual person without any discrimination. This meant that any encroachment on the freedom of this nature could not be performed arbitrarily. The 1966 Constitution required checks and balances to be put in place to oversee that the fundamental freedom was protected fully. If there were any limitations, then such had to be done reasonably in the interest of public peace and security of the country and individuals. Prior to 1966, there were no known or recorded human rights violations.

In September 1966, just 22 days after independence[134], Chief Leabua Jonathan passed several Bills in the 1965 Parliament and these included[135]:

(a) Emergency Powers Act[136]

(b) The Internal Security (Public Meeting and Procession Bill) Act.[137]

(c) The Printing and Publishing Bill 1966.[138]

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134 Note that Lesotho received independence from Britain on the 4th October 1966 after nearly a hundred years of British rule.

135 See Khaketla, 1971:142.

136 See Act No.14 of 1966.

137 See Act No.15 of 1966.

(d) The Societies Act.[139]

The passage of the Bills sparked a storm of protests from the people, with the Basutoland Congress Party and the Marema Tlou-Freedom Party leading the protests throughout the country. The protests meeting resolved that a petition against the proposed Bills be sent to the King and to the British government representative in Lesotho.

The police[140] came out in numbers to attempt to stop the procession, but the procession went according to plan. Chief Leabua ignored the protests or petitions and went ahead to pass the Bills as he had the necessary majority in parliament at the time.

2.6.1.6 Contents of the Emergency Powers Bill[141]

The emergency Powers Bill empowered the prime minister to declare a state of emergency whenever he thought there was a need. It also gave him power to detain, remove and exclude people from Lesotho.[142] The petition of the opposition parties pointed out that the Bill was inconsistent with the purport and spirit of section 4 of the Constitution of Lesotho which guaranteed immunity from expulsion.

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138 It should be noted that when the Constitution was suspended in 1970, Chief Leabua Jonathan outlawed the propaganda of communist ideals and political party activities, especially the Lesotho Communist Party which was so vocal about the Marxist-Leninism theories. The Printing and Publishing Law was used in this regard. Note that the Emergency Powers Bill was actually the Internal Security Bill which became an Act in 1966, prohibiting meetings and processions. The printing and publishing Bill and Societies Bill, prohibited newspapers and political groups from functioning. The Internal Security (public meetings and procession) Act 1973 enabled peace officers, thus Police, Chiefs and Headmen absolute discretion to allow public meetings and procession in the exercise of their power to maintain law and order.

139 See Act No.20 of 1966.

140 The Lesotho Mounted police Service at the time was called the Police Mobile Unit (PMU) under the white Command.

141 This was clearly expressed by sub-section 7(1) of the Lesotho Constitution.

142 See Khaketla, 1971:143.

The Internal Security Bill repealed all previous legislation dealing with the holding of public meetings. This was a direct infringement of the individual right to freedom of assembly as it was left to the minister to decide at his own discretion, whether or not to allow a public meeting or a procession.[143]

The Printing and Publishing Bill empowered the police or any official so authorized by the minister to intercept, open, examine or confiscate any mail or matter passing through the post office.[144]

It becomes clear that the Bills directly flew in the face of democratic principles in relation to freedom of expression provided by the 1966 Constitution. They were used to suppress the minority view which was expressed through the opposition parties' representatives at the time. Since the King had no executive powers under the Constitution, there was little, if anything he could do to save the situation, except to complain like the opposition parties.

2.6.1.7 Thaba- Bosiu[145] Public Gathering: The First Bloodshed by Police

At the end of December 1966, two months after independence, the King arranged a public gathering at Thaba Bosiu.[146]

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143 In 1993 when the democratic dispensation was re-introduced after nearly 30 years of undemocratic rule, one of the first amendments by the Basutoland Congress Party parliament (with a majority of 79 seats to one for the Basotho National Party) provided itself an early opportunity to amend the Internal Security Act No.24 of 1984 in September that year. They enacted Public Meetings and Processions Act No. 2 of 1993 which allowed individuals and groups to demonstrate and have peaceful assemblies under the limited police supervision and control.

144 See Khaketla 1971:143.

145 Thaba Bosiu is a mountain in Lesotho which was used as a fortress by Moshoeshoe the Great during lifaqane (infecane) wars, and Anglo-Boer wars and gun wars around 1880. And this is the place where Moshoeshoe I and II have been laid to rest and it still serves as a national monument, historical and heritage site today.

146 See Khaketla, 1971:144.

People attended in their numbers to listen to the King. This time the bone of contention was section 76(4) and (5) of the Independence Constitution which the people wanted repealed.[147] Although the government disapproved of the public gathering arranged by the King, he nevertheless continued with the Pitso[148] despite the prime minister's disapproval.

Section 76(4) was in relation to the powers of the King.[149] The prime minister decided to stop the King's gathering at Thaba-Bosiu, using the police force. The prime minister ordered the Police Commissioner[150] to stop the public gathering by all means. The police went to Thaba-Bosiu armed with rifles and sub-machine guns. They set up roadblocks just outside Maseru to the north-east, along the road leading to Thaba-Bosiu.[151]

On arrival at Thaba-Bosiu, the Police Mobile Unit attempted to disperse the gathering, but the people refused to disperse. The police started shooting at the people. Ten people were killed in the upheaval that ensued and several others were injured.[152]

This was the first incidence of police interference with the peoples' Constitutional right to gather, assemble and express themselves. Following that incident, several people including Ntsu Mokhehle were arrested.[153] The prime minister summoned the College of Chiefs[154] with a view to discipline the King for disobeying his clear undertaking that he should not hold the public gathering and

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147 See Khaketla, 1971:144.

148 This is a Sesotho word depicting a public gathering. It is usually a consultative forum where people actually participate in the gathering and ask questions about any issue of national concern directly. It can be equated to pure democracy as compared to a representative democracy.

149 See Khaketla, 1971:144. See also section 92(1)(2) of Lesotho Constitution No.5 of 1993.

150 At the time Clement Leepa was acting Commissioner of Police after the force was handed to Lesotho at independence in 1966 from British command.

151 See Khaketla, 1971: 146.

152 See Khaketla, 1971: 147.

153 See Khaketla, 1971: 147.

154 Note that the chieftainship Act no. 22 of 1968 was enacted and came into force.

for colluding with the opposition parties to overthrow his government. The result was that the King was placed under house-arrest.[155]

2.6.1.8 The Internal Security (General) Act[156], Powers of Search and Seizure by Police.

The Act governed dangerous weapons. Section 45 of the Act regulated the control of possession and sale or supply of dangerous weapons. It provided that a person who manufactures, or is in possession of such dangerous weapons or

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155 See Khaketla, 1971:147.

156 See Act No.24 of 1984.
The Internal Security Act was mainly introduced to tighten the security laws. To give the police more powers to act on the illegal acts of the offenders under the state of emergency, such as acts of sabotage, high treason, subversive activities and/or acts of sedition. The Internal Security Act section 45 stated as follows:
Dangerous weapons
45 (1) A person who manufactures dangerous weapons is guilty of an offence.
(2) A person who is in possession of a dangerous weapon is guilty of an offence unless he is able to prove that such weapon is possessed by him for a lawful purpose.
(3) A person who sells or supplies any dangerous weapon is guilty of an offence unless he is able to prove that he had good grounds for believing that the person purchasing or acquiring it requires it for a lawful purpose.
(4) A person guilty of an offence under this section is liable to a fine of five hundred Maluti or to imprisonment for a period of one year or to both.
(5) Nothing in this section prohibits the possession of a dangerous weapon solely as a trophy, curiosity, or ornament, if authorized thereto in writing by the commissioner or an officer delegated by him. Section 46 relating to Police Powers read as follows:
(1) Whenever a member of the Lesotho Mounted Police force has reason to believe that any dangerous weapon is being kept in or upon any land, premises, vehicle or any other means of transport, such member is authorized to enter upon and search such land or premises or search any vehicle or other means of transport at any time without warrant and to seize any dangerous weapon found thereon and the owner or occupier of any such land, premises or the owner or person in charge of such vehicle or other means of transport shall be deemed to be the person in possession of any dangerous weapon so found.
(2) A member of the Lesotho Police force is authorized to arrest without warrant a person who commits or attempts to commit an offence under section 48 and section 49 or whom he has reasonable grounds to suspect of having committed such offence.
(3) Whenever a member of the Lesotho Police force is in doubt as to whether any object is a dangerous weapon within the meaning of this Act, it shall be lawful for him to take possession thereof, and keep it in safe custody until such time as the Commissioner or an officer delegated by him issues a directive as to its disposal. Note that sections 48 or 49 deals with training in making or use of weapons, firearms, explosives, incendiary and corrosive devices and possession of explosive, incendiary or corrosive with intent to endanger life or cause injury of damage respectively.

sells such weapons is guilty of an offence and, if found guilty, shall be liable for a fine of five hundred Maluti or rands or to imprisonment for a period of one year or both.

The 1984 Internal Security Act[157] further authorizes the police under section 46 to search without warrant. They could search a person if they had a reason to believe that any dangerous weapon was kept in or upon any land, premises or vehicle. What is surprising is that under these sections, there is no mention of reasonableness, so that the police in Lesotho were given sweeping powers. In as much as one does not support an illegal possession and manufacturing of dangerous weapons, the process of search and seizure must be limited to reasonable circumstances.

The 1984 Internal Security Act[158] prohibited subversive activities such as sabotage, interference with essential services, unlawful organizations, information and contribution towards subversive activities. It further provided for the detention or investigation of subversive activities in section 13(1). The Police Order gave a member of the police force power to arrest without warrant, a person whom he reasonably suspected to be involved in subversive activities without warrant. This was for a period of more than 14 days after his arrest. Although a reasonable test is put in place, the period of 14 days is too long for holding persons on mere suspicion. The Police Commissioner under section 13(1) is given power to further temporarily detain such a person. It remains only reasonable to vest the powers to detain persons to the courts of law by way of an application for the warrant of either search, seizure or arrest of a person, so that, such powers are not left open in the discretionary hands of the Commissioner of Police.[159]

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157 See Act No. 24 of 1984: 129. Note that the word reasonableness has not been defined by the Act and, I recommend that it be defined in the future in order to narrow down its generality and discourage its abuse.

158 See Act No. 24 of 1984: 119.

159 In *Tanki v Lebamang Ntisa* CIV/T/108/76, the Court made a successful civil action ruling against several police officers and not government for malicious arrest. It is humbly

2.6.1.9 Death in Detention, Disappearances and Habeas Corpus

The first deaths in Lesotho detention centres occurred in November 1981 under the Internal Security Act.[160] The first victim was one Setipa Mathaba. According to Amnesty International report,[161] no inquest into his death was held until December 1982. A second death which occurred in September 1982 was that of

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submitted that this may go a long way in sending a clear message that delinquent police officer's actions will not go down unpunished. They should not be let off the hook with impunity so long as they perpetuate assaults or torture to suspects of crime.
In *Monare v Taylor* 1967-76 LLR 13, it was held that the government did not control the police officer in the exercise of his discretion to effect the arrest. Then only the officer and not the government would be liable. I humbly submit that this might compromise the principle of vicarious responsibility if at all the actions of officers were justified under the circumstances, i.e. in self defence or private defence.

160 Maope, 1986: 47.

161 Amnesty International, Annual Report 1982: 50. Note that the term **"***Disappearance*" has two basic elements (1) An abduction by state officials or other agents, (2) by an official's refusal to acknowledge the abduction or to disclose the detainee's fate. The importance of the second element was stressed by the United Nation's General Assembly in 1978, when it expressed concern about the "persistent refusal of competent authorities to acknowledge that they hold such persons in their custody". The Declaration on the Protection of All Persons from enforced Disappearance explicitly provides that:"In addition to such criminal penalties as are applicable, enforced disappearance render their perpetrators and state authority which organize, acquiesce in, or tolerate such disappearances liable under civil law." See United Nations Resolution on Disappearance/158 Document A/33/45 of 1978 read with General Assembly Resolution 33/173 of 1978 Dec. See also Stephen and Ratner 1996:74.
See Strydom, Pretorius and Klinck, 1997:335 who give a full text meaning of the Declaration on the protection of All persons from enforced Disappearance which reaffirms the United Nation's stance through Article one to the effect that:" Any act of enforced disappearance is an offence to human dignity and as such it is condemned as a grave and flagrant violation of human rights and the fundamental freedoms". See General Assembly Resolution 47/33 adopted on 18th December 1992. Setipe Mathaba was a political detainee and there was evidence of torture and ill-treatment.
Maqutu, 1990:46 traces the Internal Security (public meetings and procession) Act from 1966 when it was first enacted. It gave peace officers (Police, Chiefs and Headmen) power to keep order and not to stop meetings. It was repealed by a new internal security (Public Meetings and Processions) Act of 1973 which was enacted to give police absolute discretion to allow public meetings and processions in the exercise of their power to maintain law and order. This legislation was amended later in 1974 in order to suppress the opposition Parties from rioting and demonstrating against the suspension of the constitution in 1970 after the Basutoland National Party had lost elections at the polls. The 1974 internal security legislation provided for preventative detention for individual interrogation for up to sixty days. The Lesotho internal security law was copied from the South African Internal Security Act No. 51 of 1977 with the results that people were detained in custody for long periods of time without trial with access to a magistrate once a week and thus the courts were not allowed to look into the circumstances surrounding the detention.
Maqutu, 1990: 46-47.

Sophia Makhele.[162] The police reported that she allegedly shot herself with a police firearm left in her detention cell and no inquest was held. A number of mysterious deaths also occurred in 1981. In June 1981 Odilon Seheri, a prominent citizen vanished after attending a meeting.[163] His burnt body was discovered about a week later in the mountains of Lesotho.[164] On September 4, the home of Ben Masilo, a critic of government, was attacked. Masilo escaped unhurt, but his grandson was killed in the attack.[165] On September 7, Edgar Motuba (an editor of one local newspaper, *Leselinyane la Lesotho*, a church paper that was critical of the government) together with his visitors, Oriele Mohale and Lechesa Koeshe, were taken away by a group of men who said they were policemen.[166] Their bodies were discovered the following day.

Amnesty International Report[167] attributes these kinds of disappearances which were popular in the Americas to four categories:

(a) *Those recovered after a short time – the authorities never admit responsibility for this kind of short-term disappearance.*
(b) *Those transferred to an official person after the initial period of disappearance.*
(c) *Those murdered, and whose bodies were found.*
(d) *Those who disappear indefinitely and are believed to be dead or in secret detention camps.*[168]

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162 See Maope, 1986:46-47.
163 See Maope, 1986:46-47.
164 See Maope, 1986:46-47
165 See Maope, 1986:46-47
166 See Maope, 1986:46.
167 Amnesty International Report,1979:45. The first Human Rights violations which led to deaths in detention were more popular and frequent in the 1980's than the years before, hence the Amnesty International report is merely giving a comparative perspective pertaining to America at that time. See also Shelton, 2005:179 while complementing the view that the European Commission on Human Rights expanded the mandate of the working group to include monitoring state compliance with the Declaration on the protection of All persons from enforced Disappearances adopted by the United Nations General Assembly Resolution 47/133 of 18 December 1992, which refers to amongst others, prompt and effective judicial remedy, access to detention centres, the right to *habeas corpus,* the duty to investigate, prosecute and punish perpetrators.

In all the disappearances cases, members of the Police Mobile Unit (PMU) were implicated, especially in the case of Edgar Motuba. Prior to his death, the Lesotho Evangelical Church attempted to meet government about the threats to his life, but to no avail.[169]

In Sello v Commissioner of Police[170] the detainee in this case had been arrested for the purpose of interrogation concerning some subversive activities of which the police believed she had some knowledge. After approximately two days of periodic interrogation, she fainted and collapsed. She was moved to hospital under police custody. After her discharge, she was placed back in detention. There was an application that was entered on her behalf asking the respondents to show cause why the detainee should not be released or to establish that they had not assaulted her, or that they had not interrogated her during her stay in hospital. The petition sought a private interview with her before a medical doctor. The respondents argued that the medical certificate and a statement obtained by a magistrate were not admissible in the proceedings, on the grounds that they had been obtained in contravention of the then prevailing security legislation.

The Court held that the Internal security legislation had not established any presumption of the lawfulness of the detention and that the onus was on the police to establish, on a balance of probabilities, that the arrest and detention were lawful. It also held that the legislation had not taken away the right of detainees to contest the lawfulness of their detention; nor had it purported to take away the right of the courts to pass on that legality. The Court held that:

"Unless … parliament says so in clear and explicit language, there is never a presumption in favour of invading the individual's rights".[171]

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168 See Maope,1986:47.
169 See Maope,1986:46.
170 1980 (1) LLR 158 at 162.
171 *Sello v Commissioner of Police* 1980 (1) LLR 158 at 162 (A)

The Court further disapproved infringements on the rights of individuals thus:
"It is the main function of the courts in our kingdom to protect the rights of an individual. It is equally the function of parliament. If these rights are infringed or curtailed, however slightly,… our Courts will jealously guard against such an erosion of the individual's rights. Any person who infringes or takes away the rights of an individual must show a legal right to do so. The rights of an individual being infringed or taken away, even if a legal right is shown, needs the courts to scrutinize such legal right very closely. If it is an Act of Parliament, the courts will give it the usual strict interpretation in order to see whether the provisions of the said Act have been strictly observed. If the courts come to the conclusion that the provisions of an Act are not being strictly observed, then the detention of the detainee would be illegal and the courts will not hesitate to say so".[172]

Since *Sello,* the Courts have continued to condemn police methods which have unduly infringed the human rights of citizens.[173] Even more, the courts have shown themselves willing to look behind the tactics employed by police to ensure that the police action which nominally was within the law, was not in fact being used to circumvent the law.[174]

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172 1980 (1) LLR, at p.169. *Habeas Corpus***:** This is an English remedy which refers to the legal proceedings instituted by a petitioner for a writ whose object is to bring a person in government custody before the Court. Most commonly to force the person to be released unless the government can prove the legality or constitutionality of the arrest or detention. See Conde,1999:53. Schabas,1991:102 observes that section 10 (c) of the Canadian Charter on Human Rights of 1970 has entrenched this historic writ of habeas corpus as a classic remedy against unlawful detention of an individual. He further notes that, in recent years, the scope of *habeas corpus* has been enlarged to include the writ of *certiorari in aid*, which is a technique permitting the Court to look behind the warrant and review the decision-making process in rendering a detention order unlawful. The learned author is quick to add that it is particularly useful in cases where the formalities of detention are in order and where the warrant of committal appears valid on its face, but where there have been irregularities in the hearing, or possibly no hearing at all. It would further seem that this kind of writ with *certiorari in aid,* has been used to challenge revocation of parole and detention of illegal immigrants. See Shelton 2005:47 who discuses a similar remedy in Spanish speaking and Latin American Countries known as *Amparo* which he claims to be broader than *habeas corpus* in that it includes deprivation of Constitutional rights, while in Roman Dutch Law such a remedy is known as *Interdictum de homine libero exhibendo* with a similar effect.

173 See Neff, 1986: 23.

174 See Neff, 1986: 23.

In *Letsie v Commissioner of Police and Solicitor-General*[175] concerning the repeated detention and the release of a person, the court in effect stated that the police were playing a "cat-and-mouse game" of releasing the detainee as soon as legal proceedings appeared imminent in order to avoid having to pay damages to detainees whose treatment had been in violation of the procedures set down in the security laws.

In *Makakole v Commissioner of Police and Solicitor-General*[176] this decision offered a classic example of the extreme powers of the police in the security area 'spilling over' into investigation of what were ordinary criminal offences, that is a suspected car theft in this case. The court had this to say on the matter:

"I think we are here witnessing a classic example of an abdication of powers … and chaos taking over. What an ordinary citizen fears most is in fact taking place: an abuse of the law is now at work".[177]

The law is being used, not for what it was meant, but for something else. Ordinary police investigating methods which of necessity are difficult and tiresome have been abandoned and the much feared strict detention law is being readily substituted. Citizens are detained, not because they have committed or are about to commit offences relating to the security of the state, but because a citizen is suspected of being a petty car thief.

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175 See Civil Application No.32 of 1982 (CIV/APN/32/82. In Lesotho, when parties seek to approach the Court for a writ of *habeas corpus*, a civil application is filed with the concerned court, usually the magistrate's court depending on the crime charged or suspected to have been committed by the said suspect. These civil applications usually start from the magistrate's court, High Court and may end up in the Appeal Court for final determination.

176 See CIV/APN/54/82.

177 See CIV/APN/54/82.

The 1982 Internal Security legislation in effect reversed *Sello* in two ways:

Firstly, it precluded any magistrate's statement to rely upon since the role of the magistrate has been replaced by that of the 'advisor' who is appointed by the minister in charge of security. This is obviously a serious hindrance to open, unbiased and fair judicial practice. Secondly, the second change, for the worse, made by the 1982 Internal Security legislation was section 40(4), which stated that a person who is sent to a hospital while under either an interim custody order or a detention order shall be deemed to still be in custody.[178]

The Courts in Lesotho at the time attempted to provide an interpretation of the rigorous security legislation by taking the fact of detention into account in assessing the credibility of any evidence which the detainee might eventually give. This example comes out clearly in *Rex v Sesing and Others*[179] in which the court stated somewhat critically:

"It would be unreal for any court in Lesotho to pretend that it was unaware of the political situation as it is at present".[180] The Court went on to state:
"Persons detained under this legislation cannot hope for release unless they satisfy the police that they have given all the information required. It cannot be a pleasant experience for anyone to be so detained and such a person may well wish to avoid its recurrence. A court must take into account, in evaluating the testimony of witnesses, that all or any of these factors may be present in their minds when they give evidence".[181]

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178 See Neff, 1986:24.
179 See CIV/T/20/80-1.
180 See Neff, 1986:25.
181 See Neff, 1986:25.

The 1982 Internal Security Act facilitated arrests and detentions. It therefore provided a fertile ground for torture, "disappearances" and secret detention centers.[182]. The Court went on thus:

"Even though access to detainee was open to an 'advisor', instead of magistrates, by December 1982 no such advisors had been appointed, yet the law came into force on September 10, 1982.[183]

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 and there was no provision that magistrates would be 'advisors'. This would imply that all such detainees were being held illegally in the absence of 'advisors'. Forty-two, not 60 days, was the period of detention. Detention was divided into 3 stages:

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 by the Minister.*[184]

Each stage took 14 days. This law was open to abuse, because it was too general and it could have been limited to the discretion of the Police Commissioner, not a minister as the latter was a political appointee.

Section 38(2) of the Internal Security Act[185] provided that:
"*A person who was in detention under an interim custody order in stage 2 and in respect of whom no detention order in terms of stage 3 was made within 14 days should be released."*

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182 See Maope, 1986:76.
183 See Maope, 1986:58.
184 See Maope, 1986:58.
185 See Act No.24 of 1982.

He might only be re-arrested for a fresh set of facts. This was an attempt to stop the harassment of a detainee as a partial protection.[186] Policemen were able to harass detainees by means of initial detentions.[187] In *Letsie v Commissioner of Police and Another,*[188] the past experience shows that the police would release a detainee to frustrate individual proceedings, only to re-detain him immediately thereafter.

In *Matete v Minister in Charge of the Police,*[189] the police would simply ignore to inform the magistrate about the existence of a detainee. Another decision to illustrate police torture was *Rex v Mphulanyane and Others*[190] where one man vanished from the village and his younger brother and other villagers were charged with the murder of that person. All the persons alluded to were tortured and a confession was extracted from the wife of the deceased person.

In *Rex v Molupe and Another*[191], the accused, the victim of 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 noted by the court thus:
"Both accused are acquitted as there was no suggestion that the alleged treatment of the accused was investigated and those responsible were not brought to trial".

Section 40 (4) of the Internal Security (General) Act[192] provided that a hospital would be regarded as a detention centre if a detainee was being kept there. It is

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186 See Maope, 1986:59.

187 See Maope, 1986:59.

188 See *CIV/APN/32/82* unreported.
This was concerning the repeated detention and release of a person where the police would release him as soon as legal proceedings appeared imminent and only to be rearrested later and this was done in order to avoid civil damages.

189 See *CIV/APN/30/82* unreported.
The detainee was detained twice and in each case, there seemed to be no detention Order authorizing his detention. The magistrate was not allowed to visit him and he was thus kept in custody for a period exceeding 60 days.

190 See *CIV/T/10/1977*.

191 *1980 (1) LLR 112*. Molupe had allegedly made a statement to a magistrate against his will and was threatened by the police that if he did not repeat what the police had taught him, he would be severely assaulted and eventually killed.

my opinion that this was a possible act of torture. If a detainee was hospitalized for whatever reason, he should be left to recuperate and thereafter he could be interviewed.

In *Modisane v Commissioner of Police*[193], on the 17th March 1980, the petitioner applied to the court for an order in the nature of a writ of *habeas corpus*[194] in respect of one Theko Letsie. She alleged that she was a common law wife of Letsie with whom she lived at lower Thamae in the Maseru district. The petitioner alleged that at about 4.00pm in the afternoon of 10th March 1980, 3 members of the criminal investigation department came to her shop at Sebaboleng and took Letsie away. She alleged that she was told that Letsie was required for questioning. Letsie was allegedly charged with unlawful possession of a Lesotho passport. It was promised that Letsie would appear before a magistrate, but this never happened. The petitioner said that enquiries made by her at the Maseru police station failed to establish the whereabouts of her husband. On the 17th March, an order was made by *Rooney J*., requiring the respondents to produce the body of Theko Letsie by the 20th March 1980.The *rule nisi* ordered the respondents to show cause why he should not be released from custody forthwith. In substance, the order required the respondents to produce Letsie, or if that was physically impossible, to explain where he was.

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192 See Act No 24 of 1982.

193 *1980 (1) LLR 149-228.*
This decision marks one of the series of decisions in which Lesotho Courts began to frown seriously upon the arbitrary handling of suspects, accused persons and indeed strived to restore the dignity of an individual.

194 Sharpe, 1976: 125.
Besides tracing the historic background of this remedy he concludes that quite apart from the question of using *habeas corpus* to review preliminary proceedings before magistrates, there is an important matter of its use to control police practices in arresting, detaining and questioning suspects. He submits that, in this way, *habeas corpus* is, and probably always has been, much more a threat than a remedy. A person detained by police can theoretically apply for *habeas corpus* from the moment he is taken into custody. He may complain that he has been improperly arrested, and that he has been held for an unreasonable length of time without being charged or that the authorities have failed to bring him before a magistrate.

The learned justice held that in order for the application of the *habeas corpus* to succeed, the applicant must show that the person is unlawfully detained. The respondents must show that the detainee is lawfully detained. The Court held further that once there was a lawful detention, the circumstances of the person's arrest and capture are irrelevant.

The Court then supported *Mofokeng CJ in Rex v Tlali*[195] as follows:
"As I have stated, the crown were unable to call the doctor who did the post-mortem examination because he had left the country. He did not give evidence at the preliminary enquiry either. I however, called for his report and it was made available to me. No reliance could be placed on anything in it which could strengthen the crown's case, but it is an entirely different matter if there is anything in it favourable to the accused. It is not evidence, but ignoring it altogether would mean that the court, whose function it is to sit in judgment upon the liberty … of men, should enlarge its conscience".[196]

It is my considered view that the court in these cases put much emphasis on the liberty of an individual who is detained. This was an attempt to ensure that such liberties and freedoms must not be trampled upon perpetually without the suspect or the accused being given an earliest opportunity to see the magistrate for determining whether or not he has been held up in accordance with the law.

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195 See CIV/T/27/1974 unreported p. 17. In this decision the court quoted with approval the decision in the English case of *Rex v The Secretary of State for Home Affairs Ex parte O'Brien 1923 (2) KB* at 375. Regulation 14B made in August 1920, under the Restoration of Order in Ireland Act, 1920. Power was given to the Secretary of State to order internment in the British Islands of any person suspected of acting or having acted or is about to act in a manner prohibited in the restoration or maintenance of order in Ireland. It was thereby provided that the person so interned should be subject to the like restrictions and might be dealt with like a prisoner of war except so far as the Secretary might modify such restriction. The suspect was arrested in London under the order and was conveyed to Dublin, where he was interned. The Court had to determine among others, whether application for a writ of *habeas corpus* directed to the Home Secretary was a proper procedure under the circumstances. The Court held that "The duty of the Court is clear. Where the liberty of a subject is in question, the Court must enquire closely into the question whether the order of internment complained of was or was not lawfully made". The Court therefore declared the order illegal and bad in law.

196 *Rex vs Tlali Civil Application No. 27 of 1974.*

One tends to agree with the learned judge in *Sello* that the Act was indeed a drastic one on the individual freedom. Parliament had deemed it fit to curtail the liberty of an individual in order to protect that of the state. On the other hand, it should be equally understood that Parliament had deemed it fit to give an individual police the authority to determine citizens' liberties if the former was of a certain opinion. The detained person should not be left at the mercy of that individual to determine his fate as to when he will be allowed to regain his liberty.

It is a trite principle of our law that an Act of Parliament is always given strict interpretation. The other important decision in this regard is *Seshophe v Commissioner of Police*[197] where the applicant had asked the court to release her son from police custody. Seshophe had been purportedly detained pursuant to provisions of section 12 of the Internal Security (General) (Amendment) Act.[198] The Act provided amongst others that a detention period could go up to 60 days.

The Court held that:
"It is true that the interest of the state should also receive equal importance, but at the same time an individual has the right to determine whether his rights are legally interfered with and once the courts are satisfied that, that is so, that is the end of the matter."[199]

In *Petlane v Rex*[200], the accused firstly remained at the charge office for a period of a week without being asked any questions. He spent the next four weeks in

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197 See *CIV/APN/175/1979* unreported.
It was further held on p. 170 that the legislature has not taken away the detainee's right to challenge whether his detention was in fact in accordance with the provisions of the Act.

198 See Act No. 1 of 1974.
This was one of the drastic Acts, especially section 12 which provided for 60 day detention of an individual, but it must be borne in mind that the fact is that, whatever the case, the legislature had not purported to take away or exclude the court's right to investigate any legality or otherwise of the provisions of the Act.

199 *Seshophe v Commissioner of Police* CIV/APN/175/1979.

200 *1971/73 LLR* 85 on p. 91.
In that decision the Court cited with approval the decision in *R v Douglas Zwane* and *other,* Swaziland Law Reports 1970 – 1976 p. 234 E-F where the Court held that: "In my opinion to subject a person to interrogation by some eight policemen over a period of

police custody with no charge put to him, nor did he appear before a magistrate. The court held that there was no explanation furnished to the court for this unreasonable delay.

In *Theko v Commissioner of Police*[201]**,** The accused was arrested and detained on the 4th June 1990 under the provisions of the Internal Security (General) Act 24 of 1984. An urgent application for *habeas corpus* was brought on his behalf. The court issued a *rule nisi* which called upon the respondents to show cause why on the 11th June 1990 the detainee should not be released from custody. The High Court had dismissed an application for *habeas corpus* on the grounds that the suspicion of the police officer making the arrest was based on reasonable grounds. It was held that the arrest and detention of the appellant were lawful. The appellant was detained under the provisions of the Internal Security (General) Act[202] and was released after a considerable delay as stated above. The Court of Appeal[203] had this to say:

"There is no difference between the detention of one day, one week or one month. There is a clear and onerous duty on those exercising their powers in terms of the Act to exercise them with an acute awareness of the impact on the rights of the citizen affected".[204]

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thirteen days is calculated to break his resistance and induce him to make a confession which he would not otherwise make of his own volition".

201 *Theko v Commissioner of Police*, C of A CIV/APL/27/1988/ Court of Appeal 1990-1994.

202 Court of Appeal CIV/APN / No. 27 of 1988/LAC (1990-1994) 13.
In this decision justice *Ackermann JA* cited *Minister of Law and Order v Parker 1989 (2) SA* 633 (A) where the judge held that in principle the period of detention is of essence where a person has been deprived of his liberty through detention his fundamental right has been compromised.

203 Maseko's decision also involved the contravention of Act No. 24 of the 1984 Internal Security (General Act). Section 13(1) thereof provided for the arrest and detention of persons for subversive activities. The section clearly gives a member of the police force to arrest without warrant a person whom he reasonably suspects to be a person involved in subversive activities. The 1984 Act further provided that such a person may be detained for a period of not more than 14 days after his arrest, but it should also be noted here that the period of further temporary detention may be done by the order of Commissioner of Police under section 14 of the same Act.

204 *Theko v Commissioner of Police* C of A CIL/APN/27/1988 or C of A 1990-1994 at 13.

The Court anxiously scrutinized the exercise of these administrative powers to ensure that they are not abused and that the rights of the citizens are protected. It was on the basis of this that the Court of Appeal reversed the decision of the court *a quo* which had dismissed the application of *habeas corpus* by allowing the appeal on the ground that the respondents had failed to discharge the onus of showing that the continued detention of the appellant was lawful and that no grounds whatsoever existed as to why the appellant was deprived of his liberty from the 8th June until on the 13th June.

The Appeal Court cited with approval *Maseko v Attorney General* and *Commissioner of Police*[205] *by Ackermann JA* where the learned justice held that: *"It is trite law that when the liberty of an individual has been restrained or limited and the person whose liberty has been so affected, challenges the validity of such restraint or limitation, as the appellant in this case, he has challenged his arrest and detention by the police, the onus of establishing the unlawfulness thereof is on the arrestor or the person who caused the arrest"*.[206]

The previous Internal Security legislation was more virulent and drastic than the 1984 Security Act in that for example section 12 of the Internal Security (General) Amendment Act[207] prohibited access to relatives including cases of bringing food and clothes for a detainee. In Moloi v Commissioner of Police[208] the court was

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205 C of A (CIV/APN/ No. 27 of 1988 / LAC (1990-1994) 13.
This decision also involved *habeas corpus* under Act No. 24 of 1984 section 13(1) which required that an arrested person be informed of the reason for the arrest and in this decision the officer who arrested Maseko did not know the reason for the arrest and as such the appellant was not informed in substance of such reason. The Court of Appeal allowed the appeal. It set aside the orders of the Court *a quo* made on the 6th of December 1988. The following order was substituted:
1. The applicant is to be released forthwith from custody and detention.
2. The interim court order authorizing reasonable access to the applicant is confirmed.

206 *Maseko vs Attorney General and Commissioner of Police* 1990-1994 Lesotho Appeal Court 13.

207 No. 24 of 1984.
CIV/APN/203/81 or 1980 (1) LLR 158-9.
In *Moloi v Commission of Police* 1980 LLR 158 the Court cited with approval *Sigabo v Ministry of Defence and Police* 1980 (3) SA *535* where the learned judge had concluded thus: "Where an official in the exercise of his functions denies that he has

seized with the provisions of section 12(3)(a) and 12(4) of the Act which provided as follows:

"3(a) Notwithstanding anything to the contrary in any law contained, any senior officer as defined in the police order 1971, may from time to time without warrant arrest or come to arrest any person whom he suspects upon reasonable grounds of having committed or intending or having intended to commit any offence under this Act, or any offence involving damage to property of the state or any person, or who in his opinion is in possession of any information relating to the commission of any offence or the intention to commit any such offence and detain such person or cause him to be detained in custody for interrogation in connection with the commission of or intention to commit such offence at any place designated by the Commissioner, until such person has in the opinion of the Commissioner replied satisfactorily to all questions at the said interrogation, but no such person shall be so detained for more than 60 days, unless rearrested on any of the grounds in this section contained.[209]

(b) No person shall, except with the consent of the Minister or Commissioner have access to any person detained under this subsection; provided that no less than once during each week such person shall be visited in private by a magistrate of the first call.[210]

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acted unlawfully or unreasonably and alleges that he has acted within the limits of the powers conferred upon him by a statute and that he has reason to believe the existence of the state of affairs which the statute requires must exist before the powers may be exercised, but declines to state what his reasons are for that belief, or what the circumstances are which rendered his belief reasonable, that may in a proper case give rise to an interference that the powers conferred by statute were improperly exercised and that the reasonable belief which was a condition for their exercise did not exist".
As a result therefore, the Court held that the exercise of state privilege may have an unforeseen result that the state is thereby unable to establish that its officers acted in accordance with the law. See also *R v Phaloane* 1980 (2) LLR 260.The appellant, the then Head of Lesotho Police Criminal Investigations, was indicted in the High Court on a charge of murder of one Bassie Mahase who was in Police custody. He was shot several times with a 9mm pistol.

209 *Moloi vs Commissioner of Police 1980 LLR 158-159.*

210 *Moloi vs* Commissioner of Police 1980 LLR 158-159.

(c) *No court shall have jurisdiction to order to release from custody of any person so detained, but the minister may at any time direct that any such person be released from custody." It is surprising that this section is able to allow a member of executive, i.e. the minister power to release and yet the proper custodians of human rights being the courts of law have been barred to order such release.*[211]

It should further be noted that the Courts, in an attempt to rescue the plight of the individual's rights, allowed even *ex parte* applications to seek a *rule nisi* calling upon the respondents to produce the body of an individual, dead or alive. This was the situation in *Letsae v Commissioner of Police*[212] where the court insisted that the total lack of answering satisfactorily to the allegation leveled against it. As it behoves a machinery of the state mostly connected with the liberty of its citizens, it can be regarded as a failure by the respondents to discharge their onus.

The Court rendered an arrest that was focused on rumours unlawful in *Mokoaleli v Commissioner of Police.*[213] It held that the police had acted outside the scope of the enabling legislation and henceforth the detention was not lawful. *Rooney J*

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211 *Moloi* vs *Commissioner of Police 1980 LLR 158-159.*

212 1982/1984 LLR 49.
In this decision the applicant made an *ex parte* application in which he sought a rule nisi calling upon the respondents to show cause why:
(a) An order should not be granted directing the respondents to produce the body of Letsae before the court.
(b) The defendants should not cause Letsae to be released from detention on the grounds that his detention is not in terms of the provisions of the internal security (General Amendment Act No. 1 of 1974) is therefore unlawful.
(c) That the respondents shall be directed to restrain his subordinates from assaulting and mentally torturing Letsae by starving him or otherwise ill-treating him.
(d) A magistrate shall not be directed to visit him in private and have access to medical practitioner to examine him.

213 *1982/1984 LLR 84*.
On the 10th September 1982, the applicant moved the Court for an order in the nature of *habeas corpus* in respect of his son Mokoaleli who was taken into custody by police on the 7th September. And a *rule nisi* was issued directing the respondents to show cause why the suspect could not be released forthwith.

in Mahase v Commissioner of Police,[214] in a *habeas corpus* case instituted against Commissioner of Police under section 12 of the Security Act had this to say:

"Section 12 of the statute amends section 31 of the Internal Security (General) Act 1967 in section 3 (4). There is no sub-section (3) to section 12 of the 1974 Act. The amendment in section 31 includes the enabling provisions which authorize in limited circumstances the detention without trial to certain persons. The new sub-section does not create any new offences or impose any obligations. It is therefore difficult to understand how it can be said that a person had committed or intended to commit offences in contravention of that section. Be that as it may, major general Matela did not allege that he suspected upon reasonable grounds that the Mahase brothers or either of them had committed or intended to commit any offence under the 1967 Act or any offence involving damage to property of the state or of any person".[215]

The purport of the quotation is that the enabling section 31(3) of the Security Legislation does not authorize the Commissioner of police or any one else to arrest or cause the arrest of any person upon suspicion unless it is based upon reasonable grounds. The essence and the logic behind *habeas corpus* cases is to make sure that:

"All interference with the liberty of the subject is prima facie odious and it is for the person responsible to establish why in the particular circumstances such interference is legally justified."[216]

Delegated powers must be clearly established and published in the Gazette. They should be made in writing and must be signed by the minister in order to prevent abuse.[217]

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214 See CIV/APN/70/82.
215 See *Mahase v Commissioner of Police* CIV/APN/70/82.
216 See *Nkholise v Commissioner of Police* CIV/APL/197/1980.

2.6.1.10 Selected Human Rights Abuses in Lesotho: The Period between 1980 to 1986

Amnesty International reports[218] that in 1984 the government introduced an Internal Security Act[219] which allowed *incommunicado* detention without charge or trial up to 60 days. Amnesty International[220] further records that it was concerned about the detention without trial and alleged killings of civilians by anti- and pro-government forces. The report records that there was a long-standing antagonism between the ruling National Party of Chief Leabua Jonathan and supporters of the exiled Basutoland Congress Party (BCP) leader Ntsu Mokhele.

The report denotes that In May 1979 there were bomb explosions in Maseru. A serious clash occurred between armed insurgents reportedly supporting Mokhehle and the members of the Paramilitary Police Mobile Unit (PMU). The report further indicates that a number of arrests were also made following the disturbances in 1979. BCP members who were suspected for committing acts of sabotage were killed. Others were detained without trial in April 1980. The report details how a prominent church leader, Mr. Macdonald Mabote, was detained without trial on 15 March. On 15 April, the Amnesty International was informed by the government that Mr. Mabote, who was by then a vice-president of the Evangelical Church in Maseru, had been released a few days after signing a confession. Mr Mabote made a statement over the local Radio Lesotho admitting having provided financial support to the exiled Ntsu Mokhehle. In 1979, more disturbances were seen after the death of Chief Lepatoa Mou who was a cabinet minister by then. Around 50 BCP members were reportedly killed by the Police Mobile Unit in revenge or retaliation.

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217 See *Mpiti Sekake v Rex* 1971/1973 LLR AT 296.
218 See Amnesty International Report, 1980: 53.
219 See Act No. 24 of 1984.
220 See Amnesty International Report, 1980: 53.

The drastic nature of the Internal Security Act was precipitated by several incidences of sabotage of essential services by supporters of the then opposition Party Basutoland Congress Party. This led to the arrest and prosecution of several BCP members including its leader, Ntsu Mokhehle.[221]

In 1983, the Human Rights Act[222] was enacted. It introduced a measure of legal protection for Human Rights. It did not provide for the Bill of Rights. The guarantees it offered were subject to the existing laws, including the Internal Security Act.

The 1983 Human Rights Act recognized certain fundamental human rights which included, amongst others, the right to life, liberty, freedom of opinion and respect for the integrity and security of the individual.[223] Rights such as the right not to be subjected to arbitrary arrest or detention were allowed in so far as they did not conflict with the existing laws. The Internal Security General Act afforded no protection against arbitrary arrest and detention. It empowered the police to hold political suspects without charge or trial for a period of up to 42 days *incommunicado.* One tends to support the Amnesty's view that the requirement in the 1983 Human Rights Act, section 11 thereof, relating to freedom from inhuman treatment, was undermined by an amendment which allowed immunity from civil or criminal prosecution to police and other officials who committed offences in order to preserve the *"good order or public safety and to prevent internal disorder".*

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221 See *Rex v Moerane* 1974/1975 LLR at 251.

222 Act No. 24 of 1983 was a precursor to the 1993 Constitution.
In January 1981 an Amnesty International observer attended an inquest into the deaths of Edgar Motuba, the church's newspaper editor and a well known critic of the government and Lechesa Koeshe and Oriele Mohale, two friends who accompanied him when he was taken from his home by armed men in September 1981. The three were later found shot dead, allegedly by a pro-government "*death or hit-squad" known as Koeeoko or Mamolapo*. The inquest failed to attribute responsibility for the killings to anyone.

223 Amnesty International Report, 1985: 56.

Section 4(1) of the Human Rights Act, which provided for the right to life, limited that right as far as such deprivation of life resulted from the use of force:

(a) For the defence of a person from violence or defence of property;

(b) For the suppression of a riot, insurrection or mutiny;

(c) For the prevention of the commission of a criminal offence by a person; and

(d) Resulting in a person dying of a lawful act of war.[224]

Incidences of disappearances continued to take place around 1983 where Henry Khahla Nyetso Masheane was found dead. The police alleged that he had committed suicide by hanging himself with his belt, but medical evidence produced in an inquest disproved police allegations. The medical report disclosed that after he died, he was hanged in his cell to suggest suicide.

The inquest failed to identify individuals responsible either for his death or for the attempted cover-up. The report further disclosed that some 20 other political detainees were held in cells adjacent to the deceased at the time of his death, but none were called to the inquest. The magistrate directed that the inquest record be sent to the Director of Public Prosecutions, but there was no further action. The amnesty reports revealed that there were further political detentions in 1984 where one detainee, Daniel Moeketsi, was reported to have died in custody. He was later found over a cliff. It was alleged that he had apparently fallen, jumped or had been thrown over while still handcuffed.

2.6.1.11 The Period from 1986 to 1993

The Amnesty International Report[225] summarizes the government's change on the 20th of January 1986 in a *coup d'état* which ended a single party rule of

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224 Note that section 5(1) of the current 1993 Lesotho Constitution reiterates verbatim section 4(1) of the Human Rights Act No. 24 of 1983 together with its limitations.

225 Amnesty International Report, May 1992: 2.

Prime Minister Leabua Jonathan. A *coup* leader, Major General Lekhanya, argued that 'for too long the nation had been plunged into a political quagmire with politicians unable to solve the country's problems'.

All political activities were banned and the Parliament activities were suspended. The new Military Government Lesotho Order,[226] which placed the legislative and executive authority to the King, the late Moshoeshoe II was introduced. The King was advised by a six man Military Council and an 18 member cabinet.

In 1991 Major General Lekhanya was ousted by Colonel Ramaema due to internal struggles. Ramaema lifted a 1986 ban on party political activity and reaffirmed plans to restore Constitutional rule.[227]

2.6.1.12 Torture, 'Disappearances' and Extra-judicial Execution in Lesotho

Political and other extra-judicial killings continued to occur in Lesotho.[228] Excesses by law enforcement agencies continued, including fatal shootings by police and army personnel attempting to quell violent anti-Asian riots which broke out in Maseru.[229] Official figures estimated 35 people having lost their lives, but

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In June, 18 soldiers were arrested after an unsuccessful attempt to restore Major General Lekhanya to power. They were detained for some weeks under 1990 law giving the military government power to detain military personnel for up to one year without a charge. Twenty-three prisoners, all thought to be military personnel, were believed to be held in military custody at the time. They had been arrested in 1986 for opposing the coup which brought Major General Lekhanya to power.

226 See Order No. 1 of 1986.

227 See Human Rights Issues in Lesotho 1991 – 1996 an extract from country reports in human rights practices for 1991 – Department of State United States of America (Lesotho) which stated that: "Human Rights in Lesotho in 1991 remained circumscribed under the military government, but certain aspects of the situation improved over the years. There was some progress towards political and constitutional reform and increased freedom of speech, assembly, and association. Police brutality, however, continued, and the security forces used excessive force in quelling anti-riots in May, in which many persons were killed and no charges were brought against those responsible".

228 See Country Reports US Embassy, 1991-1996.

229 See Country Reports US Embassy, 1991-1996.

no charges were known to have been instituted for those responsible. Failure of the government to investigate and take action to prevent torture, ill-treatment, deaths in custody or extra-judicial executions dated back to before the military take over in 1986.[230] In *Rex v Ngoana-Ntloana Lerotholi and Sekhobe Letsie*[231] the accused were charged with murder of former cabinet ministers of Leabua Jonathan and their wives. Their bodies were later found on the remote Bushman's pass (Khalong la baroa). The accused Sekhobe Letsie was found guilty as an accessory after the fact to the four counts of murder and two counts of attempted murder.

On each count of being an accessory after the fact to murder, the applicant was sentenced to 15 years' imprisonment. On each count of being an accessory after the fact to attempted murder he was sentenced to 4 years imprisonment. Ngoana Ntloana Lerotholi, who actually executed the murders, was sentenced to death, which was later reduced to a life imprisonment. *Browde JA* had this to say:

"This matter arises from horrendous crimes which were committed at Bushmen's pass in this Kingdom on the night of Saturday 16th November 1986. I refer to the cold-blooded murders of Montsi Makhele and his wife 'Maliapeng and Desmond Sixishe and his wife, 'Manapo. At the same time the criminals attempted to murder Tsolo Lelala and his wife, 'Mantsane. An inquest concerning the deaths was commenced in November, 1989 and it was not until 19th February 1990, after the change of government as a result of a coup d'etat that the first appellant was arrested".[232]

A long period that came to pass before a legal action could be taken clearly reflects negatively on the government of the day. In fact, it becomes apparent

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230 See Country Reports US Embassy, 1991-1996.

231 See *Letsie v Director of Public Prosecutions. Lesotho Appeal Court (LAC Criminal Law Report) 1991 - 1990-94:246* These were the most horrendous scenes which shocked the nation and when the prosecution was finally done after so many years of inaction, people had some degree of hope that prosecution of more cases of this nature would follow.

232 See *Rex vs Ngoana-Ntoana Lerotholi, LAC 1990-1994: 246.*

that if it were not for the internal struggles, no further action was anticipated and hence cover up was an inevitable result.

The following incidences are some of the human rights mal-practices as listed by Amnesty International Report of 1992.[233]

- ☆ *Captain Samuel Mokete Tumo*, an officer in the Royal Lesotho Defence Force, was arrested on 20 February 1990 and kept in solitary confinement at Maseru Maximum Prison until 7 March 1990. In a subsequent affidavit he alleged that in the course of interrogation he had been stripped naked, covered with blankets, handcuffed and told to kneel on a cement floor covered with crushed stones. He agreed to confess to a murder charge. He was released in April 1990 on a writ of *habeas corpus*. He was, however, promptly re-arrested and the law was amended to allow detention without charge of military personnel for up to one year. Captain Tumo was detained for nine months, released, charged with murder and later acquitted. It is reported that no action is known to have been taken against his alleged torturers.[234]
- ☆ Lakia Pholo, an official of the Lesotho Bank, was arrested in July 1989, suspected of a criminal offence. He was subsequently released without charge and sued the government for damages for torture while he was in police custody. The Attorney General admitted liability on the government's behalf. The court examining the suit for damages found that on arrival at police headquarters a blanket was thrown over his head and fastened with a rope. A motor vehicle tyre was thrown around his neck. He was handcuffed and stripped of his trousers and underpants. When he denied any knowledge of the criminal offence the police put crushed stones into his shoes and made him jump up and down in time with the ringing of a bell. He was beaten on the hands and thighs and pinched on

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233 See *Amnesty International May 1992. AI Index: AFR 33/01/92.*

234 See Amnesty International May AI Index: AFR 33/01/92.

the thighs with something which he identified as a pair of pliers. At this point Lakia Pholo lost consciousness. When he regained his senses the blanket had been removed. He was ordered to stand up, but could not do so because of pain and numbness in his hands. Then his interrogators inserted a stick into his anus, pulled it out and put it into his mouth. They repeated this twice. He was finally given his clothes back, handcuffed and forced to spend most of the night standing. He was released two days later. Despite the government's admission of liability and the High Court's finding in favour of Lakia Pholo's account and its award of damages, there has been no criminal prosecution of any police officer in connection with his torture.[235]

☆ *Brigadier B.M. Ramotsekhoane, Colonel Sehlabo Sehlabo and Sergeant Tjane* were taken into police custody on March 1986. Brigadier Ramotsekhoane and Colonel Sehlabo were senior officers in the Lesotho Para-Military Force before the military coup of January 1986. Inquests into the deaths of Brigadier Ramotsekhoane and Colonel Sehlabo were concluded in January 1987. Brigadier Ramotsekhoane was found to have died from respiratory failure as a result of cerebral trauma caused by blows to the head while he was in custody. Colonel Sehlabo died from secondary septicaemia resulting from infection to burns inflicted while he was in custody. The inquest court did not identify the officers responsible for the prisoners' ill-treatment. No inquest was held into Sergeant Tjane's death. In August 1987 the families of Brigadier Ramotsekhoana and Colonel Sehlabo brought actions for damages against the authorities. The following month the ruling Military Council issued an Order indemnifying the Crown for all acts committed between January 1986 and January 1988 in defence of national security. There has apparently been no further

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[235] See Amnesty International Report of 1992.

investigation into these deaths and no action against those responsible was taken.[236]

These are some of the few incidences of human rights abuses which clearly indicate a pattern of unlawful methods of torture and ill-treatment used by the Police and Army officers. The incidences further go to indicate the utter failure of authorities to take effective action against those people who carried out these atrocities. It is one's considered opinion that indemnity orders are unlawful. These brute acts should never be allowed, especially in a democratic setting where people are called upon to account for their unlawful actions and henceforth attach greater significance to the sanctity of life.

2.6.1.13 Lesotho Criminal Liability for Police Misconduct

Lesotho has limited remedies which are not effective besides the writ of *habeas corpus* that we have discussed in depth in the chapter above. It suffices for now to mention that some of the legal recourse that the suspects of crime who have been victimized by the police may resort to are the following, *albeit* their lack of full development:

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236 Amnesty International Report 1992. Note the maxim:"*fiat iustitia, ruat caelum*: Let justice be done though heavens may fall". There was no action taken due to the fear of reprisal from the perpetrators who were still in power. See also *Marbury v Madison's decision US 5 Church 137 1803* where the US Court was judicially reviewing the power of US lower Court to declare an Act of Congress unconstitutional. This doctrine was established by Chief Justice John Marshall who issued a *writ of Mandamus*-which is an order that compels an official to carry out a public duty. Facts in this decision were that Chief Justice Marshall was asked to order Secretary of State James Madison to give Mr. William Marbury his commission as a Magistrate. The court stated that:"The discretion of the court always means a sound legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court is bound to grant it. They can refuse justice to no man." Hence the maxim '*Lex injusta non est lex'*. It is our fervent hope that the Director of Public Prosecution in Lesotho will be ordered to prosecute all the human rights perpetrators who violated human rights during the tenure of all the governments in Lesotho. It is further recommended that a Judicial inquest and/or inquiry be instituted in order to haul those responsible before the Courts of law to answer their unlawful activities. All the purported indemnity or immunity Orders such as No.5 of Lesotho Constitution (Commencement Act) 1993 which protected the human rights violators from having their days in Court must be declared unlawful, unconstitutional and *null and void ab initio*.

(a) *Criminal Prosecution:* In terms of section 5 of Lesotho Criminal Procedure and Evidence Act,[237]the Director of Public Prosecution is given power to prosecute on behalf of the state and there have been few police officers who have faced prosecution for the man-handling of suspects in their hands.

(b) *Interdiction from Duty***:** Here a police officer who has committed a misconduct by man-handling a suspect of crime may be interdicted from duty to avoid public outcry, but this always proves futile and short-lived as when the outcry subsides, they are always reinstated to their duties.

(c) *Police Complaints Authority*[238]**:** This office has been established by section 22 (1) of the Police Act[239] and was formally instituted in 2004, but it has not acted upon any police officer. Under section 3 thereof, the office has been given the responsibility to investigate and report any complaint from a member of the public about the conduct of a member of the service to the minister responsible for Home Affairs. It is doubtful whether the word 'member' of the public includes a suspect of crime as there have been several complaints about the police by the suspects of crime and not much action has taken place.

(d) *Suspension:* Sometimes officers are suspended, but not dismissed for the misconduct perpetrated against the suspects of crime and this scenario is lamentable as it promotes the abuse of human rights even more.

(e) *Liability for Wrongful Actions of Police Officers:* Section 76 (1) of the Police Act[240] provides that:

"The Commissioner shall be liable in civil proceedings in respect of the wrongful acts of Police Officers under his command, in the performance or

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237 See Act No. 9 of 1981.
238 See Act No. 7 of 1998.
239 See Act No. 7 of 1998.
240 See Act No. 7 of 1998.

purported performance of their functions, and accordingly be joined in proceedings in respect of such wrongdoings."[241]

This is the most effective civil claims remedy which is normally instituted against the Police and in this regard, there have been several applications in court claiming compensation either for pain and suffering, loss of business, torture, assaults, malicious arrests, unlawful search and seizure of property, detention without trial or vulgar language orchestrated against the suspects and victims of crime by the Police. As far as this is concerned, with the reintroduction of democracy in 1993, we began to witness some accountability by government to track those responsible for human rights violations to court, although this is not at all satisfactory because only those disfavoured officers face the might of the law.

(f) *Ombudsman*[242]: Section 134 of the Lesotho Constitution[243] establishes the office of the Ombudsman whose functions are, amongst others;"

(a) The Ombudsman may investigate action taken by any officer or authority in the exercise of the administrative functions of that officer or authority in cases where it is alleged that a person has suffered injustice in consequence of that action".[244]

The traditional functions of the office of Ombudsman have been captured as follows: *"An office provided for by the Constitution or by action of the legislature or Parliament and headed by an independent high-level public official who is responsible to the legislature or Parliament, who receives complaints from aggrieved persons (alleging mal-administration) against government agents, officials and employees or who acts on his or her own motion, and who has power to investigate, recommend corrective action and issue reports.*[245]

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241 See section 76 of Police Act No. 7 of 1998.
242 1993 Lesotho Constitution.
243 1993.
244 See section 134 of Lesotho Constitution.
245 See Hatchard, Ndulo and Slinn,2004:208.

In Lesotho, the Ombudsman only makes recommendations only as to what remedial action, including the payment of compensation should be made and he has no authoritative power to charge those responsible.[246] It is submitted that this position is lamentable.

One finds no apparent reason why Lesotho's 1993 Constitution, section 134 thereof, opted for a non-executive Ombudsman, especially when Lesotho's democracy was being restored after almost 30 years of undemocratic rule. The operations of this office would go a long way in alleviating the serious Magistrate and High Court backlog of cases, some of which date as far back as over ten years with material evidence risking erosion or misplacement or having dockets lost and witnesses having died.

2.6.2 South African Perspective on Human Rights Violations by Police

2.6.2.1 Origin, Policing Powers and Responsibilities of South African Police Service

The South African police history remains inadequately documented. Although Colonial and Republican Governments have left relatively copious official accounts, official records, by definition, tell the story only from above.[247] There is a largely unwritten history of those varied groups and races who suffered from police oppression in the eighteenth, nineteenth and early twentieth century, but in South Africa the historian's conundrum is compounded by factors of race and class.[248] Many coercive practices by the early police institutions against indigenous populations, white workers, and the indentured labour forces of

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246 See the National Workshop Report on the office of Ombudsman in Lesotho on 26-28 October 1994.The office was formally established in 1996 in Lesotho. In South Africa, a similar office was established in 1995, but it is referred to as the office of Public Protector which executes the same functions.

247 See Brogden, 1989:1.

248 See Brogden, 1989:1.

blacks, Chinese and Indians remain undocumented from the Cape Colony to the Transvaal.[249] Where records were largely oral rather than written, groups without access to state-resources had only folk tradition to offer a modicum of balance.[250]

Police brutality has long been a feature of South Africa where discriminatory policies and laws gave rise to continual unrest within the underprivileged communities.[251] However, allegations of torture were more widely documented since the introduction of strict and far-reaching security laws by the nationalist government, after it came into power in 1948.[252] These laws were mainly passed to deal with African political opposition.[253] The National Party introduced preventive detention and increased the police powers over political suspects to a point where the security police would hold virtually anyone for as long as they felt necessary, until they had "satisfactorily replied to" all questions or until no useful purpose would be served by his further detention per section 6 of the *Terrorism Act.*[254]

"For the last decade, Amnesty International has received a great deal of evidence that torture is an administrative practice in South Africa. Affidavits, eyewitnesses, accounts and newspaper reports show that torture and maltreatment have been used as part of the interrogation process."[255]

Section 199 of the South African Constitution[256] provides for the establishment of the Security Services of the Republic, including a single Police Service.[257] In terms of section 205 (3) of the Constitution, the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and

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249 See Brogden, 1989:1.
250 See Brogden, 1989:1.
251 See Amnesty International Report on Torture,1973:123.
252 See Amnesty International,1973:123.
253 See Amnesty International Report on Torture,1973:123.
254 See Terrorism Act No. 83 of 1967.
255 See Amnesty International Report on Torture,1973:123.
256 See Act No. 108 of 1996 Chapter 11 on p. 112 thereof.
257 See Joubert, 2001:15.

secure the inhabitants of the Republic and their property, and to uphold and enforce the law.[258] The purpose of the South African Police Act [259] is to provide for the establishment, organization, regulation and control of the service.[260] The preamble of the South African Police Act expressed the need for a service which:

(a) *Ensures the safety and security of all persons in the national territory;*
(b) *Upholds and safeguards the rights of every person as guaranteed by the Constitution;*
(c) *Ensures co-operation with the communities it serves in combating crime;*
(d) *Reflects respect for victims of crime and understanding of their needs; and*
(e) *Functions under effective civilian supervision.*[261]

Section 13 (3) of the South African Police Act[262] contains certain provisions which emphasize reasonableness as a measure for action.[263] In terms of paragraph (a), police officials must perform official duties with due regard to their powers, duties and functions in a manner that is reasonable in the circumstances.[264] Paragraph (b) states that police officials who are authorized by law to use force in performing an official duty may use only the minimum force which is reasonable in the circumstances.[265] Section 24 of the South African Police Act calls for the Minister of Safety and Security to make regulations regarding various aspects,[266] such as promotion, recruitment, transfers, discipline and management of the service.

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258 Note that the Lesotho Mounted Police Service is established by section 147(1) of the 1993 Constitution. It places such a service under the command of the Commissioner of police for general administration and discipline of the service.
259 See Act No. 68 of 1995.
260 See Joubert, 2001:16.
261 Note that the South African Police Service Act No 68 of 1995 becomes progressive in introducing a purposive preamble which must be introduced into the Lesotho Mounted Police Service Act No. 7 of 1998 which does not commit itself to the same.
262 See Act No. 68 of 1995.
263 See Joubert, 2001:17.
264 See Joubert, 2001:17.
265 See Joubert, 2001:17.
266 See Joubert, 2001:17.

In fact, looking at the South African Police Service preamble, its intents and purposes can correctly be summarized in the words of *Brogden*[267] that:

"Policing is indeed defined in terms of its key practice, that is, firstly, *to maintain the social order that those in the powerful positions in that society regard as proper. Secondly, policing operates under the mandate of an institutionalized legal process, whether accepted as legitimate or not by the people who are subject to it".*[268] The learned author further noted that:

"Even though police officers may commonly break the rules in an attempt to maintain the state-defined law and order, it is central to police work that it operates under a legal imprimatur. The corpus of the law provides policing with a form of legitimacy not readily available to the other institutions in society".[269]

Thirdly, and most importantly that,
"The legal mandate gives the police institution, almost uniquely, the legitimate right to use force in the attainment of its objectives".[270]

2.6.2.2 Incidences of South African Police Service Human Rights Violations

In 1980, the main concern was the political imprisonment, detention without trial and banning, torture, prison conditions and the death penalty.[271]

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267 See Brogden, 1989:5.
Brogden further notes that: "Those definitions which emphasise the preventive features of police work, the preservation of the life and property of the majority of citizens (within the utilitarian Benthamite perspectives – would find it hard to recognize police institutions that conventionally acted as armies of occupation. These included institutions in the post-war Transvaal and Orange River Colonies, the Natal Mounted Police (whose primary duty was to subdue the scattered black population of that territory), and the British South African police which acted beyond the boundaries of the later South African State".

