

# ATTACKS ON JUSTICE – SWAZILAND

## *Highlights*

**The independence of the judiciary continues to be undermined by the executive and police officials. In November 2002, the rule of law experienced a major crisis due to the Government's refusal to recognize court rulings. Court of Appeal judges resumed work only two years later, in November 2004, thereby providing hope that the crisis would be overcome. However, despite the drafting of a new constitution, the absence of a separation of powers (which is being monopolized by the King and his councillors), combined with impunity and a failure to conduct investigations or provide access to justice, has led to the rule of law being severely undermined. A new Constitution, which had been in the process of being drafted since 1996, was finally adopted in July 2005.**

## BACKGROUND

Swaziland remains a monarchy in which there exists no separation of powers between the executive and the judiciary. The 1968 Constitution, which provides for a constitutional monarchy with a clear separation of powers between the executive, legislative and judicial branches of Government, was repealed on 12 April 1973. In addition, Parliament was dissolved and political parties and trade unions were banned by a proclamation of King Sobhuza II. Despite the repeal of the Constitution, the 1973 Proclamation retained certain constitutional provisions relating to the courts, their working methods, the security of tenure of judges and the administration of justice. From 1973 to 1978, King Sobhuza II ruled Swaziland without an elected Parliament, enacting laws through Royal Decrees or Royal Orders in Cabinet. In enacting the *1978 Establishment of the Parliament of Swaziland Order*, legislative power previously held by the King was nominally returned to the Swazi people. The 1978 order declared that the Monarchy could not issue further royal decrees until a new constitution entered into force. While a new constitution was promulgated on 13 October 1978, it was not formally submitted to the people and thus did not come into force.

Despite the aforementioned prohibition, the Swazi Monarchy has continued to govern through the use of Royal Decrees. The 1978 Order provides for the promulgation of laws in Swaziland from three sources: (1) Acts of Parliament; (2) King's Orders in Council, operative when Parliament is not in session; and (3) Royal Decree, upon the entrance into force of a new Constitution. When King Sobhuza II restored nominal legislative power to the Swazi nation through the 1978 Order, he introduced *Tinkhundla*, a traditional system of African Government, ostensibly designed to blend Western democracy with traditional structures of government. As reformed in 1992 by King Mswati III, the *Tinkhundla* may be defined as a number of geographical areas or constituencies, presently numbered at 55, that put forth candidates standing for election to a bicameral Parliament. All candidates must receive the approval of the King prior to standing for election. In the House of Assembly, the 55 elected members sit with ten members appointed by the King. The Senate consists of 20

members appointed by the King and ten members elected by the House of Assembly. The King personally selects the Prime Minister and Cabinet and may appoint whomever he sees fit to this body, regardless of whether they originate from the ranks of the elected or appointed Members of Parliament. While Parliament sits for a five-year term, it may be dissolved at the King's will. Laws duly promulgated by the Parliament must receive the King's assent, which may, in whole or in part, be withheld.

King Mswati III has ruled the country since his enthronement on 25 April 1986. The coexistence in Swazi society of tradition and modernity is reflected also in the dual judicial system, with both Swazi laws and customs on one hand and the Roman-Dutch courts system and common law and statute on the other. Parliamentary elections took place on 18 October 2003. However, Commonwealth observers concluded that the elections were not free and fair since Parliament has no real authority and political parties are banned. Some unauthorized political groups had called for the boycott of the parliamentary elections to protest against the continuing ban on political parties. Despite the ban and restrictions on political and trade union activities, political and trade union activism has intensified, calling for a more democratic society.

