

# Kingdom of Swaziland

## Introductory Note

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### I. Origins and Historical Development of the Constitution

Swaziland gained independence from the United Kingdom of Great Britain and Northern Ireland 6 September, 1968 through a written Constitution (the Independence Constitution)<sup>1</sup> which included a Bill of Rights.<sup>2</sup> There are two theories regarding the coming about of the Independence Constitution. One suggests that the Constitution was imposed<sup>3</sup> by the departing colonial masters. The other is that the Constitution was a product of consultation and negotiation, and was formulated by a constitutional committee of a majority of the Swazi people,<sup>4</sup> including political parties that existed at the time. Whatever the case may be, there can be no question that the Independence Constitution laid down the foundation for a constitutional state with the institution of the Monarchy intact, albeit with limited powers. Political activity was free and citizens were able to form and join political parties as they wished.

On 12 April 1973, the constitutional and political landscape of Swaziland took a sudden and dramatic turn. His Majesty King Sobhuza II unlawfully repealed the Independence Constitution through the King's Proclamation to the Nation ("King's Proclamation"). The repeal of the Independence Constitution was unlawful for two reasons. First, the Constitution contained no provision that allowed for its repeal. Second, the King had not followed the requirements laid down in section 134 of the Constitution. This section set out the mode, manner and form for amendment of the Constitution and how entrenched and the non-entrenched provisions could be amended. In *R v Bhembe*<sup>5</sup> the High Court found that King Sobhuza II did not have the power to abrogate the Constitution without having followed section 134. What the Independence Constitution required

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<sup>1</sup> Independence Order No. 50 of 1968.

<sup>2</sup> Chapter III.

<sup>3</sup> John Hatchard *et al* (eds.), *Comparative Constitutionalism and Good Governance in the Commonwealth: an Eastern and Southern Africa Perspective* (2004) 15.

<sup>4</sup> Siphon Hezekiel Zwane, *Constitutional discontinuity and legitimacy: a comparative study with special reference to the 1973 constitutional crisis in Swaziland*, *Dissertation for the Degree of the Master of Laws*, (unpublished 1988) 8.

<sup>5</sup> High Court Case No. 75/2002 available at <http://www.swazilii.org/sz/judgment/high-court/2002/28>.

was a joint sitting of the Senate and the House of Assembly, which had never happened. The failure by the King to follow the provisions of section 134 was considered by the Court of Appeal (as it then was, now the Supreme Court) in *Gwebu and Another v Rex*<sup>6</sup> where it said that no provision was made for the repeal of the Constitution as this was never envisaged by the drafters of the Constitution.

After years of political agitation for constitutional reform the present King, Mswati III began a process of reform. This process started as early as the beginning of the 1990s as a result of organised labour's demands<sup>7</sup> for a comprehensive people-driven constitutional process. They demanded that the process be all inclusive, participatory, accountable to the people, and transparent resulting in the adoption of a democratic national constitution. Due to the fact that political parties were still banned and free political activity prohibited, the trade union movement became a conduit for the translation of the citizens' demands. The Peoples' United Democratic Movement (PUDEMO) and its youth league, the Swaziland Youth Congress (SWAYOCO) have been for a long time campaigning for a National Convention to chart a constitutional and democratic way.

In this regard, in 1990 the leadership of the PUDEMO were arrested and charged with the crime of high treason.<sup>8</sup> They were acquitted on appeal. Following the acquittal combined with massive workers' protests for reform, King Mswati III found himself in the unenviable position of instituting reforms. Through various commissions which he appointed and whose members he singularly picked the King began constitutional reforms. These commissions included: The *Tinkhundla* Review Commission (TRC),<sup>9</sup> the Constitutional Review Commission (CRC)<sup>10</sup> and the Constitution Drafting Committee (CDC).<sup>11</sup> All these commissions all led by senior members of the Royal family (the King's brothers) and their members were handpicked by the King without the involvement of the people or consultation with their organs. The reforms were largely seen as half-hearted and cosmetic.

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<sup>6</sup> Criminal Appeal Nos. 19 and 20/2002 available at <http://www.swazilii.org/sz/judgment/supreme-court/2002/21>.

<sup>7</sup> Swaziland Federation of Trade Unions, The popular 27 Demands annexure "NCA18" in *Jan Sithole .N.O. and Others v The Prime Minister and Others* High Court Case No. 2792/2006, at 302 of the Court Record.

<sup>8</sup> *The King v Dominic Mngomezulu and Nine Others* Criminal Case No. 94/1990 (as yet unreported).

<sup>9</sup> Decree No. 1 of 1992.

<sup>10</sup> Decree No. 2 of 1996.

<sup>11</sup> Decree No. 1 of 2000.

It is significant to state that all the commissions recommended that the powers of the King in a written Constitution must remain as they were under the King's Proclamation, that Swaziland must remain a no-party state<sup>12</sup> and that basic human rights and fundamental freedoms and civil liberties must not conflict with Swazi law and custom and traditional practices.<sup>13</sup> The findings of these commissions were no different from those of an earlier commission by King Sobhuza II<sup>14</sup> after he had repealed the Independence Constitution. This commission had also recommended that Swaziland jettisoned the idea of multi-party democracy in favour of a no-party system.<sup>15</sup>

Consequently, the Constitution which was adopted and enacted into law in July 2005 is a product of a process that was controlled and managed from the centre in that it was conceived, crafted and enacted under a political environment which was not conducive to effective and meaningful citizen and people's participation. What is more is that in the statute books there were laws<sup>16</sup> which made it difficult for the people to participate freely, without fear in the process. In practice citizens were not allowed representation by their organized formations. In its report to the King in 2001 the CRC<sup>17</sup> stated that:

Section 4 of the Constitutional Review Commission Decree No. 2 of 1996 provided that any member of the general public who desires to make a submission to the Commission may do so in person or in writing and may not represent any one or be represented in any capacity whilst making such submission to the Commission. It was for this reason that group submissions were not allowed. A person wishing to make submissions appeared before the Commission in person and by himself and had his submissions recorded by both audio and video machines. Special tents were used for this exercise. No member of the public was made to listen to another's submissions. In a way, it could be said that the collection of the submissions was done "in camera."<sup>18</sup>

Quite clearly, it cannot be suggested that the process of writing the constitution was democratic when a segment of the population which had formed itself into groups, was by law prohibited from

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<sup>12</sup> JSM Matsebula, *A history of Swaziland* (1988) 265, see also the Speech by HRH Prince David Dlamini Chairman of the Constitution Drafting Committee at the launching of the Draft Constitution, *Ludzidzini*, 31 May 2003.

<sup>13</sup> Constitutional Review Commission Report, Final report on the submissions and progress on the project of the recording and codification of Swazi law and custom (undated) 83.

<sup>14</sup> JSM Matsebula above.

<sup>15</sup> As above.

<sup>16</sup> Public Order Act No. of 1963, King's Proclamations to the Nation of April 12, 1973, Seditious and Subversive Activities Act No. 46 of 1938 as well as section 4 of Decree 2 of 1996.

<sup>17</sup> Constitutional Review Commission, note 11 above.

