

# Swaziland

## Justice Sector and the Rule of Law

A review by AfriMAP  
and the  
Open Society Initiative for Southern Africa

Maxine Langwenya

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For further information, please contact:

AfriMAP/OSISA  
PO Box 678  
Wits, 2050  
Johannesburg  
South Africa

[www.afrimap.org](http://www.afrimap.org)  
[info@afrimap.org](mailto:info@afrimap.org)

[www.osisa.org](http://www.osisa.org)

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# List of abbreviations and acronyms

ACC	Anti-Corruption Commission
ACHPR	African Charter on Human and Peoples' Rights
AfriMAP	Africa Governance Monitoring and Advocacy Project
AG	Attorney General
AU	African Union
CDC	Constitutional Drafting Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CHRPCA	Commission on Human Rights and Public Administration
CJ	Chief Justice
CMAC	Conciliation, Mediation and Arbitration Commission
CP&E	Criminal Procedure and Evidence Act
CRC	Convention on the Rights of the Child
DPP	Director of Public Prosecutions
EBC	Elections and Boundaries Commission
GDP	gross domestic product
HURISA	Human Rights Institute of Southern Africa
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICT	information and communications technology
IMF	International Monetary Fund
IT	information technology
ITUC	International Trade Union Confederation
JSC	Judicial Service Commission
MNC	medium neutral citation
MP	Member of Parliament
MVA	Motor Vehicle Accident Fund
NDS	National Development Strategy
NGO	non-governmental organisation
OAU	Organization of African Unity
OSISA	Open Society Initiative for Southern Africa
PEPFAR	President's Emergency Plan for Aids Relief
PRSAP	Poverty Reduction Strategy and Action Plan
PWD	Person living with a disability
RSP	Royal Swaziland Police
SACPRO	Swaziland Association for Crime Prevention and the Rehabilitation of Offenders

SACU	Southern African Customs Union
SADC	Southern African Development Community
SAFLI	South African Legal Information Institute
SAP	Structural Adjustment Programme
SFTU	Swaziland Federation of Trade Unions
SNAT	Swaziland Association of Teachers
SNUS	Swaziland National Union of Students
SWAGAA	Swaziland Action Group against Abuse
SWAYOCO	Swaziland Youth Congress
Swazilii	Swaziland Legal Information Institute
UN	United Nations
UNDAF	United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UPR	Universal Peer Review
USD	United States dollar
WLSA	Women and Law in Southern Africa

# Glossary of SiSwati terms

*Bandlancane*: Smaller council of advisers at the level of traditional local councillors.

*Emalobolo*: Cattle (and sometimes cash) given to the bride's family by the groom's family on marriage.

*Imphangele itala imphangele*: Means that children may grow up and behave like their parents.

*Ingwenyama*: The official title of the Swazi King, meaning 'the Lion'.

*iNgwenyama-ayombula ingubo eNkhosini*: This means to remove from oneself the blanket that would either protect one from weather elements and thus show one's vulnerability, as it were, to the elements.

*Kwembula ingubo enkhosini*: To seek the King's intervention regarding a sensitive matter/conflict/deadline.

*Liqoqo*: The King's Advisory Council.

*Lusendvo*: An inner council of the family as understood under customary law. It is composed of members of the nuclear as well as the extended family.

*Nawe uliphoyisa*: You are also a police officer.

*Ndabazabantu*: Literally means one who likes other peoples' stories. This is an officer who deals with land disputes, especially disputes regarding Swazi national land, but not title-deed land.

*Sibaya*: Is the Swazi National Council, which is made up of all adult Swazi citizens.

*Tinkhundla*: An *inkhundla* (plural, *tinkhundla*) is an area comprising several (about four or five) chiefdoms which, at election time, serves as a constituency area for the election of a parliamentary representative.

*Umphakatsi*: The chief's official residence.

# Foreword

This report evaluates Swaziland's compliance with continental, regional and international commitments related to justice and the rule of law. The overall objective of the report is to assess the efficacy, accountability and responsiveness of the justice sector in Swaziland and to recommend policy and legislative reforms.

The report was commissioned by AfriMAP and OSISA as part of a continent-wide initiative to assess African governments' compliance with good governance, democracy and human rights standards. African governments and leaders have made good governance and the protection of human rights a central part of Africa's development agenda. The challenge is no longer about a lack of normative frameworks and standards, but about implementation. By publishing a report of this nature we hope to catalyse a national dialogue around the justice sector that will identify and set national priorities.

Established in 2004 by the African foundations of the Open Society Foundations, AfriMAP has been monitoring the compliance of African states with the new commitments undertaken by the African Union since 2000 in the field of good governance, democracy, human rights and the rule of law. The report evaluates Swaziland's respect for international standards in relation to the justice sector and the rule of law.

In particular, the report:

- Assesses whether, and the extent to which, Swaziland is in compliance with its international human rights obligations, including the degree of incorporation of international human rights standards into national law;
- Reviews the historical evolution of the justice sector;
- Reviews the practice of constitutionalism and the rule of law in Swaziland, with a view to identifying shortcomings and suggesting possible solutions;
- Reviews the efficacy, accountability and responsiveness of the administrative/institutional framework for the administration of justice;
- Assesses the adequacy of established frameworks in facilitating the independence, efficacy and accountability of the justice sector;
- Assesses the technical capacity of actors in the justice sector;
- Reviews the effectiveness, accessibility and accountability of the criminal justice system;
- Establishes whether, and the extent to which, the people of Swaziland have access to

- justice (physical, financial, normative and procedural);
- Reviews the role of development partners in the justice sector; and
  - Suggests policy and legal interventions that would enhance the efficacy, accountability, responsiveness and legitimacy of the justice sector.

We are confident that the report will be used by different stakeholders, playing different roles, but working for the same objective – making justice accessible to all and ensuring compliance with the rule of law.

# Preface

The report on the justice sector and the rule of law in Swaziland was commissioned by the Open Society Initiative for Southern Africa (OSISA) and the Open Society Foundation's Africa Governance Monitoring and Advocacy Project (AfriMAP) in 2011. AfriMAP was established to monitor observance of standards relating to the rule of law, human rights and accountable government by African states as well as their development partners. To this end, research on the justice sector and the rule of law has been carried out in a number of African countries, including Swaziland.

AfriMAP complements and assists African countries in meeting their commitments to the promotion of human rights, to the advancement of democratic principles and institutions, to the realisation of popular participation, and to good governance, these being the basic principles underpinning the African Charter on Human and Peoples' Rights (ACHPR). Most African countries, including Swaziland, are members of the African Union (AU) and, as such, subscribe to the AU's Constitutive Act. As a member of the AU and other international bodies, Swaziland is expected to comply with international norms and standards related to justice delivery. The research on the justice sector and the rule of law in Swaziland is a tool that provides an in-depth analysis of Swaziland's justice sector by examining its capacity and effectiveness in meeting the needs of the country and its citizens in relation to the rule of law. It also takes into account international and regional norms related to justice delivery and assesses the extent to which the justice system in Swaziland attempts to comply with these standards.

The research involved a desk review of the relevant documentation on the justice sector and the rule of law. The major sources of information in this respect are relevant international and regional documents, the 2005 Constitution and other relevant Swaziland laws, case law, government and other official documents, published works, research by other organisations, as well as media reports. This was followed by empirical research by way of interviews and the discussion at the validation workshop, as well as an analysis, including recommendations, in response to weaknesses and shortcomings identified in the course of information-gathering. The draft report was reviewed by experts in the field and was ultimately presented and the recommendations considered at a validation workshop attended by a broad spectrum of civil society and few representative from the justice sector.

The report aims to catalyse and inform national policy dialogue, as well as serve as a national tool for all involved in the promotion of justice and the rule of law in Swaziland.

# Acknowledgements

The study on the justice sector and the rule of law in Swaziland would not have been possible without the contributions of a cross-section of stakeholders, who are as diverse as they were invaluable. Sincere appreciation is expressed to all involved.

Many individuals from the justice sector, other government departments and institutions, academics, members of civil society organisations, faith-based institutions and development partners gave up their time to be interviewed and then made insightful contributions during the validation of the report. The Swaziland Coalition of Concerned Civic Organisations (SCCCO), a non-governmental organisation, played a critical role as the host institution that oversaw the launch of the report.

Maxine Langwenya, the author of the report, worked diligently to produce a high-quality, credible and relevant report. Professor Edge Kanyongolo did a thorough editing job, adding value to the final product through his expertise as a constitutional lawyer and his in-depth regional knowledge of the sector. The AfriMAP/OSISA team of Roshnee Narrandes, Jeggan Grey-Johnson and Ozias Tungwarara supported the process by reviewing drafts, facilitating the validation workshop and providing administrative support.



# **Part I**

## **Swaziland: Justice Sector and the Rule of Law**

Discussion Paper



# Introduction

Swaziland became an independent state on 6 September 1968 and adopted a Westminster-type constitution. Five years later, the Constitution – except for a few provisions which were saved – was repealed on the grounds that it was ‘unworkable’ and had imported elements which ran counter to the Swazi culture and way of life. From 1973, Swaziland was ruled through the King’s Proclamation to the Nation and the saved provisions of the 1968 constitution. The King’s Proclamation to the Nation centralised state power in the monarch (who wielded legislative, executive and judicial power, albeit through his appointees), dispensed with the Bill of Rights and banned political parties. The 1973 political dispensation was subsequently replaced by a new constitutional order based on the Constitution of 2005, which, among other things, sought to restore respect for human rights, to promote the rule of law, and to facilitate devolution of power to the people. At the time of writing of this report, the 2005 Constitution had been in force for over seven years.

Under the 2005 Constitution, the law of Swaziland consists of acts of Parliament and subordinate legislation, Roman-Dutch common law, Swazi law and custom, judicial precedents, and, to some extent, public international law. The Constitution is the supreme law to which all other law must defer. Prior to the promulgation of the 2005 Constitution, Roman-Dutch law was viewed as the general law of the land and, consequently, the final arbiter in all matters.

This discussion paper is based on the findings and recommendations of the research report on the justice sector and the rule of law in Swaziland. The research was commissioned by the Open Society Initiative for Southern Africa (OSISA) and the Africa Governance Monitoring Advocacy Project (AfriMAP). Conducted over a period of 18 months, the research used a questionnaire to solicit information and opinions from a wide variety of stakeholders, including government officials, civil society actors, academics, ordinary citizens and donors.

This paper should be read in conjunction with the main report on the justice sector and the rule of law in Swaziland, because it is not a summary of the main report, even though it draws evidence from it for the assessment of the current state of the rule of law and justice in Swaziland. The recommendations made in this report are intended to encourage focused debate around identifying the measures that, as a matter of priority, government and other stakeholders need to implement to address underlying problems concerning the rule of law and the justice sector in Swaziland.

The discussion paper highlights key areas in which practical steps can be taken to improve the effectiveness of justice delivery in Swaziland. The paper discusses a number of key issues

that affect prospects for the rule of law and human rights in Swaziland, including: conflicts between national law and international human rights standards; inadequate domestication of international treaty obligations; breaches of treaty-reporting obligations; accountability for breaches of the law by government officials; sector-wide policy and planning for the justice sector; impediments to accessing justice; human rights in judicial, policing and penal procedures; and the management and dissemination of legal information.

## 1. International human rights treaties

Swaziland is a member of a number of international organisations, including the Southern African Development Community (SADC), the African Union (AU) and the United Nations (UN). In addition, it is a signatory to a number of international instruments that prescribe norms on human rights, the rule of law and the administration of justice. Despite this, Swaziland continues to have a legal system and a justice sector that fall short of the requirements of international norms. Aligning the Swazi legal system with international human rights standards requires that the issues discussed below be addressed.

### **Closing the gap between national law and international human rights norms**

Swaziland is a party to the African Charter on Human and Peoples' Rights (ACHPR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). On the other hand, Swaziland has not ratified other important international treaties such as the Optional Protocol to the African Charter on the Rights and Welfare of the Child, the Convention Governing the Specific Aspects of Refugee Problems in Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, the Rome Statute, the Optional Protocol to the Convention on the Rights of Persons with Disabilities, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, the Optional Protocol to the ICCPR, and the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. The failure to ratify these instruments detracts from any commitment to human rights that may be suggested by the Swaziland government's ratification of the other instruments.

Swaziland's commitment to international human rights is further brought into question by its retention of national laws that directly contradict even those international human rights instruments to which it is a party. The contradictions are exemplified by, for example, the right to gender equality, in that Swazi common law assigns women married in community of property the status of minors, and discriminates against women married to non-Swazi nationals with respect to the citizenship rights of their spouses and children. International norms on gender equality are also contradicted by some rules of customary law, for example those that deny women equality with men with respect to marital and reproductive rights. With regard to the rights of children, section 29(2) of the Constitution permits corporal punishment of children in the name of 'lawful and moderate chastisement'. This is contrary to the CRC, which expressly

prohibits any corporal punishment. Inconsistencies between Swazi law and international human rights standards also exist with regard to the right to a fair trial. There are many other statutory and customary laws which are currently in force in Swaziland, despite being inconsistent with international norms on human rights, the rule of law and the delivery of justice.

Some inconsistencies between Swazi and international human rights norms particularly disadvantage the most vulnerable members of society, such as women, children, people with disabilities, refugees and prisoners. This is especially the case with regard to the failure to ratify instruments such as the Optional Protocol to the African Charter on the Rights and Welfare of the Child, the Convention Governing the Specific Aspects of Refugee Problems in Africa, the Optional Protocol to the Convention on the Rights of Person with Disabilities, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, and the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.

The government of Swaziland should be lobbied to adopt and implement a plan of action for comprehensively removing any inconsistencies between national laws and international human rights norms. Such a plan must put in place an institutional mechanism that ensures that the review of compliance of Swazi law with international norms becomes a regular process. This can be accomplished through the establishment of a permanent law reform authority.

Consistency with international norms also requires compliance with relevant determinations of international bodies, something that the government has, on occasion, failed to do, as exemplified by the instance in which the Kingdom of Swaziland was accused of failure to implement a decision of the African Commission in Communication 251 of 2002,<sup>1</sup> as well as the recommendations in the report adopted by the African Commission following a promotional mission to the country in August 2006.

Courts can play an important role in aligning national legislation, and particularly Swazi law and custom, to human rights standards that are guaranteed by international law and the Constitution. Reliance should be placed on section 2 of the Constitution, which gives the courts the power to declare any legislation invalid to the extent of its inconsistency with the Constitution. The courts have invalidated certain statutory laws, with the result that the legislature has had to effect the necessary amendments to bring those statutes in conformity with the Constitution. Section 9 of the Deeds Registry Act is an example of a statute that has been invalidated by the courts for reasons of unconstitutionality. That the legislative machinery is slow to effect the necessary amendments to laws deemed inconsistent with the Constitution is regrettable. There is an urgent need to set up a law review commission, if only to ensure that all laws that are inconsistent with the Constitution are aligned with the supreme law. To this end, the executive must put in place the budget for the establishment of this body, as well as introduce legislation to ensure that this body is sanctioned by statute. Only then can Swaziland hope to have a systematic approach to the huge task of updating laws that are inconsistent with the Constitution as well as international law.

If there is to be fidelity to the culture of law, it is crucial that both the executive and legislative organs of government move speedily to amend laws which do not conform to the Constitution.

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<sup>1</sup> Lawyers for Human Rights vs Swaziland 251/2002.

