

### Worlds Apart?

#### A Comparative Analysis of Criminal Procedure in Swaziland and the United States

“Man fined 8 cattle for sex with brother’s wife” reads the headline of a popular Swazi daily newspaper.<sup>1</sup> On its most superficial level this curious headline would be enough to make most American lawyers (and their ilk) raise an eyebrow, at the very least. Yet it is only when one probes beneath the surface that one discovers the true complexities of a typical rural African legal system. Indeed, on first impressions it would appear that Swaziland is as far removed from the USA legally as it is geographically - one might almost say the two systems are worlds apart... or might one?

This analysis will seek to provide a brief overview of Swazi customary/tribal criminal procedure, focussing on a *structural* analysis, and using the “Adulterous Brother” story as a guide and focal point. Indeed, a number of thoughts are provoked by the intriguing headline. Firstly, the headline suggests that it is a criminal offense to have sex with one’s brother’s wife. While adultery is frowned upon in Western culture, it is difficult to imagine a US or European statute (or case-law) that criminalizes such conduct. Indeed, there is in fact no Swazi statute or caselaw on point, for the legal system under which the case was tried consisted of customary, tribal law, which is unrecorded.<sup>2</sup>

Swaziland’s legal system is split into a Western-style system. . .

“. . . partly based on Roman-Dutch law, as applied in English organised courts (including a Court of Appeal, a High Court, magistrates’ courts and industrial courts for labour matters), and traditional Swazi law and customs, as applied in Swazi National Courts.”<sup>3</sup>

The National Courts are responsible for administering “unwritten Swazi law and custom (under the 1950 *Swazi Courts Act*.”<sup>4</sup> They have criminal jurisdiction for “petty offences such as theft, assault and violations of traditional Swazi law and custom such as the practice of witchcraft.”<sup>5</sup> The remainder of this paper will focus on the traditional National Courts’ structure and criminal procedure.

Forming the outset of the criminal procedural process, Swazi investigative procedure is actually surprisingly similar to a Western-style system, and includes forensic investigations, the requirement of a lawful justification to detain suspects, the issuing of warrants (to arrest, and to search) and the posting of “bail” (a “police bond” in Swaziland).<sup>6 7 8</sup> Despite their similarities, there are also significant differences: the Swazi arrest rate is deplorable, defendants may spend up to five years in detention awaiting their trial, and there is *very* little respect for human rights with regards to treatment of suspects and prisoners.<sup>9 10</sup> Once an arrest has been made the police will forward the file to a state attorney, who assesses whether or not a crime has been committed, and if satisfied, will inform the police what charges to file, at which time the case will be registered for trial.<sup>11</sup> Despite significant challenges facing the investigative function of the Swazi criminal procedure, the fundamental structure remains very similar to a US-style system of investigative criminal procedure.

In the case of our friend, the Adulterous Brother, the woman’s husband and family were aware of the affair, and reported him to village elders.<sup>12</sup> The man was allegedly “caught red-handed by local traditional leaders as well as the husband of the wife.”<sup>13</sup> Thereafter the village elders reported the matter to the Swazi National Court. As noted already, minor criminal cases are usually heard by a National Court. In the National Courts, cases are adjudicated by court presidents who lack any legal training, and are usually monarchy-appointed tribal elders.<sup>14</sup> Two assessors and a court clerk, who records statements and administers oaths, assist the court president.<sup>15</sup> There are no juries in the National Courts. The use of customary law and the jurisdiction of the traditional courts are sanctioned by the Swazi Constitution.<sup>16</sup>

Customary law consists of “custom”: orally-transferred law that is required to be “certain, reasonable, practiced by many people and must be notorious.”<sup>17</sup> It is an elusive and, at times, controversial source of law. Since it is orally-transferred from generation to generation, there is no codification of customary law, which has resulted in a variety of “versions” of Swazi customary law.<sup>18</sup> The

Constitution also provides that “where customary law is repugnant to natural justice; it shall to the extent of that repugnancy be null and void.”<sup>19</sup> Ironically, however, one of the fundamental tenets of customary law is that “defendants are not permitted formal legal counsel but may speak on their own behalf and [be] assisted by informal advisers.”<sup>20</sup> One academic has questioned the constitutionality of this, suggesting that “denial of legal representation . . . is a clear infraction of the rules of natural justice and the right to a fair trial.”<sup>21</sup> Furthermore, it is interesting to note that while their . . .