<sup>18</sup> As above at 27.

engaging with it, and the CRC made it impossible for organizations to participate. Despite these shortcomings the Constitution was signed into law by the King at the national cattle byre<sup>19</sup> at his residence on July 26, 2005 and published in the Government Gazette.<sup>20</sup> Attempts by citizens' organisations to have a say in the constitution-making process were unsuccessful. In *Jan Sithole N.O. (in his capacity as the Trustee of the National Constitutional Assembly) and Others v The Prime Minister of the Kingdom of Swaziland and Others*,<sup>21</sup> confirming a decision of the High Court, the Supreme Court held that political parties and organized labour organizations had no legal capacity to challenge the constitutional validity of the constitution-making process. The Court found that the appellants had no *locus standi* to challenge the Constitution as at the time of crafting the King's Proclamation was operative as the "grundnorm" of Swaziland. In terms of Decrees No. 11, of the Proclamation political parties and similar bodies were banned, and meetings, gatherings and processions of a political nature were prohibited under Decree No. 11. The Court held that the appellants had no legitimate expectation to be part of the constitution-making process.

## II. Fundamental Principles of the Constitution

The Swaziland Constitution does not have a chapter on fundamental principles; instead it has one on "Directive Principles of State Policy."<sup>22</sup> Section 56 (1) states that the principles "shall guide all organs and agencies of the State, citizens and organizations and other bodies in applying or interpreting the Constitution or any other law..." However, these provisions are not enforceable in the courts of law.<sup>23</sup> Under this Chapter, the separation of powers through the distribution of functions is made for purposes of checks and balances. Democracy characterises the State and the people are encouraged and have a right to actively participate at all levels of governance.<sup>24</sup> In terms of section 57 law enforcement agencies shall respect and protect the human dignity, maintain and uphold all human rights. On political rights the Constitution reiterates that Swaziland is a democracy and citizens are encouraged to actively participate in governance at all levels.<sup>25</sup>

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<sup>19</sup> A traditional national meeting is convened by the King at the royal kraal at his traditional residence, *Ludzidzini*. The people gather and sit on the ground inside the cattle byre and make submission on an agenda prepared by the King and his traditional advisors.

<sup>20</sup> Act No. 001 of 2005, the Constitution of the Kingdom of Swaziland.

<sup>21</sup> Appeal Case No. 35 of 2007 (as yet unreported) available at <http://www.swazilii.org/sz/judgment/supreme-court/2008/22>.

<sup>22</sup> Chapter V thereof.

<sup>23</sup> Section 56 (3).

<sup>24</sup> Section 56 (4).

<sup>25</sup> Section 58.

On the economy the State is enjoined to manage the economy in such a manner as to maximise development<sup>26</sup> and to promote foreign direct investment. The Constitution recognizes that democracy and economic development are intertwined and provides that “the most secure democracy is the one that ensures the basic necessities of life for its people as a fundamental duty.”<sup>27</sup> The Constitution provides for social objectives<sup>28</sup> in order to achieve social, justice. It enjoins the State to guarantee and respect institutions charged with the responsibility for protecting and promoting human rights, including making adequate resources available.<sup>29</sup> The independence of non-governmental organizations working on human rights is to be respected and guaranteed in terms of s60 (2). The fundamental principles also provides for international relations and state that in its dealing on foreign policy, the interest of Swaziland shall take primary consideration.<sup>30</sup>

What is most significant is the principle that provides for the independence of the judiciary in section 62 of the Constitution, and the obligation of the State and other institutions to observe the independence of the judiciary. The impartiality, preservation of the integrity of the courts and the security of tenure of judicial officers is guaranteed. The Directive Principles, although not justiciable,<sup>31</sup> reinforce the Bill of Rights and its enforcement in that they serve as a guide in the interpretation of the Constitution.<sup>32</sup>

### **A. Constitutional goals**

Constitutional goals may be discerned from the preamble. They are also re-enforced in the body of the Constitution, in different chapters including Chapter V.<sup>33</sup> It appears that the drafters sought to introduce a document that would set the country on a new path so as to “start afresh under a new framework of constitutional order.”<sup>34</sup> This new order would introduce a participatory constitutional dispensation where the people crafted the constitution in absolute freedom<sup>35</sup> based on home-grown

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<sup>26</sup> Section 59 (1).

<sup>27</sup> Section 59 (2) (e).

<sup>28</sup> Section 60.

<sup>29</sup> Section 60 (1).

<sup>30</sup> Section 61 (1) (a).

<sup>31</sup> Justice Masuku’s dissenting judgment in *Jan Sithole NO and Other v The Government of the Kingdom of Swaziland* Civil Appeal No. 50/08 at para 28.

<sup>32</sup> As above at para 38.

<sup>33</sup> Directive principles of State policy and duties of the citizen.

<sup>34</sup> Paragraph 1 of the preamble.

<sup>35</sup> Paragraph 2 of the preamble.

political order.<sup>36</sup> The Constitution sought to recognise the need to harmonise various constitutional documents, laws, decrees, customary and traditional practices in an attempt to create a society based on good governance and the rule of law while preserving the Swazi traditional institutions.<sup>37</sup>

In harmonising the values and principles of a society founded on the rule of law and good governance, the constitution sought to strike a balance between the institutions of traditionalism and customary law with those of a democratic society to promote transparency and cultural development.<sup>38</sup> In this regard the constitution is binding on all departments of the government and all its agencies<sup>39</sup> and the courts are the ultimate interpreters thereof.<sup>40</sup> The constitution recognises that all of the above values, principles and aspirations would not be realised without peace, order and good governance, the happiness and welfare of all the people of Swaziland.<sup>41</sup>

Whether the constitution has been able to strike the balance between a society based on the principles of democracy, the rule of law and the respect for human rights and fundamental freedoms and civil liberties and the respect and preservation of traditional customs and practices is a subject of a vexing debate. While other constitutions sought to introduce a break with the past, for example, the Constitution of the Republic of South Africa,<sup>42</sup> it would seem that the Swaziland Constitution has not been able to do so.<sup>43</sup>

## **B. Constitutional values**

The constitutional values can be deduced from the reading of the constitution. For instance section 1 provides that Swaziland “is a unitary, sovereign, democratic Kingdom.” Democracy is a constitutional value of the Constitution. In *Mfanafuthi Mabuza v The Commissioner of Police*<sup>44</sup> the Supreme Court stated that: “... on any account this is dreadful encroachment on the liberty of an individual in a democratic country such as the Kingdom of Swaziland.”<sup>45</sup> The democratic nature of

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<sup>36</sup> Paragraph 3 of the preamble.

<sup>37</sup> Paragraph 4 of the preamble.

<sup>38</sup> Paragraph 5 of the preamble.

<sup>39</sup> Paragraph 6 of the preamble.

<sup>40</sup> Paragraph 7 of the preamble.

<sup>41</sup> Paragraph 8 of the preamble.

<sup>42</sup> Act 108 of 1996.

<sup>43</sup> It is argued that that the King as a traditional ruler (*iNgwenyama*) remains above the Constitution, and the supremacy of the King or Monarchy is inconsistent with the doctrine of constitutionalism.

<sup>44</sup> Civil Appeal Case No. 39/06 available at <http://www.swazilii.org/sz/judgment/supreme-court/m>.

<sup>45</sup> At para 12.

Swaziland is contained in various sections, especially in the Bill of Rights. Of particular significance is the provision that the rights in the constitution may be restriction and or limited only if such restriction or limitation is “reasonably justifiable in a democratic society.”<sup>46</sup> The Constitution protects equality,<sup>47</sup> dignity<sup>48</sup> and humanity<sup>49</sup> as constitutional values.