268 See Brogden, 1989:5.

269 See Brogden, 1989:5.

270 See Brogden, 1989:5.

Several new black political organizations were formed during the year to articulate black grievances and fill the vacuum caused by the banning of the Black Consciousness movement in October 1977.[272] Within a very short time, however, organizations, such as the Congress of South African Students (COSAS) and the Port Elizabeth Black Civil Organization (PEBCO) became the object of security police harassment and official repression.[273] Several people were arrested including Ephraim Mogale and other leading members of COSAS. They were detained under section 6 of the Terrorism Act in November 1979 and were held *Incommunicado* for five months until April 1980.[274] Most were freed without being charged. Thozamile Botha, the leader of PEBCO, was subsequently detained by security police on the 10th of January1980. He was held *incommunicado* for six weeks. He was later released and was restricted under five-year banning order terms which prohibited him from being in contact with PEBCO.[275] In March 1980, the former leader of the banned Azanian People's Organization (AZAPO), Ishmael Mkhabela, was detained. He was held *incommunicado* for several weeks. He had previously been detained without trial for six months after the formation of AZAPO in May 1978.[276] Shortly after Ishmael Mkhabela's release without trial in April 1980, the Minister of Police Louis le Grange publicly threatened further action against AZAPO, COSAS and other black organizations.[277] In 1978 Cynthia Montwedi was arrested. It was rumoured that while she was in custody, she had been subjected to electric shocks and

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271 See Amnesty International Report 1980:75. In March 1980, in an address made in New York to the United Nations Special Committee Against Apartheid, it called on the South African Government to implement immediately certain specific reforms as an earnest indication of its intention to promote fundamental changes. These included: The revocation of all banning orders; the removal of indefinite incommunicado detentions; the repeal of repressive legislation, particularly which provided mandatory minimum sentences and for unlimited detentions of potential state witnesses, the granting of remissions to political prisoners and the immediate release of those who were old or infirm.

272 See Amnesty International Report 1980:75.

273 See Amnesty International Report 1980:75.

274 See Amnesty International Report 1980:75.

275 See Amnesty International Report 1980:75.

276 See Amnesty International Report 1980:75.

277 See Amnesty International Report 1980:75.

physical assaults during interrogation by security police at John Vorster Square police station in Johannesburg. The government agreed to a settlement out of court and paid her damages. This was also the situation in the case of Steve Biko in 1977, where the government agreed to a settlement out of court.

Allegations of torture were made at two long-running political trials, which concluded in mid-1979. The earliest were against Sechaba Montsitsi and three Soweto student leaders who were convicted of sedition and sent to prison for four years in May 1979.[278] The other incident was the one of the major trial of the 66-year old Zeph Mothopeng and 17 others who were members of the Pan-African Congress of Azania (PAC). It ended in June after he was sentenced to terms of effectively five to 15 years of imprisonment.[279] In all, 13 out of 18 defendants alleged torture during pre-trial interrogation by security police, including Johnson Nyathi, who claimed that he had been thrown out of a window by security police and was seriously injured.[280] The first death sentence incidence occurred on November 1979 where James Mange was sentenced to death. On May 1980 Solomon Mahlangu was the first person to be hanged for a politically motivated offence since the mid-1960s.[281] This, according to the report, marked a greater move towards the use of the death penalty in political cases.

Policing in the nineteenth-century colonial South Africa was characterised by a high degree of militarism.[282]

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278 See Amnesty International Report 1980:76.

279 See Amnesty International Report 1980:76.

280 See Amnesty International Report, 1980:77.

281 See Amnesty International Report, 1980:77.

282 See Fernandez and Scharf,1992:430.In their introductory remarks, Fernandez and Scharf,1992:429 argue that: "Regrettably, the police force has a poor public image which has deteriorated rapidly over the past three decades, especially since mid-1980s.The style of policing has become a source of grave discontent within the black community. Accusations against the police range from its members' alleged naked aggression against innocent civilians, political partisanship and hit-squad activity against the extra-parliamentary opposition, to the assault and torture of 'ordinary' common-law suspects in police custody. Not a day passes without a newspaper report in which members of the South African Police are alleged to have used unnecessary force in performing their

Both the Boers and the British relied on well-armed police units, capable of carrying-out swift punitive expeditions against potential dissenters, to protect and promote their respective interests.[283] These militaristic elements became a prominent feature of the South African Police, established in 1913.[284] By the 1920s the scale of police abuse of Africans in particular had reached such alarming proportions that a large civic conference, the National European-Bantu Conference, was convened in Cape Town in 1929 to address this problem.[285]

"*Apart from the question of police violence, the conference addressed the special problems that Africans experienced with criminal procedure, the status qualifications of interpreters, the language qualifications of members of the police, failure to release accused persons as soon as possible after acquittal".*[286]
There were two major reasons for the rise of quasi-military police force for Colonial South Africa.[287] Firstly, under the Boer settler incursions, policing had been traditionally organized to safeguard the imposed rights of a minority from usurped prerogative of the majority.[288] Secondly, the Boer Commando system reflected the need for an armed, insecure white population.[289]

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duties. This is a disquieting feature of our legal culture for it is the police force, more than any other branch of the public service, which determines the public's attitude to the administration of justice." On page 433 the learned authors further argue that:"This type of police abuse of power was caused and reinforced by a combination of factors which today still influences police behaviour towards the black population. At the broad political and economic level, two major developments took place, both designed to deprive blacks of their dignity and to reduce their status from that of human beings to that of chattels. One was the enactment of the Land Act in 1913 which had the effect of evicting thousands of black families from land they had occupied for generations and of compelling them to wander homeless and starving until they drifted into the towns as labourers. The other development was the industrialization of South Africa in the 1920s and the series of stringent racially discriminatory laws promulgated to deny blacks certain jobs and to ensure that industry had a well-controlled, docile and cheap black labour force."

283 See Fernandez and Scharf,1992:430.
284 See Fernandez and Scharf,1992:430.
285 See Fernandez and Scharf,1992:430.
286 See Fernandez and Scharf,1992:430.
287 See Brogden, 1989:12.
288 See Brogden, 1989:12.
289 See Brogden, 1989:12.

2.6.2.2.1 The Public Safety Act[290]

The principle of non-racial, peace-time, detention without trial was introduced into South African Law for the first time in 1953.[291] In that year, Parliament decided to put an end to a passive resistance and defiance campaign promoted by the African National Congress against racially discriminatory legislation.[292] During the campaign, riots had broken out in Johannesburg, Kimberley, Port Elizabeth and East London where a nun by the name of Dr. Mary Quinlan was brutally murdered.[293] According to this legislation:

"Governor-General acting on the advice of the South African Cabinet, was given power to declare, by proclamation in the Gazette, a state of emergency if, in his

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290 See Act No. 3 of 1953. See Rudolph,1983:4.
Davis,1986:80-81 argues that the effect of the Public Safety Act was to make it extremely difficult for a detainee to protect himself/herself from police assaults as any information gained by a visiting magistrate would not be available to the court. Given the 'closed system' of incarceration, the detainee's counsel would be unable to gain admissible evidence of an assault whilst the detainee was in police custody. Mkhize v Minister of Law and Order 1985 4 SA at 147 (N) is of particular importance in that the dispute concerned whether or not it was legally permissible for the court to make an order under which, inter alia,

(a) A district surgeon would examine a detainee, and compile a report of his examination for submission to the court;
(b) the Magistrate authorized to visit the detainee would
  (i) inform him that he (the magistrate) had been directed by the Court as a result of an application brought by the applicant to make certain enquiries and thereafter
  (ii) Ask the detainee if he had been assaulted by any member of the police force or any other person whilst in detention in terms of the Internal Security Act. In the event of a detainee alleging an assault, the magistrate would ask for details concerning:
    (a) the nature of the assault;
    (b) the names and/or descriptions of the persons who participated in the assault;
    (c) when the assault took place;
    (d) Where the assault took place;
    (e) Any injuries sustained by the detainee or any consequences which might have resulted from the assault and record the results of such enquiries in writing and require the detainee to confirm the truth of the answers on oath.

Mkhize decision is an authority for the proposition that information covering health and welfare of the detainee does not amount to 'official information' as contained in section 29(7). Note that there is no such requirement in Lesotho under the Criminal Procedure Act Law.

291 See Rudolph, 1983:4.

292 See Rudolph, 1983:4.

293 See Rudolph, 1983:4.

opinion, there was a serious threat to the safety of the public or the maintenance of public order and the ordinary law of the land inadequate to enable the situation to be contained."[294]

In *Cooper v Minister of Police*[295], the application concerned five people namely, Mosiuoa Lekota, Lindiwe Mbandla, two members of the Cooper's family and one Myeza. They were arrested in Durban on the 25th of September 1974 and were detained in Pretoria by members of South African Security Branch under the provisions of the Terrorism Act.[296] They brought an urgent application restraining respondents from assaulting or interrogating them in the manner other than that permitted by law. In the process therefore, the Court was required to interpret section 6(6) of the Terrorism Act[297] which read:
"No person other than the Minister or an officer in the service of the State acting in the performance of his official duties, shall have access to any detainee or shall be entitled to an information relating to or obtained from any detainee."

Trengove J. held that even if the Court had power to request a magistrate to take statements of affidavits by interrogators or admissions from detainees, the information received by a magistrate would be 'official' information to which no person, including the court, would be entitled.

The powers in terms of the Public Safety Act were invoked for the first time on the 30th March 1960.[298] The reason was the rioting at Sharpeville, a black township near Vereeniging, where Black people at the time demonstrated against the compulsory carrying of passes.[299] In quelling the riots, the police used firearms, resulting in the death of 71[300] people while 180 were wounded.[301]

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294 See section 2(1) of Act no.3 of 1953.
295 1977(2) SA 209 (T).
296 See Act No. 83 of 1967.
297 See Act No. 83 of 1967.
298 See Rudolph, 1983:6.
299 See Rudolph, 1983:6.
300 There seems to be different accounts as to how many people actually died as a result of Sharpeville shootings by the South African police on March 31st 1960. Davis, 1987:12

During the emergency period, 11 503 persons were detained, of whom 11 279 were black, 98 white, 90 Indian and 36 Coloured.[302]

The detentions were authorized by two provisions of the regulations.[303] Regulation 4 authorized arrest and indefinite detention if, in the opinion of the Minister of Justice or a magistrate or a commissioner of police, such arrest or detention was desirable in the interests of the detainee, or public safety order or the termination of the emergency.[304] There were rules which were administered by a minister which prohibited any visits to the detainee, including a legal adviser, without the express permission of the officer in control of the place where the detainee was kept.[305]

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reveals that: "Had the police not turned violent in Sharpeville on March 31st 1960, the Pan-African's efforts might never have gained a prominent position in the annals of black protests."The police at Sharpeville and Langa killed seventy-one blacks and wounded two hundred others."Sixty-seven of the dead had been shot at Sharpeville alone. The combination of a poorly disciplined police force, frightened crowds." Jeffery, 2009:1 reveals that "On 21st March 1960, at Sharpeville (south of Johannesburg), the police shot dead 69 black South Africans protesting against the country's notorious pass laws." Close to 180 people were wounded. Most of the dead and injured were shot in the back after they had begun to flee". Kerr, 2009:480 reiterates the position thus:" Two years later, however, police rounded up prominent ANC leaders at a farm in Rivonia, north of Johannesburg. They, and Mandela, were charged with a number of crimes, among which were four counts of sabotage which Mandela admitted, treason and planning a foreign invasion of South Africa which he did not admit to-crimes for which they could be executed. Mandela made an eloquent statement from the dock at Pretoria Supreme Court at the opening defence case. He explained the background to the ANC's use of violence, how Sharpeville massacre, in which sixty-nine black protestors-including eight women and ten children-were shot dead by police, had been the catalyst for their decision."

301 Rudolph, 1983: 6. See also Foster, Davis and Sandler1987:20-21 who confirm the ten days shooting at Sharpeville on 20 March 1960 by the South African Police. See also Dugard 1979: 278 who argues that section 6 of the Terrorism Act came to symbolise the repressive nature of the South African legal order. He concludes at page 283 that South Africa was the violator of human rights.

302 See Rudolph, 1983: 7. See also Foster, Davis and Sandler, 1987: 24.
"A detainee who was convicted of any of the disciplinary contraventions could be subjected to any one of the following sanctions:
(a) The imposition of the duty to perform certain specific work in a place of detention for a period not exceeding 14 days, or
(b) A fine not exceeding ten pounds or in default of payment of the fine, confinement in a specific room for a period not exceeding ten days".

303 See Rudolph,1983: 7. See also Davenport,1987: 395 who talks about Sixty-nine Africans who were killed and 180 were injured when the police opened fire on a crowd of demonstrators.

304 See Rudolph, 1983: 7.

305 See Rudolph, 1983: 7.

This early legislation was very stringent in that it did not allow detainees to receive items such as newspapers, magazines, books or goods without the command of the officer in charge. In *Stanton v Minister of Justice*[306] in March 1960, the applicant was taken into custody in Pretoria by police. She was kept there for some time and was released without charge. She alleged that her detention was unlawful and *mala fide* and as such she prayed for an order for her immediate release**.** The Court held:

"It is not open to her to prove that she is in fact no danger to public order or safety and ask the Court to find that her detention is unjustified and, therefore, unlawful. The condition for the exercise of the power of arrest and detention is not the factual state of danger to public order or safety – it is the opinion of the Minister, Magistrate or Commissioned officer. The Court cannot substitute its own opinion".[307]

De Villiers JP as he then was, in *Ahsing v Minister of Interior*[308] raised a very serious caution regarding the so-called Minister's discretion in the following manner:

The legislature has said that it is in his discretion, and he is therefore the person to exercise the discretion. Only in one case can a Court of law interfere, and that is where there has been no exercise of discretion, and the law considers that there has been no such discretion when the discretion has either not been exercised at all or has been exercised mala fide or improperly. But, the mere allegation on the part of appellant that the Minister has acted arbitrarily is not sufficient. It is true, if there are serious allegations, which are substantiated by evidence, of improper conduct on the part of the Minister, it may be very desirable for the Minister in that case to answer those allegations and disclose the reasons; and if he refuses in such a case, it may be an element for the Court

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Compare this with the Lesotho position under the 1982 Internal Security Order, i.e. the three stages approach where the detention was categorized as initial release by a policeman of a certain rank, a release by a Commissioner of Police and for more rigorous detention by a Minister himself.

306 1960 (3) SA 353 (T).

307 *Stanton v Minister of Justice* 1960 (3) SA 353 (T).

308 1919 TPD 338 at p 342.

to consider whether, as a fact, he has or has not exercised his discretion. But, short of such allegations, the Court must assume that the Minister has acted properly and exercised his discretion properly in the absence of any evidence to the contrary.[309]

The second provision that authorized detention without trial was regulation 19,[310] in terms of which the Minister of Justice,[311] the Commissioner of Police, magistrate or a commissioned officer was empowered to arrest and detain a person suspected of having taken part in the commission of any offence with the *'intent to hamper the maintenance of public order or danger to public safety'*, or who on reasonable grounds, was suspected of having information in respect of such offence. The regulation required that once in detention, the detainee was held in custody until the officer concerned was satisfied that he had *"truthfully and fully"*[312] answered all the questions that had been put to him.

In *Rossouw v Sachs*[313] the applicant, a practising advocate, was detained pursuant to the provisions of section 17 of Act 37 of 1963. He approached the Court for the order that respondents were not entitled to deprive him of any of his rights and liberties, such as allowing him out of his cell daily for purposes of exercise or recreation and to be permitted to receive reading material subject to scrutiny by respondents**.**

Ogilvie-Thompson JA granted the order as prayed. Section 17 of Act 37 of 1963 related to the suppression of communism activities and the police were authorized to arrest any person without warrant whom they reasonably suspected to have committed or were about to commit an offence. Sub-section 3 of section 17 read thus:

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309 *Ahsing v Minister of Interior* 1919 TPD 342.

310 See Rudolph, 1983: 9.

311 In the case of Lesotho it was the Minister of the Interior, now Home Affairs.

312 Note that this requirement is similar to the Lesotho position under the Internal Security Act No. 24 of 1984 sections 12(3) (a) and 12(4).

313 1964 (2) SA 551 (A).

"No Court shall have jurisdiction to order the release from custody of any person so detained, but the said Minister may at any time direct that any such person be released from custody".

2.6.2.2.2 The Ninety-Day Detention Law

In an attempt to stamp out acts of terrorism, the South African Parliament introduced a series of serious inroads through the detention laws legislation. In 1963, a 90-day detention law was enacted.[314] In 1964 the 180-day detention law was also brought into the picture in order to curb the ever increasing terrorists' attacks from the Pan African Congress and the African National Congress at the time.[315] The '90-day' provision empowered a commissioned police officer to arrest without warrant and detain any person whom he suspected upon reasonable grounds of having committed or having intended to commit an offence under the Suppression of the Communism Act, the Unlawful Organisations Act, or the crime of sabotage, or having any information with regard to such offences or crimes.[316] A detainee could be held in custody for interrogation until he had, in the opinion of the Commissioner of Police, replied satisfactorily to all questions, or for ninety days on any particular occasion.[317] From the time of its enactment until its withdrawal on 11 January 1965, 857 Africans,102 Whites, 58 Coloureds and 78 Indians had been detained under the '90-day' detention provisions.[318]

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314 See Rudolph, 1983: 11.

315 See Rudolph, 1983: 11.

316 See Foster, Davis and Sandler 1987:23. See Rudolph, 1983: 9.

317 See Foster, Davis and Sandler, 1987: 23.

318 Foster, Davis and Sandler, 1987: 24 State that:" Terrorism Act introduced the concept of indefinite detention without trial in the statutes of South Africa. Section 6 of the Terrorism Act authorised a police officer of or above the rank of Lieutenant Colonel to detain persons with a view to obtaining information or on suspicion of offences under the Act. The definition of 'terrorism' under this Act was very broad indeed, and brought 'virtually every criminal act within the statutory scope of terrorism. No time limit was prescribed for detention until detainees had satisfactorily replied to all questions or no useful purpose would be served by continued detention. Even weekly visits by magistrates-an absolutely minimal safeguard-were not included in the Act. Instead, visits by magistrates, 'if circumstances so permit', would be allowed once a fortnight. Jurisdiction of courts to intervene was almost non-existent and the public was not entitled to information

In 1976, the 180-day detention provision was, in respect of crimes such as treason, sedition, sabotage and terrorism,[319] transferred from the Criminal Procedure Act.[320] As a result, the government of the day at the time was able to relax some of the harsher provisions of the law in respect of non-political crimes and the new Criminal Procedure Act[321] was enacted, which required judicial approval of the attorney-general's decision to detain a witness.

The 1950 detention law allowed no judicial intervention in respect of detainees and the 180-day detention law was retained until 1982[322] when internal security

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regarding persons held under this section. Detainees held in terms of section 6 were virtually at the mercy of their captors. Section 6 became a regular feature of political investigations, and most persons in such trials, either as accused or state witnesses, experienced considerable period of solitary confinement and incommunicado detention prior to court appearance."

319 See Rudolph, 1983: 11.

320 See Act No. 44 of 1950, sections 12 & 13.

321 See Act No. 51 of 1977.

322 See Act No. 74 of 1984. Mason, 1986: 219 notes that a detainee in terms of the Internal Security Act 74 of 1982 is defined as: "Any person detained by the police or prison authorities in a prison, police lock-up or any other place". In terms of the Internal Security Act, however, there are three kinds of detainees. Firstly persons held in prison for purposes of 'preventive detention', as per section 28 persons held for interrogation at 'any place' per section 29 and persons detained as witnesses at 'any place' per section 31. Under the common law, as a general rule, every member of the society is entitled to have his or her personal rights protected and a detainee retains all the rights of an ordinary citizen, except those expressly or by necessary implication taken away by the law.
The rights include bodily integrity, reputation, liberty and privacy. In the case of individuals detained by the police or prison authorities such personality rights may be qualified, but 'third degree' tactics may not be used by the detaining authorities as was the case in *Rossouw v Sachs 1964 (2) SA 552 (A)* and in *Shermbrucker v Klindt. 1965 (4) 606 (A) 612* where an urgent application was made by appellant on 7th August,1964 for an interdict restraining the police from continuing with the alleged unlawful methods of interrogating him. The Court in Klindt held that the detention of a person under the provisions of section 17 places that person effectively beyond the reach of the Court as his absence from its jurisdiction would. The Court further held that the detention authorised and prescribed by section 17 was, except, for the weekly visits to the detainee in private by an independent Magistrate as provided by sub-section (2), continuous detention in isolation from all contact with the outside world, until such detainee "has in the opinion of Commissioner of Police, replied satisfactorily to all questions".
In ex parte Matshini (EPD 1985 Case No. 2000/85 unreported) the accused related how he was tortured by the police by an electrical appliance: "A dark brown coloured hood was then forced over my head. It was very tight. I could not see through it, it was very difficult for me to breath normally. After this had been done, I felt something touch my back and then I felt the sensation of being shocked electrically. I felt the sensation in the vicinity of my spine and I shook involuntarily and it was extremely painful as the soles of my feet were hit forcefully with a hard object and I lost consciousness".

came into the picture where the crimes were of a political nature. Further, in terms of the Act, a commissioned officer was empowered to arrest and detain any person whom he suspected upon reasonable grounds of having committed or having intended to commit, an offence under the suppression of the Communism Act[323] or an offence under the Unlawful Organization Act[324] without warrant.[325]

Since the beginning, the South African Security Laws, like those of Lesotho, were repressive and harsh upon the suspects of crime in detention. Probably it was the case in both countries due to the surge of terrorist activities which were rife at the time. In South Africa, indefinite detention was introduced under the Terrorism Act of 1967.[326]

The jurisdiction of the courts to order the release of a detainee or to pronounce upon the validity of any action taken in terms of the section was expressly excluded in *S v Moumbaris.*[327] Accused number 6 was tried together with five co-accused on 7 to 19 counts on allegations that he and other co-accused (as members or active supporters of ANC, acting in the execution of a common purpose with ANC to wage war against and to incite violent revolution in the Republic) wrongfully and unlawfully, committed or attempted to commit certain acts in contravention of section 6 of the Terrorism Act, 83 of 1967.

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323 No.44 of 1950. Note that on the 13th of September 2006 Adriaan Vlok, the then Minister of Safety and Security appeared on Etv special programme acknowledging the past atrocities perpetrated against the then perceived enemies of the apartheid regime and declared that he was deeply sorry.

324 See Act No. 34 of 1960.

325 See Foster, Davis and Sandler, 1987: 23.

326 See Act No. 83 of 1967.

327 1973 (3) SA 109 (T).
Note an encouraging move in *S v Govender* 2004 (2) SACR 381 (SCA) where the appellants, all policemen, were convicted and they lodged an appeal against their convictions of culpable homicide and the sentence imposed in respect of the same, arising from the death of an arrestee in their custody. See also Reddi, 2005: 87.

The court held:

"The purpose of this prohibition … is not only to render the isolation of a detainee more effective, as far as the outside world is concerned, and perhaps more effectual as far as the police are concerned, than was the case under the 90-day detention law, but also to relieve the police of the obligation to furnish information which could be used to interfere with the safe detention of the detainee and the investigation by the police of terrorist activities".[328]

2.6.2.2.3 The Soweto Uprising[329]

The revolt that erupted in Soweto during the morning of 16 June 1976 had its roots in the period before the emergence of Black consciousness in 1969.The industrial unrest in 1973, the collapse of colonial regimes in Southern Africa from 1974 onwards, and the endless pressure in apartheid's townships and schools.[330] The source of the dissatisfaction was the use of Afrikaans in classes. As a result, Black students staged a protest which was dispersed roughly by police using tear-gas and live bullets which caused the death of one Hector Peterson who was a student activist.[331] The police contended that they acted in self-defence after firing warning shots and it was alleged that Hector Peterson was shot while fleeing.

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328 S v Moumbaris 1973 (3) SA 116 (T).

329 16 June 1976.

330 See Brewer, 1994: 269.

331 See Brewer, 1994: 269. See also Jeffery, 2009:17 who discusses the Soweto revolt by stating that: "Despite the rising militancy among black youth, the government in 1976 resolved to insist on full adherence to a rule requiring the use of Afrikaans as a medium of instruction in black schools. Strong protests by teacher organisations and black parents on school boards were disregarded. On the morning of 16th June 1976 some 20 000 Soweto school-children marched in protest against the new language rule. The march was peaceful, good-humoured, and high-spirited. Some marchers carried placards with slogans such as 'We are not Boers!', 'viva Azania', and if we must do Afrikaans, Vorster must do Zulu!'. Police raced to the scene and ordered the marchers to disperse. However, no such order was heard. Nor were any warning shots fired. Instead, a 13-year-old schoolboy named Hector Peterson was killed by a policeman with a shot to the head, fired from behind. Several other youngsters were shot dead by the police and then, in the words of one newspaper, 'All hell broke loose'."

2.6.2.2.4 The Rabie Report[332]

The Rabie inquiry came as a result of the death of Steve Biko[333] after he had been detained for 26 days under the South African detention without trial laws. Steve Biko was found dead after a brain injury was diagnosed, signaling that he was tortured before this death. An inquest was held before a magistrate and evidence was revealed that he had been kept naked in his cell while he was in

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[332] Rabie was a judge of Appeal at the time and he was appointed to examine "the necessity, adequacy, fairness and efficacy of internal security legislation". See Rudolph on p. 35. The report was published in 1981.
See Gready and Kgalema 2003:163 who illustrate that magistrates, alongside district surgeons, were charged with the well-being of detainees particularly from the late 1970s and early 1980s following high profile deaths in custody. They trace the main legislative provisions and regulations as follows:

* 90-day detention law (section 17 of the General Law Amendment Act 37 of 1963): visited once a week by a Magistrate.
* 180 days detention law (enacted by inserting a new provision, 215 bis, into the Criminal Procedure Act 56 of 1955; amended by Act 96 of 1965): visited once a week by a magistrate.
* Section 6 of the Terrorism Act 83 of 1967 made visits discretionary: 'if circumstances so permit, a detainee shall be visited in private by a magistrate at least once a fortnight'.
* After Steve Biko's death in September 1977, regulations ('rules of the treatment of detainees') were introduced providing for the appointment, from June 1978, of two inspectors of detainees. The appointees were two retired officials of the department of justice, a former Chief Magistrate and a former Attorney General. The inspectors were empowered to visit detainees at any time, to call for immediate medical examination, and to bring any matters to the attention of the security police. They were required to visit detainees in private and report confidentially to the Minister of justice on conditions of detention and treatment of detainees and those reports were either not made available to both Parliament or the public.
* Internal Security Act 74 of 1982: State witnesses (section 31) and those detained for the purposes of interrogation (section 29) were to be visited not less than once a fortnight in private by a Magistrate and a district surgeon. Under section 29 detainees, in addition, an inspector of detainees was required to visit as 'frequently as possible' so as to satisfy himself as to the well-being of such a person: section 45(1).
* Subsequently, in November 1982, 'Directions regarding the detention of persons in terms of section 29(1) of the Internal Security Act' were issued, reiterating that detainees were to be visited by Magistrates and that such visits were to be kept and reports submitted for observations during visits, p. 163.

[333] See also Dugard, 1982:590 for affirming the report that after a number of bannings, detentions, and deaths in detentions mounted, critics warned of the dangers of handing over uncontrolled power to the executive, and more particularly to the police. After the death of Steve Beko in September 1977, forty-fifth person died while held under the security laws. Opposition to the security laws within the legal profession intensified, culminating in the establishment of a Commission of inquiry into the security laws by the Association of Law Society of South Africa.

detention in Port Elizabeth and that he was chained on the legs and handcuffed in the interrogation room. The police alleged that Biko was violent during interrogation and as a result had hit his head against the wall.[334]

The verdict of the magistrate was that he held no one criminally accountable. In order to prohibit public criticism, the apartheid government banned 19 organizations in October 1977. The police officer who was the team leader of the interrogation was subsequently promoted to the rank of deputy commissioner.[335]

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334 See also Jeffery, 2009: 18 who argues that:"The Government cracked down with harsh repression. Hundreds of youths were gunned down on the streets and the death toll at police hands rose to 550 in little more than a year. Twenty-one detainees died in police custody between March 1976 and December 1977, an average of one death in detention every month. The most notable black leader to die in detention was Biko, then honorary president of the Black People's Convention. Biko was detained in August 1977 for breaking a banning order confining him to his home town of King William's Town in the Eastern Cape. He was still in good health on the evening of 6th September when he was taken for interrogation, but by the following morning he was a physical and mental wreck. He was nevertheless kept shackled in handcuffs and leg-irons even after his distress had become increasingly apparent. On the 11th September, lying naked and unattended in the back of a police van, he was driven 1200 kilometres from Port Elizabeth to Pretoria for medical treatment. There he died a miserable and lonely death on a mat on a prison floor.

335 See *R v Phaloane,* 1980 (2) LLR at 260 where Phaloane, a police officer who shot and killed one Basie Mahase was released from prison and promoted.
Davis, 1986: 80 submits that following the detention of Neil Aggett, the Minister of Law and Order issued directions in respect of the treatment of detainees which, inter alia, provided that "a detainee shall at all times be treated in a humane manner with proper regard to the rules of decency and shall not in any way be assaulted or otherwise ill-treated or subjected to any form of torture or inhuman or degrading treatment". See also directions regarding the detention of persons in terms of section 29(1) of the Internal Security Act of 1982. Davis, 1986:80 further indicates that notwithstanding these directions, allegations of psychological and physical maltreatment of detainees continued to be made. See South African Survey on Race Relations 766 1984 (38). The recent study of police treatment of detainees conducted by the Institute of Criminology of the University of Cape Town has confirmed these allegations. See *Orr v Minister of Law and Order* ECD 25 September 1985 case no. 2507/85 unreported. Davis,1986:81 concludes that given this evidence of police behaviour, detainees should have the power to endorse their rights and, in particular, to ensure that the police, "are not entitled, in order to induce a detainee to speak, to subject him to any form of assault or cause his health or resistance to be impaired by inadequate food, lack of sleep, living conditions or the like". This was said in *Gosschalk v Rossouw* 1966 (2) SA 476(C) on p. 476, where applicant, an architect in Cape Town was arrested by police under section 215 bis of the Criminal Procedure Act 56 of 1955 as amended. There was a major obstacle facing detainees in section 29(7) of the Internal Security Act 74 of 1982, which provided that: "No person other than the minister or person acting by virtue of his office in the service of the state: (a) shall have access to any detainee in terms of the provisions of this section, except with the consent of and subject to such conditions as may be determined by the minister

In Chermbrucker v Klindt[336] the appellant alleged that he was made to stand up straight for 28 hours continuously while he was interrogated by between two to six officers. At the time the bone of contention was whether the Transvaal Provincial Division had power, in terms of Rule 9(a), to order a detained person under the provisions of section 17 of Act 37 of 1963 for interrogation to appear personally before it for the purpose of giving *viva voce* evidence. In the majority decision*, Trollip JA* held that:

It is also appropriate to conclude that the fact that Rule 9(a) could not have been successfully invoked in the present case, does not necessarily mean that the Court's jurisdiction to deal effectively with the allegations of ill-treatment of a detainee was thereby frustrated. The vital process of justice could have been continued despite that obstacle, because there were other means at the disposal of the Court to meet the situation, and the availability of such alternatives does in my view, militate against any impelling necessity to give section 17(1) a strained construction merely to allow the free operation of a particular procedure under Rule 9(a). For instance, the Court if it had been asked, might have ordered the detainee's evidence to be taken on affidavit or commission or by interrogators, if necessary by the Magistrate who is entitled under section 17(2) to visit him, and if there was a conflict between his and respondent's testimony, the Court might have granted the applicant appropriate interim relief pending the hearing of the matter after the detainee's release from detention.

After Biko's death, the new Commissioner of Police issued rules regarding the treatment of detainees.[337] These included instructions about medical treatment, nutritional requirements, sleeping and exercising facilities.[338] Three years later, in 1982, the Detainee's Parents Support Committee approached about 50 foreign

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or the Commissioner or (b) shall be entitled to any official information relating to or obtained from such person."

336 1965 (4) SA AD 606.(A)

337 See Brewer, 1994: 290. Note that the problem, according to Brewer, was not the absence of rules governing police conduct, but the opportunity afforded officers to disregard them, enabling repression at the hands of the police to continue alongside any reform of police conduct.

338 See Brewer, 1994: 290.

medical associations to ask for support for a campaign to force the apartheid government to allow independent doctors to examine political detainees.[339]

In April the Committee sent a memorandum to the Minister of Law and Order, alleging that detainees were being tortured.[340] It presented statements from 70 detainees and ex-detainees claiming that systematic and widespread torture was being used by the police.[341] The nature of the allegations that were made by the detainees included claims of 20 cases of sleep deprivation, 22 cases of electric shocks, 11 cases of mid-air suspension, 25 cases of suffocation, 28 cases of enforced standing for long periods, 14 cases of genital attacks and 25 cases of being kept naked for long periods.[342] Dr. Aggett had alleged assault and torture during interrogation, and on three occasions magistrates were denied access to see him because the police were 'too busy'.[343] It appeared that Dr. Aggett underwent sixty-hour interrogation sessions and witnesses reported that the police abused and beat him and used electric shocks on his testicles.[344] The allegations of his interrogators were that Aggett hung himself in remorse for implicating two friends.[345]

It is evident, as *Midgley*[346] observes, that in the past the police in South Africa served as the government's instrument in upholding its apartheid policy:
"That the police's prime function was to apply the maxim, taken from Roman times, that the safety of the state is the supreme law and the police's focus was to maintain law and order, to serve the state and while this, he observes, also caused some sectors to feel safe and protected, police in essence saw

339 See Brewer, 1994: 290.See also Davis, 1986: 80.
340 See Brewer, 1994: 290.See also Jeffery, 2009: 54.
341 See Brewer, 1994: 290.
342 See Brewer, 1994: 290.
343 See Brewer, 1994: 290.
344 See Brewer, 1994: 290.
345 See Brewer, 1994: 290.
346 See Midgley, 1995: 3.

themselves as protecting the state against certain individuals and communities".[347]

Because of the political role of the police, their draconian powers and their lack of accountability to the broader populace, instances of police bullying, shootings, hit squads, massacres, dirty tricks and other human rights abuses abound.[348] Few will disagree that for decades, police conduct was a significant cause of hurt and suffering in south Africa, *"particularly among black people".*[349]

Police were unwanted in the townships and township societies created their own structures for regulating social behaviour. Both the police and anti-apartheid structures regarded black people as their enemy, leading to a dispute which brought disorder, the exact opposite of what they were designed to achieve.[350] Black on black strategy was introduced by the SAP in 1984-1986 to repress the political resistance. The recruits, called "Kits Konstabels" (meaning instant constables training for short periods of time), were engaged.[351] These recruits were employed by the SAP under section 34(1) of the Police Act,[352] which provided for the appointment of:

"fit and proper persons' as temporary members of SAP when there are insufficient ordinary members to perform police duties".

The "Kits Konstabels"(instant constables) committed serious atrocities, especially on black people in that they abused their power by misusing firearms, threatening to shoot residents, using shotgun-butts to beat residents, committing random assaults, sexual abuse, threatening, harassing and verbally abusing

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347 See Midgley, 1995: 3.
348 See Midgley, 1995: 3.
349 See Midgley, 1995: 3.
350 See Midgley, 1995: 3.
351 See Fine, 1989:46.
352 See Act No. 7 of 1958.

them.[353] There was no disciplinary action taken against these "Kits Konstabels" (instant constables) and as *Gauntlett*[354] puts it:

"In practice, the proceedings against individual members of the police or against the Minister of Law and Order on the basis of a vicarious liability generally arise in three principal areas, thus they are inquests, delictual and private prosecutors".[355] As regards inquests, *Gauntlett*[356] argues that:

"It may be anomalous to speak of proceedings against the police in the context of an inquest. After all, proceedings under the Inquest Act[357] *are not adversarial in nature. They entail public inquiry. In short, for the administration of justice to be complete, and to instill confidence, it is necessary that amongst other things, there should be an official investigation in every case where a person has died of unnatural causes and the result of such investigation should be made known…the inquest must be so thorough that the public and the interested parties are satisfied that there has been a full and fair investigation into the circumstances of the death".*[358]

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353 See Fine, 1989:46.

354 See Gauntlett,1989:87. See also Haysom,1989:139-145 where he states that: "The powers of police, even in a democratic society, are awesome. The special powers granted to the police to stop, search, arrest, detain, seize and to keep persons or groups under surveillance constitute considerable powers to invade the privacy and freedom of individual citizens. In addition police are afforded the right to the legitimate use of force, including deadly force, to underwrite their general and specific powers. Police are subject to law and are liable for prosecution should they act outside the law while exercising their duties".
Gauntlett notices a significant difficulty in pressing civil claims against the police in South Africa as stemming from a statutory provision which provides for the limitation and notification of actions against the police.
While Hansson, 1989: 118-119 records that from 1 September 1984 to 31 December 1988 the security forces killed 1 113 township residents, that during 1985 alone, the SAP killed 763 people as a result of the 'unrest'. He notes with concern that regulation 2 of Security Emergency (GN R88 GG 375 of 9 June 1989 Regulation, Gat no. 11948) gave all security force members the power to use force against anyone whom they 'think' is a danger to 'public safety', or a threat to 'public order' and the only control required is that of an oral warning. He further notes that regulation 15 indemnifies the security forces against criminal prosecution and civil liability for actions taken 'in good faith' using the emergency powers.

355 See Gauntlett, 1989: 86.

356 See Gauntlett, 1989: 86.

357 See Act No.58 of 1959.

358 See Gauntlett 1989:86 See also *Timol v Magistrate* 1972 (2) SA 271 (T).

Section 205 of the South African Constitution closes a gap as Brogden and *Shearing*[359] put it:

"It is widely accepted that South African Police Force (now Service) has to be de-racialised and transformed from being an instrument of white domination, and regarded as such, as a protector of the peace and security of all South Africans accepted as such. No longer can we have a racial caste in command of the police force .The policing talents and skills of all communities must be tapped, so that the force, from the top to bottom, becomes as culturally dappled and humanly diverse as the society from which it is drawn".[360]

This fact brings confidence to the new Police Act[361] in that *"citizens must feel that this is our police service defending the rights of ''all of us''* [362] as opposed to the

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359 See Brogden and Shearing, 1993: ix.
Note that in order to address and redress the problem of human rights abuses, the Independent Complaints Directorate (ICD) was set up in early 1997. As Martin Schonteich, 2004: 220 put it: "To investigate all cases of deaths in police custody and as a result of police action, criminal offences allegedly committed by members of SAPS and municipal police services".
He submits that in 2002/03, for example deaths in police custody, caused by police action, there were 528 people who died in police custody compared to 737 in 1997/98, a decrease of 28%, but nevertheless, the total of 3 974 deaths over the six-year period is high.
Schonteich, 2004: 220 further submits that during 2002/03, the ICD recorded 311 deaths as a result of police action, down from 518 in 1997/98 – a decrease of 67%. That when measuring such deaths at a rate per 100 000 police officers, there were 478 deaths per 100 000 officers in 1997/98, and 304 in 2002/03 – a decline of 58%.
Most of the 2002/03 deaths as a result of police action occurred during the course of an arrest (55%), or during the alleged commission of a crime (15%), and nine deaths were those of innocent bystanders, twelve as a result of 'negligent handling of firearms' by police. He finally observes that it is sobering to note that not a great number of people were killed as a result of police action in 1987, during the height of the country's political violence and at the time of a national state of emergency. In that year, members of the South African Police (SAP) reportedly killed 400 people and almost half of the deaths (46%) occurred during alleged escape attempts. See Race Relations Survey 1988/89-563. See also Bruce, Savage and De Waal, 2000: 71-73 while discussing the role of ICD as to investigate, supervise and monitor actions of SAPS members are subject of investigation. The ICD has been mandated further to investigate any misconduct or offence, any death in police custody per sections 50- 53(2) of SA Police Act 68 0f 1995. See Lesotho's corresponding section 22 of police Act 7 of 1998 which lacks full development in this regard as it has never held any police officer accountable under similar circumstances.

360 See Brogden and Shearing,1993:ix.

361 See Act no. 68 of 1995.

362 See Brogden and Shearing,1993:ix.

past period where the citizens felt that the police force was “theirs” and were perceived as protecting the interests of ‘them’ as opposed to ‘our’ interests.

One commends the African National Congress (ANC)[363] initiatives to develop, adopt and draft policy guidelines in May 1992 aimed at transforming the police into an organisation suited to a fully democratic society by declaring that:

- ☆ *The police service shall respect the ideals of democracy, non-racialism, non-sexism, national unity and reconciliation and act in a non-discriminatory fashion. The police shall be non-partisan and no member of the service shall hold office in any political party.*
- ☆ *Policing shall be based on community support and participation.*
- ☆ *Police shall be accountable to society and the community it serves through its democratically elected institutions.*
- ☆ *There shall be a professional police code governing standards and suitability of membership to the service, and a code of conduct to which police will adhere.*
- ☆ *Policing priorities shall be determined in consultation with communities they serve.*
- ☆ *Policing shall be structured as a non-militarized service function.*
- ☆ *The police service shall carry out its work primarily through non-violent means.*
- ☆ *Policing shall be subject to public scrutiny and open debate.*
- ☆ *Allegations of police misconduct shall be dealt with by independent complaints and an investigation’s mechanism.*
- ☆ *Members of the service shall be entitled to form and join employee organizations, of their choice, representing their interests.*
- ☆ *The police shall strive for high performance of standards.*[364]

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363 The African National Congress came into power in 1994 with Nelson Mandela, the longest serving Robben Island prisoner becoming the first post-apartheid President of the Republic of South Africa. In South Africa police have joined and formed a labour and dispute settlement and resolution organisation called Police and Prison Rights Union (POPCRU) and the South African Police Union (SAPU), respectively.

364 See Midgley, 1995: 12.

2.6.2.2.5 The South African Draft Policy and Green Paper Document

One further welcomes the initiatives to transform the current South African Police Service through the South African Police Act[365] which, according to *Reynecke and Fourie,*[366] came up with 13 points which formed the foundation stone in guiding the philosophy of change within the police service. They are as follows:

1.	Democratic control over police service	National Minister, MECS and other elected politicians give direction, guidance and support and ensure that Police Act is in accordance with the Constitution.
2.	Accountability of the police service	The police are responsible for protecting the community and are held accountable for the powers they exercise. The Constitution and new values ensure that police officials are not above the law.
3.	Community consultation and involvement	There must be constructive consultation between the community and the police. Empowerment and education programmes must be developed to enable the community to participate.
4.	Police service and community development	Improving the quality of life of communities is essential and the police must play a role in tackling socio-economic issues.
5.	A new emphasis on the quality of service	This includes changing the police culture and identifying with the values of non-racialism, non-sexism and equality.

365 See No. 68 of 1995. See Reynecke and Fourie 2001: 50.

366 See Reynecke and Fourie, 2001: 101. Note that contrary to Lesotho situation, the South African Constitution Chapter II, section 206(3) of 1996 provided a clear-cut political responsibilities of the Minister of Home Affairs who was then in charge of Police Department. These responsibilities are:- To monitor police conduct, to oversee the effectiveness and efficiency of the police service, To promote good relationships between the police and the community. To assess the effectiveness of visible policing. It is recommended that these responsibilities should be incorporated in the Lesotho Mounted Police Act No. 7 of 1998 in order to give Police Commissioner and Minister of Home Affairs clear guidance in their day to day operations.

6. The style of the police service	The police must be accessible to all citizens and must be 'user friendly'. Professionalism and a people-centered approach are the keywords here.
7. A professional police service	The police service strives towards professionalism so that it offers a respectable career option. To achieve this, the profession must be demilitarized, without relinquishing discipline.
8. A national police service	Uniform national standards and procedures, and a new police Act will ensure that the police are unified.
9. The nature of the police organization	To be dynamic, the police must be staffed with committed members who support the vision of the organization. The organization must be lean and the resources should be allocated according to needs.
10. The role of police unions	Police unions and management are jointly responsible for transformation. Employees will have the right to organize and healthy labour relations practices should guide this process.
11. A cost-effective police service	Resources should be allocated according to priorities and the needs of communities. Objective criteria and performance indicators must support this to ensure effectiveness.
12. Equality and the police service	The police must set an example when it comes to fairness and equality. Respect for human rights and commitment to the values of the Constitution are important prerequisites.
13. The use of force by the police service	The police should apply the principle of minimum force. Conflict resolution must replace a 'trigger-happy' approach and members who use excessive brutality must be acted against.

De Beer[367] further discusses some highlights of the urgent need to change the police customs as presented in the draft policy document by the Minister of Safety and Security, Sydney Mufamadi, in September 1994. Here are some of the extracts quoted:

- ☆ *The South African Police Service has a major role to play in shaping the future of our society. Whilst policing represents only one component of a multitude of activities which make a society work, it is a very important one. No development and reconstruction can take place without security and stability. Effective policing and maintenance of law and order is therefore a key to the success of our society.*
- ☆ *The South African Police Service can assist in making South Africa a more secure country for all its people. It can assist in fostering a human rights culture and in providing the climate within which development and reconstruction can take place. These are essential requirements for a successful democracy.*
- ☆ *The philosophy of community policing must inform and pervade the entire organization … the organization must be people-centered.*
- ☆ *This style of policing requires new training. In particular, training must equip police professionals to exercise their discretion in a responsible manner, in accordance with the fundamental rights enshrined in the Constitution. Community-police forums should also be used to evaluate the quality and appropriateness of the local police service and can contribute to ongoing improvements.*

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367 See De Beer, 1999: 2-11.
Marlene De Beer's argument is very important in addressing the question of discrimination malpractices perpetrated by police officials. These tendencies prompted the drafting of SAPS' document of 1994 to1997. The Draft document was geared towards promoting the implementation of equality and elimination of discrimination practiced on black communities by the white minority. She quotes Commissioner George Fivaz with approval in 1996 when he said: "In embracing fundamental equality in the South African police service, the constitutional rights of individuals should not merely be accepted and tolerated. The true freedom of individuals should rather be measured by the extent to which they have liberty to exercise those rights … The South African Police is thus not only responsible to ensure that specific policy is formulated".

- ✯ *Policemen and women also have rights. The new approach towards human rights by the South African Police Service should therefore start at home with the members on whom society depends for their safety.*
- ✯ *The police must move towards an appropriate civilian culture … It means that the underlying values of the police service must be the values of society as a whole … the principles of non-racialism, non-sexism and equality.*
- ✯ *The police leadership must be committed to the values of non-discrimination and to creating a human rights culture in the service. Training aimed at the elimination of racist and sexist behaviour will be encouraged.*
- ✯ *The police are therefore responsible for the protection of the Constitution and our new democracy, the Constitution, and in particular the fundamental rights and freedoms, must be known, understood, and treasured by every member of the service*.[368]

2.6.3 South African State Liability for Wrongful Police Action under Common Law

Police officials are not above the law.[369] They act only within the powers conferred on them by legislation and common law.[370] 'Wrongful police action' refers to acts performed by police officials on whom certain penalties are imposed by the law or the service.[371] The nature of the sanction depends on whether the act is a crime, a delict or misconduct.[372] If a crime has been committed, the punishment may consist of imprisonment or a fine.[373] If a delict has been committed, the guilty party is ordered to pay compensation to the prejudiced person. Misconduct can lead to discharge from the service and state

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368 De Beer 1999: 2-11. See also Ggada, 2004:103 for valuable recommendations of how to improve the police service's performance.
369 See Joubert, 2001:27.
370 See Joubert, 2001:27.
371 See Joubert, 2001:27.
372 See Joubert, 2001:27.
373 See Joubert, 2001:27.

or police officials can be held liable for any loss or damage arising from the wrongful police action.[374]

In the case of State liability for police, with specific reference to *Minister of Police v Rabie,*[375] in an action instituted in the local division, the respondent claimed damages from the appellant. He alleged that he was assaulted and unlawfully arrested by a police officer who also, unlawfully, maliciously and without any reason or grounds therefore laid false charges of attempted house-breaking against him, resulting in detention in prison for 16 days. The respondent also alleged that the policeman who arrested him was at all material times acting in his capacity as a policeman in the service of the South African Police which means that he was acting within the course and scope of his employment.

A historical development of state liability in South Africa originates from Roman Dutch law with the 1986 decision in the Rabie becoming the modern *locus classicus* on the state liability for police action.[376] In *Rabie,* the risk principle was rejected and subjected to severe criticism, opting instead for the application of the traditional test which placed emphasis on the question as to whether the policeman's conduct was within the course and scope of his employment.

The courts have expressly stated that there is no difference between the position of the state and its servants in private law. This was stated *in British South African Company v Crickmore*.[377] *Solomon JA* determined a question arising

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374 See Joubert, 2001: 27.

375 1986 (1) SA 177 (A).

376 See Negota, 1995: iii.

377 1921 AD 107-111.Note that the appeal against this decision was further based upon two grounds: the first was that the applicant was protected from liability by the doctrine of the "King can do no wrong" and the second was that the constable was acting in discharge of a statutory duty and not on behalf of the company. The Court concluded that now, in a sense, no doubt the police are servants of the company, by whom they were appointed and paid, and by whom they may be discharged. The Court went further to indicate that, but in respect of such an act as the arrest of a person for the commission of a crime, they are performing a duty imposed upon them not by the administration, but by statute. In the discharge of that duty, the administration has no control over them and that it has no power to interfere with them. Finally when therefore, a constable is effecting arrest, he is

from the High Court of Southern Rhodesia. The issue was whether a British South African Company is liable in damages to the plaintiff, who had complained that he had been wrongfully arrested by one of its police constables. In the Court below, it was held that the company was liable. The company was fined 50 pounds, with costs. In order to bring the master's vicarious liability within the general principle of fault in private law, some or other *culpa in eligendo* is presumed on the part of the master. The risk principle postulates that the injured party should be compensated even if there was no fault on the part of the wrongdoer.[378] This principle has, however, been subjected to severe criticism in that in some instances, the state does compensate subjects who have suffered loss as a result of dangerous activity on the part of the state, without fault on the part of the servants being proved, where legislation has been made for compensation.[379]

2.6.3.1 The Judicial Approach to the Limitation of State Liability for the Police Action

It is well-known that the police generally exercise their functions in emergency situations.[380] It has always been found necessary to limit the liability of the state for police action.[381] In determining the requirements for state liability, the courts have relied on the model of the private service relationship, but have also required that the policeman in question acted within the scope of his authority.[382] A decisive factor was whether the state could control the servants at the time when they performed the wrongful act.[383] This approach is referred to as the 'control test' which has been invoked in a number of cases.

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not acting as a servant of or on behalf of a company, but is carrying out a duty entrusted to him by legislature. See also section 10 of Ordinance No.21 of 1903 which established the police force for Southern Rhodesia.

378 See Negota, 1995: iii.

379 See Negota, 1995: 4.

380 See Negota, 1995: 6.

381 See Negota, 1995: 6.

382 See Negota, 1995: 6.

383 See Negota, 1995: 6.

In *Mhlongo v Minister of Police*[384] the Court held that:

All members of South African police force are prima facie servants of the state and consequently, when a wrongful act is committed by a member of the police force, in the course or scope of his employment, the state is prima facie liable. That, it is for the state to show that in committing the wrongful act, the policeman was engaged upon a duty or function of such a nature as to take him out of the category of servant pro hac vice.[385]

It went further to indicate that in order for the duty or function to take him out of the category of servant, it must be one which is personal to the policeman in the sense that from its very nature the state is so deprived of the power to direct or control him in carrying out his duty or function that he cannot be regarded as *pro hac vice* as a servant of the state".[386]

In Minister of Police v Gamble,[387] the court found that a police officer is always under the command, supervision and control of his seniors and thus under the control of the state when he was conducting police business.

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384 1978 (2) SA 551 (A).

385 Meaning for this occasion or appointment for a particular occasion as opposed to a permanent one.

386 1978 (2) SA- 551-552(A). Note that the Court finally observed that it must be emphasised that the mere fact that a duty or function is a statutory one or that it confers upon policemen discretion is not decisive. The essential criterion is whether his employer, the state, has the power to direct or control him in the execution of his duty or function, including the exercise of the discretion if any.

387 1979 (4) SA 759 (A). Judges Wessels, Jansen, Trollip, Kotze and Joubert delivering a majority decision held that:

"The state as an employer is indeed vicariously liable for a wrongful arrest made by a police officer, acting in his capacity as such, within the scope of his employment, i.e. when he is about police business. A police officer is indeed always, when he is about police business, under the command, supervision and control of his seniors and thus under the control of the state". The court went further to hold that it cannot be said that *pro hac vice* he is not an employer or servant of the state when he exercises a statutory discretion within the scope of his employment. Because of the provisions of the State Liability Act 20 of 1957 there is in principle no reason why the state as employer cannot be held vicariously liable for the wrongful arrest made by a police officer as its employee acting in his capacity as such within the scope of his employment while he purports to make the arrest without warrant in terms of section 22 (1) of the Criminal Procedure Act 56 of 1955 or section 40(1) of the Criminal Procedure Act 51 of 1977.

2.6.3.2 South African State Liability Act[388]

The liability of the state is based on provisions of section 1 of the State Liability Act[389] where the state is vicariously responsible for the wrongful conducts (delicts) of its officials.[390] Before the state can incur liability, it must be established whether the delict was committed by a servant of the state and whether that servant was acting within the scope of his/her employment.[391]

In *Union Government v Thorne*[392] the respondent was proceeding along the main road to Benoni from Brakpan at night on his motorcycle at about 15 to 18 miles per hour, and a trolley drawn by mules was proceeding in the opposite direction. At a point where there was a branch in the road leading to the Van Ryn compound, respondent collided with the trolley. The magistrate found the driver of the trolley liable because he turned off to his right suddenly to take Van Ryn's road without giving due warning or taking proper precautions. The driver was a police constable engaged at the time on official duty. The question on appeal was whether the state was liable in damages for the injuries sustained by the

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388 State Liability Act no. 20 of 1957.

389 See Act No.20 of 1957.

390 Joubert, 2001: 27.

391 Joubert, 2001: 27.

392 1930 AD 47. See also Centlivres J.A. In *Sibiya v Swart* 1950 (4) SA 515.(A). In the magistrate's court the appellant claimed damages against the *Minister of Justice and Johannes Mopakisane*, who at all material times was a police constable. It was alleged that soon after midnight on April 27th, 1947, the constable unlawfully and without just cause arrested the appellant; and both prior to the arrest and thereafter the constable unlawfully assaulted the appellant and caused him severe bodily injuries. The constable was in the employ of and under the control of the Minister. The constable's acts complained of were committed in the course of and within the scope of his employment. Section 7(1) of Act 14 of 1912 provided: "Every member of the force shall exercise such powers and perform such duties as are by law conferred or imposed on a police officer or constable, but subject to the terms of such law, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superiors in the force".
The Court held that if a policeman in the performance of any statutory duty, which does not depend on the exercise of his own discretion, commits any wrong, that wrong constitutes, within the meaning of section 2 of Act 1 of 1910, a wrong committed by a servant of the crown acting in his capacity and within the scope of his authority as a servant, the crown is therefore liable for any damage caused by that policeman. The court interpreted this section as meaning that he therefore performed those duties in his capacity as a servant of the crown and is subject to the control of the crown.

respondent in his collision with a police constable. It was held that the court's view of the first requirement is that the police officials are servants of the state and that the state can be held liable for all the delicts committed by police officials within the scope of their employment. However, according to the second requirement, the state can be held liable only if the delict was committed while the police official acted within the scope of his/her employment. The state can therefore avoid being held liable if it can be proved that the police officer performed duties of a personal nature in the sense that no control could be exercised over him/her.[393] In *Minister of Police v Gamble*[394] the Appellate division found that a police official is always under the command, supervision and control of his/her supervisors, and thus under the control of the state, when performing police work. There is no similar Act in Lesotho.

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393 See Joubert, 2001: 27.

394 1979 (4) SA 759 (A). See *Minister of Police v Ewels 1975 (3) SA 590 (A*) where the state was held delictually liable for failure of police to help a person who was assaulted by a colleague who was off-duty in their presence.
In Ewels, the respondent, an ordinary citizen, had been assaulted by a sergeant of police, who was not on duty, in a police station under the control of the police and in the presence of several members of the police from whom it was jointly reasonably possible, even easily, to have prevented or to have put an end to the attack. The court *a quo* held that the duty which rested on the policemen to have come to the assistance of the respondent was a legal duty and as it was a failure which had taken place in the course of the policeman's duty that the appellant was liable for the damages claimed by respondents. See also Dendy,1989: 22 who discusses the decision of *Union Government v Thorn* 1930 AD on p. 47.
The Appeal Court, however, found that the Court a quo erred in finding that, in relation to the assault on the respondent, Barnard was under the control of the policemen whether by reason of the fact that one of the policemen held a higher rank than Barnard who was an assaulting officer or by reason of the provisions of the Police Act. That "It is well established in our law that, generally speaking, liability in delict does not arise solely from an omission *stricto sensu".* The Court went further to hold that, but there will be liability in respect of an omission where there is a legal duty in the circumstances to act.
The Appeal Court observed that the judgement of the Court *a quo* proceeded on a very narrow basis which may be summed up as follows:
"(a) if a person is in control of another and fails to prevent that other from committing a delict, that person is guilty of actionable culpa;
(b) the policemen in question were in control of Barnard because (i) one of them enjoyed a higher rank in the police force than Barnard; and (ii) the provisions of the police Act conferred an implied control in favour of policemen over any other person who commits a crime in their presence. The police Act stipulates that it is the function of the police to prevent crime and to maintain law and order. The court concluded that in order to determine whether there is unlawfulness the question, in a given case of an omission, is not whether there was the usual "negligence" of the *bonus paterfamilias*, but whether regard being had to all the facts, there was a duty in law to act reasonably".

2.6.3.3 Personal Liability

Police officials can be held personally liable for wrongful action in three ways that:

(a) *"They will be criminally liable if the action constitutes a crime.*

(b) *If a delict is committed for which the state is held liable, the service may, in certain circumstances, recover all relevant expenses incurred from the police official concerned.*

(c) *The service may institute disciplinary proceedings against the member concerned".*[395]

2.6.3.4 Criminal Liability

Police officials may be found guilty of committing any crime, regardless of whether they were on or off duty at the time.[396] If the crime has no relation at all to police work, the member cannot rely on protection from the state, at the state's expense.[397]

Police officials must also know that exceeding their statutory powers can lead to a crime being committed.[398] Section 28 (1) (a) of the Criminal Procedure Act, for example, [399] provides that a police official who acts contrary to the authority of a search warrant is guilty of an offence and liable on conviction to a fine or imprisonment not exceeding 6 months. Once more, there is no similar provision in Lesotho.

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395 See Joubert, 2001: 28.
396 See Joubert, 2001: 28.
397 See Joubert, 2001: 28.
398 See Joubert, 2001: 28.
399 See Act No. 51 of 1977.

2.6.3.5 Disciplinary Proceedings

Section 8 of the South African Police Service disciplinary Regulation[400] provides that a commander may institute disciplinary proceedings against a police official who is guilty of misconduct as defined in Regulation 18.[401] This may include cases in which a member performs or fails to perform an action, which constitutes a crime, or fails to perform his/her duties or performs his/her functions improperly.

This procedure is similar to the Lesotho Mounted Police Service's disciplinary proceedings against the officers, be they senior or subordinate officers, who misconduct themselves. In Lesotho, for example, the relevant section dealing with discipline is section 43 of Lesotho Mounted Police Service Act.[402] The 1972 Police Regulations, section 24 thereof, further sets out the schedule of offences dealing with insubordination against the senior officers and not so much about manhandling of suspects of crime. The South African disciplinary law is more advanced and professional.

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400 Issued in terms of section 24(1)(9) of SA Police Act No.68 of 1995. See Government Gazette No.17682.

401 See Joubert, 2001: 30.

402 Section 43 of the Lesotho Mounted Police Service Act No. 7 of 1998 reads thus:
"Where a police officer is charged with an offence against discipline the procedure set out in this part shall apply".
Section 44(1) provides for alleged misconduct of senior police officers thus "subject to subsection 2, where the police officer charged is a senior officer there shall be a hearing before a board comprising three police officers, appointed by the Commissioner, who shall be a rank at least one above that of the officer concerned and shall not normally be deployed within the same district in which the officer is deployed …"
Section 45 provides for the alleged misconduct of subordinate officers in more or less the same wording. The need for a rank above and coming from different districts is purely meant to bring about impartiality and fairness in the whole disciplinary process, but in practice that does not happen for the simple reason that those responsible claim that there are not many senior officers in all the district except for junior officers who would appear before a single police senior officer. Punishment thereof includes reprimand, fine, reduction in rank, dismissal, but there is no mention of criminal prosecution or imprisonment.

2.6.4 United Kingdom's Perspective on Human Rights' Violations by Police

2.6.4.1 Developments in London Policing

According to *Stevens and Yach*[403] the Metropolitan Police in London were established in 1829 with the primary aims and duties to uphold the rule of law, to protect and assist the citizens, and to work for the prevention and detection of crime and the maintenance of a peaceful society, free of fear of crime and disorder. From the earliest times, the police were expected to fulfil these aims and duties in consultation and co-operation with others in the community.[404] Implicit in their role of upholding the rule of law are two interrelated duties: the duty to uphold the law of the land and maintain the Queen's peace.[405]

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403 See Stevens and Yach, 1995: 24.
Stevens and Yach emphasise fair decision making as one of the fundamental aspects in the police work in that it actually impacts on recruitment, resource allocation, performance management, promotion, transfers and placement, choice of disciplinary punishment and methods of deciding whether to question or search a suspect. They remind us that, internationally, it is accepted that "all are equal before the law and are entitled without discrimination to equal protection of the law". This seems to suggest that all people in police custody are entitled to be equally protected by the domestic laws. The emphasis is further placed on fair investigation in that policemen should search for the truth and not merely those facts which suit the prosecution's case as that will not be a fair treatment of suspects.