To this end, it is necessary to put in place procedures and processes to enable the correction of laws that are inconsistent with the Constitution.

## **Improving domestication of international treaty obligations**

Swaziland's commitment to international norms and standards is also undermined by its poor record of domestication of those international human rights instruments to which it is a party. This poor record is largely due to non-existent or insufficient legal and political pressure on the state to domesticate its international obligations. This is attributable mainly to the absence of clear constitutional and statutory provisions that define the domestication procedure and to low citizen demand for domestication of international legal norms. The latter is largely due to limited public awareness of the requirement of domestication and its benefit to the public.

Motivating the government to improve its record on domestication requires convincing it of the benefits of domestication. One such benefit is increased international credibility of the government as being one which is prepared to honour its international obligations for the benefit of its citizens. The government must be persuaded to establish a policy and a legal framework that states unambiguously whether domestication requires explicit restatement of the provisions of the international instrument in question in national legislation, incorporation through a statement embodied in the preamble of a piece of legislation to the effect that the particular legislation is intended to give effect to a specific international instrument, or legislation which gives indirect effect to treaty commitments without necessarily and directly making reference to the particular international treaty.

It is equally important that clarification of the law on domestication be complemented by empowerment and animation of citizens to demand domestication. This requires raising public awareness of the benefits of domestication to the average Swazi. The enhanced human rights protection that domestication of international human rights will provide for Swazis at the national level must be explained, as must the particular benefit that will accrue from domestication to vulnerable members of society such as women, children and people with disabilities.

The opportunity for advocacy was created in 2012 when, through *Sibaya* (the Swazi National Council), the nation was requested by the King to examine certain international conventions before the government ratified and incorporated them into national legislation. Reform advocates should lobby for the establishment of this initiative as a regular forum for the public not only to comment on the content of international agreements that Swaziland intends signing, but also to hold the government accountable for its record of ratification of international instruments and their domestication.

## **Aligning customary law to human rights norms**

Customary law plays a critical role in the lives of the vast majority of people in Swaziland. The structure of the state and society reflects the depth to which customary laws and traditions pervade the Swazi body politic. The King's Proclamation (Amendments) Decree of 1987 in fact effectively declared Swazi law and custom to be the supreme law of Swaziland. Since 2005, though, the Constitution became the supreme law. However, Swazi law and custom was recognised by the Constitution itself, which establishes not only the structures of a modern state, but also creates a

traditional system of government. In fact, the formal supremacy of the Constitution is challenged by the pre-eminent position of Swazi law and custom in everyday life of the majority of Swazis. By the same token, Swazi law and custom have more practical meaning in the lived realities of most Swazis than international human rights. Thus, for example, while Swaziland is a party to the CEDAW, Swazi law and custom continue to discriminate against women as a matter of course.

Whilst, on the one hand, the traditions and culture of the Swazi people must be respected as part of a national identity, on the other, as a member of the international community, Swaziland must comply with its international obligations, including those that guarantee human rights. Section 252 of the Constitution seems to address the issue by making the operation of Swazi law and custom provisional upon its conformity to 'natural justice, morality or general principles of humanity'. However, a strict reading of this provision does not make Swazi law and custom subject to 'human rights' as such. This can be addressed by amending the section and stating explicitly that among the limitations of Swazi law and custom are 'human rights norms'.

The prioritisation of customary law over Swaziland's international obligations exceeds the limits of exceptions to international obligations that states are permitted and arguably amounts to a negation of the essential content of the obligations in question. The net result is that, where international human rights and obligations are inconsistent with Swazi customary law, the latter prevails in practice. This denies the protection of international law to individuals or groups whose rights are threatened or insufficiently protected by customary law, such as women and children.

The prioritisation of Swazi law and custom over human rights in the lives of many Swazis raises a fundamental question for the Swazi legal system, namely whether it is possible for the country to honour its international legal obligations while at the same time preserving and upholding traditional customary norms in their present form. Swaziland can legitimately claim to be committed to international human rights obligations only if it ensures that the recognition of Swazi law and custom does not in practice amount to a negation of the essential content of the treaties.

The alignment of customary law to human rights standards highlights the paradox that is at the heart of Swaziland's constitutional order. On the one hand, the Constitution proclaims liberal democratic values such as human rights, the rule of law, and accountability, and sets up institutions of governance that are characteristic of a liberal democratic state, for instance an independent judiciary and an elected Parliament. On the other, the selfsame Constitution establishes 'a traditional system of government' in which executive power is vested in an unelected monarch who exercises a central function in the oversight of governance and the appointment of high-ranking public officials.

## **Addressing defaults in treaty-reporting obligations**

The Kingdom of Swaziland has, to a large extent, failed to fulfil its reporting obligations under the human rights treaties to which it is a party. Except for the report that Swaziland presented to the Universal Peer Review (UPR) in October 2011, and the report to the Committee of Experts on the Rights of the Child in 2006, Swaziland has failed to submit reports under the other treaties to which it is a party, for example the ICCPR, the International Covenant on Economic, Social

and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination, and the CEDAW.

The government attributes its failure to comply with treaty-reporting obligations to a lack of technical, human and material resources for undertaking the process of preparing the reports. A number of UN agencies based in Swaziland have, however, embarked on the training of government and civil society representatives in the preparation of reports. The lack of resources could be addressed through making specific provision in the budgets of the Ministries of Justice and Foreign Affairs for the reporting process. In addition, development partners should be encouraged to continue to assist the country with the training and capacity building of staff and the team charged with preparation of the reports.

It is also important to consider the possibility that lack of technical expertise and funds may not be the only explanations for the failure to submit treaty reports regularly. Based on experience elsewhere, it is advisable to consider the extent to which the unsatisfactory record on treaty reporting may be the result of government's apathy or unwillingness to draw attention to the challenges with regard to human rights in Swaziland that would necessarily be exposed to international scrutiny and debate through the reporting process. This possibility, which may be characterised as a lack of political will, requires a civil society response that highlights, for the government, the negative impact of failure to submit reports, that generates shadow reports, and that lobbies the public to demand accountability on the part of the government for its failure to keep up to date with its reporting obligations.

## 2. Government respect for the law

In addition to subscribing to various international instruments that prescribe tenets of the rule of law, Swaziland adopted a new constitution in 2005 that included provisions aimed at facilitating the attainment of the rule of law. This suggests official commitment to the doctrine of the rule of law, which includes the requirement that all power must be exercised in accordance with the law and that no one should be above the law. However, translating the official commitment into practice has proved challenging. The extent to which the government of Swaziland respects the law is subject to debate in the areas discussed below.

### **Enhancing respect for the Constitution**

The 2005 Constitution transformed the legal landscape by establishing itself as the basis of all executive, legislative and judicial practice, by guaranteeing human rights, and by establishing several institutions charged with the responsibility of promoting the rule of law. In practice, though, respect for the Constitution has not yet become entrenched in the legal and political spheres. Among the areas of the Constitution which have been disregarded to a significant extent are the guarantees of judicial independence and human rights. The former is exemplified by the removal from office of a High Court judge in 2011 by way of a process that did not comply with the constitutional requirements applicable to the removal of judges, including adherence to the rules of natural justice. For its part, disregard of the constitutional guarantees of human rights

is exemplified by the cases of violations of various civil and political rights by state officials, for example those which were the subject of statements made by a number of non-governmental organisations (NGOs)<sup>2</sup> to the 51st Session of the African Commission on Human and Peoples' Rights held in April and May 2012.<sup>3</sup>

Political and administrative expedience appears to be the main reason for instances of disobedience to the Constitution. However, at least two other factors which are relevant to constitutional obedience are worth discussing. The first is the lack of a robust constitutional jurisprudence whereby the courts interpret and give meaning to the constitutional norms and reinforce them through their application in individual cases. This paucity of constitutional jurisprudence may be attributed, in part, to the absence of a specialised constitutional court.

In order to inculcate respect for the Constitution by the state and its organs, a number of interventions must be implemented at both the supply and demand ends of constitutionalism. One such key reform on the supply side is the establishment of a constitutional court which, through its focused and exclusive dedication to constitutional jurisprudence, will generate a body of principles, including those which provide guidance on the enforcement of constitutional norms and of sanctions for unconstitutional conduct. This recommendation should have few problems in finding traction in Swaziland's policy environment, because the Poverty Reduction Strategy and Action Plan (PRSAP) provides that, after the adoption of the Constitution, the Ministry of Justice, through the Office of the Attorney General (AG), should establish a constitutional court to hear all cases concerning human rights abuses and violations of the Constitution.

The second factor that negatively affects compliance with the Constitution, especially by the state and its organs, is the low level of public awareness of the Constitution and the Bill of Rights. Such low level of awareness decreases the prospects of public pressure on the government to comply with the Constitution through public-interest litigation and individual claims for human rights protection and enforcement. Civil society must redouble its efforts to raise public awareness of the Constitution and of the fact that the state and its agents have not complied with it at all times.

## **Detering disobedience in respect of court orders**

Respect for the law by the government has been limited and selective, not only with regard to disobedience to the Constitution, but also with respect to non-compliance with court orders that it finds politically inconvenient. One of the most widely publicised instances of such non-compliance was the case in which the police prevented the implementation of a court order allowing residents of a particular area to return to their homes from which they had earlier been evicted by the government. Other significant examples of defiance of court orders by the government include two cases in which the executive defied court orders that declared unconstitutional a law that purported to abolish the right to bail with respect to certain criminal offences.

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<sup>2</sup> The organisations that made the statements were the Human Rights Institute of Southern Africa (HURISA), the Open Society Initiative for Southern Africa (OSISA), the International Trade Union Confederation (ITUC), Human Rights Watch, and Women and Law in Southern Africa (WLSA).

<sup>3</sup> See <http://www.safpi.org/news/article/2012/swaziland-reported-african-commission-violation-human-rights> [Accessed on 4 January 2013].

It is also important to note that some cases of defiance of the law by the executive have been perpetrated at the highest levels of the executive. One of the instances of executive defiance, namely that defying the court order invalidating the law on non-bailable offences, for example took the form of a statement from the Prime Minister's office. The particular significance of this is that disobedience to the law at the highest levels of the very branch whose constitutional obligation it is to protect and defend all laws is likely to encourage a culture of impunity in the rest of the government.

If Swaziland is to comply with its constitutional and international obligations regarding the rule of law, legal and policy measures must be introduced to enhance disincentives that deter people and institutions, especially the government, from disobeying court orders. One such measure should be the introduction of a law that provides that wilful disobedience to any court order by the government or any of its organs amounts to contempt of court, for which every official who participates in such disobedience will be personally liable. This is likely to be more of a deterrent than the current setup where contempt of court penalties are paid by the state using taxpayers' funds. Although such a law may be difficult to enforce, since the responsibility of public officials is not always easy to determine, where it is possible to identify public officials who disobey court orders, such a sanction is highly recommended in the interests of enhancing respect for the law.

## **Improving accountability for breaches of the law**

The judicial process in Swaziland provides a mechanism by means of which government institutions and their officials may be held accountable for breaches of the law, mainly through the process of judicial review of administrative action as well as civil suits and criminal prosecutions. The effectiveness of these judicial processes is discussed in more detail in the sections of the discussion paper which address access to justice and to the criminal justice system. In addition to the courts, however, there are a number of mechanisms which have the potential to promote accountability for breaches of the law.

The primary mechanisms used by departments within the public sector to investigate breaches of the law are internal inquiries in which the respective departments investigate unlawful conduct within their own institutions. However, there are no mechanisms to ensure that such internal investigations do indeed take place and that, where they do not, the relevant people are held accountable for their failure to conduct such investigations. Institutions take advantage of this gap to avoid accounting for breaches of the law, some of which result in violations of human rights. This is the case, for example, with the police service, which has a record of promising internal inquiries whenever there are allegations of excessive use of force levelled against police officers, but not accounting for the conduct and conclusion, if any, of such inquiries. In one particular case, for example, one Magubane, who had been taken into police custody on suspicion that he had stolen from his employer, was later found dead in a police cell. Although the death occurred in 2004 and the inquiry into his death was said to have been completed in 2007, at the time of writing of this paper, the results of the inquiry had not yet been published by the police.

Internal investigations of breaches of the law by the government are not only opaque, but also

ineffective. External investigations therefore offer an alternative means of securing accountability for such breaches. One institution which has significant legal authority and power to ensure accountability for breaches of the law by public institutions and officials is Parliament, whose committees have extensive powers to summon public officials who breach the law and compel them to account for their actions. However, sanctions for breaches of the law are occasionally nominal and not sufficiently deterrent. For example, on one occasion when the Parliamentary committee system was invoked by parliamentarians in a case involving the Minister of Housing who, without authorisation from Parliament, had sold Crown land to a private individual at an inflated price, the Minister was fined a paltry E400 for her breach of the law.

In theory, external investigations can also be conducted by the Commission on Human Rights and Public Administration, a constitutional body that is yet to sit and investigate the growing number of complaints that have been lodged with it. The Commission is also yet to recruit a sufficient number of staff in order to become operational. Coupled with this capacity challenge is the fact that the Commission can only investigate governmental breaches of the law if these violate human rights. This leaves out breaches of the law that do not result in such violations.

Accountability for breaches of the law may be enhanced by a number of legal reforms, including the requirement of personal liability for all breaches of the law, such as those committed in an official capacity, the enhancement of penalties for contempt of court, and the expansion of the legal mandate of the Commission on Human Rights and Public Administration. These reforms must also be discussed in relation to improvements in access to justice and to the criminal justice system.

### 3. Management of the justice sector

#### **Instituting sector-wide strategy and planning**

Individual institutions in the justice sector have a reasonably good record of strategic planning. This is the case with the judiciary, Correctional Services, the police, the Commission on Human Rights and Public Administration, the Anti-Corruption Commission (ACC) and the Elections and Boundaries Commission. These institutions have each developed their individual strategic plans. The plans contribute to improvement of the quality of management of the justice sector by providing the institutions which develop them with frameworks for systematically articulating their individual missions, visions, objectives, strategies, and monitoring and evaluation systems. However, the fact that the plans are not aligned to one another as part of an overarching, sector-wide policy and planning framework creates room for duplication and contradiction among the efforts of the different institutions. It also impedes the attainment of inter-institutional synergies in the pursuit of common sectoral objectives.

Justice sector institutions in Swaziland only began putting in place their strategic plans between 2007 and 2012. Prior to that period, the public sector relied on the National Development Strategy (NDS) of 1999 as well as the PRSAP of 2005 to outline the reform measures that needed to be carried out within the justice sector. To this end, the NDS identified the need to prepare

strategic plans for the various government ministries as one way to encourage economic growth.

Improved rationalisation and efficiency of the Swazi justice sector as a whole require the development and adoption of a sector-wide policy and strategic plan which must provide the basis for the plans and strategies of individual institutions in the sector and must be grounded in a shared sectoral vision, mission and goal. Based on experience of similar efforts elsewhere, it is critical that the development of sector-wide policy be participatory and transparent, and that it involve participation of not only supply-side institutions, such as the government, but also those on the demand side, such as civil society. The process also requires capacity-building of planners in the formulation, implementation and monitoring of sector-wide planning and implementation.