The Supreme Court has found that Swaziland is a constitutional state,<sup>50</sup> a constitutional democracy,<sup>51</sup> and that the Constitution is supreme.<sup>52</sup> It has held that the rights and interests of all the people of Swaziland will be protected and enforced equally to ensure that justice is done impartially and fairly.<sup>53</sup>

### **C. Constitutional principles**

The idea of having a written constitution is to entrench certain constitutional principles, which form the core of the constitution as a basic law. The following are some of the core principles of the Constitution:

- supremacy of the Constitution
- constitutional state / rule of law
- democracy
- respect for and promotion of human rights and fundamental freedoms
- respect for traditional institutions and the institution of the Monarch

As to whether the Constitution is supreme in reality, is in doubt given that the Monarch is immune from judicial scrutiny or review given the protection from both civil and criminal proceedings.<sup>54</sup> The King is protected from legal proceedings and is immune from taxation.<sup>55</sup> While the King is bound to exercise his powers in accordance<sup>56</sup> with the dictates of the Constitution and to uphold and

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<sup>46</sup> Sections 22(2) (d); 24(3) (c); 25(3) (c); 26(3) (b); and 56(1).

<sup>47</sup> Section 20.

<sup>48</sup> Section 18 of the Constitution.

<sup>49</sup> Section 17(3) of the Constitution.

<sup>50</sup> *Prime Minister and Others v MPD Supplies and Others* Civil Appeal Case No. 18/2007, available at <http://www.swazilii.org/sz/judgment/supreme-court/2007/11>.

<sup>51</sup> *Shell Oil Swaziland (PTY) LTD v Motor World (PTY) LTD T/A Sir Motors* Civil Appeal No. 23 / 2006, available at <http://www.swazilii.org/sz/judgment/supreme-court/2006/11>.

<sup>52</sup> *The Attorney General v Mary-Joyce Doo Aphane* cited fully below, at para 30.

<sup>53</sup> As above at para 62.

<sup>54</sup> Section 11 of the Constitution.

<sup>55</sup> Section 10 of the Constitution.

<sup>56</sup> Section 64 (1) of the Constitution.

defend it,<sup>57</sup> he is not bound to exercise his constitutional powers following the advice of constitutional bodies<sup>58</sup> empowered<sup>59</sup> to advise him. The effect of section 64 (5) is that the King may not act in accordance with the advice given to him by these bodies, the result being that he is above the Constitution. This undermines the principle of constitutionalism and the suggestion that Swaziland is a constitutional state is rendered nugatory for the reason that the extensive constitutional powers given to the King cannot be reconciled with constitutionalism.<sup>60</sup>

#### **D. Supremacy of the Constitution**

Section 2(1)<sup>61</sup> of the Constitution is the supremacy clause. It sought to reverse the supremacy of the King<sup>62</sup> in terms of the King's Proclamation. In this regard Supreme Court<sup>63</sup> has emphasised the supremacy of the Constitution, stating that the Constitution has incorporated the rule of law.<sup>64</sup>

#### **E. Constitutional state/rule of law**

The mere fact that Swaziland has a written constitution does not in itself mean that it is a constitutional or democratic state. There are certain fundamentals that need to be fulfilled in order to conclude that a country is indeed a constitutional state. According to Venter<sup>65</sup> these fundamentals include the following:

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<sup>57</sup> Section 2 (2) of the Constitution.

<sup>58</sup> Section 65 (4) of the Constitution.

<sup>59</sup> They include the King's Advisory Council (section 13 read with section 231 of the Constitution); the various service commissions which include the Judicial Service Commission (section 159); the public service commissions (Chapter X); the Commission on Human Rights and Public Administration (section 163 of the Constitution); the *Sibaya* (National meeting supposedly the highest policy-making advisory body in Swaziland in terms of section 232 of the Constitution); and the Chiefs (section 233 of the Constitution).

<sup>60</sup> Charles Fombad, 'The Swaziland Constitution of 2005: can absolutism be reconciled with modern constitutionalism?' (2007) 3 *South African Journal of Human Rights* (SAJHR) 93-115.

<sup>61</sup> Section 2 (1) reads as follows:

This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

<sup>62</sup> In terms of paragraph 3 of the Proclamation King Sobhuza had declared that:

NOW THEREFORE I, SOBHUZA II, King of Swaziland, hereby declare that, in collaboration with my Cabinet Ministers and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all Legislative; Executive and Judicial power is vested in myself....

<sup>63</sup> *The Attorney General v Mary-Joyce Doo Aphane* Civil Appeal No. 12/09 available at <http://www.swazilii.org/sz/judgment/supreme-court/2010/32>, para 28; the *Swaziland Coalition of Concerned Civic Organizations Trust and Others v The Elections and Boundaries Commission and Others* Civil Appeal No. 26/08 available at <http://www.swazilii.org/sz/judgment/supreme-court/2010/36> para 36, 37 and 44 to mention a few.

<sup>64</sup> *Prime Minister of Swaziland and Six Others v MPD Marketing and Supplies (Pty) Ltd* above at para 38.

<sup>65</sup> Francois Venter, *Constitutional comparison Japan, Germany, Canada and South Africa as constitutional states* (2000).

- > human dignity as a fundamental constitutional assumption;
- > the principle of popular sovereignty;
- > an understanding of the constitution as a contract, containing goals and values;
- > the separation of powers’
- > the principles of *Rechtsstaat*,<sup>66</sup> social state and cultural state; and
- > the independence of the judiciary.<sup>67</sup>

It is argued these are not present in the existing Swaziland constitutional order. Elsewhere, it has been suggested that the Swaziland Constitution is one without constitutionalism.<sup>68</sup> This is due to the observation that despite having a written constitution the powers of the King are not limited.

### III. Fundamental Rights Protection

#### A. The introduction of fundamental rights

Chapter III of the constitution provides for basic human rights, fundamental freedoms and civil liberties. Since April 12, 1973 when King Sobhuza II unlawfully abrogated the Independence Constitution the concept of human rights had no place in Swaziland. The re-introduction of the Bill of Rights was seen as a positive step towards restoring the protection and promotion of human rights and section 14 (2) that fundamental rights and freedoms enshrined shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government, including natural and artificial persons.

It would appear that the drafters of the Constitution sought to break the cycle of lack of constitutional governance and usher in a new order that would limit the powers of government. The

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<sup>66</sup> Venter writes that *Rechtsstaat* “indicates the exercise of the power of the state on the basis of laws adopted according to the Constitution, with the purpose of guaranteeing freedom, justice and legal certainty,” at 49.

<sup>67</sup> At 50.

<sup>68</sup> Thulani Rudolf Maseko, ‘Constitution-making in Swaziland: the cattle-byre Constitution Act 001 Of 2005’ Draft paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa, Nairobi, Kenya, April 2007, available at <http://www.ancl-radc.org.za/sites/default/files/Constitution-making%20in%20Swaziland%20by%20Thulani%20Maseko.pdf>., also cited by Mwiza Jo Nkatha, ‘Popular involvement and constitution-making: the struggle towards constitutionalism in Malawi,’ 219-242 at 235 in Morris Kiwinda Mbondenyei *et al* (eds.) *Constitutionalism and democratic governance in Africa: contemporary perspectives from Sub-Saharan Africa* (2013).

rights in the Constitution appear to have been formulated taking into account regional<sup>69</sup> and international<sup>70</sup> human rights standards. However, Gumedze<sup>71</sup> argues that a “careful scrutiny of the Bill of Rights as contained in the Constitution shows that a lot of individual rights are not guaranteed.”<sup>72</sup> The failure to guarantee all human rights, in particular political and civil rights, was as a result of the political climate that existed at the time of the crafting of the Constitution. It was not conducive.

Gumedze observes that in Swaziland there is a misconception that human rights advocacy is contrary to Swazi culture and tradition.<sup>73</sup> A campaign for the promotion and protection of human rights is viewed as an affront to the traditional authority represented by the King. Consequently, the Preamble to the Constitution speaks to the necessity “to blend the good institutions of traditional Law and custom with those of an open and democratic society so as to promote transparency and the social, economic and cultural development of the Nation.”<sup>74</sup> The blending of traditional institutions with principles of good governance and the rule of law makes the realisation and enjoyment of basic human rights and fundamental freedoms most difficult in Swaziland.