“ . . . proceedings are informal and . . . guided by natural justice . . . [the National Courts] have power to enforce their orders and to issue warrants of attachment and arrest . . . [and] are formal courts of record.”<sup>22</sup>

Finally, cases in the National Courts take an average of one to three days to complete (possibly because there are no rules of procedure and defendants are not permitted counsel), and judgments (including sentences) are statutorily required to be delivered immediately.<sup>23 24 25</sup>

Speaking of sentencing, a second interesting point about the Adulterous Brother headline is the punishment. A cattle-fine isn’t exactly common in the West. The Criminal Procedure and Evidence Act reserves the death penalty (which is carried out by hanging) for the High Court, but permits the courts of the land (including the National Courts), subject to any law (including customary law), to impose the following sentences: imprisonment; declaration as an habitual criminal; fine; detention at a juvenile centre; whipping; and putting the accused under recognisance with conditions.<sup>26</sup> Judges (or in the case of National Courts, the court presidents) have sentencing discretion with statutorily defined limits.<sup>27</sup> In terms of sentencing, perhaps the most interesting aspect of the Swazi system is the sentence of whipping, which has a statutorily-mandated maximum of fifteen strokes, and is subject to severe and constant criticism from international human rights groups and legal organizations.<sup>28 29</sup>

Regardless, our friend the Adulterous Brother received no corporal punishment, and was only required to deliver 8 head of cattle to the local sheriff. Were the Adulterous Brother to challenge his “conviction”, he would follow appellate review procedures remarkably similar to those one would find in a Western legal system. The National Courts, responsible for customary law, have a system of appeals, starting at the Court of Instance (the lowest court of record), and moving through the Swazi Court of Appeal to the Higher Swazi Court of Appeal. From the Court of Appeal, criminal appeals and reviews go to the Judicial Commissioner, who can in turn refer the case to the High Court (the highest court in the land, akin to the United States Supreme Court).<sup>30 31</sup>

Upon reflection, the third and final point of interest provoked by the Adulterous Brother headline is perhaps also the *most* interesting aspect of the headline, namely the fact that this story made the front page of one of Swaziland’s most popular newspapers. “Man fined eight cattle for sex with brother’s wife.” To the average Western (some might say patronising) eye this peculiar headline reveals an unconventional outcome to an unconventional case. Yet, the fact that the headline was worthy of publishing on a billboard as an incentive to get people to buy the newspaper should provide some indication that for all their presumed backwardness, the Swazi man (and woman) on the street is perhaps just as intrigued by such a story as your average Westerner.<sup>i</sup>

In conclusion, the Swazi traditional customary law system bears important structural differences from the U.S. stereotype, including the lack of legal representation, the lack of a jury, the informality of the court’s procedures (including the lack of legal expertise in the court president, as opposed to U.S. judges), and the sentence of whipping. Additionally the most obvious and striking difference is the dual system of traditional National Courts and Western-style Magistrates’ courts. Yet, as alternative as customary tribal law may be, the fact that a daily newspaper would use the Adulterous Brother headline as a marketing tool to encourage purchases of their newspaper, would seem to indicate a local interest in customary law. Taken into account in conjunction with the structure of the Swazi

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<sup>i</sup> This headline was observed on a newspaper billboard by the author whilst travelling in Swaziland, and indeed one such billboard headline adorns his study wall.

criminal procedure system one might almost conclude that for all its differences, the legal system of Swaziland has (at least facially) more *in common* with the USA than it has differences.<sup>ii</sup> The appellate review system, and the investigative function of their criminal justice system, both bear astounding structural similarities to the U.S. equivalent, and indeed other Western countries. Worlds apart they may be geographically, but these two legal systems are arguably not so structurally different as one might first presume. Thus, in absolute summation, the structure of the Swazi criminal procedure system is curiously similar to U.S. criminal procedure, albeit with several significant differences in certain aspects of criminal procedure, notably adjudication, and to a lesser extent, sentencing.

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<sup>ii</sup> This paper does not address the significant legitimacy and judicial independence challenges facing the Swazi legal system, of which there are many. Corruption and monarchical tyranny infest the Swazi legal system, and there are numerous substantial differences between the US and Swazi legal systems. As a brief comparison, the claims of similarity made in this paper pertain only to the facial criminal procedure structures in place in both countries, most particularly in terms of adjudication and appellate review, without giving regard to deeper underlying issues. These issues can be summarised by a brief article which was ironically published in the Times of Swaziland on the same day as the Adulterous Brother story, available here <http://www.times.co.sz/News/66425.html>.

<sup>1</sup> Times of Swaziland, “Man fined 8 cattle for sex with brother’s wife”, July 8, 2011, available at <http://www.times.co.sz/News/66423.html>

<sup>2</sup> Id.