## **Improving resource allocation and distribution**

The majority of justice sector institutions appear to be significantly under-resourced in terms of human, financial and infrastructural resources. The problem of underfunding within the justice sector results in the departments being unable to secure resources such as law reports, vehicles, computers, stationery, and basic texts and legislation. Such inadequate funding is worsened by the inequitable distribution of resources within departments in the sector. In determining its budgetary resources, for instance, the administration of the judiciary tends to unduly favour the High Court and Supreme Court at the expense of the subordinate courts. There is a need, therefore, for civil society to advocate for increased budgetary provision for the justice sector, as there is a link between justice and the rule of law on the one hand, and poverty reduction on the other. Since the majority of Swazi people are poor, there is an urgent need to invest in the justice sector and the rule of law, as the two issues are crucial to the immediate lived realities of people in Swaziland.

The obvious response to the challenge of under-resourcing is increased budgetary allocations to institutions in the sector. In order to mobilise the requisite political will to support such budgetary increases, it is essential to demonstrate to the government the linkage between the efficiency and effectiveness of justice sector institutions on the one hand, and the government's efforts to improve the living conditions of the average Swazi on the other.

Admittedly, Swaziland, like many other states, faces numerous economic pressures that limit its ability to provide adequate resources for all its sectors. However, this can be mitigated by reductions in spending and increases in revenue in the sector. The former may be achieved by introducing efficiencies in the sector, for example by the adopting and implementing a sector-wide policy and plan. The latter may be achieved by, among other interventions, mobilising increased support from development partners who have a programmatic interest in the sector. The current support from development partners should be sustained, while additional support must be lobbied for from both traditional and new donors.

In addition to enhancing budgetary allocation to the justice sector as a whole, efforts must be made to ensure equitable distribution of resources among and within institutions in the sector, bearing in mind their respective needs. This requires a review of the current distribution of resources with a view to correcting any imbalances and inequities. Sector-wide policy and planning will facilitate such a comparative analysis of resource distribution across the sector.

## **Facilitating access to legal information**

Information plays a critical role in the operation of the justice sector. The police, the courts, Correctional Services and other case-handling institutions generate a considerable amount of information. Information about human rights and the location and operation of justice institutions is also essential to any efforts to raise the awareness of citizens and empower them to access justice and demand their rights. Efficient and effective planning and management within and across institutions in the sector also relies on the availability and quality of information.

In present-day Swaziland, the contribution of information to the quality of justice and the rule of law is constrained by the fact that it is generated inefficiently, and is often inaccurate, poorly stored and inadequately published. The challenges are attributable to a number of factors, including the low levels of computerisation of justice sector institutions, inadequate levels of staff with adequate training in information processing (eg transcribers of court records in the judiciary), and low usage of online resources for publication of legal information.

The situation regarding information is best appreciated by considering the state of affairs with respect to the publication of legal information. The judiciary's failure to produce and publish important legal information, including law reports, is a serious challenge, as is the irregular, incomplete and delayed publication and distribution of copies of *Government Gazettes*, legislation and amendments, and other legal materials pertaining to the justice sector by those justice institutions charged with the responsibility for publishing and distributing these sources of legal information.

Improving the situation requires that law reports be made available to all courts in Swaziland. This can be achieved by investing in technology so that even subordinate courts in the remote parts of the country can make use of the Swazilii internet network where recent judgments of the higher courts are made available. There is also a need for the justice sector to cooperate with the University of Swaziland in the area of publication of expert commentaries on the laws of Swaziland, as well as in initiating moves to begin the publication of a law journal in Swaziland.

Increased efficiency of the justice sector requires significant improvements in the quality of its information management systems. Resources must be invested in: a programme of comprehensive computerisation of information generation and retrieval systems in individual institutions; the recruitment and training of records management staff; the online publishing of legal information, such as legislation and judgments of courts of record; as well as the reports of institutions in the sector, including strategic documentary data on case-handling.

## **Enabling capacity-building**

There are inadequate human, infrastructural and financial resources within the justice sector. The strategy for the judiciary, for example, identifies the judiciary's problem as that of inadequate staff in the administration, human resource and accounting departments. Judicial officers, specifically magistrates, are appointed to positions that require administrative skills, but are not exposed to training in administration. An accounting department has recently been established to service the judiciary, but more staff need to be added to ensure its smooth operation. The registry has challenges with regard to case management and case flow, the preparation of court rolls, as well as the record management systems. The judiciary does not have enough

transcribers of court records, and this tends to jeopardise the timeous and efficient processing of court records for filing in the Supreme Court. There is also a need to establish typing pools to ensure that judgments and court rolls are typed timeously. This must be complemented by upgraded computer facilities to enable court rolls to be e-mailed and issued early so that legal practitioners may be able to prepare themselves adequately.

The traditional courts are headed up by one Judicial Commissioner who is overloaded, as he has to ensure that new presiding officers are inducted into their responsibilities as judicial officers. He also has to monitor the operations of the courts on a regular basis, as well as attend to complaints from litigants who may approach his office about proceedings in the traditional courts. The Judicial Commissioner is therefore responsible for the smooth functioning of the traditional courts. There is a need to appoint Deputy and Assistant Commissioners to enable the Judicial Commissioner to concentrate on administrative matters regarding traditional courts.

There is also an acute shortage of accommodation for magistrates and other judicial officers. Accommodation for such officials should be provided in strategic and regional areas, and must be accompanied with security as befitting their status. Also, the lack of adequate transport facilities for magistrates sometimes results in magistrates being transported by police vehicles to their work stations. This brings into question the integrity and independence of the presiding magistrates if they are seen to be associating with the same police officers who are witnesses in cases over which they preside.

There is also a need to develop a structured training and development programme that is responsive to the individual training needs of staff within the justice sector. This includes empowering staff to broaden their knowledge base in the area of information and communications technology (ICT).

## 4. Independence and accountability of courts, prosecution authorities and lawyers

### **Reinforcing the autonomy of the judicial appointment process**

Article 26 of the ACHPR obliges states parties, which includes Swaziland, to guarantee the independence of the courts. Similarly, article 14 of the ICCPR, to which Swaziland is also a party, states that, in the determination of any criminal charge against any person, or of his or her rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a tribunal which is, among other things, 'independent and impartial'. Judicial independence is also guaranteed by the Constitution, which stipulates that, in the performance of its judicial and administrative functions, the judiciary in Swaziland shall be independent and shall not be subject to the control or direction of any person or authority.

In the interests of judicial independence, the Constitution provides for an independent Judicial Service Commission (JSC) made up of the Chief Justice, who also acts as the chairperson, two legal practitioners, the Chairperson of the Civil Service Commission, and two other persons. Of immediate interest is the fact that all members of the JSC are royal appointees. This is contrary to international norms on judicial independence, which require that bodies that oversee

judicial appointments must be independent of executive and legislative control. The JSC needs to become more structurally independent as part of the effort in ensuring the independence of justice sector functionaries and institutions in whose appointment and oversight the JSC is involved.

In order to ensure compliance with international standards pertaining to judicial appointments, the Constitution should be amended to ensure a broader participation of pertinent stakeholders in the appointment of members of the JSC. Specifically, there is a need to require the JSC to consult the Law Society of Swaziland before any lawyer is appointed to the JSC so as to ensure that only lawyers in good professional standing are appointed to the JSC. Given its responsibility for monitoring the professional conduct of lawyers, the Law Society is best placed to make appropriate recommendations for the appointment of its membership to the JSC.

## **Increasing transparency and accountability with regard to judicial appointments and impeachment**

The process for the appointment of judges in Swaziland is largely opaque, with no transparency regarding the internal processes that are used to select individuals for appointment. Although it is not possible to substantiate, definitively, claims that some appointments are based more on political considerations than on merit, such claims cannot be countered in the absence of transparency in respect of judicial appointments.

Enhancing public confidence in the judiciary and entrenching its independence depend on the implementation of constitutional and statutory reforms that require judicial appointments to be made more transparent than they are at present. The proposed reforms must be informed by international standards on judicial independence and accountability, which include the adoption and publication of objective criteria for the selection and promotion of judges based on relevant legislation, and the requirement that such criteria include the criterion that all vacancies be publicly announced and that written explanations be provided for the grading of each candidate. Such criteria also include the requirement that all candidates and members of the public should have access to the written explanations; that there should be an appeals process in the case of denial of promotion; and that, in cases of conflict of interest, members of the appointing body should recuse themselves.

Another area in which reforms are needed is that of judicial accountability, which is currently limited. Among the critical reforms that are required to enhance accountability of the judiciary is the need to draft and publish a judicial code of conduct in line with the Bangalore Principles of Judicial Conduct. This will not only provide ethical guidance to judges, but will also ensure that there is a mechanism to facilitate their accountability. Pending the adoption of a judicial code of conduct, judges could potentially be brought to account on the basis of section 239 of the Constitution, which provides for a Leadership Code of Conduct whose aim is to ensure that people in leadership positions are: committed to the rule of law and administrative justice; are transparent in their activities; are accountable to the people they serve; and do not abuse office. However, despite the constitutional provision, the Leadership Code of Conduct has not been put in place. In any case, while the Leadership Code of Conduct would apply to judges, it would not necessarily fully capture international standards of conduct that are peculiar to judges.

There is also a need to amend the Disciplinary Inquiry Regulations of 1972 to ensure that they take into account regional and international standards, particularly the principles that violations of the future code of judicial conduct should constitute disciplinary offences; that disciplinary procedures should be in line with constitutional, regional and international standards; and that disciplinary procedures should allow for a process of appeal as well as specify the timeliness for conducting the disciplinary proceedings.

## **Enhancing the independence of the Director of Public Prosecutions**

The Constitution guarantees the independence of the Director of Public Prosecutions (DPP). Section 162 of the Constitution provides not only that the DPP ‘shall be independent and not be subject to the direction or control of any other person or authority’, but also secures his or her tenure by providing that he or she shall be removed from office in the same manner and on the same grounds as a judge of the superior courts. Despite the constitutional provision for the DPP’s independence, however, there are at least two issues that need to be addressed if that independence is to be preserved.

The first is the constitutional provision which states that, in exercising his or her functions, the DPP must consult the AG on any matter that involves national security. Given that ‘national security’ is a nebulous concept, this provision creates the risk of the AG interfering with the operational independence of the DPP under the guise of safeguarding ‘national security’. There is a need, therefore, to repeal the provision or amend it by restricting the scope of ‘national security’ and stating unequivocally that, even where a prosecution involves ‘national security’, the final decision on whether to commence or terminate any prosecution is a matter for the DPP, subject only to judicial review.

Formal constitutional guarantees of independence are not effective in and of themselves. They have to be reinforced by respect for that independence in practice. Unfortunately, this has not always been the case in Swaziland. Holders of political power have, on some occasions in the past, interfered with the operations of the Office of the DPP, especially in relation to cases which were considered to be politically sensitive. An example is the case in which the AG threatened to remove from office those judges who were presiding over a matter in which the parents of a girl complained that their daughter had been taken to be one of the King’s wives without their consent. Following the AG’s threats, the DPP charged him with obstructing the course of justice, contempt of court and sedition. The AG was never prosecuted. Instead, it was the DPP who was pressurised to resign from his position. In addition to the legal reforms aimed at enhancing the DPP’s independence, therefore, it is important to advocate for measures that ensure that there is political will to uphold the independence of the DPP in practice.

## **Enhancing public confidence in the mechanism for disciplining legal practitioners**

The Legal Practitioners Act of 1964 and its Regulations of 1989 govern the legal profession in Swaziland. Where the Law Society makes application before the Chief Justice for the removal of any legal practitioner for reasons of professional misconduct, the Chief Justice may suspend such practitioner or remove him or her from the roll. The act also establishes a Disciplinary Tribunal

which is headed by a Chairperson who is appointed by the Chief Justice. The Chairperson, in consultation with the President and Council of the Law Society, appoints two other members from amongst members of the Society to be members of the Tribunal. Effectively, therefore, the composition of the Disciplinary Tribunal is entirely made up of members of the Law Society. The result is that the public does not perceive the Tribunal to be impartial, as there is no non-lawyer representing the interests of complainants. In order to increase public confidence in the Tribunal, the law should be amended to broaden the membership of the Tribunal to include members of the public.

As more complaints continue to be reported to the Law Society about lawyers who embezzle clients' funds and overcharge clients, there is a need to strengthen the mechanism for enforcing discipline in the legal profession. This can be done through: publication of the complaints procedure; empowering the Tribunal to impose deterrent fines and penalties for professional misconduct, subject to appeal or review by the High Court; and amending the law to broaden the membership of the Disciplinary Tribunal.

## 5. Crime and punishment

### **Institutionalising human rights in policing**

The police service is a key player in the criminal justice system and is the first institution with which citizens make contact when they are affected by crime. The significance of the police also lies in the wide scope of legal powers vested in police officers and the seriousness of the violations of human rights that the abuse of such broad powers is likely to occasion. Under Swazi law, the police even have the power to kill a person who resists arrest or flees, or who is, on reasonable grounds, suspected of committing a First Schedule offence under the Criminal Procedure and Evidence Act (CP&E). In effect, this law has been invoked by the police in cases of extra-judicial killing, including a recent case in which a suspect, who was wanted by the police for a series of rape cases, was eventually found by the police and shot dead. Police powers are allegedly also often abused by the police extracting confessions from criminal suspects using torture.

In order to improve the observance of human rights by individual police officers when they perform their functions, all legal instruments and operational guidelines that define and regulate police powers must explicitly incorporate constitutional and international human rights norms. Human rights must also be mainstreamed into police training curricula and be supplemented by regular on-the-job refresher courses for serving officers. Based on experience, the training must focus particularly on human rights with respect to public-order policing, arrest and detention procedures, the investigation of criminal suspects, and the handling of victims of crime. With the citizens of Swaziland in mind, civil society organisations should initiate programmes aimed at raising public awareness of human rights in relation to policing and at empowering individuals to demand their rights in their interactions with the police.

Awareness of human rights standards among the police and public demands for human rights enforcement are not enough in themselves to improve the human rights situation in Swazi policing. It is also necessary to have an effective institutional mechanism for enforcing

police accountability for human rights violations. In addition to judicial processes and action by other accountability institutions such as the ACC and the Commission on Human Rights and Public Administration, a more accessible and efficient mechanism must be established for the benefit of citizens and communities that wish to lodge complaints against the police. In this regard, it is recommended that the government establish an authority empowered to receive public complaints about police abuses and excesses, and to undertake independent and impartial investigations into such breaches in line with the standards set by the ICCPR.

## **Aligning sentencing to human rights standards**

In Swaziland, courts place great reliance on custodial sentences, even for petty crimes. As a result, prisons have become congested. This places stresses on the budget of the Department of Correctional Services and constrains it from providing the level of accommodation, food, bedding and other amenities that is required by constitutional and international human rights standards applicable to prisoners. Addressing this challenge requires, among other things, that the courts make more frequent use of their powers to impose non-custodial sentences such as home confinement, daily reporting to the police, and community supervision and service. The CP&E should expressly require every criminal court to prioritise non-custodial sentences where it has this discretion, and only impose prison sentences as a last resort.

Swazi law permits the imposition of some sentences that are prohibited by international human rights standards. One such sentence is corporal punishment, which remains in force more than six years after the 43rd Session of the United Nations Committee on the Rights of the Child recommended that the Swazi Constitution be amended to explicitly prohibit corporal punishment in all settings, including the family, schools, the penal system and all alternative care settings. It is recommended that Swaziland implement this recommendation. In addition, the government should initiate a comprehensive review of sentencing policy with a view to ensuring that every sentencing law or practice that violates human rights is explicitly prohibited.