## **B. The spectrum of rights**

Chapter III of the Constitution provides a long list of rights and these are mentioned in section 14 (1).<sup>75</sup> Section 14 (2) states that these rights are applicable to all persons, whether natural or juristic, while sub-section (3) guarantees that “[a] person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms ... subject to respect for the rights and freedoms of others and for the public interest.” Notwithstanding the range of rights, some rights are not guaranteed.<sup>76</sup> While the Constitution

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<sup>69</sup> African Charter on Human and Peoples’ Rights adopted by the Organization of African Unity (OAU) in 1981 and came into force in October 1986. Swaziland ratified the African Charter on September 15, 1995.

<sup>70</sup> The Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights, ICCPR (1966), and the International Covenant on Economic Social and Cultural Rights (ICESCR) (1966).

<sup>71</sup> Sabelo Gumedze, ‘Human rights and the rule of law in Swaziland’ (2005) 5 *African Human Rights Law Journal* 266.

<sup>72</sup> As above at 276.

<sup>73</sup> Gumedze note 75 above at 279.

<sup>74</sup> Paragraph 5 of the Preamble to the Constitution.

<sup>75</sup> These are: respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law; freedom of conscience, of expression and peaceful assembly and association and of movement; protection of the privacy of the home and other property rights of the individual; protection from deprivation of property without compensation; protection from inhuman or degrading treatment, slavery, and forced labour, arbitrary search and entry; and respect for rights of the family, women, children and persons with disabilities.

<sup>76</sup> Gumedze above.

provides for the right to life, this right is qualified in that it can be taken away if it is imposed in pursuance of an execution of sentence of a court.<sup>77</sup>

While the Constitution provides a long list of rights, there are other rights which are undermined by claw-back clauses. For instance, although freedom of conscience is guaranteed; it can only be enjoyed provided it does not concern abortion which is unlawful unless certain pre-conditions are present. Further, the right to equality before and under the law is guaranteed but excludes sexual orientation and marital status as grounds for discrimination. Furthermore, the right to freedom of association and peaceful assembly is guaranteed on condition that it is exercised within the provisions of section 79<sup>78</sup> which prescribes the system of government for Swaziland. What is more is that freedom from slavery and forced labour is enjoyable subject to the respect for “reasonable and normal parental, cultural, communal or other civic obligations, unless it is repugnant to the general principles of humanity.” Fundamental rights and freedoms are also restricted by such concepts as “in the interest of defence, public safety, public order, public morality or public health.”<sup>79</sup> The rights area also limited as may be “reasonably justified in a democratic society.”<sup>80</sup>

In *Sithole*<sup>81</sup> the Court of Appeal had to consider the applicability of the rights to freedom of association and assembly which includes the capacity to form, join and belong to political parties in view of the provisions of section 25<sup>82</sup> of the Constitution. In this case the values and principles of democracy<sup>83</sup> and the right to participate<sup>84</sup> in democratic elections by organized political groupings were at the heart of the case. The contention made by the political groups was that section 79 should not be read in such a way so as to deprive them of the capacity and the right to take part in the elections as organized formations. This was informed by the provisions of the Constitution where the parties wanted to consolidate a democratic culture in the country as also envisaged by section 84

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<sup>77</sup> Section 15 (1).

<sup>78</sup> The section reads:

The system of government for Swaziland is a democratic, participatory, *tinkhundla*-based system which emphasizes devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office.

<sup>79</sup> Section 19 (2) (a); section 21 (12) (a) (i); section 23 (4) (a); section 25 (3) (a).

<sup>80</sup> Section 22 (2) (d); section 24 (3) (c); section 25 (3) (c); section 26 (3) (b).

<sup>81</sup> Above note 72.

<sup>82</sup> Protection of the right to freedom of association and assembly.

<sup>83</sup> Section 1(1) of the Constitution provides:

The Kingdom of Swaziland is a unitary, sovereign and democratic Kingdom.

<sup>84</sup> Section 58 (1) states:

Swaziland shall be a democratic country dedicated to principles which empower and encourage the active participation of all citizens at all levels in their own governance.

(1). This section provides that the: "... people of Swaziland have a right to be heard through and represented by their own freely chosen representatives in the government of their country."

The Supreme Court of Swaziland, while accepting that "the right to freedom of association necessarily included the right to form and join political parties,"<sup>85</sup> it however, found that "... democracy is, I would suggest, like beauty, to be found in the eyes of the beholder."<sup>86</sup> The Court went on to say that the fact that Swaziland "calls itself a democracy does not mean that every body politic must match up with every rule laid down either by law or tradition by which, the greater Western democracies are governed." The Court held that political parties cannot participate in the elections, but their members as individuals. Needless to say, the Court missed the point. This was not a call for a comparison with western democracies. Rather, it was an issue of the enforcement of the Constitution as the supreme law guaranteeing human rights for all as per the dictates of section 63 (1). The section provides for instance that "... it shall be the duty of every citizen to (e) promotes democracy and the rule of law." The comparison by the Court in the judgment of the Swaziland body politic with the former Union of Soviet Socialist Republics (U.S.S.R.) and "East Germany" now Germany, as democratic countries to justify deprivation of basic human rights amounted to the abdication of responsibility by the court.

In coming to such a conclusion, the Court considered that it was not its function to interpret the Constitution in a manner that would be beneficial to the country or its citizens; that is a political decision of no concern to it.<sup>87</sup> In Swaziland, individuals and groups with dissenting voices are silenced. Despite the finding by the court that Swaziland is a constitutional democracy,<sup>88</sup> the *tinkhundla* government has made it clear at the Universal Periodic Review (UPR)<sup>89</sup> that it is not yet ready for multi-party democracy. As a result, the call by the African Commission on Human and Peoples' Rights (ACHPR)<sup>90</sup> on the government to hold democratic, free and free elections in 2013 was ignored.

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<sup>85</sup> *Sithole* at para 12.

<sup>86</sup> *Sithole* above at para 22.

<sup>87</sup> As above at para 17.

<sup>88</sup> The Supreme Court has said so in these judgments, namely *Mfanafuthi Mabuza*, *Shell Oil Swaziland*, *MPD Supplies*, *Doo Aphane* already referred to above.

<sup>89</sup> United Nations General Assembly, A/HRC/19/6/Add.1, Report of the Working Group on the Universal Periodic Review-Swaziland 9March 6, 2012 available at <http://www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CSZSession12.aspx>.

<sup>90</sup> African Commission on Human and Peoples' Rights, Resolution on the Human Rights situation in Swaziland adopted on May 2, 2012, available at <http://www.achpr.org/sessions/51st/resolutions/216/>.