Freedoms of expression and of the press, as well as freedoms of association and assembly, continue to be restricted under the *King's Proclamation of April 1973* (a Royal Order). Political activities continue to be prohibited and political activists, as well as journalists, have been harassed by the police throughout 2003 and 2004. Likewise, demonstrations and meetings of pro-democracy activists, political groups and workers' unions have been forcibly dispersed by the police. Security forces and government officials have reportedly continued to use torture, ill-treatment and excessive force with impunity. Prolonged pre-trial detention, provisions banning bail (through the *Non-Bailable Offences Order* of 18 August 1993, repealed by the September 2004 amendments to the 1938 *Criminal Procedure and Evidence Act*), a backlog of cases before the courts and a lack of judges has resulted in continued overcrowding and poor conditions of detention, with a high death rate in prisons. In June 2002, the *Internal Security Act* was adopted by Parliament. It provides for harsh penalties for anyone participating in, or organizing, political demonstrations and outlaws "support" for any political parties already banned since the *King's Proclamation of 12 April 1973*. It further restricts labour union activities, freedoms of association and of expression and authorizes police searches without warrants. On 26 March 2004 and on 26 June 2004, Swaziland acceded without reservations to the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Impunity remains a concern as the Government fails to investigate, prosecute and discipline police officers responsible for human rights abuses, including torture, excessive use of force and death in custody. No independent and impartial body has the authority to investigate police abuses. The problem of impunity is worsened by the fact that many victims cannot afford to pay the high litigation fees that would be charged if they were to seek legal action on the basis of police intimidation that they have been subjected to and in addition they may well experience obstruction of their

judicial proceedings (see Amnesty International 29 July 2004 Report, “[Human Rights at Risk in a Climate of Political and Legal Uncertainty](#)”).

### **New 2005 Constitution**

On 31 May 2003, King Mswati III disclosed the [draft of a new Constitution](#), which had been under review by the Constitutional Review Commission since 1996. This new Constitution was approved by the King on 26 July 2005, after its adoption by Parliament, and will come into force in January 2006. It replaces the 1968 Independence Constitution, repealed by King Sobhuza II’s Proclamation on 12 April 1973 and the 1978 Constitution, which never came into force. Despite some public consultations, the Constitution was drafted without taking into account dissenting opinions. Pro-democracy and political activists have demonstrated to express their disagreement and concerns about the draft constitution (see “[Striving for Democratic Governance: An Analysis of the Draft Swaziland Constitution](#)”, released on 29 August 2003, by the International Bar Association).

The new 2005 Constitution provides that the King remains the Head of State and of the executive, and that the supreme legislative authority is vested in the King in Parliament (i.e. the King acting with the advice and consent of the Senate and the House of Assembly), who is empowered to appoint 20 out of the 30 members of the Senate (the other ten members are elected by the members of the House of Assembly) and 10 out of the 76 members of the House of Assembly, and to summon and dissolve Parliament at any time. The King continues to appoint the Prime Minister, the cabinet, traditional chiefs and judges. The King remains above the law and continues to be empowered to approve bills or withhold his consent. On the other hand, the new Constitution removes his current ability to rule by decree.

The [new 2005 Constitution](#) contains for the first time a *Bill of Rights* (see comments by Amnesty International in its [29 July 2004 Report](#)). This extensive list of rights and freedoms omits the right to form or join political parties, the right to habeas corpus or to be speedily but “as soon as reasonably practicable” informed of the reasons for the arrest. On the other hand, it includes the right for detainees’ next-of-kin, lawyer and personal doctor to be allowed confidentiality and reasonable access to them (Article 16 of the new 2005 Constitution). Article 21 of the 2005 Constitution provides for the right to a fair hearing, including the right to “a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law”.

## **THE JUDICIARY**

The legal system in Swaziland is partly based on Roman-Dutch law, as applied in English organized courts (including a Court of Appeal, a High Court, magistrates’ courts and industrial courts for labour matters), and traditional Swazi law and customs, as applied in Swazi National Courts (including Swazi Courts, Swazi Courts of Appeal, Higher Swazi Court of Appeal and the Judicial Commissioner, appointed by the Public Service Commission).

The Swazi National Courts administer unwritten Swazi law and custom (under the 1950 *Swazi Courts Act*). The criminal jurisdiction of National Courts is limited to petty offences such as theft, assault and violations of traditional Swazi law and custom such as the practice of witchcraft. Court presidents, without legal training or education, fulfil judicial functions and are usually elders appointed by the monarchy. Cases are dispensed with in a relatively speedy manner as defendants are not permitted counsel, rules of legal procedure are not employed and case proceedings are not recorded.

