

# SWAZILAND

## Country Profile prepared by the ICJ Centre for the Independence of Judges and Lawyers

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### **Overview**

In Swaziland, despite constitutional guarantees and safeguards, the judiciary is not independent. The executive does not consistently respect the principle of judicial independence. Further, among other things, the King controls judicial appointments and there have been concerns about the independence of procedures related to judicial accountability, as well as about judges upholding the integrity of their office.

The right to legal representation is not always guaranteed, and the ICJ has received reports of intimidation, harassment and interference with the work of lawyers in Swaziland. Among other things, lawyers' freedom of expression is not always respected either, and concerns have been raised regarding the implementation of disciplinary proceedings.

Reportedly, the prosecutorial services have instituted or continued proceedings against private citizens for political reasons.

As regards legal education, the emphasis is on commercial law, at the expense of human rights training.

### **A. Introduction**

#### **1. Legal tradition**

Swaziland has a dual legal system, comprised of both a Roman-Dutch based common law system applied in common law or civil courts and a traditional Swazi law and custom based system applied in Swazi National Courts.<sup>1</sup>

Swaziland gained independence from Great Britain in September 1968, having been a Protectorate since the end of the Boer War in the early 1900s. The 1968 Constitution, which provided for a constitutional monarchy and clear separation of powers between the executive, legislative and judicial branches of the government, was repealed by proclamation of King Sobhuza II on 12 April 1973<sup>2</sup> that vested in the King all legislative, executive and judicial powers. Parliament was dissolved and political parties and trade unions were banned by the proclamation, which however did maintain certain constitutional provisions related to the courts, their working methods, the security of tenure of judges and the administration of justice. The 1973 Decree was never repealed and remains in effect (insofar it is not inconsistent with the 2005 Constitution, cf. below).

From 1973 to 1978, King Sobhuza II ruled and legislated in the country through Royal Decrees and King's Orders-in-Council. The 1978 *Establishment of the Parliament of*

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<sup>1</sup> The Constitution of the Kingdom of Swaziland Act, 2005 (hereafter "Constitution"), S. 252.

<sup>2</sup> See the King's Proclamation to the Nation (the "1973 Decree"). <http://eisa.org.za/PDF/swa1973proclamation.pdf> (accessed 13 January 2014).

*Swaziland Order* nominally returned legislative powers to the people, declaring that the monarchy could issue no further royal decrees until a new constitution entered into force. The Order introduced the system of *Tinkhundla*,<sup>3</sup> a system of government ostensibly designed to blend Western democracy with traditional African structures of government, but in which political parties play no role.

While a constitution was promulgated on 13 October 1978, it was not formally submitted to the people and thus never came into force. A new Constitution, which had been in the drafting process since 1996, was adopted in July 2005. The Constitution is the supreme law and other law that is inconsistent with it is void, to the extent of the inconsistency.<sup>4</sup> In the pre-ample, it is recognized that "it has become necessary to review the various constitutional documents, decrees, laws, customs and practices so as to promote good governance, the rule of law, respect for our institutions and the progressive development of the Swazi society".<sup>5</sup>

Swaziland's laws are drawn from a variety of sources: the Constitution; legislation; common law; judicial precedent; customary law; authoritative texts; and, decrees.<sup>6</sup> The country belongs to the dualist legal tradition: unless an international agreement is self-executing, it becomes law only when enacted into law by Parliament.<sup>7</sup>

## 2. [Constitutional structure](#)

Under the 2005 Constitution, the King remains the hereditary Head of State.<sup>8</sup> The Constitution provides for a Legislature in the form of a Parliament, consisting of a Senate and a House of Assembly.<sup>9</sup>

Executive authority vests in the King, and he may exercise it either directly, or through the Cabinet or a Minister.<sup>10</sup> The King appoints the Prime Minister from among members of the House of Assembly acting on the recommendation of his Advisory Council. He also appoints the other Ministers from among the members of both chambers of the Parliament, on the recommendation of the Prime Minister; at least half of the Ministers must be elected members of the House of Assembly.<sup>11</sup>

Supreme legislative authority<sup>12</sup> vests in the King-in-Parliament, i.e. the King acting with the advice and consent of the Senate and the House of Assembly. The King appoints ten of the House's seventy-six members<sup>13</sup>, as well as twenty senators (while ten senators, at least half of them women, are elected by the members of the House).<sup>14</sup> The power of the King and Parliament to make laws is exercised by bills, passed by Parliament (by both chambers severally or in a joint session or by one of the chambers, depending on the

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<sup>3</sup> Swaziland is divided into constituencies (*tinkhundla*) that are subdivided into chiefdoms. The voters of each of several chiefdoms in an *inkhundla* nominate candidates to stand for election. These then compete with other candidates nominated in this way to represent the *inkhundla* in the House of Assembly. The system emphasizes devolution of State power from central government. See Constitution, S. 79-80. The Constitution makes no mention of political parties.

<sup>4</sup> Constitution, S. 2.

<sup>5</sup> Constitution, Pre-ample, fourth recital.

<sup>6</sup> Buhle Dube and Alfred Magagula, *Update: the law and legal research in Swaziland* (June 2012).

<http://www.nyulawglobal.org/globalex/swaziland1.htm> (accessed 5 March 2014).

<sup>7</sup> Constitution, S. 238(4). The Constitution of South Africa contains a similar provision (S. 231(4)) and its Constitutional Court, while not explicitly discussing that sub-section, has held in *Government of the Republic of South Africa and Others v. Grootboom and others* (CCT11/00 – 4 October 2000) that "where the relevant principle of international law binds South Africa, it may be directly applicable" (para. 26). In Swaziland, this provision was not applied in a similar manner when the Court had the occasion to do so in *Jan Sithole NO (in his capacity as a Trustee of the National Constitutional Assemblé (NCA) Trust and Others v. Prime Minister of the Kingdom of Swaziland and Others* (Civil Case No. 2792/2006 – 6 November 2007). See Magnus Kilander (ed.), *International law and domestic human rights litigation in Africa*, Pretoria University Law Press (2010), p. 12.

<sup>8</sup> Constitution, S. 4(1).

<sup>9</sup> Constitution, Chapter VII.

<sup>10</sup> Constitution, S. 64(1) and (3).

<sup>11</sup> Constitution, S. 67.

<sup>12</sup> Constitution, S. 106(a).

<sup>13</sup> Constitution, S. 95(1)(b).

<sup>14</sup> Constitution, S. 94. The article also provides that "The Senate shall consist of not more than thirty-one members", but only makes provision for the appointment of thirty.

situation) and assented to by the King.<sup>15</sup> The Attorney General published bills that have passed and that are assented to in the government Gazette as soon as practicable. A law does not come into operation until it has been published.<sup>16</sup>

The 2005 Constitution contains a Bill of Rights.<sup>17</sup> Notably, although the Constitution guarantees the rights to freedom of association and assembly, the right to form or join political parties, is not expressly included among other fundamental rights.<sup>18</sup> In September 2013, the King announced that the Tinkhundla system would be replaced with a “monarchal [sic] democracy”, but admitted to foreign press that the change was cosmetic, for foreign consumption: “No change really. It’s just a name so people can understand ... The world really doesn’t understand the Tinkhundla system. But everybody can understand monarchal democracy ... This monarchal democracy is a marriage between the traditional monarchy and the ballot box, all working together under the monarchy.”<sup>19</sup>

### 3. International treaty status

The following table sets out the status of a range of international treaties in Swaziland as of 12 June 2014.

	Ratification (including ratification, accession and succession)
International Covenant on Civil and Political Rights	26 March 2004
<i>ICCPR-OP1</i>	No signature or ratification
<i>ICCPR-OP2</i>	No signature or ratification
International Covenant on Economic, Social and Cultural Rights	26 March 2004
<i>ICESCR-OP</i>	No signature or ratification
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment	26 March 2004
<i>CAT-OP</i>	No signature or ratification
International Convention for the Protection of All Persons from Enforced Disappearance	25 September 2007 (signature only)
International Convention on the Elimination of All Forms of Racial Discrimination	7 April 1969
Convention on the Elimination of All Forms of Discrimination against Women	26 March 2004
<i>CEDAW-OP</i>	No signature or ratification
Convention on the Rights of the Child	7 September 1995
<i>CRC-OP1</i>	24 September 2012
<i>CRC-OP2</i>	24 September 2012
<i>CRC-OP3</i>	No signature or ratification
International Convention on the Protection of the Rights of All Migrant	No signature or ratification

<sup>15</sup> Constitution, S. 107.

<sup>16</sup> Constitution, S. 109.

<sup>17</sup> Constitution, Chapter III.

<sup>18</sup> Additionally, there is no law in Swaziland that regulates such aspects of political parties as registration, funding or financial control.

<sup>19</sup> Reuters, *Swaziland’s royal ruler squashes reform hopes* (13 September 2013).

<http://www.reuters.com/article/2013/09/13/uk-swaziland-king-idUKBRE98COMO20130913> (accessed 11 December 2013).

Workers and Members of their Families	
Convention on the Rights of Persons with Disabilities	24 September 2012
<i>CRPD-OP</i>	24 September 2012

	Ratification (including ratification, accession and succession)
Geneva Convention I	28 June 1973
Geneva Convention II	28 June 1973
Geneva Convention III	28 June 1973
Geneva Convention IV	28 June 1973
<i>Additional Protocol I</i>	2 November 1995
<i>Additional Protocol II</i>	2 November 1995

Rome Statute	No signature or ratification
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Convention against Corruption	24 September 2012
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African Charter on Human and People's Rights	15 September 1995
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At the Universal Periodic Review of its human rights record in March 2012, Swaziland found the recommendations to ratify the International Convention for the Protection of All Persons from Enforced Disappearance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Optional Protocol to the Convention Against Torture, and the Rome Statute of the International Criminal Court to be acceptable.<sup>20</sup> It also accepted recommendations to put in place human rights training programmes for members of the judiciary and law enforcement officials, and to take concrete and immediate measures to guarantee the independence and impartiality of the judiciary.<sup>21</sup>

#### 4. [Court structure](#)

As noted above, Swaziland operates a dual legal system. It has two distinct court systems: traditional courts (known as Swazi National Courts) and common law courts.

The court system includes the Supreme Court, a High Court, and "such specialised, subordinate and Swazi courts or tribunals exercising a judicial function as Parliament may by law establish".<sup>22</sup>

The judiciary has jurisdiction in all matters civil and criminal, including matters related to the Constitution.<sup>23</sup> The Chief Justice is "the head of the judiciary and is responsible for the administration and supervision of the judiciary". She or he may make rules for regulating the practice and procedure of the superior and subordinate courts.<sup>24</sup>

The superior courts consist of the Supreme Court and the High Court.<sup>25</sup>

<sup>20</sup> Human Rights Council, Report of the Working Group on the Universal Period Review: Swaziland, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, UN Doc. A/HRC/19/6/Add.1 (6 March 2012), para. 1, 2, 3 and 21.

<sup>21</sup> Human Rights Council, Report of the Working Group on the Universal Period Review: Swaziland, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, UN Doc. A/HRC/19/6/Add.1 (6 March 2012), para. 7-8.

<sup>22</sup> Constitution, S. 139(1).

<sup>23</sup> Constitution, S. 139(2).

<sup>24</sup> See Constitution, S. 139(4) jo. S. 142.

<sup>25</sup> Constitution S. 139(1)(a).