The Court had yet another occasion to consider the rights of the people of Swaziland to participate in the governance of the country in *Swaziland Coalition of Concerned Civic Organizations (SCCCO) and Others v The Elections and Boundaries Commission and Others*.<sup>91</sup> While the case was concerned with the constitutionality and lawfulness of the appointment of the members of the Elections and Boundaries Commission (EBC),<sup>92</sup> on appeal it turned to border more on the wording of section 2 (2) of the Constitution. The Court put the issue as follows: “The more contentious issue in the appeal between the appellants and the respondents is whether or not the suit apparently brought by the Trustees, *qua* trustees, is maintainable?”<sup>93</sup>

On equality, the Court had occasion to deal with this right in the case of *The Attorney General v Mary-Joyce Doo Aphane*.<sup>94</sup> The applicant (appellant), complained about discrimination of women with regard to the purchase and ownership of land. She based her claim on section 20 read together with section 28 of the Constitution. The Court recognized the significance of sections 20 and 28 of the Constitution; in particular that section 20 is a powerful declaration of the fundamental rights.<sup>95</sup> The Court, having noted the emergence of women’s movement in the struggle for equality and equal rights held that “... section 28 is a pithy affirmation of women’s rights to equal treatment with men in the activities enumerated there.”<sup>96</sup>

In *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane*,<sup>97</sup> on the basis of sections 20 and 28, and following the judgment in *Doo Aphane*, the High Court set aside the husband’s marital power<sup>98</sup> on the ground that it discriminates against women. The High Court again reaffirmed the rights of women to equality in *Mana Mavimbela v The Chairman of the Elections and Boundaries Commission*.<sup>99</sup>

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<sup>91</sup> Civil Appeal No. 26/ 2008 available at <http://www.swazilii.org/sz/judgment/supreme-court/2010/36>.

<sup>92</sup> It appears that the appointment of the members by the King was contrary to the provisions of section 91(3) and (6) of the Constitution, in that most of those appointed were members of the civil service at the time of appointment, and that the Chairperson and Deputy had to be individuals possessing qualifications of a Judge of the superior courts. The Chairperson is a Chief with no such qualifications and the Deputy is a former Deputy Attorney General who was a civil servant at appointment.

<sup>93</sup> As above at para 35.

<sup>94</sup> Civil Appeal No. 12/2012 available at <http://www.swazilii.org/sz/judgment/supreme-court/2010/32>.

<sup>95</sup> Para 21.

<sup>96</sup> At para 25.

<sup>97</sup> Civil Case No. 470/2013A available at <http://www.swazilii.org/sz/judgment/high-court/2010/116>.

<sup>98</sup> At para 24.

<sup>99</sup> Judgment not available at the time of writing this report, but see Mbongiseni Ndzimandze, Times of Swaziland, August 24, 2023 available at <http://www.times.co.sz/news/90719-lubulini-mp-elections-stopped-mana-wins.html> .

The High Court had occasion to consider the application of the right to a person to pursue a profession and to carry on any lawful occupation, trade or business<sup>100</sup> in the case of *The Law Society of Swaziland v The Speaker of the House of Assembly and Two Others*.<sup>101</sup> In this case the Law Society of Swaziland (LSS) approached the Court seeking an order interdicting Parliament from investigating or probing its members for allegations of misconduct. The LSS also wanted Parliament to be stopped from inviting members of the public to lodge complaints against its members with its sub-committee.<sup>102</sup> The LSS contended that the function, power and authority to discipline its members vest with the Disciplinary Tribunal under section 32 of the Legal Practitioners Act, 1964.<sup>103</sup>

The Court held that Parliament interfered with the exercise of a profession guaranteed under section 32 (1) of the Constitution. It went on to state that section 14 of the Constitution enjoins all arms of government including the legislature, to respect and uphold the rights and freedoms in the bill of rights, including the right practice a profession.<sup>104</sup>

In *Khanyakwezwe Mhlanga and Another v The Commissioner of Police and Others*<sup>105</sup> members of the disciplined forces (the police and correctional services) had formed unions respectively, exercising the right to freedom of association and assembly in terms of section 25 as read together with section 32 (2) of the Constitution. Section 39 (3) of the Constitution deprives members of the disciplined forces the rights enshrined therein. In this case the appellants argued that the sections which deprived them the fundamental rights should be harmonized so as to give effect to the basic human rights and freedoms.

The Court held that the wording of the Constitution must be respected and followed. It said: “[w]hat is important is the wording our Constitution. A proper interpretation must be given to the language as it appears in that document. A broad, generous and liberal interpretation must be given to the sections pronouncing human rights and freedoms, and any section which limits such rights and freedoms must be given a strict and narrow interpretation.... What the courts cannot do, however, is

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<sup>100</sup> Section 32 (1) of the Constitution.

<sup>101</sup> Civil Case No. 1145/12, available at <http://www.swazilii.org/sz/judgment/high-court/2012/171>.

<sup>102</sup> As above para 1 of the judgment.

<sup>103</sup> Para 10 of the judgment.

<sup>104</sup> As above.

<sup>105</sup> Civil Appeal No. 21/2008, available at <http://www.swazilii.org/sz/judgment/supreme-court/2008/21>.

to rewrite the Constitution.”<sup>106</sup> The Court said "that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination."<sup>107</sup> On this basis the Court refused to give recognition to the unions.

In *Swaziland Ex-Mine Workers Association and Another v The Prime Minister of Swaziland and Others*.<sup>108</sup> The appellant organization approached the Court for the enforcement of section 29 (6)<sup>109</sup> of the Constitution. The Supreme Court having earlier held that the wording of the Constitution must be adhered to was expected to be consistent in its approach of respecting the language of the Constitution. This was not to be. Instead, the Supreme Court upheld government’s contention that it did not have the resources to do so. What is crucial is that section 29 (6) is not worded in the incremental approach of, for instance the ICESCR, which subjects the enjoyment of socio-economic rights to the availability of resources. Without heeding the language of the Constitution as advanced in its earlier judgment the Supreme Court refused to follow the clear words of the section, and departed from the approach in the *Mhlanga* judgment. The Court stated that “the problem posed in this appeal comes down to the availability of resources, *not a fastidious insistence on the true and proper interpretation of, section 29(6) of the Swazi Constitution.*”<sup>110</sup> This approach finds no support from the Constitution.

In *The King v Swaziland Independent Publishers (Pty) LTD and Another*,<sup>111</sup> the High Court was faced with an issue of freedom of speech and expression and an independent media in Swaziland as guaranteed in section 24 of the Constitution vis-à-vis the right to criticise the court, the High Court found the editor of the magazine and its publishers to have committed the crime of contempt of court by scandalizing the court. The court noted that while the right to freedom of expression is guaranteed, it is not absolute. Maphalala J, stated: “[t]he right of freedom of expression and opinion is important in our society in advancing the democratic ideals enshrined in the Bill of Rights; the right allows society to form and express varying opinions constructively with a view to achieve

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<sup>106</sup> As above at page 15.

<sup>107</sup> As above.

<sup>108</sup> Civil Appeal No. 8/2010 available at <http://www.swazilii.org/sz/judgment/supreme-court/2010/35>.

<sup>109</sup> The section reads:

Every Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with the first grade.

<sup>110</sup> At para 21.

<sup>111</sup> High Court Case No. 53/2010 (as yet unreported) available at <http://www.swazilii.org/sz/judgment/high-court/2013/88>.

open and accountable governance. However, the right has to be exercised and enjoyed within the confines and parameters of the Constitution; the enjoyment of this right like with all other rights should not interfere with the rights of others.”<sup>112</sup> The court found that the objective to enforce the law of contempt is not to shield the judiciary from criticism, but to guard its integrity.<sup>113</sup> Media practitioners have decried the judgment as an attack on the right to freedom of speech and expression in Swaziland.<sup>114</sup>

The application and enforcement of the Chapter III provisions by the Courts has been uneven, so much so that the declaration in section 14 (3) of the Constitution is but “hollow hope.”<sup>115</sup>

### **C. Application**

The application and enforcement of human rights is governed by 14 (2). These rights are enforceable by the courts in terms of section 151 (2) as read together with section 35 (1) of the Constitution. In its application of the rights, the courts have referred to these provisions in a string of cases.<sup>116</sup> The Bill of Rights applies both horizontally and vertically.