<sup>3</sup> International Commission of Jurists, “Attacks on Justice – Swaziland”, [www.icj.org](http://www.icj.org), article available at <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf> <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf>, p. 3

<sup>4</sup> International Commission of Jurists, “Attacks on Justice – Swaziland”, [www.icj.org](http://www.icj.org), article available at <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf> <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf>, p. 4

<sup>5</sup> International Commission of Jurists, “Attacks on Justice – Swaziland”, [www.icj.org](http://www.icj.org), article available at <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf> <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf>, p. 4

<sup>6</sup> The Criminal Procedure and Evidence Act, Act 67/1938, January 1, 1939, available at <http://www.acc.gov.sz/legislation/Criminal%20procedure%20and%20evidence%20act.pdf>

<sup>7</sup> United States Embassy, Mbabane, Swaziland, “Help for American Victims of Crime in Swaziland”, available at <http://photos.state.gov/libraries/swaziland/19452/pdfs/Victim%20Assistance%20Handout%20March%2017%202011.pdf>, pp. 1-2.

<sup>8</sup> Crime and Society: A comparative criminology tour of the world, “Swaziland”, <http://www-rohan.sdsu.edu/faculty/rwinslow/index.html>, available at <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/swaziland.html>

<sup>9</sup> United States Embassy, Mbabane, Swaziland, “Help for American Victims of Crime in Swaziland”, available at <http://photos.state.gov/libraries/swaziland/19452/pdfs/Victim%20Assistance%20Handout%20March%2017%202011.pdf>, p 2.

<sup>10</sup> Crime and Society: A comparative criminology tour of the world, “Swaziland”, <http://www-rohan.sdsu.edu/faculty/rwinslow/index.html>, available at <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/swaziland.html>

<sup>11</sup> United States Embassy, Mbabane, Swaziland, “Help for American Victims of Crime in Swaziland”, available at <http://photos.state.gov/libraries/swaziland/19452/pdfs/Victim%20Assistance%20Handout%20March%2017%202011.pdf>, p 2.

<sup>12</sup> Times of Swaziland, “Man fined 8 cattle for sex with brother’s wife”, July 8, 2011, available at <http://www.times.co.sz/News/66423.html>

<sup>13</sup> Id.

<sup>14</sup> United States Embassy, Mbabane, Swaziland, “Help for American Victims of Crime in Swaziland”, available at <http://photos.state.gov/libraries/swaziland/19452/pdfs/Victim%20Assistance%20Handout%20March%2017%202011.pdf>, p 2.

<sup>15</sup> International Bar Association, “Swaziland – Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law”, March 2003, available in pdf at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CE4QFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3Da0309ed4-69d3-477a-826a-0768ad8727f3&ei=XH4FUJXnlaPd4QTD9aCsCQ&usq=AFQjCNF2jCdpJqEN3yYDIXw4sYzCEZStVw>

<sup>16</sup> Id.

<sup>17</sup> Buhle Dube and Alfred Magagula, “Update: The Law and Legal research in Swaziland”, Hauser Global Law School Program at [www.nyulawglobal.org](http://www.nyulawglobal.org), article available at <http://www.nyulawglobal.org/Globalex/Swaziland1.htm>

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Crime and Society: A comparative criminology tour of the world, “Swaziland”, <http://www-rohan.sdsu.edu/faculty/rwinslow/index.html>, available at <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/swaziland.html>

<sup>21</sup> Buhle Dube and Alfred Magagula, “Update: The Law and Legal research in Swaziland”, Hauser Global Law School Program at [www.nyulawglobal.org](http://www.nyulawglobal.org), article available at <http://www.nyulawglobal.org/Globalex/Swaziland1.htm>

<sup>22</sup> International Bar Association, “Swaziland – Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law”, March 2003, available in pdf at

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<sup>23</sup> Id.

<sup>24</sup> International Commission of Jurists, “Attacks on Justice – Swaziland”, [www.icj.org](http://www.icj.org), article available at <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf> <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf>, p. 3

<sup>25</sup> The Criminal Procedure and Evidence Act, Act 67/1938, § 294 (1), January 1, 1939, available at <http://www.acc.gov.sz/legislation/Criminal%20procedure%20and%20evidence%20act.pdf>

<sup>26</sup> Id. at §§ 296-297.

<sup>27</sup> Id. at §§ 300-312, 317.

<sup>28</sup> Id. at § 306.

<sup>29</sup> See U.S. Department of State, “2011 Human Rights Reports: Swaziland”, May 24, 2012, available at <http://www.state.gov/j/drl/rls/hrrpt/2011/af/186248.htm>

<sup>30</sup> International Commission of Jurists, “Attacks on Justice – Swaziland”, [www.icj.org](http://www.icj.org), article available at <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf> <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf>, p. 3

<sup>31</sup> International Bar Association, “Swaziland – Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law”, March 2003, available in pdf at

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