The Supreme Court is the apex court,<sup>26</sup> and hears appeals from the High Court<sup>27</sup> and exercises discretionary appellate review over cases originating in other courts.<sup>28</sup> It is composed of the Chief Justice and no less than four Justices.<sup>29</sup>

The High Court exercises original jurisdiction in most civil and criminal matters, and can hear appeals from lower courts or tribunals.<sup>30</sup> Notably, the High Court's jurisdiction includes constitutional questions and the enforcement of fundamental rights.<sup>31</sup> Its jurisdiction is excluded in matters falling within the competence of the Industrial Court, the Swazi Courts or the Courts Martial.<sup>32</sup> The High Court is composed of the Chief Justice, *ex officio*, and no less than four judges of the High Court,<sup>33</sup> the Chief Justice may also assign other judges to sit on the High Court for any case or period.

Magistrates Courts are established under the *Magistrates Courts Act 1938*. Under the 2011 *Magistrates Courts (Amendment) Act*, a classification into principal magistrate's court, senior magistrate's court and magistrate's court was introduced, replacing the old distinction between classes. The jurisdiction of each of these courts is limited by the amount of the claim.<sup>34</sup> Judgments of Magistrates Courts may be appealed to the High Court.<sup>35</sup>

Swaziland also has specialty courts, created by statute and with limited jurisdiction. Governed by the *Industrial Relations Act 2000*, the Industrial Court has broad jurisdiction over matters touching upon industrial relations and the employer-employee relationship. Decisions of the Industrial Court may be appealed to the Industrial Court of Appeals;<sup>36</sup> the High Court reviews decisions of the Industrial Court, which are appealable in that respect to the Supreme Court. The *Small Claims Court Act 2011* authorizes the Minister of Justice to establish a Small Claims Court<sup>37</sup> with limited jurisdiction.<sup>38</sup> The Act has not yet been implemented and no Small Claims Courts are operational at present. The *Children Protection and Welfare Act 2012* provides for the creation of a Children's Court.<sup>39</sup> No such court is operational at present. There is a Court at the High Court with facilities for small children and another has recently been opened in Nhlanguano.

Swazi National Courts have jurisdiction to adjudicate petty criminal offenses and minor civil disputes governed by customary law. The National Courts system is governed by the 1950 *Swazi National Courts Act* and includes Swazi Courts, Swazi Courts of Appeal, Higher Swazi Court of Appeal and the Judicial Commissioner. Cases are dispensed with, according to unwritten customary law, in a relatively speedy manner, as individuals accused in criminal matters are not permitted counsel.<sup>40</sup>

The existence of the two court systems has given rise to forum shopping. Customary courts are seen as providing prompt and affordable justice, and may be preferred by victims of a crime because of the belief that unlike in common law courts, there will be no lawyers to "derail" the proceedings.<sup>41</sup> Practice, at times inconsistent with legislatively

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<sup>26</sup> Constitution, S. 146(1).

<sup>27</sup> Constitution, S. 147(1)(a).

<sup>28</sup> Constitution, S. 147(1)(b).

<sup>29</sup> Constitution, S. 145(1).

<sup>30</sup> Constitution, S. 152.

<sup>31</sup> Constitution, S. 151(2)(a).

<sup>32</sup> Constitution, S. 151(3).

<sup>33</sup> Constitution, S. 150.

<sup>34</sup> Magistrates Courts Act, S. 16 (amended).

<sup>35</sup> Part VIII Magistrates Courts Act for civil matters, S. 85-86 Magistrate's Court Act for criminal matters. S. 92 Magistrates Courts Act provides that the Director of Public Prosecution may, in criminal cases, seek a ruling of the High Court on matters of law, if he is dissatisfied with a decision on this by the Magistrate's Court.

<sup>36</sup> Industrial Relations Act, S. 20(1).

<sup>37</sup> Small Claims Court Act, S. 3.

<sup>38</sup> Small Claims Court Act, S. 13-25.

<sup>39</sup> See Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa* (March 2013), p. 132.

<sup>40</sup> This prohibitory clause has come to be interpreted to denote that once a person indicates a desire to be represented, the case is moved to the jurisdiction of the Magistrate Court. See Angelo Dube, *Assessment Study on Delayed Justice Delivery* (July 2010), p. 46.

<sup>41</sup> Angelo Dube, *Assessment Study on Delayed Justice Delivery* (July 2010), p. 2.

attributed competence, has given rise to a grey area as regards the exact procedure for case referral: the police department makes a list of cases to be taken to each court and consults with the clerk of court at the Magistrate's Court, who serves as a check and balance. However, some cases do not go through this informal system and state police moreover do not always inquire of suspects upon arrest if they wish to be represented (which would lead to the exclusion of the Swazi Courts' jurisdiction). Consequently, some cases find their way to the customary courts, in spite of the accused's preference for the Magistrate's Court, potentially leading to long legal battles to move the case to the desired forum.<sup>42</sup> Moreover, the police refer some cases, in which evidence is tenuous and which may lead to an acquittal in the Magistrate's Courts, to traditional courts where convictions will be assured.

## **B. Judges**

*It is fundamental to the rule of law, to the right to a fair trial, the right to liberty and security of person, and to the right to effective remedy for violations of human rights, that individual judges and the judiciary as a whole must be independent and impartial.<sup>43</sup> The requirement that courts and other tribunals be effective, independent and impartial "is an absolute right that is not subject to any exception."<sup>44</sup>*

*For the judiciary as an institution, the requirement of independence refers in particular to: the procedure and qualifications for the appointment of judges; guarantees relating to security of tenure until a mandatory age of retirement or expiry of term of office; the conditions governing promotion, transfer, suspension and cessation of their functions; and the degree to which the executive and legislative branches of power do or do not in practice interfere with judges and judicial decision-making.<sup>45</sup>*

In contrast to the 1973 Decree, which vested all judicial as well as executive and legislative powers in the King, the 2005 Constitution vests all judicial power in the judiciary.<sup>46</sup>

While the Constitution enshrines the guarantee of the independence of the judiciary (both in the exercise of judicial and administrative functions)<sup>47</sup>, the executive has not respected the principle in practice.

In late 2002, a judicial crisis occurred when the government refused to honour two court orders and the Prime Minister sharply and publicly criticized the Court of Appeal.<sup>48</sup> In response, all members of the Court of Appeal resigned, and several High Court judges refused to accept pleadings filed by the government. The government attempted to

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<sup>42</sup> Angelo Dube, *Assessment Study on Delayed Justice Delivery* (July 2010), p. 46.

<sup>43</sup> Among others, International Covenant on Civil and Political Rights (ICCPR), Article 14(1); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.1 Universal Declaration of Human Rights, Article 10; Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (hereinafter: 'UN Basic Principles on the Independence of the Judiciary'), Principle 1 and 2; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 1; Bangalore Principles of Judicial Conduct, Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002, Value 1 and 2. Generally, see also International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors – Practitioners' guide, no. 1* (2007).

<sup>44</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

<sup>45</sup> See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19; UN Basic Principles on the Independence of the Judiciary.

<sup>46</sup> Constitution, S. 140(1).

<sup>47</sup> Constitution, S. 141.

<sup>48</sup> The two cases were *Minister of Home Affairs et al. v. Fakudze et al.*, and *Gwebu and Bhembe v. Rex*.

resolve the crisis through a mix of threats and bribes.<sup>49</sup> The crisis only abated in 2004, when a newly appointed Prime minister apologized for the statement of his predecessor and promised to abide by future court rulings.<sup>50</sup>

Attacks on the independence of the judiciary have continued, leading to another crisis in 2011. The Chief Justice issued a directive ordering the non-registration of all lawsuits that challenge the King "directly or indirectly".<sup>51</sup> This directive served to effectively bar the filing of any lawsuits against corporations in which the King owns shares or has interests. In addition, the King, on the advice of the Judicial Service Commission, removed Justice Thomas Masuku from the bench for, among other things, allegedly criticizing the him (see below). The Law Society of Swaziland launched a boycott of the courts to protest the lack of judicial independence.<sup>52</sup> This boycott lasted four months and seriously hampered the delivery of justice in the country.

In 2011, a complaint was filed with the African Commission by the Law Society, accusing Chief Justice Ramodibedi of systematically undermining the independence of the judiciary related among other things to the Chief Justice's dismissal of complaints by the Law Society against himself. The government has yet to file in the matter, which remains pending before the Commission.

In 2005, the African Commission on Human and People's Rights, in relation to the law prior to the entry into force of the Constitution, had taken the view that vesting judicial power in the King, ousting the jurisdiction of the courts on certain matters and allowing the Head of State to dismiss judges was in violation of the right to fair trial and the obligation to respect the independence of the courts in the African Charter.<sup>53</sup> The Commission recommended among other things bringing the law in conformity with the provisions of the Charter. In 2012, the Commission expressed alarm at the failure of Swaziland to implement its 2005 decision.<sup>54</sup>

Further, the Chief Justice has issued a practice directive entitling him, together with the Registrar, to allocate cases in the High Court. This directive has abrogated the fair processes hitherto followed in allocation of cases and allows the Chief Justice to allocate sensitive and political cases to some judges and not others. There is concern that politically sensitive cases and cases in which the government is a litigant are assigned only to specific judges within the High Court. Such a practice is not only inconsistent with the independence and impartiality of the court and is likely to erode public confidence in the rule of law.<sup>55</sup>

## 1. [Constitutional and legislative recognition of the principle of judicial independence](#)

*The independence of the judiciary must be guaranteed by the State and enshrined in the Constitution or the law.*<sup>56</sup>

As noted above, the Constitution in Swaziland expressly guarantees that, "the Judiciary, in both its judicial and administrative functions, including financial administration, shall be

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<sup>49</sup> High Court Justice Thomas Masuku was demoted from the High Court to the Industrial Court. The High Court found his demotion illegal.

<sup>50</sup> See International Commission of Jurists, *Attacks on Justice: Swaziland* (2005).

<sup>51</sup> See Practice Directive No.4/2011.

<sup>52</sup> See International Commission of Jurists and SADC Lawyers Association, *General Briefing on Judge Thomas Masuku's case* (8 July 2011).

<sup>53</sup> African Commission on Human and People's Rights, *Lawyers for Human Rights v. Swaziland*, Comm. No. 251/2002 (2005), para. 54, 58.

<sup>54</sup> See African Commission on Human and People's Rights, 216: Resolution on the Human Rights Situation in the Kingdom of Swaziland (2 May 2012).

<sup>55</sup> Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa* (March 2013), p. 96.

<sup>56</sup> UN Basic Principles on the Independence of the Judiciary, Principle 1; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(a).

independent and subject only to this Constitution, and shall not be subject to the control or direction of any person or authority."<sup>57</sup> It furthermore guarantees that neither Crown nor Parliament or any person acting under their authority shall interfere with the exercise of judicial functions.<sup>58</sup> Also, all organs or agencies of the Crown are required to give the courts such assistance as they may reasonably require for protecting the independence, dignity and effectiveness of the courts.<sup>59</sup>

Regrettably, as described above and below, these Constitutional guarantees of and safeguarding judicial independence continue to be breached in practice.