Industrial Courts in Swaziland are vested with exclusive jurisdiction over labour matters that include unfair dismissal, contractual labour agreements and labour union actions/strikes. Employed on a fixed-term two-year contract, the incumbent Judge President of the Industrial Court does not enjoy tenured service. However, recent Industrial Court rulings demonstrate that this court has, in practice, maintained its independence. Rulings from the Industrial Court may be appealed against to a three-judge panel of the High Court and then to the Court of Appeal, if necessary.

Magistrates' Courts are governed by the *1938 Magistrates' Courts Act* under which the criminal jurisdiction of top-level Magistrates' Courts encompass all criminal offences except treason, murder, sedition, offences relating to coinage and currency, rape and any conspiracy or attempt to commit any of these offences. Civil jurisdiction is limited to cases involving a monetary value not exceeding 1,000 Emalangeni (the equivalent of US\$125) and to matters not involving the dissolution of a marriage, estates and determinations as to mental capacity. Civil and criminal findings may be reviewed by the High Court and up to the Court of Appeal, if necessary. Thirteen legally qualified magistrates serve Swaziland on the Magistrates' Courts' bench.

Under Article 104 of the 1968 Constitution – a provision that continued in force by virtue of the 1973 Proclamation – the High Court is invested with unlimited civil and criminal jurisdiction to hear and decide matters brought before it. Appeals from High Court decisions proceed directly to the Court of Appeal. The Chief Justice and the judges of the High Court are appointed by the King. Article 100 of the 1968 Constitution provides that "a judge at the High Court may be removed from office only for inability to perform the functions of his office or for misbehaviour". In such a case, the King shall appoint a tribunal, whose members are selected by the King, to investigate and advise the King whether the judge should be removed from office for inability or misbehaviour.

According to those saved provisions of the 1968 Constitution that continue to be in force, the Swaziland Court of Appeal possesses unlimited civil and criminal jurisdiction to hear and determine appeals from courts. Until 30 November 2002, the Court of Appeal was composed of six retired South African justices (the *1968 Judiciary Act* authorizes appointments to the bench from all Commonwealth countries) who held two three-week sessions during April and November of each calendar year.

Under Chapter IX, Part III of the 1968 Constitution, the Judicial Services Commission (JSC) was authorized to appoint, exercise disciplinary control over and remove High Court and Court of Appeal judicial officers in Swaziland. Through the 1973 Proclamation, the JSC was abolished only to be re-established in 1982, under

the *Judicial Services Commission Act*, with severely circumscribed powers to appoint, discipline and remove judicial officers. The JSC also advised the King on specific laws. The JSC was composed of the Chief Justice, the chairman of the Civil Service Board and three persons appointed by the King (two of them possessing legal qualifications and experience).

### **Under the new 2005 Constitution**

Article 62 of the new 2005 Constitution provides that the independence of the judiciary is a directive principle of state policy. Article 141 of the new 2005 Constitution recognizes that the judiciary and its financial administration shall be independent. A Supreme Court is created to replace the Court of Appeal, as the new highest judicial body. Article 153 provides that ‘the chief justice and all the other justices of the superior courts shall be appointed by the King on the advice of the Judicial Service Commission’. The Judicial Service Commission (JSC) reviews and makes recommendations to the King on the terms and conditions of service for judges and persons holding judicial office. Article 159(1) provides that the JSC will be independent. It is composed of the Chief Justice, the chairman of the Civil Service Commission, two legal practitioners appointed by the King and two lay persons appointed by the King. This composition does not ensure the full independence of the judiciary, as the members are all appointed by the King.

The new 2005 Constitution also provides for the establishment of a Commission on Human Rights and Public Administration, empowered to investigate abuses of power and unfair practices by public officers, except for “any matter relating to the exercise of a royal prerogative”. Likewise, cases that have a bearing on the institution of the King and other Swazi law and custom issues are not under the jurisdiction of the High Court (Article 151(8) of the 2005 Constitution).