The law and practice that pertain to the execution of sentences must also be made consistent with international human rights standards. Advocacy for reforms must focus on those areas in which Swaziland has, in the past, failed to live up not only to international human rights standards, but also constitutional norms. On this basis, reforms must be implemented specifically to ensure that, with respect to the restraint of the liberty of a child, for example, his or her best interests are granted priority in accordance with the CRC and that there is segregation between adults and juveniles in accordance with, among others, the ICCPR, whose article 10 requires that ‘accused juvenile persons shall be segregated from adults’, and the CRC, which states in article 37 that ‘every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so’.

An effective and efficient sentencing regime that complies with international human rights standards while promoting national justice sector goals, such as deterrence of criminals and protection of the public, depends on strategic coordination and cooperation among the police, the courts and Correctional Services. It is recommended that these three institutions, together with the Ministry of Justice, establish a forum of their experts to develop and lead a common, integrated approach to sentencing involving all actors in the criminal justice chain.

## Enhancing rehabilitation of offenders

The Prisons Act of 1964 establishes the Department of Correctional Services, whose aim is to rehabilitate offenders. The intent to reform and rehabilitate, however, seems to be impeded by the Prisons Act itself. For example, section 11 of the act provides for the use of force against prisoners by prison officers, while section 11(3) stipulates the instances in which an officer would be justified in using a firearm against a prisoner. Section 11(2) states that an officer or warder may apply ‘what force is reasonably necessary’ to secure obedience or maintain discipline in a prison. No limit to the amount of force to be used is suggested. Clearly, this provision goes against a human rights-centred approach to the rehabilitation of offenders and must be repealed and replaced with provisions that will accord with the rights of offenders.

Prisons in Swaziland are congested, overstretched and underresourced. One of the reasons for some prisons being overcrowded is a sentencing practice adopted by many courts which is strongly focused on imprisonment. As a consequence, even first-time petty offenders are sent to prison. There is a need to review the Prisons Act by taking into account, and ensuring compliance with, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The availability and application of alternative forms of imprisonment, wherever such alternative forms are appropriate, would benefit society. It is recommended that alternative forms of imprisonment, including community service, should be considered by the courts in order to reduce congestion in prisons.

## 6. Access to justice

The justice sector cannot contribute to improvements in the living conditions of people if the protection and remedies that it offers are not accessible to all. In its present form, the legal framework in Swaziland falls short of achieving this objective, despite including features that go some way towards easing and increasing access, such as: the legal recognition of ‘Swazi courts’ which operate in all parts of the country, apply customary law and use the local language in their proceedings; the establishment of the Industrial Court and the Small Claims Courts; and the provision of some legal aid. However, the factors discussed below continue to significantly impede access, especially for vulnerable sections of the population.

### Equalising standards of justice in a dual legal system

Equality before the law and equal protection of the law are guaranteed by various international human rights instruments, including the ACHPR and the ICCPR. The same is the case with the Constitution of 2005, whose section 14 provides that ‘the fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely – (a) respect for life, liberty, right to fair hearing, *equality before the law* and *equal protection of the law*’ (emphasis added).

Although the Constitution formally guarantees equality before the law and equal protection of the law, in practice the standards of justice before the law that apply vary depending on whether the individual accesses the ‘Western-style’ or the traditional Swazi

system. For purpose of the discussion in this section, the ‘traditional Swazi system’ refers to both the statutory ‘Swazi courts’ and the chiefs’ courts. Although, in theory, chiefs do not have formal judicial power, in practice they exercise a wide range of powers that are, in effect, judicial in nature. These ‘courts’ also command public acceptance owing to their cultural proximity to the people, with the average Swazi, especially in the rural areas, being more comfortable taking his or her case to the person who has traditionally been performing this function rather than to the general courts about which he or she knows very little and in which he or she has no trust at all. People expect that the chief’s court will apply the law of their ancestors and that they will be judged by the people they know personally and who profoundly control other aspects of their life.

The duality of ‘Western-style’ and traditional Swazi law virtually creates two separate legal systems which, in practice, do not offer equal legal protection to people. For example: while litigants in the former are entitled to legal representation, those appearing in Swazi and chiefs’ courts are not; a widow cannot participate in a case before the chief’s court while in mourning, whereas no such bar applies in the other courts; and, in chiefs’ courts, men are reportedly treated more leniently than women, especially in cases of domestic violence. This exemplifies the violation of the right of every person to equality before the law guaranteed by various international instruments, including the ACHPR and the ICCPR, as well as the Constitution of Swaziland.

Equalising standards of justice across the two legal systems in Swaziland is required by both constitutional and international norms that prescribe equality before the law. It is imperative to remove inequalities in the quality of justice that arise from the duality between Western-style and Swazi justice systems. This entails giving practical meaning to the constitutional requirement that Swazi law and custom must be consistent with the Constitution and the ‘general principles of humanity’. Interventions to achieve this goal must include the repeal of laws that bar legal representation in Swazi courts, those that restrict the right of access of women in mourning, and all other statutory and customary laws that discriminate between litigants in ‘Western-style’ courts and those in Swazi courts. The reforms must be complemented by training for all holders of judicial power over constitutional and international law norms on human rights, especially the right to a fair trial and the right to equality before the law.

## **Removing social and economic barriers in respect of equal access to justice**

Access to justice in Swaziland is also adversely affected by a number of socio-economic factors, which include poor physical access to courts, particularly for citizens who live in the rural areas. The physical location of courts is an obstacle to accessing justice, in that people have to travel long distances to court. Since the majority of people in Swaziland are poor, they cannot make the trip to the courts for lack of money for public transport. What compounds this problem is that all the common law courts are in urban areas and not in the rural areas where the majority of the population lives. The Industrial Court, High Court and Supreme Court are even less geographically accessible to most Swazis, since they are located only in the capital city, Mbabane, and do not go on circuit.

Access to justice is also hindered by language. While the Constitution recognises SiSwati and English as the languages of Swaziland, only English is the language of record in the common law courts. This is the case even though it is estimated that only a small proportion of the population is fluent in that language. The Constitution also guarantees every person the right to be tried in a language which he or she understands, or, failing this, to have the proceedings interpreted, at the expense of the state. The rules of the common law courts provide that there must be an interpreter in any case in which the defendant does not understand English. However, standards of interpretation are generally poor, particularly in relation to technical words. In the event of interpreters not being available, court proceedings are postponed, since to continue to hear a matter when there is no interpreter amounts to a fatal irregularity in the proceedings.

The Constitution does not provide for the use of sign language as an official language and yet a significant number of people living with visual disabilities use and understand only sign language. In addition, there are no full-time interpreters who are proficient in sign language. There is a need for the Ministry of Justice to cooperate with the University of Swaziland in providing the necessary sign-language training for court interpreters, the police, prosecutors, prison warders and other staff within the justice sector, as they might have to deal with cases involving people who can communicate only through sign language.

## **Improving efficiency in justice delivery**

Another constraint on access to justice for most people is the lack of communication around cases. People often travel long distances only to be told when they get to court that their matters have been postponed. The postponement may be due to a number of reasons, including the unavailability of witnesses, whose absence is often understandable because they are not reimbursed for expenses incurred in travelling to court. The absence of witnesses leads to adjournments whose ultimate effect is to cause delays in the delivery of justice. Adjournments are also often the result of situations where a lawyer is scheduled to appear before two or more courts at the same time in different matters, something which is common with lawyers in the DPP's and AG's chambers. Practice dictates that cases heard by the superior courts take precedence over matters before subordinate courts. This anomaly exists because, at the time of set-down, all that is indicated to the court is the law firm that is representing the litigant and not the name of the legal practitioner from that law firm or from the Office of the DPP or AG. For this reason, attorneys become double-booked. There is a need for a schedule to be drawn up by the Registrar of the High Court when matters are set down detailing not only the law firm that will be dealing with the matter, but also the names of counsel who will be appearing in matters before the superior courts. With this schedule from the Registrar of the High Court's office, legal practitioners will be able to diarise properly the matters set down in the subordinate courts.

Advocacy for, and implementation of, the proposed reforms aimed at improving access to justice in Swaziland must target the various social and economic constraints systematically and strategically. This entails, first, recognising that, while some of the factors limit access for all Swazis equally, others disproportionately constrain access for particular sections of society such as women, children, rural residents and low-income earners. Secondly, it requires that, in addressing the constraints, interventions must extend to traditional customary and informal

justice institutions, especially with respect to ensuring that custom and informality are not promoted and pursued at the expense of human rights, including the right to have equal access to justice in all its forms. Thirdly, access to justice must be clearly linked to the nation's development agenda and not be seen as marginal to it. International norms on justice and the rule of law promote improvement of access to justice not only as a human right, but also as a basic social service whose provision contributes to poverty reduction and development. The linkage of access to justice to development entails cooperation and coordination among 'democracy/human rights' advocates and those working on 'development'.

## Expanding legal aid

According to the PRSAP of 2008, 69% of Swazis are poor. This makes it difficult for most people to afford the costs associated with accessing justice, especially lawyers' fees which currently range from E400 for a junior attorney up to E2 000 per hour for a senior attorney. Such fees are simply prohibitive for the majority of people who live on less than USD1 per day. Lawyers are bound by law and ethics to charge adequately and properly for professional services unless they act *pro deo* or *pro amico*. Access to justice will be improved if the law permits flexible fee arrangements that take into account the needs of indigent clients. In this vein, the Legal Practitioners Act should be amended to allow contingency-fee arrangements between attorney and client where the client is impecunious.

Even more importantly, the government should establish a statutory legal aid system. Article 14, paragraph 3(d), of the ICCPR states that everyone should be entitled, among other rights:

to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

This places a legal obligation on the government to set up a legal aid scheme that provides lawyers, at no cost, for clients if the interests of justice so require, and to do so free of charge for those who cannot afford to pay lawyers' fees. Currently, legal aid is not provided for in law and is mainly provided on an ad hoc basis by some NGOs and by the government for accused persons who are charged with offences which might attract capital punishment.

The Ministry of Justice should establish a special task force under the office of the AG to review and draft appropriate legal aid legislation. In performing its functions, the task force should take into account the Final Report on National Feasibility Study for the Establishment of a Legal Aid System for the Kingdom of Swaziland as well as the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa. There is also a need to remove the barriers to the provision of legal services by non-practising lawyers who work for NGOs as well as lawyers attached to the commissions in the justice sector.

Finally, there is a need to amend the Legal Practitioners Act to make it mandatory for lawyers to provide a determined level of *pro bono* services for indigent citizens as a condition of practice. This obligation should be enforced, in part, by making renewal of every lawyer's licence conditional on proof of the provision of the required amount of *pro bono* services in the preceding year.

## Institutionalising informal justice

As a result of the impediments to accessing justice as outlined above, the majority of Swazi people rely on informal or non-statutory institutions to access justice. The informal structures include the family, the chiefs' courts and *Ndabazabantu*. In Swaziland, the family is generally considered to be the most important and most immediate justice-delivery structure for many people. The family is responsible for the settlement of family-related problems, including the resolution of disputes related to deaths, child maintenance, inheritance, and violence within the family. The mediating process by the family structure consists of a meeting to discuss and take decisions to which family authorities and other parties are invited. Problems are discussed within the parameters of the nuclear family, and, where this structure fails to adequately address the issue, it is referred to the extended family. The family deals with problems on a private, as opposed to public, level and has no legal power to enforce decisions on offenders. In practice, women comply more readily with family decisions than men. Compliance with family decisions by men is usually ensured through the ancestral cult, since Swazis believe that a family includes both the living and the dead through the ancestors.

Although the family is regarded as an important centre for mediating and settling conflicts, certain roles within the family have proven detrimental to its members, especially women. The family often assumes the gatekeeper's role, which enables it to harbour criminals and allows conflicts to escalate. Families are often protective of perpetrators of crime who happen to be their kin, albeit selectively. Certain family members are usually favoured at the expense of others.

Family disputes are also handled by chiefs' courts where they are reported to them by family members. The chief's residence (*umphakatsi*) is used as the venue for the settlement of such disputes. Chiefs receive cases from families, individual community members as well as from *Ndabazabantu*. Cases tried in these courts include family disputes, minor cases of assault, land disputes, *emalobolo*-related disputes, and maintenance-related conflicts. The emphasis in the chief's court is more on reconciliation of the people in a dispute than assignment of liability and retribution.

*Ndabazabantu* is a structure that was created by colonialists but which is now considered a traditional structure aimed at settling land disputes regarding Swazi national land as opposed to title-deed land. This structure can neither impose a sentence of imprisonment or a fine, nor can it sign a warrant of attachment for restitution of property in civil matters. Simply put, it is largely an extra-legal forum based solely on the pursuit of reconciliation and consensus. There is no process of appeal to or from it, and one's only recourse when aggrieved with the outcome of a hearing would be to the King.

There is a need for Parliament to enact legislation which will set down the minimum standards of justice and human rights that must be upheld in proceedings before chiefs' courts. Such legislation must not seek to restructure the fundamental nature of these courts. In particular, the legislation must not compromise the informality and accessibility of chiefs' courts that give them their advantage over formal courts with respect to access to justice. The enactment of the legislation should be complemented by the integration of chiefs' courts and *Ndabazabantu* into the sector-wide policy and planning for the justice sector.

# Conclusion and recommendations

Since 2005, when Swaziland adopted its current Constitution, the legal framework has undergone significant changes which have transformed the justice sector and the rule of law to some extent. Among the indicators of progress made in this area are the establishment of a Bill of Rights, as well as the creation of various institutions mandated to administer justice and promote transparent and accountable governance. In addition to the gains registered in respect of the national legal framework, Swaziland has also made progress with respect to complying with certain international obligations in the areas of justice delivery, the rule of law, and human rights. For its part, the judiciary has contributed to the progressive development of the justice sector through some activism in holding accountable public officials who breach the law.

Despite the gains mentioned above, however, more needs to be done if the law and practice are to enable Swaziland to honour both its constitutional and international obligations in full. The list of areas that need attention is long and the prospects of reforms will be conditioned by the peculiarities of Swaziland's system of government, which attempts to blend parliamentary and traditional systems of government. Against this background, it is essential that any interventions proposed for the purposes of improving the prospects of justice, the rule of law and human rights should be strategic in nature.

A strategic response to the challenges that face the Swazi justice sector requires integrating the challenges of particular institutions into a unified analytical framework that seeks to understand and explain the interconnectedness of the challenges. The adoption and implementation of a sector-wide policy and strategy will go a long way towards facilitating such a strategic approach to justice sector reform. The strategic approach must also adopt as its specific aims: alignment of Swazi law to Swaziland's international obligations; improvement of government respect for the law; grounding criminal justice in human rights norms; enhancement of the efficiency of justice sector institutions; expanding access to justice; and securing the independence and accountability of the judiciary and lawyers.

- The government should expedite the adoption of a sector-wide policy framework for the justice sector and mobilise resources to fund implementation of components of the policy, including capacity-building for planners.
- The government and civil society organisations should lobby development partners to increase their overall budget support for the justice sector, especially in strategic areas such as the development of a sector-wide policy framework, the development of a comprehensive law reform programme, and reforms in traditional customary law.
- The government should adopt and implement a plan of action that seeks to harmonise all national laws with international human rights norms. The plan should have the following main objectives: the ratification of outstanding treaties; the domestication of all treaties that it has ratified; and the clearing of the backlog of overdue treaty reports.
- The government should promote a culture of respect for the law among justice sector institutions by enhancing the accountability of public officials through enacting

legislation that imposes personal liability on public officials for any breaches of the law which they perpetrate.