## 2. [Appointment and promotion of judges; Security of tenure](#)

*To safeguard the independence of the judiciary and the rights to equality before the law and equal access to the profession, international standards clarify that judges should be appointed through an open process on the basis of prescribed criteria that are based on merit and integrity, and without discrimination.<sup>60</sup> To ensure that the composition of the judiciary is essentially reflective of the population and to combat discrimination and ensure equality before the law, steps should be taken to ensure the appointment of qualified women and members of minority communities.<sup>61</sup>*

*As regards appointment criteria, the UN Basic Principles on the Independence of the Judiciary stipulate that persons selected must be "individuals of integrity and ability with appropriate training of qualifications in law".<sup>62</sup>*

*An appropriate method of appointments of judges is a prerequisite for the independence of the judiciary<sup>63</sup> and is a means of ensuring equal access to the profession. On the procedure for judicial appointments, the UN Basic Principles on the Independence of the Judiciary provide that "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives".<sup>64</sup> The Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers, in relation to appointment and promotion of judges, have repeatedly recommended the use of bodies that are independent from the executive,<sup>65</sup> plural and composed mainly (if not solely) of judges and members of the legal profession,<sup>66</sup> and that apply transparent procedures.<sup>67</sup>*

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<sup>57</sup> Constitution, S. 141(1).

<sup>58</sup> Constitution, S. 141(2).

<sup>59</sup> Constitution, S. 141 (3).

<sup>60</sup> Principle 10 of the UN Basic Principles on the Independence of the Judiciary provides in part: "In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory." Also, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(h)-(j); Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

<sup>61</sup> Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, UN Doc. A/HRC/66/289 (2011), para. 22-33, 92; Human Rights Committee, Concluding Observations on the United Kingdom, UN Doc. CCPR/CO/73/UK (2001), para. 15; Human Rights Committee, Concluding Observations on France, UN Doc. CCPR/C/FRA/CO/4 (2008), para. 26; Human Rights Committee, Concluding Observations on Sudan, UN Doc. CCPR/C/79/Add.85 (1997), para. 21; Committee Against Torture, Conclusions and recommendations on Bahrain, UN Doc. CAT/C/CR/34/BHR (2005), para. 7(h); Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, UN Doc. A/60/18 (pp. 98-108) (2005), para. 5(d); Committee on the Elimination of Racial Discrimination, Concluding Observations on Guatemala, UN Doc. CERD/C/GTM/CO/12-13 (210), para. 8; Committee on the Elimination of Racial Discrimination, Concluding Observations on Colombia, UN Doc. CERD/C/304/Add.76 (1999), para. 13.

<sup>62</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(i) and (k).

<sup>63</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

<sup>64</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(h).

<sup>65</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(h) encourages "the establishment of an independent body". Also e.g., Concluding Observations on the Congo, CCPR/C/79/Add.118, para. 14; Concluding Observations on

*Promotions within the judiciary must be based on objective factors, particularly ability, integrity and experience.*<sup>68</sup>

*It is widely accepted that when judges have security of tenure in office they are less vulnerable to pressure from those who can influence or make decisions about the renewal of their terms of office. Accordingly, international standards prescribe that judges tenure must be guaranteed until a mandatory retirement age or expiry of the term of office.*<sup>69</sup>

*While as described below in section 4, judges nonetheless remain accountable throughout their terms of office, as a necessary corollary to the guarantee of security of tenure, international standards specify that during their term of office, judges may be removed only in exceptional, strictly limited and well-defined circumstances provided for by law, involving incapacity or behaviour that renders them unfit to carry out the duties of their office, and following a fair procedure.*

In Swaziland, the King controls judicial appointments.

The King appoints the Chief Justice and the other Justices of the Superior Courts, on the advice of a Judicial Service Commission (JSC).<sup>70</sup> The JSC is established by the Constitution as an "independent" body, neither itself nor its members subject to the direction or control of any person or authority in the exercise of its functions.<sup>71</sup>

However, the fact that all appointments to the JSC are under the King's control, undermines the Constitutional guarantees of its independence. It is composed of the Chief Justice; the chairman of the Civil Service Commission; and four members selected by the King, at least two of whom must be legal practitioners with at least seven years' practice.<sup>72</sup>

The JSC's mandate comprises, *inter alia*, advising the King on the appointment, discipline and removal of judges and prosecutors; issuing recommendations on improving the administration of justice; and appointing court registrars.<sup>73</sup>

The Constitution prescribes that all judges of the Supreme and High Court must be of high moral character and integrity. In addition the prescribed qualifications for serving on the

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Liechtenstein, CCPR/CO/81/LIE, para. 12; Concluding Observations on Tajikistan, CCPR/CO/84/TJK, para. 17; Concluding Observations on Honduras, CCPR/C/HND/CO/1, para. 16; Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 11; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 9.

<sup>66</sup> Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 28-29. See International Commission of Jurists, International principles on the independence and accountability of judges, lawyers and prosecutors – Practitioners' guide, no. 1 (2007), pp. 45-48.

<sup>67</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(h); Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 32; Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Preliminary Report to the Human Rights Commission on a mission to Ecuador, UN Doc. E/CN.4/2005/60/Add.4 (2005), para. 5(d).

<sup>68</sup> UN Basic Principles on the Independence of the Judiciary, Principle 13; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(o); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 14.

<sup>69</sup> UN Basic Principles on the Independence of the Judiciary, Principle 12; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(l); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 16(b) and 18(c); Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 8.

<sup>70</sup> Constitution, S. 153(1).

<sup>71</sup> Constitution, S. 159(3). It is of note that the provisions on the Commission's independence are lacking in the JSC Act.

<sup>72</sup> Constitution, S. 159(1) and (2). There is an inconsistency between the Constitution and the Judicial Service Commission Act 1982 in this regard. The JSC Act lists as members the Chief Justice, the Chairman of the Civil Service Board and three persons appointed by the King on such terms and conditions as he may determine and two of whom possess such legal qualifications and experience as the King may determine (See JSC Act, S. 3(1)).

<sup>73</sup> Constitution, S. 160(2)-(3).

Supreme Court are: (a) being or having been a legal practitioner, barrister or advocate in Swaziland or any part of the Commonwealth or the Republic of Ireland for at least fifteen years; or, (b) being or having been a judge of the High Court in Swaziland or of a superior court with unlimited jurisdiction in civil and criminal matters in any part of the Commonwealth or Ireland for at least seven years; or, (c) having been a legal practitioner and a judge (under the same conditions) for a combined period of at least fifteen years. For appointment to the High Court, the minimum time periods are ten years as a legal practitioner, five years as a superior court judge in the Commonwealth or Ireland, and ten years combined experience, respectively.<sup>74</sup> While magistrates are not required to have legal training as a precondition for appointment, in practice most do hold a first degree in law.<sup>75</sup>

In June 2011, Justice Bheki Maphalala was appointed to the Supreme Court in contravention of the constitutionally prescribed requirements, as he had served for only two years on the High Court bench. There was, however, no legal challenge to the appointment.

Traditionally, those who served as Justices on the Supreme Court Justices came from other countries, primarily South Africa. This was considered to be necessary because the Supreme Court only sat for six weeks each year, and part-time judicial service would create conflicts of interest for virtually every experienced legal practitioner in Swaziland.<sup>76</sup> Pursuant to the 2005 Constitution, however, only citizens of Swaziland have been eligible for appointment as Justice of a superior court since 26 July 2012.<sup>77</sup>

In the period leading up to July 2012 there was a flurry of appointments of foreign nationals to the benches of the superior courts, including Chief Justice Ramodibedi (who had previously served on the basis of an interim contract). This was seen by some as a move to circumvent the Constitution.<sup>78</sup> Further, in May 2013 Mr Justice Benjamin Odoki, Chief Justice of Uganda, was appointed to serve on Swaziland's Supreme Court.

Furthermore, Justice M.C.B. Maphalala and Justice Esther Ota were appointed as permanent judges of both the High Court and Supreme Court (with appointments to the latter bench in 2011 and 2012, respectively). This situation, where a judge sits both on a court and on the court that exercises appeal and review jurisdiction over the former, gives rise to (at least the perception of) a tendency not to criticize a peer who sits on the same bench. Thus, public confidence in the impartiality and independence of the court is compromised.

Appointing judges who do not meet the prescribed qualifications of the Constitution violates the rule of law. Failure to ensure an independent and fair procedure for the appointment of judges can not only undermine judicial independence but also the public's confidence in independence and impartiality of the judicial system as a whole.

Under the Constitution of Swaziland, judicial appointees to a superior court are not subject to a probation period and the justices are guaranteed security of tenure.<sup>79</sup> Justices of superior courts may retire after attaining the age of sixty-five, and must do so at seventy (for those sitting on the High Court) or seventy-five (Supreme Court Justices).<sup>80</sup> In 2013, the High Court was seized with an application seeking to set aside a Supreme Court judgment on the grounds that Mr Justice A.M. Ebrahim, a citizen of Zimbabwe, sat in the panel of judges despite having attained the mandatory age of retirement.<sup>81</sup>

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<sup>74</sup> Constitution, S. 154.

<sup>75</sup> Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa* (March 2013), p. 54.

<sup>76</sup> International Commission of Jurists, *Report of the Centre for the Independence of Judges and Lawyers: Fact-finding Mission to the Kingdom of Swaziland* (June 2003), p. 17.

<sup>77</sup> Constitution, S. 157(2).

<sup>78</sup> News24, *Swaziland re-appoints judge Ramodibedi*, 26 June 2012; Mail & Guardian, *Mswati flouts Constitution to cement royal control of judiciary* (10 May 2013).

<sup>79</sup> Constitution, S. 155.

<sup>80</sup> Constitution, S. 156(1).

<sup>81</sup> *Bhokile Shiba v. Mr Justice Ebrahim and Others*.

In addition to these constitutional guarantees of security of tenure, however, there is concern about other provisions of the Constitution that permit the Chief Justice to ask the King to make temporary appointments to the Supreme Court or High Court when needed. In such cases the appointment may not exceed a single renewable period of three months. Further, the Chief Justice acting on his own may make an acting appointment for a period of one month, which is not renewable.<sup>82</sup>

The fact that the Constitution contemplates "appointment of Justices of the superior court on contract" raises concerns regarding security of tenure for judges and the independence of the judiciary. Many judges have been hired under short-term contracts; some of them have eventually been appointed to a permanent judicial office, while others have not.

The Constitution furthermore states that "unless otherwise agreed between the contracting parties, a judge on contract shall vacate office at the end of the period provided in the contract".<sup>83</sup> In the gap period between the expiration of his interim contract and his definitive appointment in June 2012, Chief Justice Ramodibedi continued to serve at the King's pleasure.<sup>84</sup>

### 3. [Financial independence of the judiciary](#)

*At the institutional level, international standards make clear that it is the duty of the State to provide adequate resources to enable the judiciary to properly perform its functions.<sup>85</sup> As a safeguard of judicial independence, the courts' budget shall be prepared "in collaboration with the judiciary having regard to the needs and requirements of judicial administration".<sup>86</sup>*

*Furthermore, the remuneration and pensions of judges must be secured by law at an adequate level<sup>87</sup> that is consistent with their status<sup>88</sup> and is sufficient to safeguard against conflict of interest and corruption.*

The ICJ notes that the Constitution includes safeguards of financial independence that are consistent with international standards. In particular it states that the judiciary is independent in its administrative functions, including its financial administration; the administrative expenses are to be charged on the Consolidated Fund and the judiciary is to keep its own finances and administer its own affairs, being authorized to deal directly with the ministry responsible for finance or any other person in relation to its finances.<sup>89</sup>

The ICJ does not currently have information regarding the application of these Constitutional provisions in practice.

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<sup>82</sup> Constitution, S. 153(4).

<sup>83</sup> Constitution, S. 157(2).

<sup>84</sup> Mail & Guardian, *Mswati flouts Constitution to cement royal control over judiciary* (10 May 2013). <http://mg.co.za/article/2013-05-10-00-mswati-flouts-constitution-to-cement-royal-control-of-judiciary> (accessed 13 January 2014).