404 See Stevens and Yach, 1995: 24.

405 In *Glasbrook Bros v Glamorgan County Council* 1925 Appeal Cases, at 270. In this case, the action was brought by the respondents against appellant to recover a sum of 2200l.lls pounds for services of police special supply for the appellant at their request and by agreement with them. The appellants claim that there was no consideration for promise to pay as it was a duty of respondents to afford police protection without payment and that they were forced to sign the agreement. The Court held that the primary function of the constable is the preservation of Queen's peace with justice Viscount stating:
"No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them necessary for keeping the peace, for preventing crime or for protecting property from criminal injury".
Further note that the same view was expressed by Justice Lord Parker CJ in *Rice v Connally* (1966) 2 Q.B. *414* when he described the duties of the police as follows:
"It is part of the obligations and duties of a constable of police to take all steps which appear to him to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least there and they would further include the duty to detect crime and to bring offenders to justice".
Clayton and Tomlinson, 1987 note that Police and Criminal Procedure Act 1984 section 20 stipulates that it is a constable's duty to prevent breaches of the peace that he

The duty is to abstain from arbitrary action, to respect the individual's rights and the freedoms of all citizens.[406] In discharging the duty of maintaining peace, it is necessary for the police to co-operate with others.[407] The urban disturbances in Brixton in 1981 highlighted the tension between the duty to enforce the law and the corresponding duty to maintain order.[408] The general approval was given to the principle that:

"where a conflict arises between the duty of the police to maintain order and their duty to enforce the law, the solution will be found in the priority which is to be given in the last resort to the maintenance of public order through the ethical exercise of police discretion".[409]

Apart from a focus on prevention, the review of the police role and responsibilities in the mid 1980's emphasizes that in carrying out their duties, the police will:

- ☆ *Respect citizens' individual rights and freedoms and avoid arbitrary or unlawful actions.*

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reasonably apprehends. This view was reiterated in the decision of *Duncan v Jones* 1936 1 K.B. 13 on 218. The appellant was about to address a number of people in a street when a police officer, who reasonably suspected that a breach of peace would occur if the meeting were held , forbade her to do so. The appellant insisted in trying to hold a meeting and obstructed the police officer in his attempt to prevent her. The Court held that, as it is the duty of a police officer to prevent breaches of peace which he reasonably suspected, the applicant was guilty of wilfully obstructing the officer when in the execution of his duty.
Neither the applicant nor any of the persons present at the meeting committed, incited or provoked a breach of peace. The Court added that, but not to protect an individual against "a mere apprehension of future crime". The policeman is under the duty to protect life and property. See *Haynes v Harwood* 1935 1 K.B. on 146. The plaintiff, a police constable was on duty at the police station. He claimed damages for injuries he sustained when a van drawn by a horse in the street where there were many people and children ran away. The Court held that the defendant's servants were guilty of negligence in leaving the horse unattended in a busy street. That the defendant must and ought to have contemplated that someone might attempt to stop the horses in an endeavour to prevent injury to life and limb, and as the police were under a general duty to intervene to protect life and property, the act of, and injuries to the plaintiff were the natural and probable consequence of defendant's servants negligence. Finally that the maxim" *Volenti non fit injuria*" did not apply to prevent plaintiff from recovering damages.

406 See Stevens and Yach, 1995: 24.
407 See Stevens and Yach, 1995: 24.
408 See Stevens and Yach, 1995: 24.
409 See Stevens and Yach, 1995: 24.

- ✯ *Operate within correct procedures.*
- ✯ *Support individual freedoms, including the right to free speech, the right to free association, the right of access to legal advice, and presumption of innocence.*
- ✯ *Observe the suspect's rights.*
- ✯ *Prohibit discriminatory behaviour towards individuals, classes of persons and minority groups.*
- ✯ *To act with integrity in the collection and preservation of evidence.*
- ✯ *Respect human dignity and use minimum force.*[410]

2.6.4.2 Acting with Fairness and Carrying out Responsibility with Integrity and Impartiality

Fairness in the police service has several dimensions.[411] In decision-making, it means ensuring that suspects receive dignified treatment when in police custody or when they are under investigation.[412] The police are required to conduct investigations in an objective and balanced way to ensure a fair trial by interpreting the legislation objectively.[413] Police officers need to exercise discretion in their work.[414] This means that the police are required to use balanced judgment when making decisions regarding privacy and confidentiality in order to exercise flexibility of their powers.[415] In summary, therefore, emphasis is placed on the fact that every individual has a right to freedom of thought,

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410 See Stevens and Yach, 1995: 24-25.They raise an interesting point that:"Police as a public service have a duty to enhance democratic rights and freedoms. They have the ability to create the minimum conditions for peaceful co-existence through upholding the law and maintaining the peace. Thus the police should respect citizen's rights and freedoms and avoid arbitrary or unlawful actions. They must respect a just balance between order and freedoms, they must operate within correct procedures, they must observe suspect's rights."

411 See Stevens and Yach, 1995:27.

412 See Stevens and Yach, 1995:27.

413 See Stevens and Yach, 1995:27.

414 See Stevens and Yach, 1995:28.

415 See Stevens and Yach, 1995:28.

conscience, religion, opinion, expression, peaceful assembly, association and freedom to privacy.[416]

2.6.4.3 The Nature of Police Powers under English Police and Criminal Procedure Act[417]

There are three categories:

(a) Common law powers

Despite increasing trends towards the statutory codification of police powers, the common law position remains of crucial importance in many cases.[418] For example:

"Common law police powers are usually such that they can only be exercised if certain preconditions of fact and belief are fulfilled. Thus a constable has a common law power to arrest someone whom he sees breaking the peace or who so conducts himself that he causes a break of the peace to be reasonably apprehended. If no breach of the peace has taken place and no one is reasonably apprehended, then, the constable has no common law power of arrest and any arrest made will be unlawful".[419]

(b) Without warrant Powers

Many of the most important police powers of arrest, search, entry and seizure are statutory *"without warrant"* powers.[420] In other words, they can only be exercised

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416 See Stevens and Yach,1995:28.

417 1984. Clayton and Tomlinson,1987:28 observe that: "Police powers at common law have been refined and adapted by judicial decisions over the centuries. The courts continue to play a creative role in this field". This therefore means that both the English Police and Criminal Procedure Act of 1984 and the common law seem to operate side by side.

418 See Clayton and Tomlinson, 1987: 27-28.

419 See Clayton and Tomlinson, 1987: 28.

420 See Clayton and Tomlinson, 1987: 28.

if particular preconditions of fact or belief laid down by the statute are fulfilled.[421] The majority of such powers are now to be found in the Police and English Criminal Procedure and Evidence Act of 1984 otherwise known as PACE. If the preconditions of fact or belief laid down by the Act are not met, then, an arrest, search or entry will have been done without *'lawful justification'* and the action of tort will lie.[422] They argue that the lawfulness of the exercise of a police power must be justified 'at the time of its exercise' thus *"it cannot be made lawful or unlawful according to what happens afterwards".*[423] This was held by Lord *Denning in Chic Fashions v Jones***.**[424] In 1965 and 1966 ladies clothes of various makes were stolen from several shops and factories. In March 1966, the police received information that clothes of that make were being sold at less than the usual retail trade prices at plaintiff's shops. The warrant was issued authorizing police to search the shop for stolen goods from Ian Peters.

(c) Power with warrant

According to Clayton and Tomlinson[425] Police arrests, entries, searches and seizures are often conducted under the authority of a legal authorization or "warrant".[426] A warrant gives a person to whom it is issued lawful authority to do acts which would otherwise be unlawful. A warrant provides a complete defence to a civil action in respect of things done *"in obedience to it".* Even if a warrant is,

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421 See Clayton and Tomlinson, 1987: 28.

422 See Clayton and Tomlinson, 1987: 28.

423 See Clayton and Tomlinson, 1987: 28.

424 1968 2 Queen's Bench on 312.

425 Clayton and Tomlinson,1987: 29 further argue that:" In order to be able to carry out their various duties in an effective manner the law gives constables a number of special powers". Under these powers the police are 'authorized' to do things which would otherwise be unlawful. If an ordinary citizen attempted to stop and search people in the street, then arrest them on suspicion of having committed crimes, or to enter and search their houses he would usually be liable to civil action. Police powers provide constables with a defence of 'lawful justification' against civil actions in respect of actions carried out in pursuance of their duties".

426 See Clayton and Tomlinson, 1987: 29.

in fact, invalid, the police will have a statutory defence under the *Constable Protection Act 1750,* provided they act "in obedience" to it.[427]

2.6.4.4 The Nature of Human Rights' Abuses in the United Kingdom

The following are some of the human rights' abuses in the United Kingdom where the Court has had to intervene:

In *O'Connor v Hewitson*[428], the court of appeal had awarded damages where P was lawfully arrested for being drunk and disorderly. He was assaulted by the police officer in an attempt to restrain him. P sustained bruising of his right cheek and the face from the officer's blows.

In *Mannoch v MPC*[429] the court awarded damages where P was assaulted at the police station after arrest for motoring offences.

In *Ballard, Stewart-Park, Findlay v MPC*[430] the court awarded damages where P1 and P2 had been hit over the head by police officers with truncheons in the course of a demonstration.

In *Barbara v Home Office*[431] the court awarded damages to P who was injected with a tranquillizing drug whilst he was in custody and liability was admitted.

In *Fisher v MPC*[432] the court awarded damages to P for assaults where he suffered swollen lips, nose, and for the injuries to the forehead and the back. These cases go on to show the extent to which the courts of law have had to intervene in the human rights' abuses by the police in the United Kingdom. The

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427 See Clayton and Tomlinson, 1987: 29.

428 1979 Criminal Law Report. 46. See also Clayton and Tomlinson, 1987: 367 to 368.

429 1983 County Court (unknown). See Clayton and Tomlinson, 1987: 368. .

430 1983 New L.J. 1133 January 10, 1984 Westminster County Court. See Clayton and Tomlinson, 1987: 368.

431 1984 134 New L.J. 888, High Court. See Clayton and Tomlinson, 1987: 368.

432 1985 Westminster County Court. See Clayton and Tomlinson, 1987: 369.

pattern of assaults in the three jurisdictions Lesotho, South Africa and United Kingdom discussed so far, go to demonstrate that human rights' violations have been going on unabatedly.

Haysom[433] adds another drastic human rights abuse by British police when he states that:

In the 1980's, in three separate incidents, unarmed suspected members of the Irish Republican Army were shot dead by the police. A public debate was held to determine whether security forces were pursuing a deliberate 'shoot to kill' policy.[434] *As a result, the Deputy Chief Constable of the greater Manchester Constabulary, John Stalker, was appointed to investigate the circumstances and the police investigations into the shootings of the six suspects.*[435] *When Stalker*[436] *had uncovered disturbing irregularities in his investigations into the shootings and was close to unearthing possible abuses which had taken place, he was suddenly removed from the investigations. He was placed under suspicion himself, because he had been seen at a party attended by a person who had a criminal offence.*[437] He was replaced and his report was never released.

Finally *Murphy and Stockdale*[438] observe that in cases of detention and treatment of suspects, the British Police and Criminal Evidence Act[439] and its code of

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433 See Haysom, 1989:158.
Haysom actually examined a comparative survey of police control mechanisms in the United States, South Africa and the United Kingdom. John Stalker was the deputy chief constable of the greater Manchester Constabulary at the time. It should be noted that the principal machinery for reviewing police misconduct was through the statutory complaints procedures. Further note that in the United Kingdom, the Complaint Procedure was first established in 1976 through the Police Act of 1976 which established a Police Complaints' Board. The 1976 Complaint Board was lacking in many respects in that it lacked independent investigative powers, the establishment of persons appointed to serve on the Board and the right to sue complainants for defamation. That notwithstanding, when the 1984 Act came into place, the task of investigation was left in the hands of the police with the Board acting as an oversight over investigation.

434 See Haysom, 1989:158.

435 See Haysom, 1989:158.

436 SeeHaysom,1989:158.

437 See Haysom,1989,:158.

438 See Murphy and Stockdale,1992:875.

practice provide for the questioning and treatment of detained suspects. The PACE and recent decisions validate the use of detention of persons as an aid to interrogation. In *Holgate Mohammed v Duke*[440] a detective constable, exercising his powers under section 2(4) of the Criminal Law Act of 1967, arrested the plaintiff on suspicion that she had stolen jewellery and took her to a police station where she was questioned. She was not charged with any offence. She brought an action of damages for wrongful arrest. It was in accordance with a leading principle that all persons in custody must be dealt with expeditiously and released as soon as the need for detention had ceased to apply. In this decision, the plaintiff had been arrested on suspicion of having committed an arrest-able offence. The judge at the first instance found that although there were reasonable grounds to believe that she was guilty, the fact that the motive of the police had been to question her at the police station in order to obtain a confession invalidated the arrest. Questioning between an arrest and a charge was an incident that had been recognized in the past by a number of sources and thus could not be an irrelevant consideration.[441]

Murphy and Stockdale 1992:875 note that "where a person is arrested for an offence, whether without a warrant or under a warrant, not endorsed for bail, the custody officer at the station where he is detained is to determine whether he has sufficient evidence to charge the suspect with the offence for which he is arrested. He must perform this task as soon as it is practicable after the arrested person arrives at the station or, if the arrest occurs there, as soon as possible after the arrest. He may detain the person at the police station for so long as it is necessary to enable him to discharge this function". See section 37(1) of PACE of 1984 which stated that: "A custody officer who becomes aware at any time that the grounds for detaining a suspect in police custody have ceased to apply and who is not aware of any other grounds which would justify his continued detention must release him immediately".

439 See PACE of 1984 C 60.

440 See 1984 Appeal Cases 437.

The principle in *Holgate Mohammed v Duke* is in relation to legal characteristics of arrest which are to the effect that:"There is no necessary assumption that arrest will be followed by a charge; a constable who reasonably suspects a person of involvement in an offence may arrest that person with a view to interrogating him in a more formal atmosphere of a police station". The emphasis was placed on the fact that the power to arrest must, however, be the basis of reasonable suspicion, where the arrester knows at the time of arrest that there is no possibility of a charge being made and that arrest must be justified by some rule of positive law because "constable who cannot justify his actions by reference to lawful authority is said not to act in the execution of his duty".

441 Robilliard and McEwan, 1986: 125-126.

Sections 42(1) (a) and 43 (4) (a) of PACE make it clear that questioning in order to secure or preserve evidence is a legitimate incident of arrest. Thus the particular problem that arose in *Holgate-Mohammed v Duke* was resolved.[442]

In Britain, a suspect may be detained for a period of 24 hours, up to 36 hours, for more than 36 hours, up to 96 hours under the Act upon certain conditions when such a suspect has committed certain serious offences.

2.6.4.5 United Kingdom Liability for Wrongful Police Action: *Writ of Habeas Corpus*

Clayton and Tomlinson[443] indicate that the writ of *habeas corpus ad subjiciendum* is often said to be the foundation stone of the liberties of the subject. In *R v Batcheldor*[444] *Lord Denman* once put it as follows:

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442 Robilliard and McEwan, 1986: 126.

443 Clayton and Tomlinson, 1987: 393 state that: "Given the modern limitations on the writ and in particular the practice of adjourning any application to give notice to the police, this statement sounds rather exaggerated today. Nevertheless, it does, at the limit, serve as a remedy for those in police detention and the threat of an application is perhaps, on occasion, sufficient to secure the early release of detained persons".
Habeas corpus: Historical background: Sharpe, 1976: 125 traces the origins of the writ of habeas corpus from the seventeenth century as we have seen above, *habeas corpus* was an important aspect of day to day criminal procedure. It was the accepted method by which a person committed by the local justices could appeal to the general clemency of the King's Bench to grant bail. It generally provided a method of review over pre-trial proceedings. It was and still is thought to provide a measure of protection against arrest and detention unauthorized by the ordinary criminal process. "In the first place *habeas corpus* provided a remedy, where pre-trial proceedings had been defective and when an accused person was arrested, in the normal course, he was brought before a justice of the peace and the justice had to decide whether to discharge, commit or bail the prisoner according to the facts and according to the applicable legal principles". The justice was required to take in writing the examination of the accused and of the other witnesses. Sharpe further indicates that before a statutory change in 1848, this early form of the preliminary inquiry had a distinctly inquisitorial character. The justice set out to collect evidence and he examined the accused about an offence. He took the depositions of the witnesses in the accused's absence. According to Sharpe, the proceedings were designed to prepare the prosecution's case for trial and not as a judicial process to determine whether or not, on the evidence, a full trial was warranted while an accused person was committed for trial without preliminary proceedings of a judicial character. He mentions an important feature that *habeas corpus* did not provide a method of judicial review of the case at an early stage, but the prisoner could argue that the justice had wrongly refused him bail, and that the evidence against him was too weak to warrant holding him for trial, or that the charges against him were deficient in law.

"The provisions made by the law for the liberty of the subject have been found for ages effectual to an extent never known in any other country through the medium of the summary right to the writ of habeas corpus."

This writ served as a remedy for those in police custody. The threat of an application is perhaps, they add, on occasion, sufficient to secure the early release of detained persons. The *habeas corpus* is a prerogative writ by which the Queen's Courts can inquire into the reasons for the imprisonment of any person. Thus, the purpose of the writ is to order the production of the body of the imprisoned person before the court so that inquiries into the reasons for the imprisonment can be made. The release from subsequent detention can thus be secured. Note that the nature of *habeas corpus* application is made *ex parte* as it is believed that the rights of a suspect are in danger.

2.6.5 Remedies in relation to goods

2.6.5.1 The Police (Property) Act 1897

The police may be in possession of goods in a wide variety of circumstances. The following are common situations in which the police hold goods belonging to other people:[445]

1. *Where they acknowledge that the goods belong to an innocent party, but are reluctant to return them to the plaintiff because of what are perceived as competing civil claims. An example of this is where a stolen car which has been sold by the thief to a bona fide purchaser has been recovered by the police.*
2. *Where it is not alleged that the plaintiff has any criminal involvement, but the police claim that his goods in fact belong to someone else.*

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444 1839 1 Per and Dav 516 on 567. See Clayton and Tomlinson, 1992: 446.

445 See Clayton and Tomlinson, 1992: 446.

3. *Where the goods have been taken from the plaintiff, but the police claim that they have been stolen.*
4. *Where it is claimed that the goods are being held for the purposes of an investigation for use as evidence*.[446]

In these circumstances therefore, Parliament has provided a summary remedy for the police in this situation which is now found in the Police (Property) Act of 1897. Section (1) of the Act, provided that when the property has come into the possession of the police in connection with their investigations of a suspected offence, a court of summary jurisdiction may, on the application of either an officer of police, or a claimant to the property:
"Make an order for the delivery of the property to the person appearing to the court to be the owner thereof, or, if the owner cannot be ascertained, make such order with respect to the property as to the magistrate or the court may seem fit".[447]

The making of such an order does not prevent the right of any person from taking legal proceedings against anyone in possession of property delivered under the court order. They add, however, that such proceedings must be taken within six months of the date of the order and *"on the expiration of those six month the right shall cease"*.

Under section 1(1) of the Police and Criminal Procedure Act of 1984, the claimant to the goods has to prove that he is the owner and cannot rely on any possessory title he had prior to the making of the order. This was the situation in *Irving v National Provincial Bank*[448] where the branches of W bank were broken into and substantial sums of money in notes were stolen. The police arrested the plaintiff and seized certain bundles of notes which became exhibits at the trial. The plaintiff was convicted for breaking and entering the premises. In October

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446 See Clayton and Tomlinson 1992: 446.
447 See Clayton and Tomlinson,1992: 444.
448 1962 (2) Queen's Bench. 73.

1960, the magistrate, on a summons by the bank, made an order under section 1 of the Police Property Act of 1897 for delivery to them of the money taken from them, by plaintiff on his arrest.

2.6.5.2 Replevin

Replevin[449] will be appropriate when the owner of goods wants them back as quickly as possible.[450] If the goods have been seized under a warrant issued without jurisdiction then *replevin* will be the only action available to recover consequential damages as well as the goods themselves.[451] Note that the advantage of an action of *replevin* is that damages can be claimed in the same action.

2.6.5.3 Injunctions

An injunction is a court order obligating a party to a civil case or action either to refrain from doing something or requiring something to be done by the party.[452] There has been no reported case in which an injunction has been granted against police in respect of their functions.[453] There is no reason in principle why injunctions should not be granted against police in appropriate cases to restrain them from acting unlawfully.[454] An injunction is an equitable remedy and is therefore discretionary.

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449 A *Replevin* is a personal action *ex delicto* brought to recover possession of goods unlawfully taken. The word means a redelivery to the owner of the thing taken in distress. It is the mode of contesting of the party from whom the goods were taken and he/she wishes to have them back. See also Black,1968:1463.

450 See Clayton and Tomlinson, 1992: 432.

451 See Clayton and Tomlinson, 1992: 447.

452 See Clayton and Tomlinson, 1992: 432.

453 See Clayton and Tomlinson,1992: 433. This relief proves to be useful and could be incorporated in Lesotho. As Clayton and Tomlinson, 1992:433 put it:"There are two basic types of injunctions which are grounded on the different principles. The first is a prohibitory injunction which operates to restrain a party from doing some act in the future. The second type is a mandatory injunction which is an order that some party does some special act."

454 See Clayton and Tomlinson, 1992: 433.

In *Wilkinson v Downton*[455] an injunction against molestation or interference with the plaintiff was granted. Section 1 of Police Property Act[456] read thus:

(1) Where any property has come into possession of the police in connection with any criminal charge, the court of summary jurisdiction may, on application, either by an officer of police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrate or court to be the owner thereof, or if the owner cannot be ascertained, make such order with respect to the property as to the court may deem fit.

(2) An order under this section shall not affect the right of any person to take, within six months from the date of the order, legal proceedings against any person in possession of property, but on expiration of those six months, the right shall cease to exist.

2.6.6 United States of America's Perspective on Human Rights Violations

Police brutality is one of the most serious, enduring, and divisive Human Rights violations in the United States of America.[457] The problem is nationwide, and its nature is institutionalized.[458] The United States government as well as state and city governments have an obligation to respect the international Human Rights' standards.[459] The United States is bound and it should be held accountable by international Human Rights' bodies and international public opinion.[460]

Police officers engage in unjustified shootings, severe beatings, fatal choking and unnecessary rough physical treatment in the cities throughout the United

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455 1897 (2) Queen's Bench 57.
456 See Act 1897. See page 74 of the actual judgment.
457 See Human Rights Watch, 1998: 1.
458 See Human Rights Watch, 1998: 1.
459 See Human Rights Watch, 1998: 1.
460 See Human Rights Watch, 1998: 1.

States.[461] Police supervisors, city officials, and the justice department fail to act decisively to restrain or penalize such acts or even to record the full magnitude of the problem.[462] The Human Rights Watch Report reveals that habitually, brutal officers, usually a small percentage of officers in the force, may be the subject of repeated complaints, but are usually protected by their fellow officers and by the shoddiness of internal police investigations. A victim seeking redress faces obstacles at every point in the process, ranging from overt intimidation to the reluctance of local and federal procedures to take on brutality cases. The report finally adds that severe abuses persist because overwhelming barriers to accountability make it all too likely that officers who commit human rights violations escape punishment only to continue their abusive conduct.

2.6.6.1 New York City

Tucker[463] is of the opinion that in 1990, the New York city board's annual report showed a total of 2 376 complaints for 'excessive force', 1 140 for 'abuse of authority', 1 618 for 'discourtesy' and 420 for 'ethnic slurs'. Among the 2 376 complaints for excessive force, injuries were documented in 267 cases.[464] These involved 71 bruises, 92 lacerations requiring stitches, 30 fractures, 22 swellings.[465] In the 2 286 cases that were pursued, 566 were dropped because

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461 See Human Rights Watch, 1998: 1-2.

462 See Human Rights Watch, 1998: 2.

463 See Tucker, 1993: 24.
Tucker, 1993: 24 observes that:"The experience is that when the procedure for filing complaints is made more open, to the public, the number of complaints rises. In fact the number of complaints filed is seen as evidence that the police brutality is "wide spread" and since only a very small number of complaints ever lead to disciplinary action (just as a very small number of criminal complaints ever lead to jail sentences), the vast number that fall apart or not resolved will usually be taken as proof that "the system isn't working". Note that the report covers cities such as Atlanta, Boston, Chicago, Detroit, Indianapolis, Los Angeles, Minneapolis, New Orleans, New York, Philadelphia, Portland, Providence, San Francisco and Washington D.C. See also Adler 2007: 233 for stating that the American Police have a long history of violent behavior. That in 1976, American Police officers killed almost 600 suspects, and approximately half of the states continue to rely on vague, centuries old common law standards that justify the use of deadly force against fleeing suspected "felons".

464 See Tucker, 1993: 24.

465 See Tucker, 1993: 24.

the complainants became un-co-operative, 234 cases were dropped because the complainants withdrew the charges and 1 405 were closed with less than five investigations, usually because the complainants became unavailable.[466] As a result, only 81 cases resulted in a finding against policemen.

In September 16, 1992, three off-duty New York City Police officers became embroiled in an argument with an 18-year old Ywanus Mohamed as they were on a subway.[467] During the argument, Mohamed pulled a box-cutting razor knife and slashed officer John Coughlin in the face, cutting him so badly that he nearly died.[468] Officers Thomas Cea and Patrick O'Neill subdued Mohamed, but after they had handcuffed him, they allegedly continued punching him until they broke his jaw. These officers were charged with assault.

2.6.6.2 Abuses of Police Power while conducting an illegal Search and Seizure

Schlesinger[469] observes that the Fourth Amendment to the Constitution of the United States of America provides a "right of the people to be secure … against unreasonable searches and seizures …" In an effort to apply and enforce that right, the Supreme Court of the United States has imposed the exclusionary rule upon federal courts since 1886 and upon States' Courts since 1961.[470] The exclusionary rule is a rule of evidence which excludes, or renders inadmissible in

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466 See Tucker, 1993: 24.

467 See Tucker, 1993: 25.

468 See Tucker, 1993: 25.

469 See Schlesinger, 1977: 1-11.
The Fourth Amendment to the United States of America's Constitution provides that: "The right of the people to be redeemed in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". It would seem that the Amendment clearly suggests that reasonable searches are permitted and only unreasonable ones are proscribed and more importantly, also in general, searches should be conducted with a warrant.

470 See Schlesinger, 1977: 1.

criminal proceedings, evidence obtained illegally by law enforcement officials.[471] Thus, evidence obtained by an illegal search and seizure could not, under the present Supreme Court decisions, be admissible in any criminal prosecution in America.[472]

Thus the fruits of all police procedures judged to be illegal by the courts or legislature must be excluded.

The following exclusionary rule undertaken by law enforcement officials are worth mentioning:

In *Mapp v Ohio*[473] the court excluded an illegal search and seizure where a residence was searched without a warrant.

In *Miranda v Arizona*[474] where a confession was secured by means contrary to the fifth or sixth amendments where police officers had secured it without having firstly upraised the suspect of his rights to remain silent and to be represented by counsel, were excluded.

In *Gilbert v California*[475] where identification testimony was conducted in violation of the fifth and sixth amendment where police staged a police line-up. It was excluded by the court.

In *Rochin v California,*[476] evidence of police methods that 'shocked the conscience', such as the involuntary stomach pumping, were excluded by the court.

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471 See Schlesinger, 1977: 1.
472 See Schlesinger, 1977: 1.
473 367 U.S. 643, 81 S.Ct. 1964 (1961).
474 384 U.S.436, 86 S.Ct. 1602 (1966).
475 388 U.S. 263, 87 S.Ct.1951 (1967).
476 342 U.S.165, 72 S.Ct. 206 (1952).

The American courts have stood against the abuse of police powers from time immemorial.

2.6.6.3 Confessions and Police Conduct

The extensive litigation centering on the admissibility of confessions obtained during the investigation phase of the criminal process has established this body of law as a significant subset of Fifth Amendment jurisprudence.[477] Interrogations have long been recognized as an essential and accepted part of law enforcement.[478] Yet, for a number of reasons, not all confessions that result from such interrogations are admissible.[479] In particular, the Supreme Court has excluded confessions which were considered the product of 'compulsion' by the state, in part because they may not be reliable as evidence, but primarily because society should not sanction coercive techniques, regardless of the importance of the information they may produce.[480] The rationale behind excluding coerced confessions was because of a distrust of the validity of such confessions and an abhorrence of the methods used.[481] The court's emphasis on the propriety of police conduct has in many cases rendered the admissibility and reliability a secondary issue.[482]

In *Rogers v Richmond*[483] Frankfurter went as far as to say that involuntary confessions are excluded:

Not because such confessions are unlikely to be true, but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: That ours is an accusatorial and not inquisitorial system – a system in which the state must establish guilt by evidence independently and freely and

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477 See Whitebread and Slobogin, 1986: 357.
478 See Whitebread and Slobogin, 1986: 357.
479 See Whitebread and Slobogin, 1986: 357.
480 See Whitebread and Slobogin,1986: 357.
481 See Whitebread and Slobogin, 1986: 358.
482 See Whitebread and Slobogin, 1986: 358.
483 365 U.S.534,81 S.Ct.735 (1961).

may not, by coercion, prove its charge against an accused out of his own mouth.[484]

In *Williams v United States*[485] Douglas noted that confessions obtained through the use of physical brutality and torture cannot be admissible under any concept of due process.

The first confession case that was decided by the United States Supreme Court was *Brown v Mississippi.*[486] The court followed a Fourteenth Amendment due process approach in ruling upon the admissibility of a confession.[487] The test that evolved out of these cases was whether, given the totality of circumstances, the statement was voluntarily made.[488]

In *Fikes v Alabama*,[489] the accused had been questioned far from his home, and had seen no one other than his accusers for over a week before confessing. This was weighed heavily by the court in holding his confession inadmissible.

A similar crucial inquiry into the validity of police conduct is whether an accused is provided with basic amenities, such as food or cigarettes, during an extended interrogation.[490] Many of the interrogations found to be improper by the court in its due process involved a denial of these amenities.[491]

In *Ashcraft v Tennessee*[492] where the police questioned the suspect continuously for 36 hours without allowing him rest or sleep, the confession that was ultimately obtained was ruled inadmissible.

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484 See Whitebread and Slobogin, 1986: 358.
485 622 U.S.97,S.Ct. 1127 (1981).
486 297 U.S. 278, 56 S.Ct.461(1936).
487 See Whitebread and Slobogin, 1986: 357.
488 See Whitebread and Slobogin, 1986: 357.
489 352 U.S. 191,77 S.Ct.281 (1957).
490 See Whitebread and Slobogin, 1986: 359.
491 See Whitebread and Slobogin, 1986: 359-360.
492 322 U.S. 143,64 S.Ct. 921 (1944).

In *North Carolina v Davis*[493] the court held that the fact that Davis was never effectively advised of his rights added weight against inadmissibility of his confession.

2.6.6.4 The Genesis of the Writ of Habeas Corpus

According to Whitebread and Slobogin,[494] the writ of *habeas corpus*[495] was praised by *Blackstone* as *'the most celebrated writ in the English law.*[496]

It is explicitly recognised in the federal Constitution and was included in the first Judiciary Act[497] which provided that:

"Several courts of the United States, and the several justices and judges of such courts … shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States …".[498]

The writ originally was not to extend to prisoners in jail except when they were in custody "under or by colour of the authority of the United States", in other words,

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493 394 U.S. 721, 89 S.Ct.1761 (1969).

494 Whitebread and Slobogin, 1986: 830 are of the opinion that determining whether a given detention is an arrest can often be a difficult endeavour. On the other hand, "It seems apparent that seizures accompanied by handcuffing, drawn guns or words to the effect that one is under arrest qualify as an "arrest" and thus require probable cause. The probable cause requirement was clearly articulated by the Supreme Court In *Beck v Ohio 379 U.S. 89,85 SCt 223 (1964)* when it declared that police have probable cause to effect an arrest when:

> … the facts and circumstances within their knowledge and of which they (have) reasonable trustworthy information (are) sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offence".

Probable cause it would seem is generally thought to require something less than the preponderance of evidence standard associated with civil litigation. It should be noted that historically, the writ of habeas corpus directed the prisoner's jailer to "bring forth the body" of the prisoner to court and that is still the position even today.

495 Whitebread and Slobogin 1986:830 add that Writ of *habeas corpus* refers to the writ of *habeas corpus ad subjiciendum***,** which examines the legality of detentions and containing powers to order release of petitioners illegally held.

496 See Blackstone Commentaries 129 as quoted by Whitebread and Slobogin, 1986:830

497 Judiciary Act of 1789 Ch 20.1 statute 73.

498 See Whitebread and Slobogin, 1986: 830.

it applied only to federal prisoners.[499] However, in 1867, contemporaneous with the adoption of the Fourth Amendment, the writ was extended to state prisoners *"in custody in violation of the Constitution or laws or treaties of the United States"*.[500] This was the time when the fourteenth amendment was enacted.

Prior to 1915 courts strictly limited the availability of the writ to state prisoners.[501] Initially, in apparent disregard of the Judiciary Act, it was available only when the sentencing court lacked formal jurisdiction over either the petitioner or the subject matter of the proceedings involved.[502] In *Frank v Magnum*[503] the Supreme Court's first major twentieth century *habeas corpus* decision, held that the *habeas corpus* remedy should be provided whenever the state, *"supplying no corrective process, … deprives the accused of life or liberty without due process of law".*[504] If the state did not provide an effective remedy to vindicate federal Constitutional rights, the federal courts had jurisdiction to hear *habeas corpus* petitions.[505] Nearly forty years later in *Brown v Allen*[506] the court made an even more significant pronouncement, holding that, assuming state remedies have been exhausted, a state prisoner can petition a federal court for adjudication of a Constitutional claim even when the state corrective process is adequate.[507]

2.6.6.5 *Civil remedies*

Damage suits and suits for injunctive relief against government officials who have acted in violation of the Fourth Amendment to the American Constitution are available in a number of situations.[508] There are certain limitations on actions of

499 See Whitebread and Slobogin, 1986: 830.
500 See Whitebread and Slobogin, 1986: 830.
501 See Whitebread and Slobogin, 1986: 831.
502 See Whitebread and Slobogin, 1986: 831.
503 237 US 309 35 S.Ct.582 (1915).
504 See Whitebread and Slobogin, 1986: 831.
505 See Whitebread and Slobogin, 1986: 831.
506 344 US 443 73 S.Ct. (1953).
507 See Whitebread and Slobogin,1986: 831
508 See Whitebread and Slobogin, 1986: 46.

this sort, however, the chief of which are the related concepts of sovereign (governmental) and official (individual) immunity.[509]

2.6.6.5.1 Damages

Whitebread and Slobogin[510] observe that at the federal court level, there are two avenues for seeking monetary relief for misconduct by the law enforcement officers. These are suits against the officers themselves and suits against the Federal Government. The first type of suit was recognized in *Biven's v Six Unknown* Named Agents of Federal Bureau of Narcotics[511] wherein the Supreme court created an implied private cause of action under the Fourth Amendment.[512]

In *Bivens***,** the petitioner was manacled, searched and arrested, and his apartment ransacked by federal agents in pursuit of evidence of alleged narcotic violations. The federal agents effected the arrest and search without a warrant of

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509 See Whitebread and Slobogin, 1986: 46.

510 Whitebread and Slobogin,1986: 46.See also O'Hagan, 2003: 1357-395 who notes that the United States Constitution section 42 of 1983 provided that: "Police brutality is one of the most serious and enduring human rights violations in the United States today. One means by which victims may seek redress is under United States Constitution Amendment Act section 42 of 1983, which provides a civil cause of action against state actors who deprive individuals of their Constitutional rights". It would seem that this is solely to protect post-arrest and pre-trial detainees alleging the use of excessive force by law enforcement officials. He contends that the 1983 Constitutional rules were intended to fulfill two principal purposes: "Firstly, they are designed to compensate victims of excessive force through an award of compensatory damages. Secondly, Congress intended these actions to make police officers and departments answerable to constitutionally required standards of conduct".
O'Hagan, 2003: 1357 summarises his argument by stating that the Fourth Amendment "is commonly understood as a limitation on the power of police to search for and seize evidence, instrumentalities, and fruits of a crime". It would seem that the amendment also protects the right of citizens to be secure in their persons so that illegal arrests or other unreasonable seizure of a person is itself a violation of the Fourth Amendment which seeks to balance an individual's expectation of privacy against the government's interest in investigating and preventing crime. The test is reasonableness.
See also Panwala, 2003: 639-662.
Panwala adds an important element that excessive use of force by police officers undermines faith in the criminal justice system because the citizens expect those with badges and guns to follow the law as well as enforce it, but that these two roles often come into conflict. The author seems to define police brutality "as any excessive use of force by a police officer under the colour of law."

511 403 US 388 91 S.Ct. 1999 (1971).

512 See Whitebread and Slobogin, 1986: 46.

any sort. The petitioner sought damages from each of the federal officers for the mental suffering resulting from the invasion of privacy. The Supreme Court held that a violation of the Fourth Amendment *"by a federal agent acting under colour of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct"*.[513] At the time of Bivens's decision, the Federal Torture Claim Act provided that a *prima facie* case against the government existed if the plaintiff could prove:

(1) Damage to or loss of property, or death or bodily injury, which was
(2) Caused by a negligent or wrongful act
(3) Committed by a federal employee acting within the scope of employment
(4) In a state where the act committed would lead to legal liability for a private person.

2.6.6.5.2 Injunctive Relief

The second type of civil relief for a Fourth Amendment violation is a suit seeking a court order enjoining the offending police misconduct.[514] The elements of proof in an injunctive suit are similar to those in a damages action with the following exceptions: the plaintiff normally must prove (1) that the misconduct is persistent and repeated; and that (2) the injunctive relief is the only effective remedy which usually follows from the proof of the first element.[515]

2.6.6.5.3 The Torture Victim Protection Act[516]

The Torture Victim Protection Act (TVPA) was enacted into law in March 1992. As a major piece of Human Rights legislation, the TVPA sets forth an explicit

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513 See Whitebread and Slobogin, 1986: 46.
514 See Whitebread and Slobogin, 1986: 57.
515 See Whitebread and Slobogin, 1986: 57.
516 Pub. L. No. 102-256, 106 Statute 73 1992 codified.

federal cause of action for torture. It governs summary execution committed anywhere in the world, so long as certain key prerequisites are satisfied.[517]

It represents an important accomplishment for the international movement to hold Human Rights violators accountable.[518]

The basic elements of a Torture Victim Protection Act claims are clearly stated in the statute, which defines liability as follows:

"An individual who, under actual or apparent authority, or under colour of law, of any foreign nation –

(1) Subjects an individual to torture shall, in a civil action be liable for damages to that individual; or

(2) Subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death".[519]

The word 'individual' is used to define the defendant, thus excluding governments or other associations. In addition, the requirement that the acts be committed under the authority or under colour of law of 'foreign nation' excludes acts committed on behalf of the United States government, as well as those acts committed by purely private actors.[520] The statute also includes the precise definitions of torture and extrajudicial executions in sections (3) (a) and (3) (b). TVPA imposes a 10-year statute of limitation in section 2(c).[521]

The TVPA thus strengthens Human Rights litigation in several distinct ways: for example, it creates an independent cause of action for certain claims; allows

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517 Stephens and Ratner, 1996: 25.
518 Stephens and Ratner, 1996: 25.
519 See Stephens and Ratner, 1996: 25.
520 See Stephens and Ratner, 1996: 25.
521 See Stephens and Ratner, 1996: 26.

United States citizens to raise those claims.[522] It is therefore recommended that Lesotho as the signatory to many international instruments is enjoined to adapt this kind of a civil remedy couched alongside the American statute on TVPA. Although the United States of America is not a signatory to the United Nations Torture Convention of 1984, this is a right step in the right direction. A state violates international law if, as a matter of state policy, it practises, encourages or condones:

(a) genocide;
(b) slavery or slave trade;
(c) the murder or causing the disappearance of individuals;
(d) torture, or cruel, inhuman, or degrading treatment or punishment;
(e) prolonged arbitrary detention;
(f) systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights.[523]

It becomes apparent that this statute seeks to enforce and encourage state parties to observe and respect the fundamental Human Rights.

2.6.6.5.3.1 Summary Executions or Extrajudicial killings

Stephens and Ratner[524] define summary executions or extrajudicial killing in terms of TVPA as follows:

Extrajudicial killing: for the purposes of this Act, the term 'extrajudicial killing' means a deliberate killing not authorized by a previous judgment pronounced by

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522 See Stevens and Ratner, 1996: 27.

523 Stevens and Ratner, 1996: 56.

524 Stephen and Ratner, 1996: 67 stated that: "The list is not necessarily complete, and is not closed: Human Rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future". This practice is often referred to as a *jus cogens* which is a norm "accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm … having the same character".

a regularly constituted court affording all the judicial guarantees which are recognized as indispensible by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.[525]

This definition reflects the United States' vehement defence of the legality of the death penalty, excluding killings authorized by a court which adheres to 'civilized' standards of due process.[526] The definition also excludes killings 'lawfully carried out', which might include certain killings during war, by enforcement personnel or in self-defense.

2.7 CONCLUSION

This chapter has analysed the concepts such as the writ of *habeas corpus,* state liability evolving around vicarious responsibility for the unlawful conduct of law enforcement officers. It has discussed civil remedies such as damages, and injunctive relief which seek to redress and compensate the aggrieved party. The chapter indicated that in criminal investigations, the incidence of police brutality, deaths in detention, assaults and police high-handedness are strikingly high in the four selected jurisdictions. Weaknesses in terms of legislation have been identified. In Lesotho for example, there is a dire need to develop legislation giving effect to the prevention of police excessive use of power during public demonstrations, riots, public unrest or during criminal investigations. The United Kingdom, the United States of America and the Republic of South Africa have tried to improve their respective human rights record over time.

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525 See Stephens and Ratner, 1996: 67.

526 See Stephens and Ratner, 1996: 68.

Chapter 3

A Comparative study of Police use of Force in effecting Arrest in the four selected Jurisdictions

3.1 THE UNITED KINGDOM: INTRODUCTION

The chapter scrutinizes arrest and its application in the criminal justice system. It regards arrest as a pivot around which criminal investigations[527] revolves. It argues that police[528] powers of arrest in some instances are too wide and therefore, need to be curtailed. It criticises police powers of arrest.[529] It cites court decisions which have been vocal about the necessity to restrain, and to reduce police powers of arrest. Elements such as reasonable suspicion, objectivity, and fairness are emphasised. The chapter discovers that it is of utmost importance to inform the suspects and accused persons of the reasons for their arrest as soon

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527 See Weston and Wells, 1970: 1 who define criminal investigation: "As a lawful search for people and things useful in constructing the circumstances of an illegal act or omission and the mental state accompanying it". "Thus it is a probing from the known to the unknown, backward in time, and its goal is to determine truth as far as it can be discovered in any post facto inquiry". Horgan 1974: 3-4 stipulates the following key points as requisites for a successful investigator:

"1. Suspicion: Take nothing for granted. Be cautious of obvious and way of persons quick to produce identification or *alibis*. An officer should demand verification whenever possible in order to resolve all doubts.

2. Curiosity: Many cases are solved by officers wondering about a statement, dress, suspicious car, or a person's actions. Habitual inquisitiveness and a desire to learn the truth often disclose true and important facts that would otherwise go unnoticed.

3. Observation: The use of five senses plays an important part in the prevention and detection of crime. An officer must remember and associate unusual things about an individual's posture, gait ,expression, dress, mannerism and other traits.

4. Memory: The ability to recall facts and past occurrences will assist an investigator in solving crimes. Solutions to difficult cases have often been resolved by a detective's ability to recall minute details of a former criminal's method of operation, physical characteristics, dress, unique hobby and other idiosyncrasies." Swanson, Territo and Chamelin, 1977: 2 define an investigator as an individual who gathers, documents and evaluates facts about a crime and thus investigation is the process through which these are accomplished.

528 Barnhart, 1964: 1504 define police as persons whose duty is to keep order and arrest people who break the law. See also Fowler and Coulson, 1970: 34.

529 La Fave, 1974: 56 define arrest as the beginning of imprisonment, because the man's liberty has been restrained by the state. An arrest by lawful authority takes away a person's freedom and places him in the custody of the law."

as it is practicable to do so. This is done in order to enable them not only to plead, but also to prepare for their defence within a reasonable time. Concepts such as resisting a lawful arrest, justifiable homicide, proportionality, deadly or reasonable force,[530] grounds of arrest are explained and discussed.

3.1.1 The definition of arrest

In *Leachinsky v Christie*[531] the plaintiff, a Russian Jew, was arrested in 1942 by defendant, a detective constable, Christie, of Liverpool police force without warrant, purporting to act under Liverpool Corporation Act of 1921(1). The plaintiff**,** *Leachinsky,* was a waste merchant dealing with, *inter alia*, the waste material of a tailoring business**.**

Scott LJ held as follows:

(1) That arrest on a criminal charge always was and still is a mere step on a procedural road towards committal, trial, verdict, judgment, punishment or acquittal, as the result may be.

(2) The power of arrest conferred by law is limited to the purpose of the particular proceedings, that is the specific charge formulated.

(3) The arrest must be made on that charge only; and the person arrested must be made aware by the arresting constable at the time of arrest what the charge is.

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530 Bouvier, 1914: 1254 defines force as restraining power which is valid and has a binding effect. The actual force is when strength is actually applied or the means of applying it are at hand. There is also implied force that is where it is implied by law from the commission of an offence or act."

531 (1946). King's Bench. 124 on 130 1947 AC 573 p. 600.The learned Judge further stated that "It is clear from the case that one of the reasons why an arrested man is entitled to be informed of the grounds for the arrest is in order that he may be able to give more than a bare and unconvincing denial if he is in fact innocent." See section 28(3) of PACE 1984. It is imperative therefore that arrested persons be given reasons for arrest, unlike in Lesotho where police arrest a person for purposes of investigation only to be released later without being charged.

Arrest itself involves the notion of taking someone into custody and it is the first step in criminal proceedings on a charge which is intended to be judicially investigated.[532] In *Lindley v Rutter*[533] the defendant, one Janet Lindley, was charged by the prosecutor, police constable Eric Rutter for disorderly behaviour, drunkenness and assault of a police constable in the execution of her duty contrary to section 91 of the Criminal Justice Act of 1967. The Court held that which measures are reasonable in the discharge of this duty will depend upon the likelihood that the particular prisoner will do any of these things unless prevented. It was further held that this, in turn, will involve the constable to consider the known or apparent disposition and sobriety of the prisoner and further, what can never be justified is the adoption of any particular measure without regard to all the circumstances of a particular case. An arrest takes place where the suspect is not free to go as he pleases or has been told that he is in state custody.[534]

Murphy and Stockdale[535] further add an element that some of the purposes of arrest are, for example:

(i) "Preventative as in when the intention is to terminate a breach of the peace;

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532 See Clayton and Tomlinson, 1987: 132.

533 1980-81 1 Queen's Bench, p 128.

534 See Clayton and Tomlinson, 1987: 132.

535 See Murphy & Stockdale, 1998: 939.
Murphy and Stockdale, 1998: 939 are of the view that many, albeit not all powers of arrest, are premised upon a constable having reasonable cause to believe that the suspect has committed or is committing or is about to commit an offence. The term 'reasonable cause' relates to the existence of facts and not to the state of law. An officer who reasonably, but mistakenly proceeds on a particular view of law, and exercises his power of arrest, does not have reasonable suspicion. They add an important element that reasonable cause imports an objective standard which is however, lower than information sufficient to prove a prima facie case or proof which must rest on admissible evidence. They seem to argue that reasonable suspicion may take into account matters which are not admissible in evidence, or matters which, while admissible, could not form part of a *prima facie* case and that the circumstances should be such that a reasonable man, acting without passion or prejudice, would fairly have suspected the person of committing the offence. "The constable's reasonable suspicion must relate to the offence for which he arrests the suspect".

(ii) Punitive as in when a person is taken before a magistrate to answer in relation to a commission of an offence; or

(iii) It could be protective as and when inebriated or mentally ill persons are arrested for their own protection.[536]*"*

In *Holgate Mohammed v Duke*,[537] a detective constable John Duke, while exercising his powers under section 2(4) of the Criminal Law Act of 1967, arrested one Mariam Holgate-Mohammed, the plaintiff, on suspicion that she had stolen jewellery, and he took her to the police station for questioning. She was not charged, but she spent six hours in detention after which she was released. The judge held that the detective constable had had reasonable grounds to suspect the plaintiff of having committed an offence. The court held further that the period of detention was not excessive. But because the constable had decided not to interview her under caution, instead he subjected her to a greater pressure of arrest and detention, so as to induce a confession, there had been a wrongful exercise of the power of arrest. The Court further held that when a constable exercises his powers of arrest, there are certain rules which must be complied with thus:

(a) He must be acting bona fide and the arrested person must be told the reason for the arrest.

(b) The arresting person must use only reasonable force to achieve the intended purpose.

(c) He may not use unnecessary and unreasonable modes of detaining the suspect.

Arrest must be justified by some rule of positive law.[538] A constable who cannot justify his action by reference to lawful authority is said not to act in the execution of his duty.[539] In determining whether the conduct is an unlawful interference

536 See Murphy and Stockdale, 1998: 939.
537 See 1984 Appeal Cases 437.
538 See Murphy and Stockdale, 1998: 939.
539 See Murphy and Stockdale, 1998: 939.

with the person's liberty or any property, they add, the court must consider whether such conduct falls within the general scope of any duty imposed by the statute or recognized at common law, and whether such conduct, albeit within the general scope of such duty, involved an unjustifiable use of powers associated with the duty.[540] In *Waterfield*,[541] two constables, having been informed that a car was involved in a serious offence, but having no personal knowledge of the circumstances, were keeping watch on the car which was in the public car park. The Court held that the constable's conduct was *prima facie* an unlawful interference with the liberty or property and that:

"It was relevant to consider, firstly whether that conduct fell within the general scope of any duty imposed by statute or recognized in common law. Secondly, if the conduct did not fall under the scope, whether it involved an unjustifiable use of powers associated with the duty".

The Court further held that:

"Although the constables were acting in the execution of a duty to preserve for the use in court evidence of a crime, the execution of that duty did not authorize them to prevent removal of the car; and consequently, when they detained the car they were not acting in due execution of their duty at common law".

Compare this with detention by a constable of a vehicle which he believed to be stolen in *Sanders v DPP.*[542] In *Rice v Connolly*[543] the defendant appeared to a police constable to have been acting suspiciously in an area where there had been a number of house breakings the same night. The defendant was asked for his name and address several times, but he refused to give them. When asked to accompany the police to the station he declined to do so and was therefore arrested. It was held that the police may not restrain a person from going about his business, unless they act under powers of stop, search or arrest. The

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540 See Murphy and Stockdale, 1998: 939.
541 See 1964 1 Q.B. 164.
542 See 1988 Criminal Law Report. 605.
543 See 1966 2 K.B. 414.

purpose of the judgment quoted above is to emphasise the fact that police powers must, in one way or the other, be restrained, controlled, measured and/or qualified by some kind of a legal norm, regulation, principle or statute in order to curtail such powers to enhance reasonableness in the process. This is done in order to enhance protection of individual liberties that may be open to an abuse by unlimited police discretion. In *Murray v Ministry of Defence*,[544] the House of Lords stated categorically that any restraint within defined bounds is in fact a restraint which amounts to an imprisonment. In *Lewis v Chief Constable of the South Wales Constabulary*[545]**,** the plaintiffs were arrested by a police officer on suspicion of burglary. They were taken to a police station. At the police station, they were informed about the reason for the arrest. The first plaintiff was informed 10 minutes after the arrest while the second plaintiff was informed 23 minutes later. They were detained for about five hours before they were released from custody. It was held that whether or not a person has been arrested depends not on the legality of the arrest, but on whether he has been deprived of his liberty to go about where he pleases.

The Court further noted that since arrest was a continuing act in common law, the arrest became lawful from the moment its reasons were given.

3.1.2 Power of Arrest at Common Law

The only power of arrest under the common law in the United Kingdom relates to "breaches of the peace".[546] A constable may arrest a person who is causing a breach of the peace, or who is behaving in such a way as to lead the constable reasonably to apprehend an imminent breach of the peace, or who, where a breach has occurred, behaves in a way which leads the constable reasonably to believe that a breach will occur.[547]

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544 See 1988 1 WLR 692.
545 See 1991 1 ALL ER 206.
546 See Stone, 1994: 47.
547 See Stone, 1994: 48.

In *Howell v R*[548] the defendant was tried on an indictment of assault in respect of two police constables. The prosecution's case was that there was a disturbance in the early hours of the morning from a house where a party was held and the police were called. When asked to go home, the defendant started swearing at the police. The phrase, 'breach of peace' was defined by *Watkins LJ*[549] as follows:

> *"We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence, his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance".*

It is submitted that the common law position was more appropriate in protecting the rights and liberties of persons against the arbitrary powers of the police.

3.1.2.1 The Obligation to Give Reasons for an Arrest

Clayton and Tomlinson[550] argue that in common law no arrest will be lawful unless the person is told both that he is under arrest and of the grounds for his arrest at the time he is arrested or as soon as is practicable afterwards. This

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548 (1982) Queen's Bench 416 at 427.

549 R v Howell 1982 Q.B. 416 at 427.

550 Clayton and Tomlinson,1992:163 while dealing with search on arrest state that at common law the police have no right to search a person to see if he has committed a crime, but that they are, however, under a duty to preserve the evidence of a crime for use in court. They have power to take goods which they reasonably believe are material evidence against a suspect arrested for a serious offence or those implicated in the same crime if the goods are in his possession or immediate control at the time when the arrest takes place. They state that in order for the search to be lawful, the arrest must itself be lawful. That an officer conducting a search must inform the suspect of the reasons for it unless giving such reasons is unnecessary or impracticable. In Lesotho, however, when police conduct an unlawful search they normally seize the dangerous weapons if found. They then conduct arrests afterwards. It is recommended that the above British position should be adopted in Lesotho in order to curtail the abuse of power. This will reduce random search of citizens which usually happens during police raids which are normally unlawful and not regulated in Lesotho. See also Basdeo, 2009:80-81 on conduction of raids under South African Police Act 68 of 1995.

fundamental principle is now given statutory force under section 28(1) of the Police and Criminal Procedure Act of 1984.[551] Under section 28(3) of the Police and Criminal Procedure Act, if the information is not given, then the arrest is unlawful. The same is true in terms of section 28(2) and (4) of the Act. The duty applies even if the fact of the arrest or ground of the arrest is obvious. Section 28(5) of PACE, however, states that the duty does not apply if it is not reasonably practicable to inform him because he has escaped before he can be informed.

The information to be conveyed under section 28(3) appears to be the same as at common law.[552] It is necessary for the suspect to be told the true grounds for his arrest and sufficient detail of the allegations involved.[553] In *R v Holah*[554] the appellant was seen driving dangerously by two police officers who required him to take a breath test. He failed to inflate the bag and so, the policemen concluded that he was drunk and charged him under section 2(5) of the Road Safety Act of 1967 for failure to provide a specimen of breath. It was held that the arrest will be unlawful if the suspect is told he is, for example, arrested for burglary without informing him where and when it was committed.

In *R v Long*[555] the Canadian Court by comparison, held that the officer should listen to any statement that the suspect seeks to make. This may be important to determine whether or not the officer has carried out sufficient investigations before making an arrest. It is interesting to note that the cases cited show that there are clear particulars of an offence. This becomes important at a later stage when the suspect would be preparing for his defence. It should further be noted that there is a tendency among some police officers to overstep their line of duty

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551 See English Act 1984 of Police and Criminal Procedure.

552 See Clayton and Tomlinson, 1992: 164.

553 See Clayton and Tomlinson, 1992: 164.

554 1973 1 West Law Report 127. See also R v Telfer 1975 Criminal Law Report. T was arrested by a police officer on suspicion of burglary. Two weeks back, notice had been given in the police daily information sheet that T was sought for interview in connection with a burglary. On arrest, no details of burglary were given to him. The Court held that the arrest was unlawful noting that sufficient details of information should be given for which he is being arrested.

555 1969 8 C.R.N. 298.

by actually enjoying detaining people for the fun of it and by releasing them without any charge.

3.1.2.2 The Actual Use of Force in making Arrests

The Criminal Law Act[556] of PACE section 3(1) provides that:

> *"A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large".*

This will apply to all arrests and clearly specifies that only such force as is reasonable in the circumstances as stated above may be used.

Watney,[557] however, criticizes sub-section 2 of the British Police and Evidence Act of 1984 for directing that sub-section 1 of the Act shall replace the rules of the common law. The sub-section does nothing to enhance the position of the

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556 1967 section 3 thereat specifies that only such force as is reasonable, will be taken into account, all the circumstances including the nature and the degree of force used, the harm that would follow from the use of force against the suspect and the possibility of effecting an arrest or preventing the harm by other means.

557 Watney, 1999: 28.
Watney, 1999: 28 argues that the amount of force which may be applied when attempting to arrest an absconding suspect has always been the issue. He further states that at the heart of this dilemma is the question of what is regarded as the most valuable. Thus on the one hand, there is the right of the individual to freedom of movement and in more extreme cases, his right to life. That on the other hand, there are interests of the community and the proper administration of justice as reflected in the apprehension and trial of a person suspected of having committed an offence.
By comparison, in South Africa in *S v Walters 2002 (3) SA 613***,** it was stated that the purpose of arrest was to take the suspect into custody to be brought before court as soon as possible on a criminal charge and it was clearly stipulated in no uncertain terms that it does not necessarily involve the use of force. The court further held that "The use of any degree of force to effect an arrest is allowed only when force is necessary to overcome resistance by the suspect and/or any one else, to arrest by the person authorized by law to carry out such arrest". And where the use of force is permitted, continued the learned Judge, "only the least degree of force necessary to perfect the arrest may be used and similarly, when the suspect flees, force may be used only where it is necessary and then only the minimum degree of force that will be effective may be used".
The learned judge concluded that the arrest is not an objective in itself, but it is merely an optional means of bringing a suspected criminal before court and therefore resistance or flight does not have to be overcome or prevented at all costs.

arrestor who has to make quick decisions in often difficult circumstances as to what amount of force to apply. The learned author submits, and correctly so, that it is left to the courts in such circumstances to lay down guidelines on what is considered reasonable.

Watney's view is supported by *Murphy and Stockdale*[558] when they state that in determining what force is reasonable, the court will take into account all the circumstances, including the nature of the offence, degree of the force, the gravity of the offence, the harm that would flow from the use of force against the suspect, including the possibility of effecting the arrest or preventing the harm by other means. In *Simpson v Chief Constable of South Yorkshire Police*[559] the plaintiff was arrested by police officers when he was walking past the Hatfield Main Colliery where picketing was going on, although he was never part of it. The police charged picketing people with batons and he was arrested alongside them**.** It was held that the use of excessive force will not, however, render the arrest unlawful. One tends to agree with the submission of the court, because the suspect has civil remedies left open to him to exhaust for reparation, compensation or making good the harm done. In *Allen v Metropolitan Police Commissioner*[560] the plaintiff claimed damages for an assault which he alleged was committed on him on 6th July 1975 by police officers who were claiming that he was driving a motor vehicle whilst unfit due to drinking. He alleged that police officers who arrested him used more force than was reasonable in the circumstances. As a result of their negligence he argued, they have lost their statutory protection. This effectively codified the common law position of section 3(1) of the Criminal Law Act 1967. The Court held that only such force may be used which is necessary to secure and subdue the fugitive.

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558 See Murphy and Stockdale, 1998: 942.
559 1991, The Times, 7 March. See also www.Lexisnexis.com downloaded on 16/03/2009.
560 1980 Criminal Law Report 441.

Murphy and Stockdale[561] submit that in respect of the use of lethal force, the court must take account of the time available to the actor. This should include whether he could avert the risk of harm to others by not arresting. Whether taking preventative action outweighs the harm, including the possibility of death, that might be caused to the person concerned.

Lord Diplock also arrived at the same outcome in *Attorney General for Northern Ireland*[562] where a British soldier on patrol in Northern Ireland (in the exercise of his duty under section 3 of Criminal Law Act 1967 to prevent crime, while searching for terrorists), shot and killed an unarmed man, who had run away when challenged, in the honest and reasonable, though mistaken belief, that he was a terrorist. A judge, sitting alone without a jury, acquitted him of murder because he had no intention to kill or seriously injure. The killing amounted to justifiable homicide. It is submitted, that all reasonable safeguards are being put in place in order to make sure that, notwithstanding the amount of force used, the fundamental rights of the suspect are secured and protected. This seems to be a leading example to be followed in Lesotho.

3.1.2.3 Resisting Arrest

Murphy and Stockdale[563] submit that a person has an unqualified right at common law to resist an unlawful arrest. This means that the person on whose

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561 Murphy and Stockdale,1998: 941 indicate that it is the duty of every person arresting another to inform the person arrested of the reason for the arrest either at the time or as soon as practicable thereafter. That in the case of a constable, this applies even though the reason for arrest is obvious. This is per section 28 of PACE. Unless this information is given, the arrest is not lawful. It should, however, be noted that the duty to give information 'at the time' of arrest is not a duty which must be fulfilled at the precise moment of arrest, but according to them, may be fulfilled during a reasonable period before or after that moment. Where no reasons are given at the time of arrest because it is impracticable to inform the suspect in terms of the statute acts done at the time of arrest do not become retrospectively invalid because of a later failure to inform him.

562 1977 Appeal Cases 105.

563 Murphy and Stockdale, 1998: 942 observe that the court, in determining what force is reasonable, will take into account all the circumstances including the nature and degree of the force used, the gravity of the offence for which arrest is to be made, the harm that would flow from the use of force against the suspect, and the possibility of effecting the

body an unlawful arrest is attempted, may resist such force as under the circumstances is reasonable. What is reasonable depends upon the circumstances of the particular case.

3.1.2.4 What Constitutes Reasonable Grounds

In many police cases the fundamental issue at the trial is whether the police had "reasonable grounds" for their belief or suspicion which was the basis of the power they were purporting to exercise.[564] This arises, for example, where they exercise their statutory power to stop and search, where they make an arrest without warrant and where they enter and search premises without warrant.[565] The burden of proof is on the police whenever they seek to justify trespass to the person, goods or land by relying on the "police power" involving the need for "reasonable grounds" for suspecting or believing.[566] What is essential is that the officer has reasonable grounds for the suspicion or belief on which the power is based.[567] Honest and reasonable belief in the existence of the power is not, of itself, sufficient and such a mistake of law will mean that the arrest will be unlawful.[568]

In *Wershof v Commissioner of Police for Metropolis*[569] the plaintiff was telephoned by his younger brother (who was in charge of the family jewellery shop) that he was engaged in a dispute with the police who suspected that he had stolen jewellery. When he arrived, he was informed by the police that it was

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arrest or preventing the harm by other means. It would seem that the use of excessive force will not, however, render the arrest unlawful and that force cannot be used where the suspect does not resist an arrest or attempt to escape. Compare that with section 42 of the Lesotho Criminal Procedure and Evidence Act no. 9 of 1981 which only approves the killing of a suspect while fleeing or resisting arrest and it deems that a justifiable homicide. See verbatim version of Section 49(2) of South African Criminal Procedure Act 51 of 1977 in this regard.

564 See Clayton and Tomlinson, 1987: 145.

565 See Clayton and Tomlinson, 1987: 145.

566 See Clayton and Tomlinson, 1987: 145.

567 See Clayton and Tomlinson, 1987: 145.

568 See Clayton and Tomlinson, 1987: 145.

569 1978 (3) All E.R. 540.

stolen property and they were seizing it. The Court awarded civil damages for the following reasons:

(1) *"That at common law, a police officer had power to arrest without warrant a person who willfully obstructed him in the execution of his duty only if:*

(a) The nature of the obstruction was such that the offender actually caused or was likely, to cause a breach of peace or was calculated to prevent lawful arrest or detention of another person or at a relevant time, the police officer was acting in the execution of his duty" .