- The government should develop and implement a legal information management and dissemination plan with the following main objectives: increased digitisation of legal information generation, storage and dissemination; increased electronic networking connecting justice sector institutions; and increased accessibility of legal information to the public, especially marginalised and vulnerable groups such as women, people with disabilities, rural inhabitants and people who are not literate in the English language.
- Civil society advocates for improved access to justice should enhance the legitimacy of their interventions by linking them conceptually and programmatically to the improvement of the living conditions of the average Swazi citizen.
- The Law Society of Swaziland should implement a programme aimed at enhancing public access to affordable and accountable legal representation through the establishment of a compulsory obligation on lawyers to provide a set minimum amount of pro bono services, and through advocating for public representation on the membership of the Disciplinary Tribunal.
- Government ministries and civil society organisations with an interest in the inclusion of vulnerable groups in governance and development should implement a collaborative programme aimed at overcoming barriers to accessing justice which disproportionately affect vulnerable groups.
- The government should initiate a criminal justice review centred on amendments of the CP&E, the Police Act, the Prisons Act and other related statutes to ensure that policing, prosecution, sentencing, and penal regime policies and practices comply with human rights standards, as well as on establishing human rights as a key component of the respective missions, training curricula and operational guidelines of the police and the Correctional Services.



# **Part II**

## **Swaziland: Justice Sector and the Rule of Law**

Main Report



# 1

## Introduction

Swaziland is a country that is in transition from one which did not provide for respect for human rights and the rule of law to one in which the Constitution is supreme<sup>1</sup> and provides for a comprehensive Bill of Rights. It is a country which previously outlawed separation of powers among the legislature, the executive and the judiciary, but where the Constitution has now sought to restore the independence of the judiciary. The Constitution also establishes the Human Rights Commission, whose responsibility it is to promote and protect human rights.

The advances that have been made with regard to constitutional development have, however, been adversely affected by the country's economic decline. Swaziland's economy faces key challenges in consolidating economic and structural reforms so as to address poor economic performance linked to declining inward investment and fiscal discipline, a lack of transparency and integrity, and a political system of governance which is viewed as being out of step with regional and international norms and standards to which Swaziland has subscribed. Further, the system of governance prioritises individual merit as opposed to plural political participation. The result is: the limitation of the autonomy and accountability of institutions created by a state which remains highly centralised, very much contrary to the provisions of the Constitution; a weak separation of powers; the failure of the crime and punishment regime to modernise and cope with emerging social and economic challenges; as well as limited responsiveness of the formal justice system to the needs of the majority of the population.

While the present report recognises that the transition from a non-constitutional to a constitutional state should be gradual, it identifies key areas where practical steps can be taken to improve the effectiveness of justice delivery in Swaziland. Some of the key challenges identified in the report include: guaranteeing the independence of the courts and the judiciary, including

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<sup>1</sup> Section 2 of the Constitution Act, 2005.

ensuring that government officials do not interfere with due process of law and comply with court orders; initiating a comprehensive law reform process that is inclusive of civil society; providing free legal aid for Swazi people who are in need; improving prison conditions, particularly with regard to the issue of overcrowding; as well as ensuring a responsive criminal justice system.

## A. Background

The Kingdom of Swaziland is a country that is almost completely surrounded by the Republic of South Africa, except on its eastern border, which it shares with the Republic of Mozambique. Swaziland gained political independence from Britain on 6 September 1968. When Swaziland became a sovereign state, it also adopted a Westminster-style Constitution which enshrined a comprehensive Bill of Rights, the concept of an independent judiciary, as well as the doctrine of the rule of law. As a sovereign state, the Kingdom of Swaziland has aligned or associated itself, and even endorsed, its support for and commitment to the protection and promotion of internationally and universally recognised human rights norms. Since independence, Swaziland has ratified a whole range of international instruments that have a direct or indirect bearing on the protection of human rights. In particular, the Kingdom of Swaziland is a signatory to the Harare Commonwealth Declaration of October 1991, along with its counterpart member states of the Commonwealth of Nations. In the Declaration, signatories proclaimed their support for the protection and promotion of the fundamental values upon which the Commonwealth family is founded, as well as their preparedness to protect and promote such values, to wit:

democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;

fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief.

In line with most common law countries in Africa,<sup>2</sup> Swaziland has adopted dualism in its approach to the application of international law. Dualist theory holds that international law and domestic law are different and separate legal systems.<sup>3</sup> In a country that follows the dualist approach, international law has to be incorporated into domestic law before the courts can apply it. As a consequence of applying dualist theory, international legal instruments become legally enforceable in Swaziland only when they have been incorporated into the country's domestic law. One major way of assessing the practical application of principles and norms embodied in international instruments to which a state is a signatory is to examine its legal system. Thus, in order to determine whether Swaziland has moved from the sphere of diplomatic rhetoric to honouring her pledges to the international community and the African continent in protecting and promoting human rights, one must assess the legal system of modern Swaziland.

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<sup>2</sup> Common law countries include the countries which inherited Roman-Dutch law, including South Africa, Namibia, Botswana and Lesotho.

<sup>3</sup> Killander, M et al 'International Law and Domestic Human Rights Litigation in Africa', Pretoria University Law Press, Pretoria, 2010, p. 11.

## B. The legal system in pre- and post-colonial Swaziland

In pre- and post-colonial Swaziland, the supreme lawmaker in Swazi society was, and is, *iNgwenyama*,<sup>4</sup> that is, the King in his capacity as such under Swazi law and custom. The administration of justice in pre-colonial Swaziland was the responsibility of chiefs and the *lusendvo*. The importance of the *lusendvo* in the dispute-resolution process in traditional Swazi society was underscored by the fact that the many disputes at the family level were settled with finality, and within the family. Such 'judicial power' as was placed in the family was normally the purview of the head of the extended family as opposed to the nuclear family.<sup>5</sup> Depending on the gravity of the offence, the function of dispute settlement was, and still is, performed with the assistance of the family *libandla* or family tribunal made up of adult male family members. The rationale behind the existence of family tribunals has been attributed to the secretive nature of the Swazi people. To avoid humiliation and scandals, family disputes are considered best dealt with by the family tribunal and kept within the family.<sup>8</sup>

Immediately above the family tribunal in the hierarchy of the traditional judicial system are the chiefs' courts. These were, and continue to be, open courts. Every adult male in the chiefdom is expected to attend the proceedings and to participate actively in the deliberations of these courts. Court sessions are normally held in the open under a tree near the chief's official residence. The court is composed of the presiding officer and a council of advisers called *bandlancane*, which is made up of between six and ten males nominated by the chief. The court plays an active role in examining the parties. Spectators often freely join in the proceedings by interposing interrogatories. 'In principle, no evidence is excluded and all evidence is judged on its merits. Direct evidence and evidence of an eye witness is considered as very important... mendacity is punishable.'<sup>9</sup> A chief's court can impose a fine, which is then forfeited to the state. The losing party may also be required to pay compensation to the successful party. The court may further make an order for the restoration of any item or goods unlawfully removed or claimed by the defendant. The ultimate punishment is banishment of the wrongdoer from the chiefdom. A party who is not satisfied with a decision of the chief's court may take the matter to the Swazi courts and, ultimately, to *iNgwenyama-ayombula ingubo eNkhosini*.<sup>10</sup> Swazi law and custom endows any Swazi aggrieved by a decision made by his chief, or anyone else for that matter, with the right to seek an audience with the King and his councillors at the Royal Palace for the purpose of redress. This customary remedy is a form of final appeal and is aimed at checking the abuse of power by local and other authorities. It is arguable that this remedy is, in practice, limited only

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<sup>4</sup> See the Constitutional Review Committee Report (Swaziland), Government of Swaziland Publication, 2002.

<sup>5</sup> Defined as 'an inner council of a family as underscored under customary law'. See the now repealed Swazi Administration Order, No. 6 of 1998, section 3.

<sup>6</sup> Jele, ZD 'Chiefs' Courts', unpublished dissertation submitted in partial fulfilment of the requirements for the award of the LLB degree, Uniswa, 1990, at p. 28.

<sup>7</sup> Council of Advisors.

<sup>8</sup> See Jele, ZD, *op cit* at p. 38 where he points out that disputes which are dealt with at the family council level are called *tibi tendlu* (meaning dirt of the home).

<sup>9</sup> Constitutional Review Committee Report (*supra*) at p. 136.

<sup>10</sup> This means to remove from oneself the blanket that would either protect one from weather elements and thus show one's vulnerability, as it were, to the elements.

to 'members of the Swazi nation'.<sup>11</sup>

The Swazi system of government has, for a long time, been derided as lacking in respect for human rights. However, this has not always been the bane of the Swazi system of government. In the unadulterated, indigenous Swazi system, human rights and the rule of law were not alien concepts. In pre-colonial Swaziland, for instance, the distribution of authority was such that it led to a form of checks and balances at every level from the Royal House down to the village chiefdom. The Queen Mother came to occupy a position both independent of the King and strategic enough to act as a check on any absolutist royal pretensions. The King ruled through an inner council. Although the inner council was appointed by the King himself, its members were drawn from the royal clan, as well as from the chiefs and other trusted commoners. Members of the inner council did not draw a salary for advising the sovereign.

The whole structure, consisting of the community of peers – the King in Council, the Queen Mother, the princes, the chiefs and the headmen – was constrained by a popular institution convened as the National Council and comprising both nobles and commoners. Its sanction was required on all important matters. These structures did not function just at the centre, as they were all mirrored at local levels and required the traditional chief to consult corresponding councils on various aspects of local importance. The concept of accountability of the chief to the people was well established. As such, there was little chance of violation of human rights and the rule of law. Violations of community norms by a chief invariably led to the deposition of the chief.<sup>12</sup>

The notion of due process of law permeated Swazi law and custom; deprivation of personal liberty or property was rare; security of the person was assured; and customary legal process was characterised not by unpredictable and harsh encroachments upon the individual by the sovereign, but by meticulous, if cumbersome, procedures for decision-making.<sup>13</sup> This, however, is now all in the past, as the bane of the present government and of the justice system is continuing disregard for the rule of law, the use of state resources to prosecute enemies (real or perceived), corruption, police brutality, failure to respect the rule of law, and continuing and contemptuous disregard for the independence of the judiciary.

Swaziland effectively became a territory of the South African Republic in 1890 when Britain and the South African Republic signed the Convention by which the Republic was allowed to annex the territory known as the Little Free State (Swaziland).<sup>14</sup> The legal consequences of the Convention for Swaziland were clarified when Britain and South Africa signed a new convention relating to the annexation of Swaziland in 1893. The 1890 Convention contained a clause requiring the approval of Swaziland as a condition for the treaty to come into effect. When the Swazis refused to approve that Convention, Britain and the Republic of South Africa signed the 1893 Convention, which did not require Swaziland's approval of the annexation.

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<sup>11</sup> For instance, the *Times of Swaziland* of June 12 2002 carried on its front page an article with the heading 'The King will deal with my case-CJ'. The story went on to relate that, the then Chief Justice Mr Stanley Sapire, an expatriate, who, after losing his appeal to the court of appeal challenging the retirement age of judges, said he would not take his case to another court, but to the King in accordance with Swazi law and custom.

<sup>12</sup> Professor Asante, 'Nation-building and Human Rights in Emergent African Nation', 1969, *Cornell Law Journal* at p. 72.

<sup>13</sup> Asante, *op cit*.

<sup>14</sup> Pollholm CP, 'Swaziland. The Dynamics of Political Modernisation', University of California Press, Berkeley, 1972, for the circumstances leading to the signing of this Convention.

Article 2(3) of the 1893 Convention stated that:

the management of the internal affairs of the natives shall be in accordance with their own laws and customs ... and the native laws and customs shall be administered by the native chiefs entitled to administer the same in such manner as they are in accordance with the native law and custom ... in so far as the said laws and customs are not inconsistent with civilised laws and customs, or with any Law in force in Swaziland made pursuant to this Convention ... .

In effect, and despite the annexation, the laws and customs, as well as the traditional legal institutions, of the Swazis were not tampered with. At the end of the Anglo-Boer War, the British emerged victorious and took over administrative control of the Transvaal as well as Swaziland. In 1903, the British passed the Swaziland Order-in-Council, a law which gave the Commissioner of the Transvaal power to legislate by proclamation for the Kingdom of Swaziland. In so doing, the Commissioner was enjoined to 'respect any Native laws by which the civil relations of any native chiefs, tribes or populations under His Majesty's protection are now regulated.'<sup>15</sup> This provision, no doubt, ousted the jurisdiction of the traditional institutions in criminal matters, leaving them with jurisdiction in civil matters only.

Other legislation which encroached further into the traditional domain of Swazi law and custom was the Swaziland Administration Proclamation of 1904.<sup>16</sup> This Proclamation was amended in 1907 by the General Law and Administration Proclamation 4 of 1907. Under the provisions of the latter Proclamation, a special court was created. This court had jurisdiction to hear cases involving serious crimes such as murder, rape and witchcraft. It was headed by a rotational magistrate who was based in the Transvaal and came into the Kingdom fortnightly to try cases. The effect of the General Law and Administration Proclamation was to make the Roman-Dutch common law the general law or common law of Swaziland applying to, and governing, all legal transactions in the Kingdom regardless of the race of the parties. Consequently, in one fell swoop, Swazi law and custom was subordinated to the Roman-Dutch common law.

In 1912, the High Court, which had jurisdiction over all civil and criminal matters, and also to hear reviews and appeals from all courts, was established by the Swaziland Superior Court Amendment Proclamation. Between the years 1904 and 1930, Swazi customary law and its supporting institutions were legally in a state of suspended animation, as no specific legislation was passed to regulate the application of customary law, a law which continued to be applied in the traditional judicial institutions in suits involving only 'members of the Swazi nation'.

In 1950, the colonialists passed the Swazi Courts Act<sup>17</sup> and the Swazi Administration Act,<sup>18</sup> which were meant to regulate the application of customary law. In 1938, three Criminal Procedure and Evidence Proclamations were passed with the aim of vesting the courts with criminal jurisdiction and regulating their procedure in the former High Commission territories.

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<sup>15</sup> Section 5.

<sup>16</sup> Act No. 1/1904.

<sup>17</sup> Act No. 89/1950.

<sup>18</sup> Act No. 79/1950.

To date, Swaziland uses the Criminal Procedure and Evidence Act of 1938, coupled with the 1954 and other minor post-independence amendments, to regulate procedure in the subordinate as well as in the superior courts.

The British set up a national police force in 1907 and were thereafter content with issuing proclamations and enforcing them directly, much against their avowed policy of indirect rule in Africa. Even though, from time to time, they would consult with the Swazi King,<sup>19</sup> in effect the traditional Swazi authorities had their political power curtailed and their official responsibilities limited to the collection of taxes. This background set the tone for the constitutional developments that eventually took place, and continue to take place, in post-colonial Swaziland. These developments also provide the basis for examining the operations of the justice sector and the application of the rule of law in present-day Swaziland.