<sup>85</sup> UN Basic Principles on the Independence of the Judiciary, Principle 7; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(v); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 33.

<sup>86</sup> Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 34.

<sup>87</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(m).

<sup>88</sup> UN Basic Principles on the Independence of the Judiciary, Principle 11; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 16(a); Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 13.

<sup>89</sup> Constitution, S. 141.

#### 4. Independence and impartiality; Judicial integrity and accountability

*Judicial independence is founded on public trust and, to maintain that trust, judges must uphold the highest standards of independence, impartiality and integrity, and must be accountable to those standards.*

*The guarantee of judicial decisions by independent tribunals means that judges must be free to "decide matters before them impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".<sup>90</sup> Thus, both state actors and non-state actors alike must respect the independence of the judiciary and refrain from action aimed at improperly influencing members of the judiciary, undermining their independence and impartiality. While respecting the hierarchy between the courts of first instance and higher courts international standards clarify that other judges, must also respect the independence of their colleagues within the scope of the exercise of judicial functions: "No one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge, except, where applicable, the opinion in a particular case given on appeal by the higher courts."<sup>91</sup>*

*In the course of the exercise of judicial functions, judges must be impartial, and be seen to be impartial. Judges "must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other." Further, even where an individual judge might arguably in fact be able to ignore a personal relationship to one of the parties to a case, he or she should step aside from the case to protect against an apprehension of bias: "the tribunal must also appear to a reasonable observer to be impartial."<sup>92</sup>*

*Judges must also ensure that their conduct is above reproach in the view of a reasonable observer. They must avoid impropriety and the appearance of impropriety in all their activities. Their behaviour must reinforce the people's confidence in the integrity of the judiciary.<sup>93</sup>*

*A judicial code of conduct, drafted primarily by judges and members of the legal profession and consistent with international standards,<sup>94</sup> can help to safeguard judicial integrity and protect against conflicts of interest.<sup>95</sup> Pursuant to international standards, such a judicial*

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<sup>90</sup> UN Basic Principles on the Independence of the Judiciary, Principle 2; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.5(a). See UN Basic Principles on the Independence of the Judiciary, Principles 1-7; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Articles 2-8; Bangalore Principles of Judicial Conduct, Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002, Value 1; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Articles 1-4.

<sup>91</sup> Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 4; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(f), which provides in part "... nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentences by competent authorities, in accordance with the law"; Article A.5(e) states that "A judicial officer may not consult a higher judicial authority before rendering a decision in order to ensure that his or her decision will be upheld".

<sup>92</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 21; UN Basic Principles on the Independence of the Judiciary, Principle 2; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 25; Bangalore Principles of Judicial Conduct, Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002, Value 2 and 4; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 5. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.5(d) presents four concrete situations in which the impartiality of a judicial body would be undermined.

<sup>93</sup> Bangalore Principles of Judicial Conduct, Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002, Value 3 and 4; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 5-7.

<sup>94</sup> Bangalore Principles of Judicial Conduct; International Bar Association Minimum Standards of Judicial Independence, para. 35-42.

<sup>95</sup> Bangalore Principles of Judicial Conduct, Preamble and 'Implementation'.

*code of conduct, which should be enshrined in the law, should serve as the basis for the determination of cases of alleged judicial misconduct within a fair disciplinary system.*<sup>96</sup>

*Complaints about judicial misconduct must be processed expeditiously and fairly under an appropriate procedure that is subject to independent review.<sup>97</sup> The judge in question has the right to a fair hearing<sup>98</sup> before an independent and impartial body. The body responsible for discipline of judges should be independent of the executive,<sup>99</sup> plural and composed mainly (if not solely) of judges and members of the legal profession.<sup>100</sup> The judge's rights to a fair proceeding, including to notice of the accusations against him or her, to adequate time and facilities to prepare and present a defence including through counsel,<sup>101</sup> to challenge the evidence against him or her and present witnesses must be respected. Decisions must be based on established standards of judicial conduct, and sanctions must be proportionate. Decisions to suspend or remove a judge must be limited to cases in which the incapacity or behaviour of a judge renders the individual unfit to discharge his or her judicial duties. Decisions and sanctions in disciplinary proceedings should be subject to independent judicial review (although this may not apply to decisions of the highest court or the legislature in impeachment proceedings).<sup>102</sup>*

*In order to safeguard the independence of the judiciary, individual judges should also enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.<sup>103</sup>*

In Swaziland, during the tenure of Chief Justice Richard Banda, a code of judicial conduct was drafted.<sup>104</sup> It was not subsequently taken forward. The Leadership Code of Conduct<sup>105</sup> will apply to judges, once adopted, but concerns have been expressed that this Code falls short of a proper judicial code of conduct.<sup>106</sup>

There have been concerns about the independence of procedures related to judicial accountability in Swaziland and judges upholding the integrity of their office.

The Constitution provides for the removal of a justice of the Superior Court only in cases of stated serious misbehaviour or "inability to perform the functions of office arising from infirmity of body or mind".<sup>107</sup>

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<sup>96</sup> UN Basic Principles on the Independence of the Judiciary, Principle 19.

<sup>97</sup> UN Basic Principles on the Independence of the Judiciary, Principle 17 and 20; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(r); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 28.

<sup>98</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(q).

<sup>99</sup> Human Rights Committee, Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on Honduras, UN Doc. CCPR/C/HND/CO/1 (2006), para. 16; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20.

<sup>100</sup> Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 28-29.

<sup>101</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(q).

<sup>102</sup> UN Basic Principles on the Independence of the Judiciary, Principle 17-20; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(p)-(q); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 26-31; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 8 and 11.

<sup>103</sup> UN Basic Principles on the Independence of the Judiciary, Principle 16; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(n)(1); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 20; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 10.

<sup>104</sup> Swazi Times, *CJ announces code of ethics for judges* (20 January 2009), consulted at

<http://swazilandsolidaritynetworkcanada.wikispaces.com/CJ+announces+code+of+ethics+for+judgesJan+20,+2009> (last accessed 4 December 2013).

<sup>105</sup> Constitution, Chapter XVI.

<sup>106</sup> Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa*, March 2013, p. 92-93.

<sup>107</sup> Constitution, S. 158(2).

If the King, acting on the advice of an *ad hoc* committee in case of the Chief Justice (made up of the minister responsible for justice, the chairman of the Civil Service Commission and the President of the Law Society) or acting on the advice of the Chief Justice in other cases, considers the question of removal ought to be investigated, he refers the matter for investigation to the Judicial Service Commission, which is reconstituted for the purpose as may be appropriate, subject to principles of fairness and natural justice. The Commission inquires into the matter and makes a recommendation to the King, who "shall act in each case on the recommendation of the Commission".<sup>108</sup> The procedure does not appear to provide for an independent review of the decision of the Commission in relation to any level of judiciary.

The Judicial Service Commission has not performed this function impartially. In 2011 it removed Justice Thomas Masuku, one of the country's few independent judges, from office for allegedly criticizing the King. Due process safeguards were not observed in the case and the proceedings were not transparent, impartial or fair.

Concerns about the independence and integrity of the disciplinary process were evident in when also in 2011, the Chief Justice presided over proceedings pertaining to himself that were initiated pursuant to a complaint filed by the Law Society, summarily dismissing the case for lack of evidence.<sup>109</sup>

Concerns have been raised, including by the ICJ about the manner in which the quest for supremacy in the Basotho judiciary has been carried out in Lesotho between Chief Justice Ramodibedi, who also serves not only as CJ in Swaziland but also as President of the Court of Appeal in Lesotho, against the (now former) Chief Justice of Lesotho, Mahapela Lehohla.<sup>110</sup>

### **C. Lawyers**

*Lawyers fulfill an essential function in protecting human rights and ensuring the fair and effective administration of justice. An independent legal profession is one of the pillars upon which respect for human rights and the rule of law rests.*

*UN Basic Principles on the Role of Lawyers enumerate duties that lawyers must be able to carry out at all times freely. They include, among others: "advising clients on their rights and obligations and the working of the legal system insofar as it is relevant to their rights and obligations; assisting clients in every appropriate way and taking legal action to protect their interests"; and "assisting clients before courts, tribunals and administrative authorities, where appropriate". In doing so, lawyers, as well as "seek to uphold human rights and fundamental freedoms, and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession. They must "always loyally respect the interests of their clients".*

*As essential agents of the administration of justice they must also maintain the honour and dignity of their profession.*

*Governments must, among other things, ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference. They must recognize and respect that all communications between lawyers and their clients within their professional relationship are confidential. The competent authorities must ensure that lawyers have access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance.<sup>111</sup>*

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<sup>108</sup> Constitution, S. 158.

<sup>109</sup> See Law Society of Swaziland, Memorandum (30 August 2011).

<sup>110</sup> See International Commission of Jurists, *The Crisis of Judicial Leadership in the Kingdom of Lesotho: Report of the High-Level Mission* (September 2013).

<sup>111</sup> UN Basic Principles on the Role of Lawyers, Principles 12-22.

## 1. The role of lawyers

*An independent legal profession is one of the pillars upon which respect for human rights and the rule of law rests.<sup>112</sup> They have an essential function in protecting human rights and ensuring the fair and effective administration of justice. Among other things, lawyers can play a critical role in protecting the right to liberty and the prohibition against arbitrary detention when representing people deprived of their liberty, including by challenging the legal basis of arrests and filing habeas corpus petitions. They can also protect fair trial rights when working to defend individuals charged with criminal offences. They play a crucial part in combating impunity, when advising and representing victims of human rights violations and their relatives, including in the context of criminal cases brought against the alleged perpetrators and in proceedings aimed at obtaining other forms of reparation.*

*The ICCPR and other international standards guarantee the right of all persons charged with a criminal defence to access to counsel, and the right to defend themselves against the charges with the assistance of counsel. Those who do not have counsel of choice to represent them are entitled to have legal assistance assigned to assist in their defence in any case where the interests of justice so requires, free of charge if the accused cannot afford to pay.<sup>113</sup> The UN Principles and Guideline on Access to Legal Aid in Criminal Justice and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide, and the Human Rights Committee has clarified that the gravity of the offence, the complexity of the case and the severity of the potential penalties are important factors in deciding on whether the "interests of justice" require appointment of a lawyer. Effective assistance by a lawyer, free of charge if necessary, is considered to be a fundamental requirement in death penalty cases.<sup>114</sup> At the regional level, the right to a fair trial has been interpreted as requiring the State to ensure the assistance of a lawyer, again free of charge if necessary, also in at least some non-criminal (e.g., civil) proceedings.<sup>115</sup>*

The Constitution recognizes the right to a fair hearing, which includes for persons who are charged with a criminal offence the entitlement to present a defence either directly or through a chosen legal representative.<sup>116</sup> They must be given adequate time and facilities for the preparation of the defence.<sup>117</sup>

Parties to cases heard in the Swazi National Courts – including those charged with offences, are not permitted the right to counsel.<sup>118</sup> Legal representation is also not allowed in the Small Claims Court.<sup>119</sup>

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<sup>112</sup> Lawyers' essential role in defending human rights and the rule of law has been underscored repeatedly by United Nations authorities, see *inter alia* General Assembly, Strengthening the rule of law: Report of the Secretary-General, UN Doc. A/57/275 (2002), para. 41; Human Rights Council, Resolution on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/23/6 (2013), Pre-amble.

<sup>113</sup> ICCPR, Article 14(3)(d).

<sup>114</sup> UN Principles and Guidelines on the Access to Legal Aid in Criminal Justice Systems Proceedings, Principle 3; *the Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Section H(b); Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 38.