It was further held that honest and reasonable belief in the exercise of the power is not, in itself, sufficient and such a mistake of law means that the arrest is unlawful.

It is submitted that the import of this judgment is clearly to place a strict interpretation of the duty of the police to make use of reasonable belief or grounds. It is further submitted that this approach is recommended for Lesotho as there is no similar provision.

3.1.2.5 The Difference between "Suspicion" and "Belief"[570]

The 1984 Police and Criminal Procedure Act[571] carefully distinguished between instances where the police have to have reasonable grounds for their suspicion and those where they have to have reasonable grounds for their belief. For most powers over the person, the police must show reasonable grounds for "suspecting," for example when they make an arrest without warrant or stop and search someone.[572] However, a number of other powers depend upon reasonable grounds for "believing", for example when the police are entering and

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570 See Clayton and Tomlinson, 1987:145.
571 See PACE of 1984.
572 See Clayton and Tomlinson, 1987:145.

searching premises or searching a person upon arrest and that it was thus necessary to look at the wording of each specific power.[573]

In *Wills v Bowley*[574] the appellant was charged with an offence of using obscene language in a street contrary to provisions of section 28 of the Town Police Clauses Act of 1847. The Court held that a power to arrest on reasonable suspicion should be inferred in this case because:

(1) "A duty is imposed and not the power
(2) The duty is imposed on a constable and not on persons generally;
(3) The duty is to be discharged immediately on the evidence of the constable's own senses and not at some later date".

It has been argued that "suspicion" may arise from conjecture whereas "belief" can only exist when one is firmly persuaded of the truth of a particular fact and that a reasonable person may suspect someone although he would withhold his belief until further evidence appears which finally convinces him.[575]

The above stipulated differences between "suspicion" and "belief" become of essence, especially in meaning. The two words therefore provide an opportunity for the Lesotho statute to give a clear definition. Most of the statutes in Lesotho still require certain acts to be done on reasonable grounds, belief or suspicion, without extrapolating what they mean for the policeman on the beat. It would be helpful if the Lesotho Law Reform Commission could recommend accordingly, in that direction, in order to assist the police in the exercise of powers on a day to day basis.

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573 See Clayton and Tomlinson, 1987: 146.
574 (1983) 1. Appeal Cases. 57.103.
575 See Clayton and Tomlinson.1987:146.

The European Convention of Human Rights[576] becomes important where it provides for the situation where the deprivation of liberty does not breach the right to liberty. Article 5(1) of this Convention also provides that the right is not breached in the case of lawful detention of a person convicted by a lawful court. Article 5(1)(b) refers to the lawful detention of a person for non-compliance with the lawful order of court or order to secure the fulfillment of any obligation prescribed by the law.

The requirement of a lawful arrest is clearly designed to afford procedural protection against an invasion of a person's liberty. It is therefore appropriate that these safeguards should be most welcome in Lesotho's legal development in this regard as there is no proper law for arrest and use of force.

Any reforms in the use of deadly force by the police must be considered with more than saving either citizens or police lives. They must be concerned with establishing an equitable balance or risk protecting police officers from being attacked by armed citizens and citizens from being erroneously shot by police officers.[577]

There is a code of conduct for law enforcement officials.[578]

Articles 2 and 3 of the United Nations Law enforcement Code[579] provided that the purpose was to respect and protect human dignity, to maintain and uphold human rights.

Police are given power under the law to use force.[580] Without this and other powers, such as the power to deprive people of their liberty, it would not be

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576 See European Convention of Human Rights of 1950.

577 See Scharf and Binder, 1983: 9.

578 See also Law Enforcement Code: United Nations General Assembly I 106, 1979 – 17. December or United Nations General Assembly Resolution 34/169 of 17 December 1979 Article 3. See Basic Principle 9 of the Code of Police Conduct.

579 See United Nations General Assembly Resolution No.34/169 of 17 December 1979.

possible for police to enforce the law, to maintain or to restore order.[581] Peaceful means should be attempted before force is applied. Only the minimum level of force is to be applied.[582] Given these principles and the centrality of force, expressed or implied, to policing, and given the nature of policing with its uncertainties and its dangers, it is clear that the power to use force should be vested only in those people who are qualified to exercise it properly.[583] Those trained police officers will undergo extreme vigorous selection, training processes, effective command, control and supervision by leaders who will ensure strict accountability of police to the law when power is abused.[584]

The general requirements of the United Nations Law Enforcement Code[585] states:

(a) *"While the provision implies that police may use force as is reasonably necessary under the circumstances of the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that purpose may be used; and*

(b) *Firearms should not be used except when a suspected offender offers armed resistance or in other ways jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspect".*[586]

3.1.2.6 The United States of America: The Use of Force

Gardner and Manian[587] state that the responsibility of maintaining public order and safety rests primarily on the Federal Constitution of the United States of

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580 See Crawshaw, Devlin and Williamson, 1998: 105.

581 See Crawshaw, Devlin and Williamson, 1998: 105

582 See Crawshaw, Devlin and Williamson, 1998: 105.

583 See Crawshaw et al.1998:105.

584 See Crawshaw et al.1998:105.

585 See United Nations General Assembly No. 34 of 1979.

586 See Crawshaw, Devlin and Williamson, 1998:107.

587 See Gardner, and Manian, 1974: xi.
Gardner and Manian make an interesting observation that in the United States of America, the use of force has been divided into two categories thus:

America. The government, having some responsibility and obligation under the United State's Constitution and Article IV thereof, also protects the state.

In America, like anywhere in the world, maintenance of public order and safety is achieved through the use of the police power of the state.[588] The said police power is defined as the power and responsibility of the state to promote and provide public safety, health and morals.[589] However, the police power is not confined to the suppression of what is offensive, disorderly or unsanitary, but it also extends to what is for the greatest welfare of the state.[590] This principle was further illustrated in *Kovacs v Cooper*[591] where the United States Supreme Court stated that the:

"The police power of a state extends beyond issues of health, morals, safety and comprehends the duty, within Constitutional limitations to protect the well being and tranquility of a community".

In order to achieve these goals, the state must vest, in the municipal sub-divisions, the authority and capacity to safeguard public health, morals and safety by appropriate means.[592] The method and means used by the state and the political sub-divisions of the state are valid as long as they do not contravene the United States of America's Constitution or infringe upon any of the rights granted or secured there-under.[593] *Armacost*[594] illustrates the limitations of the existing legal remedies for addressing police misconduct in the United States of America. The flaw is that these remedies focus almost exclusively on individual culpability for the particular isolated incident approach. This undermines the power of the

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(a) Deadly force which is the force which is likely or intended to cause or create bodily injury, and
(b) Less than deadly force which is of means not intended or likely to cause death or great bodily injury.

588 See Gardner and Manian, 1974: xi.
589 See Gardner and Manian, 1974: xi.
590 See Gardner and Manian, 1974: xi.
591 336 U.S.77, 69 S.Ct.448 (1949).
592 See Gardner and Manian, 1974: xii.
593 See Gardner and Manian, 1974: xii.
594 See Armacost, 2003-2004: 457.

police organisation in shaping the conduct of the police.[595] This type of an approach is not only ineffective, but is also perverse as it creates scapegoats that may satisfy society's moral outrage while deflecting attention away from the institutional structures that lie at the root of the problem of police brutality.[596]

Unlike the courts, scholars of police conduct have long recognised the powerful role that the police organisation plays in determining police conduct.[597] Virtually all major police Commissions or task forces convened over the last 30 or so, have concluded that the patterns of repeated, wrongful incidents identified in these troubled police departments were at least partly caused by system features of police culture.[598] Deadly force is allowed in cases of a serious nature, such as murder, robbery, rape, arson, riots or kidnapping.[599] On the contrary, less force, however, may be required in cases where minors are involved.

In *Tennessee v Gardner*[600] the net effect was to declare unconstitutional a statute which permitted an officer who had been given notice of intent to arrest a criminal to use all the necessary means to effect an arrest if the suspect flees or forcibly resists. In *Gardner*[601] the effect was that an arrester would obviously not always be able to establish this fact on the spur of the moment. That may eventually be detrimental to effective law enforcement. This decision emphasizes the issue of the danger which the individual poses to society. Thus 'where the suspect poses no immediate threat to others, the harm resulting from failure to apprehend him does not justify the use of deadly force'. It is also admitted that where the officer has a probable cause to believe that the suspect poses a threat of serious nature or physical harm to either the said officer or others, it is not constitutionally unreasonable to prevent the escape by using deadly force.

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595 See Armacost, 2003-2004: 457.
596 See Armacost, 2003-2004: 457.
597 See Armacost, 2003-2004: 457.
598 See Armacost, 2003-2004: 457.
599 See Armacost, 2003-2004: 457.
600 471 U.S.1,105 SCt.1694 (1985).
601 471 U.S.1,105 SCt.1694 (1985).

3.1.2.7 Constitutional Requirements for an Arrest in the United States of America

Article VI of the American Constitution provides that:
"This Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land; and the judges in every state shall be bound thereby and anything in the Constitution or laws of any state to the contrary notwithstanding".

This passage simply means that the use of powers of arrest, search, seizure and detention are methods and means of government which must be in harmony with the Constitution, otherwise they would be of no force and effect if they conflict.
In the United States of America, In order for an arrest to be considered valid, the following requirements have emerged:

1. *The authority to arrest must exist, that is to say that the person making the arrest must have the authority to do so by the power vested in him by statutory or common law.*
2. *There must be an intent to use this authority by the person making the arrest.*
3. *There must be an actual or constructive seizure of the person who is to be arrested.*
4. *There must be an understanding and comprehension by the arrested person of the fact that he is being arrested and why he is being arrested.*[602]

602 See Gardner and Manian, 1974: 5-6.

Section 3.08 of the American Law Institute Model Code[603] of pre-arraignment procedure states the following:

Upon making arrest, the law enforcement officer shall:

(a) Identify himself as such unless his identity is otherwise in danger;

(b) Inform the arrested person that he is under arrest; and

(c) As promptly as is reasonable under the circumstances, inform the arrested person the cause of the arrest, unless the cause appears to be evident.[604]

3.1.3 The Use of Deadly Force

Indiscriminate use of force is prohibited in the United States of America.[605] Law enforcement officers may use force only to protect themselves and others or to make an arrest and to detain a person, lawfully arrested, in custody.[606]

The use of force, alone, may be construed by a court as a seizure and restraint of the person as to amount to an arrest.[607] Placing handcuffs on a person against his will is a detention amounting to an arrest, unless there is other justification for doing so.[608] After *Miranda v Arizona*[609] warning should be given even here so that an arrested person understands the reason for the arrest. It is stated that there is an exception where the officer reasonably believes that by giving such notice of the intended arrest, he would endanger himself or others or if he reasonably believes he would jeopardize the opportunity to make a peaceful arrest. The same situation obtains when a crime is committed there and then. Also where such a person cannot appreciate the reasons for arrest due to

603 See Article 120.7 Official Draft Code (1975) U.S.
604 See Gardner and Manian, 1974: 6-7.
605 See Gardner and Manian, 1974: 64.
606 See Gardner and Manian, 1974: 64.
607 See Gardner and Manian, 1974: 64.
608 See Gardner and Manian, 1974: 64.
609 384 US 436 SCt. 1602 (1966).

drunkenness, mental incapacity, or when reasons for arrest are obvious. Deadly force must always be governed by reasonableness and should be used as a last resort when everything else has failed.

The officer or citizen making an arrest may use only such force as he reasonably believes is necessary to:

(i) Detain the offenders, to make the arrest and sustain detention.

(ii) To overcome resistance.

(iii) To prevent escape and retake the person if he escapes.

(iv) To protect himself, others and his prisoner if necessary.[610]

Whitebread and Slobogin[611] state that virtually every state has a statute or, at the least, a police regulation specifying the circumstances in which violence or the threat of violence may be used to apprehend an arrestee.

The statute promulgated by the American Law Institute in its Model Code of pre-arraignment procedure is a perfect example in that Article120.7 of the said Code provides that an officer:

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610 See Gardner and Manian, 1974: 64.

611 See Whitebread and Slobogin, 1986: 101.
The learned authors are of the view that in the decision of Tennessee v Gardner 1985 US 105 SCt. p 1694 the Supreme Court held that the Model Code's approach to the use of deadly force, or one essentially like it, is required by the Fourth Amendment that Gardner declared unconstitutional a Tennessee statute which permitted an officer who has given notice of an intent to arrest a criminal suspect to "use all the necessary means to effect the arrest" if the suspect flees or forcibly resists. That construing "all necessary means" to include deadly force, the Court held that, under the Fourth Amendment's reasonableness requirement, such means cannot be used to effect an arrest unless

1) It is necessary to prevent escape and
2) The officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others. They further note that the Court also agreed with the Court of Appeal ruling that because the officer in Gardner had been "reasonably sure" that the suspect was unarmed, young and of slight build, he acted unreasonably in shooting and killing the suspect as he fled over a fence at night in the backyard of the house he was suspected of burglarizing.

"May use such force as is reasonably necessary to effect the arrest, to enter premises, to effect the arrest, or to prevent the escape from custody of an arrested person".[612]

Deadly force is authorised when the arrest is for a felony, the use of such force "creates no substantial risk to innocent persons" and the officer "reasonably believes that the felony involved the use of threat of the use of deadly force or there is substantial risk" that the arrestee will cause other deaths or serious bodily harm if deadly force is not used.[613]

The use of police dogs is equally a dangerous kind of police brutality to the extent that the use of police dogs as excessive force in theory is similar to other types of indirect police force.[614] Police dog force is unique in several important aspects. Police dogs are used primarily to detect as well as seize suspects of crime.[615] Canine force is frequently applied while the dog is out of sight of the deploying officer, and further, the canine and not the officer determines and applies the amount of force.[616] The dog normally bites the suspect and holds him or her until the handler arrives and orders the animal off and then the suspect is taken into custody.[617]

The typical police law suit results from cases where the detainee is not resisting arrest, is not dangerous, not violent or not the intended suspect, but is bitten anyway.[618] In Lesotho, for example, canine force has been reintroduced recently after it ceased to operate for a long time. It is submitted that this kind of force may, in some instances, be useful in areas such as operating as sniffer dogs on drugs smuggling and related matters.

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612 See Whitebread and Slobogin, 1986: 101.
613 See Whitebread and Slobogin, 1986: 101.
614 See Weintraub, 2000-2001: 937.
615 See Weintraub, 2000-2001: 937.
616 See Weintraub, 2000-2001: 937.
617 See Weintraub, 2000-2001: 937.
618 See Weintraub, 2000-2001: 937.

3.1.4 The police use of force through tasers

In the United States of America, the use of taser[619] for its promise of safe and effective less lethal control of suspects has begun to be used as an alternative less brute force.[620]

There are, however, communities and interest groups which have started raising concerns over its use.[621] Taser related excessive force litigations are on the rise.[622] In reaction to the civic complaints, the Police executives have struggled to draft appropriate taser policies and training programmes to preserve it as a less lethal option.[623] A long standing practice in the United States of America is that the Courts have approved the use of tasers routinely against assaultive and physically resistant suspects.[624] With this new policing technology, legal confrontations surrounding the use of the taser as compared to the use of pepper spray in the 1990s, are inevitable.[625]

Law enforcement officers have been sued for allegedly using tasers inappropriately.[626] In addition, as it happened with pepper spray, reported instances of the number of deaths associated with taser have captured the attention of the media and the public to the extent that the authorities have called for a moratorium on the use of tasers.[627] In Lesotho, the use of tasers has not been applied, but similar instruments which, however, are equally deadly are used to disperse the crowds. These are rubber bullets, pump-actions, tear-gas or pepper sprays and live bullets. The Lesotho scenario is highly lamentable as

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619 Smith, Petrocelli and Scheer, 2007: 411 define Taser as meaning, a conducted energy device designed to control resistant subjects through the use of electricity. Wireless or probes attached to the Taser device make contact with the skin or clothing of the subject and deliver 50000 volts of electricity in two or five seconds bursts. The electricity causes loss of neuromuscular control and incapacitates the target while the electricity is being delivered.

620 See Smith, Petrocelli and Scheer, 2007: 398.

621 See Smith, Petrocelli and Scheer, 2007: 398.

622 See Smith, Petrocelli and Scheer, 2007: 398.

623 See Smith, Petrocelli and Scheer, 2007: 398.

624 See Smith, Petrocelli and Scheer, 2007: 398.

625 See Weintraub, Petrocelli and Scheer, 2007: 399.

626 See Weintraub, Petrocelli and Scheer, 2007: 399-400.

627 See Weintraub, Petrocelli and Scheer, 2007: 399-400.

the police must improve policing strategies in order to enhance crowd management policy even in individual cases of arrested suspects.

One commends America's move towards formulating or redefining policies and drawing training guidelines for taser use, which must be mindful of fundamental human rights of the suspects of crime.
First and foremost, officers must be trained when not to use tasers, specifically without provocation against a non-resistant citizen. Officers should be trained so that they are able to articulate a physical threat or potential threat before using a taser against a verbally resistant subject. What emerges from the two jurisdictions discussed so far is that only reasonable force which is believed to be necessary to accomplish the arrest should be employed to arrest a suspect.

It further becomes apparent that the common denominator for the use of deadly force is that it may be used as the last resort in order to save life or to prevent serious bodily harm. It should be appreciated that the American Bill of Rights[628] further influenced the development of the common law principle to such an extent that a fleeing person suspected of committing serious crimes may be killed only during an attempt to arrest him if he is dangerous or is armed. In *Tennessee v Gardner,*[629] the Court further held that an arrestor would obviously not always easily be able to establish this fact in the heat of the moment and it may eventually be detrimental to effective law enforcement. Deadly force training is indispensable to police when they must confront persons who threaten them or others with serious violence.[630] It is necessary to invest substantial resources in the education, training, and initial fire-arm qualification of new police recruits at the academy.[631]

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628 1795. Bander, 1966: 10 explains Bill of Rights as the first ten Amendments of the United States of the American's Constitution which limited the powers of United States Federal Government.

629 105 U.S. 1694 SCt. (1985).

630 See Morrison, 2006: 331.

631 See Morrison, 2006: 331.

Departments have in-service programmes to periodically revisit those important matters, so that this combination of pre- and in-service programming may suffice to induce, maintain and refine important skills and abilities as well as integrate new and modified skills over time.[632] The initial preparation and continuing education of instructors form the foundation for departmental programmes because these key personnel influence priorities, plans and delivery of training, conduct requalification and presumably monitor field performance.[633] *Klinger*[634] advances a strong view that besides many positive changes that modernization brought to our lives, fear of crime is thriving in many metropolitan jurisdictions as a negative outcome of the improvement in our society.

We demand protection from criminals or other parties who can harm families, society and ourselves.[635] As a result, police have been given the authority to use the necessary force on our behalf to prevent crime, even by using deadly force when it is required.[636] On the other hand, the probability of the violation of the authority for using force causes a concern among society for the freedom that comes with democratic rights.[637] Because of this concern, people demand that police stay within their legal boundaries while using this authority and not wound the heart of the public.[638]

Klinger[639] raises an important factor which most critics forget to advance, namely the question of personal circumstances of the police officer who is confronted with a situation of peril. In order to understand the nature of deadly force cases, it is vital to know how officers feel when they pull the trigger. In most cases, the mutual feeling of the officer is an observation of a real threat. Officers rely on

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632 See Morrison, 2006: 331.
633 See Morrison, 2006: 331.
634 See Klinger, 2005: 208.
635 See Klinger, 2005: 208.
636 See Klinger, 2005: 208.
637 See Klinger, 2005: 208.
638 See Klinger, 2005: 208.
639 See Klinger, 2005: 214.

their gun when they feel that there is a real threat against an individual, themselves, their colleagues or a citizen.[640]

It is submitted that Lesotho's law of arrest is clouded by ambiguity as there are no clear procedural guidelines given to the law enforcement officers. Police officers have a wide discretion in determining what is reasonable under a given case and, in some extreme situations, are unable to discern and appreciate what is meant by "reasonable", "suspicion", "belief" or "grounds" as the courts have not been seized with the matter.

3.2 THE REPUBLIC OF SOUTH AFRICA

3.2.1 Resisting Arrest and Attempt to Flee

In South Africa, the Act providing for the police use of force is the Criminal Procedure[641] Act[642] section 49 of Act 51 of 1977. It provides for the use of force by police officials or members of the public. Section 49(1) of the Criminal Procedure Act[643] provides that:

"If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person (a) resists an attempt and

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640 See Klinger, 2005: 214.

641 Act No. 51 of 1977. See also Haysom, 1987: 10 who raises an interesting point that in general, the South African law authorises the use of deadly force by law enforcement officials on three grounds a) where the policeman is enjoined by virtue of common law or his statutory obligations to protect a person or property of another or himself. b) In terms of section 49 (2) of Act 51 of 1977.(c) In terms of sections 48 & 49 of Internal Security Act 74 of 1982.

642 See Act No. 51 of 1977.

643 Act No. 51 of1977. See also *Matlou vs Makhubedu* 1978(1) SA 946 (A) where it was emphasised that a degree of force used should be proportional to the seriousness of the offence in respect of which the attempt is made to arrest the suspect. This seems to suggest that the less the offence, the less the degree of force.
See also section 42 of Lesotho Criminal Procedure and Evidence Act No. 9 of 1981 where requirement (a) is absent, but requirement (b) is similarly required before shooting a fleeing suspect, although in Lesotho few officers have been held accountable under this section on account that individual suspects have either been injured or killed under unjustified circumstances.

cannot be arrested without the use of force; and or (b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorized may in order to effect an arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing".

According to *Bekker,*[644] the onus of proof rests on the arrestor to prove the following:

1. *"That he was lawfully entitled to arrest the suspect;*
2. *That he attempted to arrest him;*
3. *That the suspect attempted to escape by fleeing or offering resistance;*
4. *That a degree of force was reasonably necessary to effect the arrest"*.[645]

In *R v Van Heerden*[646] the appellant was charged with an offence of assault with intent to murder. In September 1957, the house of one Richards in South Hills Johannesburg, was entered by a man and when Richards followed the man from his bedroom, the man escaped through the kitchen window. He gave chase, but the man ran away and the appellant fired a shot which hit the complainant on the right temple causing total blindness. The court quoted with approval *Schreiner JA* in *Britz*[647] where the learned Judge had this to say:

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644 See Bekker et al. 1999: 108. Note that Bekker et al. argue that the 'words reasonably necessary' in section 49 (1) have been interpreted by courts to include a proportionality test. See also *Govender v Minister of Safety* 2001 (4) SA 273 SCA on page 293 where the Supreme Court of Appeal ruled that a test in *Matlou v Makhubedu* 1978 (1) SA 947 (A) is too narrow and has to include all the circumstances in which force is used, so that not only seriousness of the offence should be considered.

645 See Bekker et al. 1999: 108.

646 1958 (3) SA 150 (T). Note that in the court below, it was argued that the appellant's conduct was excused by virtue of provisions of section 24(1) (c) and 37 of the Criminal Procedure Act No. 56 of 1955 which read; "Any private person may, without warrant, arrest any person whom he has reasonable grounds to suspect of having committed an offence mentioned in the First Schedule". While section 37, now section 49(2)) relates to the killing of a fleeing suspect if he cannot be stopped otherwise than through killing. Note that Lesotho still uses similar clauses to date which are sections 22 and 42 of Act No. 9 of 1981 respectively.

647 1949 (3) SA 293-303 (A). Note that the Court went further on page 304 to hold that "Bearing in mind the serious risk that firearms may, if the protection is too easily obtainable, be lightly used upon occasion to prevent the escape of someone suspected, reasonably, but perhaps wrongly of some possibly not very serious crime, and bearing in

"The form of the section itself suggests that the protection is only available when the circumstances are all shown to be present, and that it is not available where their presence has only not been negative. It should be noticed in the next the fact that, although a private person may only arrest without warrant under section 31, if his suspicion is reasonable, once he is entitled to arrest, he is not deprived of the protection afforded by section 44 because he has acted unreasonably if the circumstances are fulfilled as specified in that section."

The Court interpreted the word 'reasonably' to require an objective approach.

3.2.2 Justifiable Homicide

Section 49(2) of the South African Criminal Procedure Act provided that:
"Where a person is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the grounds that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide".

By virtue of this section, the killing of a person who committed a crime or who is suspected of having committed a crime is justified.[648] It is a serious matter to kill a person in these circumstances, because he may be absolutely innocent.[649] In *Mazeka v Minister of Justice***,**[650] an accused had killed another and claimed the protection afforded by section 49(2) the Court held that:

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mind also the emphasis which our law and customs have in general laid upon the sanctity of human life, I am satisfied that the legislature must have intended that a person who has killed another and seeks to use the very special protection afforded by section 44 should have to prove, on the balance of probabilities, the circumstances specified in the section as a pre-requisite to immunity."

[648] See Bekker, 1999: 108.

[649] See Bekker, 1999: 108.

[650] 1956 (1) SA 312 A. See also *S v Scholtz* 1974 (1) SA 120 (W) on p.124 where it was pointed out that it is an important aspect of life in a state under the rule of law that the police do not exceed the limits of their powers in terms of section 49(2). The Court further held that the words 'arrested by other means' in section 37 of Act 56 of 1955 cannot

"I consider it expedient, however, to make a few observations upon the onus which rest on a person who invokes the protection of section 44(1) of Act 31 of 1917 or section 37 of Act 56 of 1955. The punishment may be a period of imprisonment not exceeding six months, without an option of a fine. It need not necessarily be a heinous crime or even gravely anti-social. In empowering private persons as well as peace officers to kill a person suspected on reasonable grounds of having committed such an offence, who flees in order to escape arrest or resists arrest, the legislature could not possibly have intended that recourse to shooting should be taken lightheartedly. The sub-section gives protection only if the guilty or suspected person cannot be apprehended and prevented from escaping by other means".[651]

The onus was upon him to show, on a balance of probabilities, that the requirements of this section were complied with.[652] In fact, *Van den Heever JA* went on to rule that:

"Where a fit young man of 24 years old intends to arrest a person much more than ten years his senior, who was only a few yards away, and is admittedly not running very fast, where such a young man promptly avails himself of the ultima ratio legis without using any other means of effecting an arrest, especially where he has information which points to the likelihood of the arrestee being located, identified and arrested, I do not think it is enough for him to say that he thought there were no other means of preventing the escape."[653]

In *Government of Republic of South Africa v Basdeo*,[654] soldiers in the employ of the defendant set up and operated a legitimate roadblock for purposes of a lawful operation, namely the interception and apprehension of persons carrying

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possibly be so interpreted as to include also the notion of exercising a discretion whether to arrest at all. That the section applies to the manner of arrest and nothing else.

651 *Mazeka vs Minister of Justice* 1956 (1) SA 312 (A).

652 See Bekker et.al. 1999:108.

653 *Mazeka vs Minister of Justice* 1956 (1) SA 312 (A).

654 1996 (1) SA 355-576 (A).

unlicensed or unlawful firearms into Natal from the Republic of Transkei. The deceased and his friend had had a few drinks and they were probably in a social mood, intending to have an evening of fun. They made a u-turn on the road to tease the soldiers. Instead of stopping, or slowing down, when they saw one Wichmann and Apostolides, they accelerated the car towards them. The soldiers fired a deadly shot which killed the deceased.

The Court there held that:
"Accordingly, every facet of police action under section 49(2) must be carefully analyzed and measured against the requirements of this section".
These requirements are:

1. *The power to kill exists only in respect of specified serious offences, namely those which are mentioned in the first schedule of the Act.*
2. *Where the person effecting the arrest is doing so on a suspicion, the fugitive must reasonably be suspected of having committed a first schedule offence.*
3. *The person who arrests or attempts to arrest with or without a warrant must have the power to arrest the offender or to assist in his arrest for such 'First Schedule Offence'.*
4. *A person who claims protection under section 49(2) must have attempted to arrest the offender.*
5. *The person who wishes to avail himself of the protection afforded by the section, must have had the intention to arrest the offender.*
6. *The offender must have fled or resisted arrest.*
7. *The offender must be aware of the arrestor's intention to arrest him and then flee.*
8. *There must be no other means to effect the arrest of the offender.*
9. *The force used must of course be directed against the suspected offender.*[655]

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655 *Government of the Republic of South Africa v Basdeo* 1996 (1) SA 355 (A).

The amount of force which may be applied when attempting to arrest an absconding suspect has always been an issue.[656] At the heart of this dilemma is the question of what is regarded as the most valuable.[657] Thus on the one hand, there is a right of an individual to freedom of movement and in more extreme cases, his right to life.[658] On the other hand, these are the interests of the community in the proper administration of justice as reflected in the apprehension and trial of a person suspected of having committed an offence.[659]

In *Walters v S*,[660] there was a shooting of a fleeing suspect by two civilians after a burglary in that two accused, one Edward Joseph and his son and one Marvin Edward Walters, were standing trial in the High Court in Umtata on a charge of murder. The trial arose from a shooting incident in Lady Frere in February 1999 during the night when the two accused were shot at and wounded. One of the accused's wounds proved fatal, resulting in the murder charge to which the accused raised section 49(2) of the Criminal Procedure Act.[661] The question was whether under the circumstances the shooting of a fleeing suspect was justified, and if such circumstances exist, how are they defined in law, given the Bill of Rights. The purpose of arrest was laid down as to take the suspect into custody to be brought before court as soon as possible on a criminal charge and it was clearly stipulated in no uncertain terms that it does not necessarily involve the use of force. On the contrary the learned judge held that:

"The use of any degree of force to effect an arrest is allowed only when force is necessary to overcome resistance by the suspect and/or anyone else, to arrest by the person authorized by law to carry out such arrest".[662] And where the use of force is permitted, continued the learned judge:

"Only the least degree of force necessary to perfect the arrest may be used and similarly, when the suspect flees, force may be used only where it is necessary,

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656 See Watney, 1999: 28.See also Sorgdrager, Coertzen and Maree, 1988: 45.
657 See Watney, 1999: 28.
658 See Watney, 1999: 28.
659 See Watney, 1999: 28.
660 2000 (4) SA KH. at 63.See also Neethling and Potgieter, 2003: 158.
661 See Act No. 51 of 1977.
662 2000 (4) SA KH 63.

but even then only the minimum degree of force that will be effective may be used".[663]

The learned judge concluded that the arrest is not an objective in itself, but it is merely an optional means of bringing a suspected criminal before court and therefore resistance or flight does not have to be overcome or prevented at all costs. It is submitted that the learned judge is correct in his approach, especially where the identity of the suspect and/or his whereabouts are well-known. He can be located later through investigation.

After the High Court in Umtata found section 49 (2) as well as section 49 (1) (b) of Act no 51 of 1977, in respect of a fleeing suspect inconsistent with the Constitution and consequently invalid, the matter was taken to the Constitutional Court. Section 172 (2) of the Constitution required confirmation or otherwise.[664] The court agreed that it did not apply its mind to section 49 (1) (b). It is further submitted that the South African courts have come up with a clear-cut balancing act between the interest of society and the need to maintain law and order on the one hand and the corresponding obligation to respect the fundamental human rights of an individual suspect or the other by reducing the chances of police engaging in acts of exercising excessive force. In summary therefore, the decision in *S v Walters*[665] has stated the law with regard to the use of force in order to effect an arrest as follows:

"In order to make perfectly clear what the law regarding this topic is, I tabulate the main points:

(a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.

(b) Arrest is not the only means of achieving this purpose, nor always the best.

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663 2000 (4) SA KH 63.

664 See Lambrechts and Prinsloo, 2002: 132.

665 2001 (2) SACR 197 SCA.

(c) Arrest may never be used to punish the suspect

(d) Where arrest is called for, force may be used only where it is reasonably necessary to carry out the arrest.

(e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.

(f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature, the circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these cases.

(g) These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of others."[666]

These inroads are meant to remind police officers of their Constitutional obligations to balance the interests of both society and those of a suspect and further to learn to restrain their use of force in crowd management situations. This is the lesson to be learned by the Lesotho Mounted Police Service as they have a propensity to use excessive force on suspects of crime with impunity.

In *R v Britz*[667] at about 10:30 pm on the night in question, the accused was awakened by his wife who told him that there was noise outside and he went out barefoot, in his pyjamas with a shot-gun. He saw a person assaulting a servant girl. When the attacker saw Britz, he tried to run away. When he did not stop,

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666 See Bekker et al. 2003: 101.

667 1949 (3) SA 293 (A). Note that section 44(1) of Act No. 31 of 1917 read : 'When a peace officer or a private person authorized or required under this Act to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected of having committed any of the offences mentioned in the First Schedule of this Act, attempts to make such arrest, and the person so attempted to be arrested flees or resists and cannot be apprehended and prevented from escaping by other means than by such officer or private person killing the person so fleeing or resisting, such killing shall be deemed in law justifiable homicide '.Lesotho section 42 of the Criminal Procedure And Evidence Act No. 9 of 1981 is similar to this provision, but the difference is that in Lesotho there are no safeguards.

Britz shot him in the back killing him. The question on appeal was whether, in order to succeed in the defence of justifiable homicide, based on section 44(1) of Act 31 0f 1917, it was incumbent upon the accused to establish the requirements of this defence as prescribed by such sub-section, on a preponderance of probabilities.

Schreiner JA considered that a person relying on the protection afforded by section 49(2) of the South African Criminal Procedure Act, had to prove, on the balance of probability, that his actions were covered by the provisions of the section as a pre-requisite to immunity. In *S v Swanepoel*[668] it was held that where an accused is charged with murder or culpable homicide, and he invoked the provisions of section 49(2) of South African Criminal Procedure and Evidence Act[669], and alleged that the killing of the deceased was justifiable in terms of the section, the onus is on him to prove that the provisions of the section are applicable to him.

Rabie CJ affirmed the decision in *Britz* as a correct approach regarding the onus of proof. *Watney*[670] tabulates certain requirements that may have to be met. The arrestor has to prove compliance therewith on the balance of probabilities before his conduct may be justified by statute as follows:

1. *"The Act authorized him to arrest the suspect;*
2. *An attempt to arrest was made;*
3. *The suspect resisted arrest and could be restrained only with the application of force;*
4. *The suspect, while it was clear to him that an attempt was being made to arrest him and his flight could not be prevented without the use of force, or the suspect resisted arrest and fled;*
5. *The force applied was reasonably necessary in the circumstances".*[671]

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668 1985 (1) SA 576 (A).
669 See Act No. 51 of 1977.
670 See Watney, 1999: 30.
671 See Watney, 1999: 30.

These attributes were stated in *Wiesner v Molomo*[672] in an action for damages for bodily injuries. It transpired that appellant (defendant) had fired a number of shots with the purpose of intimidating and bringing to a halt the respondent (plaintiff) whom he had found on his smallholding. The last shot struck the respondent in the back. The appellant's primary objective was not to apprehend the respondent in order to deliver him to the authorities, but to investigate. It was contended on his behalf that he had reasonable grounds to believe that respondent had committed an offence appearing in Schedule I of the South African Criminal Procedure and Evidence Act. As such he was entitled, in terms of section 42(1)(a) and 49 of the Act,[673] to use force to arrest the fleeing respondent.

It is submitted, with due respect, that while the spirit and purport of the suggested improvements and developments are in order, one wishes to express a definite fear that strict interpretation of section 49 will render law enforcement officials ineffective due to the perceived danger awaiting them should they attempt to use the powers. It is further submitted that they are likely to be reluctant to effect legitimate arrest for fear of reprisal, especially when, in some cases, they have to make quick decisions on the spur of the moment under usually difficult circumstances as when they are under immediate or imminent threat of fire and have to act in private defence.

3.2.3 Section 49 v the new South African Constitution

Bruce[674] gives us an illustrative analogy of the killing under the South African new Constitutional dispensation in relation to arrest and the use of force. He raises three pertinent questions namely:

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672 1983 (3) SA 151 (A).
673 See Act No. 51 of 1977.
674 See Bruce, 2003: 432.

"What is the purpose of the use of lethal force, what is the type of offence or situation in relation to which the use of lethal force for purposes of arrest can be used?

Who should have power to use lethal force for purposes of arrest?

The question of the standard of proof considering the risk of error, how sure must the person using lethal force go about the facts of the situation in order to justify the use of lethal force?"[675]

He argues that under the common law, the core provisions of the law which justify the use of force are common law provisions which define the circumstances in which the use of force in private defence may be justified.

In *S v Makwanyane*[676], the Constitutional Court confirmed that the right to private defence is upheld by the Constitution where the Court stated that the approach taken in law is to balance the rights of the aggressor against the rights of the victim, and favouring the lives of the innocent over the lives of the guilty. This position was re-confirmed by the Court in *S v Walters*,[677] where a bakery owner and his son were charged with murder after they had shot to death a person who had broken into their bakery and was fleeing from the scene. The Constitutional Court finally struck down section 49(2), but declined to declare section 49(1) unconstitutional, thus leaving it untouched.

One tends to agree with *Burchell* [678] when he states that the use of force by a person, usually a police officer, in effecting an arrest or preventing an escape of a fleeing suspect is regarded as legitimate in most systems of the law.

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675 See Bruce, 2003: 432.

676 1995 BCLR 666 CC.

677 2001 (2) SACR 157 SCA.

678 See Burchell, 2000: 200. See also Snyman, 1995: 97 who defines private defence as: "Entitling a person to act in that capacity and his act is therefore lawful, if he uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon his or somebody else's life, bodily integrity or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker and is not more harmful than necessary to ward off the attack".

Skeen[679] discusses *Govender vs Minister of Safety and Security.*[680] Govender's son, Justin, was shot and permanently disabled while he and his companion were being pursued on foot by a policeman who had stopped a stolen vehicle driven by Justin and the pair could not stop even after warning shots. The High Court justified the police action, but the Supreme Court of appeal unanimously held that the shooting by a policeman was unlawful.

According to the interpretation in *Govender,* section 49(1) of the Criminal Procedure Act [681] must, generally speaking, be interpreted so as to exclude the use of a firearm or similar weapon unless the person authorized to arrest, believes on reasonable grounds that the arrested person is resisting arresting.[682] Only if the arrestor has reasonable grounds for believing that the suspect poses an immediate threat of serious bodily harm to him or her, or members of the public or that the suspect has committed a crime involving the serious infliction of grievous bodily harm then, he may use the necessary amount of force.[683] In this direction, therefore, the Supreme Court of Appeal, supported by the Constitutional Court held that:

"The existing narrow test of proportionality between the seriousness of the relevant offence and the force used should expand to include a consideration of proportionality between the nature and degree of force used and threat posed by the fugitive to the safety and security of the police officer, others and society as a whole".[684]

See Article 2(2)(b) of European Convention on Human Rights of 1950 which justifies the use of limited use of force on the protection of physical integrity and the life of an individual.

679 See Skeen, 1999:573. See also Cowling, 2003:16.

680 1999 (2) SACR 706 or 1999 (6) BCLR 590. See also *S v Janeke* 1999 (2) SACR 360.

681 Act No. 51 of 1977.

682 See Skeen, 1999: 573.

683 See Skeen, 1999: 573.

684 *Govender vs Minister of Safety and Security* 1999 (2) SACR 706.

It is important to emphasize that police officers do not have discretion to fulfil their obligations as they wish, but they are so charged with legal duty to do so. They are always entitled to and often obliged to take all reasonable steps, including the use of reasonable force, to carry out their duties.[685]

Maepa[686] wonders why the new Amendment to section 49 has been delayed since the time it was initiated in 1998 and he apportions part of the reasons for the delay to serious debates that have gone on since that time.[687] The nature of some of the debates was that it was not realistic to limit the police use of force against suspected criminals in such a violent society, with a high rate of police murders, so that the question was whether it is wise to limit their options when confronted with violent offenders. He further notes that South African Police Service management were reluctant to implement the amendment which up to then had not been passed into law since 1998.

One shares the view advanced by *Maepa* that while we do not condone police use of excessive force, we submit that such force should not be limited only for the sake of it and safety of the officers. Generally, police safety must be placed high on the agenda at all cost lest they fear to execute their mandate for fear of prosecution. At the same time, they should not be allowed to use "shoot to kill policy" currently demanded by government given the nature of a violent crime in South Africa.

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685 See Lambrechts and Prinsloo, 2002: 136.

686 See Maepa, 2002: 11-13.The heated debate goes on as we write in 2010 still no finality.

687 Note that as we write now (November 2009), the same debate has not come to pass . On the one hand, The *Minister of Police, then Ministry of Safety and Security* is advocating for more police power to 'shoot and kill' suspects of crime. On the other hand eminent people, scholars, some sectors of the society express a view that, South Africa is not a police state, on the contrary, it is a democratic Country with the Constitution propagating for the rule of law founded on the basic fundamental human rights of every one living in it. The South African Parliament will soon be seized with this matter.

3.2.4 The Proportionality Test

It is submitted that the *Walter's*[688] decision came as a celebrated intervention, especially when it introduced the question of proportionality test. It is further submitted, with due respect, that the learned judge is supported in his conclusion that:

"I am of the view that, in giving effect to section 49(1) of the Act, and in applying the Constitutional standard of reasonableness, the existing test of proportionality between the seriousness of the relevant offence and the force used should be expanded to include a consideration of proportionality between the nature and degree of the force used and a threat posed by the fugitive to safety and security of the police officers, other individuals and society as a whole".[689]

The learned judge further built another clear-cut barrier that:

"The words use such force as may in the circumstances be reasonably necessary … to prevent the person from fleeing, must be interpreted so as to exclude the use of a firearm or a similar weapon unless the person authorized to arrest or assist in arresting, a fleeing suspect has reasonable grounds for believing:"[690] and concluded that unless:

(a) "The suspect poses an immediate threat of serious bodily harm to him or her; or

(b) A threat of harm to members of the public; or

(c) That the suspect has committed a crime involving the infliction or threatened infliction of a serious bodily harm".

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688 2002 (4) SA 613 (CC).

689 See *S v Walters,* 2002 (2) SACR 105 -154 CC. Note that in terms of Schedule 1 of Criminal Procedure Act, the serious offences include treason, sedition, murder, rape, robbery, fraud, conspiracy or incitement. It should be noted that in Walter's decision, the Constitutional Court declared section 49(2) to be unconstitutional unlike in Lesotho, for example where a similar provision has been put in effective use as stipulated under section 42 of Criminal Procedure Act 9 of 1981.The Walter's decision further introduces a shift in evidence to he who alleges must prove principle, but of course, on the balance of probabilities.

690 See *S v Walters,* 2002 (2) SA SACR 105-154 CC.

The learned judge proposed a very weighty disposition in encouraging the legislature to limit the license to kill to serious offences. It is strongly recommended that this position of the law should be introduced in Lesotho to form the body of the law of arrest for police officials. Lesotho Law Reform Commission is called upon to act accordingly in the interest of development of the Lesotho Criminal Justice System in order to curtail the unchecked police sweeping powers of arrest in that Kingdom. This is to give effect to the fundamental human rights provisions as propounded by section 5(1) of the Lesotho Constitution[691] in respect of the right to life which is claimed to be inherent.

It is further submitted, with due respect, that *Neethling and Potgieter*[692] support what we have extrapolated above when they indicate that one may not shoot a fleeing suspect merely because he will otherwise get away. It is our conviction that this approach is meant to give effect to the sanctity of life. It strives to strike a balance between the interests of the society on the one hand, and the fundamental human rights of the suspect on the other. The proposed provisions of the new amendment to section 49 of Criminal Procedure Act which has not passed into law states that:

"If the arrestor (that is, any person authorized by the Act to arrest or to assist in arresting a suspect) attempts to arrest a suspect and the suspect resists the attempt, or flees, when it is clear that an attempt to arrest him is being made, and a suspect cannot be arrested without the use of force, the arrestor may use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing".[693]

The provisions must be clear to the accused that the attempt is being made to arrest him. This implies that before force may be used against him, he must be

691 See Act No. 16 of 1993:15
692 See Neethling and Potgieter, 2003: 158.
693 See Neethling and Potgieter, 2004: 603.

made aware of such an attempt.[694] Secondly, the necessity of the bodily infringement by force must be certain. That is, there must (reasonably) be no other options for the arrestor than to use force, and if the circumstances permit, he should therefore first attempt non-violent means to stop the suspect, for example, by giving an oral warning or by firing a warning shot into the air or on the ground.[695]

In *S v Barnard*[696] the appellant, a member of the South African Police, was charged with murder, but convicted of culpable homicide in that when he was on patrol duty he was informed that shots were being fired in the Supreme Court vicinity. An attack on the building had been launched by terrorists shortly before and the police had been warned that they could expect more attacks on Court buildings. He went in the direction of the Court and saw a vehicle and thought that it had terrorists who were firing shots in the direction of the Court. He fired four gun-shots at the tyres of a moving vehicle and when the latter failed to stop, he aimed at the driver and fired a number of shots and fatally wounded him. The deceased and his passenger had no firearm on them. At the trial, he had tried to rely on section 49(2) of Criminal Procedure Act 51 of 1977.

The trial Court found that the state had discharged its onus of proving that homicide was not justifiable in terms of the provisions of section 49(2), but that appellant had lacked knowledge of unlawfulness. On appeal, the Court listed the requirements of section 49(2) for purposes of the present appeal as being:

(a) *That the appellant must have reasonably suspected the occupants of the vehicle of the commission of the crime viz, terrorism.*

(b) *The deceased and his passenger must have been on the point of being arrested.*

(c) *The deceased must have been aware of an intention of an appellant, which must therefore have been made known to arrest them,*

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694 See Neethling and Potgieter, 2004: 603.
695 See Neethling and Potgieter, 2004: 604.
696 1986 (3) SA 1 (A).

(d) The deceased must have fled with that knowledge, i.e. endeavoured to avoid arrest by escaping and

(e) There must have been no other way of preventing the eventual escape than killing the deceased.[697]

The Court held on the facts that the appellant had failed to prove that requirements C and D above had been complied with or that he had reasonably thought such to be the case**.**

Coetzee J recommended that although the arrestor's defence was that he mistakenly thought he was justified in using force in terms of section 49 of the Act, then, his genuinely held mistake would not, on its own, serve to excuse his conduct if he had exceeded the scope of his authority and that his mistaken belief had to be reasonable as well.

3.2.5 The Requirement of Reasonableness in the exercise of Police Powers

It is submitted that the South African section 49(2) continues to use the words "reasonable grounds", or "belief" to be effected by the arresting official and it seems to be placing the onus of proof on the he "who alleges'' principle. This position is comparable to what we discussed while dealing with the same issue in respect of the position in the perspective on the United States of America.

Bekker[698] observes that the question is often posed concerning how one is supposed to determine exactly when a suspicion may be said to be a "reasonable suspicion", or when one could be said to have "reasonable grounds" or believe, or what force would be "reasonably necessary" to achieve a certain objective. The learned authors submit that although it would be impossible to lay

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697 1986 (3) SA 1 (A).

698 See Bekker et al. 1999: 90. Note that they indicate several sections of South African Criminal Procedure where the use of the word 'reasonableness is used.

down any hard and fast rules in this regard, the following guidelines may be followed:

1. *A person will only be said to have "reasonable grounds" to believe or suspect something or that certain action is necessary if:*
   - *(a) He really 'believes' or 'suspects' it;*
   - *(b) His belief or suspicion is based on certain "grounds"; and*
   - *(c) In the circumstances and in view of the existence of those 'grounds', any reasonable person would have held the same belief or suspicion.*[699]
2. *The word "grounds", as it is used here, refers to 'facts'. This means that there will only be 'grounds' for a certain suspicion or belief if the suspicion or belief is reconcilable with available facts. Such existence or otherwise of a "fact" is objectively determined.*[700]

   This was the holding in both Van Heerden[701] *and* Nell[702]*where it was held that a peace officer, as defined in section 1 of Ordinance 34 of 1963 (South West Africa, now Namibia) can rely upon the protection of section 37(1) where the fugitive is assaulted and not killed. He must prove on the balance of probabilities that he complied with the requirements of the section. It was held the test here is objective.*[703]

   The learned authors think that five senses, thus looking, hearing, smelling, touching and tasting may be used to determine what the facts really are.
3. *Once a person has established what the facts really are, he will evaluate them and make an inference from those facts with regard to the existence or otherwise of other facts, which he is at the time, for whatever reason, unable to establish". Bekker*[704] *therefore submit that this means that he thus considers the true facts and will then decide whether the true facts*

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699 See Bekker et al. 1999: 90.
700 See Bekker et al. 1999: 90.
701 1958 (3) SA 150 (T).
702 1967 (4) SA 489 (S .W .A.)
703 See Bekker et al. 1999: 90.
704 See Bekker et al. 1999: 91.

are in the view sufficient to warrant a belief that the other facts also exist and this was the position in the decision of Mnanzana.[705]

4. *Once he has made the inference that the other facts exist, it can be said that the person himself "believes" or "suspects" that such facts exist.*[706]

The learned authors, however, note that the mere fact that a certain person believes or suspects that certain facts exist is not sufficient to regard this belief as one based on "reasonable grounds" as required by the law. This will only be the case if it can be said that any reasonable person would have held the same belief or suspicion in the circumstances. Bekker[707] considers the words "any reasonable person", as they are used in this regard, to refer to any other person who has more or less the same background knowledge (such as training and experience) as the person who actually entertains the belief or suspicion. He hold an opinion that:

A person can therefore be said to have "reasonable grounds" to believe or suspect something if he actually believes or suspects if, his belief or suspicion is based on facts from which he has drawn an inference, and if any reasonable person would, in view of those facts, also have drawn the same inference.[708]

This, the learned authors[709] further submit, is a factual question that will have to be answered with reference to factual circumstances that are present in each case.

It is submitted that these guidelines are recommended for use in Lesotho to improve the existing arrest legislation which is seriously wanting.

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705 1966 (3) SA 38 (T) on p. 43. Note that the Court in this decision held that an accused who is charged with assault is entitled to the protection of section 37 of Act 56 of 1955 as amended, where he satisfied the conditions prescribed by the section.

706 See Bekker et.al. 1999: 90.

707 See Bekker et al. 1999: 91.

708 See Bekker et al. 1999: 91.

709 See Bekker et al. 1999: 91.

It would appear from the decisions cited above that any person, either private or official, would have a steep road in order to claim any immunity under the present section 49(2) of the Act in terms of claiming its enjoyment and hence subsequent protection thereof. I submit that this is what is required in those countries which seek to nurture and protect their young and thriving democracies. Although one will be quick to caution that a proper balance has to be struck between the powers given to police officers for their day to day operations and those rights enjoyed by the general public and in that direction therefore, I urge the Lesotho Government, through the Law Reform Commission, to draw on the lessons of the South African experience in this regard.

The strict interpretation of this section is highly supported as expounded in *Britz v R* [710] in which *Schreiner JA* finally held that:
"If the circumstances specified in the section are present, the conditions for protection are completely fulfilled, and, however unreasonable the arrestor may have been, the killing is deemed to be justifiable."

3.3 THE KINGDOM OF LESOTHO: THE USE OF FORCE

3.3.1 The Lesotho Criminal Procedure and Evidence Act[711]

The arrest under the Lesotho's Criminal Procedure and Evidence Act is governed by sections 23 and 24. The sections give power of arrest to both Police and Peace Officers to arrest without warrant persons who commit a crime in their presence or are reasonably suspected that they are about to commit crimes mentioned in Part II of the First Schedule. The offences listed under Part II of the First Schedule are regarded as very serious offences which call for stiffer sentences on those who are found guilty. They include, but are not limited to treason, sedition, murder, rape, robbery, arson, house-breaking, fraud, forgery

710 1949 (3) SA 293 (A).
711 See Act No. 9 of 1981.Note that Part II of Lesotho list of Serious Offences in the First Schedule, is the same as the South African one.

and uttering, theft in all its present forms. A peace officer is defined by section 3 to include a sheriff, any officer, non-commissioned officer or trooper of a Police Force established under any law. Any person carrying out the arrest under the law or performing the powers, duties and functions of the Police Service in Lesotho, a Chief or Prison Warder. Judicial officer includes a Judge, Magistrate or Justice or any officer appointed to act in any of the above capacities. Section 27 of the Act also empowers a private person to effect an arrest in relation to certain offences, especially those offences which are committed in their presence. The offences appear in Part II of the First Schedule. A private person has not been defined by the Act, but this may be understood to refer to all persons who are neither Judicial Officers nor peace officers as alluded to hitherto. Section 32 places a procedural proviso and a caveat to the effect that:

> "*No person arrested without warrant shall be detained in custody for a longer period than in all circumstances of the case is reasonable and such period shall, subject to sub-section 2 unless a warrant has been obtained for a further detention upon a charge, not exceed 48 hours".*

Sub-section 2 of the Lesotho Constitution[712] directs that the arrested person should be brought before a magistrate as soon as possible. There seems to be no difficulties regarding arrest with a warrant as long as it has been properly issued by a competent authority.

3.3.2 Resisting Arrest

Section 42(1) of Lesotho Criminal Procedure Act reads:

> *"When any peace officer or private person authorized or required under this Act to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected of having committed any offence mentioned in Part II of the first schedule,*

[712] See Act No.16 of 1993.

attempts to make the arrest, and the person whose arrest is so attempted flees or resists and cannot be apprehended and prevented from escaping, by other means than by the peace officer or private person killing the person so fleeing or resisting, such killing shall be deemed justifiable homicide".[713]

The words "reasonable grounds" or "justifiable homicide" have not been defined by the Act. This fact alone renders their use too general. Their use is open to abuse and witch hunting by police. One strongly recommends that the words be well defined in scope and limit. It is not even clear who bears the onus of proof. It is further recommended that Lesotho should perhaps consider invoking the South African position which has a similar provision in section 49 (2) relating to the use of force in effecting an arrest as amended by section 7 of the Judicial Matters Act.[714]

Lesotho is a sovereign and democratic state which accords its people general suffrage through periodic elected government. Chapter II of the Lesotho Constitution[715] guarantees every individual person in that country protection of the fundamental human rights and freedom to be enjoyed by all and sundry without any discrimination whatsoever, save where limitations, as stipulated, apply in respect to some of the rights.

The following rights have been limited under the Lesotho Constitution and for the purpose of illustration we will only deal with few of such limited rights.

- ☆ The right to life
- ☆ Section 5(1) stipulates that:

  "Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life. Without prejudice to any liability for a contravention of any other law with respect

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713 See Act No. 9 of 1981.
714 See Amendment No. 62 of 2000.
715 See Act No.16 of 1993.

to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use of force to such extent as is necessary in the circumstances of the case".

(a) "For the defence of any person from violence or for the defence of property,

(b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained,

(c) For the purpose of suppressing a riot, insurrection or mutiny,

(d) In order to prevent the commission by that person of a criminal offence".

It becomes apparent from the above quotation that the limitation clause is placed as far as there is a use of force which might even result in the taking of one's life. For our purpose, we will deal with limitations (b) and (d). Thus in order to effect a lawful arrest or to prevent the escape of a person lawfully detained or in order to prevent the commission by that person of a criminal offence.

Crime is a menace in Lesotho. It rocks the country to a significant scale. The law enforcement operatives, in order to reduce the scourge of the relentless toll of crime levels, need to put in place proactive and reactive strategies. Section 24(1) of the Lesotho Mounted Police Service Act[716] spells out the fundamental functions of the Lesotho Mounted Police Service, amongst others, as:

- ☆ *Prevention of crime*
- ☆ *Maintenance of law and order*
- ☆ *Apprehension of offenders and taking them to court*

[716] See Act No.7 of 1998.

3.3.3 Right to Personal Liberty

The second limitation clause is in respect of section 6 of the Constitution which lays down that:

"6(1) Every person shall be entitled to personal liberty, that is to say, he shall not be arrested or detained save as may be authorized by law. These are some of such incidences:

(a) In execution of death sentence by order of court

(b) For contempt of court

(c) For writ of execution

(d) While bringing the suspect to court

(e) Upon reasonable suspicion or having committed or being about to commit a crime".

It should be pointed out at this early stage that sub-section 2 of the Lesotho Constitution places a very crucial proviso that any person so arrested or detained shall be informed as soon as is reasonably practicable, in a language he understands, the reasons for his arrest or detention or else he should be released or brought before the court of law "as soon as it is reasonably practicable". It should further be noted that the onus of proof here is placed on the person who alleges that the provisions of the section have been complied with.

It is submitted, with due respect, that sub-section 2 of the Lesotho Constitution acts as a safeguard against any human rights' violations of the suspects. It definitely accords with the position laid out by section 12 of the Constitution relating to the presumption of innocence. It further ensures that law enforcement operatives do not abuse their powers during the period of arrest or detention and is calculated to improve speedy investigation or else the concerned police, must be prosecuted for violating human rights.

3.3.4 Freedom of Movement

Section 7(1**)** of the Lesotho Constitution[717] provides that:

> *"Every person shall be entitled to freedom of movement, that is to say, the right to move freely throughout Lesotho, the right to reside in any part of Lesotho, the right to enter Lesotho, the right to leave Lesotho and immunity from expulsion from Lesotho".*

Sub-section 2 of the Constitution provides a caveat that any person's restriction on freedom of movement will be consistent if he has been lawfully detained or arrested in the interest of defence, public safety, public order, health or morality.

It is submitted that the spirit and purport of the provisions of the two sections as we have alluded to above, is to limit enjoyment of the individual's rights so long as he offends against any provisions of the said sections.

It becomes imperative to note that the three sections, as stipulated above guarantee that the arrested person's rights should be protected and promoted where there is need to do so, save where the limitations have been so placed.

Lesotho section 42(1)[718] in relation to the use of deadly force versus South African section 49[719]

> *"Section 49 (1) of South African Criminal Procedure and Evidence Act states:*
>
> *If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the*

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717 See Act No. 16 of 1993.
718 See Act No. 9 of 1981.
719 See Act No. 51 of 1977.

circumstances to overcome the resistance or to prevent the suspect from fleeing: provided that the arrestor is justified in terms of this section in using deadly force, only if he or she believes on reasonable grounds".

(a) "That the force is immediately necessary for the purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

(b) That there is a substantial risk that the suspect will cause imminent future death or grievous bodily harm if the arrest is delayed.

(c) That the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves life threatening violence or a strong likelihood that it will cause grievous bodily harm".

By way of comparison with the South African position, *Burchell*[720] argues that the test is reasonable and/or proportional. He respectfully submits that the new version does specifically stipulate that the force used in either overcoming the resistance of a suspect, who is to be arrested, or preventing his or her escape must be reasonably necessary and proportional in the circumstances to overcome fleeing. The learned author adds that this general limiting factor applies to all use of force including the use of deadly force scenario. The other information to add from the learned author's view is that the obvious value of a proportional or reasonable criterion is that a court has to weigh in the balance factors, such as the seriousness of the suspected offence against the degree of force used by the arrestor, the requirement that the suspect has been made aware of the fact that he/she is to be arrested, the need for oral warning or warning shots, the ability of the suspect to escape.

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720 See Burchell, 2000: 200.

By contrast, the South African view is buttressed by *Rumpff CJ in Matlou v Makhubedu*[721] where the defendant shot the plaintiff in the back (but did not kill him) in the course of attempting to arrest him on the grounds of a reasonable suspicion that the plaintiff had committed an offence specified in the First Schedule to Act 56 of 1955. In the action for damages for assault, the defendant pleaded that in the circumstances he was entitled to shoot the plaintiff even though he had not fired a warning shot. The learned judge emphasized that section 49(2) has to be read in the light of the following limits:

> *In regard to a fugitive suspect, If the circumstances permit, an oral warning should be given; then, if that does not help, a warning shot should be fired into the ground or in the air, depending on the circumstances, and after that the arrestor should try to shoot the suspect in the legs.*

To conclude this part therefore, it is submitted that the South African approach through section 49(2**)** is an appropriate one which needs to be taken into account by the Lesotho Law Reform Commission as the interim measure which is reasonable under the present circumstances, including the proper definition of the words, such as reasonable or justifiable homicide. Perhaps *Black's*[722] meaning of the word reasonable, which includes just, proper, fit and appropriate to the end in view, fair, moderate, not excessive, tolerable, could be employed in an attempt to limit the sweeping powers given to peace officers in Lesotho under section 42 of the Criminal Procedure Act. Lesotho has a Constitution which guarantees the right to the presumption of innocence in section 12(a) thereof,

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721 1978 (1) SA 946 (A). See section 37(1) of South African Criminal Procedure and Evidence Act 56 of 1955 as amended which contemplated intentional killing and in that direction therefore, the court in this decision further held on page 947 that ' it is clear, however, that the section contemplated the existence of lawfulness only when no other or lesser force could have availed to overcome the resistance put up'. The Court further noted that similarly, in the case of a fugitive, it was contemplated that the killing would be justified if the escape could not reasonably be prevented in any other way, including the use of other or lesser force.

722 See Black, 1968: 1431.

and this implies that every possible avenue should be exhausted before a peace officer could unleash a lethal force on the perceived suspect of crime.

In *Rex v Pereko Motjokoseli,*[723] the accused were convicted of resisting arrest, after the policeman, acting on the sole orders of chieftainess. He did not have any reasonable suspicion himself. *Harragin CJ* held that the policeman who arrested the suspects must have had reasonable grounds to suspect the commission of the alleged offence himself before he and not someone else could act.

In *Rex v Joubert Soare*,[724] the accused had been arrested by a policeman without a warrant because the policeman had been told that the accused had resisted against the police who was arresting him. *Harragin CJ* stated that where a suspect had resisted against a policeman and had escaped from lawful custody, it was necessary that the prosecution must be able to prove that the accused was in lawful custody and that arrest without a warrant does not authorize the arrest of a person who is suspected of having resisted or obstructed a policeman. In general, section 42 of the Criminal Procedure & Evidence Act[725] has not been challenged effectively through the Lesotho courts. This has turned out to make police officers think that they can invoke it anyhow they wish and that they can get away with that.

It is further recommended that words such as presumption of innocence under section 12(b**)** should also be defined in order to clear any doubt or general application. In this direction therefore, *Schwikkard and Van der Merwe's*[726] understanding of the meaning of presumption must be adopted by Lesotho Law

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723 1926-53 H.C.T.L.R.: 238 C-E Note that the accused was arrested under section 24 of Criminal Procedure 59 of 1938.

724 1926-53 H.C.T.L.R.: 179-80. Further note that here the accused was arrested under section 26(1)(c) of Act No.59 of 1938.