From this background, it can be seen that the legal system in Swaziland is dualist in nature: it consists of Roman-Dutch common law on the one hand, and Swazi customary law on the other. In this regard, Swaziland is similar to many other African countries which operate both a customary legal system and the imposed Western system. This duality of the legal system and system of government forms the basis, in this report, for discussing the justice sector and the rule of law in Swaziland.

### **c. Constitutional developments**

At independence, the Kingdom of Swaziland adopted a Westminster-style Constitution which enshrined a comprehensive Bill of Rights, as well as the concepts of an independent judiciary, the separation of powers and the rule of law. The Independence Constitution theoretically created a constitutional monarchy which was bound to function on the premise of a bicameral Parliament. It also created the executive arm of government, whose head was a Prime Minister who was the leader of the majority party in Parliament. The Constitution further created an independent judiciary whose head was the Chief Justice. The government of the day reflected political pluralism in so far as it was formed following competitive elections among different political formations.

The Independence Constitution furthermore entrenched the principle of supremacy of the Constitution, thus establishing the Constitution as the supreme law. Provisions of the Constitution would prevail over all legal or political actions of government which were inconsistent with it. Such action, or inaction, would consequently become null and void. An interesting observation here is that this principle was included in a Constitution supposedly modelled on the British parliamentary political system in which parliamentary, and not constitutional, supremacy was the underlying doctrine. Constitutional supremacy was never, and has never been, a part of the Westminster system of government as practised in Britain then and now. In a Westminster system of government, acts of Parliament are legally supreme and the constitution is subordinate thereto. In the context of constitutional supremacy, however, the constitution is supreme and, until it is amended according to the prescribed procedures, its provisions place certain actions altogether beyond the mandate of any of the branches of government.

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<sup>19</sup> The British subsequently demoted the Swazi King to the position of Paramount Chief, as in their understanding no one other than His Majesty the King of England, could be King.

On 12 April 1973, the life span of the Independence Constitution was cut short by its abrogation by King Sobhuza II on, inter alia, the ground that it was unworkable as it imported elements which ran counter to Swazi culture and the Swazi way of life. Through a King's Proclamation to the Nation, the King repealed the Independence Constitution. The immediate effect was to vest all executive, legislative and judicial powers in the King, who was to be assisted by his Council of Ministers in running the government. The Council of Ministers comprised former members of the now-defunct Westminster-style cabinet by virtue of Decree 4 of the Proclamation, which was subsequently reaffirmed in paragraph 2 of the King's Proclamation 1 of 1981. It was only five years later that, by decree, the King restored legislative powers to Parliament with an executive cabinet.<sup>20</sup> This was the birth of the *tinkhundla* system of government.

Clearly, the 1973 constitutional development showed no regard for the rule of law. In the ordinary course of events, a constitution is repealed through a referendum or through a joint resolution of a majority of members of Parliament in a joint sitting. The Independence Constitution could therefore either have been repealed through a referendum or by way of a two-thirds majority of Members of Parliament voting in a joint sitting for the repeal of certain provisions of the Constitution. However, the Independence Constitution was abrogated with no regard to procedure and law pertaining to its repeal. In abrogating the Constitution, the King rode 'roughshod over some of its fundamental provisions and in doing so usurped powers for himself'.<sup>21</sup> The power which he appropriated to himself had not been envisaged in the 1968 Constitution. As such, this seizure of power was illegal.

After 1973, and until the enactment of the new Constitution of the Kingdom of Swaziland on 26 July 2005, Swaziland was governed through a succession of decrees and orders in council. The source of power and the validity of these instruments were often unclear and the consequent legal uncertainty created tensions and constitutional volatility. The constitutional framework such as it existed was fertile ground for the arbitrary and authoritarian exercise of power.

It is against this historical background that the 2005 Constitution was enacted. That the Constitution recognises the need for a society governed by law is evident from the clear terms of its Preamble.

The Kingdom of Swaziland is a constitutional state. It has incorporated the doctrine of the rule of law through the enactment of the Constitution. Such incorporation presupposes the principle of legality. It is at the heart of the concept of a constitutional state that the lawgiver and the executive 'in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law'.<sup>22</sup>

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<sup>20</sup> Through the Establishment of the Parliament of Swaziland Order, 1992.

<sup>21</sup> *Ray Gwebu and Nhlanhla Lucky Bhembe vs The King*, Unreported Court of Appeal cases 19/20 2000, p. 8.

<sup>22</sup> See the case of *The Prime Minister of Swaziland & Others vs MPD Marketing & Supplies (Pty) Ltd*, Unreported Supreme Court case No. 18/2007 at p. 32.

## D. The rule of law: A historical conspectus

The concept of the rule of law has undergone extensive change since it was initially defined by Professor AV Dicey.<sup>23</sup> The rule of law is a concept that exists in order to ensure that human rights and fundamental freedoms are enjoyed by all humankind. It is a concept that found expression in the Act of Athens of 1955 through the International Commission of Jurists (ICJ). The ICJ reconfigured the concept to mean that:

- The state is subject to the law;
- Judges should be guided by the rule of law, should protect and enforce the rule of law without fear or favour, and should resist any encroachment by governments or political parties on their independence as judges;
- Governments should respect the rights of the individual under the rule of law and should provide the means for the enforcement of the rights of the individual;
- Lawyers of the world should preserve the independence of their profession, should assert the rights of the individual under the rule of law, and should insist that every accused is accorded a fair trial.

The ICJ reaffirmed the above principles in 1959 when, in the Declaration of Delhi, the jurists emphasised that an independent judiciary and an independent legal profession are essential to the maintenance of the rule of law and to the proper administration of justice. Viewed in this sense, the rule of law implies that the:

powers exercised by government and public authorities must have legitimate foundation; they must be based on the authority of law, statutory, constitutional or customary in so far as the latter does not run counter to recognised rules of natural justice and contemporary morality or constitutional law.<sup>24</sup>

The import of the rule of law is that it enjoins the executive to respect due process of law as well as orders of courts established by law and property constituted to exercise jurisdiction. It also implies that government is bound by the law which itself has made. It also means that the judicial process must not only be credible, but must also be speedy, cheap and transparent, and its procedure must be such that it is certain and constant. It must also secure the independence of judicial personnel. The rule of law also requires that the law should conform to certain minimum standards of procedural and substantive justice, and, lastly, public authorities and government officials must be subject to effective legal sanctions if they depart from the law, either by having their acts declared unconstitutional if performed by virtue of purported constitutional power or declared *ultra vires* if exercised on the strength of a purported enabling statute. Executive action must be subject to judicial review that is supported by efficient and effective remedies.

In the modern era, respect for the rule of law is one of the conditions which is imposed by development partners before they can grant aid to countries like Swaziland. According

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<sup>23</sup> In his writing 'Introduction to the Law of the Constitution' (1885).

<sup>24</sup> Okpaluba, C 'Human Rights in Swaziland: The Legal Response', p. 16.

to international financial institutions, there is a crisis of governance in Africa. The crisis of governance, so the argument goes, is caused by the failure of public institutions. What is required to cure these ills is a reincarnation of the modernisation paradigm in the form of 'good governance'. This involves multiparty democracy, the rule of law, accountability, and free-market institutions, all of which are found in the international financial institutions' Structural Adjustment Programmes<sup>25</sup> (SAPs).

The official position is that Swaziland's economy is on a downward spiral mainly because of the global economic crisis, but also because of an overvalued real exchange rate. The fiscal crisis has continued to deepen also as a result of a large decline in Southern African Customs Union (SACU) imports in 2009, when transfers from the SACU revenue pool to Swaziland fell by 11% of the country's gross domestic product (GDP) during the 2010/2011 fiscal year.<sup>26</sup> To compound the problem, the country's wage bill was increased following an unbudgeted-for 4.5% wage increase given to civil servants in 2010. While capital expenditure has been halved in recent months to offset the impact of lower SACU revenue, this was partly reversed by a supplementary budget in November 2010 which regularised capital expenditure overruns of about E350 million for a new airport project. The result was that the fiscal deficit almost doubled to around 13% of GDP, compared with 7.1% in the 2009/2010 fiscal year.

The government has been financing the deficit by issuing government bonds, drawing down its deposits at the Central Bank, and incurring domestic payment arrears on all expenditure items, except for wages and utilities. This is an untenable position which does not, in any way, point to the road to economic recovery.

The International Monetary Fund (IMF) has recommended, among other things, that the government should trim its bloated civil service by 7 000 to 10 000 jobs and reverse the notorious Circular 1 of 2010, a legal instrument which provides for lucrative financial perks for Ministers and Members of Parliament. The country has to address poor economic performance, which is linked to declining inward investment, to fiscal indiscipline, to a lack of transparency and integrity, as well as to a political system of governance that is largely viewed as undemocratic. For economic recovery, Swaziland has to stimulate direct investment inflows, as well as design and follow policies to boost job creation. Additionally, the country requires improvements in its administrative procedures that will further facilitate the uprooting of corruption and the building of a strategy for rationalising government expenditure. The assault on the rule of law in recent years appears to have hampered a lot of developments in this regard.

The Central Bank of Swaziland acknowledges the nexus between economic development and good governance in the following words:

Prospects for FDIs will continue to depend largely on the political will to improve the image of the country...that can only be achieved, among other things, by formulating and implementing prudent macro-economic policies, respecting the rule of law and the new Constitution and by practising good governance.<sup>27</sup>

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<sup>25</sup> Adelman et al 'Law in Crisis in the Third World', p. 188.

<sup>26</sup> See <http://www.imf.org/external/pubs/ft/scr/2011/c1184.pdf> accessed on the 2 March 2012.

<sup>27</sup> The Central Bank of Swaziland Annual Report, 2006, p. 31.

## E. Legal and institutional framework

### International law, the Constitution and national legislation

#### *International law*

The relationship between international law and domestic law is often viewed in terms of the monism–dualism dichotomy. Common law countries in Africa have traditionally been seen as dualist and civil law countries as monist. Dualist theory provides that international law and domestic law are separate legal systems. If international law is not transformed into national law through legislation, national courts cannot apply it. Some scholars have argued that the description of the English legal system, and legal systems based on it, as the embodiment of dualism is exaggerated. Firstly, customary international law forms part of the law of the land in common law countries like Swaziland. Secondly, though the domestic courts may not directly apply them, unincorporated international treaties play an increasingly important role in common law countries.

The role of international law in interpretation relates to the interpretation of constitutional provisions, statutory interpretation and the development of the common law and customary law. Unlike constitutions of other common law countries, the Swazi Constitution does not have provisions on the role of international law with regard to the interpretation of the Bill of Rights and statutory interpretation. This, however, should not prevent courts from using international law. A trite principle of the common law is that, where appropriate, a statute should be interpreted in a manner which is consistent with a treaty obligation. Courts should apply this principle not only to statutory interpretation, but also to constitutional interpretation, thereby paving the way for striking down legislation which violates international law on the basis of a properly construed Bill of Rights. An expansive reading of the Bill of Rights would, for instance, be needed in socio-economic rights cases in states such as Swaziland that do not recognise such rights as justiciable in its Bill of Rights.

Section 61(1)(c) of the Constitution provides that, in dealing with other nations, the government of Swaziland shall ‘promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means’. This provision is in the part that deals with directives of state policy, a part which the Constitution provides is unenforceable in a court of law. For its part, section 238 of the Constitution of Swaziland regulates the application of international law in Swaziland by providing that, unless an international convention is self-executing, it shall become law only once it has been incorporated into the country’s municipal laws through an act of Parliament or through a resolution of at least two-thirds of the members of a joint sitting of both chambers of Parliament. This provision raises interesting questions on the import of self-executing treaties. Treaties may be self-executing wholly or just in respect of some of their provisions where ‘they lend themselves to judicial or administrative application without further legislative implementation’.<sup>28</sup> The UN Committee on Economic, Social and Cultural Rights states that, with regard to the provisions of the Covenant on Economic, Social and

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<sup>28</sup> Section 238(2) & (4).

Cultural Rights, courts should avoid any a priori assumption that norms should be considered to be self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

The rights entrenched in the Swazi Constitution are entrenched in human rights treaties which may be self-executing. There have not been many cases in which the courts have had to directly apply international human rights law. Among the few cases in which international human rights law has been applied is that of *Swaziland National Ex-Miners Workers Association and Others vs The Minister of Education and Others* (unreported High Court case 3 35/2009) in which the court reiterated the legal position that the country has adopted the dualist approach, but also stated that international instruments have a bearing on the interpretation of constitutional provisions. International law, the High Court observed, is the basis on which the Bill of Rights chapter is premised and the lawmakers should not be 'presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law'.<sup>29</sup> International human rights law, case law, resolutions and general comments should inform courts' interpretation of constitutional provisions to ensure that the country's laws are evaluated and applied in line with the country's obligations under international law. Here, persuasiveness is the operative criterion, but courts should avoid findings which, if taken before an international body with jurisdiction over the case, would lead to a finding of a violation of international human rights.

The High Court also referred to international law in the cases of *Rex vs Siboniso Sifanyana Mngometulu & Another*<sup>30</sup> and *Rex vs Makhosi Dlamini*<sup>31</sup> (hereafter 'Makhosi Dlamini'). These cases dealt with juvenile boys who were charged, tried and convicted by a magistrate's court of the crime of rape. All of them were sentenced to a term of five years in prison without the option of a fine. The accused were 14 years old when the offences were committed. On review, the High Court observed that Swaziland is a state party to the UN Convention on the Rights of the Child (CRC) and that 'principles enshrined therein may therefore ... be properly taken into account in dealing with matters before this court'.<sup>32</sup> The court pointed out that one of the principles contained in the CRC relates to detention of children and juveniles and requires that, where children are accused of criminal offences, detention should be a sanction of last resort, and then for the shortest possible period. The court further stated that there is a need for legislation dealing with children and juveniles within the criminal justice system and that Parliament should take corrective measures regarding this issue considering the serious effects detention may have on a child who has had the misfortune of coming into conflict with the law.

In the case of Makhosi Dlamini, the court pointed out that it ought to be guided by the principles set out in the CRC, which include the principle of proportionality, the best interests of the child and the possible restrictive deprivation of the child's liberty, and that detention, if appropriate, must be a measure of last resort and, even then, for the shortest appropriate

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<sup>29</sup> Per Mohamed DP in *Azania Peoples' Organisation (AZAPO) & Others vs President of the Republic of South Africa* 1996 (4) SA 671 at 688 (CC).

<sup>30</sup> Unreported High Court Review case No. 57/2009.

<sup>31</sup> Unreported High Court Review case No. 5/2010.

<sup>32</sup> *Siboniso Sifanyana Mngometulu* (supra) paragraph 17 at p. 11.

period of time. The court considered the five-year sentence handed down in respect of the child offenders to be harsh and reduced it to two years' imprisonment wholly suspended for a period of three years. Through these cases, the High Court has taken tentative steps to refer to, and invoke, international law.

The case of *R vs Mngomezulu & Others 1977 High Court decision*<sup>33</sup> is instructive as regards Swaziland's dualist approach. The case involved two ANC cadres who were arrested for being found in unlawful possession of arms of war and ammunition. In their defence, the accused argued that such a criminal offence had since been superseded by Swaziland's international obligations as a signatory of the Organization of African Unity's (OAU's) founding instrument, in that the aforesaid organisation had adopted resolutions calling on member states to provide assistance for all those committed to the overthrow of the apartheid regime in South Africa. Chief Justice Nathan disposed of the matter by stating, 'I can find no support in the resolutions ... for these allegations. Even if there are further resolutions which bear on the question it appears to me that there is nothing in the municipal law of Swaziland which incorporates such resolutions as part of the law of Swaziland.'<sup>34</sup> This decision was arrived at in 1977, 28 years before the present constitution of Swaziland was adopted in 2005.