<sup>115</sup> The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article H explicitly provides for a right to legal assistance in civil cases where the interests of justice so require, to be determined in light of the complexity of the case, the rights that are affected and the likely impact of the outcome of the case on the wider community. Also see the jurisprudence of the European Court of Human Rights on the interpretation of Article 6: *Airey v. Ireland*, Application No. 6289/73 (1979), para. 26; also see *McVicar v. the United Kingdom*, Application No. 46311/99 (2002), *Essaadi v. France*, Application No. 49384/99 (2002), *P., C., and S. v. the United Kingdom*, Application No. 56547/00 (2002), *Steel and Morris v. the United Kingdom*, Application No. 68416/01 (2005). The Inter-American Court of Human Rights has addressed the need to remove obstacles in access to justice that might originate from a person's economic status, including by ensuring free legal assistance, in *Advisory Opinion OC-11/90*; also see *Advisory Opinion OC-18/03* on "juridical condition and rights of undocumented migrants" and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*.

<sup>116</sup> Constitution, S. 21(2)(e).

<sup>117</sup> Constitution, S. 21(2)(d).

<sup>118</sup> Constitution, S. 21(13)(b).

<sup>119</sup> Small Claims Court Act, S. 8(2).

In the Industrial Court in Swaziland, the parties to the proceeding may opt to be represented by a legal practitioner or “any other person authorized by such party”.<sup>120</sup> While the provision was intended to improve access to justice, aiming to do away with the technical barriers and expense the involvement of a lawyer may entail, it has achieved the contrary: the lack of legal training and understanding of procedure and court rules of these ‘labour consultants’ has impacted negatively on the delivery of justice.<sup>121</sup>

Despite reports that a majority of cases concern people who cannot afford the services of a lawyer,<sup>122</sup> there is no provision in the law of Swaziland for the provision of legal aid. Legal aid is however, currently provided by the government for accused charged with a crime that may attract capital punishment<sup>123</sup> and on an *ad hoc* basis by some NGO’s in other cases.<sup>124</sup>

The fact that legal counsel or representation is not allowed in Swazi National Courts, which have limited criminal jurisdiction, does not comply with international and regional standards that guarantee the right of all persons charged with a criminal offence to access to counsel and to defend themselves against the charges with the assistance of counsel. Further, the lack of a legal aid scheme outside of death penalty cases, may in certain cases, where the interest of justice would require the assistance of a lawyer, entail a violation of the right to a fair trial.

## 2. [Access to the legal profession](#)

*Every person who has the necessary qualifications and integrity should be allowed to practice as a lawyer. No discrimination is permitted on grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status with regard to entry into the profession or continued practice. The prohibition of discrimination does not however necessarily preclude a requirement that a candidate for judicial office must be a national of the country concerned.*<sup>125</sup>

*States should take special measures to provide opportunities and ensure needs-appropriate training for candidates from groups whose needs for legal services are generally not met, particularly when those groups have distinct cultures, traditions or languages or have been the victims of discrimination.*<sup>126</sup>

*The Special Rapporteur on the independence of judges and lawyers has recommended that “all aspects of the lawyers’ career be regulated by the bar association”,<sup>127</sup> which in turn must be independent (see below).*

*Independence of the legal profession both implies and includes security for lawyers, their clients and justice. For lawyers, this regularly means being granted a license that establishes their credentials and gives them the privilege to practice law. Licensure is a means of ensuring the quality and integrity of lawyers. At the same time, being part of a licensed profession provides lawyers with special protection, applying particular safeguards to the exercise of their professional activities, thus contributing to their independent*

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<sup>120</sup> Industrial Relations Act, S. 10.

<sup>121</sup> Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa* (March 2013), p. 130.

<sup>122</sup> Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa* (March 2013), p. 130-131.

<sup>123</sup> Constitution, S. 21(2) recognizes entitlement in cases of alleged offences that carry the death penalty or imprisonment for life.

<sup>124</sup> Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa* (March 2013), p. 22.

<sup>125</sup> UN Basic Principles on the Role of Lawyers, Principle 10; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 77 and 80; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 1.

<sup>126</sup> UN Basic Principles on the Role of Lawyers, Principle 11.

<sup>127</sup> Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Report on mission to Turkey, UN Doc. A/HRC/20/19/Add.3 (2012), para. 66. See also Human Rights Committee, Concluding Observations on Belarus, UN Doc. CCPR/C/79/Add.86 (1997), para. 14.

*functioning. It thus also serves to protect and assure those who call upon lawyers for legal services and enhances the quality of the administration of justice.*

There are two categories of lawyers in Swaziland: advocates and attorneys.

Becoming an advocate requires citizenship of or ordinary residence in Swaziland, and being a "fit and proper person" of at least 21 years of age. Additional requirements are:

- a bachelor of laws degree from the former University of Botswana, Lesotho and Swaziland; the former University of Botswana and Swaziland; the University of Swaziland; or any university in Botswana, Lesotho, Zimbabwe, South Africa, Namibia, England, Ireland or Scotland; or,
- holding a bachelor of laws degree and having practiced as an advocate in South Africa, Namibia, Botswana or Lesotho, or as a legal practitioner in Zimbabwe, for at least two years; in this case, if the individual previously practised as an attorney, he or she may not have done so for a period of three months immediately prior to the application in Swaziland; or
- having been admitted as a barrister or solicitor in England, Scotland or Ireland and remaining so enrolled.<sup>128</sup>

In order to be licensed to practice law as an attorney, the applicant must provide proof of the same citizenship and educational requirements as those applicable to advocates. In addition he or she must:

- provide proof of holding a bachelor's degree in law from a university in one of the countries referred to above and provide proof of having served a period of articles and having passed the examinations, which may be written after having completed at least half of service of articles. The Chief Justice makes the regulations pertaining to the service under, and the examination for articling attorneys, after consultation with a committee consisting of a law officer, the Registrar of the High Court and two legal practitioners appointed by the Council of the Law Society;<sup>129</sup> or,
- provide proof of holding a bachelor's degree in law from a university in one of the countries referred to above, and being enrolled as an attorney in South Africa, Namibia, Botswana or Lesotho or as a legal practitioner in Zimbabwe, and having practised so for at least two years; or,
- provide proof of having been admitted as a barrister or solicitor in England, Scotland or Ireland; or,
- provide proof of having practiced as an advocate in Swaziland, but not in the three months prior to the application for enrolment as an attorney, and of having successfully served articles of clerkship and passed any examinations prescribed.<sup>130</sup>

The High Court is the body that admits advocates and attorneys to practice.<sup>131</sup> Applicants must first serve a copy of his or her petition to practice on the Attorney-General and the Secretary of the Law Society.<sup>132</sup> The latter two provide certificates to this effect, which are essential for the application to the High Court.<sup>133</sup> The certificates usually record non-objection to the petition; if there are grounds for opposition, they are filed with the Court for argument.

A person who is neither a citizen nor a resident of Swaziland may seek permission to appear as counsel or attorney. To do so, they must apply to the Attorney General and the Secretary of the Law Society. The Chief Justice takes the decision on the right of audience, for each case.<sup>134</sup>

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<sup>128</sup> Legal Practitioners Act, S. 5(1).

<sup>129</sup> Legal Practitioners Act, S. 33(2).

<sup>130</sup> Legal Practitioners Act, S. 6(1).

<sup>131</sup> Legal Practitioners Act, S. 5(1) *in fine* and S. 6(1) *in fine*.

<sup>132</sup> Legal Practitioners Act, S. 28.

<sup>133</sup> Legal Practitioners Act, S. 30.

<sup>134</sup> Legal Practitioners Act, S. 5(2) and 6(2).

### 3. [Independence of the legal profession: the Law Society](#)

*In order for legal assistance to be effective, it must be carried out independently.<sup>135</sup> To this end, international law establishes safeguards aimed at ensuring the independence of the individual lawyer, as well as the profession as a whole.*

*The UN Basic Principles recognise that lawyers are entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training, and protect their professional integrity. The executive body of the professional associations are to be elected by its members and are to exercise its functions without external interference.<sup>136</sup> The UN Special Rapporteur on the independence of judges and lawyers has also underscored the "importance of an organized legal profession, including an independent and self-regulated association, to safeguard the professional interests of lawyers".<sup>137</sup>*

*Lawyers' professional organizations' functions in ensuring the profession's independence include, among other things, maintaining the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession, as well as protecting the intellectual and economic independence of the profession; defending the role of lawyers in society; promoting equal access of the public to the system of justice; promoting and supporting law reform; promoting a high standard of legal education as a prerequisite for entry into the profession, while ensuring equal access for all persons having the requisite professional competence; and promoting the welfare of the members of the profession.<sup>138</sup>*

*International standards place a duty on the authorities of the State to abstain from interfering in the establishment and work of professional associations of lawyers. The Human Rights Committee has raised concern about requirements for the compulsory affiliation of lawyers to a State-controlled association and the need for authorization by the Executive as prerequisites for the exercise by lawyers of the legal profession.<sup>139</sup>*

*International standards also underscore that associations of lawyers must, however, cooperate with governments to ensure effective and equal access to legal services, and to ensure that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.<sup>140</sup>*

*Lawyers' associations are created to safeguard the professional interests of lawyers and to protect and strengthen the independence of the legal profession. As associations of essential agents in the administration of justice, they also have a key role in supporting law and justice sector reform. They should be able to engage in activities, and to initiate and participate in public discussion on the substance, interpretation and application of existing and proposed legislation. They should do so in a manner that is consistent with the protection and promotion of human rights, upholding the dignity of the legal profession and the legal system.<sup>141</sup>*

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<sup>135</sup> UN Basic Principles on the Role of Lawyers, Preamble para. 9.

<sup>136</sup> UN Basic Principles on the Role of Lawyers, Principle 24; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(I); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 97; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 17.

<sup>137</sup> Gabriela Knaul, Special Rapporteur on the Independence of Judges and Lawyers, Report on missions to Mozambique, UN Doc. A/HRC/17/30/Add.2 (2011), para. 79.

<sup>138</sup> See International Bar Association (IBA) Standards for the Independence of the Legal Profession (1990), Article 18.

<sup>139</sup> Human Rights Committee, Concluding Observations of the Human Rights Committee on Belarus, UN Doc. CCPR/C/79/Add.86 (1997), para. 14.

<sup>140</sup> UN Basic Principles on the Role of Lawyers, Principle 25. For a more elaborate list on the functions of lawyers' associations, see International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 18; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 99. Also see General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/RES/67/187 (2012), Principle 10-11.

<sup>141</sup> UN Basic Principles on the Role of Lawyers, Principles 12 and 23; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 99(g); International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 18.