### **Independence of the judiciary**

The King has judicial powers and appoints and removes judges at will. The independence of the judiciary and the authority of the courts are undermined by the executive, government officials and the police. Following a mission to Swaziland in January 2002, the ICJ concluded in its [report](#) that “threats to judicial independence, in violation of international human rights standards, are deeply rooted and routine in Swaziland”. The report also indicates that “periodic attacks on the judiciary by the executive have now given way to an executive attitude that holds the judiciary, the rule of law, and the separation of powers in virtual contempt, in particular when they conflict with entrenched interests”. When their rulings and decisions are considered by the executive to be contrary to Swazi laws and customs – that is, when they are in contradiction with entrenched interests of the King – judges are intimidated, harassed and demoted by the King (see [Report of the ICJ/CIJL](#) on its Fact-Finding Mission to the Kingdom of Swaziland, released 10 June 2003). This interference is less felt in the Swazi National Courts, which administer Swazi law and customs exclusively and whose members are Swazis, than in the Roman-Dutch system.

## Cases

For many years, the executive has regularly threatened judicial independence, the rule of law and the administration of justice when they have conflicted with entrenched interests (see [Report of the ICJ/CIJL](#) on its Fact-Finding Mission to the Kingdom of Swaziland, released 10 June 2003). Nevertheless, a crisis in the rule of law was sparked by a statement of the then Prime Minister when he said he would not abide by two Court of Appeal decisions on 28 November 2002.

In the *Minister of Home Affairs et al. v. Fakudze et al.* case, the Court of Appeal in June 2002 allowed 200 evicted families from Macetjeni and Kamkhweli to return to their homes on the grounds that the eviction order was defective. These families had been evicted in October 2000 for having refused the imposition of a new Chief following a decree by King Mswati III, who relieved the two villages of their chiefs to replace them by his brother. Despite the Court of Appeal ruling, the Commissioner of Police and Lubombo regional commander prevented the families from returning and barred the execution of the court order. The Commissioner of Police and the regional commander were consequently held in contempt of court and sentenced to a 30-day term of imprisonment.

In the *Gwebu and Bhembe v. Rex* case, the Court of Appeal ruled on 26 November 2002 that *Royal Decree Number 3 of 2001*, denying bail to pre-trial prisoners charged with certain offences such as rape, was not valid since there was no legal basis under which the King could rule by decree, since the 1978 Order declared that the monarchy could not issue further Royal Decrees until a new constitution came into force. The Government did not recognize the Court of Appeal ruling and prisons officials therefore refused to release suspects charged with offences falling under the *1993 Non-Bailable Offences Order (Order No.14 of 1993)* reconfirmed in *Royal Decree Number 3 of 2001*.

On 28 November 2002, the then Prime Minister stated that he would not abide by the two Court of Appeal rulings and that "it is Government's belief that the judges of the Court of Appeal have been influenced by forces outside our system [i.e. South Africa], and that they have not acted independently". Two days later, six Court of Appeal judges resigned en masse and other judges and magistrates also threatened to quit. On 4 December 2002, the ICJ sent a [letter to King Mswati III](#) expressing its concern over the resignation of the Court of Appeal judges and over the disregard for the fundamental international principles of the separation of powers and the independence of the judiciary. On 19 December 2003, the High Court stated that it would refuse to consider any legal application from the Government unless the statement by the Prime Minister was unconditionally withdrawn with an apology and the Government abided by the Court of Appeal rulings. Trade union and civil society organizations also demanded that the Government respect the rule of law and organized a mass strike, street marches and public protests. The Chief Justice, Stanley Sapire, resigned on 3 April 2003 after being threatened with demotion by the executive. Other judicial officers were dismissed, demoted or threatened with deportation.

Attacks on the rule of law and judicial independence continued, with the Government attempting to influence the Court of Appeal to resume its work by announcing a 60

per cent salary increase and additional professional allowances to High Court and Court of Appeal judges. For his part, the then Prime Minister stated on 17 March 2003 that the Court of Appeal had no authority to repeal Swazi laws. Likewise, the newly appointed Minister of Justice declared that in his opinion the Roman-Dutch Courts were anti-government. On 4 April 2003, King Mswati III appointed Justice Jacobus Annandale Acting Chief Justice.