Swaziland has ratified some of the most important conventions relating to the justice sector, the rule of law and the independence of the judiciary. The following is a list of the relevant conventions ratified by the Kingdom of Swaziland.

Conventions which have not been ratified include, but are not limited to, the Optional Protocol to the Convention on the Rights of Persons with Disabilities, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, the Optional Protocol to the ICCPR, and the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. Swaziland has also not ratified the UN Convention against Transnational Organized Crime and the Rome Statute. This non-ratification has contributed to the low global ranking of Swaziland in various areas.<sup>35</sup> At the regional level, Swaziland has yet to ratify the following notable treaties: The Optional Protocol to the African Charter on the Rights and Welfare of the Child, the Convention Governing the Specific Aspects of Refugee Problems in Africa and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

The signing/ratification of international conventions is not without legal consequences. While non-binding international instruments are not legally binding at the national level, when they are adopted they do have some important legal consequences. The adoption of international instruments at a major international or regional conference, for instance, does constitute some evidence of state practice. It demonstrates that the states present at the meeting were prepared to accept that the statements they agreed to represented a common set of goals, aims or aspirations concerning a particular issue, for example the protection of women's rights – as was the case with respect to the Maputo Protocol.

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<sup>33</sup> 1977–78 SLR p. 159.

<sup>34</sup> *Ibid* at p. 161.

<sup>35</sup> See <http://sz.one.un.org/index.php?option=?=+id=:international-instruments&catid=142:un-in-swaziland> (accessed on 3 February 2012).

*Table 1: List of international and regional conventions acceded to and ratified by Swaziland*

<b>Name of convention</b>	<b>Status</b>	<b>Date</b>
International Convention on the Elimination of All Forms of Racial Discrimination	Accession	7 April 1969
Freedom of Association and Protection of the Right to Organise Convention	Ratification	26 April 1978
Right to Organise and Collective Bargaining Convention	Ratification	26 April 1978
Convention concerning Forced or Compulsory Labour	Ratification	26 April 1978
Equal Remuneration Convention	Ratification	5 June 1981
UN Convention on the Rights of the Child	Accession and ratification	22 August 1990 and 7 September 1995 respectively.
African Charter on Human and Peoples' Rights (ACHPR)	Accession	15 September 1995
UN Convention against Transnational Organized Crime	Accession	8 January 2001
Constitutive Act of the African Union (AU)	Ratification	8 August 2001
Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour	Ratification	23 October 2002
Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organized Crime	Accession	24 March 2004
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Accession	24 March 2004
International Covenant on Economic, Social and Cultural Rights (ICESCR)	Accession	26 March 2004
International Covenant on Civil and Political Rights (ICCPR)	Accession	26 March 2004
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	Accession	26 March 2004
Convention on the Rights of Persons with Disabilities	Ratification	12 September 2012

The adoption of such instruments therefore becomes important evidence of state practice which can become the basis for the development of customary international law.

Swaziland is a member of the UN, the AU and the Southern African Development Community (SADC) and, to its credit, has signed or ratified some of the international and regional conventions.

Cooperation at the regional level is one of the most effective methods of enforcing human rights norms within states. However, the effectiveness of the enforcement mechanisms largely depends on the efficacy of the specific institutional framework established by the regional instrument for that purpose. For instance, the AU has an oversight body, the African Commission on Human and Peoples' Rights, which, in a recent case,<sup>36</sup> held that governments should avoid restricting rights and should have special regard to those rights protected by constitutional or international human rights law. The Commission went on to state that international human rights standards must always prevail over contradictory national law.

The Commission's position is that it considers its decisions as an authoritative interpretation of the Charter and therefore binding on states. The binding nature or otherwise of its recommendations depends largely on the goodwill of states.

Swaziland has a relatively good track record of signing and acceding to international conventions. In 1995, for instance, Swaziland ratified the CRC, although it then made a declaration at the time of ratification that the implementation of its obligations had to be achieved progressively, and that it would strive for full compliance as soon as possible. Therefore, in so far as Swaziland has not brought its national laws in line with the provisions of the CRC, it is technically not in breach of its obligations. Swaziland is in a rather incongruous situation, because, while it has expressed the political will to accede to the Convention, it has managed to avoid being bound by the obligations created thereby without actually making a specific reservation regarding any of the provisions therein. In other quarters, it has been suggested that 'the Swazi Parliament is very reluctant to fully ratify the CRC because of the implications that arise for customary law'.<sup>37</sup> The act of acceding to international legal instruments is not usually accompanied by the corresponding act of ratification and incorporation of international law into Swaziland's domestic law. Where Swaziland has had the opportunity to domesticate contents of international instruments which it has signed, it has usually fallen short in some way. For instance, in 2005, when the country adopted its Constitution, it made provision for children's rights but permitted 'moderate chastisement'<sup>38</sup> of children – a provision that is contrary to the CRC, which disallows the use of any corporal punishment.

Swaziland has not adopted implementing legislation relating to the treaties it has ratified. In addition, no institutional arrangements have been made specifically for the implementation of human rights treaties. It remains unclear what form the legislation for domesticating treaties should take. The Constitution does not give guidance in this regard. Parliament therefore has a discretion to choose whether to reproduce the entire text of a treaty in the incorporating act of Parliament or to incorporate the treaty in question by or without implication. The result has been lack of uniformity in the way Parliament domesticates international treaties, which has led to uncertainty as to whether certain international standards have been incorporated at all. The country would do well to amend the Constitution to clarify what form should be taken by legislation that domesticates the state's treaty obligations. In this respect, the provisions of the

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<sup>36</sup> *Media Rights Agenda and Constitutional Rights Project vs Nigeria* (2007) 7 IHHR 265.

<sup>37</sup> Gallinetti, J, Report on Children's Law in Swaziland, commissioned by Save the Children (Swaziland) and the United Nations Children's Fund (UNICEF), 2004, at p. 21.

<sup>38</sup> Section 29.

Namibian Constitution are instructive. In Namibia, international law is directly applicable unless otherwise provided for by the Constitution or an act of Parliament.

There are a number of laws that are inconsistent with international treaties that Swaziland has signed and ratified. The law relating to women married under the Marriage Act<sup>39</sup> and in community of property remains discriminatory against women, contrary to the provisions of the CEDAW, which Swaziland ratified in 2004. Women's minority status both in customary law and with regard to certain aspects of civil law negatively affect their ability to independently pursue economic interests and to access and control resources without the requirement of assistance by male relatives. This subordinate legal status has implications for all aspects of women's lives and has contributed to inhibiting their advancement.

The Suppression of Terrorism Act 3 of 2008 is another law that includes provisions which are contrary to the provisions of the ICCPR on the right to a fair trial. The act gives wide powers to the state to certify and declare any person, group or organisation to be a terrorist entity. Further, it gives the police extensive powers of arrest without warrant and to detain, based on a High Court order secured *ex parte*, any person for the purpose of preventing him or her from committing an offence under the act. The incumbent Prime Minister of Swaziland, Dr Barnabas Sibusiso Dlamini, metaphorically refers to the legislation as a knobkerrie, a traditional club used by Swazi males as a defensive weapon. In rejecting calls to review the legislation, he asked: 'What does the person who keeps telling me to throw away my weapon [the Terrorism Act] want to do to me once I have thrown away my knobkerrie?' For good measure, he added: 'The Suppression of Terrorism Act will stay in place until government was convinced terrorists were no longer a threat.'<sup>40</sup>

Another law that is contrary to the right to a fair trial is section 313(t) of the Criminal Procedure and Evidence Act (CP&E) of 1938, which provides that 'if a person is convicted before the High Court or any magistrate's court of any offence other than one specified in the Third Schedule the court may in its discretion postpone ... the passing of sentence and release the offender...'. Section 313 of the CP&E prescribes a mandatory custodial sentence in respect of the offences listed in the Third Schedule and proscribes the possibility of suspending any portion of such sentence. In the case of *Rex vs Mfanzile Mphicile Mndzebele*, the High Court declared section 313(t) of the CP&E to be unconstitutional, a position that was reiterated in the Makhosi Dlamini case.

Another law that is contrary to the provisions of the Constitution is section 16(3) of the Deeds Registry Act and regulations 7 and 9 of the Deeds Registry Regulations. Section 16(3) of the Deeds Registry Act requires that a woman married in community of property assume the husband's surname in the registration of immovable property. This provision is inconsistent with sections 20 and 28 of the Constitution. The High Court declared section 16(3) of the Deeds Registry Act to be unconstitutional and, in doing so, Mabuza J stated: 'It is clear to me that something must be done about section 16(3) of the Deeds Registry Act. The Constitution was promulgated in July 2005 and there has been no overt move to bring this section into alignment

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<sup>39</sup> No. 47/1964.

<sup>40</sup> *Times of Swaziland*, 23 April 2009, p. 14.

with the Constitution by the legislature.<sup>41</sup> When the matter was heard on appeal, the Supreme Court confirmed the decision of the High Court, but suspended the declaration of invalidity for a period of 12 months from the date of the court order in order to enable Parliament to pass such legislation as it might deem fit to correct the invalidity in section 16(3) of the Deeds Registry Act. The court further held that, should Parliament fail to remedy the unconstitutionality in the section declared to be inconsistent with the Constitution within 12 months, the appellant would have leave to approach the court on the basis of the record to seek such further order as the circumstances would require. During the validation workshop held on 24 September 2012, it was stated that Parliament had passed a law amending section 16(3) of the Deeds Registry Act. However, at the time of finalising the present report, the law had still not been gazetted.

On the issue of submitting reports, Swaziland has been slow, erratic and irregular in following the reporting procedures related to the international human rights treaties to which it is a party, though, in recent years, this has improved. Swaziland ratified the CRC in 1995, but was only able to submit its report to the Committee on the Rights of the Child in September 2006. State parties to the CRC are obliged to submit regular reports to the Committee of Experts on how the rights concerned are being implemented. States must report initially two years after acceding to the Convention, and then every five years. Swaziland was tardy in this regard, in that it only reported for the first time 16 years after it had acceded to the CRC. Swaziland has never presented a report to the UN based on its obligations under the ICCPR and the ICESCR. It was only in January 2012 that the government, with the help of UN agencies in Swaziland, held a workshop to train participants in the role and function of the treaty-monitoring bodies, and in understanding the reporting process as well as producing an effective report. In effect, since the time of accession to the core conventions, Swaziland has not prepared any reports under the ICCPR and the ICESCR, even though she has appeared before and reported under the Universal Peer Review (UPR) system.<sup>42</sup>

The reasons for the failure to submit most of the reports to the international and regional bodies to which Swaziland is a party is that it lacks the necessary technical and personnel capacity. However, the government, with the help of the UN, has sought to improve its record by conducting training in how these reports must be prepared. The problem with this training is that the procedure and criteria for the selection of participants are not transparent. What is clear, though, is that those attending the training are largely people from government departments. The process could, however, be enriched through transparent selection criteria as well as a mixture of participants from government as well as from civil society.

In the past, civil society involvement was on the basis of the preparation of shadow reports. Under the UPR process, there was an attempt to include members of civil society in the preparation of state reports. Even then, the appointment of people who were tasked to collaborate with government officials in writing the report was unclear. It is also unclear if the Inter-Ministerial Committee which prepared the UPR report will continue to prepare the reports as required by the other different international and regional organisations.

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<sup>41</sup> *Mary-Joyce Doo Aphane vs The Registrar of Deeds and Others*, Unreported High Court case No. 383/2009 at para 16, p. 8.

<sup>42</sup> Swaziland reported under the UPR system in October, 2011.

There has also been one complaint filed against the Kingdom of Swaziland with the African Human Rights Commission.<sup>43</sup> This was a communication filed against the state by a non-governmental organisation (NGO), namely Lawyers for Human Rights. The NGO complained that the King's Proclamation to the Nation violated provisions of the African Charter and requested the Commission to mandate Swaziland to take constitutional measures to give effect to all provisions of the African Charter. The matter was considered at the 37th Ordinary Session in Banjul, where the Commission ordered that the Proclamation be brought in conformity with the provisions of the African Charter.

### *The Constitution*

The Constitution of Swaziland is a product of a long and arduous process which culminated in the promulgation of the Constitution in July 2005. The process of drawing up the Constitution commenced in 1996 when the King put in place a Constitutional Review Commission chaired by Prince Mangaliso Dlamini. The Commission's terms of reference initially provided that it would draft a new Constitution, but these terms were subsequently amended to the drafting of a report, a report which was finalised in August 2001. The terms of reference of the Commission did not expressly allow for group submissions. NGOs were effectively prevented from making submissions and the Commission kept no records of any submissions it received. Media coverage of submissions was also apparently banned. In addition, information is said to have been elicited in a highly charged atmosphere in which individuals were reportedly asked, in the presence of chiefs, whether they wanted to retain the position of the King and whether they preferred political parties.<sup>44</sup> The Commission's report stated: 'There is a 'small' minority which recommends that the powers of the monarchy must be eliminated but that an overwhelming majority of the nation recommends that political parties must remain banned.' The conclusion of the report was thus:

An overwhelming majority recommends that the system of government based on the *Tinkhundla* (constituencies) continue, and, as well as the ban on political parties being maintained, the position of traditional advisers to the King be strengthened, and that Swazi customs should have supremacy over any contrary international human rights obligations.

It was on this premise that the Constitutional Drafting Committee (CDC), chaired by Prince David, was put in place.

The constitution-making process in Swaziland was criticised as being flawed, in that it was not sufficiently inclusive, transparent, participatory or accountable to the people. These are the main tests, it has been said, that any constitution-making process should pass for the final product to be considered as legitimate. According to the *Government Gazette*, records and documents of the proceedings of the Constitutional Review Commission were not to be made available to any person other than members of the Commission, the Attorney General (AG), experts assisting the

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<sup>43</sup> Case No. 251/2002: *Lawyers for Human Rights vs Swaziland*.

<sup>44</sup> International Bar Association Report (IBA) on Comments on Swaziland's Draft Constitution, 2004.

Commission and members of the secretariat.<sup>45</sup> The Supreme Court of Swaziland, in the case of *Jan Sithole (in his capacity as the Trustee of the Constitutional Assembly Trust) & Others vs The Prime Minister of Swaziland & Others*<sup>46</sup> (hereafter 'Jan Sithole' case), held that the appellants were not entitled to make submissions to either the Constitutional Review Commission or the CDC as representatives of their organisations, as representations were acceptable only if they were made by people in their individual capacities. In support of this view, the court relied on the decrees that put in place both the Constitutional Review Commission and the CDC. The court asserted that the 1996 Decree disentitled the appellants from participating, and that those decrees were neither invalid nor ultra vires. It reasoned that:

the Decrees afforded every one of the members of appellants organizations or bodies the complete right to make whatever submissions or representations they wanted to ... to the CRC in their individual capacities. They were only barred from representing others, or being represented by others, in making such submissions or representations.