## **IV. Separation of Powers**

### **Horizontal distribution of authority: the executive and the legislature**

The Constitution of Swaziland aspires for the separation of powers. This appears from the Preamble which provides for respect for the rule of law<sup>117</sup> by the three arms of government.<sup>118</sup> The Constitution provides separate chapters for the three arms, namely the Executive,<sup>119</sup> the Legislature<sup>120</sup> and the Judicature.<sup>121</sup> Chapter XIII deals with local government and local authorities and demarcates areas of jurisdiction. In the *Doo Aphane* judgment the Supreme Court made a clear statement about separation of powers in Swaziland.<sup>122</sup>

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<sup>112</sup> At para 97.

<sup>113</sup> At para 100.

<sup>114</sup> Sifiso Sibandze, Times of Swaziland, Thursday April 18, 2013, ‘MISA, unions decry conviction.’

<sup>115</sup> Mark S. Kende, *Constitutional rights in two worlds South Africa and the United States* 11 (2009).

<sup>116</sup> See *Khanyakwezwe Mhlanga; Jan Sithole NO; MPD Supplies; Swaziland Coalition; Mary-Joyce Doo Aphane* in this regard.

<sup>117</sup> Para 4 of the Preamble.

<sup>118</sup> Para 6 of the Preamble.

<sup>119</sup> Chapter VI of the Constitution.

<sup>120</sup> Chapter VII of the Constitution.

<sup>121</sup> Chapter VIII of the Constitution.

<sup>122</sup> At para 38.

## A. The Executive

In terms of section 64 (1) of the Constitution executive authority vests in the King who is the head of state. The King is enjoined to protect and defend this Constitution and all laws made under or and continued in force by this Constitution.<sup>123</sup> He is to exercise his powers in accordance with the provisions of the Constitution, although he may exercise his powers directly or may delegate to the Cabinet or a Minister.<sup>124</sup> The King appoints the Prime Minister in terms of section 67 (1)<sup>125</sup> and appoints the Cabinet on the recommendation of the Prime Minister.<sup>126</sup>

The nature and extent of the exercise of executive authority is spelt out in section 65, and subsection (1) states that “[i]n the exercise of the functions under this Constitution or any other law the King shall act on the advice of the Cabinet or a Minister acting under the general authority of the Cabinet...” It would appear from these provisions that the powers of the King are significantly limited, notwithstanding the discretion under paragraphs (a) and (b).

The Cabinet shall keep the King informed about the general conduct of the government of Swaziland<sup>127</sup> and it is collectively and individually responsible to Parliament for any advice given to the King.<sup>128</sup> The formulation and implementation of government policy is the responsibility not of the King, but Cabinet.<sup>129</sup> Of significance is that, while the Cabinet is responsible to Parliament for the advice it gives to the King, it does not say whether the King is accountable to Parliament for his exercise of power. This is critical considering the powers of the King and *iNgwenyama* in Chapter II of the Constitution. The question arises whether the exercise of traditional power by the King as *iNgwenyama* is subject to checks and balances.

## B. Parliament

Parliament is composed of two chambers: the Senate<sup>130</sup> and the House of Assembly.<sup>131</sup> The Senate has a membership of no more than thirty (30).<sup>132</sup> Twenty (20) are appointed by the King in his

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<sup>123</sup> Section 64 (2).

<sup>124</sup> Section 64 (3).

<sup>125</sup> It is worthy of note that the Prime Minister Dr. Barnabas Sibusiso Dlamini, was not a member of the House of Assembly at the time of his appointment, hence his being in office is constitutionally questionable.

<sup>126</sup> Section 67 (2).

<sup>127</sup> Section 69 (1).

<sup>128</sup> Section 69 (2).

<sup>129</sup> Section 69 (3).

<sup>130</sup> Section 94 of the Constitution.

<sup>131</sup> Section 95.

discretion after consultation with such bodies as he may deem appropriate.” Ten (10) are elected by members of the House “to represent a cross-section of the Swazi society.”<sup>133</sup> It is an irony in a democratic country that the majority of the members of the upper House are appointed by the Executive.

With regard to the composition of the House, it has a composition of not more than seventy-five (75) members.<sup>134</sup> No more than sixty-five (65) are elected directly by the people from the constituencies (*tinkhundla*) areas.<sup>135</sup> The King nominates ten (10) members in his discretion after consultation with such bodies as he may deem appropriate.<sup>136</sup> Over and above the sixty-five elected by the people directly and the ten nominated by the King, the House has four (4) members “specially elected”<sup>137</sup> from the four Regions<sup>138</sup> of the country. During the tenure of the Parliament elected in 2008, the female members required in terms of section 95 (1) (c) read together with section 86 of the Constitution were not elected. An attempt to enforce these provisions after the September 20, 2013 national elections was unsuccessful in *Madandane Juliet Mavimbela v The Speaker of the House of Assembly and Others*.<sup>139</sup> It is worth stating that the Attorney General is an *ex-officio* Member of Parliament<sup>140</sup> as well as the Cabinet.<sup>141</sup>

Both the Senate and the House are involved and participate<sup>142</sup> in the adoption or amendment of legislation and amendment of the Constitution.<sup>143</sup> Before a bill becomes law the King has to assent to it<sup>144</sup> although he may withhold assent.<sup>145</sup> The Constitution is silent as to what should happen where the King withholds assent.<sup>146</sup> What is more perplexing is the provision that “the supreme legislative authority of Swaziland vests in the King-in-Parliament.”<sup>147</sup> It would seem that this provision coupled with the fact that the King nominates and appoints members into Parliament

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<sup>132</sup> Section 94

<sup>133</sup> Subsection (2).

<sup>134</sup> Section 95 (1).

<sup>135</sup> Subsection (1) (a).

<sup>136</sup> Subsection (1) (b).

<sup>137</sup> Subsection (c).

<sup>138</sup> The four regions of Swaziland are Hhohho, Manzini, Lubombo and Shiselweni.

<sup>139</sup> Civil Case No. 1670/2013 available at <http://www.swazilii.org/sz/judgment/high-court/2013/253>.

<sup>140</sup> Subsection (d).

<sup>141</sup> Section 77 (3) (b).

<sup>142</sup> Section 107.

<sup>143</sup> Section 245 (2) of the Constitution.

<sup>144</sup> Section 108 (1).

<sup>145</sup> Subsection (2) (3).

<sup>146</sup> In the Kingdom of Lesotho, where the King has withheld assent the Prime Minister is constitutionally authorized to step in and act in a manner consistent with the dictates of the Constitution to do as the King would have done.

blurs the line of separation of powers and functions. Not only is the King the executive authority, he also has legislative power. This places in doubt any suggestion that legislative powers of the King are symbolic. The finding by the Supreme Court that “[t]he making of laws is essentially the function of the legislature”<sup>148</sup> is not necessarily correct on account of the composition of Parliament and the role that the King plays in the enactment of legislation.

## V. Federalism/Decentralisation

In terms of section 1 of the Constitution, Swaziland is a unitary democratic state. Although unitary, the Constitution states that state power shall be de-centralised from central government through *tinkhundlas* (constituencies). The decentralisation of power is specifically mentioned in section 80 (3) Swaziland is certainly not a federal state.

### A. The Regions.

In its decentralised system, Swaziland is divided into four administrative regions. These are Hhohho, Lubombo, Manzini and Shiselweni regions.<sup>149</sup> Each region is headed by a Regional Administrator<sup>150</sup> whose status is equivalent to that of a Deputy Minister<sup>151</sup> (there are no Deputy Ministers in Swaziland). Each of the regions is divided into various chiefdoms,<sup>152</sup> *tinkhundla* and *tinlhundla* committees (*bucopho*).<sup>153</sup> The *tinkhundla* and *tinkhundla* committees are the local authorities composed of persons elected from the various chiefdoms or polling divisions within an *inkhundla*.<sup>154</sup> The structure of the government is designed along a traditional system.<sup>155</sup> Regions do not legislative competency.