In Swaziland, the Law Society is established under the 1964 *Legal Practitioners Act*.<sup>142</sup> The law requires that every person admitted and enrolled as an advocate or attorney is a member of the Law Society.<sup>143</sup> It has a Council consisting of a President, Vice-President, Secretary, Treasurer and up to four other persons, all elected annually by the general annual meeting, plus a law officer<sup>144</sup> who is admitted and enrolled as a legal practitioner and appointed by the Minister responsible for justice.<sup>145</sup> The Council is vested with the management and control of the Law Society and may exercise the Law Society's competences, except for those that are expressly required to be exercised by the Society in general meeting.<sup>146</sup>

The Law Society's objects and functions – in general terms – are to regulate the legal profession, to uphold and improve the standards of professional conduct and qualifications and provide for the effective control thereof, to promote and represent the profession's interests, and to initiate and promote reforms and improvements to the administration of justice.<sup>147</sup> The Law Society's Council can publish rulings concerning the standards of conduct to which it expects the members to adhere and its bye-laws set out a non-exhaustive list of conduct or behaviour deemed "unprofessional or dishonourable or unworthy".<sup>148</sup> The Law Society's Council also has the competence to assess, at the request of any person, the fees payable to an attorney. The Council, or a committee it establishes for this purpose, reviews the fees and allows all those appearing reasonable, with a view to affording the attorney reasonable and adequate remuneration.<sup>149</sup>

#### 4. [Non-interference with the work of individual lawyers](#)

*Lawyers, as set out in the UN Basic Principles on the Role of Lawyers, shall at all times maintain the honour and dignity of their profession.<sup>150</sup> Their duties include advising clients on their rights and obligations and the working of the legal system insofar relevant to their rights and obligations; assisting clients in every appropriate way and taking legal action to protect their interests; and assisting clients before courts, tribunals and administrative authorities, where appropriate. In doing so, lawyers must seek to uphold human rights and fundamental freedoms, and at all times act freely and diligently in accordance with the law and recognized deontological standards.<sup>151</sup> They must always loyally respect the interests of their clients.<sup>152</sup>*

*The UN Basic Principles on the Role of the Lawyer recognize that in order for such legal assistance to be effective, it must be carried out independently.<sup>153</sup> To this end, international law establishes safeguards aimed at ensuring the independence of the individual lawyer, as well as the profession as a whole.*

*Governments must ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference.<sup>154</sup>*

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<sup>142</sup> Legal Practitioners Act, Part IX.

<sup>143</sup> Legal Practitioners Act, S. 35(1).

<sup>144</sup> "Law officer" means the Attorney General, Crown Counsel or any other person delegated generally or specially by the Attorney General in terms of the Law Officers Act 1966 or any other law.

<sup>145</sup> Legal Practitioners Act, S. 37(1).

<sup>146</sup> Legal Practitioners Act, S. 38(1).

<sup>147</sup> See Legal Practitioners Act, S. 36, which contains more detail on the Law Society's functions.

<sup>148</sup> The Law Society of Swaziland Bye-Laws 1992, S. 15.

<sup>149</sup> The Law Society of Swaziland Bye-Laws 1992, S. 16.

<sup>150</sup> Also, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(h).

<sup>151</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(i).

<sup>152</sup> See UN Basic Principles on the Role of Lawyers, Principles 12-15; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(j).

<sup>153</sup> UN Basic Principles on the Role of Lawyers, Preamble para. 9.

<sup>154</sup> UN Basic Principles on the Role of Lawyers, Principle 16(a). Also see Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(b)(2).

*Among other things, the authorities must ensure that lawyers are granted prompt and regular access to individuals who have been deprived of their liberty, regardless of whether they have been charged with a crime.<sup>155</sup> Initial lawyer-client meetings should occur from the very outset of detention, and in a matter involving suspected criminal conduct, before and during questioning of a suspect by the competent authorities, such as police, and investigating judges.<sup>156</sup> Any delay in access to counsel must be determined and justified on a case-by-case basis. In any case delay should not exceed "forty-eight hours from the time of arrest or detention".<sup>157</sup> Delay in granting an individual access to counsel and/or other interference in the lawyer-client however, in particular in a criminal case, can affect the ability of the accused to protect and preserve his or her rights and may prejudice the overall fairness of the subsequent criminal proceedings.*

*International standards related to the rights of people charged with a criminal offence, including the ICCPR, provide that a client must be granted "adequate time and facilities for the preparation of his defence".<sup>158</sup> Respect for this right requires, among other things that lawyers be permitted adequate time and facilities to meet with their detained clients. The UN Basic Principles on the Role of Lawyers, among other standards, affirm that those detained "shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality".<sup>159</sup>*

*Because confidentiality is paramount to an effective lawyer-client relationship, states have duty to respect and protect the confidentiality of lawyer-client communications, within the professional relationship. In the fulfilment of this duty international standards specify that lawyer-client consultations between a detained person and their lawyer "may be within sight, but not within the hearing, of law enforcement officials"<sup>160</sup>, ensuring confidentiality but taking security needs into account.*

*The state is obliged to ensure that lawyers have "access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients".<sup>161</sup>*

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<sup>155</sup> UN Basic Principles on the Role of Lawyers, Principle 7; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article M.2(b) and (f); General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), Principle 17; Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 34; Human Rights Committee, Concluding Observations on Georgia, UN Doc. CCPR/C/79/Add.74 (1997), para. 28; International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 8.

<sup>156</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article M.2(f) and N.2(c); General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/RES/67/187 (2012), Guideline 3, para 43(b); Human Rights Council, Resolution 13/19 on Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers, UN Doc. A/HRC/RES/13/19 (2010), para. 6.

<sup>157</sup> UN Basic Principles on the Role of Lawyers, Principle 7.

<sup>158</sup> ICCPR, Article 14(3)(b); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article N.3; General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), Principle 18.

<sup>159</sup> UN Basic Principles on the Role of Lawyers, Principle 8; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article N.3(a) and (c). Also, Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 34; General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), Principle 18; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 91; International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 8; International Bar Association (IBA) Standards for the Independence of the Legal Profession (1990), Article 12-13; International Law Association, Paris Minimum Standards of Human Rights Norms in a State of Emergency (1984), Article 5.2(b).

<sup>160</sup> UN Basic Principles on the Role of Lawyers, Principle 8. Outside criminal justice matters, Principle 22 establishes that "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential". Also, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article N.3(e)(1)-(2).

<sup>161</sup> UN Basic Principles on the Role of Lawyers, Principle 21; Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 33;

*It is essential that lawyers do not face any adverse consequences for representing any client. The UN Basic Principles and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa require that lawyers "shall not be identified with their clients or their clients' causes as a result of discharging their functions".<sup>162</sup> Furthermore, lawyers "must never be subjected to criminal or civil sanctions or procedures which are abusive or discriminatory or which would impair their professional functions, including as a consequence of their association with disfavoured or unpopular causes or clients".<sup>163</sup> Thus, lawyers "shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority".<sup>164</sup>*

*Further, the authorities must safeguard lawyers' security where this is threatened as a result of discharging their functions.<sup>165</sup>*

Regrettably the ICJ has received reports of intimidation, harassment and interference with the work of lawyers in Swaziland.

On 17 March 2014, human rights lawyer Thulani Maseko and journalist Bheki Makhubu were arrested and charged with criminal contempt of court on the basis of a warrant issued by Chief Justice Ramodibedi. The charges arise from articles allegedly written by Thulani Maseko and Bheki Makhubu in February and March 2014, in which they questioned circumstances surrounding the arrest of government vehicle inspector, Vincent Gwebu. The vehicle inspector had been arrested and charged with contempt of court reportedly after he had arrested the driver of a High Court Judge. The articles also raised questions about the integrity, impartiality and independence of the Swaziland judiciary in relation to the Gwebu case.

At the initial remand hearing, which was held in the Chief Justice's chamber and not in open court, the accused were not allowed to apply for bail and their lawyer was not allowed to appear on their behalf.<sup>166</sup> Subsequently, a successful challenge to the legality of the arrest, detention and charges against Thulani Maseko and Bheki Makhubu before High Court Judge Mumcy Dhlamini, resulted in their release from custody. However, two days later, the men were rearrested and detained when the State appealed Judge Mumcy Dhlamini's ruling.<sup>167</sup> The ICJ has condemned this as "an attack not only against these two men, but on the rule of law in Swaziland".<sup>168</sup>

On 12 June 2014, a group of United Nation human rights experts condemned "the repeated arrests, detention and trial of Mr. Maseko and Mr. Makhubu and are concerned that these may be directly related to their legitimate exercise of the right to freedom of expression". The Special Rapporteur on the right to freedom of opinion and expression said that the detention and trial "runs contrary to Swaziland's international human rights obligations" and the Special Rapporteur on the independence of judges and lawyers said

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Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article N.3(3)-(7); International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 8.

<sup>162</sup> UN Basic Principles on the Role of Lawyers, Principle 18; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(g).

<sup>163</sup> International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 7. See Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 84.

<sup>164</sup> UN Basic Principles on the Role of Lawyers, Principle 20; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(e); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 85.

<sup>165</sup> UN Basic Principles on the Role of Lawyers, Principle 17; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(f).

<sup>166</sup> International Commission of Jurists, '[Swaziland: ICJ sends team to observe bail hearing of human rights lawyer and journalist](#)', 24 March 2014.

<sup>167</sup> International Commission of Jurists, '[Swaziland: trial of human rights lawyer Thulani Maseko and journalist Bheki Makhubu commences](#)', 23 April 2014.

<sup>168</sup> International Commission of Jurists, '[Swaziland: ICJ concerned at moves to re-arrest human rights defenders Thulani Maseko and Bheki Makhubu](#)', 9 April 2014.

that she is “also concerned about allegations of lack of due process in the trials of these two men.” The experts urged the authorities of Swaziland to uphold the independence of the judiciary and to ensure that judicial proceedings be conducted fairly and in accordance with the country’s international human rights obligations.<sup>169</sup>

As of 15 June 2014 the two men remain detained. The ICJ will continue to observe and monitor the proceedings against Thulani Maseko and Bheki Makhubu, given the arbitrary nature of the arrest and detention, concerns that the charges are inconsistent with respect for the right to freedom of expression, and concerns about the fairness of the proceedings. In June 2009, Thulani Maseko was charged initially under the Suppression of Terrorism Act and then under the Sedition Act, based on remarks he allegedly made at a May Day rally in Manzini, where reportedly he had spoken with approval of an attempt by two men to bomb a bridge near one of the King’s palaces. The charge was never brought to trial. At the time, Nicole Fritz of the Southern African Litigation Centre said, “That [the Swazi government] would arrest Thulani who has been involved in almost every important human rights challenge in Swaziland in recent years shows just how shameless it is.”<sup>170</sup>

## 5. [Lawyers’ freedom of expression and association](#)

*Like other citizens, lawyers are entitled to enjoyment of their rights to freedom of expression, belief, association and assembly. These fundamental freedoms acquire specific importance in the case of persons involved in the administration of justice.*

*The UN Basic Principles and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa accordingly underscore and clarify the particular rights of lawyers to take part in public discussions of matters concerning the law, the administration of justice, and human rights; to join or form local, national or international organizations; and to attend the meetings of such groups or associations without suffering professional restrictions. They also emphasize that in exercising their rights to freedom of expression and association, lawyers must conduct themselves in line with the law and recognized standards and ethics of the legal profession in exercising these rights.<sup>171</sup>*

*Furthermore, as set out above in Section 3, lawyers are entitled to form and join self-governing professional associations that represent their interests, promote their continuing education and protect their professional integrity.*

### [a\) Freedom of association](#)

The Constitution guarantees the freedom of association,<sup>172</sup> and several voluntary associations of lawyers with a specific focus are active in the country, such as Lawyers for Human Rights of Swaziland (who advocate for rule of law and human rights, and among other things have litigated against the government at the African Commission level, see above) or the Christian Lawyers Association (who are a member of Advocates International, a global body of law practitioners with Christian values). While these groups generally operate without government restrictions, officials are rarely responsive to their views.

Membership of the Law Society of Swaziland is mandatory for everyone admitted as an advocate or attorney.

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<sup>169</sup> UNOHCHR, ‘[Swaziland: UN experts condemn continued detention and trial of human rights defenders](#)’, 12 June 2014.