725 See Act No. 9 of 1981.

726 See Schwikkard and Van der Merwe, 2000: 28.

Reform Commission and the meanings must include, but not be limited to the following:

- ✯ *Conclusion which may or must be drawn in the absence of contrary evidence.*
- ✯ *Effect of the rules as to the burden of proof, i.e. presumption of innocence requires the prosecution to prove accused's guilt.*
- ✯ *Conclusion or presumed fact which may or must be drawn if another fact, i.e. basic fact is first proved.*
- ✯ *Presumption without a basic fact such as a conclusion which is to be drawn until the contrary is proved.*
- ✯ *Presumption with basic fact, such a conclusion, which is to be drawn upon proof of the basic fact.* These definitions were derived from R v Bakes.[727]

3.3.5 European Convention[728] and the Use of Force in Effecting Arrests by Police

Police are given power under the law to use force. Without this and other powers, such as the power to deprive people of their liberty, it would not be possible to enforce the law or to maintain or restore order.[729] Whilst policing can be expressed as a series of functions, for example to enforce the law or to maintain or to restore order, it can also be expressed as one function:
"That of responding to every situation arising within a society in which force may have to be used to provide at least a temporary solution".[730]

At the same time the principles that peaceful means should be attempted before force is applied, and that only minimum levels of force are to be applied, in any event are fundamental to policing.[731] Given these principles and the centrality of

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727 1986 DLR 4: 200.
728 See Newman and Weissbrodt, 1990: 97. Also see 1950, 213 U.N.T.S. 222, entered into force in Sept.1953.
729 See Crawshaw, Devlin and Williamson, 1998: 105.
730 See Crawshaw, Devlin and Williamson, 1998: 105.
731 See Crawshaw, Devlin and Williamson, 1998: 106.

force, express or implied, this is important for policing. It is necessary to specify the police powers under arrest given the nature of policing with its uncertainties and dangers. Given the importance of policing in society, it is clear that the power to use force should be vested only in those people qualified to exercise it properly.[732] This implies extremely vigorous selection and training processes; effective command, control and supervision of police officials by police leaders and strict accountability of police to the law when the power is abused.[733]

The use of force may potentially violate the Convention's guaranteed rights to life or the right not to be subjected to torture, inhuman or degrading treatment. The 'right to life' is protected by Article 2, which provides as follows:[734]

> *"(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *(2) Deprivation of life shall not be regarded as inflicted in contravention of the article when it results from force which is no more than absolutely necessary:*
>
> *(a) In defence of any person from unlawful violence;*
>
> *(b) In order to effect a lawful arrest or prevent an escape of a person lawfully detained;*
>
> *(c) In action lawfully taken for the purpose of quelling riot or insurrection."*[735]

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732 See Crawshaw, Devlin and Williamson, 1998: 106.

733 See Crawshaw, Devlin and Williamson, 1998: 106.

734 See Clayton and Tomlinson, 1992: 480.

735 Clayton and Tomlinson, 1992: 480 argue that the use of force is subject to the principle of proportionality and they further argue that the Convention only licences the minimum force necessary to achieve the desired objectives. See Davis, Cheadle, and Haysom, 1997: 311 where the issue of proportionality test was considered by the learned authors by stating that proportionality requires the following limitations:
(a) That it be 'rationally' connected to its objective;
(b) That it impairs the right or freedom 'as little as possible'; and
(c) That there is 'proportionality' between its effect and its objectives.
See also *R v Oakes* 1986 CC or SCR 103 where there was emphasis that the Canadian Charter employs 'reasonableness' as one of its threshold values recommended by

3.3.6 The United Nations' Code of Conduct for law Enforcement Officials[736]

Article 3 of the Code of Conduct expresses standards on the use of force in the following terms: '*Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty'.*[737]

Paragraph a. to the Commentary supplied by the United Nations General Assembly states that the use of force by police should be exceptional. While police may use such force as is reasonably necessary for the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.[738]

Paragraph b. points out that national law ordinarily restricts the use of force by police in accordance with the principle of proportionality, and asserts that it is to be understood that such national principles of proportionality[739] are to be respected in the interpretation of this provision.[740] Paragraph c. emphasizes that

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Canadian jurisprudence as a starting point of inquiry. In this decision, there was a statutory presumption to the effect that an accused found beyond reasonable doubt to be in possession of narcotics in those amounts constituted trafficking for the purposes of the statute was declared unconstitutional as it offended against the principle of presumption of innocence until proven guilty.

736 See United Nations General Assembly Resolution. 34/169 of 17 December 1979.

737 See Crawshaw, Devlin and Williamson,1998;107.

738 See Crawshaw, Devlin and Williamson, 1998: 107.

739 See *Edwards Books and Art Ltd v R* 1987 35 DLR 4th 1 where the Court stated that:
"Two requirements must be satisfied to establish that the limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a Constitutional right. It must bear on a 'pressing and substantial concern".
Secondly, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects:
The limiting measures must be carefully designed, or rationally connected, to be objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless, outweighed by the abridgement of rights". See Davis,Cheadle and Haysom:312.
The court stated that the nature of proportionality test would vary depending on the circumstances and both in articulating the standard of proof and in describing the criteria compromising the proportionality test, the court has been careful to avoid right and inflexible standards.

740 See Crawshaw, Devlin and Williamson, 1998: 107.

the use of firearms is considered an extreme measure and that every effort should be made to exclude the use of firearms, especially against children.[741] It states that in general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others. The less extreme measures are not sufficient to restrain or apprehend the suspect.[742]

The learned authors also impress upon the fact that the standards on the use of force by law enforcement officials embodied in the Article and its commentary notes reiterate the important principle of proportionality that force must be used only to the extent required and necessary force should be used only when strictly necessary in order to prevent crime or in order to exercise lawful powers of arrest.

Davis, Cheadle and Haysom[743] add that in applying the European Convention for the protection of Human Rights and the fundamental freedoms, the European Court has also laid down that a restriction must not only pursue a legitimate aim, but that there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

The learned authors further argue that the Supreme Court of India had also followed a similar line of reasoning in defining what 'reasonable limits' are in

741 See Crawshaw, Devlin and Williamson, 1998: 107.

742 See Crawshaw, Devlin and Williamson, 1998: 107.

743 See Davis, Cheadle and Haysom, 1997: 312. See also Seighart, 1983: 94 where the learned author, in addressing the question of the principle of proportionality, had this to say: 'The principle of proportionality is inherent in the adjective 'necessary'. This means, among other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed must be proportionate to the legitimate aim pursued and this principle is one of the factors to be taken into account when assessing whether a measure of interference is 'necessary'. In fact in the decision of Sunday Times v United Kingdom 2 European Human Rights Report 245, the European Court (EUCT) formulated the question thus: 'Does the interference complained of correspond to a 'pressing social need', is it proportionate to the legitimate aim pursued, are the reasons given by the national authorities to justify it relevant and sufficient under the paragraph of restriction?

respect of a Charter of fundamental rights and freedoms in section 19 of the Indian Constitution[744] which provides that:

"There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved … if there is a direct nexus between the restriction and the object of the act then a strong presumption in favour of Constitutionality of the act will naturally arise.[745]"

The Supreme Court of India concluded that a just balance has to be struck between the restriction imposed and the social control envisaged by clause 6 of Article 19 and that the Court must see the prevailing social values whose needs are satisfied by restriction meant to protect social welfare.[746]

It is concluded that even in cases of peaceful and/or violent assemblies, which the nation is entitled to participate in, in terms of principle 13[747], the law enforcement officials are always reminded that in dispersing such unlawful or non-violent assemblies, they are to avoid the use of force. Where this is not practicable, they must restrict the use of force to the minimum and they must also observe principle 14[748] which deals with the dispersal of violent assemblies where the law enforcement officials are required to use firearms only when less dangerous means are not practicable. To use force or firearms in such cases, except under the conditions stipulated under principle 9, which permits firearms to be used only against a person posing imminent threat of death or serious injury or grave threat of life is a violation of the law. Firearms could not be used solely to disperse a violent assembly unless specific threats of violence reasonably exist.

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744 1978 AIR SC 20 at 778.

745 *Pathumma v State of Kerala* 1978 AIR SC 771 at 778.

746 *Kailash Chandra Sharma vs State of Madhya Pradesh* 21sept. 1990. See also http://www.indiankanoon.org/doc/1751883 down loaded on 29/o6/2009.

747 See United Nations Congress the Prevention of Crime and the Treatment of offenders adopted on September 1990.

748 See The United Nations Basic Principles on the Use of Force and Firearms by Law enforcement Officials adopted on 7 September 1990.

As regards the scenario relating to the question of 'proportionality', reasonableness, does not seem to come to the fore in Lesotho. In July 1990, for example, the Allied Workers' Union of Lesotho (CAWULE), members of a labour organisation in Lesotho at the Lesotho Highlands Water Project first dam construction site in Katse, were shot by police without resorting to the test placed under these principles.

It is submitted that Lesotho government should develop a broad range means of modern technology in order to equip police officials with crowd management tools. Given the importance of the power to use force in the process of law enforcement, and the serious nature of human rights violations arising out of abuse of power, the allocation of resources to that end must be given top priority. Personnel dealing with public unrest must be properly selected through screening procedures and they must posses the appropriate moral, psychological and physical qualities for the effective exercise of these functions.

3.4 CONCLUSION

The chapter has argued that although arrest is a mere step on a procedural path towards committal, trial, verdict, judgment, punishment or acquittal, police officers must always be guided by reasonable suspicion when effecting an arrest.

It was established that arrest sometimes could either be preventative, proactive or protective, but in whatever situation, police officers must exercise greater care not to interfere with suspects' rights unnecessarily. The reason for an arrest must always be a basis for an arrest. In other words, a suspect of crime must always be informed about the charge within a reasonable time. The chapter has emphasized that arrest must be informed by a warrant of arrest as far as it is possible, but where it is not practicable to secure one, and the arresting officer fears that delay in obtaining one will defeat the ends of justice, then he may arrest without warrant. The chapter has further noted that where force is to be

used in order to overcome a resisting suspect, then an arresting officer may use such force as is reasonable in the circumstances.

Chapter 4
The Power of Police to Interrogate Suspects of Crime: Meaning of Interrogation and Interview in Criminal Investigations

4.0 INTRODUCTION

This Chapter investigates instances of police powers to interrogate suspects of crime with emphasis on interviewing techniques. The meaning of interview and interrogation in criminal investigations is provided and discussed. The chapter reveals that some scholars have used the two terms inter-changeably, while others, have distinguished their use. For our purposes, however, we have attached no significance to their meaning. As far as we are concerned, interrogation is a defining characteristic of the modern police investigations. The chapter emphasises that there is a need to balance the interests of the public and those of an individual person. This means that, in so much as the police are expected to maintain law and order, they are obliged to respect the corresponding rights of suspects of crime in their hands. The police powers of arrest, stop and question individuals have been given.

4.1 THE NATURE OF POLICE POWERS

The Police, according to *Goldstein*[749]:

"Are by the very nature of their function, an anomaly in a free society.

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749 Goldstein 1977: 1 further notes that democracy looks up to its police to prevent people from preying on one another; to provide a sense of security; to facilitate movement; to resolve conflicts; and to protect the very process and rights, such as free elections, freedom of speech and assembly on which continuation of a free society depends so that the strengths of a democracy and the quality of life enjoyed by its citizens are determined in large measure by the ability of the police to discharge their duties. See also Baldwin and Bottomley, 1978: 37 for describing the police as 'gatekeepers of the Criminal Process'. The learned authors argue that internal and external pressures upon the police to get results in the 'crime control' terms of court convictions can partly account for many traditional police practices, i.e. torture or forced confessions and/or admissions.

They are invested with a great deal of authority under a system of government in which authority is reluctantly granted and, when granted, sharply curtailed. The specific form of their authority to arrest, to search, to detain, and to use force, is awesome in the degree to which it can be disruptive of freedom, invasive to privacy, sudden and direct in its impact upon the individual. And this awesome authority, of necessity, is delegated to individuals at the lowest level of bureaucracy, to be exercised, in most instances without prior review and control. Yet a democracy is heavily dependent upon its police, despite their anomalous position, to maintain the degree of order that makes a free society possible."[750]

The assertion advocated by *Goldstein*[751] seems to be true, because although the police officers come from the same society, where most of them have their backgrounds and next of kin well known, they are disliked by the same community the moment they join the police force or service as the case may be. Since police officers were, in the past, seen as enemies of the society due to the nature of their work, i.e. of arresting, detaining and taking suspects of crime to court, they were never tolerated. In most cases they were perceived as enemies because of the way they conducted themselves. For example, they were brutal when handling suspects of crime on behalf of the state and they regarded themselves as a law unto themselves.

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750 See Goldstein, 1977: 1-2. According to him, statutes usually require and much of the public, in theory, expect the police to enforce all the laws all the time and yet the same public will not tolerate full enforcement of many laws, and hence the police would be held up to ridicule were they to attempt full might of the law and that in the same token, the public holds the police responsible for preventing crime, apprehending all criminals. It would seem that the police, in an endeavour to live up to these expectations, are in reality extremely limited in their ability to cope with crime.

751 Goldstein, 1977:132 concludes by warning that police should not be directed through political process thus, much of the current ambiguity and the arrangements for supervising police operations is traceable to the pervasive influence that partisan politics had on police agencies since their early years of development. He further notes that not only jobs were filled by patronage, the police and police authority were used in various ways to enforce party loyalty and even to deliver elections, and that friends were rewarded with lax law enforcement, while enemies were harassed with the end result that honest efforts to provide equitable police service delivery were constantly compromised.

Goldstein[752] is of the view that although a policeman is paid by the public in order to attend to the prevention and detection of crime, one supports the view that the power which is given to police officers, in most instances is above the power given to ordinary citizens. In Lesotho, for example, apart from the powers of arrest given to a peace officers or judicial officers, an individual is also given power to arrest in that capacity where an offence occurs in his presence. In the contemporary world of policing, it is important for legislators to regulate the police powers exercised over the ordinary citizens, especially in a democratic setting in order to limit the abuse or arbitrary use of such powers.

Uglow[753] acknowledges that there is a significant change which justifies the way public order policing is undertaken nowadays as opposed to the past, where the use of the army and militia was common. They were used for protecting the lives and property of the upper and middle class and the authority of government. In cases of crowd management and public order policing, there are, however, some caveats to be considered. For example, before force can be used to deal sufficiently with riotous or demonstrative situations, it is necessary to balance the interests of the state against those of the society. It is for this reason that even in these extreme cases, force is not warranted for the very reason that the public interest and collective political freedoms (which may be perceived by the state as a threat to public order, tranquility or security), must be exercised as much as possible. The police often act as if they are entitled to regard all the demonstrators as potential rioters and, therefore legitimate targets for pre-

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752 See Goldstein, 1977: 1-3. He further notes that: "By problems, I mean the incredibly broad range of troublesome situations that prompt citizens to turn to the police, such as street robberies, residential burglaries, battered wives, vandalism, speeding cars, accidents, acts of terrorism make the essence of police work and they are the reason for having a police agency". See Goldstein, 1977: 242. See also Torch and Grant, 1991: 3.

753 Uglow, 1988: 80-83 argues that demonstrations are a threat to public order or tranquility and as such this is a precondition of the personal security so that within a liberal society, order has to be more than tranquility. He further notes that it is a more deep-seated consensus which accepts challenges to political authority or dislocation of the market place as a crucial element. According to him, it is through such conflicts that the ability of Constitutional relationships are shown to rely not on repression of an exploited and powerless class, but on the development of a delicate balance, achieved by allowing freedom to individual and collective expression and by recognizing the rights of minorities.

emptive strikes. The public does have the right to demonstrate, to march, to meet or even picket.[754]

In a democracy, a balance has to be struck and a compromise found that will accommodate the exercise of the right to protect within a framework of public order which enables the citizens, who are not protesting, to go about their business and pleasures without obstruction or inconvenience.[755] The fact of the matter is that those who are at one time concerned to secure the tranquility of the streets are not entitled to deny the protestors the right to march. The fact that the protestors are desperately sincere and are exercising a fundamental human right must not lead us to overlook the rights of the majority.[756]

4.2 THE MEANING OF INTERROGATION

Ainsworth[757] raises an interesting point in relation to police interrogating powers when she states that police interrogators as trained officers, conduct questioning in a way calculated to increase the anxiety felt by the accused or suspects of crime in order to break down his or her resistance. This is true, especially when the idea is to put the suspect under complete control of the interrogating officer.

An interrogating officer may do this by using several strategies at his disposal. For example, he may change the physical environment in which the questioning will take place or isolate the suspect.

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754 See Uglow, 1988: 87.

755 See Uglow, 1988: 87.

756 See Uglow, 1988: 87.

757 See Ainsworth, 1993: 288. See also Strydom, Pretorius and Klinck, 1997: 332 who discuss the Economic, Social and Cultural Council (ECOSOC) resolution adopted on 24th May 1989/50.This relates to the principles of the effective prevention and investigation of extra-legal, arbitrary, and summary executions. Principle 1 calls upon Governments to prohibit by law all extra-legal, arbitrary and summary executions and ensure that any such executions are recognized as offences under their criminal laws and punishable by appropriate penalties. The Principle raises a further interesting requirement that exceptional circumstances including war or threat of war, internal political instability, or any other public emergency may not be invoked as a justification of such executions.

Ainsworth[758] asserts that even the suspect's ability to answer questions is constrained by the interrogator who may repeatedly interrupt the suspect's denials and explanations in order to condition him to accept domination by the interrogating officer. This point becomes true, especially when the interrogator decides the length of the interrogation session which will, in most cases, be prolonged intentionally in order to gain control over the suspect.

The learned author [759] further argues that in most cases, the interrogator unilaterally determines the suspect's method of investigation, including the way questions would be asked. In this instance, the interrogator normally employs several tactics which are designed to put pressure on the suspect and these tricks may be in the form of confrontation, accusation, deception, baiting questioning, insults, or humiliation which is intended to appeal to the suspect's emotion or religious values. This is mostly true, because in Lesotho, for example, the suspect will be promised freedom or promised to be a state witness or an accomplice if he or she can give a confession or an admission of his or her involvement in the commission of the crime.

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758 Ainsworth, 1993: 288.

759 Ainsworth, 1993: 287-288. According to Ainsworth, police interrogation of a criminal suspect may be the paradigmatic context in which one participant, the questioned suspect, feels powerless before the other. She further states that many features of the typical police interrogation in and of itself creates a power disparity between the person asking the question and the person being questioned so that the questioner has the right to control the subject matter, tempo and progress of the questioning, to interrupt responses to questions and to judge whether the responses are satisfactory. She observes that the person questioned, on the other hand, has no right to question the interrogator, or even to question the propriety of the questions the interrogator has posed. She concludes that the impact of these factors, present in any interview, is magnified in the highly adversarial context of the police interrogation of an arrested suspect, especially when the police officer consciously manipulates the interrogation to enhance the perceived power of the interrogator and the suspect's feelings of vulnerability.

4.3 POLICE WORK AND FUNCTIONS OF INTERROGATION

Williams[760] argues that the defining characteristic of the modern police interrogation is almost a universal endorsement by the policing community as a necessary component of any effective investigation. Based on this conviction, interrogative practices have come to play an irreducible role in the justice process as a means of establishing the culpability of suspects and subsequently, preparing the cases against them. He contends that it has now become something of a truism to observe that, in most criminal cases, the crucial stage is the interview at the police station, for it is at that stage that a suspect's fate is, as a rule, sealed. Despite this widespread endorsement of the interrogation as a key stage in the justice process, a considerable ambiguity and debate surrounds the specific nature of its functions and effects. Thus, while the most typical rationale involves its technical role in eliciting confessions providing inculpatory evidence, it generates information pertaining to other crimes.

The learned author[761] concludes that the police interrogation may not be reduced to the technical function of eliciting confessions, inculpatory evidence, and/or other cases' relevant information as part of an overall search for an objective truth, but instead as a crucial component of the overall context of police work. The interrogation may be seen to function in the production and legitimization of police accounts of criminal behavior. This aspect aids in the translation of complexities and ambiguities of daily life into the codified narratives which constitute a foundation for both immediate police action, and the subsequent treatment of suspects as they are transformed into cases and processed through the criminal justice system.

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760 See Williams, 2000: 214. See also Baldwin & McConville, 1982: 174 who argue that: "It is evident, therefore, that the idea that police interviewing is, or is becoming, a neutral or objective search for truth cannot be sustained, because any interview inevitably involves exploring with a suspect the details of allegations within a framework of points that might at a later stage or date need to be proved. Instead of a search for truth, it is much more realistic to see interviews as mechanisms directed towards the 'construction' of proof".

761 See Williams, 2000: 215.

In *Miranda v Arizona,*[762] it was held that a person subjected to a custodial interrogation must be warned that he has a right to remain silent. That any statement he makes may be used in evidence against him and that he has the right to the presence of an attorney before and during questioning. In the absence of a fully effective legislative or judicial equivalent, however, the proper warnings must be given and a valid waiver must be found before any statement may be admitted. The decision in *Miranda* is a celebrated one in that it guards against human rights abuses on the suspects of crime in custodial questioning by police.

In England such provisions have been incorporated in the Police and Criminal Evidence Act 1984 (PACE). It provides for powers and responsibilities of the police and the rights of the suspect. As regards those detained prior to the charge, they are governed by part IV and V of the Evidence Act of 1984.

Stone[763] states that much of the responsibility for ensuring that the provisions of the Act are complied is on the shoulders of the 'custody officer' who is in charge of the 'custody record'. The record should provide documentary evidence as to what was done in relation to each suspect in detention. He concludes that the act attempts to achieve a balance between the powers of police and freedoms of the citizens, by record keeping, in order to strive to ensure that the limits are not overstepped. The Lesotho Criminal Procedure and Evidence Act[764] does not have the corresponding provision on these issues.

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762 384 U.S. 436 86 S Ct. 1602 (1966).

763 Stone, 1997: 61. Stone also questions the logic and the reason for extending detention prior to a charge and asks a question why should the police have the power to detain prior to charge the suspect? He actually attributes the main purpose of such detention to the fact that this enables the suspect to be questioned, with a view to deciding whether there is sufficient evidence to bring a charge, or to obtaining such evidence, e.g. in a form of a confession. He is quick to caution that, the need to obtain evidence cannot, in itself justify the deprivation of liberty involved and he is of a strong view that it is not right to give the police compulsory powers of detention in relation to witnesses to criminal offences, because such people are "perfectly entitled to refuse to co-operate with the police".

764 See No.9 of 1981.

Remington[765] argues that it is obvious that an officer may ask an individual a question and not subject himself to a risk of liability, provided that he does not confine or restrain the individual without consent. What is more difficult is the question whether the officer can confine or restrain an individual for a period of time for the purpose of questioning him under the circumstances, where grounds of arrest are lacking, by force or display of authority.[766] The learned author submits, and correctly so, that there is no doubt that it is common police practice to stop and question suspects as to who they are.

In *Rios v United States*[767] the court dealt with the issue of traditional ambiguity, thus returning the case to the trial court to determine when the arrest was made without giving explicit attention at all to the issue of whether a right to stop and question exists apart from arrest and, if it does, within what kind of limitations. The prosecution's contention that the test should be reasonable grounds for inquiry was neither accepted nor rejected. At about ten o'clock on the night of February 18, 1957, two Los Angeles police officers, dressed in plain clothes and driving an unmarked car, saw a cab standing in a parking lot of a house at a street corner. The neighborhood had a reputation for narcotics activity. The cab drove away and the cops followed it. They had no arrest or search warrant, nor

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765 As edited by Sowle, 1962: 14.
Remington states that it is more difficult to generalize about the situation in regard to the law relating to misdemeanour arrests. He identifies at least three identifiable views thus:

(1) An arrest for a misdemeanour may be made without a warrant only when a misdemeanour amounting to a breach of the peace is committed in the presence of the officer. It is typically held that an offence is committed "within the presence" when the officer can detect its commission by the use of his senses, including the senses of hearing and smelling as well as seeing the elements of the offence.

(2) The law of some jurisdictions provides a somewhat broader right of arrest, allowing an arrest for any misdemeanour, not only a breach of peace, committed in the presence of the officer.

(3) Finally, few states allow an officer to arrest for a misdemeanour whenever he has reasonable grounds to believe that a misdemeanour has been committed. Typically these statutes require a further showing that the officer had reasonable grounds to believe that an arrest was necessary in order to prevent additional harm or prevent to escape of the person reasonably suspected of having committed a misdemeanour. Note that such is the case in South Africa, Lesotho and England.

766 See Remington, as edited by Sowle, 1962: 14

767 364 U.S.S.Ct. 253 (1960).

did they have information that someone might be engaged in criminal activity. They approached the cab owner and searched him. Some narcotic package fell down and he was arrested there and then. It was held that the right to detain for questioning cannot exist if there are no grounds for arrest. *Remington* further adds that in the United States, for example state courts are in disagreement as to whether there is a right to detain a person for purposes of questioning prior to arrests.

In *Gisske v Sanders*,[768] the courts in California, have typically recognized the right to question. Some other state courts have had less occasion to consider the question, but have given some indication that the police may stop and question under circumstances in which an arrest would be improper.[769] Questioning by an officer may produce sufficient additional information to justify an arrest.[770] It is not clear however, whether a refusal to answer can be given

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768 *California Appeal Court. 13, Pac*. 43 (1908).
Remington recalls an international conference on survey of current problems in the administration of justice in Chicago where the conference had to deal with police power of detention and arrest privileges. In this conference four general questions were posed for consideration by participants in the preparation of their papers dealing with arrest and detention.
The questions were:

"1. In the absence of sufficient grounds for an arrest, should the police have a right to stop and question a person as to his identity and reason for being where he is, if the appearance or conduct of that person has reasonably aroused police suspicion?
2. Should the police be permitted to search such a person for weapons or for incriminating evidence?
3. If the police practices of these kind or nature are to be legally sanctioned, what limitations should be imposed?
4. With regard to police arrest statutes generally, should more freedom be granted to the police in recognition of their contentions that existing laws are obsolete and hamper police attempts to meet the public demands for adequate police protection?"

I find these questions highly relevant to Lesotho today which the Department of Home Affairs should ask itself as the authority entrusted with policing issues and management. It is further recommended that in an attempt to solicit answers to these pertinent questions, the Ministry of Home Affairs must stage a similar conference drawing participants from all public sectors for appropriate answers and the way forward which would culminate into the propagation of proper and improved police investigation skills and training techniques.

769 See Remington as edited by Sowle,1962:16.

770 See Remington, as edited by Sowle,1962:16.

weight in determining whether grounds for arrest exist or not.[771] The answer depends upon whether the court considers the privilege against self-incrimination to apply to the street questioning, and if it does, whether it requires excluding a refusal to answer from the issue of arrest as well as from the issue of guilt and innocence.[772]

4.4 LIMITATION UPON THE RIGHT TO STOP, QUESTION AND FRISK[773]

According to *Remington*[774] there is increasing concern with the question as to when it is proper to subject an individual to inconvenience of a reasonable investigation to determine whether he is guilty of a crime. If it is assumed that there is no right to question, unless there are grounds for arrest for example, then the issue is resolved.[775] However, if it is assumed that there is a right to question in situations where there is no right to arrest, then these situations must be defined.[776] No one would assert that questioning should be completely indiscriminate[777] and that perhaps the test should depend upon the seriousness of the suspected offence.

In *Brinegar v United States,*[778] *Justice Jackson* had this to say:

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771 See Remington, as edited by Sowle, 1962: 16.

772 See Remington, as edited by Sowle, 1962: 16.

773 The word *frisk* according to Alswang and Van Rensburg 1995: 326 means to search a person for concealed weapons.

774 See Remington as edited by Sowle 1962: 15-17 who argue that: "Being stopped by a police officer for purposes of inquiry may at times cause some inconvenience to the person stopped, but that the temporary inconvenience is normally minor compared to the importance of such reasonable inquiry to effective law enforcement. Without the power, for example, to stop a suspiciously-acting automobile to ask questions, the police might be forced to spend fruitless hours investigating actions which the occupants, had the police been able to ask him questions, could readily have explained as being entirely innocent. In a fair balancing of the interest at stake, we submit that the rights of the person questioned are adequately protected by his privilege not to answer and that the police, having reasonable grounds for inquiry, ought not to be foreclosed from at least the opportunity, by asking questions, to determine whether further investigation is necessary".

775 See Remington, as edited by Sowle, 1962: 17

776 See Remington, as edited by Sowle, 1962: 17

777 See Remington, as edited by Sowle, 1962: 17.

778 338 U.S. 160 183 (1948). 15-16.

> *"If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighbourhood and search every outgoing car, it would be drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger".*[779]

It is submitted that questioning whatever its intention or purport might be, must not anticipate guilt of a person as that may fly directly in the face of the principle of fair trial, especially the right to be presumed innocent[780] until the contrary is proven by the court of law through evidence. The legal rules defining the police power have to be developed on a case to case basis and it is submitted, that whatever development there may be, such must include the protection of such officers from the impending peril and life risk that may be posed by the suspects of crime who are about to be questioned. This is so because in some cases an officer may stop and question a suspect under circumstances in which the officer knows he will be in danger if the suspect is armed.

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[779] See Remington, 1962: 15-16.

[780] See section 12(1) of Lesotho Constitution Act of 1993 and also section 35(1)(h) of the South African Constitution Act No. 108 of 1996.
Section 12(1) of Lesotho Constitution provides thus:

1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Any person who is charged with a criminal offence –
   (a) Shall be presumed to be innocent until he is proved or has pleaded guilty;
   (b) Shall be informed as soon as reasonably practicable, in a language he understands and in adequate detail, of the nature of the offence charged.

The South African Constitution section 35(1)(h) states that: "Everyone who is arrested for allegedly committing an offence has the right – to be presumed innocent, to remain silent and not to testing during the proceedings". As it can be seen, there is a sharp contrast between the two Constitutions.

Nel[781] by way of comparison argues that in South Africa, questioning by the police has two main purposes, namely to obtain information which may be independently verified by further investigation and to obtain incriminating statements.

Steytler[782] indicates that there are three important aspects of interrogation, namely detention for the purpose of investigating crime, detention for the purpose of preventing crime and detention for the purpose of prosecuting crime. The detention for the purposes of investigating crime is normally done at the very elementary stage where the suspect of crime is taken into custody after the alleged commission of an offence and this is done not because there is a concrete piece of evidence against the suspect, but because he is merely there as a suspect, as opposed to an accused person. On the contrary, detention for the purposes of prevention of crime is a fairly recent phenomenon where the idea is to act pro-actively against the commission of the crime by actually placing police officers on the street on a daily basis to form a beat patrol. Cameras or electronic devices are used a lot recently to assist the police with a modern pro-

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781 See Nel, 1998: 99 who gives a comparative perspective on practical rules regarding police questioning in England, United States of America, Canada and South Africa where he reiterates the position stated by Clayton and Tomlinson, 1987:128-129 who states that in England, the police have no legal right to detain a suspect for questioning, "so that no one is under a legal obligation to answer questions from the police".
In the English law, "a person has every right to remain silent or to refuse to answer and where a person has not been arrested" if there are grounds to suspect him of an offence, he must be cautioned before any questions about it are put to him for the purpose of obtaining evidence which may be given to a court in a prosecution. In Lesotho, a similar provision exists as far as search without warrant for detention of property is concerned, this is where section 47 of the Criminal Procedure and Evidence Act No. 9 of 1981 states that: "(1) If a policeman of or above the rank of warrant officer believes on reasonable grounds that the delay in obtaining a search warrant would defeat the object of search, he may search any person, premises, other place, vehicle, or receptacle and any person found in or upon the premises, other place, vehicle or receptacle for any such thing as is mentioned in section 46 and may seize such if found and take it before a magistrate. But sub-section 2 of the same section provides that this kind of search "shall as far as possible be made by day and in the presence of two more respectable persons of the locality in which the search is made". It would seem that there is no corresponding provision as far as arrest or detention is concerned and it is recommended that Lesotho law reform should act accordingly.

782 See Steytler, 1996: 51. See also Cawthra,1993: 45 for complementing a view that although extra-legal methods have been favoured by South African Police and Army in those years, many of those detained have never seen the inside of a courtroom and the courts formed part of the repressive apparatus that had enforced the apartheid system.

active system. This type of policing is perceived to be the most effective method of policing as opposed to the old style of policing which was reactive in nature.

Steytler[783] further asserts that detention for the purpose of prosecuting crimes allows an arraignment of the accused before the court in order for such accused to stand trial. This fact seems to be acknowledged as a 'universal phenomenon forming the basis for an accepted legitimate ground or just cause for the deprivation of the person's liberty'. The commonly used method to secure the attendance of an accused person to court is by way of a warning, summons or written notice as the new forms of non-custodial measures.

The notorious Judges' Rules were formulated as a guide to police officers and these rules were operating both in Lesotho and South Africa during the Roman Dutch Common law era. In the United States, the *Miranda* decision seems to emerge as a leading case, as we have discussed in this chapter, where questions might be asked after a warning that one has the right to remain silent, has a right to a lawyer, etc. In Lesotho the Roman Dutch law Judges' Rules gained from Britain still play a role, despite their non compulsory nature.

In 1982, Canada developed a Bill of Rights which has taken care of the rights of the suspect, including warning of suspect prior to arrest. The South African Constitution no. 108 of 1996 demands the limitation of rights to the extent that they accord with the law of general application. Further that such limitations must be reasonable and justifiable in an open democracy. Section 35(1) of the Constitution directs that arrested, detained and accused persons have the right to remain silent. Sections 32 and 74 of the Lesotho Criminal Procedure Act[784] provide that the accused person has the right not to incriminate himself and the right to be released within 48 hours.

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783 See Steytler, 1996: 52-57 who further notes that detention for purposes of interrogation has been part of the amoury of a repressive apartheid state.

784 See No. 9 of 1981.

4.5 THE MEANING OF INTERVIEW

Stone[785] defines the word 'interview' in accordance with para.11.1A of the English Police and Criminal Procedure Act of 1984 (PACE) as questioning of a person regarding his involvement or suspected involvement in a criminal offence or offences. Questioning is required to be carried out with the necessary caution. According to *Stone,*[786] interviews are the main methods by which the police gain, or attempt to gain, evidence from a suspect. It would seem, however, that the given definition will:

> *"Presumably exclude the situation where the questioning is directed to a person who is not at that stage a suspect, but who may become one, depending on the answer to the questions".*

Code C of Police and Criminal Procedure Act, (PACE) of 1984 of the United Kingdom, provides that once a decision to arrest has been taken, a suspect must not generally be interviewed about an offence other than at a police station. There is no provision in Lesotho guiding the police on questioning or interviewing methods either before or after an arrest. *Yeschke*[787] defines interviewing *as:*

> *"The task of gathering information; a process of dyadic communication with a predetermined and serious purpose designed to interchange behaviour and involves the asking and answering of questions. A specialized pattern of verbal interaction initiated for a specific purpose, and focused on some specific*

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785 See Stone, 1997: 81. Note that some writers make distinction between interrogation and interview, but for our purposes we will attach no greater significance to the two terms as they mean one and the same thing as tools of analysis to achieve the end result in criminal investigations.

786 See Stone, 1997: 81.

787 See Yeschke, 1993: 3-5. Note that according to him, an interview is either a student of or a specialist in gathering truthful testimonial evidence where such a student becomes aware, observant, and more interested in comprehending the dynamics of an interview interaction. He further observes that such students attempt to gain greater insight into the interview phenomena to more concisely defined and classified processes of interview situations to be better able to establish hypotheses and predict future outcomes of the investigative inquiries.

> *content area, with consignment elimination of extraneous material".*[788]

Interviewing is very much like piano playing. A fair degree of skill can be acquired through formal instruction.[789] There is a world of difference in craftsmanship, in technique, and in finesse between the amateur who plays "by ear" and the accomplished concert pianist.[790] The self-instructed player mechanically reproduces on the keyboard certain melodies that have been committed to memory; the artist, by skilfully blending mastery of musical theory and countless hours of practice. Personal interpretation creates an effect that is technically precise, pleasing to the audience and expressive to the pianist's inner feelings.[791] The learned author further stated that:

> *"Interviewing is darting to an aim with compassion, a means by which to collect testimonial evidence. Simply stated, an interview is a dynamic human interaction having the purpose of collecting truthful data to be used for mature decision making and just action-taking."*[792]

Yeschke[793] clearly differentiates interviewing from interrogating, although one may concede that there are those scholars who simply take the two as meaning one and the same thing. He observes that an "interrogation is a face-to-face meeting with the distinct task of gaining an admission or confession in a real or apparent violation of the law, policy, regulation or other restrictions.

Gudjonsson[794] gives interviewing process its broadest sense, by clarifying that an interviewer is any person who utilizes conversation in order to obtain information

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788 See Yeschke, 1993: 3-5.
789 See Yeschke, 1993: 3-4.
790 See Yeschke, 1993: 3-4.
791 See Yeschke, 1993: 3-4.
792 See Yeschke, 1993: 3.
793 See Yeschke, 1993: 3-5.
794 See Gudjonsson, 1992: 6-7.

from another person. He proceeds to state that the police typically have four groups of subjects thus:

1. *Victims are the people who have been offended against. This may involve damage to or theft of their property, a break in at their home, or violent or sexual assaults upon them. A victim is also commonly a potential witness to the facts of the case.*[795]
2. *Witnesses are the people who are potentially able to provide the police with information about the alleged offence or the offender. This could include an eyewitness to the alleged offence, an alibi witness or an informant.*[796]
3. *Complainants are the people who report a particular crime to the police. They are commonly also the victims, and in some instances witnesses.*[797]
4. *Suspects are the people who the police have a reason to believe may have been involved in the commission of the alleged offence. It should be noted that, victims, witnesses and suspects differ in certain respects as far as police interviewing is concerned.*[798]

Interviews differ greatly in their purpose, scope and subject matter, although they share the common overall objective of information gathering or fact-finding.[799] The nature of the information sought by the police varies widely, depending on the nature of the case being investigated and who is being interviewed.[800] In its simplest form, it consists of a straightforward description of events, for example, in the case of a witness or a victim who is required to give a narrative account of what he or she observed.[801] The information sought, whether it is from the victim, witness or suspect, may involve a description of events, behaviour, feelings, thoughts or intentions.[802] Considering the potential evidential value of an

795 See Gudjonsson, 1992: 7.
796 See Gudjonsson, 1992: 7.
797 See Gudjonsson, 1992: 7.
798 See Gudjonsson, 1992: 7.
799 See Gudjonsson, 1992: 7.
800 See Gudjonsson, 1992: 7.
801 See Gudjonsson, 1992: 7.
802 See Gudjonsson, 1992: 7.

interview statement, it is important that the information obtained by the police is accurate as well as complete.[803]

Gudjonsson[804] identifies four points which in his opinion form, broadly speaking, sources of information which are used or geared towards crime storing:

1. *There may be witnesses to the crime and they need to be interviewed and possibly give evidence in court in due course. Victims and police officers are also potential witnesses. An identification parade may be set up if the police have a potential suspect.*
2. *Information may be supplied by informants, whose motivation to talk may include financial considerations, revenge or morals.*
3. *Criminal suspects may give information to the police during interviewing, including self-incriminating admissions or confessions.*
4. *Forensic science techniques may provide the police with tangible evidence. This concludes the work of the pathologist, the fingerprint expert, the forensic scientists and the scene of crime officer.*[805]

McConville and Baldwin[806] conclude that the police interrogation is, *"… a vital stage in the process of setting the suspect apart from the rest of the conforming society and importantly, of setting the police apart from the suspect".*[807]

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803 See Gudjonsson, 1992:6-7.

804 See Gudjonsson, 1992: 6-7. See also Milne and Bull, 1999: 1 who quote Director of the United States of America National Institute of Justice as follows: "Information is the lifeblood of criminal investigation and it is the ability of investigators to obtain useful and accurate information from witnesses and victims of crime that is crucial to effective law enforcement".

805 See Gudjonsson, 1992: 6.

806 See McConville and Baldwin, 1982: 174.

807 See McConville and Baldwin, 1982: 174.

In *R v Maconey and Deherty*[808] the court held that an interview can take place away from a police station and that it was not necessary that an officer concerned should intend to conduct such an interview. In the decision *of R v Sparks,*[809] however, the court held that what started out as an informal discussion between an officer not involved in the investigation and the suspect, was capable of being regarded as an interview when the conversation elicited damaging admissions from the suspect. It is submitted therefore that this protection becomes of essence, especially in those cases where information is obtained through forced pointing out in a confession and admission.

In recent years, the Canadian criminal justice system has been plagued by a number of high profile wrongful convictions.[810] While each of these cases has raised questions concerning the justice process as a whole, particular attention has been directed towards the police and their ability to satisfy their dual mandate of investigating crime while protecting the interests, rights and freedoms of the accused person.[811] One notable aspect of police operations that has come under increasing scrutiny in this regard is the police interrogation, a practice which is upheld by police officers as a crucial means of gathering information and dispose cases. It is therefore, usually denounced by civil rights advocates as a serious threat to the standards of fairness and due process.[812]

Interrogation is a defining stage in the overall process of case construction and disposition.[813] It represents one of the first points of contact between the police and the potential suspects.[814] It serves as a critical forum in which initial information and impressions are exchanged.[815]

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808 See 1988 Criminal Law Report 523.
809 See 1991 Criminal Law Report 128.
810 See Williams, 2000: 209.
811 See Williams, 2000: 209.
812 See Williams, 2000: 209
813 See Williams, 2000: 209.
814 See Williams, 2009: 209.
815 See Williams, 2000: 209.

To that extent, this interaction transpires under conditions of low visibility and is premised upon both a presumption of guilt and the intention to an expeditious outcome. The interrogation emerges as a potential threat to the standards of due process and, subsequently, the attainability of justice within the Canadian criminal justice system.[816] The definition of the police interrogation should be expanded to include not only the legally circumscribed act of active police questioning under conditions of arrest or detention as defined by case law, but also as a more informal exchange between police and suspects prior to the laying of a formal charge.[817]

4.6 THE INTERROGATION AND THE CRIMINAL JUSTICE PROCESS

McConville and Baldwin[818] conclude that:

> *"It is (interrogation) that, in the majority of cases, colour what happens at later stages in the criminal process, indeed, often they determine the outcome of cases at trial. Questioning provides information classifiable in legally defined ways, resolves doubts, is administratively efficient and fulfills certain psychological needs. Questioning has come to dominate the police work and, as a result, police perceptions of reality have come to dominate the criminal process"*.[819]

Williams[820] derives two insights from the above paragraph. Firstly, police interrogation plays an important role in case construction, and subsequently,

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816 See Williams, 2000: 209.

817 See Williams, 2000: 219.

818 See McConville and Baldwin, 1982: 174.

819 See McConville and Baldwin, 1982: 174.

820 Williams, 2000: 219. Williams finally asserts that the police interrogation may not be reduced to the technical function of eliciting confessions, inculpatory evidence and/or other case of relevant information as part of an overall search for an objective truth. That, instead, as a crucial component of the overall context of police work, the interrogation may be seen to function in the production and legitimization of police accounts of criminal behaviour. In this respect, it aids in the translation of the complexities and ambiguities of daily life into codified narratives which constitutes a

bears a considerable impact on case outcomes within the more formal stages of the justice process. Secondly, the implications of interrogative strategies for the principles of fairness and due process must be construed in relation to this overall context of criminal justice. It is within this light that more explicit connections may be drawn between the nature and functions of the police interrogation identified above and specific outcomes, such as the violation of the Charter rights and, in more extreme cases, wrongful convictions. Police interrogation may impact negatively upon the outcomes of specific cases. In a technical sense, interrogations may produce either false confessions or inculpatory evidence which may be applied in constructing a prosecutorial case against the accused.

Dixon and Travis[821] explain the experience of the New South Wales police force where the police began having electronically recorded interviews with suspected persons (ERISP) in 1991. They argue that this was done in response to the widespread practice of what they refer to as 'verballing,' the fabrication of confessions and the subsequent miscarriage of justice as revealed by the ever increasing use of DNA analysis. 'Verballing' had become an entrenched part of policing practice, tacitly accepted by judges who allowed uncorroborated records of interviews to be admitted as evidence, that it took some time for worries of civil liberties to emerge.[822]

In New South Wales, prior to 1997, there was no legal framework for detention and questioning of suspects between arrest and charge. Eventually, legislation was introduced which allowed for electronic recording of police interviews.[823] Confessions made in unrecorded interviews are subsequently recorded and adopted in order for them to be admissible in court.[824] It is suggested that

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foundation for both immediate police action, and the subsequent treatment of suspects as they are transformed into cases and processed through criminal justice systems.

821 See Dixon and Travis, 2007: 292.

822 See Dixon and Travis, 2007: 292.

823 See Dixon and Travis, 2007: 292.

824 See Dixon and Travis, 2007: 292.

Lesotho adopts this kind of advanced interviewing strategy in order to reduce the existing gaps in the law. Lesotho should also adopt the approach set out in the English Code of practice which appears in Part IV (Detentions) and Part V (Questioning and Treatment of Persons by Police) of the 1984 Act in police custody which is fundamentally lacking in that Country to the present date.

Maguire[825] analyses these two areas of the British law of criminal procedure by indicating that the focus was upon the police, because at that early stage, they were interpreting and operating the new procedures to be followed within police stations subsequent to arrest.

One of the principal aims of 1984 Act was to rule out the unnecessary or unnecessarily lengthy detentions of suspects of crime in police stations.[826] This point is clearly buttressed by, for example section 37 (2), of 1984 which states that: "An arrested person may be kept in detention without charge only as long as it 'is necessary to secure or preserve evidence relating to an offence for which he is under arrest".[827]

This officially prevents policemen not only from bringing in known criminals simply to engage in 'fishing expeditions' or 'suck it and see' questioning, but also from leaving suspects to 'cool their heels' in cells for long periods in the hope of obtaining a confession.[828] It would further seem that according to him, section 38(10) of PACE 1984 emphasis that if there is sufficient evidence to bring a charge, this must be done 'as soon as practicable', or if further investigation is necessary, senior officers must review the case at intervals and satisfy themselves that it is being conducted 'diligently and expeditiously' as section 42(1) of PACE of 1984 indicates.

825 See Maquire, 1988: 23.
826 See Maguire, 1988: 23.
827 See Maguire, 1988: 23.
828 See Maguire, 1988: 24.

4.7 THE EFFECT OF QUESTIONING ON BASIC RIGHTS

In order to determine whether questioning infringes entrenched rights, different methods of questioning must be distinguished.[829] The *prima facie* unlawful questioning will at least qualify as an infringement of the right to a fair trial and other practices, such as extraction and torture. The third degree methods will at least be regarded as an infringement of the right to physical and/or psychological integrity as well as the right to security of the person.[830] In England such provisions have been incorporated in the Police and Criminal Evidence Act 1984 (PACE). It provides for powers and responsibilities of the police, and the rights of the suspect. Those detained suspects prior to the charge, are governed by part IV and V of the Act respectively.

Stone,[831] argues that PACE places great responsibility to ensure that the provisions of the Act are left on the shoulders of the 'custody officer' who is in charge of the 'custody record' which, in turn, should provide documentary evidence as to what was done in relation to each suspect in detention. He concludes that the Act attempts to achieve a balance between the powers of police and freedom of the citizens by record keeping, to ensure that the limits are not overstepped.

The Lesotho Criminal Procedure and Evidence Act no 9 of 1981 does not have the corresponding provision on these issues and it is highly recommended that similar provisions be enacted in order to strengthen the protection of the human rights of suspects.

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829 See Nel, 1998: 17.

830 See Nel, 1998: 17.

831 See Stone, 1997: 61. See Liebenberg 2005:7 who discusses human dignity as closely related to the notion of human beings as agents capable of making moral choices, of shaping their identity, resisting injustice and participating in the shaping of society. Thus according to him, to value the inherent dignity of human beings as a society is to ensure that people enjoy civil and political liberties and also have effective access to the social and economic means indispensible to the development to their physical, emotional, creative and associational capabilities.

4.8 A COMPARATIVE POLICE PRACTICAL PROTECTION ON QUESTIONING TECHNIQUES

4.8.1.1 Lesotho Practical Protection of Human Rights of Suspects of Crime: Protection under Lesotho Constitution[832]

Section 12 (2) (a) of Lesotho Constitution Act[833] states that every person charged with a criminal offence is to be presumed innocent until the contrary has been proven or until he has pleaded guilty and calls for his adequate time to prepare for his defence through a lawyer within a reasonable time.

One celebrates *Lebona v DPP*[834] where *Steyn J* held that the practical application of section 12 (1) of the Lesotho Constitution Act to a fair trial has been given enforcement through section 22 of the said Constitution which sets out the provisions dealing with the right to a fair trial. In that case, the respondent exercised her right to approach the High Court for redress by way of a notice of motion in which according to the Judge President, *Ramolibeli that:*

> *"…the proceedings in CVI/T/40/95 be stayed permanently on the grounds that the applicant's rights under section 12(1) of the Constitution have been infringed by the delay in bringing the matter to Court".*

The application was granted in the Court *a quo* by the Chief justice. The judge president there ruled that unreasonable delay almost inevitably breeds injustice and thus confirmed the judgment of the Court *a quo* because as the saying goes, justice delayed is justice denied.

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832 See Act No. 2 of 1993.
833 See Act No. 2 of 1993.
834 See CIV/T/40/95.

4.8.1.2 Lesotho Criminal Procedure and Evidence Act[835]

Section 32 of the Criminal Procedure Act[836] provides some kind of protection to persons arrested without warrant to be detained for a period "no longer than in all circumstances of the case is reasonable" and unless there is a warrant of further detention the period shall not exceed 48 hours. This clause must be given a strict interpretation by the Court.

4.8.1.3 Confessions[837]

Section 228 of the Criminal Procedure Act[838] provides some guidelines in relation to the admissibility of confessions. The Lesotho Criminal Procedure Act is a replica as far as this part is concerned of the South African[839] section 219 of criminal procedure Act with all its requirements, i.e.

(i) Freely, voluntary, without undue influence, made in sober and sound senses and that it should be made before a magistrate.

One, however, welcomes *Ackermann JA in Mabope*[840] where the court placed a discretion on the admissibility of pointing out evidence if there were allegations of

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835 See Act No. 9 of 1981. It should be noted that the term "all circumstances of the case are reasonable" is too open-ended and it is always a subject of abuse by police. Note that judges' rules still have influence in Lesotho.

836 See Act No. 9 of 1981.

837 In *R v Becker* 1929 A.D. 167 at 171 DE Villiers A.C.J. defined confession as:"An unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a Court of law."

838 See Act No. 9 of 1981.See *R v Tsiu Mosala* 1974-1975 LLR at 313.

839 See Act No. 51 of 1977. In *R v Zwane* 1950 (3) SA 717 (OPD) De Beer J.P. further held that it is a duty of the officer entrusted with the duty of taking down a confession to satisfy himself that the accused is in his sound and sober senses, that the accused is making the confession freely and voluntarily and that he has not been influenced to make such a confession. While in *R v Gumede* 1942 A.D. 398 at p. 400 the court held that: "Questions should be put to the accused whether he has previously made a statement, and if his answer is in the affirmative, then Gumede suggests that the presiding official should enquire from the accused the nature of such statement, the circumstances of making such statement".

840 1993-94 LLR Legal Bulletin, p. 150-4.
Note that this section renders section 229(2) ineffective where evidence of pointing out is clouded by malice or torture.

torture or lack of free will as required by section 228 of the Criminal Procedure Act and if there were assaults meted out before the suspect or accused person could give his statement. It is submitted that this is a step in the right direction. The Court thereat confirmed all the appeals of the four appellants and set aside all convictions.

4.8.1.4 Writ of Habeas Corpus

We have dealt with this remedy at length in chapter two, but it suffices to acknowledge the wisdom of the Appeal Court in Lesotho in enforcing the writ in the following decision:

(a) In *Phiri v Commander Lesotho Defence Force*[841] the applicants had allegedly been assaulted by the authorities charging them with a contravention of section 162 of the Lesotho Paramilitary Force Act.[842] Under that section, the commander is required to form a certain opinion prior to effecting an arrest or detention that such a person is suspected to be involved in a criminal activity. The *rule nisi* was granted on an *ex parte* basis. The case involved an alleged robbery of money from the department of labour construction unit which is an official Lesotho Ministry of Works.

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841 CIV/T/92/LAC (1990-94) 233.

842 See Act No. 13 of 1980 as amended by order no. 3 of 1996.
Note that Lesotho still follows the Roman Dutch law principle with of course the current South African authoritative case law, but it is submitted that legislation is lacking behind terribly. It is suggested that it be stepped up to pace it with the three jurisdictions.

4.8.2 The United States of America

4.8.2.1 The Impact of Interrogation[843] or Interview[844] on Confessions

Interrogations have long been recognized as an essential and accepted part of law enforcement.[845] Yet, for a number of reasons, not all confessions that may result from such interrogations are admissible.[846] In particular, the Supreme Court has excluded confessions which were considered the product of 'compulsion' by the state, in part because they may not be reliable as evidence, but primarily because society should not sanction coercive techniques, regardless of the importance they may produce.[847]

Brown v Mississippi[848] was the first confession case to be decided by the United States Supreme Court in *1936*.[849] Since then, the Court has considered well over

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843 The Interview seems to be distinguished from interrogation by writers, i.e. Ward 1975: 18 points out that much of the investigator's work involves interviewing and interrogation. Thus interviewing differs from interrogation in that during interview the individual is generally co-operative and answers questions as truthfully as possible. While interrogation, on the other hand, generally refers to the questioning of a hostile or unco-operative subject.

844 See also Swanson, Territo and Chamelin, 1977: 2 who agree with Ward 1975:18 above that there is a difference between the two types of techniques in that except that they are both an art of science. Interviewing has been defined as the process of obtaining information from people who possess knowledge about a particular offence, as part of the process of investigation. On the other hand, interrogation is designed to match already acquired information to a particular suspect in order to secure a confession or admission. In short, they are of the opinion that interviewing is primarily for the purpose of gaining information while interrogation is the process of testing that information and its application to a particular suspect. See Swanson et al.1977: 144 and contrast that with Horgan, 1974: 49 who argues that the words "interview" and "interrogation" are interchangeable in police work.
See also Klotter and Kanovitz, 1995: 313 while discussing interrogations and confessions quote Brandeis J with approval in the decision of *Ziang Sung Wan v US* 266.114 (1924) where the learned judge noted that: "A Confession is voluntary in law if, and only if it was, in fact, voluntarily made, but, a Confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in the judicial proceedings or otherwise".

845 See Whitebread and Slobogin, 1986: 357.

846 See Whitebread and Slobogin, 1986; 357.

847 See Whitebread and Slobogin, 1986: 357.

848 297 U.S. 278 56. S. Ct. 461 1936.
The facts in Brown according to Whitebread and Slobogin, 1986: 358 presented an extreme situation which the Court could not ignore.

100 cases involving confessions.[850] In the course of doing so, it has ruled on three different Constitutional provisions to support its holdings.[851]

In *Brown,* the police used hanging, severe whipping and other brutal methods of extortions to obtain signatures of three black defendants to confessions which had been dictated to them by the police in a murder case. A conviction was obtained on the basis of these confessions alone in the lower court . The Court, expressing great dissatisfaction at the police conduct involved, found the convictions void for want of essential elements of due process under the Fourth Amendment. The Supreme Court placed emphasis on the question of voluntary test. In the confessions cases, decided over the ensuing three decades, the court followed a Fourteenth Amendment due process approach in ruling upon the admissibility of a confession.[852] The test that evolved out of these cases was whether, given the totality of the circumstances, the statement was voluntarily made.[853] Then, for a short time, the focus in confession rulings switched to whether, under the Sixth Amendment, a person subjected to interrogation was denied his right to counsel at a critical stage of the proceedings against him.[854] The Fifth Amendment remains the touchstone for Constitutional analysis of interrogations.[855]

4.8.2.2 Custodial Interrogation: The Miranda warning[856]

Weston and Wells[857] observe that in *Escobedo v Illinois,*[858] Escobedo was arrested for murder, questioned, and then released the same day, after his

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849 See Whitebread and Slobogin, 1986: 357.
850 See Whitebread and Slobogin, 1986: 357.
851 See Whitebread and Slobogin, 1986: 357.
852 See Whitebread and Slobogin, 1986: 357.
853 See Whitebread and Slobogin, 1986: 357.
854 See Whitebread and Slobogin, 1986: 357.
855 See Whitebread and Slobogin, 1986: 357.
856 384 U.S.478,84 S.Ct. (1964).
857 Weston and Wells, 1974: 177.
See also Anonymous, 1963-64: 1054 where the Article discusses the balance between the interests of the individual and the state in interrogation. According to the author,

lawyer had obtained a writ of *habeas corpus.* Ten days later, an alleged accomplice implicated Escobedo and the latter was rearrested. Enroute to the police station, he was advised of his accomplice's accusations. His request to consult his attorney was denied, as were several requests of counsel to consult with Escobedo. The two were kept apart until Escobedo, after four hours of questioning, made a damaging statement. He was convicted for murder based, in part, on the statement. *Goldberg J* stated the Supreme Court's holding as follows:

Counsel does not only serve the function of providing technical aid. But he is a needed buffer at the point of confrontation between the state and the accused, because the accused is incapable of defending himself in this moment of stress.
It would further seem that "when the Bill of Rights was put into effect, its drafters recognized that the crucial point of confrontation was at a trial. And that the investigative process on the other hand was private. Thus the state and accused did not meet until the trial. But now that investigative process is in the hands of the state, the state and the accused meet during interrogation in the back room of the police station".
"Interrogation as it is now practiced is precarious to the accused who is defenceless against the abuses of both physical and psychological coercion. Even if there is no intention to make the situation coercive to the accused, questioning of an accused alone in an alien atmosphere must be inherently coercive. Counsel, by serving in his role as buffer against the state, could remove the dangers of the situation".
On the other side of the balance is the argument that the presence of counsel will emasculate the process of interrogation and thus cripple or destroy the enforcement of the law. I agree *in toto* with the writer that the latter statement or argument is not true because in most cases of confession, "there is a strong suspicion that only the weak confess, while the professional criminal is too cunning to be trapped". I therefore support the presence of counsel at interrogation stage in Lesotho. Currently there is no such requirement and more often than not, this is the stage where suspects of crime face serious humiliation by police while seeking confessions or admissions from them. At this stage police usually say that they are still within their 48 hours requirement per section 32 of Lesotho Criminal Procedure and Evidence Act No. 9 of 1981. See also Yale Law Journal. 1047 – 1963 – 1964. See Hein online … 73. (Vol. 73: 1000). Down-loaded on 7 March 2008.
The practical example where the denial to Counsel was punished is in the decision of Escobedo v Illinois where conviction was reversed on the grounds that the trial judge had improperly excluded evidence that his counsel was turned away at the door of the police station.

858 378 U.S. 478 84 S.Ct.(1964).
See also the decision of *Rogers v Richmont* 365 U.S. 534, 540-41, S.Ct. 735, 739 (1961) where Justice Frankfurter went as far as holding that involuntary confessions are excluded:
"Not because such confessions are unlikely to be true, but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law. That ours is an accusatorial and not an inquisitorial system – a system in which the state must establish quilt through evidence independently and freely. It may not by coercion prove its charge against an accused out of his own mouth".

"We hold… that where, as here, the investigation is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and has been denied an opportunity to consult his lawyer, and the police have not effectively warned him of his absolute Constitutional right to remain silent, the accused has been denied the assistance of counsel in violation of the Sixth Amendment and that no statement elicited by the police during interrogation may be used against him at a criminal trial".

Weston and Wells further observe that a confusing series of state appellate decisions followed about the timing of this right to a warning, and to counsel that is 'the when' factor in the pretrial period.[859] In *Miranda v Arizona*[860], the Court clarified that in the absence of an intelligent waiver of the Constitutional rights involved, confessions and any other statements obtained by custodial police interrogation are held inadmissible in evidence.

Miranda[861] comes as a celebrated decision of the century in an attempt to rescue suspects of crime from the claws of over-zealous police officers during interrogation and/or interview periods.
The picture painted in *Miranda*[862] is that prior to questioning, the police must make known to the suspect that:

1. *He has the right to remain silent.*
2. *Anything he says can be used against him in a court of law.*
3. *To have the right to talk to a lawyer and have him present while being questioned.*

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859 This is very important because in Lesotho suspects are not seen by Counsel during police investigations or there is no law to that effect which entitles Counsel to see the suspect during the interrogation stage by the police; he is allowed this opportunity after the arrest of the suspect.
860 384 U.S.436, 86 S.Ct. 1602 (1966).
861 384 U.S. 436, 86 S.Ct. 1602 (1966).
862 384 U.S. 436, 86 S.Ct. 1602 (1966).

4. If he cannot afford to hire one, one will be appointed to represent him before questioning. Miranda[863] warning also places a waiver by the suspect in that the suspect must be asked:

1. Do you understand each of these rights I have explained?
2. Having these rights in mind, do you wish to talk to us now?

Miranda[864] as already discussed, has established a warning as prerequisite to any police interrogation of a suspect once a case has focused and the suspect has been taken into custody. *Whitebread and Slobogin*[865] caution that there are procedural safeguards supplementing this warning and constituted a foundation for a waiver of Constitutional rights. Suspects may waive such rights after a warning has been given and an opportunity afforded to him, but the waiver must be made knowingly and intelligently.

4.8.3 United Kingdom's Perspective

4.8.3.1 The Power to Stop for Questioning

It is sometimes suggested that the police have legal power to detain a suspect on the street in order to question him.[866] However, the common law gives an officer no special power to commit what would otherwise be a trespass in this situation.[867] If a police officer attracts someone's attention and goes beyond the physical contact generally accepted by all who move in society, he will be liable for battery.[868]

In *Collins v Willcox*[869] where *Goff L.J.* held that:

"Of course, a police officer may subject another to restraint when he lawfully exercises his power of arrest; and he has other statutory

863 384 U.S. 436, 86 S.Ct. 1602 (1966).
864 384 U.S. 436, 86 S.Ct. 1602 (1966).
865 See Whitebread and Slobogin, 1986: 352.
866 See Clayton and Tomlinson, 1987: 128.
867 See Clayton and Tomlinson, 1987: 128.
868 See Clayton and Tomlinson, 1987: 128.
869 1984 1 West Law Report 1172 at 1178.

powers, for example, the power to stop, search and detain persons under section 1 of English Police and Criminal Procedure Act of 1984. But, putting such cases aside, police officers have for present purposes no greater rights than ordinary citizens. It follows that, subject to such cases, physical contact by a police officer with another person may be unlawful as a battery, just as it might be if he was an ordinary member of the public. But a police officer has his rights as a citizen as well as his duties as a policeman".

Police officers have no legal right to detain a suspect for questioning.[870] A person is under no legal duty to answer any questions from the police; he has every right to remain silent or to refuse to answer.[871] He cannot, in the absence of some specific police power, be detained for questioning without expressly consenting to that detention.[872]

4.8.3.2 The Statutory Powers in the United Kingdom to Stop and Search

Clayton and Tomlinson[873] submit that besides the common law prohibition and/or restriction, there are new stop and search powers which significantly increased

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870 See Clayton and Tomlinson, 1987: 128.