### B. Local government

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<sup>147</sup> Section 106 (a).

<sup>148</sup> *Doo Aphane* above at para 39.

<sup>149</sup> Section 82 (1).

<sup>150</sup> Section 83 of the Constitution.

<sup>151</sup> Subsection (4).

<sup>152</sup> These are geographical areas under the leadership of Chiefs in terms of Swazi law and custom in accordance with section 233 of the Constitution.

<sup>153</sup> Section 81.

<sup>154</sup> Subsection (2).

<sup>155</sup> The CRC recommended in its constitutional review report that: “... the system of government based on the *Tinkhundla* must continue, be strengthened and be developed so that it is clear the *Tinkhundla* is a system or way of governing the Kingdom and not a Government Ministry or Department,” at 88.

Over and above the regions, *tinkhundla* centres and *tinkhundla* committees, the Constitution establishes local governments in terms of Chapter XIII. According to section 218 (1), within five years of the commencement of the Constitution, Parliament ought to provide for the establishment of a single country-wide system of local government which is based on the *tinkhundla* system of government, hierarchically organised according to the volume or complexity of the service rendered and integrated so as to avoid urban/rural dichotomy. The local government areas would be determined by the Elections and Boundaries Commission (EBC)<sup>156</sup> from time to time.<sup>157</sup>

The duties and functions of the local government are provided for in section 212 of the Constitution, and in terms of section 222, local government have the power to raise revenue. Government where necessary, has the authority to allocate funds and the requisite expertise to assist local governments. The management of local government is the responsibility of a designated ministry.<sup>158</sup>

## **VI. Constitutional Adjudication**

### **A. The Judiciary**

The Constitution provides that the judicial power of Swaziland vests in the judiciary.<sup>159</sup> In line with this provision, according to section 141 (1), the judiciary “shall be independent and subject only to this Constitution, and shall not be subject to the control or direction of any person or authority.” The administrative functions of the judiciary are vested in the Chief Justice.<sup>160</sup> The judiciary is composed of the Supreme Court<sup>161</sup> and the High Court.<sup>162</sup> The Supreme Court consists of the Chief Justice and not less than four other justices,<sup>163</sup> and it is the final court of appeal<sup>164</sup> on all matters conferred by law and the Constitution.

The High Court consists of the Chief Justice, *ex officio* and no less than four other justices<sup>165</sup> and such other judges of the Superior Court of the Judicature as the Chief Justice may, in writing assign.

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<sup>156</sup> Established in terms of section 90.

<sup>157</sup> Section 219 (1).

<sup>158</sup> Section 225.

<sup>159</sup> Section 140 (1).

<sup>160</sup> Section 142.

<sup>161</sup> Chapter VIII Part 2 (a).

<sup>162</sup> Chapter VIII Part 2 (b).

<sup>163</sup> Section 145 (1).

<sup>164</sup> Section 146 (1).

<sup>165</sup> Section 150 (1)

The High Court has unlimited original jurisdiction in all civil and criminal matters,<sup>166</sup> and to enforce the fundamental human rights and freedoms guaranteed by the Constitution.<sup>167</sup> Although the Constitution guarantees the independence of the judiciary, such independence is determinable by the manner and process of the appointment of judges. The composition of the Judicial Service Commission (JSC) becomes significant. Section 159 creates the JSC. The difficulty presented by this section is that all the members are appointed by the King.<sup>168</sup> The question arises whether judiciary can be independent given that the body that advises the King is composed of members all appointed by him.<sup>169</sup> It can be argued that the appointment of judges by the King is not merely a formality; it goes into very substance of the appointment.

Despite the institutional and financial independence of the judiciary as section 141 envisages, such is not achievable if the system and process of appointment of judges is dominated by the executive. This difficulty was noted at the time of the crafting of the constitution.<sup>170</sup> It was observed that the membership of the JSC was strongly towards royal appointments.<sup>171</sup> It was recommended that not only should the appointment of judges be transparent, but the appointment of the members of the JSC as well.<sup>172</sup> The recommendation was not accepted by the government of Swaziland and the drafters of the Constitution, and the independence of the judiciary in Swaziland remains a challenge.

## **B. Interpretation and independence**

The interpretation and enforcement of the Constitution is the function of the courts, being the independent<sup>173</sup> judicial organ. Independence presupposes impartiality.<sup>174</sup> However, a mere statement in the constitution that the judiciary is independent is not enough. What is required are constitutional guarantees for such independence. These include the appointment, recruitment and discipline of judges.<sup>175</sup> It has been suggested that in order to ensure judicial independence, two essential elements are critical. First, the criteria for the appointment and second, the composition of

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<sup>166</sup> Section 151 (1) (a).

<sup>167</sup> Section 151 (2).

<sup>168</sup> Section 159 (2)

<sup>169</sup> Section 153 (1).

<sup>170</sup> International Bar Association, 'Striving for democratic governance: an analysis of the Draft Swaziland Constitution, a report by the International Bar Association,' August 2003.

<sup>171</sup> At 21.

<sup>172</sup> At 29 para 44.

<sup>173</sup> Section 141 of the Constitution.

<sup>174</sup> International Commission of Jurists above at 21, 27.

<sup>175</sup> International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors, Practitioners Guide No. 1*, (2007) 22.

the body that appoints judges.<sup>176</sup> In Swaziland there is a difficulty both in relation to the criteria and procedure for appointment as well as the composition of the JSC. Langwenya<sup>177</sup> writes that it of interest that all the members of the JSC are appointed by the King, which is inconsistent with international norms on judicial independence. It is unclear what criteria are used to appoint judges as well as members of the JSC. This gave rise to the perception the government was packing the courts with judges who were seen as executive-minded.<sup>178</sup>

The independence and impartiality of the judiciary in Swaziland cannot be looked into without reference to the disciplinary hearing of one of the High Court judges, Justice Thomas Masuku. He was charged with several counts including that he insulted the King by using the phrase “forked tongue” in the course of a written judgment, and that he had touted himself to be appointed Chief Justice amongst chiefs.<sup>179</sup> Others related to the Chief Justice as a complainant.<sup>180</sup> The independence and impartiality dictate that judges must not harbour perceptions about a matter before them and that they must not act in a manner that promotes the interests of one of the parties.<sup>181</sup> The Chief Justice as head of the judiciary and Chairman of the JSC should have recused himself given that he was a party in the proceedings. The Chief Justice and the JSC acted in a manner not in accord with the preservation of the dignity of the office as well as the impartiality and independence of the judiciary. The observation by Vijver<sup>182</sup> that Swaziland needs Chief Justice with no hidden agenda<sup>183</sup> is apposite in this regard.

In its role as the interpreter of the Constitution the Courts have to take into account the existence of a customary traditional law side by side with the constitutional order as well the Roman-Dutch common law. In this regard, the court has no jurisdiction to deal with matters of a customary nature, which is the exclusive preserve of traditional courts and traditional institutions.<sup>184</sup> Section 252

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<sup>176</sup> Above at 41.

<sup>177</sup> Maxine Langwenya, *Swaziland: justice sector and the Rule of Law a review by AfriMap and the Open Society Initiative for Southern Africa* 14-15 (2013).

<sup>178</sup> Fombad above at 108.

<sup>179</sup> Letter by the JSC to the King, Referral under section 158 (3) of the Constitution: Mr. Justice T.S. Masuku.: 11 August, 2011.