On that same date, King Mswati III demoted High Court Justice and rule of law defender Thomas Masuku to a lower court. Justice Masuku had decided not to process any legal application from the Government until the Prime Minister withdrew his 28 November statement. He was transferred by *Legal Notice No.29 of 3 April 2003* to the Industrial Court without any respect for the rules for removal provided for High Court judges in Article 100 of the 1968 Constitution (see under [Judiciary](#), above). Arguing that his transfer was unlawful, he challenged it in the High Court. After the Government resorted to delaying tactics, pressure and intimidation, the High Court finally ruled on 21 May 2004 that Justice Masuku should be reinstated, as the legal notice was unlawful. Justice Masuku however eventually resigned.

On 23 April 2003, in a [press release](#), the ICJ expressed its concerns “at the unabashed disrespect for the rule of law and the erosion of the integrity of the legal system”.

On 17 May 2003, the Attorney General issued a statement in which the Government unconditionally retracted the 28 November statement that judges of the Court of Appeal were “influenced by forces outside our system and that they were not acting independently” in their work. This May 2003 statement affirmed that the Government respected the rule of law and the independence of the judiciary and accepted the fundamental obligation to abide by judicial judgments. However, the Government did not recognize the rulings of the Court of Appeal and did not agree to release suspects granted bail by the magistrates’ courts and the High Court or to implement the judicial reform recommendations submitted by the former Court of Appeal judges before they resigned.

Following an agreement signed in October 2004 with the Government, which pledged to be bound by, and to carry out, the orders of the courts, the Court of Appeal judges resumed their work on 10 November 2004. However, the Government had not complied with the Court of Appeal’s earlier decision in the *Minister of Home Affairs et al. v. Fakudze et al.* case as of the end of November 2004.

In their reports, the ICJ/CIJL ([June 2003](#)) and the International Bar Association (Swaziland: [Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law](#), March 2003) highlight the role of the King’s Special Committee on Justice, known as the “Thursday Committee”. This committee has actually usurped the role of the Judicial Service Commission as it effectively controls the appointment and removal of judges and arbitrarily modifies their conditions of employment. Furthermore, judicial decisions adverse to the interests of “Thursday Committee” members are attacked as being contrary to the interests of the state or as contravening traditional law and customs. The executive has indeed affirmed that the judges had undermined traditional law and customs and the authority of the king as an excuse not to recognize the decisions, although the legal issues in the court decisions in question

were not related to the alleged conflict between Roman-Dutch law and Swazi traditional law and customs.

On 30 October 2002, the Attorney General, the head of the armed security forces, the Commissioner of Police and the Commissioner of Correctional Services instructed the three-judge panel of High Court judges to stop hearing the case of the abduction, by agents of the King, of a girl for her to become the tenth wife of King Mswati III (*L. Dlamini v. Q. Dlamini and Sikondze*) or to resign. The Director of Public Prosecutions, who has ultimate authority in deciding in which court a case will be tried, formally charged the Attorney General with obstructing the course of justice, contempt of court and sedition. On 11 November 2002, the Attorney General refused to appear in court. The following day, Government officials and palace advisers threatened the Director of Public Prosecutions to withdraw the charges or face dismissal. After he refused, Government officials raided and searched his office, prevented him from accessing the premises and charged him with ‘malicious prosecution’ regarding a previous matter. The Government subsequently stopped the proceedings against the Attorney General and on 14 April 2003 replaced the Director of Public Prosecutions after he resigned.

### **Lack of judicial resources**

The lack of an independent court budget, of trained staff and of case management techniques, together with inadequate salary remuneration, undermines the efficiency of the Roman-Dutch judicial system, while the Swazi National Court system is less hampered by financial constraints. The shortage in basic equipment aggravates the difficulties of the judiciary.