871 See Clayton and Tomlinson, 1987: 129.

872 The relevant decisions for the above exposition are Kenlin v Gardner (1967) 2 Queen's Bench. 510. In this decision, two schoolboys, aged 14, innocently were visiting a number of premises for purposes of reminding certain members of their school rugger xv about a forthcoming match aroused the suspicion of police constables who were on duty in plain clothes. One of the officers approached the boys producing his warrant card and the boys ran away. At that moment one of the officers produced his gun and cautioned the boys that he would shoot if they did not stop. The boys started struggling violently, punching and kicking one of the officers. The Court held that justification of self-defence existed to the charge of assault under section 51(1) of the Police Act of 1964. See Rice v Connolly (1966) 2 Q.B. 414 on 419 above and Bentley v Brudsinski (1982) 75 Criminal Appeal Cases Report at 217.

873 Clayton and Tomlinson,1987:129 add an important element of an identification by the police officer who anticipates to conduct a search in that, if an officer contemplates a search other than of an unattended vehicle either under the statutory power or another power to search without making an arrest, "he is under a duty before beginning his search to take reasonable steps to provide documentary evidence that he is an officer if he is not in uniform and (whether in uniform or not) to inform the suspect of his name,

police powers in the United Kingdom. These were brought about by section 1(2) of 1984 Criminal Law Act[874] which stated that a police officer:

(a) "May search

(i) Any person

(ii) Anything which is on or in a vehicle, for stolen or prohibited articles; and

(b) May detain a person or vehicle for the purposes of search".

4.8.3.2.1 The scope of the power

Clayton and Tomlinson[875] hold that this power to detain only arises if the police are acting lawfully in making their search.[876] It will also be exercisable if the

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police station, the object of the proposed search, his grounds for proposing it and the suspect's rights to a record of the search unless he feels that this will not be practicable". It is submitted that failure by a police officer to identify himself will make a subsequent search unlawful.
See www.emeraldinsight.copm/1363-951.htm, downloaded on 7th March 2008. pljpsm 30, 3, 466.
See also Qurechi,2007:466 who examines whether the introduction of the UK's Criminal Act (CJA) 2003 which extended police stop and search powers had any impact at all on the reduction of crime. According to him, the Act allowed officers to stop and search for Articles concerning commission of an offence of criminal damage. It would seem that the Act made a number of key changes to police procedures, such as changes to arrestable offences i.e. stop and search powers.
Qurechi further notes that the second modification brought about by police powers under Criminal Justice Act 2003 was that it widened the scope of prohibited articles under the existing legislature provision of section 1 of PACE 1984 which had previously categorized prohibited Articles as "offensive weapons or Articles used for the purpose of brutality and related crimes" but that this has now been changed or amended to include any Article: "... made or adapted for use, or in connection with a criminal damage offence or where the person having the Article with him, intends, it for such use, whether by himself or anybody else …" Qurechi finally notes that these "prohibited articles can now include objects such as spray cans and marker pens as well as activities associated with political protests and graffiti".
This innovation can be most welcome in Lesotho where there is no such provision.

874 See PACE of 1984 C 60.

875 See Clayton and Tomlinson, 1992: 159 further argue that apart from the power to stop and search, the police have no power to detain a person short of arrest. In particular, they have no right to detain a suspect "to help them with their inquiries". Note that in Lesotho, for example it is not uncommon for police to arrest and detain a suspect for the period exceeding 48 hours to 'assist' them with investigations and this process is often abused by overstepping the required period. Sometimes the perceived or 'known' suspects are rounded up especially around Christmas eve for purposes of "purported crime prevention or pro-active attempt" only to release them after without a charge.

876 See Clayton and Tomlinson,1992:159.

police have “reasonable grounds to believe” that they will find stolen or prohibited articles.[877] If nothing suggests that the goods are stolen, the search will become unlawful.[878] An officer may also seize an article discovered in the course of his search if he has reasonable grounds for suspecting it to be stolen or prohibited.[879] However, an officer who detains a suspect or vehicle under this statutory power or by some other power which permits a search without making an arrest does not need to conduct the search if it subsequently appears to him that no search is required or that a search is impracticable.[880]

If he decides not to conduct a search it seems this will not render the initial detention to be unlawful.[881]. This was held in *David v Morrison.*[882]

This is a perfect protection of the suspect of crime in the United Kingdom which must be incorporated into the Lesotho Criminal Procedure and Evidence Act as it will be shown in the chapters ahead, in order to improve human rights standards to be maintained and observed by police officers in that kingdom while investigating alleged crimes.

It is important therefore, in order to conclude this part, that the United Kingdom, the United States of America and South Africa seem to have increased and/or improved police powers of either arrest, search and detention, while obtaining a confession from a suspect. Enough care must be taken to make sure that there is a balance between police powers, the corresponding obligations and the duties

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877 See Clayton and Tomlinson, 1992: 159.

878 See Clayton and Tomlinson, 1992: 159. See also R v Prince 1981 Criminal Law Report at 638.

879 See Clayton and Tomlinson, 1992: 159. See section 1(6) of 1984 Act.

880 See Clayton and Tomlinson, 1992: 160. See section 2(1) of 1984 Act.

881 See Clayton and Tomlinson, 1992: 160.

882 1979 70 Criminal Appeal Cases Report on 142. See also the European Convention on Human Rights Article 5 (1950) which is to the effect that: The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is necessarily considered reasonable to prevent him from committing an offence or fleeing often having done so is appropriate.

of officers to balance the interests of justice as a whole. The improvements from these jurisdictions are welcome in Lesotho.[883]

4.8.4 South Africa's Practical Protection of Human Rights

4.8.4.1 Unconstitutionally Obtained Evidence

Section 35(1) of the South African Constitution[884] provides for the arrest and detention of accused persons. It further provides such people the following rights:

(a) "To remain silent.

(b) To be informed promptly

(i) Of the right to remain silent and

(ii) Of the consequences of not remaining silent;

(c) Not to be compelled to make any confession or admission that could be used in evidence against that person

(d) To be brought to the court as soon as reasonably reasonable".

Section 35(5), however, seeks to exclude evidence obtained in a manner that violates any right in the Bill of Rights, especially when that evidence tends to render the trial unfair or otherwise detrimental to the administration of justice. This is a celebrated change and progress by the South African Constitution. I therefore propose such inclusion in the case of Lesotho.

4.8.4.2 Illegally Obtained Evidence

In *S v Melani*[885] the accused were charged with three counts of murder, theft and unlawful possession of firearms and ammunition which were connected with the

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883 Stone 1994: 56. See also Nel 1998: 97 where he reiterates this position. Also note that in the United Kingdom such powers have been increased under the Police and Criminal Procedure Act (PACE Code) in order to improve the security of the suspect's rights in relation to search or seizure. See also Crawshaw, 1999: 195 for code of conduct for law enforcement officials Article 4 of United Nations General Assembly 34/169/79.

884 See Act No.108 of 1996.

death of one deceased who was shot and killed**.** The state sought to tender evidence of pointing out made by one of the accused which was done in July 1992 when the said accused was under arrest, but the charge was withdrawn against the accused only to be reinstated later after the commencement of the Constitution. The Court dealt with the question of the admissibility of evidence of pointing out where the accused was not properly informed about his right to consult with the legal advisor. A further bone of contention was that the accused was not warned about consequences of making any statement. It was held that such right protected the accused person against self-incrimination and presumption of innocence. *Froneman J* had this to say:

"All three accused dispute the admissibility of a proposed evidence relating to their respective pointing out. In respect of each a separate trial-within-a-trial,[886] *or what I would called an 'admissibility trial' was held".*

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885 1996 (1) SACR 335 (E).
Judge Froneman in *S v Melani* 1995 (2) SACR 141 E continued also to state the common law position with regard to the admissibility of pointing out in that "in keeping with the approach that, if possible, the issues should be decided on the basis of the common law unaffected by constitutional provisions the next question to be determined is whether, on the facts found above, evidence of the pointing out of the three accused were admissible or not according to common law". That the pointing out of an accused of a certain fact, the existence or discovery of which is in itself highly relevant to the alleged crime and which therefore establishes a link between the knowledge of the accused of that fact and the commission of the crime, may amount to an admission by conduct on the part of the accused. This was the situation in the decision of *S v Sheehama* 1991 (2) SA 860 (A) on pp 879B, 879H-I. In Sheehama, the appellant had been convicted in the Court *a quo*, on five charges of murder arising from the death of five people as a result of the 1996 bombings of a butchery in Walvis Bay. The admissibility of certain admissions and pointing-out by the appellant was considered by the trial Court after a lengthy trail within a trial which eventually determined its admissibility thereof on the basis of which appellant was convicted. The Court discovered that the pointing out were preceded by assaults and threats and as such they were not free and voluntary in terms of section 219A of Act 51 of 1977. Froneman J added that it is only admissible as evidence in terms of the common law and that in terms of section 219(1) of the Criminal Procedure Act No. 51 of 1977 if it was made freely and voluntarily. See also *S v January; Prokureur Generaal Natal* v *Khumalo* 1994 2 SACR 801 (A) on pp 806h – 807. See also Southwell and Van Rooyen 1993:3-5 who provide the meaning of a pointing out as "an overt act whereby the accused indicates physically to the inquisitor the presence or location of something or someplace actually visible to the inquisitor" per Hoexter J in *S v Nkwanyane* 1978 (3) SA 404 at 405.

886 Note that this is an independent enquiry which is done whenever the accused persons dispute the admissibility or otherwise of a confession.

The learned judge ascertained that the first accused did not testify in his admissibility trial and as such he admitted the evidence, but accused no. 2 and 3 did testify and he ruled that evidence of pointing out for the two accused was inadmissible because the accused alleged that they were assaulted by the police prior to making the alleged pointing out and henceforth inadmissible for want of voluntariness in terms of section 219(1)[887] of the Criminal Procedure Act.

In *S v Lebone,*[888] *Rumpff JA* expressed the view that when a trial judge had adjudicated upon the admissibility of a confession as a separate issue, and when the accused himself alleges that the contents of his confession are false and that they were submitted by the police and this fact was used as part of his case, and that he was forced by the police to make a statement, then a prosecutor had a right to cross-examine the accused on the contents of a confession to show that the accused himself was the source of the contents, and not the police as alleged by him. It was further held that the cross-examination was then taken with the view of attacking the credibility of the accused. The learned Judge further noted that the requirements of 'freely and voluntary' and 'without undue influence' were distinct, each of which had to be complied with as a prerequisite to admissibility.

In *S v Yolelo*[889] Mrs M, after attending her horses, returned to her house, where she noticed a suitcase on the floor of the bedroom. When she entered the toilet two men attacked her, struck her with an iron bar, bound and gagged her. *Van Heerden JA* added that an admission made by the appellant to a magistrate, which admission was reduced to writing, and after it had been interpreted by an interpreter from the appellant's own words, brought the presumption of voluntariness, as provided in section 219A(1) into operation. This is

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887 See Act No. 51 of 1977. See also *S v Naidoo* 1998 (1) BCLR 46.See also *S v Buda and* others 2004 (1) SACR 9 (T).

888 1965 (2) SA 837 (A).See also *S v Madiba* 1998 (1) BCLR 38. In *S v Mphala*,1998 (4) BCLR 494, the court rejected a confession because it would render the trail unfair. See section 35(5) of South African Constitution No. 108 of 1996.On the contrary, in *S v Soci* 1998 (3) BCLR 376, Erasmus J admitted a confession, but excluded a pointing out evidence made before a policeman.

889 1981 (1) SA 1002 (A).See also Burchell and Milton, 1997: 663.

notwithstanding the fact that, no certificate by the interpreter, as required by paragraph (a) of the said proviso, as appeared thereon. However, the interpreter and the magistrate had testified at the trial. The Court further held that section 219A of the Act[890] which requires that admissions be 'voluntarily made' before they may be admitted, merely codified the common law position in this regard.

In *R v Barlin*,[891] the appellant was convicted of receiving stolen property, knowing it to have been stolen recently from a local firm. It was found in his shop with some name tabs removed from shirts while some tabs were found in a dust bin under the counter. The common law rule was expressed where it was held that a statement is freely and voluntarily made if 'it has not been induced by any promise or threat coming from the person in authority'.

In *S v Motloutsi*[892] bank notes were found and seized by police in a room occupied by the accused. The search and seizure of the notes took place without

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890 See Act No. 51 of 1977.

891 1926 AD 459 on p. 462. Note that in the decision of *S v Mpetha* 1982 (2) SA 406 (CPD). Five of the 19 accused had made written statements to a magistrate and the state sought to have these statements admitted as evidence, but the defence contested their admissibility. Williamson J extended the concept of undue influence to just 'free and voluntary'.

892 1996 1 SACR 78. Du Toit et al. 2001: 26 argues that the fact that the statement is free and voluntary does not exclude the possibility of influence that may have been applied to the Maker. See also De Beer in *R v Zwane* 1950 (3) SA 717(A).
Here the Court had an opportunity to deal with the constitutional provisions as well as sections 20 and 22 of Criminal Procedure Act No. 51 of 1977. As far as section 14 of South African Constitution is concerned, the section reads as follows:

14. "Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home, or property, the seizure of private possessions or the violation of private communications", while sections 20 and 22 of South African Criminal Procedure Act provides that:

20. "The state may, in accordance with the provisions of this chapter, seize anything (in this chapter referred to as an article) –
    (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere or
    (b) which may afford evidence of the commission or the suspected commission of an offence, whether in the Republic or elsewhere or
    (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence".

22. "A police official may without a search warrant search any person, container or premises for the purposes of seizing any article referred to in section 20 .

a search warrant on Sunday morning on the 27 November of 1994 after the accused had been arrested the previous night. The Court excluded evidence that was illegally obtained in breach of the right to privacy entrenched in terms of section 13 of the Constitution (interim Act no. 200 of 1993) (now section 14 of Act no. 108 of 1996) of the current Constitution of South Africa. The Court held that such evidence should be excluded, where the state deliberately and consciously violated the Constitutional rights.

In *Key v Attorney General*[893] a representative of the Director of the Serious Economic Offences Act[894] acting in terms of section 6(1), searched the residence and offices of the applicant and seized a number of documents. On the 3rd of February 1994, the applicant was implicated on a number of charges relating to the affairs of a company in liquidation**.** The accused had contended that the case against him was built on the basis of documents seized during searches of his offices and consequent interview with witnesses and a report prepared by the investigative accounting officer to whom such documents were given in terms of section 7 of the Act**.** *Kriegler J,* however, held that there was nothing inherently unfair in receiving evidence material which was properly gained in the course of a lawful search. The purpose of the decisions is, however, to make sure that the

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(a) if the person concerned consents to the search for and the seizure of the Article in question, or if the person who may consent to the search of the container or premises consents to such search and seizure of the Article in question or

(b) if he on reasonable grounds believes –

(i) That a search warrant will be issued to him under paragraph (a) of section 21 if applies for such warrant and

(ii) That the delay in obtaining such warrant would defeat the object of the search".

Lesotho's Constitutional protection on privacy and arbitrary search or entry is governed by section 10 of the Lesotho Constitution Act 16 of 1993 and section 48 of Criminal Procedure and Evidence Act No. 9 of 1981 respectively.

893 1996 (2) SACR 113 (CC).
Note that section 6(1) of the investigation of Serious Economic Offences Act in South Africa authorizes the officers to enter, inspect and search any premises in which he or she suspects there was anything relevant to an inquiry by him into a serious and complicated economic offence. Section 6(1)(d) authorizes the seizure of anything found on the premises regarded by the director as having a bearing on the inquiry.

894 See Act No.117 of 1991.

fundamental human rights of the suspect of crime are protected as guaranteed by the Constitution of the Republic of South Africa.

4.8.4.3 Interrogation

Du Toit[895] argues that confessions extracted by persistent questioning could not be excluded on that ground alone, but that they could, however, be excluded if the accused freedom of volition was sufficiently impaired, as in the case where he was frightened or overawed by persistent and aggressive questioning or where fatigue broke down his powers of resistance and induced him to speak where he would otherwise not have done so.

4.8.4.4 Detention

In *S v Christie*[896] the appellant, a South African student and doctor of philosophy, had been convicted on five counts under the Terrorism Act.[897] His flat was

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895 See Du Toit et al. 2001: 24-59. See *R v Ananias* 1963 (3) SA 486 (SR) where Beadle CJ raised two questions of law: To what extent, if any, do the following facts make a statement of accused to the police inadmissible? The fact that (a) after arrest and caution he was subjected to 30 or 40 minutes of questioning, which questioning was in part intended that he incriminates himself by his answers.(b) After the accused had denied all knowledge of the crime, he was confronted with a witness who had not been charged with the crime,who made a statement implicating the accused's presence. (*S v Mkwanazi* 1966 (1) SA 736 (A) where the accused was charged with robbery with aggravating circumstances and was found quilty as charged and was sentensed to eight years imprisonment and a whipping of four strokes. Leave to appeal was granted on the basis that the Appeal Court might reasonably come to a conclusion that he had wrongly admitted in evidence a confession made by him to a magistrate. See *R v Sibanda* 1965 (1) SA236 (RA) Where appellant was charged for contravening section 33 (1)(a) of maintenance of law and order of Act 53 of 1960 and was convicted and sentensed to a mandatory death sentence as the offences he was alleged to have committed included throwing petrol bombs into occupied residences.
Note that the position stated by Du Toit, et al. that confessions extracted by persistent questioning could not be excluded on that ground alone has received a telling blow and a nail on the head by a recently celebrated decision See Mabuza (http://www.businessday.co.za/printfriendly.aspx?10=BD4A746292 downloaded on 15/04/08) as landmark Court ruling on police torture in *Bongani Mthembu v State*, Case No. 379/07 delivered on 10th April 2008 by the Supreme Court of Appeal (SCA).
The decision has ruled that evidence obtained through the use of torture is inadmissible – even when the evidence was reliable and necessary to secure the conviction of an accused facing serious charges. It was held that the Constitution prohibits torture absolutely. The accused, Bongani Mthembu, was a taxi operator and former police

searched in Cape Town and he was taken to the police station where he was interrogated the whole night. He was made to make a statement which he was forced to repeat to a magistrate. Section 6 of the Terrorism Act permitted indefinite confinement with a considerable degree of isolation until a detainee had replied satisfactorily. It was argued that this scenario could create conditions calculated to put the detainee under pressure to make statements regardless of their truth or falsity. The Appellate Division held that a court would not automatically assume that, because a person was being held in terms of security legislation, any statement he made was not freely and voluntarily made. With regard to improper inducement, *Du Toit***,**[898] argues that it was a question of fact to be looked into in each case. It is submitted with due respect that this position indeed accords well with section 36 of the South African Constitution, relating to the limitation of individual rights in the Bill of Rights. It must, however, be taken not to make sweeping statements where there is a clear violation of an individual's rights at the velvet fist of police officials.

4.8.4.5 Non-Compliance with the Judge's Rules

Du Toit,[899] observes that the Judges' Rules were drawn up in 1931 as a code of conduct to guide the police in their dealings with suspects and accused persons.

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officer. Among the charges he faced in the Verulam Regional Court were theft of two motor vehicles and armed robbery amounting to R70 000 of pension money from the Maidstone post office at Tongaat in 1998. The magistrate sentenced him to 23 years' imprisonment. The High Court in Durban reduced the sentence to 17 years, but allowed the appeal.
Judgement of SCA was delivered by Judge Arthur Cachalia. This judgment bears relevance in Lesotho, especially when the Appeal Court in that country nearly reached the similar decision in *Mabope v R* in 1993(4) LLR, but, allowed a discretion and now the position of the law in Lesotho must change in the light of this *ratio decidendi.*

896 1982 (1) SA 464 (A).

897 See Act No. 83 of 1967. Note that section 22 of the (South African General Law Amendment) Act 62 of 1966 provided for only limited detention and did not create an obligation to speak and section 6 was obviously more drastic and exposed detainee to increased likelihood of influence by circumstances of his detention under Terrorism Act .

898 See Du Toit, et al. 2001: 24-60. See also Upadhyay, 1999: 157 who shares with us an Indian experience relating to pre-trial detention as discussed in the decision of *D.K.Basu vs State* 1997 1 SCC at p.416 where the Supreme Court of India held that: "Custodial death is perhaps only the worst crimes in a civilised society governed by the rule of law."

899 See Du Toit et al. 2001:24.

He further argues that these were purely administrative directives without any force of law so that non compliance with these provisions would therefore not necessarily render a confession or admissions inadmissible. In *Mpetha*[900] above, the Court stated that non-compliance with the rules may weigh heavily on the scale against the prosecution and suggested that serious consideration should be given to declaring that the Judge's Rules impose a duty which will ordinarily render the incriminating statement inadmissible.

In *S v Sampson*[901] Mr. Achamer was robbed of a sum of R28,000.00 contained in a black brief case which he had just drawn on behalf of his employees. The robbers used a Ford motor car as a get-away vehicle from the scene of the crime. The police confronted a suspect in a criminal investigation with a statement of another suspect in order to induce him to make a confession. The Court held that the police were acting contrary to rule 10 of the Judges' Rules. *Milne JA* warned that the fact that the Judges' Rules are administrative directions which do not have the force of the law "does not mean that they are to be ignored".

4.8.4.6 Conclusion

This chapter has acknowledged that police officers are vested with a great deal of authority to arrest, search, detain or use force where necessary. It has further acknowledged that this authority has to be exercised with great care and reasonableness. In conducting their daily work, the police are allowed to question, interview and interrogate suspects of crime. As trained officers, the police have to conduct themselves with utmost discipline, emphasis being placed on the balancing of the interests of the public and the suspects alike. It has been discovered that there is one thing in common in the four selected jurisdictions, which is that police officers some times over step their boundaries while

900 1982 (2) SA 406 (CPD).
901 1989 (3) SA 239 (A).

conducting arrest, search or detain suspects of crime. It has emerged that torture of suspects of crime some times become extreme. The chapter has provided examples through case law in that regard. The chapter has noted progress made by some jurisdictions as far as remedies are concerned. It has cautioned however, that questioning of suspects of crime must be done in the manner acceptable, without resorting to extra-judicial mechanisms.

Chapter 5
The Contribution of International Bodies towards the Protection of Human Rights

5.0 INTRODUCTION

The chapter supports the United Nations for its courage, wisdom, vision and determination to save and protect 'succeeding generations'. It has identified several United Nations Charters, Conventions, Covenants and Treaties signed and ratified by Members in order to safeguard the fundamental human rights, dignity and worth of mankind. It has endorsed that these instruments have been forged in the wake of wars, struggles or instability the world over " which twice in our lifetime have brought untold sorrow to mankind".[902] The United Nations bodies such as the General Assembly, the Security Council, the International Court of Justice, the United Nations Declaration of Human Rights and Human Rights Commissions and Committees have been appreciated in their effort to deal with Human Rights disputes and abuses. The police officers across the world have been constantly monitored and guided through international instruments such as the Code of conduct for law enforcement officials, Convention against Torture, African Charter on Peoples' Rights, International Covenant on Civil and Political Rights. These instruments ensured that people's rights and freedoms are guaranteed and protected at all cost.

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902 See United Nations Charter, June 26 of 1945:59. Statute 1031, T.S. No.993,3 Bevans 1153, effective on 24 Oct.

5.1 THE MEANING OF PROTECTION UNDER THE INTERNATIONAL LAW OF HUMAN RIGHTS

The United Nations Security Council Document reads as follows:[903]

(a) 'Protection' can mean legal protection in the form of intervention with the security and the judicial authorities, as well as the political instances, of the occupying power, or by outside agency, in order to ensure the just treatment of an individual or groups of individuals.

(b) 'Protection' can mean physical protection in the form of the provision of armed forces to deter, and if necessary fight, any threats to the safety of the protected persons.

(c) 'Protection' could take a less well defined form, called 'general assistance' in which an outside agency intervenes with the authorities of the

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[903] Thant was Secretary General of the United Nations in 1971. See Secretary General United Nations Document S/19443, resolution 605 (1987) 21 Jan 1988: 10 paragraph 28. See also Ramcharan, 1989: 17-20 who groups methods of international protection into three main categories thus –

(a) Anticipatory or Preventative Protection which involves the making of telegrams and urgent appeals addressed on behalf of the victims or interim measures undertaken on their behalf, e.g. in the apartheid era, the United Nations Security Council has had to meet on urgent basis and adopted appeals to spare the lives of persons who were under threat of execution;

(b) Curative or Mitigatory Protection. Here various procedures exist within different international organizations, whose aims may be said to stop or mitigate excesses being committed or to cure or redress situations giving rise to such excesses. Among these are:
   1. International Labour Organization (ILO) Complaints Procedure
   2. United Nations Educational and Social Council Organization (UNESCO) Complaints Procedure
   3. Inter-Governmental complaints procedures
   4. Such as those under:
      (a) European Convention on Human Rights (ECHR)
      (b) American Convention on Human Rights (ACHR)
      (c) International Covenant on Civil and Political Rights (ICCPR) Investigation and Fast-finding Procedures
      (d) Red Cross Procedures (RCP) and lastly,

(c) Pro-facto, Remedial or Compensatory Protection. This third group and/or method of protection emphasises the need for different inter-Organizations to have objectives of providing the protection through remedies or compensation. This may include petition systems under the European and American Conventions on human rights and under the optional protocol of International Convention on Civil and Political Rights (ICCPR) and this also includes judicial measures provided by the European court, the Inter-American Court and become of essence in this regard.

occupying power to help individuals or groups of individuals to resist violations of their rights, i.e. security restrictions, curfew, harassment, difficulties or bureaucracy.

(d) *Finally there is a somewhat 'Intangible Protection' afforded by outside agencies, including the international media, whose mere presence and readiness to publish what they observe may have a beneficial effect for all concerned, i.e. 'Protection of publicity".*[904]

Madsen[905] defines the word 'Protection' as:

Measures of some kind or other methods taken by a subject of international law in order to safeguard or promote the integrity, rights, or interests of an individual. Protection may take many shapes… we may distinguish between internal protection (the protection of the law) and external protection (diplomatic or consular protection). Moreover, protection may be active or passive. Thus, if a government intercedes with another government for one of its citizens, we may speak of active or explicit protection. On the other hand, if the authorities of one state merely enable a person to refer to them and thereby get certain benefits from the authorities of another state, we may call it passive or implicit protection. Typical of the latter kind of protection is the issuing of national passports and certificates of nationality.[906]

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904 See U.N. Doc. S/19443, Res. 605 (1987) 21 Jan. 1988:10.Para.28.

905 See Madsen, 1966: 318.
See also Ramcharan, 1989: 17-18 where the learned author talks about 'shades of protection' as being direct and indirect. Thus the international protection of human rights in the contemporary world may be said to be either direct and indirect. 'By direct international protection is meant the intercession of an international entity either at the behest of a victim or victims concerned, or by persons on their behalf, or on the volition of the international agency protecting itself to halt the violation of human rights'. In the case of: "Examples of direct international protection mention may be made of the activities of the United Nations (UN) High Commissioner for refugees, of the International Committee of the Red Cross, or the various petitions or Complaints Procedures, such as that provided under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)". That:"In direct protection include the creation of international environment which is conducive to the realization of human rights, the elaboration of norms and standards, education, teaching, training, research and dissemination of information and the provision of advisory services in the field of human rights".

906 Madsen, 1966: 381. See also Abdullahi, 1999: 22 who discusses possibilities and constraints of the legal protection of Human Rights under the Constitutions of African Countries and states. That of particular significance to the legal protection of Human

5.2 HUMAN RIGHTS PROTECTION UNDER THE UNITED NATIONS

The United Nations was founded after the Second World War in 1945 with a view to preventing further bloodshed and catastrophies around the world by establishing organized, sanctioned and regulatory interventions.[907] According to *Buergenthal and Cohen*[908] its development was attributed to the monstrous violations of Human Rights by (Hitler from Nazi Germany) who executed people extra judicially, especially the Jews. *Buergenthal and Cohen* believe that some of these violations might have been prevented had an effective international system for the protection of Human Rights existed in the days of the League of Nations.

The United Nations Charter was drawn up by representatives of 50 Countries at the United Nations Conference on International Organizations.[909] The Conference was held at San Francisco from 25th April to 26 June 1945.[910]

Rights is the general weakness of the principle of Constitutionalism itself in most African States and the failure of the Constitutions adopted at the time of independence. He further argues that the idea that governments must adhere to the rule of law in order to uphold the fundamental individual and collective rights of all citizens has not been heeded by Post-Colonial States. The Constitutional instruments have also failed to effectively hold governments accountable to the principle of Constitutionalism. According to him, Constitutionalism refers to a cluster of norms, institutions and processes pertaining to the rule of law, political participation and protection of fundamental rights.

907 Viljoen, 1997: 47. Lesotho attained independence on the 4th of October 1966 and she became United Nations member on the 17th October 1966.

908 Buergenthal and Cohen, 1988: 17. Note that according to these writers, the human rights cause was eloquently espoused and devised as early as 1941 by President Franklin D. Roosevelt of the United States of America in his famous "four freedoms speech". In his Congress message on 6 January 1941 in which he pointed out that: "In the future days, which we seek to make sure, we look forward to a world founded upon four essential Human Freedoms: "The first is freedom of speech and expression – everywhere in the world". The second is "freedom of every person to worship God in his own way – everywhere in the world". The third is "freedom from want – which, translated into world terms, means economic understandings which will secure every nation a healthy peacetime life for its inhabitants – everywhere in the world". "The fourth is freedom from fear – which, translated into world terms, means a worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour – anywhere in the world". "That is no vision of a distant millennium, it is a definite basis for a kind of world attainable in our own time."

909 See De Cuellar, 1987: 1. He was United Nations Secretary General at the time. The United Nations Charter was signed and ratified on the 26th of June 1945 by representatives from 50 Countries. The day is celebrated annually to mark its historic occasion.

From August to October 1944, delegates deliberated on the basis of proposals worked out by representatives from China, Soviet Union, United States of America and the United Kingdom.[911] The United Nations and its founding Charter expressed the ideals and common aims of all the peoples whose governments joined together to form the United Nations Charter.

It is submitted that the United Nations intervention of Human Rights is in accordance with the Charter. In order to fully realize these rights, calls for co-operation in economic, social, cultural and indeed humanitarian intervention are made for full development and enjoyment of these rights.

5.3 THE RIGHTS AND FREEDOMS UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS[912]

The Universal Declaration of Human Rights proclaims two broad categories of rights: Civil and Political Rights, on the one hand, and Economic, Social and Cultural Rights on the other.[913] Its catalogue of Civil and Political rights includes the right to life, liberty and security of a person; the prohibition of slavery, of torture and cruel, inhuman or degrading treatment; the right not to be subjected to arbitrary arrest, detention or exile; the right to a fair trial in both civil and criminal matters, the presumption of innocence and the prohibition against the application of ex post facto laws and penalties.[914]

The Declaration recognizes the right to privacy and the right to own property.[915] It proclaims freedom of speech, religion, assembly and freedom of movement.

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910 See De Cuellar, 1987: 1. See also Sohn and Buergenthal, 1973: 505.

911 See De Cuellar, 1987: 1.

912 See also Joseph, Schultz and Castan, 2000: 4 who indicate that these: "Civil Rights" cover rights to protect physical integrity, procedural due process rights, and non-discrimination rights. Thus "Political Rights" enable one to participate meaningfully in the political life of one's society, and such includes rights, such as freedom, expression, assembly, association and the right to vote.

913 See Buergenthal and Cohen, 1988: 26.

914 See Buergenthal and Cohen, 1988: 26.

915 See Buergenthal and Cohen, 1988: 26.

The latter embraces the right of every one to leave any country, including his own, and to return to his country.[916] Also guaranteed is the right to seek and to enjoy in other countries asylum from persecution and the right to a nationality.[917] Important political rights proclaimed in Article 21 of the Declaration, including individual's right to take part in the government of his country, directly or through freely chosen representatives.[918] That provision also declares that the will of the people shall be the basis of the authority of government through periodic and genuine elections which are all carried through universal suffrage.[919]

The catalogue of Economic, Social and Cultural Rights which is proclaimed in the Declaration starts with the proposition, expressed in Article 22, that:
"Everyone, as a member of society … is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality".[920]

The Declaration then proclaims the individual's right to social security, to work, and to protection against unemployment, to "equal pay for equal work", and to "just and favourable" remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.[921] Article 24 of the Declaration recognizes the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay while Article 25 of the Declaration states that everyone has the right to a standard of living adequate for the health and well-being of himself and his family.

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916 See Buergenthal and Cohen, 1988: 26.
917 See Buergenthal and Cohen, 1988: 27.
918 See Buergenthal and Cohen, 1988: 27.
919 See Buergenthal and Cohen, 1988: 26.
920 See Buergenthal and Cohen, 1988: 27.
921 See Buergenthal and Cohen, 1988: 27.

The Universal Declaration on Human Rights is not a treaty.[922] It was adopted by the United Nations General Assembly as a resolution having no force of law.[923] Its purpose according to its preamble, is to provide "a common understanding" of the human rights and fundamental freedoms as is indicated by the United Nations Charter as "to serve as a common standard of achievement for all peoples and all nations".[924]

The Universal Declaration has since formed a normative instrument that creates legal obligations for the member states of the United Nations.

One may wish to quote *Gerhardy v Brown*[925] where one Robert John Brown was charged, on the complaint of one David Alan Gerhardy, that on or about the 27th of February 1982 he committed a breach of section 19(1) of the Pitjantjatjara (one of Australian aboriginal groups) Land Rights Act of 1981. The complaint was heard by a magistrate who found, *inter alia,* that the defendant, who was an aboriginal, but not a pitjantjatjara, was at a place within the land which was the subject of State Act of 1981 without written permission from the owner of the land. The case raised a number of questions of law for the opinion of the Supreme Court of South Australia, including whether section 19 of the State Act was invalid or restricted in its operation by the reason of the Racial Discrimination Act 1975. *Millhouse J* held that section 19 of State Act was invalid because it was in conflict with section 9 of the Commonwealth Act and Article 5 of the international Convention on the Elimination of All Forms of Racial Discrimination**.** *Blackshield and Williams*[926] further argue that an attempt to define Human Rights

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922 See Buergenthal and Cohen, 1988: 29.

923 See Buergenthal and Cohen, 1988: 29.

924 See Buergenthal and Cohen, 1988: 29.

925 1985 159 Commonwealth Law Report 70. See also http://International westlaw.com down loaded on 11/08/ 2009.

926 See Blackshield and Williams, 2002: 1088.
See International Covenant on Civil and Political Rights (ICCPR) adopted on 16 December 1966, entered into force 23 March 1976; 999 UN Treaty Series 171 and International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted on 11 December 1966; entered into force on 3 January 1976; 993 UN Treaty Series 3.

and fundamental freedoms exhaustively is bound to fail, for the respective religions, cultural, and political systems of the world would attribute a different content to the notions of freedom and dignity and would perceive at least some difference in the rights and freedoms that are conducive to their attainment.

Further note that we have deliberately omitted discussion on (ICESCR) as it is not relevant to our work now.

5.4 INTERNATIONAL COVENANT ON HUMAN RIGHTS WITH EMPHASIS ON INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

5.4.1 The International Covenant on Civil and Political Rights[927]

The International Covenant on Civil and Political Rights consists of a Preamble and fifty-three Articles which are divided into six parts.[928] The Preamble

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927 This Covenant was adopted on 16 December 1966 and it came into force on 23 March 1976 by UN 999 resolution treaty series 171. See Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) abolishing death penalty 1989 – 2000 /. See also Joseph. Schultz and Castan, 2005:9 where they give the substantive guarantees of the ICCPR as contained in part III with the following summary of rights:

Article 1: Right to self-determination.
Article 6: Right to life.
Article 7: *Freedom from torture, inhuman and degrading treatment, and punishment.*
Article 8: Freedom from slavery, servitude, and forced labour.
Article 9: Rights to liberty and security of the person.
Article 10: *Right of detained persons to humane treatment.*
Article 11: Freedom from imprisonment for mobility to fulfil a contract.
Article 12: Freedom of movement.
Article 13: Right of aliens to due process facing expulsion.
Article 14: *Right to a fair trial.*
Article 15: Freedom from retroactive criminal law.
Article 16: Right of recognition as a person before the law.
Article 17: Rights of privacy.
Article 18: Freedom of thought, conscience and religion.
Article 19: Freedom of opinion and expression.
Article 20: Freedom from war propaganda, freedom from incitement of racial, religious and national hatred.
Article 21: Freedom of assembly.
Article 22: Freedom of association.
Article 23: Rights of protection of the family and the right to marry.
Article 24: Rights of protection for the child.
Article 25: Right of participation in public life.
Article 26: Right to equality before the law and rights of non-discrimination.
Article 27: Rights of minority.

Further note that according to Joseph, Schultz and Castan, 2005: 8 the Covenant in September 2003, had 149 State Parties, 104 Parties to the First Optional Protocol and 49 parties to the Second Optional Protocol. Joseph, Schultz and Castan:2000: 3-4 clarify that civil rights cover rights to protect *physical integrity, procedural due process rights and non-discrimination rights while political rights* enable one to participate meaningfully in the political life of one's society and include rights such as freedom of expression, assembly, association and the right to vote. Joseph, Shultz and Castan, 2000: 4 further note that these rights are sometimes referred to as 'First Generation Rights' which dominated earliest domestic Bill of Rights in the 18th and 19th centuries and they were classically perceived as rights to be free from government interference. These rights are in contrast with 'Second Generation Rights' which include Economic, Social and Cultural Rights which advocate for adequate living standards, education and health which rights are traditionally conceived as requiring political government action.

recognizes the inherent dignity of the human person as a source of equal and inalienable rights and proclaims the' ideal of free human beings enjoying freedom from fear and want, can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.[929] The Preamble also notes the obligations on States under the United Nations Charter to promote human rights, and the duties and responsibilities of the individual.[930] Part I (Article 1) concerns the right of all peoples to self-determination.[931] Part II (Articles 2-5) contains certain general provisions relevant to all the rights set out in the ICCPR.[932] Part III (Articles 6-27) contains a catalogue of civil and political rights.[933] Part IV (Articles 28-45) contains provisions for the establishment and operation of an independent Human Rights Committee.[934] Part V (Articles 46-7) deals with the interpretation matters of the ICCPR while part VI (Articles 48-53) contains the final clauses pertaining to signatures, ratifications, accessions and entering into force items.[935]

Article 2(2) of the Covenant on Civil and Political Rights provides that:
Where not already provided for the existing legislation or other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its Constitutional process and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant.[936]
Article 3 of the Covenant continues to state that each state party to the present Covenant, undertakes:

> *(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective*

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928 See McGoldrick, 1994: 18.
929 See McGoldrick, 1994: 18.
930 See McGoldrick, 1994: 18.
931 See McGoldrick, 1994: 18.
932 See McGoldrick, 1994: 18.
933 See McGoldrick, 1994: 19.
934 See McGoldrick: 1994: 19.
935 See McGoldrick, 1994: 19.
936 See Blackshield and Williams, 2002: 1090.

remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided by the legal system of the state, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authority shall enforce such remedies when granted.[937]

In *Kruger v Commonwealth*[938] the decision involved the provisions authorizing that the forced removal of Australian aboriginal children from their families were held to be unconstitutional after a number of adult Aboriginals sued the Commonwealth alleging that as children, they had been 'removed into and detained and kept in the care, custody and/or control of' the chief protector in institutional reserves'. *Brennan CJ* summarized the rights of movement and political communication as follows:

"… They are freedoms which, of their own nature are universal, in the sense that they necessarily operate without restrictions as to time or place. That being so, they necessarily restrict state legislative power and thus, may be described as giving rise to general, although … not absolute freedoms. Even so, it does not follow that the Constitution gives independent or free standing rights to move in society and to associate with one's fellow citizens, which if breached, sounds in damages. Thus the right to move in society and to associate with one's fellow citizens is an aspect of personal liberty which is jealously guarded by the common law which is abridged only to that extent it is inconsistent with the

937 See Blackshield and Williams, 2002: 1090.
938 1997 190 Commonwealth Law Report 1.

positive rights including property rights or to the extent that the statute law validly provides to the contrary".[939]

The net-effect of the decision is that rights should be respected to a larger extent by states parties, to the extent that the enjoyment of such rights is not hindered without just cause and legal authority which sanctions the same in the advent of breach thereof. I recommend that section 45 of Lesotho Criminal Procedure and Evidence Act[940] dealing with Searches and Seizures be amended accordingly.

5.4.2 Limitations under International Covenant on Civil and Political Rights[941]

Joseph, Schultz and Castan[942] argue that some international Covenant on Civil and Political Rights, are absolute. Such are the rights in Article 7 of the Covenant

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939 Compare that with the United States of America's experience where the Bill of Rights included in the United States of America's Constitution is the classic example of express provision of the judicially enforceable limitations on the powers of Government. Blackshield and Williams, 2002: 1095 argue that its purpose is to erect secure Constitutional barriers against governmental intervention and that some of these barriers are expressed as limitations, and others as 'rights' but in practice all of them are understood as conferring Constitutional 'rights'. The learned authors claim that the United States of America's Constitution which had been adopted on 25th of September 1789 was clarified with the inclusion of the Bill of Rights as the "first" 10 Amendments in 1791 which covered a range of personal rights that must be steadfastly adhered to.
Note that the United States of America's Fourth Amendment relating to the rights of people to be secure in their person, houses, no arrests without warrant, no unreasonable searches and seizures is the most salient one for our purposes which guarantees a definite cause of action for any human rights violations by the police and this Amendment is welcome in Lesotho.. See also Basdeo, 2009: 80-81 who discusses section 13(8)(a) of the South African Police Service Act 68 of 1995 which, in my humble opinion, gives a reasonable operational application in relation to Police Raids. The section requires the Commissioner of Police to authorise in writing a police officer to set up a roadblock on any public road in a particular area, a checkpoint at any place in a particular area. The Police Commissioner is also expected to indicate specific legitimate goals for such roadblock or checkpoint. See section 13(8)(9)(i) therein.

940 See Act No.9 of 1981.

941 See Joseph, Schultz and Castan, 2005: 31. Note that Article 4 of Civil and Political Rights confers a right on the State Party to derogate from the ICCPR obligations in times of public emergencies. Joseph, Schultz and Castan 2000: 4 further observe that, that notwithstanding, this derogation clause is strictly limited by internal provisions of Article 4 so that there are in built guarantees against its abuse by the state. See also Newman and Weissbrodt, 1990: 25 for the full text of the Covenant - GA Res.2200A (XXI), December 16, 1966, 21U.N.GAOR Supp.16 at 52 U.N.Doc. A/6316 (1966), 999 U.N.T.S 171 entered into force March 23, 1976.

which prohibits torture, inhuman and degrading treatment or punishment and Article 8(1) which prohibits slavery. The learned authors further argue that a state cannot impose limits on an absolute right unless it has entered a valid derogation under Article 4 or has entered a reservation. The learned authors submit that where limitations are permitted, they must generally be prescribed by national law and that this means that the circumstances in which the limitation will be imposed are clearly delineated in an accessible law, whether that law should be statute or common law. They do, however, warn that such law should not be so vague as to permit too much discretion and unpredictability in its implementation.

International Covenant on Civil and Political Rights Articles 12(1) and 2, 13, part of 14(1), 18(1), 19(2), 21 and 22 do list permissible limitations, such as public order, national security and protection of rights of others. It would seem that all enumerated limitations must be 'necessary in a democratic society', which imports a notion of proportionality in determining the permissibility of a particular limitation. One must take stock of the fact that Articles 6(1), 9(1), 12(4) and 17 permit 'non-arbitrary' limits and that the notion of 'arbitrariness' also incorporates proportionality into the determination of the extent of such limits. It is suggested that the rights under the International Covenant on Civil and Political Rights are negative in nature in that the state parties are required to refrain from doing certain actions or not interfere and it is further suggested that the International Covenant on Civil and Political Rights also places horizontal obligations[943] and duties upon state parties to protect individuals from undue interference with their International Covenant on Civil and Political Rights by other people.

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942 See Joseph, Schultz and Castan, 2005: 31-32.

943 Compare horizontal obligations with what Joseph, Schultz and Castan, 2005: 35 term vertical obligations under the International Covenant on Civil and Political Rights (ICCPR) as remedies which should be available against the state within its municipal jurisdiction. That most obviously International Covenant on Civil and Political Rights should be enforceable as vertical implementation of the International Covenant on Civil and Political Rights. That the state is directly responsible for the actions of its own authorities, such as its Police, Prison officers, Army, Civil servants, Legislators and Judicial officers.

5.4.3 Human Rights Committee[944] and Freedom from Torture under International Covenant on Civil and Political Rights: Article 7[945]

The aim of the provisions of Article 7 of the International Covenant on Civil and Political Rights is to protect both dignity and the physical and mental integrity of the individual.[946] It is the duty of the state party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.[947]

Even in situations of public emergency such as those referred to in Article 4 of the Covenant, no derogation is allowed.[948] The committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reason, including those based on an order from a superior officer or public authority.[949] In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or disciplinary measure.[950]
In this regard the following decisions are of importance.

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944 Joseph, Schultz and Castan, 2005: 16 submit that the Human Rights Committee (HRC) is created under Article 28 of the International Covenant on Civil and Political Rights (ICCPR). Thus it is a panel of eighteen human rights experts. Human Rights Committee members are nominated by the state party of which they are nationals per Article 29 and are elected by ballot of all state parties to serve four year terms as implied by Article 32(1) and half of the Human Rights Committee is elected every two years and it convenes three times a year for three-week meetings, though members do an amount of relevant work between sessions. According to Article 31(2) International Covenant on Civil and Political Rights specifies that consideration be given to the 'equitable distribution of membership and to the representation of the different forms of civilization and to the principal legal systems'.

945 See general comment No. 20 of Article 7 of International Covenant on Civil and Political Rights: Freedom from torture which was adopted in 1984 and put in force in 1987 by Human Rights Committee. United Nations General .Assembly (UNGA).

946 See Harris, 2004: 696. See also Steiner and Alston, 1996: 500-501.

947 See Harris, 2004: 696

948 See Harris, 2004: 696

949 See Harris, 2004: 696

950 See Harris, 2004: 696.

In *State v Makwanyane*[951] the accused had been convicted on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. In *Furman v State of Georgia*[952] Furman was convicted of murder in Georgia and was sentenced to death. The question before the Court was whether imposition and subsequent carrying out of the death penalty in this decision constituted cruel and unusual punishment in violation of the eighth and fourteenth Amendments of American Constitution. The Court ruled that the death penalty did violate the said provisions.

5.4.4 Some Responsibilities of the Human Rights Committee

In the view of the Committee, states parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment upon return to another country by way of extradition, expulsion or refoulement.

The following submissions were made by the Committee: To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in the registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present. This information should also be available for purposes of judicial or administrative proceedings. Provision should be made against *incommunicado* detention. In that connection, states parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of detainees also requires that prompt and

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951 1995 (3) SA 391 CC.

952 In Furman v Georgia 408 US 238, 290 (1972) per Brennan J. The Court held that: "The death penalty is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by state". See also <<http:// international.westlaw.com as down loaded on 11/08/2009.

regular access be given to doctors and lawyers, and, under appropriate supervision when the investigation so requires, to family members.[953]

It is important for the discouragement of violations under Article 7 that law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment. [954] Article 7 should be read in conjunction with Article 2, paragraph 3, of the Covenant; the right to lodge complaints against maltreatment prohibited by Article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authority so as to make the remedy effective.[955]

In *Munkong v Cameron*[956] the author was a journalist who had long advocated for multiparty democracy in the one party state of Cameroon. He was arrested in 1988 following a British Broadcasting Corporation's interview in which he criticized the President of Cameroon and the government. The reason for the arrest was that his remarks were subversive, against an ordinance under which he was later charged. He contended that some of the books he wrote were either banned or prohibited from circulation. He claimed that while in detention, he was not only interrogated about his interview, but also, subjected to cruel and inhuman treatment.

The committee found that the conditions of his detention infringed upon Article 7 of International Covenant on Civil and Political Rights and that limitation of his freedom of speech was in breach of Article 19. The state party's argument was that they dismissed the author's claim under Article 9 by indicating that he had been arrested and detained in application of the rules of criminal procedures and that the police detention and preliminary enquires by the examining magistrate

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953 See Harris, 2004: 697.
954 See Harris, 2004: 697.
955 See Harris, 2004: 697.
956 1995 (2) European Human Rights Report (E.H.R.R.) 131.

were compatible with Article 19. In *Estrella v Uruguay*[957] the author, an Argentinian national, was a professional pianist living in Uruguay. He was officially informed that, as a Peronist, he was regarded as an opponent of the government and that his concerts and teachings were cancelled. He was therefore arrested. While in detention, he claimed to have been tortured with electric shocks, beaten with a rubber truncheon, punched and kicked with the hands tied behind him. The Human Rights Committee in this case ordered the state party to provide effective remedies, which also included compensation.

The Human Rights Committee in the two cited decisions clearly came down hard on the perpetrating Governments, which instead of providing effective protection to detained individuals and groups who find themselves in situations of peril and untold predicament, pay the appropriate price.

5.5 THE EUROPEAN CONVENTION OF HUMAN RIGHTS

The European Convention of Human Rights was signed on November 4, 1950 and was entered into force on September 3, 1953.[958] As originally adopted, the European Convention of Human Rights guaranteed[959] the following rights: the

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957 Reported by Human Rights Committee 1983 (2) 93. See also Shelton, 2005:189 who adds an important element that the European Convention permits both States' Parties and individuals to bring communications against States adhering to the Convention. Note further that according to Shelton, until 1998, the obligations of States' Parties were overseen by two organs, the European Commission on Human Rights and European Court of Human Rights after which the reform of the system was enacted by Commission Protocol 11, which replaced both Organs with a new Court of Human Rights to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and Protocols thereto'. Steiner and Alston, 1996:571 recall that the European Court of Human Rights was inaugurated by 1 November 1998.

958 See Buergenthal and Cohen, 1988: 81.

959 See Ramcharan, 1989: 17. Note that the word 'guarantee' has an international meaning and in that direction therefore, Ramcharan quotes with approval the 'Tottoni Report' which was accepted by the Council of the League of Nations in 1920 which addressed itself to the meaning of the term 'Guarantee' thus "… It may be advisable at the outset to define clearly the exact meaning of the term 'Guarantee in the League of Nations'. It seems clear that this stipulation means, above all, that the provisions for the protection of minorities are inviolable, that is to say, they cannot be modified in the sense of violating in any way rights actually recognized, and without the approval of the majority of the Council of the League of Nations". See League of Nation Document 5 of 1931. See also

right to life; the right not to be subjected to torture, inhuman or degrading treatment and punishment; freedom from slavery; the right to liberty, security of person and due process of law; freedom from *ex post facto* laws and punishment; the right to private and family life; freedom of thought, conscience and religion, freedom of expression and peaceful assembly and the right to marry and found a family.[960]

5.5.1 Police Activities and the European Convention

The Convention protects a variety of Human rights.[961] The rights which may in particular be relevant to Police activity include the right to life, per Article 2; integrity, per Article 3; personal liberty and security, per Article 5; respect for private and family life, home and correspondence, per Article 8; and peaceful assembly and freedom of association, per Article 11 of the Convention.[962] These rights may only be interfered with or restricted in such a manner as 'prescribed by law.[963] The procedure must be lawful under domestic law and must be in conformity with the provisions of the Convention.[964]

In *Sunday Times v United Kingdom*[965] the distillers had marketed a drug called 'Thalidomide' which had been taken by a number of pregnant women who later gave birth to deformed children. Writs were issued by parents and long negotiations followed without the case proceeding to trial. A weekly newspaper, *the Times*, began a series of articles with the aim of assisting the parents in obtaining a more generous settlement in their action. The editor filed an application with the European Commission of Human Rights claiming that the

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Van Dijk et al.1990:1 for tracing the genesis of the European Convention and see full text by Newman and Weissbrodt, 1990: 97 Nov.4 1950,213 U.N.T.S 222, entered into force Sept. 3 1953.

960 See Buergenthal and Cohen, 1988: 82.

961 See Clayton and Tomlinson, 1987: 426.

962 See Clayton and Tomlinson, 1987: 426.

963 See Clayton and Tomlinson, 1987: 426.

964 See Clayton and Tomlinson, 1987: 426.

965 1979 2 European Human Rights Report. 245.

injunction infringed upon their right of freedom under that Convention. The European Court held that the domestic law must comply with the following general requirements:

(i) The law must be adequately accessible. For example, the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case;

(ii) A norm cannot be regarded as 'law' unless formulated with sufficient provision to enable the citizen to regulate his conduct.

The European Convention, however, allows various restrictions of rights and freedoms, which must be applied for the purposes for which they are prescribed by it in accordance with Article 18 of the European Convention. It would further seem that even when restrictions are within the European Convention compliance with the general principle of 'proportionality' to suit the legitimate aim must be pursued.

5.5.2 Reasonable Grounds for Arrest and Detention

Strydom, Pretorius and Klinck,[966] while discussing the United Nations General Assembly body of principles for the protection of all persons under any form of detention or imprisonment, tabulate the meaning and the use of the relevant terms under the resolution[967] as follows: For the purposes of the body of principles:

(a) 'Arrest' means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

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966 See also Strydom, Pretorius & Klinck, 1997: 179. Note that these principles become very important for Lesotho where suspects of crime continue to suffer indiscriminate facets of arbitrary arrests or detentions without trial with the police having unlimited discretion.

967 General Assembly Resolution. 43/173 of 9 December 1988.

(b) 'Detained person' means any person deprived of personal liberty except as a result of conviction for an offence;

(c) 'Imprisoned person' means any person deprived of personal liberty as a result of conviction for an offence;

(d) 'Detention' means the condition of detained persons as defined above;

(e) 'Imprisonment' means the condition of imprisoned person as defined above;

(f) The words 'a judicial or other authority' means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.[968]

It is submitted that the clarifications of the meanings of these terms will enable us to appreciate the extent to which human rights abuses are perpetrated against the suspects of crime.

5.5.3 Arrest and Detention

A person's rights in relation to detention and arrest are guaranteed by Article 5 of the European Convention[969], which provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty and here are some of the following cases and in accordance with a procedure prescribed by law:

(a) The lawful detention of a person after conviction by a competent court;

(b) The lawful arrest or detention of a person for non-compliance with the lawful order of court or in order to

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968 See Strydom, Pretorius and Klinck, 1997: 179.

969 Which was signed in 1950 and entered into force in 1953.

secure the fulfillment of any obligations prescribed by law;

(c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent lawful authority;

(e) The lawful detention of persons for the prevention of the spreading of infectious diseases or persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition;[970]

2. Every one who is arrested shall be informed promptly, in a language which he understands of the reasons for his arrest;

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness

970 See Clayton and Tomlinson, 1992: 477-478.

of his detention shall be decided speedily by the court and his release ordered if the detention is not lawful.

5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."*[971]

If police arrest and detention procedures did not amount to clear and accessible rules, they may be challenged as not being in accordance with Article 5.[972]

The expression 'lawful' and 'accordance with a procedure prescribed by law' used in article 5(1) refer essentially to national law and establish the need to apply its rules; but they further require that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness.[973] In *Bozano v France*,[974] the applicant was convicted *in absentia* in Italy of several crimes. He was arrested in France, where the Italian authorities unsuccessfully sought an extradition. Their application to the French Court was refused on the grounds that the procedure followed in the trial was incompatible with the French public policy. This ruling was final and binding on the French Government which then issued a deportation order against the applicant who was taken by police to Switzerland by force. The proceedings before a French Court were quashed as an abuse of power. As far as reasonable grounds and detention are concerned, Article 5(1) of the European Convention on Human Rights states that 'everyone has the right to liberty and security of the person.' Clearly that cannot apply to some of the persons proceeded against for crimes, and so among the exceptions is Article 5(1)(c) which provides that:

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971 See Clayton and Tomlinson, 1992: 477-478.
The limitations on police powers of arrest imposed by the European Convention (1950) do not differ at all from those contained in the English Law. The European Convention seems to lay down a foundation stone for the respect for the fundamental human rights, especially by police officers who are more often than not working on a daily basis with the suspects of crime.

972 See Clayton and Tomlinson, 1992: 478.

973 See Clayton and Tomlinson, 1992: 478.

974 1987 9 European Human Rights Report. 297.

"The lawful arrest or detention of a person effective for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is considered necessary to prevent his committing an offence or fleeing after having done so."[975]

Arrest or detention is therefore not an infringement of an individual's right to liberty, in so far as there is 'reasonable suspicion' that he or she has committed an offence.[976] The term 'reasonable' immediately imports an element of judgment and degree into the protection, but this has not prevented the Court from finding breaches.[977]

In *Fox, Campbell and Hartley v United Kingdom*[978] the suspects were stopped by the police and were brought to the police station in Belfast where their vehicle was fully searched. They were arrested later on suspicion of terrorism activities gathering intelligence for the Irish Republican Army**.** The Court held that detention for up to forty-four hours of any persons suspected of being a 'terrorist' under a Northern Ireland law could not be justified unless the arresting authority was willing to disclose the basis for the suspicion. The United Kingdom government contended that suspicion was based on acutely sensitive material that could not be disclosed, since it would place the lives of others in danger.[979] The majority of the court, however, decided against this submission on the basis that it was not possible to ascertain whether the safe-guard in Article 5(1)(c) had been secured.

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975 See Ashworth, 1994: 63.
976 See Ashworth, 1994: 63.
977 See Ashworth, 1994: 63.
978 1990-91 13 European Human Rights Report (E.H.H.R) on p 157.
979 See Ashworth,1994:64

5.5.4 Derogations under the European Convention[980]

Ashworth[981] argues that the European Convention rightly allows no derogation from Article 3 on torture, inhuman, or degrading treatment, nor from Article 7 on non-retroactivity. However, the Convention 'does permit limited derogations' from other provisions under Article 15.

The following are some of the permissible derogations under the European Convention on Human rights:

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980 See Ashworth, 1994: 67. See also ORAA,1992:26-35 who tabulates the main features of the emergency powers envisaged in the treaties vide, The United Nations Commission on Human Rights to Economic, Social and Cultural Council (ECOSOC), which contains the expression ' in times of war or other Public Emergency', the International Covenant on Civil and Political Rights (ICCPR) which refers to a 'Public Emergency which threatens the lives of the nation, and the wording of American Convention which describes emergency in times of War, Public danger or other emergency that threatens the independence or security of a State Party. The main features are that (1) emergency must be actual or imminent (2) Its effect must involve the whole population (3) The threat must be to the very existence of the nation (4) Its declaration must be the last resort and must be of temporary measure. See also Robertson and Merills, 1993: 183 who confirm that the emergency powers requirements were accepted as a working definition in the decision of Greek. See Yearbook xii,1969 part ii at p. 72.

981 See Ashworth, 1994: 67-68. See also Chaskalson JP (retired) in *State v T Makwanyane and M* Mchunu CCT/3/1994 at page 65 where the learned Judge while referring to limitations of rights under the European Convention had this to say: "The European Convention also has no general clause, but makes certain rights subject to limitations according to specific criteria. The proportionality test of the European Court of Human Rights calls for balancing of ends and means. The end must be 'pressing social need' and the means used must be proportionate to the attainment of such an end. The limitation of certain rights is conditioned upon the limitation being 'necessary' in a democratic society for purposes defined in the relevant provisions of the Convention. The national authorities are allowed a discretion by the European Court of Human Rights in regard to what is necessary to a margin of appreciation, but not unlimited power. The margin of appreciation that is allowed varies depending upon the nature of a right and ambit of restriction. A balance has to be achieved between the general interest and the interest of the individual. Where the limitation is to be a right fundamental to democratic society, a higher standard of justification is required; so too where a law interferes with a 'legitimate aspect' of private life".

5.5.4.1 Public Emergencies

The first two paragraphs of Article 15 of the European Convention[982] read as follows:

> 1. *In times of war or other public emergency threatening the life of the nation any, contracting party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not in conflict with its other obligations under international law.*
> 2. *No derogation from Article 2, except in respect of death resulting from lawful acts of war or from Articles 3, 4 paragraph 1 and 7 shall be made under this Provision.*[983]

These provisions allow derogation from Articles 5 and 6 which, along with Article 3, are closely dealing with the criminal process.[984] In *Ireland v United Kingdom*[985] the British Government, faced with serious acts of terrorism perpetrated by members of the Irish Republican Army (IRA) and the loyalist groups in Northern Ireland, introduced special powers of arrest and detention without trial, which were widely used, chiefly against the IRA. Notices of derogation under Article 15(1) of the European Convention were lodged with the Secretary General of the Council of Europe in the view of "public emergency threatening the life of the Nation". The government of the Republic of Ireland brought an application before the Commission alleging, *inter alia;* (1) that the extrajudicial detention infringed Article 5(1) of the European Convention which reads:

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982 The European Convention of Human Rights (1950) entered into force in 1953.

983 See Ashworth, 1994: 67.

984 See Ashworth, 1994: 68.

985 1978 Series A. 25 (ECHR) 78 or Series A 25 of 18 January 1978 the European Court of Human Rights. Note that Article 5 of the European Convention safeguarded freedom of the person in prohibiting arrest or detention except for certain indicated purposes where government believed it will not fall under the permitted exceptions, while Article 15 allowed derogation (within state's limits or under specified conditions).

Everyone has the right to liberty and security of a person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:… the lawful arrest or detention of a person affected for the purpose of bringing him before a competent legal authority on reasonable suspicion of having committed an offence…while Article 5(3) provides: Everyone arrested or detained in accordance with the provisions of paragraph (1) (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.[986]

The Commission held that it was not saved by Article 15 (2) that various interrogation practices, in particular the so-called 'five techniques', which included wall-standing, hooding and deprivation of sleep and food amounted to torture and inhuman or degrading treatment contrary to Article 3.
Finally that the use of special powers primarily against IRA members constituted discrimination in violation of Article 14 (relating to non-discrimination of rights and freedoms).

The Commission unanimously found that the five techniques did constitute a practice of torture, but on the other hand the court accepted the contention of the United Kingdom government that the situation in Northern Ireland amounted to a 'public emergency' which threatened the life of the nation. It was held that the conditions for derogation set by Article 15 had not been overstepped in that case. The derogation from Article 5, on detention without being brought before a court and other matters, were therefore held to be permissible.

The European Commission on Human Rights was again seized with the matter in *Brogan v United Kingdom***.**[987] Terence Patrick Brogan was arrested by police at

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986 See Steiner and Alston, 1996: 604.

987 1988-9 11 European Human Right Report (E.H.R.R) 117. See also Steiner and Alston 1996: 601 on the discussion of *Brogan v United Kingdom* E.C.H.R 1988 Series A. no. 145 B 11 at p 117.

his home, detained in custody and released after five days on suspicion that he had attacked a police mobile patrol killing a police sergeant as a member of the Irish Republican Army and injuring another in August 1984.

The United Kingdom Government was again found to be in breach of Article 5 on the lengthy detention.[988] The use of Article 15 to derogate was challenged unsuccessfully in a separate proceeding, the court again holding, in *Brannigan and McBride v United Kingdom* [989] that persons were arrested at their homes by police on suspicion of Terrorist activities on 5 January 1989 pursuant to section 12(1)(b) of 1984 Terrorism Act and were detained for four days. The Commission held that the extent and impact of terrorist violence in Northern Ireland and elsewhere in the United Kingdom was sufficient to constitute a public emergency requiring exceptional measures, such as extended detention under the prevention of the Terrorism Act.