<sup>180</sup> Such as the allegation that Justice Masuku attacked the Chief Justice at a symposium of the International Commission of Jurists in Lesotho; threatening the Chief Justice with resignation when confronted with the judge's absenteeism; destabilizing the High Court staff as well as defying the Chief Justice to prepare a monthly schedule of pending judgments.

<sup>181</sup> International Commission of Jurists above, at 27.

<sup>182</sup> Linda Van De Vijver, *The Judicial Institution in Southern Africa a Comparative Study of Common Law Jurisdictions* (2006).

<sup>183</sup> At 184.

<sup>184</sup> Section 151 (8) of the Constitution.

recognises and adopts principles of Swazi customary law<sup>185</sup> to the extent that same is not inconsistent with the Constitution, or repugnant to natural justice or morality or general principles of humanity.<sup>186</sup> In a number of cases the Courts have found that matters of a customary nature can only be decided by the common law courts on review or appeal. The Courts have to make a determination on the choice of law applicable.<sup>187</sup>

The challenge presented by the dual system is the uncertainty of customary law. A process that was intended to codify customary law never really saw the light of the day.<sup>188</sup> Swazi customary law can be used as a tool to suppress and undermine the rights enshrined in the Constitution. This is especially so because the pronouncement by the King as *iNgunyama* “become Swazi law when they are made known to the nation, especially at *Esibayeni* or Royal Cattle Byre.”<sup>189</sup> Sternford Moyo<sup>190</sup> makes the point that “the abuse of culture to justify human rights abuses and perpetuation of absolute rule or some form of divine rights of the monarchy in Swaziland.”

The emphasis on traditional values has a lot bearing on the independence of the courts. This is because under Swazi customary law the King holds executive, legislative and judicial powers.<sup>191</sup> As it was during the pre-2005 constitutional era, so it is with coming about of the 2005 Constitution. Notwithstanding the provisions that appointments are to be done competently, transparently and openly the process of appointment of judges is still shrouded in secrecy.

## VII. International Law and Regional Integration

The Swaziland Constitution does not have provisions specifically dealing generally with international law. Rather Part XV deals with international relations. Section 236 (1) (d) states that Swaziland, shall in dealing with other nations “endeavour to uphold the principles, aims and ideals

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<sup>185</sup> Subsection (2).

<sup>186</sup> Subsection (3).

<sup>187</sup> *The Commissioner of Police v Mkhondvo Maseko* Civil Appeal No. 03/2011 at para, available at <http://www.swazilii.org/sz/judgment/supreme-court/2011/15> 2; *Sandile Hadebe v Sifiso Khumalo NO and Others* Civil Appeal No. 25/2012 at para 18, available at <http://www.swazilii.org/sz/judgment/supreme-court/2013/39>.

<sup>188</sup> CRC Final Report note 11 above.

<sup>189</sup> Above at 135.

<sup>190</sup> Sternford Moyo, ‘The role of the legal profession in promoting and protecting the rule of law and independence of the judiciary’ in Francis Neate (ed.), *The Rule of Law Perspectives from the Around the Globe* (2009) 165-170 at 170.

<sup>191</sup> The King’s Proclamation (Amendment) Decree No.1 of 1987, para 1 thereof reads in part:

I hereby reaffirm that in terms of Swazi Law and Custom, the King holds Supreme power in the kingdom of Swaziland and as such all Executive, Legislative and Judicial powers vest in the King....

of the United Nations, the Commonwealth, the African Union, the Southern African Development Community, and other international organizations of which Swaziland is a member.’

Sub-section (2) deals with the applicability of international customary law. It provides that in the conduct of international affairs, Swaziland shall do so in accordance with accepted principles of public or customary international law and diplomacy “in a manner consistent with national interest.” A careful reading of the section seems to suggest that national interest is a primary consideration where international law is concerned. A further reading gives an impression that of reluctance to give effect and respect international law including international customary law. This impression is discernible from the provisions of section 236 (a) and (b).

International agreements<sup>192</sup> are governed by section 238 of the Constitution. According to section 238 (2) (a) international agreements executed by the Government are binding to Swaziland only if –

- a resolution of at least two-thirds of the members of a joint sitting of both Chambers of Parliament.
- if the treaty is technical, administrative or executive in nature, the above provision does not apply.

According to sub-section (4) a self-executing treaty becomes law in Swaziland only when enacted into law by Parliament.

The Constitution does not deal with regional integration. However, it states that Swaziland shall uphold values and principles of both regional and international bodies.<sup>193</sup> Over and above these, Swaziland has been a member of the Southern African Customs Union (SACU).<sup>194</sup> Swaziland is also a member of the Common Market of Eastern and Southern Africa (COMESA).<sup>195</sup> In its recommendations, the CRC recommended that: “[t]he establishment of friendly relations and cooperation with other states and international organizations must continue and be strengthened.”<sup>196</sup> However, this was subject to the proviso that “we must be careful as a nation not to accept and go along with foreign ways of doing things which conflict with our way of peaceful coexistence.”<sup>197</sup> The CRC further stated that the nationhood of Swaziland must be respected by the friendly nations

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<sup>192</sup> Under sub-section (4) international agreements includes treaties, conventions, protocols, international agreement or arrangement.

<sup>193</sup> Section 236 (1) (d).

<sup>194</sup> Available at <http://www.sacu.int/>.

<sup>195</sup> Available at <http://www.comesa.int/>.

<sup>196</sup> CRC Final Report at 90.

and international organizations to which Swaziland is a member.<sup>198</sup> From these recommendations, it is clear that sovereignty was the paramount consideration in the preparatory work of the drafting of the Constitution.

### VIII. Final remarks

An analysis of Swaziland's constitutional order post-2005 shows a gloomy picture in so far as constitutional developments are concerned. As opposed to representing new, the Constitution is false dawn. It has become increasingly clear that the document has not been able to guarantee constitutionalism. It has failed to achieve the rule of law and separation of powers, as the King continues to hold supreme authority in the country. This is, however, consistent with the recommendations of the CRC for it is recommended in 2001 that:

*Almost the entire members of the nation whom we interviewed recommend that the Monarchy continues as it is constituted currently. All powers of governing (ruling) and reigning over the Kingdom must remain entrenched in the Ngwenyama, according to Swazi law and custom and existing laws...<sup>199</sup>*

On the question of human rights, free political activity and the role of political parties in a democracy, the CRC's recommendation that "rights and freedoms ... must not conflict with our custom and traditions as the Swazi nation"<sup>200</sup> and that "political parties must remain banned ... the existing laws regarding this position must be enforced,"<sup>201</sup> has one the day. The Court of Appeal has succeeded in interpreting the Constitution in a manner that is consistent with the 1973 Proclamation in line with these recommendations at the expense of the rule of law, democracy, good governance and the respect, promotion and respect for all human rights.

Unless Swaziland strikes a healthy balance between its commitments to the generally accepted standards of constitutionalism there will always be an unhealthy conflict between fundamental human rights, freedoms and civil liberties and Swazi customary practices and traditions. In the absence of an independent judiciary, weak institutions to support democracy and an environment not conducive to meaningful and effective citizenship participation in decision-making and

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<sup>197</sup> As above.

<sup>198</sup> As above.

<sup>199</sup> CRC Report at 77.

<sup>200</sup> As above at 83.

<sup>201</sup> As above at 95.

governance, there are no prospects that constitutionalism will take root in Swaziland. In the final analysis, it is clear that a written constitution by itself, without political will and commitment to the values and principles of the rule of law, will not guarantee good governance and human rights.

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