<sup>170</sup> Southern African Litigation Centre, [News Release: Thulani Maseko](#) (2 June 2009).

<sup>171</sup> UN Basic Principles on the Role of Lawyers, Principle 23; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People’s Rights, Article I(k); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 92; International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 5; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 14.

<sup>172</sup> Constitution, S. 25.

## *b) Freedom of expression*

The Constitution guarantees freedom of expression. However, the provision contains a vaguely worded limitations clause that could lead to it being used to impose extensive restrictions that are broader than those allowed under international law, which requires that any restrictions be prescribed by law, serve a legitimate aim and are necessary in a democratic society.<sup>173</sup>

A number of other laws threaten freedom of expression,<sup>174</sup> notably the Suppression of Terrorism Act 2008, which introduced a vague definition of "terrorist act",<sup>175</sup> so broad that virtually any act can be prosecuted; severe penalties,<sup>176</sup> and wide discretion for the government to declare an organization to be a terrorist group.<sup>177</sup> The courts' role in reviewing such decisions is limited.<sup>178</sup> These provisions were used to charge human rights lawyer Thulani Maseko in 2009 (cf. supra).

## 6. Integrity and accountability of the legal profession

*As with judges, a code of professional conduct for lawyers is an essential tool for the maintenance of the integrity of the profession and, consequently, the quality of access to justice in a country. The UN Basic Principles on the Role of Lawyers state that "[c]odes of professional conduct shall be established by the legal profession through its appropriate organs, or by legislation".<sup>179</sup>*

*In order to uphold the integrity of the legal profession lawyers must be held accountable in fair proceedings before independent bodies, for breaches of established standards of professional conduct.*

*Complaints against lawyers for misconduct in their professional capacity should be "processed expeditiously and fairly under appropriate procedures."<sup>180</sup> They should be decided "in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession."<sup>181</sup>*

*International professional standards prescribe that the body responsible for investigating and adjudicating on allegations of misconduct by lawyers should be independent and impartial, and ensure that proceedings are conducted fairly and following proper procedure.<sup>182</sup> A lawyer accused of professional misconduct must have "the right to be assisted by a lawyer of their choice".<sup>183</sup> He or she should be entitled to notice of the complaints against him or her and have adequate time and facilities to prepare and present a defence. Any sanction against a lawyer for misconduct should be proportionate.*

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<sup>173</sup> Constitution, S. 24.

<sup>174</sup> See Article 19, *Statement: Swaziland: Counter-Terrorism Not a Pretext for Repression* (24 November 2008).

<sup>175</sup> Suppression of Terrorism Act, S. 2.

<sup>176</sup> Suppression of Terrorism Act, Part III.

<sup>177</sup> Suppression of Terrorism Act, S. 28.

<sup>178</sup> Suppression of Terrorism Act, S. 28(5)-(7). Also see Amnesty International, *An atmosphere of intimidation: Counter-terrorism legislation used to silence dissent in Swaziland* (May 2009).

<sup>179</sup> UN Basic Principles on the Role of Lawyers, Principle 26; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(m). The International Bar Association (IBA) Standards for the Independence of the Legal Profession (Standard 22) reserve this task for lawyers' associations. See Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 102.

<sup>180</sup> UN Basic Principles on the Role of Lawyers, Principle 27; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(n).

<sup>181</sup> UN Basic Principles on the Role of Lawyers, Principle 29; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(p).

<sup>182</sup> UN Basic Principles on the Role of Lawyers, Principle 27 and 29; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(n)-(o); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 106; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 22.

<sup>183</sup> UN Basic Principles on the Role of Lawyers, Principle 27; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(n).

*The lawyer should be entitled to independent judicial review of the disciplinary proceedings.*<sup>184</sup>

In Swaziland, the *Legal Practitioners Act* regulates disciplinary proceedings. It establishes a Disciplinary Tribunal, consisting of a Chairman who is appointed by the Chief Justice and possesses the qualifications required for appointment to the judiciary and two other members selected by the Chairman in consultation with the President of the Council of the Law Society from among the Society's members.<sup>185</sup>

These provisions on the establishment of the Disciplinary Tribunal do not comply with international standards, which prescribe that the primary competence to conduct disciplinary proceedings against lawyers shall lie with "an independent statutory authority consisting mainly of lawyers".<sup>186</sup> While indeed according to the law's provisions at least two out of three of the Tribunal's members are lawyers, the independence of the Tribunal cannot be guaranteed in light of the involvement of the Chief Justice in its composition.

If a person has a complaint regarding the professional conduct of a legal practitioner, he or she is to submit the complaint in writing to the Secretary of the Law Society, who will refer the complaint to the Chairman of the Tribunal, for appropriate action.<sup>187</sup>

The Disciplinary Tribunal's procedures are prescribed in regulations made by the Chief Justice, in consultation with the Chairperson of the Tribunal, the Council of the Law Society and the Attorney General.<sup>188</sup> Among other procedural rights, the practitioner who allegedly engaged in misconduct is entitled to present written explanations in answer to the complaint during a preliminary investigation.<sup>189</sup> If a *prima facie* case is made against the practitioner under investigation, the Tribunal proceeds to hold a hearing, at which the practitioner (or his or her legal representative) can introduce evidence and present a defence, as well as examine the evidence *à charge*.<sup>190</sup>

If, after due inquiry, the Tribunal decides that a legal professional has been "guilty of professional misconduct" or that it would be contrary to the public interest to allow continued practise because of mental or physical disability:

- the Tribunal can direct the Law Society to make an application to the High Court for an order suspending the practitioner for a period of more than three months or removing him or her from the roll; or,
- the Tribunal can suspend the legal practitioner for a period of less than three months; or, impose a penalty; or, impose "such conditions as it deems fit" to which the practitioner may continue practicing; or,
- the Tribunal can censure the legal practitioner; or, caution and discharge either conditionally or unconditionally.<sup>191</sup>

Upon application by the Law Society to the High Court, the Chief Justice (or another judge, in his absence) may for reasonable cause order suspension or removal from the roll or apply one of the lesser sanctions provided for.<sup>192</sup> A practitioner whose name was removed from the roll may make an application to have his name restored.<sup>193</sup>

Orders or findings of the Tribunal and the penalties it imposes can be appealed to the High Court, except in those cases where the Tribunal directed the Law Society to make an

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<sup>184</sup> UN Basic Principles on the Role of Lawyers, Principle 28; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article N(o); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 105; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 24.

<sup>185</sup> Legal Practitioners Act, S. 27bis(1).

<sup>186</sup> [Draft Universal Declaration on the Independence of Justice](#) (also known as the Singhvi Declaration), Article 103.

<sup>187</sup> Legal Practitioners Act, S. 27quin. Also see Legal Practitioners Act (Disciplinary Proceedings) Regulations, Regulations 6 and 7 (under Legal Practitioners Act S. 27 bis(2)).

<sup>188</sup> Legal Practitioners Act, S. 27bis(2).

<sup>189</sup> Legal Practitioners Act (Disciplinary Proceedings) Regulations, Regulation 8(3).

<sup>190</sup> Legal Practitioners Act (Disciplinary Proceedings) Regulations, Regulation 12.

<sup>191</sup> Legal Practitioners Act, S. 27ter.

<sup>192</sup> Legal Practitioners Act, S. 27(1).

<sup>193</sup> Legal Practitioners Act, S. 27oct(1).

application to the High Court for a suspension of more than three months or removal from the role. Decisions of the High Courts can be appealed to the Court of Appeal.<sup>194</sup>

Misconduct, unprofessional or dishonourable or unworthy conduct are defined by Law Society Bye Laws.<sup>195</sup>

Reportedly, complaints of lawyers misappropriating their clients' funds abound in Swaziland.<sup>196</sup> However, some in the legal profession with whom the ICJ spoke, voiced doubts about the validity or genuineness of all of these complaints.

In October 2012 Mr Sibusiso Shongwe, then a lawyer and member of the Judicial Service Commission and currently the Minister of Justice and Constitutional Affairs, was alleged to have withheld money belonging to his client and his employer. He reportedly stated that he would "defy" the Disciplinary Tribunal and not appear before it and that the Law Society was out to destroy his character. The Chief Justice, citing failure by the Law Society to provide the accused with further particulars in accordance with his requests, refused to sign the subpoena that must be served on the lawyer before the Tribunal can hear the case.<sup>197</sup>

In October 2013, he was summoned to make an appearance before the Council of the Law Society in relation to an inquiry against him into alleged professional misconduct. The summons mentioned: public statements allegedly imputing treasonous behaviour on the part of the Law Society; alleged interference in the operation of the courts; failure to pay statutory subscriptions; and failure and refusal to submit himself to a statutory body after a formal complaint was lodged by a member of the public.<sup>198</sup> However, he did not appear before the Council and according to media reports said that the Law Society has no legal right to summon him. The following month Mr Shongwe, who is also facing charges of defrauding The Swazi Observer together with that newspaper's former Managing Director, was appointed Minister of Justice and Constitutional Affairs.<sup>199</sup>

In June 2012, Parliament set up a select committee, mandated to "investigate allegations of unprofessional conduct of lawyers suspected of mismanaging Trust Accounts and enriching themselves through fraudulent means".<sup>200</sup> Upon a legal challenge by the Law Society, the High Court decided that Parliament did not have the power to initiate investigations against lawyers, as there is a self-regulatory mechanism under the *Legal Practitioners Act*.

## **D. Prosecutors**

*Prosecutors play a crucial role in the administration of justice, which they must fulfil fairly, consistently and expeditiously in accordance with the law. International standards underscore that they must respect and protect human dignity and uphold human rights.*<sup>201</sup>

*Prosecutors perform an active role in criminal proceedings, including the institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of such investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of*

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<sup>194</sup> Legal Practitioners Act, S. 27quat.

<sup>195</sup> Law Society Bye Laws 1992, S. 15(1)-(2), enacted under Legal Practitioners Act, S. 42.

<sup>196</sup> Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa*, March 2013, p. 106-107.

<sup>197</sup> Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa* (March 2013), p. 106.

<sup>198</sup> See, among others, Swazi Observer, *Lawyer Sibusiso Shongwe Summoned* (10 October 2013). <http://www.observer.org.sz/index.php?news=55219>. <http://www.observer.org.sz/index.php?news=55219> (last accessed 13 January 2014).

<sup>199</sup> See, among others, Times of Swaziland, *Minister of Justice faces fraud charges* (9 November 2013). <http://www.times.co.sz/news/93080-minister-of-justice-faces-fraud-charges.html> (last accessed 13 January 2014).

<sup>200</sup> *The Law Society of Swaziland v The Speaker of the House of Assembly & 2 others* (1145/12) [2012] SZHC171 (9 August 2012), para. 4.

<sup>201</sup> UN Guidelines on the Role of Prosecutors, Guidelines 12-13.