## **LEGAL PROFESSION**

The Law Society of Swaziland serves as Swaziland’s bar association. The *1964 Legal Practitioners Act* regulates the Law Society and provides that all persons admitted and enrolled as legal practitioners (advocates, attorneys, notaries and conveyancers) in Swaziland are obliged to become members of the Law Society. Under the *Legal Practitioners Act*, the objects and functions of the Law Society include, *inter alia*, to represent the views of the profession; to initiate and promote reforms in legislation, the administration of justice and practice of law; to uphold the integrity of legal practitioners; to maintain the status and dignity of the legal profession; and to deal with the interests of the legal profession. The national legal profession numbers approximately 100 advocates (lawyers) and attorneys.

### **Cases**

In April 2003, the Law Society decided to boycott court proceedings involving two newly-appointed High Court judges and the Acting Chief Justice, on the grounds that their appointment was unconstitutional and to protest against the forced removal and demotion of the previous judges (see above under Judiciary: Cases). Following their boycott some lawyers were charged with contempt of court. For example, attorneys Siphon Simelane and Osborne Nzima were condemned for contempt of court and arrest warrants were issued against them in May 2003. In addition, the executive body

of the Law Society was reportedly threatened and harassed by the executive and has been required to appear in court on charges of inciting lawyers not to appear before judges. Additionally, two senior members of the Law Society, including its then President, Paul Shilubane, have been threatened with deportation for holding dual citizenship. On 27 June 2003, the UN Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, stated in a [press release](#) that "if indeed the appointments of these judges are constitutionally flawed, then the Law Society is quite right in taking the position that it took" and that "flawed judicial appointments would certainly not give legal legitimacy to the courts in which the judges sit. Such courts would certainly undermine the rule of law." On 1 July 2003, the ICJ denounced in a [press release](#) this new violation of the rule of law in which lawyers had been convicted for refusing to appear before an unconstitutionally appointed judge, and in which proceedings for contempt of court had taken place. In early July 2003, the lawyers decided to end the boycott after High Court Justice Shabangu agreed to drop charges against some lawyers who had already been condemned.

## **PROSECUTORS**

*Director of Public Prosecutions Order No.17 of 1973* regulates the Directorate of Public Prosecutions. Prosecutors and the Director of Public Prosecution are appointed by the King, as is the Attorney General, who is the principal legal adviser to the King and Government. Officially, the Director of Public Prosecution has the authority to decide which court will try a case.

Article 162 of the new 2005 Constitution provides that the office of Public Prosecutions is a public office. The Director of Public Prosecutions, who is appointed by the King on the advice of the Judicial Service Commission, "shall be independent and not be subjected to the direction or control of any other person or authority" and "shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process". He/she has the authority to institute, undertake, take over, continue and discontinue criminal proceedings before any court.

## **ACCESS TO JUSTICE**

The poverty of the Swazi population is an obstacle to proper access to justice and right to a fair hearing, as a large part of the population cannot afford to pay the legal fees for counsel. Indeed, legal representation provided by the government is limited to offences carrying the death penalty or life imprisonment, and no legal aid system is available. Besides, the population lacks confidence in the judiciary and legal profession, as corruption and malpractice are allegedly perceived as widespread.

The new 2005 Constitution does not provide for the establishment of free legal aid, despite the population's financial inability to access to justice.

Chapter IV of the 2005 Constitution, on the "Protection and Promotion of Fundamental Rights and Freedoms" contains for the first time a Bill of Rights.

However, it does not include the right to habeas corpus and the right to be speedily informed of the reasons for arrest (instead, there is a right to be informed "as soon as reasonably practicable of the reasons for the arrest or detention and of the right of that person to a lawyer chosen by that person") (see comments of Amnesty International in its 29 July 2004 report '[Human Rights at Risk in a Climate of Political and Legal Uncertainty](#)').

## LEGAL REFORMS DURING THE PERIOD

- 2002–2003:** Codification of Swazi law and custom by UNDP and the Government.
- June 2002:** *Internal Security Act* adopted.
- 26 March 2004; 26 June 2004:** Accession without reservations to the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, and the *Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
- September 2004:** 1938 *Criminal Procedure and Evidence Act* was amended, introducing new provisions for bail and repealing the 1993 *Non Bailable Offences Order* (but allowing the actions taken under this order to be lawful and valid up to the date of the repeal).
- 26 July 2005:** New national Constitution signed into law by King Mswati III.