Seriousness of the offence becomes an important element in determining whether or not a derogation should be allowed. An argument which is sometimes raised is that given what the basic principle should yield in the face of very serious offences, there is a need to check before taking any action that may affect the rights of others.[990] This argument was even raised against the presumption of innocence, particularly in cases involving firearms or drugs, where there is alleged greater social danger.[991]

In *Malone v United Kingdom*[992] the applicant, an antiques dealer, was prosecuted for offences relating to dishonest handling of stolen goods. During the trial it was discovered that the applicant's telephone had been tapped by police, acting on the authority of the Home Secretary. Following his acquittal, on the criminal

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988 See Ashworth, 1994: 68.

989 1993 *The Times* 27 or 26 May of 1993 17 European Human Rights Report (E.H.R.R) at 539.

990 See Ashworth, 1994: 68.

991 See Ashworth, 1994: 68.

992 See *Malone v UK* 1985 7 European Human Rights Report.

charges, the applicant brought civil proceedings seeking to establish that the tapping of his telephone had been unlawful. The court stated that the inherent secrecy of the telephone-tapping leads to a 'danger of abuse that is potentially easy in individual cases and could have harmful consequences for democratic society as a whole'. It would seem that the court placed its emphasis on the need for 'adequate guarantees against abuse' and therefore found the United Kingdom in breach for failing to require judicial authority for any tapping. The same Court, reiterated that, the United Kingdom's argument and submission in relation to 'the increase of crime, particularly the growth of organized crime', the 'increasing sophistication of criminals and the ease and speed with which they can move about have made telephone interception an indispensable tool in the investigation and prevention of serious crimes'.[993]

5.6 THE POLICE POWERS OF SEARCH AND SEIZURE UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS

Police powers of search and seizure will breach the Convention if they do not comply with Article 8, which provides:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

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[993] See Ashworth, 1994: 69. See also *S v Naidoo* 1998 (1) BCLR 462 where McCall J held that: "Robbery in question has been referred to as the biggest in the history of South Africa" and that the crime cannot be brought under control unless 'there is an efficient, honest, responsible and respected police force' capable of enforcing the law. There is no law regulating telephone tapping in Lesotho hence the need for the Law Reform Commission to initiate one to protect citizen's rights to privacy with the necessary exceptions of course as depicted by various jurisdictions under review. See Van der Merwe, 1998: 462.
Note Bekker,et al., 2005: 5 where the learned authors quoted in approval Packer, 1968: 158 when he stated that: "The value system that underlies the crime control model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process". The learned authors argue that criminal procedure is, in the final analysis, a system which seeks to incorporate and balance certain fundamental values. And those, it would seem, include striking a balance between the interests of society in effective criminal law enforcement and the interest of society in the protection of the rights and freedoms of all individuals "suspected of, and arrested for, or charged with, or convicted of, and sentenced for crime".

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or moral, or for the protection of the rights and freedoms of others".[994]

Any interference with a person's private and family life, home and correspondence must, therefore, be 'in accordance' with clearly defined rules of domestic law and furthermore, in order to be 'necessary in a democratic society, it must therefore be founded on a pressing social need. In particular, it must be proportionate to the legitimate aim pursued.[995] This was the situation in *Schonenberger and Durmaz v Switzerland*.[996] The second applicant, who was a taxi driver was detained on remand. Then the first applicant, a lawyer, having been instructed by the second applicant's wife, sent him a letter informing him, *inter alia,* of his rights to act on his behalf. The letter had not been given to the prosecutor, so the applicant claimed violation of Articles 8 and 10 of the European Convention.

5.6.1 Body Samples, Photographs and Fingerprinting

Taking body samples may amount to 'inhuman and degrading treatment' contrary to Article 3 of the European Convention.[997] It might also breach the right of respect to private life under Article 8(1) unless justified by Article 8(2) of the European Convention.[998]

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994 See Clayton and Tomlinson, 1992: 481.
995 See Clayton and Tomlinson, 1992: 482.
996 1989 11 European Human Rights Report on p 202.
997 See Clayton and Tomlinson, 1992: 482.
998 See Clayton and Tomlinson, 1992: 483.

Du Toit, et al,[999] while addressing a similar situation as regards the ascertainment of bodily features of the accused, submit that section 37 of the South African Criminal Procedure Act,[1000] makes serious inroads upon the bodily integrity of an accused. The learned authors are quick to warn that these inroads should be seen in the light of the fact that the ascertainment of the bodily features and 'prints' of an accused often forms an essential component of the investigation of crime and is in many respects a prerequisite for the effective administration of justice, including the proper adjudication of a criminal trial.
The following South African decisions which are peculiar to Lesotho are very instructive:

In S v Huma and Another,[1001] the accused was charged with several counts of murder, attempted murder and contravention of the Arms and Ammunition Act[1002] Claasen J, held that the taking of fingerprints was neither inhuman nor degrading as the practice was accepted worldwide as a proper form of individual identification; that the taking of fingerprints in private could not lower a person's self-esteem; thus it did not constitute an intrusion into a person's physical integrity; so that if taken in terms of section 37 of the South African Criminal Procedure Act,[1003] they would be destroyed if the person was acquitted, and the

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999 Du Toit, et al. 2002 (Service 28) 3-1 – Chapter 3. Note that the learned authors seem to propose the rules of practice while conducting a police parade and it is submitted that these principles should one day become handy for incorporation and use in the Lesotho Mounted Police Service in Lesotho.
The rules generally encourage the recording of an identification parade by a conducting policeman in a police register i.e. an occurrence's book. The rules stipulate that the officer conducting the parade should not be an investigating officer and that suspects should be given reasons for the parade and must have access to legal representation. These rules are important in that they further encourage, for example the following: "At least eight persons or more should form a parade, there must be more than one suspect on the parade, this is more so because officers tend to expose the suspect, and a photograph of all involved may be taken and finally, if the suspect participates in more than one parade, then he should not be the only one appearing in both and the officer must as far as possible select the similar build, height, age or appearance of the suspect."

1000 See Act No. 51 of 1977.

1001 1995 (2) SACR 411 (W).

1002 See Act No. 75 of 1969

1003 See Act No. 51 of 1977.

taking of fingerprints could be a useful method for ensuring the acquittal of an accused.

In *S v Maphumulo*[1004] by *Combrink J,* the two accused had been indicted on charges of murder and house-breaking with intent to rob and robbery, involving aggravating circumstances. In this decision, the State had lifted certain fingerprints which were thought to be linked to the two accused.

The Court held that:
I have concluded, accordingly, that the taking of the accused's fingerprints, whether it be voluntarily given by them, or taken under compulsion in terms of the empowerment thereto provided in section 37(1), would not constitute evidence given by the accused in the form of testimony emanating from them, and as such would not violate their rights as contained in section 25(2)(c) or 25(3)(d) of the Constitution nor does it appear to be a violation of accused's rights as contained in section 10 of the Constitution, which reads: Every person shall have the right to respect for and protection of his or her dignity.[1005] *In the end, the police are in the circumstances entitled, in terms of the power conferred upon them by the provisions of section 37(1) South African Criminal Procedure Act,*[1006] *to take the accused's fingerprints, forcibly if necessary. In doing so, however, the police are enjoined to exercise discretion and in this case, to have due regard to the identity of the accused and as far as the application is concerned, and for the reasons mentioned, I refuse to make the order applied for under section 37(3)(a).*[1007]

In *Minister of Safety and Security v Gaga*[1008] applicants filed an urgent application on the basis that they had reason to believe that the respondent was shot by one of the two deceased in the course of a double-murder which took

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1004 1996 (2) SACR 84 (N).
1005 *S v Maphumulo* 1996 (2) SACR 84(N).
1006 See Act No. 51 of 1977.
1007 *S v Maphumulo* 1996 (2) SACR at 84 (N).
1008 Unreported decision case no.190/26 of February 2002(C.P.D).

place during a botched robbery. There was expert evidence that the bullet in the respondent's leg was either a .38 or .357 calibre bullet. The bullet was visible on an X-ray. An expert from the police forensic laboratory claimed that if the bullet were made available to him, he would have been able to ascertain whether it was fired from the .38 revolver licensed in the name of the deceased. An orthopaedic surgeon also stated that removal of the bullet was a relatively safe and simple medical procedure under general anaesthetic. The second applicant obtained a search warrant to secure the bullet, but was unable to act in terms of it without employing reasonable force as the respondent refused to consent to the removal of the bullet from his leg.

Desai J ordered the surgical removal of a bullet from the leg of the accused for purposes of ballistic tests and held that it was necessary for proper criminal investigation.

The cases as quoted above illustrate a point that it is sometimes imperative that the accused person can be searched in the interest of justice. Lesotho has no corresponding section 37(1) similar to the South African Act, but such evidence could be obtained through the use of ordinary principles of evidence. It is recommended that this section be applied in Lesotho in order to clarify the procedure further.

5.6.2 European Convention and Police Surveillance

Clayton and Tomlinson[1009] argue that police surveillance may also breach the guarantee of privacy contained in Article 8 of the European Convention on Human Rights. In *Klass v Germany*[1010], the applicants, who were German Nationals, one Klass claimed that restriction by the Secrecy of the mail, post and

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1009 Clayton and Tomlinson, 1992: 483. See also Shelton, 2005: 294 who asserts that the European Court of Human Rights awards monetary compensation if necessary, for example, for pecuniary losses, non-pecuniary damages or (loss of life or limb) or costs and expenses.

1010 1978 2 European Human Rights Report (E.H.R.R) 214.

telecommunications Act[1011] was contrary to Article 10 (2) of the European Convention. The European Court took notice both of the technical advances made in surveillance and of the developments of terrorism. The court stated that the state is entitled to counter terrorism with secret surveillance of mail, post and telecommunications under exceptional circumstances, although it cannot adopt whatever measures it thinks appropriate in the name of the struggle against espionage and terrorism.

In *Klass*[1012], the court gave some general guidance as to the application of Article 8 of European Convention to legislation authorizing surveillance thus:

1. *"That legislation must be designed to ensure that surveillance is not ordered haphazardly, irregularly or without due and proper care;*
2. *Surveillance must be reviewed and must be accompanied by procedures which guarantee individual rights;*
3. *It is in principle desirable to entrust the supervisory control to a judge in accordance with the rule of law, but other safeguards might suffice if they are independent and vested with sufficient powers to exercise an effective and continuous control;*
4. *If the surveillance is justified under article 8(2) the failure to inform the individual under surveillance of this fact afterwards is, in principle, justified".*[1013]

In *Malone v United Kingdom*[1014] it was held that the right to privacy must be 'in accordance with the law', with the result that the telephone tapping and metering was a breach of the European Convention. Explaining the meaning of this phrase, the European Court on Human Rights stated that the phrase implied that there had to be a measure of legal protection in domestic law against arbitrary

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1011 See Act No. 13 of 1968.
1012 1978 2 European Human Rights Report (E.H.R.R) 214.
1013 1978 2 European Human Rights Report (E.H.R.R) 214.
1014 1985 7 European Human Rights Report (E.H.R.R) 14.

interferences by public authorities with the rights protected by Article 8 of European Convention on Human Rights.

The law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which the authorities are empowered to resort to secret and potentially dangerous interference with Article 8 of the European Convention on Human Rights.[1015]

Since the implementation in practice of surveillance was not open to scrutiny by the individuals concerned, or the public at large, it would be contrary to the rule of law for the discretion granted to the authority to be expressed in unfettered terms: the law had to indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, having regard for the legitimate aim of the measures in question, to give the individual adequate protection against arbitrary interferences.[1016]

The European Court of Human Rights has ruled that telephone tapping carried out on the instructions and under the supervision of an investigating judge in France violated Article 8 of the European Convention of Human Rights.[1017]

Thus, in *Huvig v France*[1018] the applicants were suspected of, and subsequently convicted of various offences of tax evasion by using forged invoices**.** In the course of judicial investigation, the investigating judge authorized a senior police officer to have the applicant's business and private telephone tapped. The applicant claimed violation of Article 8 of the European Convention. *In Kruslin v France,*[1019] the applicant was convicted of armed robbery. One decisive piece of evidence against him was a tape recording of his telephone conversation with another person whose telephone was also tapped in relation to other

1015 See Clayton and Tomlinson, 1992: 484.
1016 See Clayton and Tomlinson, 1992: 484.
1017 See Clayton and Tomlinson,1992: 484.
1018 1990 12 European Human Rights Report (E.H.R.R) 528.
1019 1990 12 European Human Rights Report (E.H.R.R) 547.

proceedings. He argued that the state had offended against his rights under Article 8 of the European Convention of Human Rights.

The following deficiencies were identified by the European Court of Human Rights:

(a) *The categories of people liable to have their telephones tapped and the nature of the offences which might give rise to an order were nowhere defined;*

(b) *Nothing obliged the investigating judge to set a limit on the duration of the tapping;*

(c) *The procedure for drawing up the summary reports of the intercepted conversations was unspecified;*

(d) *The precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and by the defence were unspecified;*

(e) *The circumstances in which the recordings might or must be destroyed, particularly where the accused had been discharged or acquitted, were unspecified.*

Further in *Leander v Sweden*[1020] the applicant had been refused permanent employment as a museum technician with the Naval Museum on account of certain secret information which allegedly made him a security risk. He contended that vetting had involved an attack on his reputation. The European Court held that the gathering of information in a secret police register and its release to the public service, the applicant's prospective employer, did not transgress Article 8 of European Convention. It was contested that there had been an interference with the applicant's rights under Article 8(1) of the European Convention on Human Rights. The Court was satisfied that the Swedish personnel control system had the legitimate aim of protecting national security. Thus it was also 'in accordance with the law' and that in this regard, the Court

[1020] 1987 9 European Human Rights Report (E.H.R.R) 433.

attached particular importance to the involvement of the parliamentary committee on justice in the supervision of the system. It was further held that, police practices of 'visual and aural surveillance' are clearly in breach of Article 8 of the European Convention as they are regulated only by administrative guidelines and not therefore 'in accordance with the law'.

Article 8 of the European Convention may prove particularly useful in relation to the police, because it guarantees rights which receive almost no protection under English law. It is submitted that Lesotho is the country whose laws by far require intensive amendments, as most of them are old, rigid and unprogressive in both time and space. It is further recommended that applications under this article may often be the only remedy available to those who have been subject to unreasonable surveillance. One would like to conclude this part, therefore, by referring to the dicta of *McCall J* in *S v Naidoo*[1021] where in a robbery case, the prosecution sought to rely on evidence of a conversation intercepted in terms of the Interception and Monitoring Prohibition Act.[1022] The learned judge held that:

> *I suggest, the textbook example of the principle that the 'bad faith' conduct of the police should weigh heavily in favour of the exclusion of unconstitutionally obtained evidence and it is not in the interests of justice to permit the police to deliberately flout those rules which govern their investigation powers and which seek to protect Constitutional rights where the primary rules (in this instance the provisions of the Interception and Monitoring Prohibition Act) are clear, the secondary rule (in this instance the exclusionary rule contained in section 35(5) of South African Constitution ought to be invoked with vigour.*[1023]

1021 1998 (1) BCLR 46.

1022 See Act No. 127 of 1992.

1023 Compare that with *R v Duarte* 1990 (1) SCR 30 where brief facts were that as part of investigation into drug trafficking, the Ontario provincial police rented an apartment which was to be used and occupied by a police informer working for undercover police. The apartment was equipped with audio-visual recording equipment installed in a wall. Mario Duarte, the undercover police and one Paul Vidotto met at the apartment of the informer to discuss cocaine transactions which were recorded. The appellant was charged with conspiracy to import a narcotic. On trial he put his challenged on a *Voir dire and* the validity of Canadian section 178.11(2)(a) of the Code. The Code excepted the prohibition

5.6.3 The European Convention and Freedom from Torture or Inhuman or Degrading Treatment or Punishment

Sieghart[1024] tabulates several concepts that are usually used in explaining the nature and extent of the pain and suffering of individuals at the hands of policemen as follows:

1. Torture
2. Cruel treatment
3. Cruel punishment

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of unauthorized electronic surveillance, the interception of conversation to which one of the parties consented. The Court held that, the actions of the authorities infringed the applicant's rights to be secure from unreasonable search and seizure under section 8 of Canadian Charter of Rights and Freedoms as such, evidence concerning the interpretation of section 24(2) of the Canadian Charter of Rights and freedoms was excluded. It was held further that evidence of electronic participant surveillance should be admitted despite the infringement of an important charter right and despite the fact that the evidence could have been procured without infringing the Charter. The decisive factors favouring admission were that the infringement was neither deliberate nor flagrant and that the police had acted in good faith and had a good reason to believe that was the legal position. Contrast that with the decision of New York v Quarles 467 US 649 (1984) where facts were that the suspect was detained and frisked by police in a supermarket where he was found wearing an empty shoulder holster after a police officer was informed that the suspect was carrying a gun. The police officer believed that the suspect had just removed the gun thus discarding it in a supermarket where any customer may make use of it. The Supreme Court of the United States of America held that: 'There is a public safety exception to the requirement that Miranda warnings be given …' writing for the majority Rehnquist J held that the accused's statement ('the gun is over there') and the real evidence (the revolver) obtained prior to the accused having been warned in terms of *Miranda v Arizona* 483 US 436 (1966) were admissible.

. McCall J warns, however, that the fact that *Madiba* 1988 (1) BCLR 38 (where two policemen had obtained real evidence) (two firearms in the course of a search of premises which had been forcibly entrenched) the Court was satisfied that there had been breach of the accused's Constitutional right to privacy. The court went further to state that the fact that each court had to apply its own peculiar exclusionary rule, cannot detract from the following basic protection: "The exclusion of unconstitutionally obtained evidence, however necessary it might be for the purpose of promoting legality. As a result, enforcing Constitutional rights must always be considered in the context of the realities that the police officers face in the execution of their duties".

The court further held that:"One of the realities of criminal investigation is that police officers will – from time to time under pressing circumstances and through no fault of their own, have to take snap decisions on 'Constitutional issues. The Court finally held therefore that:

"I suggest that courts should, in their subsequent and dispassionate judicial assessment of the Constitutionality of the conduct of the police officer, constantly bear in mind that the honest and reasonable blunder of the bobby on the beat was not necessarily an attempt to circumvent or side-step Constitutional rights, but an honest attempt to act in accordance with Constitutional due process requirements".

1024 See Sieghart, 1983: 161.

4. Inhuman treatment
5. Inhuman punishment
6. Degrading treatment
7. Degrading punishment

In *Denmark v Greece*[1025] the European Commission noted that 'all torture must be inhuman and degrading treatment and added that- the word 'torture' is often used to describe inhuman treatment. It could be used for obtaining information or confessions, or for the infliction of punishment. This is an aggravated form of inhuman treatment.[1026]

The following judgments of the European Court of Human Rights are very instructive.

In *Ireland v UK,*[1027] it was concluded that the conduct established against the British Security Forces in Northern Ireland constituted inhuman and degrading treatment. The European Court adopted its earlier definition of torture as 'an aggravated form of inhuman treatment' and found that the conduct established satisfied that test. The Court defined torture as: 'A *d*eliberate inhuman treatment causing very serious and cruel suffering'. It held further that the conduct established did not occasion suffering of the particular intensity and cruelty implied by the word 'torture' as so understood.[1028]

The European Court has found the following examples to amount to torture and physical brutality: 'Falanga' or 'Bastinado.'[1029] This refers to an the application of electric shock, the placing of a metal clamp on the head which is then screwed onto both sides of the temples, pulling out of hair from the head, or pubic region, kicking of the male genital organs, dripping water on the head, intense noises to

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1025 3344/1967 European Human Rights Report (E.H.R.R.).
1026 See Sieghart, 1983: 162.
1027 European Court of Human Rights (E.C.H.R) Series A, No.25 18 Jan. 1975.
1028 Judgment 2 European Human Rights Report 1971 25.
1029 Sieghart, 1983: 164.

prevent sleep, introduction of a stick into the rectum, burning with cigarettes, burial up to the head, insertion of pins under nails, being hung up head downwards over a fire, having one's hands manacled behind the back for several days or being kept handcuffed for a prolonged period.[1030]

In *Denmark v Greece*[1031] the European Commission held that the conditions of detention may sometimes amount to torture. These include overcrowded detention quarters, lack of proper washing facilities, absence of heating in winter, lack of hot water, poor lavatory facilities, unsatisfactory dental treatment, close restriction of letters, visits and the extreme manner of separating detainees from their families.

'Cruel treatment'

The word 'cruel' does not appear in the European Convention for the Protection of Human Rights and Fundamental Freedoms[1032] Article 3.The word does appear in the Human Rights Committee,[1033] the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights. The word 'cruel' also appears in the International Covenant on Civil and Political Rights Article 7 and in the American Convention on Human Rights[1034] Article 5(2). Surprising enough, the word 'treatment' does not appear either in the English or the United States of America Bill of Rights, but it appears in the Canadian Bill of Rights where it has not so far been successfully invoked in this respect and as such has not received legal interpretation or application[1035].

1030 See Sieghart, 1983: 163.

1031 European Human Rights Report 1967. Note that it was also held that solitary confinement, isolation in police cell without food, water, or access to toilets, more executions, threats to throw a person out of a window, the use of intuiting language, rubbing the head with vomit, forced to strip naked constitute torture.

1032 European Convention for Protection of Human Rights and Fundamental Freedoms as adopted in 1950 and came into force in 1953.

1033 United Nations Human Rights Committee as created under International Covenant on Civil and Political Rights (ICCPR) of 1966.

1034 American Convention on Human Rights which was adopted in 1969 and entered into force in 1978.

1035 See Sieghart, 1983: 165.

'Cruel punishment'

For similar reasons, there is, so far, no international jurisprudence on the interpretation or application of the expression 'cruel punishment'.[1036] This expression is found in both the eighth Amendment to the United States of America Constitution and the English and the Canadian Bills of Rights.[1037] It has been interpreted and applied by the Superior Courts..[1038]

From those decisions, the following propositions may be extracted:
"A punishment was originally considered cruel if it involved torture or a lingering death, for example burning at the stake, quartering, the rack and thumbscrew, and in some circumstances solitary confinement were mere classical forms of cruel punishment."[1039]

'Inhuman treatment'

In *Denmark v Greece*[1040], the European Commission on Human Rights stated that the notion of inhuman treatment covers treatment which deliberately causes severe suffering, mental or physical. And in the particular situation is unjustifiable. In *Ireland v United Kingdom,*[1041] the Commission noted that the use of the term *'unjustifiable' had given rise to cases such as the duration of the treatment, its physical or mental aspects and, in some cases, the sex, age, and the state of health of the victim.*[1042]

All methods of interrogation which go beyond the mere asking of questions may bring some pressure on the person being interrogated, but they cannot, as by that fact alone, be classified as inhuman[1043]. The European Commission has noted that:

1036 See Sieghart, 1983: 165.
1037 See Sieghart, 1983: 165.
1038 See Sieghart, 1983: 165.
1039 See Sieghart, 1983: 165.
1040 3344/67 European Human Rights Report.
1041 European Human Rights Report 1971 25 (E.H.R.R).
1042 See Sieghart, 1983: 167.
1043 See Sieghart, 1983: 167.

There may sometimes be a certain roughness of treatment in the form of slaps or blows by the hand on the head or face which is often tolerated and accepted by detainees as being neither cruel nor excessive[1044]*.* This type of treatment may be the only acceptable treatment.

Deprivation of sleep or restrictions on diet, if considered separately, may not as such constitute inhuman treatment.[1045] However, the combined application of several techniques which are designed to cause severe mental and physical stress, in order to obtain information from the suspect, would constitute inhuman treatment.[1046]

The deportation or extradition of a person may constitute inhuman treatment if there are substantial grounds to fear that such a step might expose the person concerned to torture or to cruel, inhuman, or degrading treatment or punishment in the state to which he is being sent. Where there are adequate medical grounds for the assumption that such a measure might, owing to the mental state of the person concerned, lead to serious damage to health or the danger of suicide.[1047]

In *X v Netherlands*,[1048] it was held that deportation or extradition did not amount to inhuman treatment while, in *De Corney v United Kingdom*,[1049] it was held that solitary confinement of a person under interrogation or awaiting trial, having regard to its strictness, its duration and end pursued, may constitute inhuman treatment.

'Inhuman punishment'

Apart from the dictum of the European Commission in *Tyrer v United Kingdom,*[1050] it was held that the suffering occasioned must attain a particular level before a punishment can be classified as 'inhuman'. In some instances, it

1044 See Sieghart, 1983: 167-168.
1045 See Sieghart, 1983: 168.
1046 See Sieghart, 1983: 168.
1047 See Sieghart, 1983: 167-168.
1048 European Human Rights Report 1983 18 (E.H.H.R) 63.
1049 European Human Rights Report 1972 2. (E.H.H.R) 560.
1050 European Court of Human Rights Series A. No. 26 of 1978.

was held that life imprisonment with no hope of release becomes inhuman and here again there seems to be no international interpretation or application binding.[1051]

'Degrading treatment'

In *Denmark v Greece,*[1052] as already referred to, the Commission defined 'degrading treatment' as:

"Treatment which grossly humiliates an individual or drives him to act against his will or conscience".

The Commission applied a similar test when it held that the five techniques used by the British Security forces in the interrogation of suspects in Northern Ireland were degrading:

'Since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[1053]

'Degrading punishment'

For punishment to be degrading, the humiliation and debasement involved must attain a particular level and must, in any event, be other than the usual element of humiliation involved in judicial punishment[1054].

Harris, O'Boyle and Warbrick[1055] add an important element that 'degrading' has a meaning in connection with degrading treatment as in *Tyrer vs United Kingdom.*[1056] Here, the appellant, a citizen of the United Kingdom, resident on

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1051 See Sieghart, 1983: 169.

1052 European Human Rights Report 1967.

1053 *Ireland v United Kingdom* 5310/1971 2 E.H.R.R.25

1054 See Sieghart, 1983: 170.

1055 Harris, O'Boyle and Warbrick,1995:85. Note that in the decision of *Albert v Belgium* (A58 1983 EHRR) it was held that striking a doctor off a role is not sufficient to warrant humiliation and I submit that the same could apply in a case of a lawyer who misconducts himself i.e. by mishandling client trust money.

1056 A 25 1978 European Court of Human Rights Series A, No.26 April 1978 (ECHR).

the Isle of Man, pleaded guilty in the Juvenile court to unlawful assault occasioning actual bodily harm to a senior pupil at his school. The latter having reported the applicant together with three others for taking beer into the school, as a result of which they had been caned. The court characterized a degrading punishment as follows: ...*In order for a punishment to be degrading and be in breach of Article 3 of the European Convention against torture which is to the effect that…no one shall be subjected to torture or inhuman or degrading treatment or punishment*,[1057] the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation. These, for example happen in the military, prisons, schools, etc, but this no longer the case at schools as that in itself is regarded as human rights' violations.

As far as torture is concerned, the court in *Ireland v United Kingdom,*[1058] defined torture as: *'Deliberate inhuman treatment causing very serious and cruel suffering.'* Applying this test, it held that neither the use of the five techniques nor the physical assaults that had occurred in that case amounted to torture.

1057 Harris, O'Boyle and Warbrick, 1995: 55. Note that ill-treatment also must attain a minimum level of severity if it is to fall within the context of Article 3.

1058 *Ireland v United Kingdom*. The following are given interviewing techniques examples which are meted out against suspects of crime in *Ireland v United Kingdom* European Human Rights Report (E.H.H.R) 25 1971 as described by the court –See Harris, O'Boyle, Warbrick,1995:65-66

"(a) Wall standing: forcing the detainees to remain for a period of some hours in a 'stress position', described by those who underwent it as being 'spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back causing them to stand on their toes with the weight of the body mainly on the fingers;

(b) Hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation.

(c) Subjection to noise; pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) Deprivation of sleep: pending their interrogations, depriving detainees sleep;

(e) Deprivation of food and drink: subjecting the detainee to reduced diet during their stay at the centre pending interrogation". See also Wolfendale, 2007: 101 who reiterates the unanimous decision of the European Committee on Human Rights that "The use of the five techniques amounted to torture, inhuman and degrading treatment."

The court went further to state that Ill-treatment 'must attain a minimum level of severity', if it were to fall within Article 3.[1059] The threshold level is a relative one: *"It depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and in some cases, the sex, age and state of health of the victim".*[1060]

In contrast to torture, 'inhuman treatment' need not be intended to cause suffering, although in practice it is likely that such an intention will be present and as the court has emphasized, the crucial distinction lies in the degree of suffering caused.

Article 3, which applies to human beings, but not other legal persons, contains an absolute guarantee of the rights it protects.[1061] It has been said to do so in two senses. Firstly, it cannot be derogated from even in times of war or other public emergency.[1062] Secondly, Articles 3, unlike most Convention Articles, is expressed in unqualified terms.[1063]

This can be understood to mean that ill-treatment within the terms of Article 3 is never permitted, even for the highest reasons of public interest.[1064] On this basis, it has been held that the need to fight terrorism cannot justify violations of physical integrity or the use of psychological interrogation techniques causing suffering above the threshold level of Article 3.[1065] However, there are recognized exceptions to the absolute nature of Article 3 in this second sense.[1066]

America's Supreme Court ruled that the death penalty constitutes cruel and unusual punishment.

1059 Harris, O'Boyle and Warbrick, 1995: 56.
1060 Harris, O'Boyle and Warbrick, 1995: 56.
1061 Harris, O'Boyle and Warbrick, 1995: 55.
1062 Harris, O'Boyle and Warbrick, 1995: 55.
1063 Harris, O'Boyle and Warbrick, 1995: 55.
1064 Harris, O'Boyle and Warbrick, 1995: 55.
1065 Harris, O'Boyle and Warbrick, 1995: 56.
1066 Harris, O'Boyle and Warbrick, 1995: 56.

In *R v Therens*[1067] the Court held that a person who was required to submit to a breathalyzer test was a person under detention, even if the deprivation of liberty was very brief, and that the constraints exercised by the police authority were of a moral or psychological, rather than of a physical, nature.

5.6.4 Prohibition against Torture

Umozurike[1068] supports the question of limitation of rights in that some rights may be derogated from, abridged, limited or suspended under certain circumstances and that in both international and municipal law, it is acknowledged that certain rights are not absolute, but may be qualified in the given conditions. Article 29(2) of the United Nations Universal Declaration of Human Rights[1069] provides that "in the exercise of his rights and freedom, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". Thus under Article 4 of the United Nations Declaration on Human Rights, no one may be arbitrarily deprived of his life or integrity. In other words, *Umozurike*[1070] argues that the right to life and to integrity are subject to

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1067 1985 13 CCR 193 or DLR 13 p. 55.
In *Therens,* the Supreme Court had evaluated the contents of the right to counsel. A policeman, having reasonable and probable grounds for doing so, made a demand on the accused to accompany him for the purpose of obtaining samples of the accused's breath for analysis. The accused complied, but was at no time informed of his right to retain and instruct a counsel. The accused was also not put under arrest. The Court concluded that the demand by the constable, that the accused accompany him to the police station, constituted a detention and that the accused was accordingly entitled to be informed of his right to counsel. The congruent evidence had to be excluded if, "having regard to all the circumstances, the admission of it would bring the administration of justice into disrepute". See section 24(2) of Canadian Bill of Rights.

1068 See Umozurike, 1997: 29. The Universal Declaration on Human Rights Article 4 of 1948 states: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

1069 United Nations Universal Declaration on Human Rights 1948.

1070 See Umozurike,1997:29-30 who makes a distinction between the two groups of Rights; those rights that may be restricted and those that must not. According to him, the restrictions are not by way of derogations as numerous Human Rights Treaties, but by Claw-Back Clauses. Claw-back clauses are those which confer a wider discretion to exclude the enjoyment of the right totally while on the contrary, a derogation clause

law or may be defined in circumstances prescribed by law as is the case in Lesotho under section 298 of the Criminal Procedure and Evidence Act while Africa in *S v Makwanyane*[1071] the death sentence was abolished in South Africa. Notwithstanding *Tyrer v United Kingdom,*[1072] the Court held that birching by order of a judicial authority on the Isle of Man amounted to degrading punishment and thus violated article 3 of the European convention. This was the case in South Africa in *S v Williams*[1073] as we have indicated above.

Without warrant if they suspect on reasonable grounds that the provisions of this section have been offended against. In 1993 a new Public and Processions Act[1074] was enacted which in the main related to the provisions of the 1984 Internal Security Act in that police officers were merely notified about the impending public meeting or a procession as opposed to a discretion to refuse in the old legislation.

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normally states the circumstances in which the rights may be limited, for example, by a law reasonably justifiable in a democratic society .It is submitted that the Lesotho Constitution does not have Claw-back clauses, but uses derogation clauses to limit any fundamental right with the exception of freedom from torture.

1071 1995 BCLR 665 CC p 676 where Chaskalson P (as he then was) held that: "The right to life and human dignity are the most important of all rights, and the source of all other personal rights in Chapter 3.By committing ourselves to a society founded on the recognition of human rights, we are required to value these two rights above all others" on pp 722H-723 B.

1072 European Court of Human Rights 25 April 1978 Series 26-31 Langa J (as he then was) quotes with approval in his judgment in *S v Williams* 1995 3 SA on p. 643 the decision of *Tyrer v UK* (ECTHR) where the Court characterised the whipping of a juvenile thus:

"The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is a perfect case violence permitted by the law, ordered by the judicial authorities of the state and carried out by the police authorities of the state. Thus, although the applicant did not suffer any severe or long lasting physical effects, his punishment-whereby he was treated as an object in the power of authorities- constituted an assault on precisely that which is in the main purpose of Article 3 to protect, namely a person's dignity and physical integrity…The institutionalised character of this violence, is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender." Note that Article xxv of the American Declaration of Rights and Duties of Man states that every individual who has been deprived of his liberty has the right … to humane treatment during the time in custody, while Article xxxvi states that every person accused of an offence has the right not to receive cruel, infamous or unusual punishment.

1073 1995 171 BCLR 861 (CC).

1074 See Act No. 2 of 1993, section 3 thereof.

5.6.5 Questioning and the right to life

De Waal, Currie and Erasmus[1075] place two obvious limitations to the right to life:

(a) Self-Defence and Necessity

According to De Waal, Currie and Erasmus, the right to life, in the sense of the right not to be killed is, like all the other rights and freedoms, not absolute, and may be limited in terms of section 36 of the South African Constitution.[1076] In *S v Makwanyane* above, the court held that the law may validate killing in self-defence and it was further held that lethal force may legitimately be applied by the state to kill a hostage taker to save the life of an innocent hostage whose life is in real danger. That the state may act to stop a rebellion and may protect itself from external aggression.

1075 In De Waal, Currie & Erasmus, 1999: 226.
De Waal, Currie and Erasmus, 1999: 224 note that entrenchment of the right to life requires the state to lead in re-establishing respect for human life and dignity in South Africa. Langa J explained the implications of this duty as follows in Makwanyane that:
"The history of the past decades has been such that the value of life and human dignity have been demeaned. Political, social and other factors created a climate of violence resulting in a culture of rehabilitation and vengeance. In the process, respect for life and for the inherent dignity of every person became the main casualties. The state has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify a high regard for the dignity of the person and the value of every human life … implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral preservation rather than force; on example rather than occasion. In this new context, then, the role of the state becomes clear. For good or worse, the state is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the state must take the lead. In acting out this role, the state not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by example, society's own regard for human life and dignity by refusing to destroy that of the criminal".

1076 See Act No. 108 of 1996.

(b) Killing while making an arrest

De Waal, Currie and Erasmus concede that the legality of a police officer shooting at an escaping suspect or convict is a complex issue[1077]. In *S v Makwanyane*[1078] it was held that such a shooting could not be equated with execution, but that greater restriction on the use of force in making an arrest may be one of the consequences of the establishment of a Constitutional state which respects every person's right to life.

In fact, one tends to agree with *Nel*[1079], that if policing is done with full regard to basic rights, it does not have to be an indication of a "soft on security" approach, and neither does that mean that law enforcement has to be less effective, or that control over crime is lost.

As *Swanepoel*[1080] puts it, the limitation placed by section 36(1) of the South African Constitution applies a criteria of reasonableness and justifiability in an open and democratic society based on human dignity. It is suggested that Lesotho must therefore act accordingly.

5.6.6 International Perspective on the Right to Life

Jayawickrama[1081] is of the opinion that the right to life is the supreme right of human beings. In *Carmargo v Colombia*[1082] it was held that:

1077 De Waal, Currie and Erasmus, 1999: 226.

1078 1995 (3) SA 391 CC.

1079 Nel, 1998: 69.

1080 Swanepoel, 1997: 347.

1081 Jayawickrama, 2002: 2.
Jayawickrama is of the opinion that this formula was adopted in the American Convention on Human Rights Article 4 and not in European Convention of Human Rights Article 2 which prohibits 'intentional' killing and proceeds to specify three distinct exceptions to that prohibition. Another problem that arose at the drafting stage of international Covenant on Civil and Political Rights was the fact that several countries in which domestic law authorized the application of the death penalty. He argues that some opposition was expressed to any recognition of this fact by the inclusion in the article of provisions dealing with capital punishment and that it was feared that an impression might be

> "It is the right from which all other rights flow, and is therefore basic to all human rights and it is one of the rights which constitute the irreducible core of human rights".

It is, therefore, a non-derogable event which threatens the life of the nation in times of public emergency.[1083] When the International Covenant on Civil and Political Rights, Article 6, was being drafted, different opinions were expressed as to how the right should be formulated.[1084] One view was that it should enunciate the principle that no one should be deprived of his life under any circumstances.[1085] It was maintained that in formulating the most fundamental of all rights, no mention should be made of circumstances under which the taking of life might seem to be condoned.[1086]

Against this view, it was contended that the Covenant must be realistic that circumstances did exist under which the taking of life is justified.[1087] A second view was that it was desirable to define as precisely as possible the exact scope of the right and the limitations thereto in order that states would be under no uncertainty with regard to their obligations in a covenant which would not admit progressive implementation of its provisions[1088]. The proper method of formulating the right would be to specifically spell out the circumstances in which the taking of life would not be deemed a violation of the general obligation to protect life.[1089]

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conveyed that the practice was sanctioned by the international community. Its other argument was that capital punishment had no deterrent effect on crime and was contrary to the modern concept of punishment, which was to bring about the rehabilitation of the offender. It was further acknowledged on the other hand, that capital punishment did exist in certain countries, its rejection in the covenant would create difficulties of ratification for those countries which had not yet abolished it.

1082 Communication No. 45/1979 of Human Rights Committee 1982 (6) Annexure xi.

1083 See Jayawickrama, 2002: 243.

1084 See Jayawickrama, 2002: 243.

1085 See Jayawickrama, 2002: 243.

1086 See Jayawickrama, 2002: 243.

1087 See Jayawickrama, 2002: 243.

1088 See Jayawickrama, 2002: 243

1089 See Jayawickrama, 2002: 243.

It was further maintained that any enumeration of limitations would necessarily be incomplete and would, moreover, tend to convey the impression that greater importance was being given to the exceptions than to the right[1090]. It is respectfully submitted that, although one encourages the debates as they come up at the time of the drafting of the Covenant. One automatically supports the view that no absolute limitation should be placed on any right and that to do so would be living in an Utopian world where everyone is sacrosanct. It is further submitted that one welcomes the present formulation as it discourages any arbitrary deprivation of life. This part simply goes to show that all the individual rights are not absolute hence the need to counter balance them for purposes of greater security and peace of other members of the society who are not part and parcel of the said activity and that they must be left alone to go about their daily lives and activities unhindered thereto in a democratic dispensation.

It is for this reason, therefore, that one supports the view stated by the United Nations Declaration of Human Rights[1091] to the effect that:

> *"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedom of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".*

Questioning must therefore be done in the manner acceptable without resorting to extrajudicial mechanisms which, in the ultimate count, deprive the suspect of crime of his right to life and in doing their job, the peace officers must be able to strike a balance between the right to question and the respect of the dignity of the said suspect of crime under the circumstances. In *Ireland vs United*

1090 See Jayawickrama, 2002: 243.

1091 United Nation Universal Declaration of Human Rights 1948: Art. 29(1). Note that under Article 4, no one may be arbitrarily deprived of his life or integrity. In other words the right to life and integrity are subject to law.

Kingdom[1092] the Court condemned the so-called five techniques which amounted to torture. Thus:"Hooding a prisoner, putting him into a very uncomfortable position against the wall, exposing him to high noise continuously and depriving him of food and sleep" we found to be unacceptable.

5.7 THE EUROPEAN COMMISSION OF HUMAN RIGHTS

The European Convention established two institutions to 'ensure the observance of the engagements undertaken by the high contracting parties' per Article 19: the European Commission on Human Rights and European Court of Human rights.[1093] The European Convention also confers some supervisory functions relating to the enforcement of the rights it guarantees on the Committee of Ministers of the Council of Europe.[1094] The Committee of Ministers is the governing body of the Council of Europe.[1095] The European Commission of Human Rights consists of a number of members equal to that of the High Contracting Parties.[1096] The Commission members are elected for a six-year period by the Committee of Ministers and serve in their personal capacities.[1097] The European Court of Human Rights consists of a number of judges equal to that of the members of the Council of Europe per Article 38.[1098] The judges are elected for a nine-year term by the Parliamentary Assembly of the Council of Europe from a list of three nominees submitted by each member state of the council.[1099] The judges serve in their individual capacities and above all, they must be persons of 'high moral character' who 'possess the qualifications

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1092 European Convention on Human Rights (ECHR) 1976: 792-794. Note that Lesotho has signed and ratified the following instruments: Article 4 of the African Charter, Article 6 of International Covenant on Civil and Political Rights (ICCPR), Convention against torture and first optional protocol to the International Covenant on Civil and Political Rights in 1992, 1991, 2001 respectively.

1093 See Buergenthal and Cohen, 1988: 84.

1094 See Buergenthal and Cohen, 1988: 84.

1095 See Buergenthal and Cohen, 1988: 84.

1096 See Buergenthal and Cohen, 1988: 85.

1097 See Buergenthal and Cohen, 1988: 85.

1098 See Buergenthal and Cohen, 1988: 85.

1099 See Buergenthal and Cohen, 1988: 85.

required for appointment to high judicial office or be jurists consults of recognized competence' per Article 38(3).[1100]

5.7.1 The European Commission of Human Rights: Inter-State Complaints

By ratifying the European Convention on Human Rights, a state is deemed to have accepted the jurisdiction of the Commission to receive complaints from other state parties alleging a violation of the treaty per Article 24.[1101] The applicant state does not have to demonstrate any special interest in or relationship to the victim of the violation or in its subject matter.[1102] In *Austria v Italy,*[1103] the European Court had this to say:

… The convention allows the contracting parties to require the observance of these obligations without having to justify an interest deriving from the fact that a measure they complain of has prejudiced one of their nationals.

The admissibility of private petitions is governed by the provisions of Article 27 of the European Convention, which provides that:

(1) The Commission shall not deal with any petition submitted under Article 25 which

(a) is anonymous, or

(b) is substantially the same as a matter which has already been examined by the commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

1100 Note that the Commission and the Court have their seat in Strasbourgh, France, which is also the seat of the Council of Europe and each Convention Organ has its own professional staff, the Commission's staff is headed by its Secretary, the Registrar is the Chief Clerk of European Convention. It is submitted that the requirement of the officers to serve in their personal capacities enhances independence from their respective governments.

1101 See Buergenthal and Cohen, 1988: 87.

1102 See Buergenthal and Cohen, 1988: 87.

1103 788/1960 4. See Yearbook of the European Convention of Human Rights 116. Note that the inter-state complaints are not subject to the admissibility requirements prescribed for private petitions other than the obligation to exhaust domestic remedies first before they could be entertained.

(2) The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition.

(3) The Commission shall reject any petition referred to it which it considers inadmissible under Article 26."[1104]

The question whether a petition is or is not admissible under Article 27 is determined by the Commission in preliminary proceedings, which conclude with a ruling on its admissibility.

Under Article 27(2) a petition must be considered inadmissible:
"if it is incompatible with the provisions of the … convention, manifestly ill-founded, or it is an abuse of the right of petition".[1105]

The Commission will consider a petition to be:
"incompatible with the provisions of the … Convention' when, for example it is filed against a state that has not recognized the right to private petition or when it involves rights that are not guaranteed in the Convention."[1106]

As far as exhaustion of local remedies is concerned, Article 26 provides that:
"The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken".

Article 27(3) of the European Convention provides that the Commission must reject any application referred to it which does not comply with the exhaustion of

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1104 See Buergenthal and Cohen, 1988: 90-91. Note that Article 26 and 27 of the European Convention of Human Rights place conditions for admissibility. See also Robertson and Merills, 1993: 263-271.

1105 See Buergenthal and Cohen, 1988: 92.

1106 See Buergenthal and Cohen, 1988: 92.

local remedies requirement.[1107] Although it would seem unnecessary for states to ensure that local remedies have been exhausted, since states are bringing the claim not on behalf of an alleged victim, but in their own right, Commission has nevertheless examined the question where individual rights within the respondent state have been in issue[1108]. The jurisprudence of the Commission and the Court has also demonstrated that, in accordance with international law, applicants are not required to exhaust local remedies if they are not genuine or effective or if they are subject to unreasonable delay.[1109]

Once the applicant has demonstrated that local remedies have been exhausted, he or she must also satisfy three further criteria contained in Article 27 before the application can be ruled admissible by the Commission.[1110]

There are certain circumstances which the Commission cannot entertain. These include, for example, the substantiality requirement, where the matter under discussion has already been examined by the Commission, the requirement of duplication as in where the matter is being handled under another international investigation, circumstances which are manifestly ill-founded as in where there is no manifestation of a *prima facie* case established by the petition or application, abuse of the right of application as in where there are false allegations or claims made by the applicant, and the incompatibility requirement where the Commission may declare applications inadmissible on this ground under a variety of circumstances.

It would finally seem that according to the author**,**[1111] when the new protocol[1112] entered into force, a consequential amendment to Article 48 of the European Convention would allow a fifth category of persons to refer a case to the court.

1107 See Davidson, 1993: 106.
1108 See Davidson, 1993: 106.
1109 See Davidson, 1993: 106.
1110 See Davidson, 1993: 108.
1111 See Davidson, 1993: 109-110.
1112 See Act No. 9 1990.

This category includes the person, Non Governmental Organizations or group of individuals who lodged the complaint with the Commission. It would seem further that the reason for this additional protocol was to broaden access to the Court by individuals and thus make the system more responsive to the individuals who are 'meant to serve'.

Davidson,[1113] however, further warns that:
"The potential amendment to Article 48(2) of European Convention makes it clear that individuals will not be entitled to refer a case to the court as a right, since a procedure is established for screening such referrals"[1114]*.*
According to the learned author, where a case is referred by an individual, it must first be considered by the panel of three judges, one of whom must be a member of the respondent's state. If the panel decides that by unanimous vote the case does not raise a serious question affecting the interpretation or application of the Convention, and that It does not warrant consideration by the Court for any other reason, it may decide that the case should not be considered by the Court. According to the learned author, if the panel takes such a decision, then the matter fails to be dealt with by the committee of ministers in the 'usual manner under Article 32'.

As regards derogations[1115] under the European Committee of Human Rights, we have seen in this part that there is a possibility of derogation in most human rights instruments and these allow states to modify or opt out of the protection of

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1113 See Davidson, 1993: 111.

1114 See Davidson, 1993: 111.

1115 Derogations: Article 15(1) of the European Convention on Human Rights provides:"In time of war or public emergency threatening the life of the nation any High Contracting party may make measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".
Davidson, however, contends that it is apparent from Article 15(1) that derogation may only be made in circumstances in which the very fabric of the state is under threat, and even then any derogation must be proportionate to the threat. In most cases in Lesotho, the force used is often brutal and there is no case law in this regard that could serve as *res judicata* (settled law or principle) attempting to challenge the police use of excessive or unwarranted force.

certain rights in certain circumstances, however, this, according to *Davidson,*[1116] does not mean that states are given a free hand to do what they like by declaring a derogation. Derogation may stand in the way of effective human rights protection by precluding or limiting the possibility of redress by an applicant.

5.7.2 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

5.7.2.1 Background and Functions

In 1984 the United Nations General Assembly adopted a Convention Against Torture and other Cruel, Inhuman and Degrading Treatment.[1117]

The Committee against Torture, which was tasked with the supervision role, was established to implement the provisions of Convention against Torture. The Committee was to perform the following responsibilities:

(i) *It considers state reports, which states' parties have to submit within one year of ratification or accession, and again every four years thereafter.*[1118] *After considering these reports, the committee may issue comments on a particular report, and may include general comments about the reports in its annual report to the states' parties and the United Nations General Assembly.*[1119]

1116 See Davidson, 1993: 111.See also Robertson and Merills,1993:35 who discussed Article 3 of the European Commission of Human Rights as well. Section 3 read thus: "No one shall be subjected to torture or inhuman or degrading treatment or punishment". In *Soering v the United Kingdom* 1989 11 E.C.H.R. on p.439, the Court made a declaratory judgment to the effect that death penalty was regarded as inhuman punishment. In this decision, the applicant filed an urgent application restraining the British Government from extraditing him to the United States of America where he was likely to receive death penalty for murder charges in the state of Virginia in breach of Article 3. See also Thamae Lenka,1997:7 who advocated for the removal of death sentence in Lesotho because its continued use is not only inhuman, unjustified, but also unti-social.

1117 Adopted, opened for signature and accession on 10 December 1984, the General Assembly Resolution 39/46, entered into force on 26 June 1987 after ratification by twenty states per (Article 27 thereat).

1118 See Article 19 of the Convention Against Torture of 1984.

1119 See Article 19(5) read with Article 24 of Convention against Torture 1984 (CAT).

(ii) The committee may initiate a confidential inquiry on the basis of reliable information revealing "well-founded indications that torture is being systematically practiced in the territory of a state party".[1120] *Once a finding has been made, it is kept confidential and transmitted to the state party. The finding may later be included in the committee's annual report. Unless a state party makes a specific declaration to exclude this competence,*[1121] *it follows automatically from accession or ratification.*

(iii) Complaints by one state party against another may be directed to and may be considered by the committee. This procedure is optional.[1122]

(iv) Complaints by or on behalf of individuals may be directed to and may be considered by the committee.[1123] *Similar to the inter-state complaint procedure, this is also a procedure that does not follow directly from ratification or accession to the convention.*[1124]

1120 See Article 20(1) of Convention against torture of 1984.

1121 See article 28 of Convention against torture of 1984.

1122 Article 21 of Convention against Torture of 1984.

1123 Article 22 of Convention against Torture of 1984.

1124 See Article 22 which is similar to the International Covenant on Civil and Political Rights (ICCPR) (1966 adoption) (1976 entered into force). Second Optional Protocol to ICCPR which abolished Capital Punishment was adopted in 1963 and entered into force in 1970. Note that as of December 1994, 35 States had signed the First Optional Protocol which was adopted in 1952 and entered into force in 1954. See Stephens and Ratner, 1996: 230. See also Viljoen, 1997: 118 who states that nineteen African states had ratified this covenant by 1 January 1996 and that in March 1997, 4 more African states ratified it bringing the number to 23. See also Crawshaw, Devlin and Williamson, 1998:158 where they quote the Code for law enforcement official by the United Nations General Assembly Article 5 which sets out the full extent of the prohibition against torture as follows:
"No law enforcement official may inflict, instigate, tolerate any act of torture, or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification for torture or other cruel, inhuman or degrading treatment or punishment". Also see The Council of Europe Declaration on the police where Article 3 prohibits torture in the following terms:
"Summary executions, torture and other forms of inhuman or degrading treatment or punishment remain prohibited in all circumstances. A police officer is not allowed to disobey or disregard any order or instruction involving such measures".
See also Principle 24 of the United Nations Code of Conduct for law enforcement officials and the basic principles on the use of force and firearms by law enforcement officials, which is built on the code as follows: "Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, of should have known, that law enforcement officials under their command are resorting, or have resorted to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress of report such abuse".

5.8 THE EUROPEAN COURT OF HUMAN RIGHTS: THE RIGHT TO LIFE AND THE POLICE USE OF FORCE

5.8.1 Right to life is protected by Article 2 of the European Convention on Human Rights

Article 2 of the European Convention provides thus:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as violated in contravention of this Article when it results from the use of force which is no more than absolutely necessary

(a) In defence of any person from unlawful violence;

(b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) In action lawfully taken for the purpose of quelling a riot or insurrection".[1125]

Article 2 of the European Convention places upon states both a positive obligation to protect the right to life by law and a negative obligation not to take life, other than in certain exceptional cases. The European Court of Human Rights in *McCann v the United Kingdom*[1126] dealt with the killing of three members of an Irish Republican Army. 'Active Service Unit' by members of the S.A.S. regiment of the British Army on Sunday 6 March 1988 in Gibraltar. The British and the Spanish authorities had known since November 1987 that the Irish Republican Army was planning a terrorist operation in that area and a combined operation involving the British, Gibraltarian and Spanish authorities

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[1125] See Harris, O'Boyle and Warbrick, 1995: 42. See also Code of Conduct for Law Enforcement Officials, UN.G.A Res.34/169 of Dec. 1979.

[1126] See European Human Rights Report 1994-1995 17 545 27 September.

was mounted. The Court stated that the provision *"is one of the most fundamental in the convention and must be strictly construed"*.

It further construed that "Paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes situations where it is permitted to 'use force,' which may result as an unintended outcome, in the loss of life – the use of force must be no more than 'absolutely necessary'.

The preliminary considerations of the Court on the conduct and planning of the operation were as follows:

> *The court must have regard to the dilemma confronting the authorities on one hand, the duty to protect lives of people in Gibraltar and, on the other, to have minimum resort to the use of lethal force. It is also to be borne in mind that (1) the authorities were confronted by members of the Irish Republican Army who were convicted of bombing offences and by a known explosives expert and (2) the authorities had ample opportunity to plan their reaction – nevertheless, they were obliged to formulate their policies on the basis of an incomplete hypothesis.*
>
> *The court must scrutinize not only whether the force used was strictly proportionate to the aim of protecting lives, but also whether the operation was planned and controlled so as to minimize, to the greatest extent possible, recourse to lethal force.*[1127]

The court observed that the failure to make provision for a margin of error must also be considered in combination with the training of the soldiers to continue shooting, once they opened fire, until the suspect was dead. Thus the authorities 'were bound by their obligation to respect the right of life of the suspects to

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[1127] See McCann v United Kingdom 1994- 1995 17 European Court of Human Rights Report 464.

exercise the greatest care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill'. The court concluded that there had been a lack of appropriate care in the control and organization of the arrest operation and found that there had been a breach of Article 2 of the European Convention.

In *McCann*, the court noted that a general legal prohibition of arbitrary killings by the agents of the state would be ineffective if no procedure for reviewing the lawfulness of the use of lethal force by state authorities existed. It pointed out that the obligation to protect the right to life read in conjunction with the state's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in the convention' requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of state.

5.8.2 Prohibition on the taking of Life and General Exceptions

Article 2 of the European Convention imposes liability for the actual taking of life where it is not justified by any of the four exceptions permitted by its text.[1128] Thus given that they are exceptions and that Article 2 of the European Convention is a provision from which derogation is not permitted in time of war or public emergency under article 15, they are 'exhaustive and must be narrowly interpreted'.[1129] Liability applies to the taking of life by the state, i.e. the police, prison officers, or soldiers. The need to exhaust local remedies before a claim is brought arising out of deaths caused by the state agents can be avoided if it can be shown that the deaths are the consequence of an 'administrative practice'; if they follow instead from a particular incident or incidents that are not the result of any official policy or practice, resort must first be had to the local courts.[1130]

1128 See Harris, O'Boyle and Warbrick, 1995: 44.
1129 See Harris, O'Boyle and Warbrick, 1995: 44.
1130 See Harris, O'Boyle and Warbrick, 1995: 44.

5.8 2.1 Permitted Exceptions

(a) Deaths resulting from the use of force for permitted purposes

Article 2(2) of the European Convention lists three situations in which the taking of life by the state is justified. These should result from the use of force which is no more than absolutely necessary:

(i) In self-defence or defence of another;

(ii) To effect an arrest or prevent an escape; and

(iii) To quell a riot or insurrection.[1131]

Article 2(2) of the European Convention permits the taking of life only when it results from the use of force which is no more than absolutely necessary for one or more of the authorized purposes.[1132] A clear example is *Stewart v United Kingdom*[1133] where the application arose out of the killing of the applicant's thirteen year old son who died after being hit on the head by a plastic bullet which was fired by a British soldier in Belfast attempting to quell a riot. The son had been one of the crowd of 150 people who were throwing stones and bottles at an eight-man patrol. The patrol officer ordered a soldier to fire a baton round of plastic bullets at a leader among the rioters. As he did so, aiming at the youth's legs, the soldier was struck by missiles which, in turn caused him to hit the applicant's son instead. Civil proceedings were instituted in the Northern Ireland courts. In deciding that the force used was 'absolutely necessary', the Commission noted that public disturbances involving a loss of life were common

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1131 See Harris, O'Boyle and Warbrick, 1995: 47.

1132 See Harris, O'Boyle and Warbrick, 1995: 47.

1133 See European Human Rights Report 1982 39 162 where the Commission stated that: "Force is 'absolutely necessary' if it is proportionate to the achievement of the permitted purpose". The Commission continued to state thus: 'In assessing whether the use of force is strictly proportionately, regard must be had to nature of the aim pursued, the dangers of life and limb inherent in the situation and the degree of risk that the force employed might result in the loss of life. The Commission's examination must have due regard to all the relevant circumstances'.

in Northern Ireland; that riots such as that on the facts were sometimes used as cover for sniper fire against soldiers.

In considering the application, the Commission addressed the applicability of Article 2 of the European Convention on Human Rights as unintentional killings. The principles of necessity and proportionality in relation to the taking of life were applied. The United Kingdom government responded in *Stewart's* decision that Article 2 of the European Convention extended only to intentional acts and was thus not applicable to the case because the killing was unintentional.

The Committee argued that in Article 2 of the European Convention paragraph 2, the adverb 'absolutely' must be given a stricter and more compelling test of necessity and that further regard must be paid to the nature of the aim pursued, the dangers of life and limb inherent in the situation and the degree of the risk that the force employed might result in the loss of life.

The Commission further concluded that there had been no breach of Article 2, as the death resulted from the use of force which was no more than absolutely necessary "in an action lawfully taken for the purpose of quelling a riot". The Commission found that the killing was accidental.

Other incidental cases on the right to life violation is found in *Pretty v United Kingdom*[1134] where in a judgment delivered on 29 April 2002, Diane Pretty was dying of an incurable motor neurone disease which had affected her muscles. She was paralysed from her neck downwards and she was aware that she could not live any longer. As a result, she requested DPP to allow her husband to kill or terminate her life as she could not do it herself. She asked for indemnity for her husband from prosecution if he had complied with her request. The European Court of Human Rights unanimously found the application admissible and held that there had been:

[1134] See Human Rights Committee Document 13 2002.

- ✯ *No violation of Article 2 right to life of the European Convention on Human Rights;*
- ✯ *No violation of Article 3(c) of the European Convention on prohibition of inhuman or degraded treatment or punishment.*

It would therefore seem that the "first sentence of Article 3 section 1 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction". This involves a primary duty on the state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provision.

"It also extends in appropriate circumstances to a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual".

This was the holding in *Paul and Audrey Edwards v UK*.[1135] Christopher Edward had been arrested on 27 November 1994 and was taken to Colchester police station. The European Court found that there had been a violation of Article 2 of the European Convention unlike in the Pretty decision above.

[1135] See Human Rights Committee Document 13 2002. See also Shelton, 2005:208 who adds that Inter-American System for the protection of Human Rights has a dual institutional structure, one having evolved from the Charter of the Organization of American States (OAS 1948) and the other was put into force by the American Convention on Human Rights (1969). It would seem that in both cases, they are vested with authority to receive communication from individuals and groups alleging violation of Human Rights contained in either of them.

5.9 INTER-AMERICAN HUMAN RIGHTS SYSTEMS

5.9.1 A brief history

According to *Buergenthal and Cohen,*[1136] the inter-American human rights system has two distinct legal sources. One has evolved from the Charter of the Organization of American States, a regional inter-governmental organization with the aim to promote and protect human rights on the one hand, and on the American Convention of Human Rights on the other.

5.9.2 Nature of Organization of American States

The Charter, a multilateral treaty which is the Constitution of the Organization of American States, was opened for signature in Bogota, Colombia, in 1948 and entered into force in 1951[1137]. It was amended by the protocol of Buenos Aires, which was concluded in 1967 and came into effect in 1970.[1138]

According to *Viljoen,*[1139] this was, however, simply a resolution not intended as a binding obligation on states and that no institutional arrangement was made for the implementation or supervision of the proclaimed rights. In amending the Organization of American States Charter, the protocol of Buenos Aires introduced some "important changes bearing on human rights.[1140]" It established the Inter-American Commission on human rights as an Organization of the American States Charter organ and prescribed that the Commission's principal

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1136 See Buergenthal and Cohen, 1988: 124 Note that according to Pasqualucci, 2003: 2 the Member States of the Organization of American States are made up of a number of member States. See also the Basic documents 2001-http://www.cid.oas.org. Further note that Cuba was suspended in 1962 for adopting a Marxist Leninist form of Government.

1137 See Buergenthal and Cohen, 1988: 126.

1138 See Buergenthal and Cohen, 1988: 126.

1139 See Viljoen, 1997: 442. See also De Villiers, Van Vuuren and Wiechers,1992: 107.

1140 See Viljoen, 1997: 442.

function should be 'to promote the observance and protection of human rights'.[1141]

5.10 AMERICAN CONVENTION OF HUMAN RIGHTS

According *to Sieghart,*[1142] the drafting and negotiation of this instrument began in 1959. It was signed ten years later. From then on, it took nine years before it could enter into force on 18 July 1978, through the deposit of the eleventh instrument of ratification. The American Convention on Human Rights is devoted almost entirely to Civil and Political rights and it is broadly based on both the European Convention and the International Covenant on Civil and Political Rights with obvious differences as follows.[1143]

"The right to life commences from the moment of conception as per Article 4(1); property is protected per Article 21 and a special provision is made for the limited application of the convention in federal states by Article 28".[1144]

Like the European Convention, the American Convention provides for a three-tier enforcement system, by means of the inter-American commission on human rights, the inter-American court of human rights and the general assembly of Organization of the American States.[1145]

1141 Buergenthal and Cohen, 1988: 127.
See Articles 51 (3) and 112 of the American Declaration of the Rights and Duties of Man respectively.