*the public interest. These functions shall be carried out separately from judicial functions.*<sup>202</sup>

*Every prosecutor must fulfil his or her professional duties in an independent, impartial and objective manner, without discrimination of any kind, and as essential agents of the criminal justice system, maintain the honour and duty of their profession.*

*Prosecutors may not initiate or continue prosecution if an impartial investigation shows the charge to be unfounded. Further, they must give due attention to the prosecution of crimes committed by public officials, in particular corruption, abuse of power, grave violations of human rights and other crimes recognized by international law. If prosecutors come into possession of evidence that they know or believe on reasonable grounds was obtained through recourse to unlawful methods that constitute a grave violation of the suspect's human rights, they must refuse to use such evidence against anyone other than those who used such methods or inform the Court accordingly and take all necessary steps to ensure that those responsible are brought to justice.*<sup>203</sup>

### 1. Functioning of the prosecutorial services

*Prosecutors play a crucial role in the administration of justice, and respect for the rule of law requires a strong prosecutorial authority in charge of investigating and prosecuting criminal offences. Each prosecutor must be empowered to fulfil his or her professional duties in an impartial and objective manner.*

*Prosecutors must perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights.*<sup>204</sup> *They perform an active role in criminal proceedings,*<sup>205</sup> *and must carry out these functions impartially and objectively, protecting the public interest.*<sup>206</sup>

*This requires, among other things that Prosecutors:*

- *Ensure that victims of crime are provided with information about the proceedings and their rights within them, and consider their views, as appropriate;*<sup>207</sup>
- *Do not initiate or continue a prosecution when an independent investigation indicates that the charge is unfounded;*<sup>208</sup>
- *Refuse to use evidence gained as a result of unlawful means, including torture or other ill-treatment, except in proceedings against those allegedly responsible for using such unlawful means;*<sup>209</sup>
- *Give due attention to the prosecution of crimes committed by public officials, including in particular corruption, abuse of power, violations of human rights and crimes under international law.*<sup>210</sup>

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<sup>202</sup> UN Guidelines on the Role of Prosecutors, Guideline 11.

<sup>203</sup> UN Guidelines on the Role of Prosecutors, Guidelines 14-16.

<sup>204</sup> UN Guidelines on the Role of Prosecutors, Guideline 12; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(h); International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 1(h) and 4.1.

<sup>205</sup> UN Guidelines on the Role of Prosecutors, Guideline 11; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(g); International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 4.2.

<sup>206</sup> UN Guidelines on the Role of the Prosecutor, Guideline 13; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(i); International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 1(g), 3(a) and 3(c).

<sup>207</sup> UN Guidelines on the Role of Prosecutors, Guideline 13 (d); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(i)(4).

<sup>208</sup> UN Guidelines on the Role of Prosecutors, Guideline 14; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(j).

<sup>209</sup> UN Guidelines on the Role of Prosecutors, Guideline 16; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(l).

<sup>210</sup> UN Guidelines on the Role of Prosecutors, Guideline 15; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(k).

*States must ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.<sup>211</sup> In particular, the authorities must physically protect prosecutors and their families when their personal safety is threatened as a result of discharging their prosecutorial functions.<sup>212</sup>*

*The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.<sup>213</sup> Further, the law or published rules and regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecutorial process.<sup>214</sup> If non-prosecutorial authorities have the right to give general or specific instructions, those should be transparent, consistent with lawful authority, and subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.<sup>215</sup>*

Under Swaziland's Constitution, the Director of Public Prosecutions has the power, in any case in which he or she considers it "proper":

- to institute and undertake criminal proceedings against any person before any court other than a Court Martial;
- to take over and continue any criminal proceedings;
- to discontinue at any stage before the delivery of a judgement, any criminal proceedings instituted or undertaken by the DPP or any other person or authority; and,
- to perform "such other functions as may be prescribed".<sup>216</sup>

In the exercise of these powers, the Director must have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process; furthermore, he or she must be independent and not subject to the direction or control of any other person or authority. In matters where national security may be at stake, the Attorney-General is to be consulted, "without derogation" however from the previous provision.<sup>217</sup>

In practice, however, the DPP's office has reportedly instituted or continued proceedings against private citizens for political reasons.<sup>218</sup>

Under the *Criminal Procedure and Evidence Act 1938*, if the authorities<sup>219</sup> decline to prosecute a person for an alleged offence, individuals can bring a private prosecution, if they can show some substantial and peculiar interest is at issue in the case, that arises out of some injury that he or she individually suffered.<sup>220</sup> However, the DPP's constitutional power "to take over and continue any criminal proceedings that may have been instituted or undertaken by any other person or authority"<sup>221</sup> means that he or she can assume control of cases that were initiated as private prosecutions.

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<sup>211</sup> UN Guidelines on the Role of Prosecutors, Guideline 4; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(a)(2); International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 6(a).

<sup>212</sup> UN Guidelines on the Role of Prosecutors, Guideline 5; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 6(b).

<sup>213</sup> International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 2.1.

<sup>214</sup> UN Guidelines on the Role of Prosecutors, Guideline 17.

<sup>215</sup> International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 2.2.

<sup>216</sup> Constitution, S. 162(4).

<sup>217</sup> Constitution, S. 162(6)-(7).

<sup>218</sup> Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa* (March 2013), p. 111.

<sup>219</sup> Criminal Procedure and Evidence Act, S. 3. Note that the Act pre-dates the creation of the DPP, and designated the Attorney-General as the prosecuting authority.

<sup>220</sup> Criminal Procedure and Evidence Act, S. 10.

<sup>221</sup> Constitution, S. 162(4)(b).

## 2. [The prosecutor's career](#)

*Persons selected as prosecutors must be individuals of integrity and ability, with appropriate training and qualifications.<sup>222</sup> Accordingly, States must ensure that selection criteria embody safeguards against appointments based on partiality or prejudice, and that prosecutors have appropriate education and training.<sup>223</sup>*

*Promotion of prosecutors must be based on objective factors and decided upon in accordance with fair and impartial procedures.<sup>224</sup>*

*Prosecutors must enjoy "[r]easonable conditions of service ... adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations".<sup>225</sup> They must "at all times maintain the honour and dignity of the profession".<sup>226</sup>*

The Constitution of Swaziland establishes the public office of Director of Public Prosecutions (DPP). The King appoints the Director on the advice of the Judicial Service Commission; the DPP must meet the same requirements as a judge of the superior courts.<sup>227</sup>

## 3. [Accountability of the prosecutorial services](#)

*Like all members of the legal profession, prosecutors must carry out their roles with integrity and in accordance with the law and in a manner that is consistent with human rights and established standards of prosecutorial conduct. And like other legal professionals Prosecutors must be accountable for professional misconduct. These are imperatives for upholding the integrity of the office of the Prosecutor as well as the legal system and respect for the rule of law.*

*Disciplinary offences must be defined in law or lawful regulations and complaints alleging misconduct must be processed expeditiously and fairly in the context of fair procedures before an independent and impartial body. The prosecutor whose professional conduct is in question must be afforded a fair hearing and the decision must be based on established standards of professional conduct, and subject to independent review.<sup>228</sup>*

Swaziland's Constitution guarantees that the Director of Public Prosecutions can only be removed from office in cases of stated serious misbehaviour or "inability to perform the functions of office arising from infirmity of body or mind".<sup>229</sup>

The Minister of Justice institutes proceedings,<sup>230</sup> by referring the matter for investigation to the Judicial Service Commission, which is reconstituted for the purpose as may be appropriate, subject to principles of fairness and natural justice. The Commission inquires

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<sup>222</sup> UN Guidelines on the Role of Prosecutors, Guideline 1. See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(a)(1).

<sup>223</sup> UN Guidelines on the Role of Prosecutors, Guideline 2.

<sup>224</sup> UN Guidelines on the Role of Prosecutors, Guideline 7; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(c); International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 6(e); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(c).

<sup>225</sup> UN Guidelines on the Role of Prosecutors, Guideline 6; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(b); International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 6(c)-(d).

<sup>226</sup> UN Guidelines on the Role of Prosecutors, Guideline 3; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 1(a).

<sup>227</sup> Constitution, S. 162(1)-(3).

<sup>228</sup> UN Guidelines on the Role of Prosecutors, Guideline 21-22; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(n)-(o); International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 6(f)-(g).

<sup>229</sup> Constitution, S. 162(8) *jo.* S. 158(2).

<sup>230</sup> Constitution, S. 162(8).

into the matter and makes a recommendation to the King, who "shall act in each case on the recommendation of the Commission".<sup>231</sup> The procedure does not appear to provide for an independent review of the decision of the Commission in relation to any level of judiciary.

## **E. Legal education**

*The availability and provision of quality legal education and continuing education is essential to ensuring that legal professionals are competent and able to play their essential role in contributing to ensuring respect for the rule of law, the protection and promotion of human rights and the fair administration of justice.*

*The Basic Principles on the Independence of the Judiciary provide that persons selected for judicial office must have "appropriate training or qualifications in law".<sup>232</sup> Furthermore, the Singhvi Declaration places a duty on judges to "keep themselves informed about international conventions and other instruments establishing human rights norms".<sup>233</sup> The Bangalore Principles of Judicial Conduct add that "a judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control".<sup>234</sup>*

*The Guidelines on the Role of Prosecutors likewise specify they shall be individuals "with appropriate training and qualifications".<sup>235</sup> States must ensure that they meet this criterion and that prosecutors be made aware of the ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.<sup>236</sup> Prosecutors have a duty to "keep themselves well-informed and abreast of legal developments".<sup>237</sup>*

*The Basic Principles on the Role of Lawyers place a duty on governments, professional associations of lawyers and educational institutions to ensure that lawyers have appropriate education and training and are aware of lawyers' ethical duties and of human rights and fundamental freedoms recognized by national and international law.<sup>238</sup> Further, they should take special measures to provide opportunities and ensure needs-appropriate training for law students from groups whose needs for legal services are not consistently met, particularly including those who have distinct cultures, traditions or languages or have been the victims of past discrimination.<sup>239</sup> Legal education must be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status.<sup>240</sup>*

*The UN Special Rapporteur on the independence of judges and lawyers has recommended that magistrates, judges, prosecutors, public defenders and lawyers should be requested*

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<sup>231</sup> Constitution, S. 158.

<sup>232</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article B(a).

<sup>233</sup> Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 40; Bangalore Principles of Judicial Conduct, Value 6: Competence and diligence, 6.4.

<sup>234</sup> Bangalore Principles of Judicial Conduct, Value 6: Competence and diligence, 6.3.

<sup>235</sup> UN Guidelines on the Role of Prosecutors, Guideline 1.

<sup>236</sup> UN Guidelines on the Role of Prosecutors, Guideline 2(b); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article F(a)(1).

<sup>237</sup> International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 1.

<sup>238</sup> UN Basic Principles on the Role of Lawyers, Principle 9; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article I(a); International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standards 2-4.

<sup>239</sup> UN Basic Principles on the Role of Lawyers, Principle 11.

<sup>240</sup> Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 77.

*to take courses on international human rights law. She also recommended that on-going legal education should be mandatory at all levels.*<sup>241</sup>

*The Singhvi Declaration states that "continuing legal education shall be available to judges"<sup>242</sup> and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa add that "where appropriate" judges shall receive training and education in racial, culture and gender sensitisation.<sup>243</sup>*

The University of Swaziland has a law department within the Faculty of Social Sciences that offers a Bachelor of Laws (LLB) degree; a few years ago, the Bachelor of Arts in Law degree was phased out in favour of a five-year LLB degree. The University's Institute of Distance Education also awards a Diploma in law. The emphasis of training has been on commercial law, at the expense of human rights education, which has only been available since the introduction of the LLB degree. Recently, Clinical Legal Education has been introduced into the Department of Law; in the course of the clinical programmes the theory and practice of human rights law are promoted. The Law Society has expressed the view that graduates lack technical competence when they join the legal profession.<sup>244</sup>

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<sup>241</sup> Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Advance report on the global thematic study on human rights education and training of legal professionals, UN Doc. A/HRC/20/20 (2012), para. 112.

<sup>242</sup> Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 12.

<sup>243</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article B(c).

<sup>244</sup> Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa* (March 2013), p. 104-105.