1142 See Seighart,1983: 28. See also Newman and Weissbrodt,1990:61 for the full text of the Convention Nov. 22, 1969, O.A.S. Treaty Series No.36,at 1, OEA/Ser. L/ii.23 Doc.Rev.2 entered into force July 18,1978.

1143 See Van Wyk, Dugard, De Villiers and Davis, 1994: 187.

1144 See Van Wyk, Dugard, De Villiers and Davis, 1994: 187.

1145 See Van Wyk, Dugard, De Villiers and Davis, 1994: 187.

5.10.1 The Inter-State American Court of Human Rights

The inter-American Court derives its powers exclusively from the American Convention and in terms thereof, the Court can issue three kinds of judgments. These are advisory opinions, findings of and remedies for violations in individual cases and interim orders.[1146] After the Commission procedures, either the State or Commission can refer a case to the inter-America Court of Human Rights, if the State involved is a party to a Convention and has expressly recognized the Court's jurisdiction.[1147] The Court is allowed to make declaratory judgments from a perspective of a defendant state, to afford the victim of Human Rights violation protection. This was the situation in *Soering v United Kingdom*[1148] where the applicant, a German national, was detained in England pending extradition to the United States of America to face murder charges in the state of Virginia. The offence could have subjected the applicant to the death penalty if he were convicted. The decision to send him to the United States, would give rise to a breach, by the United Kingdom, of Article 3 of the European Convention due to his exposure to 'death row.' The Court held in favour of the applicant and declared that the decision to extradite, if implemented, would give rise to a breach of Article 3. *Soering* was, however, extradited later after ensuring that there would be no death sentence meted against him.

5.10.1.1 Contentious Jurisdiction

The Court's jurisdiction is delimited as follows:

1. *A state party may upon depositing its instruments to ratification or adherence to this convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the*

1146 See Viljoen, 1997: 449.
1147 See Shelton, 2005: 216.
1148 1989 European Court of Human Rights (E.C.H.R) 11 p. 439.

jurisdiction of the court on all matters relating to the interpretation of the application of this convention[1149].

2. *Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the secretary general of the organization, who shall transmit copies thereof to the other member states – of the organization and to the secretary of the court*[1150].

3. *The jurisdiction of the court shall comprise all cases concerning the interpretation and application of the provisions of this convention that are submitted to it, provided that the state parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.*[1151]

This provision indicates that a state does not accept the jurisdiction of the court merely by ratifying the Convention.[1152] To do so, a state party must either have filed the declarations referred to in paragraph 1 and 2 of Article 62 or have concluded the special agreement mentioned in paragraph 3.[1153] The general declarations accepting the Court's jurisdiction have, up to date, been made by some other states in South America.

The Convention specifies in Article 61(1) that "only the state parties and the Commission shall have the right to submit a case to the Court.[1154]" Individuals who have filed a complaint with the Commission cannot consequently bring the case to the court and depend on the Commission or a state to do it for them.[1155]

1149 See Buergenthal and Cohen, 1988: 155.
1150 See Buergenthal and Cohen, 1988: 155.
1151 See Buergenthal and Cohen, 1988: 155.
1152 See Buergenthal and Cohen, 1988: 156.
1153 See Buergenthal and Cohen, 1988: 156.
1154 See Buergenthal and Cohen, 1988: 156.
1155 See Buergenthal and Cohen, 1988: 156.

5.11 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and People's Rights entered into force on October 21, 1986.[1156] It was adopted by the Organization of African Unity in 1981 and has to date been ratified by 49 states.[1157] The African Charter established a system for the protection and promotion of human rights that is designed to function within the institutional framework of the Organization of African Unity (OAU).[1158] The African Union is a regional intergovernmental organization which came into being in 1963 and has a membership of 53 states.[1159] It operates through a permanent secretariat, various ministerial conferences, a Council of Ministers and the Assembly of Heads of State and Government.[1160] The Assembly meets once a year and is the highest policy-making body of the African Union.[1161]

5.11.1 The Rights and Duties

The African Charter differs from the European and American Conventions on Human Rights in a number of respects.[1162] First, the African Charter proclaims not only rights, but also duties.[1163] Second, it codifies individual as well as people's rights.[1164] Third, in addition to guaranteeing civil and political rights, it protects economic, social and cultural rights.[1165] Fourth, the treaty is drafted in a form that permits the State Parties to impose very extensive restrictions and limitations on the exercise of the rights it proclaims.[1166] Article 1 of the African Charter reads as follows:

1156 See Buergenthal, 1995: 228.
1157 See Buergenthal, 1995: 228.
1158 See Buergenthal, 1995: 228.
1159 See Buergenthal, 1995: 229.
1160 See Buergenthal, 1995: 229.
1161 See Buergenthal, 1995: 229.
1162 See Buergenthal, 1995: 229.
1163 See Buergenthal, 1995: 229.
1164 See Buergenthal, 1995: 229.
1165 See Buergenthal, 1995: 229.
1166 See Buergenthal, 1995: 229.

"The member states of the Organization of African Unity parties to the present charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislature or other measures to give effect to them."[1167] This provision should be compared to Article 25, which places on State parties the obligation:

"To promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present charter and to see to it that these freedoms and rights as well as the corresponding duties are understood".[1168]

Closer scrutiny of the African Charter also shows that civil and political rights are indissociable from economic, social and cultural rights, in both conception and universality, and that the satisfaction of the latter guarantees enjoyment of the former[1169]. In fact, this affirmation is merely a classification of Article 28 of the Universal Declaration of Human Rights which states that 'every one is entitled to a social and international order in which the rights and freedoms set forth in this declaration may be fully realized'.[1170]

5.11.2 The African Commission on Human and People's Rights

The African Commission, a body of eleven independent experts, was created in 1987.[1171] The members serve in their personal capacity and should be known for their high reputation, morality, integrity, impartiality and competence "in relevant matters".[1172] The Commission is tasked with the "promotion and protection of

1167 See Ouguergouz, 2003: 52.
1168 See Ouguergouz, 2003: 52- 53.
1169 See Ouguergouz, 2003: 57.
1170 See Ouguergouz, 2003: 57.
1171 See Smith, 2003: 136.
1172 See Article 31 of the African Charter.

human and peoples' rights in the region."[1173] To this end, the functions of the Commission include:

The promotion of human rights through collecting documents, undertaking studies on African problems in the field of human and people's rights, dissemination of information, organization of symposia, formulation of principles and rules aimed at solving legal problems relating to rights and freedoms, and co-operating with other African and institutions concerned with the promotion and protection of human and people's rights, the protection of human rights in accordance with the Charter and the interpretation of the Charter.[1174]

Mutua[1175] argues that, as part of the Charter, the African Commission on Human and Peoples' Rights was created to ensure that African States complied with the Charter. In his five year report on the work of the Commission, *Welch*[1176] describes the protection of human rights provided domestically by most African States, and regionally by the African Charter, as weaker than in west European States, and significantly weaker than in most western Hemisphere countries that have ratified regional Covenants. In this direction, therefore, *Ankumah*[1177] with reference to the Commission's failure to act stated thus:" Violations of human rights has been the order of the day in a number of countries and limitations under the Charter seemed to swallow the rule."[1178]

5.11.3 Meetings of the Commission

According to *Smith*,[1179] the Commission meets twice a year for two week sessions, usually with each meeting being held in a different state. It facilitates

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1173 See Article 30 of the African Charter.

1174 Smith 2003: 136. See Article 45 of the African Charter.

1175 See Mutua, 1999: 345.

1176 See Welch, 1991: 1.

1177 See Ankumah, 1996: 135-137.

1178 See Ankumah, 1996: 137

1179 Smith 2003: 132-136. Note that since its inception in 1963, the Organization of African Unity (OAU) served mainly as a talking shop for African States for decolonization and not so much on Human Rights which were systematically abused by various military Governments in the Region. Further note that in 1997, the Protocol to the African Court

access to the Commission by both the public, by states and non- governmental organizations[1180]. Despite the benefits of rotating sessions of the Commission, costs of transport and communications can be increased.

The Commission receives reports from contracting states every two years[1181]. It is also competent to receive inter-state complaints and individual communications[1182]. A primary role of the commission is the promotion of human rights.[1183] Generating an awareness of rights in a region often torn by strife and still characterized by oppressive regimes is the first step towards ensuring the promotion of fundamental rights and freedoms[1184].

The Commission has promotional and quasi-judicial functions.[1185] Its promotional mandate is broad and includes the power to undertake studies, convene conferences, initiate publication programs, disseminate information and collaborate with national and local institutions concerned with human and people's rights[1186]. As part of this promotional effort, the Commission may "give views or make recommendations to governments". [1187] This power should enable the Commission to bring to the attention of individual governments "problem areas" revealed by its studies.[1188] The quasi-judicial powers may be divided into two parts: the so-called interpretative powers and powers applicable to the resolution of disputes involving allegations of human rights violations[1189]. The

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on Human and People's Rights was drawn up aimed at creating a Court for reinforcement of the work of the Commission in furtherance of the protection of Human and Peoples Rights as enshrined the Charter. Note that as of May 2002, the Protocol had attracted only five of the fifteen ratifications necessary to enter into force and in that year the (OAU) became African Union (AU).

1180 See Smith, 2003: 136.
1181 See Smith, 2003: 137.
1182 See Smith, 2003: 137.
1183 See Smith, 2003: 137.
1184 See Smith, 2003: 137.
1185 See Buergenthal and Cohen, 1988: 182.
1186 See Buergenthal and Cohen, 1988: 182.
1187 See Buergenthal and Cohen, 1988: 182.
1188 See Buergenthal and Cohen, 1988: 182.
1189 See Buergenthal and Cohen, 1988: 182.

Commission's interpretative powers resemble the advisory jurisdiction of some international courts which are extensive[1190].

The Commission has jurisdiction to interpret all the provisions of the present Charter at the request of a State Party, an institution of the African Union or an African Organization recognized by the African Union.[1191]

The Commission is also empowered, in the context of its promotional activities, 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and people's rights and fundamental freedoms upon which African governments may base their legislation'.[1192]

This grant of power combines quasi-legislative and quasi-judicial aspects, for it seems to permit the Commission to prepare draft legislation, to propose legal solutions to disputes and to articulate, by means of codification and interpretation, human rights standards.[1193] The Commission's other quasi-judicial powers are those dealing with complaints charging violations of human rights.

5.11.4 The African Court on Human and People's Rights

The move towards an African Rights Court began in the late 1990s.
Mboya[1194] gives some reasons for the long delay. He argues that conciliation is important among African Peoples and is preferred to legal proceedings. He quotes an African saying to the effect that 'to go to court means to dispute, not to discuss.' *Mboya*[1195] highlights the immense difficulties with and differences from

1190 See Buergenthal and Cohen, 1988: 182.
1191 See Article 45(3) of African Charter.
1192 See Article 45(1)(b) of African Charter.
1193 See Buergenthal and Cohen, 1988: 183.
1194 See Mboya,1992:67.See also Benidek,1990: 255 where he reiterates the commitment of African States through the Banjul Charter which stated that:"…Time has come for the African Continent to develop a culture of respect for human rights, human dignity, human treatment of all human beings, as well as principles of democracy."
1195 See Mboya, 1992: 67.See also Dlamini, 1995: 87.

western values. Thus, the imposition of an African court is not, a simple, logical step which will solve all the problems.

"*The mere addition of a court although a significant development, is unlikely by itself to address sufficiently the normative and structural weaknesses that have plagued the African Human Rights System since its inception."*[1196]

The Protocol to the African Charter on the establishment of the African Court on Human and Peoples' Rights of 1997 seeks to create a Court which will complement and reinforce the work of the Commission in furtherance of the protection of human and peoples' rights as enshrined in the African Charter.[1197]

5.11.4.1 Proposed Composition

The Court consists of eleven judges elected to serve in an individual capacity from amongst 'jurists of high moral character and of recognized practical judicial or academic competence and experience in the field of human and people's rights'.[1198] All judges of the African Court must be nationals of member states.[1199] Judges serve for a term of six years, with the possibility of one period of re-election.[1200] In keeping with practices elsewhere, a staggered system of re-election (essentially four judges every two years) is envisaged.[1201] Unlike other instruments, the Protocol makes explicit and detailed provision for the independence of the judiciary: judges cannot hear cases in which they have previously been involved in any capacity; judges enjoy the immunities extended to diplomatic agents under international law throughout their term of office. They

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1196 See Mutua, 1999: 343.

1197 Note that as of 2002, the protocol had attracted only five of the fifteen ratifications necessary to enter into force although it has 36 signatories.

1198 See protocol Article 10 of the African Charter.

1199 See Smith, 2003: 137.

1200 See Smith, 2003: 137.

1201 See Article 14 of African Charter.

cannot be held liable for any decisions or opinions taken in the exercise of their functions[1202].

5.11.4.2 Proposed Jurisdiction

According to *Smith*[1203] the Court has jurisdiction over all disputes and cases submitted to it concerning the interpretation and application of the Charter, the Protocol, and any other African human rights Conventions.[1204]

It has advisory (issuing advisory opinions on any related legal matter) and declaratory (deciding cases) jurisdiction.[1205] Should the Court find a violation of human or people's right:

It shall order appropriate measures to remedy the situation" and this can include orders of compensation or other reparation and, it would seem, in appropriate situations, the adoption of provisional measures".[1206]

Judgments of the Court are binding and final and are by majority (although separate and dissenting opinions may also be attached).[1207] The execution of any judgment of the Court is to be overseen by the Council of Ministers of the African Union or similar body of the African Unity on behalf of the assembly per Article 27 of the Protocol.[1208] Regular reports on the activities of the Court will be submitted to the Assembly with attention drawn to States which have not

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1202 See Smith, 2003: 137.

1203 Smith, 2003: 137 is hopeful that in the future, the operation of the Court will be determined by the rules of procedure by it when it is finally established. He warns, however, that it is clear that it is envisaged that the Court will work alongside the Commission in protecting human rights. See Articles 60 and 61 respectively. Compare that with what Pasqualucci, 2003: 1 had to say in respect of the American Court of Human Rights in that it is the sole Judicial Organ of the Inter-American Human Rights system as a final arbiter of Human Rights in those American States that have ratified the Convention. It is submitted that the African Court when it is finally realized can draw up some lessons here.

1204 See Protocol Article 3 of the African Charter.

1205 See Smith, 2003: 137.

1206 See Protocol, Article 24 of the African Charter.

1207 See Smith, 2003: 138.

1208 See Smith, 2003: 138.

complied with the court's judgment.[1209] The court may use publicity as its weapon for rogue states.

5.11.4.3 Locus Standi in iudicio

The Commission and states have automatic *locus standi* in *iudicio* before the court.[1210] It is anticipated that cases brought by private parties will initially be brought before the Commission in terms of article 55 of the Charter and People's Rights.[1211] However, "the Protocol of the court does not provide the possibility of exceptional jurisdiction being exerted over cases brought by individuals, non-governmental organizations and groups of individuals".[1212]

Given that in normal individual applications, it is expected that the court will only handle the matter once the Commission has prepared a report or taken a decision thereon, the operation of the new system appears similar to that practised by the Council of Europe prior to the entry into force of the Eleventh Protocol to the European Convention of the Protection of Human Rights and Fundamental Freedoms.[1213] However, the new court will have the power to call individuals to testify.[1214] The Court will normally hear cases in public unless the interests of justice demand in camera proceedings.[1215] Any judge who is a national of the state party to the dispute may sit on the case.[1216]

It is submitted that (given the African human rights records, genocide, mass graves, civil wars and any other inhuman malpractices by terrorists, militia and hostile armies) the question of the African and people's court is long overdue as it is a step in the right direction to try to intervene in a meaningful way in order to

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1209 See Smith, 2003: 138.
1210 See Smith, 2003: 138.
1211 See Smith, 2003: 138.
1212 See Article 6 of Protocol of the African Charter.
1213 See Smith, 2003: 138.
1214 See Smith, 2003: 138.
1215 See Smith, 2003: 138.
1216 See Smith, 2003: 138.

bring about appropriate remedies and reparations. It is highly recommended that those state parties which have not indicated the existence of the court protocol, should do so without any further delay and finally, as *Smith* puts it, 'it should be in a position to develop swiftly a truly African jurisprudence on human and people's rights'[1217].

5.11.4.4 African Charter and Torture, Cruel, Inhuman or Degrading Treatment

Physical or moral torture and cruel, inhuman, or degrading treatments are expressly prohibited by the African Charter which, "like other general instruments relating to human rights protection, does not define them".[1218] The reason for this silence is to be sought in the difficulty of such a definition of torture, in particular.[1219]

To date, the Commission has handed down a number of decisions finding that the rights of the individual to physical integrity guaranteed by Article 5 of the African Charter had been violated by a State party.[1220] Most of these decisions stigmatize classic acts of physical torture[1221]. Others hold that an expulsion measure can be treated as 'an inhuman and degrading treatment".[1222]

1217 See Smith, 2003: 138.

1218 See Ouguergouz, 2003: 113 who observes that the status of adoption and ratification as at 5th of April 2002 is as follows and the 35 African states are Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, Democratic Republic of Congo, Egypt, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Libyan Arab, Jamahiriya, Malawi, Mali, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Togo, Tunisia, Uganda and Zambia.

1219 See Ouguergouz, 2003: 113. However, this omission could be remedied by recourse to the two main instruments adopted on this subject by the United Nations General Assembly, a course which Article 60 of the African Charter seems to suggest. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by consensus on 10th December 1984, to which thirty-five African States are currently parties.

1220 See Ouguergouz, 2003: 116.

1221 See Ouguergouz, 2003: 116.

1222 See Ouguergouz, 2003: 116.

This was the case, for instance concerning a communication in which the plaintiff, in the Commission's own words, 'was deported to South Africa and forced to live for eight years in the 'homeland' of Bophuthatswana, and then for another seven years in 'no-man's land,' a border strip between the former African Homeland of Bophuthatswana and Botswana'.[1223]

The Commission held that:
"Not only did this expose him to personal suffering, it deprived him of his family, and it deprived his family of his support and finally that such inhuman and degrading treatment offends the dignity of a human being and thus violates Article 5".[1224]

The Commission confirmed this view in a decision of 5 May 1999 in connection with three communications lodged against Zambia where the Commission held that:
"By forcing the two victims, to live as stateless persons under degrading conditions, the government of Zambia has deprived them of their family and is depriving their families of the men's support, and this constitutes a violation of the dignity of a human being".[1225]

1223 Ouguergouz, 2003:116. See also Communication 97/93 John K. Modise v Botswana which was a deportation decision.

1224 See Ouguergouz, 2003: 116.

1225 See Ouguergouz, 2003: 116 for giving an illustrative practical examples where the African Commission has arbitrated. In communication 47/90 in the decision of the Lawyers Committee of Human Rights v Zaire, the African Commission was seized with the communication against Zaire, and there it was held: "Article 4 of the African Charter protects the rights to life. In addition to alleged arbitrary arrests, arbitrary detention and torture, alleged extra-judicial executions which are a violation of Article 4". The other example is the communication lodged against Chad and Rwanda where a decision in connection with a communication reporting several massive violations of Human rights i.e. harassment of journalists, arbitrary arrests illegal detentions, killings, inhuman treatment of prisoners, disappearances and torture was made. The African Commission held that:
"The Charter specifies in Article 1 that the State Parties shall not only recognize the rights, duties and freedoms adopted by the Charter, but they should also undertake … measures to give effect to them". In other words, if a state neglects to ensure the rights in the African charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation. The African Charter, unlike other Human Rights instruments, does not allow for state parties to derogate from their treaty obligations

5.12 CONCLUSION

The Chapter argues that the International Bodies have taken social responsibility to protect the fundamental Human Rights of people all over the world. This mammoth task has been fulfilled through numerous International, Regional and National treaties, regulations, Covenants, Conventions, laws and rules. In general terms, these International Bodies have been able to influence legislative processes around the world where such processes had lingered behind. The emphasis is placed on the need to sign and ratify international instruments in order to give effect to the due implementation by governments. The United Nations has in particular been able to encourage governments and Nations to take social accountability on a number of issues and initiatives affecting Human Rights. It is clearly understood that these international instruments, although, greatly supported by governments, are in most cases not mandatory. The chapter has outlined those areas of concern to governments and nations which need immediate attention in terms of redress by way of legislation. These include, improvement of Human Rights records, speeding up of signing and ratification of international treaties, and where there are limitations of Rights, such must be undertaken reasonably and strict interpretation must always be given by the courts of law. The chapter gives Lesotho a lesson to learn from other jurisdictions as far as improvement of Human Rights record is concerned. It further provides Lesotho an opportunity to review its Human Rights treaties, laws in the light of with international trends.

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during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African charter. In this case, Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the government has failed to intervene to prevent the assassination and killing of specific individuals liberty of its citizens, and to conduct investigations into murders, Chad is therefore responsible for the violations of the African Charter.

Chapter 6
Summary, Concluding Remarks, Lessons and Recommendations

6.1 INTRODUCTION

This chapter provides an overview of the previous chapters followed by lessons and concluding remarks based on the research. The Chapter concludes with recommendations aimed at assisting the Lesotho Mounted Police Service to clearly understand its new mandate in a democracy which places great impetus on the respect for the fundamental human rights as embodied in the Lesotho Constitution.[1226]

The recommendations further seek to keep the Lesotho Mounted police Service better informed and equipped with the contemporary human rights discourse arising out of the three selected jurisdictions. Finally, the recommendations are meant to sensitize the Lesotho Government about the plight of the police service. The chapter also draws up lessons and/or guidelines, based on the experiences of the selected Countries.

6.2 SUMMARY

Chapter one provided an introduction to the study, outlining the problem[1227] which led to this research and provided a brief focus on the specific problems[1228] which outlines amongst others, the aim of the study, necessity of the research,

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1226 See Act No. 3 of 1993.
1227 See 1.1 aim of the study.
1228 See 1.1 to 1.7 of the study.

analysis, justification and research focus. The study further provided research problem, design, methodology and the value thereof.

The second chapter focused on the legal history of Lesotho and historical development in the nineteenth century when there were bitter wars relating to control of land, animals, crops, people and other natural or mineral resources. The chapter shows how Moshoshoe I the founder of the Basotho nation, emerged as a leader amidst those bitter struggles for a nation state where the main opponents were the Boers and the British who were regarded as white settlers.

The chapter traces the Lesotho legal dualism as the country was administered interchangeably between the Cape Colony and the Boers before 1868 when Lesotho became a British protectorate. It further discusses Lesotho's legal system which ushered in the 1966 Constitutional order[1229] under which the first elections were called until that Constitution was suspended in 1970. Information on the courts, historical development of Lesotho Mounted Police Service, Police order, regulations, Police Act, police powers under internal security Act, detention orders and people disappearances, is provided. Comparison of human rights violations is contrasted between the Republic of South Africa, The United States of America, the United Kingdom and the Kingdom of Lesotho.

Chapter three focused on the comparative police use of force while effecting arrest. The chapter explained arrest, procedure under common law, resisting arrest and legal implications in that regard.

The issue of police use of deadly force is discussed along with factors such as proportionality and reasonableness tests. The questions of when to kill a fleeing suspect and the reasons for arrest are discussed and measured against constitutional requirements in each country under review.

[1229] No. 1172 of 1966.

Chapter four discussed interrogation and interviewing means by police as their day to day operational tools and questioning techniques. Although some scholars have distinguished the two terms, but we found it unnecessary to split the hairs and therefore we regarded them to mean one and the same thing. As far as we are concerned, they could be used interchangeably. Questions relating to human dignity, constitutional rights of suspects of crime and recourse thereof were also discussed.

Finally, Chapter five was dedicated to the contribution of the international Bodies pioneered by the United Nations. National and Regional instruments geared towards the Protection of Human Rights under international law have been discussed..

6.3 CONCLUDING REMARKS, LESSONS AND RECOMMENDATIONS

Is the Lesotho Mounted Police Service falling short of International Agreements on Policing Standards?

The police institution is one of the oldest institutions in the world, comprising entrenched police cultures, structures, traditions, practices and manners which are mainly shaped by the way police conduct their daily business. A typical example of police culture is the police chain of command which is rigid to the extent that police recruits are taught how to obey instructions and orders usually from a senior officer. Dire[1230] consequences await these recruits if they fail to execute such orders. Training is normally tough, long and disciplined. During the training period, recruits are subjected to rigorous training conditions. They are also taught battle dress operations. They are trained for possible confrontation with members of the public, mostly in riotous situations. They are therefore taught crowd management skills in order to apply them under those

[1230] See also Wolfendale,2007:164 who asserts that serious punishment may result as long as the refusal to continue torturing is couched in terms of the individual combatant's weakness or failure to be a 'man enough' rather than a direct refusal of an order.

circumstances. Would- be criminals are more often than not unarmed, save for those who would be armed for violent crimes, such as a bank robbery, stock theft or drugs peddling.[1231] This pattern seems to be common in the four selected jurisdictions. In the United States of America, for example, sometimes, suspects of crime are subjected to interrogation by way of unlawful searches and arrests without warrants or without their rights being explained to them first, as it has been explained in *Miranda v Arizona.*[1232]

Equally, in the United Kingdom, suspects are on occasion, beaten, humiliated, searched without warrants. During the apartheid era, in the Republic of South Africa, suspects of crime who were on occasion regarded as lesser human beings. To address these patterns of interrogations and Human Rights abuses in the four selected jurisdictions, constructive efforts aimed at correcting the *status quo* have been stepped up over the years. Major influences seemed to have come from international policing human rights standards of protection, *vide***:** the United Nations Declaration on the Protection of all Persons from Torture and other Cruel and Inhuman or Degrading Treatment or Punishment,[1233] Article 9 of the Law enforcement Code provides:
"That if an act of torture as defined in Article one has been committed, the competent authority of the State concerned shall promptly proceed to an impartial investigation even if there has been no formal complaint."

The European Convention for the Protection of Human Rights and Fundamental Freedoms[1234], with Article 5 of European Convention on Human Rights providing that: *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except if provided by relevant law."*

1231 Wolfendale, 2007:136.See also Amnesty International 'Stop Torture' at http//:www.amnestyusa. org/stoptorture/about.htm/
Wolfendale, 2007: 193.

1232 Miranda v Arizona 384 US 436 SCt. 1602 (1966).

1233 United Nations Convention against Torture 1984.

1234 European Convention for the protection of human Rights 1950.

The United Nations General Assembly resolution[1235] on the code of Conduct for Law enforcement officials[1236], with Article 8 providing:

"Any person who alleges that he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain to, and have his case impartially examined by, the competent authority of the State concerned."

These Articles were, in the main, meant to encourage governments and Law enforcement agencies to be held accountable for the abuses. The 1984 Torture Convention[1237] itself was adopted by the General Assembly on 10th December. It clearly defines torture and all its ugly vestiges. Lesotho is a signatory to most of the international human rights' agreements and has ratified some. This means that it is clearly bound by them and as such it has to enact parent legislation. There are, at present, no suspects protection laws under the Lesotho Criminal Procedure and Evidence Act,[1238] save what appears in the Police Act of 1998[1239] section 76 itself, where civil remedy is called for. I submit that this law is worthless due to the lack of accountability and prosecution of those involved and it does not provide a clear cut ruling on the period of compensation. The present Lesotho 1998 Police Act still retains most of the repressive sections of the 1984 Act,[1240] including the notorious section 42 relating to the shooting of a fleeing suspect. It does not have proper guidelines as opposed to the similar South African Criminal Procedure Act[1241] section 49 as amended.

1235 34/169 of 17 December 1979.

1236 United Nations General Assembly resolution 34/169 of 17 December 1979.

1237 United Nations General Assembly Convention against Torture 10th December 1984.

1238 See Act No. 9 of 1981.

1239 See Act No. 7 of 1998. The Lesotho Police Act of 1998, is more like a 'new label for old police wine in a more fashionable bottle.'

1240 See Act No. 24 of 1984.

1241 See Act No. 55 of 1977.

6.4 THE LESSONS DRAWN FROM THE FOUR SELECTED JURISDICTIONS ARE AS FOLLOWS:

The Republic of South Africa:

The way the South African Police Service (then SAP) operated during the apartheid period before 1994, left much to be desired as borne out in the text by the following writers: *Midgley*[1242]

"As you know, South Africans feel strongly about policing issues. For many years the police served as the government's instrument in upholding its apartheid policy. The police's prime function was to apply the maxim, taken from Roman times, that the safety of the State is the supreme law. The police's focus was to maintain law and order, to serve the State and while this also caused some sectors in our society to feel safe and protected, police in essence saw themselves as protecting the State against certain communities and individuals."[1243]

Hansson[1244]

"The philosophy of policing in the eighties has shifted from its original roots in 'total onslaught' and 'total strategy', and now rests on the notion of 'revolutionary onslaught'. Initially this meant that the SAP was trained to perceive civil conflicts as part of a global Communism onslaught against Capitalism. They now see civil resistance as symptomatic of a third world revolutionary attack. From this standpoint, it has become the duty of SAP to stave off onslaught in every way possible. In the case of S v Villet[1245], it was shown that the SAP was ordered to 'eliminate' people that they perceived as being enemies, especially blacks or Africans."[1246]

1242 See Midgley, 1995: 3.
1243 See Midgley, 1995: 3.
1244 See Hansson, 1989: 118-119.
1245 See Case no.166/1987 CPD unreported.
1246 See Hansson, 1989: 120.

Haysom[1247]

"In comparison with police forces in Europe and the United States of America, the South African Police Force (SAP) is highly centralized, militarized and coercive. They wear paramilitary uniforms and are armed with military type firearms. In South African Townships, the police perform their patrolling duties in armoured cars and are equipped with the same weapons as the South African Defence Force (SADF) to the extent that Township residents are confused between the two."[1248]

Fourie and Reyneck[1249]

"There is an element of resistance to change in that, aspects such as increasing crime levels, inadequate resources, police corruption, etc. are all elements that make the current situation unacceptable. 'Tradition' and 'politics' are the main resistance-to-change factors in the SAPS. Changes to the status quo are often perceived as threats and traditional response to resistance".[1250]

This scenario changed just before the elections at the time when the African National Congress (ANC) was preparing to come into power. It developed and adopted a draft of policy guidelines in 1993 which was aimed at transforming the police into an organization suited to a full democratic society.

There was an undertaking that the police service shall respect the ideals of democracy, such as non-racialism, non-sexism, national unity and reconciliation. A further lesson can be drawn from the introduction of the South African Police Act in 1995[1251] which formed a foundation stone as regards the philosophy of change *as Fourie and Reyneck*[1252] put it. The new South African Police Act covered the whole range of changes in the entire operations of the old South African Police which is now called South African Police Service, dedicated to the

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1247 See Haysom, 1989: 145.
1248 See Haysom, 1989: 140.
1249 See Fourie and Reyneck, 2001: 104.
1250 See Fourie and Reyneck, 2001: 104.
1251 See Act No. 68 of 1995.
1252 See Fourie and Reyneck, 2001: 101.

service of its people as a whole. The points of change included accountability, quality service, use of minimum force, professional police service, the right to belong to a trade union as opposed to Lesotho where the Police service is only allowed to form an association per section 66 of the Lesotho Police Act 7 of 1998 which does not have any bargaining power, let alone the right to strike. It is submitted that the formation of the police staff association without its full industrial rights was, however, a step in the right direction. The courts also stood side by side in holding the state accountable, through the state liability theory under common law in South Arica as we have seen, and have finally declared section 49 (2) of the South African Criminal Procedure Act 51 of 1977 unconstitutional. Officers face disciplinary hearings leading to punishment and discharge. Section 36 of the South African Police Act 68 of 1995, as amended, provides for imprisonment as an alternative punishment, a phenomenon that does not exist in the Lesotho Police Act 7 of 1998.

The United Kingdom:

In the United Kingdom, *Stevens and Yach*[1253] indicated that:

"Fair decision making impacts on recruitment, resource allocation, performance management, promotion, transfers and discipline".

These attributes are meant to motivate police officers in order for them to handle suspects of crime with dignified treatment when they are in police custody or when they are under police interrogation. Police officers are called upon to use minimum force required under the circumstances. They are expected to respect and enforce human dignity so that individuals can enjoy free speech, free

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1253 See Stevens and Yach, 1995: 26. Note that the incumbent himself visited London in 2000 to understudy how the Police Union of England and Wales operated after the Lesotho Mounted Police Staff Association was established in 1999 whereof I was also a founder member. Section 68 of the Lesotho Mounted Police Act establishes a body called Police Negotiating Council with the purpose of considering questions relating to pay, uniform, conditions of service etcetera. The Council is composed of representatives from the office of Home Affairs, Commissioner of police and Police Staff Association members. Despite this requirement, Police Staff Association members are often excluded from the decisions affecting them and they are given conclusions and orders which they must just follow without questioning.

association, access to legal representation and the right to be presumed innocent. The British Police and Criminal Procedure Act (PACE) of 1984 has undergone massive reforms and innovations in order to accommodate modern policing challenges. The British police were prone to using brute force against its citizens, especially suspects of crime in their hands, but with the developments that were introduced by the decisions of *Holgate Mohammed v Duke*[1254] where the court formulated a leading principle to the effect that:

"For all cases of persons in custody, their cases must be dealt with expeditiously or a person has to be released once the need for detention seizes to arise".

The United States of America:

The United States of America is no exception to human rights violations. Human Rights Watch[1255] records that there are many incidences of human rights abuses in the United States of America where suspects of crime have been shot dead, beaten up, maltreated, etc. In the United States of America, however, when police officers offend the law, they are brought to book to account for their unlawful conduct. They are not left alone to escape punishment. Greater inspiration came with the principle in *Miranda v Arizona*[1256]warning where the court held that:

"A person who is subjected to a custodial interrogation must be warned that he has a right to remain silent, not to incriminate himself and has a right to legal advice".

This decision came as a celebrated case which guarded against human rights abuses by police officers. The United States of America established a further remedy for victims of crime in 1992 which is termed Torture Victim Act aiming at protecting victims as well as acting as an injunctive relief.

1254 See1984 Appeal Cases 437.
1255 See International Human Rights Watch 1998:1.
1256 384 US 436 86 S.Ct. 1602 (1966).

The Kingdom of Lesotho:

As we conclude this part therefore, it is common cause that Lesotho first experienced democracy from 1965 till 1970 when the second election was supposed to be called. The 1970 election never came to pass, because it was annulled due to allegations of vote rigging. It was marred by violence with the result that the 1966 Independence Constitution was suspended. From 1970 Lesotho was a one party State until 1986 when that Government was toppled by the military which also excluded political participation in the Country until 1993 when the Second dispensation was called. As one can understand, the Lesotho Mounted Police Force evolved through all these undemocratic stages having to serve undemocratic Governments over time. This scenario contributed so much in the way the Lesotho Mounted Police force operated with little choice in the circumstances that it found itself in, so that there was no respect for the fundamental rights due to the suspension of the Constitution which contained the Bill of Rights.

In 1993 a new Constitution came into effect which was by and large a replica of the 1966 Constitution providing for the fundamental human rights of citizens. In 1997, almost five years after the democracy was restored in the Country, the Government amended and enacted the 1984 Police Act and the 1971 Police regulations bringing into picture the 1998 Police Act. This goes to show how long the police force was neglected, even after the second dispensation in 1993 yet it was expected to discharge its functions and protect the society professionally. The 1998 Police Act brought about a few changes, notably the concept of pro-active policing which emphasized partnership with the communities involved. The word force was removed and was replaced by the word ‘service’, depicting a softer approach to the citizens. The 1998 Police Act has retained large portions of the 1984 Police Act provisions, especially those dealing with the following: shooting a fleeing suspect, section 42 of Lesotho Criminal Procedure and Evidence Act 9 of 1981 thereat and (in this regard see section 49(2) of South African Criminal procedure which has been declared unconstitutional by the

Courts),[1257] crowd control, suppression of terrorism, sabotage and fundamental freedoms, such as freedom of assembly and association which must be sought from the police through a permit. The police service itself does not enjoy freedom to join any workers union or a political party of their choice and yet they are expected to enforce other's rights. There is a need for political will in Lesotho to bring the perpetrators to book. The Lesotho Law Reform Commission is called upon to integrate this in the formulation of the new laws. The police must have modern crowd control equipment and proper regular training and the service must be highly motivated by promotions, salary and special courses as incentives for the good work.

6.5 THE SUMMARY OF THE POLICE USE OF DEADLY FORCE IN THE FOUR SELECTED JURISDICTIONS

The use of deadly force seems to be the pivot around which the police day to day operations revolve. Central to the police daily activities is the protection of life and limb, property and the general welfare of the state and its people either in their individual or collective capacity. The legislature in the four selected jurisdictions seem to have in one way or the other tried to curtail, limit and/or regulate the police use of lethal force by providing specific confines within which the police may operate.

6.6 REASONABLENESS AND PROPORTIONALITY FACTORS

The legislature further seems to have placed a yardstick to police officers to gauge themselves while executing their daily duties in attempting to exercise the use of deadly force. The yardstick is that in whatever they do, police officers must act reasonably and try as far as the circumstances permit, to use the amount of

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1257 See *Govender v Minister of Safety and Security* 1999 (2) SACR 706, *S v Walters* 2002 (2) SACR 298-306 These Cases emphasized the question of reasonableness, proportionality, balance, warnings, before the police can take action etc.

force which is no more than necessary. This is done in order to strike a balance between the interests of the state and those of the individual person.

The following measures are examples of how the four selected jurisdictions regulate their respective police use of deadly force:

6.6 (a) The United Kingdom

Section 3(1) of PACE 1984 as amended requires police officers to use such force as is reasonable in the circumstances for the prevention of crime or effecting a lawful arrest.

6.6 (b) The United States of America

There is a requirement that police officers may use force which is no more than is necessary in the circumstances. In other words, indiscriminate use of force is prohibited according to Article 120.7 of the Model Code in Pre-Arraignment Procedure.

Lawton[1258] argues that:
"The police officer's discretion to use force, or the threat of force, is perhaps the most defining characteristic of the police role. With the exception of the military and other law agencies, theirs is the only occupation that relies on the use of force as a prescribed means for fulfilling their mandate".[1259]

6.6 (c) The Republic of South Africa

Section 49(2) of the Criminal Procedure Act 51 of 1977 as amended, authorises police officers to use deadly force on a fleeing suspect if such a person cannot

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1258 See Lawton, 2007: 163. See also htt://jrc.sagepub.com downloaded on 6th October 2008.
1259 See Lawton, 2007: 163.

be arrested by any means other than killing him and the police officer's action is deemed lawful under such circumstances.

Kriegler J in Ex parte Minister of Safety and Security v Walters[1260] held that:
"There is moreover an apparent difference of opinion between two Ministries of state most directly concerned with section 49(2). Each proceeds from and emphasises a particular public interest: on the one hand the Ministry of Safety and Security underscoring the pressing public need to afford SAPS the powers they reasonably require to maintain law and order; and on the other side the Ministry of Justice seeks to conform with the Constitutional command to promote and protect the fundamental rights and freedoms of all, including fleeing suspects".[1261]

This assertion is probably true in the wake of the high spate of violent crimes, not only in South Africa, but also in the other selected jurisdictions as well, which claim lives of the police officers daily. That notwithstanding, the balance would have to be struck between the interests of the public and the required prevention of crime.

6.6 (d) The Kingdom of Lesotho

Section 42 of Lesotho Criminal Procedure Act 9 of 1981, is similar to the South African section 49(1), requiring police officers to use lethal force to persons who have committed offences that appear in the First Schedule relating to serious offence such as murder, robbery or theft etc.

In all the four jurisdictions, a common denominator seems to be that due to the seriousness of the offence, such arrest may be conducted without warrant,

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1260 2002 (4) SACR 613.
1261 See Watney, 2003: 75.

especially where any attempt to obtain a formal warrant would delay or defeat the ends of justice.

There seems to be a serious disagreement or conflicting views of scholars in this field as to what constitutes reasonable force or when such force should be unleashed by police officers given the fact that, in some cases, they have to act impulsively, at the spur of the moment, in order to avert an impending dangerous situation.

A traditional view of some scholars is that police officers must act decisively without endangering themselves. Given the nature and sophistication of modern crimes, and the manner in which they are executed, i.e. using advanced means and weapons, police officers are increasingly exposed to situations of peril. If the legislature cannot protect them they will be reluctant to act in the interest of the public good.

A corresponding view, however, is that police officers must learn to restrain themselves while conducting their use of deadly force and are called upon to use that amount of force as is required under the circumstances so that the means used fit the crime or the desired end result in a democratic setting, where citizens enjoy their rights relatively freely without any undue interference.

It is submitted that proportionality, will in the main, depend upon the circumstances of each case from Country to Country as there is no straight-forward answer that can be given to police officers on duty save to say that caution must be taken not to over-step the operational lines stipulated by laws. As far as possible, police officers must give a warning shot unless circumstances dictate otherwise.

6.7 CONCLUSION

In the three selected jurisdictions, except Lesotho, oversight systems put in place seem to be highly advanced either in terms of technology, training in crowd management strategies, and equipment enabling them to effectively deal with any situation they may be confronted with.

On the contrary, in a certain sense, Lesotho seems to have lingered behind in these areas. Part of the reason, as we have indicated *supra*, may be apportioned to lack of political will on the part of those who are currently administering the Country. It is submitted that besides economic factors, as opposed to the three selected jurisdictions, police officers in Lesotho are not on par in terms of proper training, pay, promotions, advanced courses, motivation, crowd management control, uniform, housing and in other respects. In this regard, therefore, Parliament is called upon to act speedily to remedy these shortcomings by enacting legislation that will respond decisively to our submissions in order to realize effective and efficient policing standards, required for Lesotho le Basotho.

6.8 RECOMMENDATIONS FOR LESOTHO DRAWN FROM THE THREE SELECTED JURISDICTIONS WILL HELP LESOTHO MOUNTED POLICE SERVICE TO PERFORM ITS POLICING MANDATE IN A DEMOCRATIC SETTING PROFESSIONALLY

- ☆ The Lesotho Mounted Police Service must participate fully in an industrial action in order to enhance its bargaining power with its employer for the sole purpose of engaging the latter to improve the current *status quo* in terms of service delivery and conditions of service.
- ☆ The current formation of the Police staff association does not serve any purpose, because it does not allow members to strike, petition, or even use their will-power or to go slow. Most of the police stations, for example,

are very old, dating from colonial times. There is to a large extend no proper crowd management equipment.

- ☆ The introduction of a Police Complaints Authority in Lesotho is a step in the right direction, but it lacks full development in terms of accountability by taking action against those officers who are suspect of repeated misconduct as opposed to the three selected jurisdictions.
- ☆ There is no point in drawing up good mission statements, visions and values in modern democratic policing, which in the ultimate account, will form part and parcel of business as usual thereby only decorating police walls and shelves.
- ☆ Police officers must not be allowed to take the law unto themselves in a democratic dispensation in cases of arrests, searches or seizures, but they must be encouraged to allow the courts to intervene by issuing such instruments.
- ☆ The Lesotho Government must strengthen the oversight bodies, such as Parliament, NGO, Media and create public forums in order to monitor police malfunction and abuse of people's fundamental rights and freedoms.
- ☆ The Lesotho Criminal Procedure and Evidence Act must be revised to provide clear guidelines to police officers in respect of the use of minimum force or deadly force, especially in public emergencies as opposed to now where there are no such pillars.
- ☆ Police administration must be selected on merit, expertise, experience or training or by qualification in order to enhance transparency, accountability in order to boost the low morale and confidence of the rank and file as a whole. Promotion should not be determined by political affiliation as it is the case now.
- ☆ The Lesotho Government must empower the police with advanced skills in crime intelligence, surveillance competent courses, pro-active crime methods in order for them to play a preventative role as opposed to

reactive one, which is normally followed by dire consequences of police frustration and high-handedness culminating into unwarranted civil claims.

- ☆ The Lesotho Government must not pay lip-service to the international instruments which it has not only signed, but has ratified some. Lesotho must go ahead and enact domestic legislation giving effect to the same in order to enhance greater protection to its citizens against abuse of their fundamental rights and freedoms.
- ☆ The Lesotho courts must be strengthened by legislation in order for them to enjoy their independence in the exercise of their mandate to deliver judgements freely, without fear or favour.
- ☆ The Parliament of Lesotho must protect the suspects and victims of crime from arbitrary arrests, detentions without trial, unlawful searches and seizures and draw up guiding principles on how and when to use deadly force under section 42 of the Criminal Procedure Act. In this direction therefore, an example can be derived from the South African section 49, of the Criminal Procedure Act 51 of 1977.
- ☆ Suspects of crime must be inspected by medical officers whenever they come out of police holding cells in order to reduce allegations of torture, or to ascertain whether or not any misconduct by police took place or whether there are any disappearances from the police holding cells and a judicial officer should be engaged wherever there are allegations of torture to investigate the circumstances and hand his finding to parliament and the Director of Public Prosecutions for appropriate action.
- ☆ Proper balance between the interests of the state and the citizens must be maintained in order to enhance undue interference with the fundamental freedoms and rights of citizens, such as privacy, movement, expression and gathering.
- ☆ Police must allow relatives or a legal representative of the suspect to visit the holding cells or detention centres where such a suspect has been kept.

- ☆ The onus of proof where the rights of a suspect have been infringed, or his liberty has been restrained or limited, must always remain with the person who has arrested him and the suspect must always be given the reason for his arrest.
- ☆ Reasonable suspicion must form the basis for the arrest, search or seizure.
- ☆ Political detainees must not be exposed to *incommunicado* detentions, arbitrary arrests and torture. Instead they must be given a proper platform to defend themselves in court through established procedures.
- ☆ All deaths that took place during the undemocratic rule, including those that appeared under liberation movements that were never investigated and prosecuted, must be reopened through a judicial enquiry. Those responsible must be brought to book in order to discourage impunity at all cost and remove any indemnity order that may have been put in place.
- ☆ The office of the Ombudsman needs to be given real power in order to be effective as provided under section 134 of the Constitution.
- ☆ Lesotho Police Service must further introduce a section similar to South African Police Act which empowers a senior officer of the rank of Assistant Commissioner or deputy, to arrest or cause to be arrested any person reasonably believed to be a terrorist or suspected of practising such activities.
- ☆ The Lesotho state liability has to be strengthened through legislation in order to compare it to the South African situation. The state must be held vicariously accountable for the wrongful actions of police which fall within the scope of their mandate.
- ☆ The Police in Lesotho must themselves further be held personally liable if their acts fall outside their scope of duty, either delictual or criminal as this will enhance discipline within the service. Police regulations must be updated to equate them with the South African position which already calls for imprisonment as one of the options of punishment.

- ☆ The Lesotho police must enjoy an autonomy and not be clustered under other departments, such as immigration, passport offices in order to fully commit it to its sole budget which will take care of all its demands as it is the case in South Africa.
- ☆ No indemnity orders should be given to police officers for their misconduct of violating human rights of citizens, as it normally happens in the United States of America. They must further take an oath of office or affirmation while intending to carry out searches and arrests in order to commit them to the respect for civil rights.

6.9 THE FOLLOWING RECOMMENDATIONS BY GGADA ARE OF PROFESSIONAL VALUE FOR LESOTHO AS GUIDELINES:[1262]

- ☆ **Partnership:** The environment in which policing takes place requires that the police should undertake joint police training and information sharing in a bid to entrench a culture of effective policing and openness by training police officers, non-governmental organizations and other initiatives. Exchange of information and co-operation can lead to synergy which can leverage the functioning of the police to win over crime. Neighbourhood police stations can share the resources and complement each other by jointly co-operating where resources are inadequate. The same applies to detectives and intelligence works. These important resources can also be shared between nearby police stations where assistance is needed.
- ☆ **Leadership:** The task of leadership, as opposed to leaders, requires personal capabilities of setting direction and steering the organization along the right path. Station managers in particular are faced with the dual challenge of discovering these high level capabilities in themselves and of gaining commitment and capabilities from others. Central to this task is the positive influential role they play in terms of inspiring the station members. Managers at station level should possess leadership and vision

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1262 See Ggada, 2004: 103.

in order to constantly foresee opportunities and are able to articulate goals of the organization clearly and ensure that they are implementable.

- ☆ **Training and development:** The critical challenge is to change the attitude of the police members to be positive by reinforcing learning rather than focusing on tasks. The training curriculum must instil professionalism as opposed to specialists. At the same time it should not end with completion of task programs, but true training must be linked to personal development. The knowledge and skills gained must be broad and applicable even outside the duty. Given the changing environment they operate in, proficiency in specific tasks alone is not enough, training must equip people with multitask knowledge and skills in order to anticipate and function effectively.
- ☆ **Capacity building:** A culture of entrepreneurship needs to be engendered in the Lesotho Mounted Police Service if the police are to meet the demands and needs of the community in a more successful manner, providing ongoing capacity building support to station managers. This is important to ensure that they are in line with the strategic direction of the organization. The advantage of capacity building programme is that they are aimed at outcomes-based development. While these can facilitate the changing of attitude, they can also help in developing leadership that is so scarce in the Lesotho Mounted Police Service.
- ☆ **Deployment:** A large number of the Lesotho Mounted Police Service members are either under skilled or poorly trained while effective deployment of police members is more than just making routine checks and disappearing. It needs proper planning, a thorough analysis of area profile, knowing about the occurrence of regular crimes committed in the area and at certain periods. Visible policing is another important mechanism such as foot, bicycle and vehicle patrolling to discourage the would be offenders. In areas where there are no police stations, satellite police stations can be opened so that police services are accessible when needed.

- ☆ **Performance management:** An integrated performance system should be designed to ensure that individual performance is not only based on proficiency skills and abilities but, should also be linked to outcome development. This can be achieved where coaching and training take place and learning is rewarded. In addition, employees must be seen as assets to the success of the organization. Likewise an integrated human resource system should play a key role to ensure that the organization retains a highly competent team which is continuously upgrading itself.
- ☆ **A new culture:** The Lesotho Mounted Police Service needs to be mission driven and find the most innovative ways for delivering public goods to the community. In order to entrench a new culture, the real meaning of the principles of the government White Paper (1997) needs to be properly explained to police officers in terms of how it relates to their expected behaviour when performing their work. As part of the Lesotho Mounted Police Service expected performance outcomes these principles should be included when measuring its performance indicators in order to ensure that the individual officer's behavioural attitude is aligned. It needs to constantly evaluate and review the overall effectiveness of the department, including leadership style and management practices, such as fostering a culture of performance and reward, increasing employee participation and setting goals for individuals and teams to ensure inclusiveness and collective commitment to goal achievement.
- ☆ **The high performance organization** should also strive to inculcate a high-involvement culture where mediocracy is not tolerated and openness to challenge, change and continuous learning is fastened. Equal decentralization of decision-making and authority to lower levels, particularly at the station level where police officers face daily tasks of fighting crime and solving community problems, should not be viewed as losing power. Instead it should be seen as part of an empowering process for the police at station level to make informed decisions and become responsive in order to achieve greater efficiency.

☆ **Organizational structure and design:** The present organizational form is a reflection of a hierarchical structure with fragmented units. The current form of organizational design structure with the many powers vested at high levels, exhibits inflexibility and creates ambiguity, as it lacks proper flow of communication. More powers need to be devolved to the station level where war against crime occurs. Devolving powers to the station manager is possible without losing any control at top level. In addition, attention should be paid to restructuring the station level by integrating units that perform related functions into a single unit in order to achieve better coordination, efficiency and a speedy response.

6.10 REMEDIAL MEASURES RECOMMENDED BY UPADHYAY[1263] IN PRE-TRIAL DETENTIONS IN INDIA ARE OF SIGNIFICANCE TO LESOTHO TO FORM PART OF POLICE TRAINING MANUAL:

☆ The Government should strengthen its international commitment to prevent torture when it ratified the Human Rights Covenants and agreed to the United Nations Declaration against torture as emphasized in section 8 of the Lesotho Constitution.

☆ The Government should launch an intensive programme of human rights education as a standard part of the training curriculum for all police and security forces personnel involved in the arrest, detention and interrogation of suspects.

☆ At the time of arrest, the accused should necessarily be examined medically at the instance of the police.

☆ Judicial inquiries should be made mandatory into all allegations of torture, rape and deaths in custody.

☆ The officers in charge of police stations should be instructed that all detainees must be formally notified of their rights, including a list of rights to be displayed in all police cells in a local language.

1263 See Upadhyay, 1999: 152.

- ☆ In order to establish liability of the police in cases of custodial death the presumption of guilt should be raised against them. This could be possible in civil disputes.
- ☆ For meeting the requirements of such genuine cases, the Magistrate should be empowered to permit the investigating officer to further examine the accused in jail instead of the present practice of remanding him to police custody, which sometimes puts him at risk of being tortured at the hands of unscrupulous officers.
- ☆ The guidelines laid down by the supreme Court in *Basu v State of W.B.*[1264]are to be followed in all cases of arrest or detention till legislative measures are taken that:
- ☆ The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designation recorded in the police register.
- ☆ The police officer carrying out the arrest of a detainee shall prepare, at the time of arrest, a memo attested to by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made to be countersigned by the arrestee reflecting date and time.
- ☆ A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-ups, shall be entitled to have a friend or relative or other person known to him or having interest in his welfare being informed, as soon as it is practicable.

6.11 RECOMMENDATIONS TO GOVERNMENTS AND POLICE AUTHORITIES IN THE SADC REGION SHOULD BE INCLUDED IN LESOTHO POLICE TRAINING MANUAL:

Amnesty International believes that both individual governments and the Southern African Development Community (SADC) as a whole, need to take

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1264 1997 1 SCC 416.

action urgently to address human rights violations by the police and to further encourage the transformation of police services in a manner consistent with human rights standards and standards of professional conduct.

The following recommendations, based on the findings of Amnesty International report, are primarily addressed to governments and police authorities in the SADC member states. Amnesty International also calls on regional intergovernmental organizations – in particular SADC and the Southern African Regional Police Chiefs Co-operation Organization (SARPCCO) – and those governments with political, economic or other interests in the SADC region to do everything in their power to support the political and police authorities in the SADC member states in implementing these recommendations.

Set standards[1265]

- ☆ Develop a culture of respect for international and regional human rights standards by incorporating and giving full effect to those standards in national jurisdictions;
- ☆ Ensure that the public are aware of their rights and the means of enforcing them;
- ☆ Ensure complete judicial independence, as well as independence of the legal profession, and be willing to respect the judgements of the courts and the rule of law;
- ☆ Make clear publicly that human rights violations by the police will not be tolerated under any circumstances and that the need to investigate crime or deal with public disorder can never be used as a justification for human rights violations;
- ☆ Ensure that the criteria for career advancement within the police service include police conduct which is professional and conforms to international and regional human rights standards;

1265 See Amnesty International Report, 1997-2002: 96.

- ☆ Where necessary, reform laws, regulations and police operating procedures to bring them in line with international human rights standards;
- ☆ Ensure that strict guidelines govern the use of firearms, tear gas and other security equipment and that the use of such equipment is carefully monitored;
- ☆ Provide all "community policing" bodies (community policing forums, neighbourhood watch schemes, crime prevention committees, etc.) with a meaningful legal and regulatory framework in national law which defines the roles and responsibilities of members and officers. Such rules should ensure that all law enforcement activities are carried out in accordance with human rights standards. These rules should be widely disseminated and publicized;
- ☆ Make private security companies subject to national regulations ensuring strict accountability and rigorous training of their personnel. Training should include a comprehensive component concerning human rights standards. The roles and responsibilities of private security officers should not undermine those of the national police and law enforcement agencies.

Ensure accountability[1266]

- ☆ Investigate and bring to justice suspected perpetrators of human rights violations. It is vital that the authorities take effective measures to investigate allegations of human rights violations promptly, thoroughly, impartially and independently, in accordance with strict international standards for such investigations. Judicial proceedings against perpetrators should be carried out in accordance with international and regional standards for fair trial and without recourse to the death penalty;
- ☆ Ensure that all reform initiatives are monitored and evaluated. The monitoring of the impact of these initiatives is essential to ensure that objectives are being achieved and that resources are properly allocated.

1266 See Amnesty International 1997-2002: 97.

Guarantee professional and impartial policing[1267]

☆ End the political use of the police. Governments should cease to use law enforcement officials for political purposes, including to suppress peaceful, non-violent public assemblies and to persecute opposition parties, non-governmental organizations and minorities, including gays and lesbians. All police officers should receive clear, explicit instructions to respect the human rights of all, irrespective of political beliefs, sexual identity, religion, ethnic origin, sex, colour, language or similar orientation.

☆ Take steps to improve police officers' conditions of work and the resources available to police forces to enable them to perform their duties in a professional manner.

Provide effective training[1268]

☆ Ensure that all police officers receive human rights training which is practical, relevant to police work and based on international and regional human rights standards. Police training in the following areas should always be based on human rights standards and aimed at ensuring the highest standards of professional conduct. Training should pay due attention to the obligation to respect the human rights of vulnerable groups, such as women and children:

* Public order policing. Use of force and firearms in public order policing should conform to international standards. Police should be taught skills that enable them to use force and firearms, according to the principles of necessity and proportionality. Lethal force should only be used when strictly unavoidable as a last resort to protect life. This component of training should be associated with a program to review equipment at the disposal of law enforcement officials to ensure that they are able to undertake policing in accordance with these principles;

1267 See Amnesty International 1997-2002: 98.

1268 See Amnesty International 1997-2002: 98.

* Arrest and detention procedures. Police should carry out arrests using the minimum force necessary in a manner that is consistent with the prohibition against torture and ill-treatment. Training should be based on international and regional human rights standards relating to the use of force and to the treatment of detainees or prisoners.
* The interrogation of criminal suspects. Training on “scene of crime management”, the gathering, analysis and preservation of evidence and other aspects of the investigation of alleged crimes, including techniques of interviewing and taking statements from suspects and witnesses, should be designed to develop the capacity of law enforcement officers and the police to build a case in an efficient manner that avoids reliance upon coercion;
* Victims of crime. Training should be provided on interviewing complainants reporting human rights abuses, particularly where allegations of rape and domestic violence are involved. This training should be linked to other initiatives intended to raise the standard of medico-legal examinations of survivors;

☆ Ensure effective monitoring and evaluation of training programmes. The criteria for evaluating the success of training programmes – including the evaluation of trainees’ understanding of and commitment to human rights standards – should be established at the start of the training program to ensure that lessons are learned from previous training and that those lessons are incorporated into future training initiatives;

☆ Ensure that police training facilities have reliable and continuing access to skilled trainers. This should include high-quality training of trainers at national or regional level, or sustainable co-operative agreements between police training institutions and other agencies;

☆ All training and reform initiatives should be linked to the creation of effective accountability mechanisms.

Build partnerships[1269]

- ☆ All projects involving civil society partnerships with police organizations should be based upon international and regional human rights standards;
- ☆ Non-governmental projects and initiatives aimed at promoting community safety consistent with human rights standards should be encouraged and supported by donor agencies;
- ☆ Business and company sponsorship of anti-crime initiatives should be encouraged where this contributes to the promotion of human rights standards and does not increase disparities in resources for policing between richer and poorer areas;
- ☆ All police services should seek civil society partnerships to ensure better reporting of, and action against, the crimes of rape and domestic violence;
- ☆ Governments should acknowledge the expertise and contribution of non-governmental and other civil society groups to police training and should seek ways to strengthen these relationships.

6.12 SPECIFIC REFORMS[1270]

Amnesty International calls on the governments and police authorities of SADC countries to undertake the following measures:

Legal reforms[1271]

- ☆ Demonstrate their commitment to protecting and promoting human rights for all citizens by ratifying international treaties that contain safeguards against human rights violations. Important treaties that have not yet been signed or ratified by some SADC countries include:
  - * the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) (Angola, Swaziland, Tanzania and Zimbabwe);

1269 See Amnesty International 1997-2002: 99.
1270 See Amnesty International 1997-2002: 100-101.
1271 See Amnesty International 1997-2002: 100-101.

- * the International Covenant on Civil and Political Rights (Swaziland);
- * the UN Convention on the Elimination of All Forms of Discrimination against Women (Swaziland);

☆ Ensure that torture is defined as a crime in their national laws. This is a clear obligation under Article 4 of the Convention against Torture. Some States' Parties to this treaty have not yet fulfilled this obligation. They include Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa and Zambia;

☆ Repeal or amend laws which allow the use in any proceedings of any statements or evidence obtained as a result of torture or ill-treatment, except as evidence against the person accused of torture or ill-treatment. Countries whose criminal procedure laws allow evidence obtained as a result of torture to be used by the prosecution in criminal cases, or fail to prohibit such evidence being used, include Botswana, Lesotho, Malawi and Zambia;

☆ Repeal or amend laws which allow for incommunicado detention or prolonged detention without trial or remove the jurisdiction of the courts in bail matters. Such laws include:

- * The Pre-Trial Detention Law of 1992 (Angola);
- * The Dangerous Drugs Act of 1986 and the Prevention of Terrorism Act of 2002 (Mauritius);
- * The Criminal Procedure Code of 1929 (Mozambique);
- * The 1993 Non-Bailable Offences Order and subsequent amendments (Swaziland);

☆ Ensure that the provisions relating to police use of lethal force in constitutions, national laws or regulations are in line with international human rights standards. Constitutions which fail to properly limit the use of lethal force include those of Botswana, Lesotho, Zambia and Zimbabwe. National legislation in all countries should also be amended where necessary to ensure that the principles of necessity and proportionality in the use of force are reflected in the law;

☆ Repeal or amend legislation that curtails freedoms of conscience and expression and of peaceful assembly and association. Such legislation denies fundamental human rights and can facilitate political use of the police. Legislation limiting these rights is particularly evident in Swaziland and Zimbabwe.

Oversight and accountability mechanisms[1272]

☆ Set up effective, adequately resourced and independent bodies that are empowered to investigate complaints against the police, including complaints of human rights violations perpetrated by the police and of police failure to investigate other human rights abuses. Such bodies should be accessible to all victims of human rights violations and be publicly accountable:

* The following countries do not have bodies that meet the above criteria, Angola, Botswana, Mauritius, Mozambique, Swaziland, Zambia and Zimbabwe;
* The Police Public Complaints Authority in Zambia, provided for by the 1999 Police Act, and the *Provedor de Justica* (Ombudsman) in Angola, provided for by the Constitution, should be established as soon as possible.
* The 1998 Police Act in Lesotho should be amended or new legislation put in place to allow members of the public direct access to the Police Complaints Authority and to ensure that action is taken as a result of its investigations.
* The government of South Africa should demonstrate its commitment to the independent oversight of the police by ensuring that the Independent Complaints Directorate (ICD) has adequate resources and all appropriate powers to enable it to operate effectively and credibly in the investigation of allegations of human rights violations by the police and to fulfil its new duties in relation to

1272 See Amnesty International 1997-2002: 101-102.

both the Domestic Violence Act and oversight of the metropolitan police services. The government and national parliament should support a process of establishing the ICD on a separate legislative basis to enhance its institutional independence;

- ☆ Put in place measures to facilitate and enable oversight bodies to have access to independent forensic experts when investigating allegations of human rights violations by the police.

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