The court reasoned, further, that it could not review the decisions of the Constitutional Review Commission not to take group representations, because its (the Commission's) functions were neither judicial nor quasi-judicial, and neither legal nor quasi-legal. 'Its task was to solicit and collate the views of the public on the political issues which were to form the foundation of the draft constitution.'<sup>47</sup>

The draft Constitution was finally presented to the King on 31 May 2003. Subsequently, the CDC carried out a national validation exercise in respect of the draft Constitution. This exercise consisted of collecting submissions from the Swazi people on whether the draft was an accurate articulation of the views that had been expressed over the years. In October and November 2004, the process of adoption of the Constitution was set in motion by the 'people's parliament' or *Sibaya* submission process. This process culminated in the submission for debate in Parliament of the Constitution Bill by the Minister of Justice on a certificate of urgency. The Constitution Bill finally became law through an Act of Parliament when it was gazetted as such in July 2005.

The Constitution is the supreme law of the land. The supremacy of the Constitution is, however, undermined, since the Constitution fails to subject all persons, the law, and institutions to its power. The King retains all the powers that he had under the King's Proclamation to the Nation, and remains both *de jure* and *de facto* head of all three branches of government. The pervasiveness of the powers of the King is compounded by the fact that he continues to wield powers as king and *iNgwenyama* – his powers when he acts in the latter capacity are virtually unlimited under Swazi law and custom.

In 2011, the Chief Justice issued a number of practice directives which were viewed as *ultra vires* his powers and as unconstitutional. The first practice directive barred legal practitioners from instituting legal action and or application proceedings against His Majesty the King and *iNgwenyama*, either directly or indirectly. The Chief Justice based the practice

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<sup>45</sup> See *Swaziland Today*, Vol. 8 No.7, 22 February, 2002.

<sup>46</sup> Unreported Supreme Court case No. 35/2007.

<sup>47</sup> *Jan Sithole* case at p. 15.

directive on section 11 of the Constitution, and further directed the office of the Registrar of the High Court to refuse to accept such summons or application proceedings. At face value, the directive may appear to mirror the said section 11 of the Constitution, but, on closer scrutiny, nothing could be further from the truth. The directive applies not only to the King, but also to anyone and anything that is done in his name. It is important to note that, when the Chief Justice issues directives, he does so in his capacity as a legal administrator as opposed to his capacity as a judicial officer. Consequently, he cannot purport to interpret, with finality, a constitutional provision when he acts as a legal administrator, as this is the preserve of a judicial officer sitting in a properly constituted court. The mandate of interpreting the Constitution is better left to judges when they are acting in their capacity as judges and not in their capacity as civil servants.

The other problem with the practice directive concerning the immunity of the King is that it extends the protection given to the King to a wide and undefined class of people. Clearly, this is unacceptable, as it opens the door to a myriad of human rights abuses by people claiming to have acted in the King's name. Consequently, ordinary people may be left without recourse, as the Registrar of the High Court will be bound not to register such matters. Ideally, it should be the duty of a properly constituted court of law, and not the Registrar of the High Court, to determine if a matter touches on the immunity of the Head of State.

Another shortcoming of the Constitution is that the Bill of Rights does not provide for social, economic and cultural rights as justiciable rights. Except for the right to education that is found in the Bill of Rights, other socio-economic rights are found in the chapter dealing with directives on state policy. Swaziland is a party to the ICESCR as well as the ACHPR, and, as such, is expected to incorporate some of these rights in the Bill of Rights. Socio-economic rights in the Swazi Constitution are only catered for as unenforceable policy.<sup>48</sup> If the worry is that Swaziland will not have sufficient resources to ensure the realisation of such rights, it should take comfort in the fact that it is possible to judicially enforce these rights, as courts do not insist that government should do what it lacks the necessary resource to do. Providing for socio-economic rights in the Bill of Rights would have ensured that these rights are enforceable in a court of law. That, by extension, would translate into the narrowing and limiting of the current economic inequalities in Swaziland.

In the case of *Swaziland National Ex-Miners Workers Association and Others vs The Minister of Education and Others*, the applicants made an urgent application against the respondents requiring the respondents to show cause why they should not be ordered by the court to make free primary education in public schools available to every Swazi child in terms of sections 29(6) and 60(8) of the Constitution. Section 29(6) is a provision in the Bill of Rights, while section 60(8) is in the part dealing with directives on state policy. Section 29(6) provides: 'Every Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with the first grade.' Section 60(8) provides: 'Without compromising quality the State shall promote free and compulsory basic education for all and shall take all practical measures to ensure the provision of basic health care services to the population.'

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<sup>48</sup> Section 59 and 60.

The applicants further required the respondents to make available to them the education policy relating to the implementation of their constitutional obligation. The High Court issued its order in March 2009, declaring that free primary education for all Swazi children in all grades in public schools should be made available by the government of Swaziland. The court pointed out that the government had a constitutional obligation to provide education free of charge to every Swazi child. It was also stated by the court that failure by the respondents to implement free primary education in all grades at the same time would amount to an abdication of their constitutional obligation.

When there appeared to be no move on the part of government to abide by the court order, the applicants returned to court to compel the respondents to outline the steps they were taking to ensure that free primary education would at least be made available to all Swazi children at the beginning of the school year in January 2010. The matter was registered under case number 2168/09. The respondents argued that they had not made a budgetary allocation for free primary education, because they had misunderstood their constitutional obligation under section 29(6) of the Constitution. The court stated that the issue of preparedness of the respondents to implement free primary education, as well as the availability of resources, could not be ignored, since all these factors had a bearing on the enforcement of the right to free primary education. The court was of the view that the court order handed down in March 2009 was nothing more than a declaratory order which was not self-executing and therefore did not compel the respondents to implement the right to free primary education. It said the order was not mandatory. According to the court, the respondents could not be dictated to by the court as to how they should go about implementing the right to free primary education. As the respondents had submitted that they could only implement the right through a staggered approach beginning with Grades 1 and 2 in 2010, the court sided with the respondents in this respect. The court observed that an order to force the respondents to implement, wholesale, free primary education could only be made where the court was satisfied, on a balance of probabilities, that the funds did exist. To support the view of the respondents, the court stated that ‘in countries where the economy is good and is not shaky like ours, it is understandable to issue such an order’, that is, compelling the government to roll out free primary education.

More astoundingly, the court went on to say:

[The] availability of the right in the constitution is one thing and its implementation is another thing and that for a court to declare that the right exists is one thing, the enforcement of the right is another thing which depends ultimately on the availability of resources; hence the court has to be careful not to be populist and play to the gallery and ignore closing the gap between theory and practice ...Whether the right in issue is absolute or qualified [the court reasoned], is irrelevant. What is decisive is the availability of resources, the preparedness of the state to enforce the right with the requisite structures in place.<sup>49</sup>

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<sup>49</sup> *Swaziland National Ex-Miners Workers' Association vs The Minister of Education & Others*, Unreported High Court case No. 2168/2009 paras 46 and 47 pp. 17–18.

The decision of the court contradicts provisions of the ICESCR. Articles 13(2) and 14 of the ICESCR have been interpreted to mean that states parties are required to 'prioritise the introduction of compulsory, free primary education'. The Committee responsible for interpreting the ICESCR has further pointed out that the requirement that primary education be free of charge is 'unequivocal' and that 'the right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians'. Thus the requirement to provide free and compulsory education is not subject to progressive realisation; rather, immediate action must be taken.

The Bill of Rights also does not include the right to habeas corpus, the right to be speedily informed of the reasons for the arrest or detention (instead, there is a right to be informed 'as soon as reasonably practicable'), and of the right of the person to a lawyer of his or her choice. The Bill of Rights, however, enshrines the right to freedom of assembly and association, although, in practice, political parties are still banned, despite the Supreme Court ruling that they can operate but not contest for power. In the Jan Sithole case (*supra*), Masuku J wrote a dissenting judgment in which he reasoned that the protection of the freedom of assembly and association implied that such rights should be upheld a priori in any other section, including that which says 'individual merit shall be the basis for election or appointment to public office'. The tenor of the dissenting judgment was that political parties were allowed to contest for public office as a result of the Constitution enshrining, in the Bill of Rights, the freedom of assembly and association. The majority judgment on this matter, it is submitted, renders the application of the rule of law in Swaziland a mirage and makes Swaziland a pariah state by virtue of making it acceptable for the country to disallow political parties to participate in a contestation for election to public office.<sup>50</sup> Such participation of political parties is a basic requirement in most international and regional instruments for democratic countries in the modern era.

The principle of non-discrimination is an important feature of the Constitution. The net effect of this provision is that people, especially women, children and other vulnerable groups like people living with disabilities, can no longer be discriminated against without such discrimination falling foul of the constitutional provisions. In reality, discrimination against women has historically been common practice for many decades. The minority status of women has been evident in cultural practices that place women in a subordinate position to men, and this has been further entrenched in various legislative provisions that have continued to perpetuate the divide between the rights of women and those of men. As an example, women married under Swazi law and custom cannot make decisions that pertain to their sexual reproduction, because the husband and his family hold exclusive marital power over such issues.

Most of the laws which are discriminatory in Swaziland originate in colonial legislation. The Intestate Succession Act is an example. The act regulates who is entitled to inherit the estate of a deceased person who has failed to effect a valid will. This legislation, in relation to children, is discriminatory, as only legitimate children can inherit from the estates of both their father and mother. Illegitimate children are only entitled to inherit from the estate of their mother. This act has been overtaken by section 31 of the Constitution which abolishes the status of illegitimacy.

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<sup>50</sup> Section 79 of the Constitution.

But until the legislation is removed from the statute books by Parliament or is invalidated by the courts on the grounds of unconstitutionality, it remains a part of the law in Swaziland.

### *Need to reform national legislation*

Swaziland has no law reform commission mandated to identify laws that are out of step with the Constitution and the country's obligations under international law. Consequently, there is a need for the establishment of such a body. International human rights law in the form of conventions to which Swaziland is a party, coupled with the Bill of Rights in the Constitution, is not effective unless buttressed with domestic laws that show, and reflect on, respect for human rights.

A law such as the Suppression of Terrorism Act, which has a negative effect on people's enjoyment of their rights, should, as a matter of urgency, be reviewed to make it comply with both human rights and constitutional provisions in this regard. At the time of compiling the present report, the author was informed that the Ministry of Justice was working on the amendment of the Marriage Act and the Administration of Estates Act. At the same time, the Sexual Offences and Domestic Violence Bill was being considered by Parliament, while the Children's Protection and Welfare Act was passed as law by Parliament in September 2012. The latter act domesticates most aspects of the CRC and seeks to introduce a child justice system that emphasises the best interests of the child. This is commendable, in part because Swaziland has a high number of orphaned and vulnerable children, mostly as a result of Aids-related deaths of their parents.

A review is also required with respect to the Suppression of Terrorism Act, which is an affront to constitutional provisions and international human rights conventions. The act permits incommunicado detention without charge or trial for up to seven days and empowers the state to order the removal from Swaziland of any person suspected of an offence under the law without procedural safeguards. There is thus a need to either repeal or amend this law to ensure that it upholds human rights in its responses to any acts of violence, including suspected acts of terrorism.

## **F. Structure of the courts**

### **Background**

The historical development of the court structure in Swaziland was alluded to in the sub-topic dealing with the development of the legal system. As stated earlier, Swaziland is a former British Protectorate which was administered through Roman-Dutch common law as well as through Swazi law and custom. When the British colonial authorities introduced the Roman-Dutch system of law into the Protectorate, they did not abolish the traditional legal and institutional arrangements that they found in Swaziland. Instead, they simply created an Anglo system of courts that existed side by side with the customary courts that pre-existed in the territory.

Although Swazi customary courts have been established in terms of statute, their procedures are commonly determined by traditional practices and may also be created by the court itself. The proceedings can be less rigid and formal than those in the Anglo system.

The differences in substantive and procedural law applied in Swazi customary courts and formal state courts has led to 'forum shopping', whereby citizens pick and choose which court is likely to produce a more desirable outcome in a particular case, and then choose to institute their matter in the chosen forum. This choice of courts is in itself a good thing, as each citizen has a 'right to choose' which court will be approached, and therefore which law will apply. However, the following example illustrates the evils of forum shopping.

In terms of Swazi law and custom, a man may obtain custody of a minor child by paying the customary 'purchase price'. In a trite ruling of the High Court, this customary practice was declared contrary to good morals or *contra bonos mores* and the court thus refused to sanction customary transactions involving the purchase and sale of children. Therefore, in a dispute over the custody of a minor child, because of the choice of court a male litigant would much rather institute custody proceedings in the Swazi national courts, whereas a female litigant would sooner institute custody proceedings in the state courts than in customary ones.

It is important to determine with certainty the issue of which law is superior between Swazi law and custom and the received law as well as the Constitution, mainly in relation to child marriages in Swaziland. Girls under the age of 18 years are often married, sometimes forcefully, under Swazi law and custom. While these marriages could be contested in the common law courts on the grounds that the girl has not reached the legal age of consent, there is no such age of consent in Swazi law and custom. How, then, is such a case to be pursued, and from where does the girl derive her rights? How does a widow who is a victim of property-grabbing pursue her case? Does the widow take her case to a customary system which disqualifies her from direct inheritance, and gives her in-laws authority to dispose of the estate following customary law principles?

There was general agreement among respondents that the existence of a dual legal system in Swaziland is problematic. The system was said to be the cause of confusion and conflicts. Some respondents, mostly female, expressed the opinion that the duality results in the potential infringement of the rights of certain persons, particularly women and children. This category of respondents advocated for the replacement of the dual system with a uniform system of law.

Other respondents said the duality merely creates the perception of conflict, while, in reality, there is no conflict between the two legal systems. The perception of conflict was said to be manifested in discomfort and hostility on the part of in-laws towards wives who are married under the modern law as opposed to the customary law, ostensibly because these women then resort to a different, and presumably conflicting, value system.

Yet other respondents, mainly from the urban and peri-urban areas, also disagreed that a dual system of law is confusing, instead suggesting that duality should be maintained and that the nature of conflicts must determine under which law a case should be adjudicated. Accordingly, in relation to criminal matters, they felt minor offences should be dealt with under customary law, while serious offences should be dealt with in the common law courts.

The Constitution provides that Roman-Dutch common law is the common law of Swaziland, but applicable only when its principles are not inconsistent with the Constitution. Similarly, principles of Swazi customary law are applicable and enforceable as part of the law of Swaziland as long as they are not 'repugnant to natural justice or morality or general principles

of humanity'.<sup>51</sup> Instances where customary law has been declared a nullity for its failure to comply with natural justice are difficult to find. There is a need, therefore, to codify Swazi law and custom, if only to ensure its certainty and predictability. In the past decade, there was a move to codify Swazi law and custom. The result of this process was never made public. The application of Swazi law and custom in the traditional courts is the exclusive preserve of men, as all Swazi courts are presided over by men. This may not be in line with Swaziland's international obligations to allow women to participate in decision-making processes, such as those in the Swazi courts.

It now remains to consider the structure of the courts as it obtains in modern-day Swaziland. The modern system is based on Roman-Dutch common law and comprises the Supreme Court (formerly the Court of Appeal), the High Court, magistrates' courts, the Industrial Court and Small Claims Courts. The traditional system is based on Swazi courts which follow unwritten traditional law and custom. Most legal disputes are handled in the traditional court system and are administered at this local level. Sentences imposed by a traditional court may be reviewed by the High Court. An appeal on a matter heard in a Swazi court may only be heard by the High Court once the litigant has exhausted the appeal process within the traditional court hierarchy.

## The Supreme Court

The Supreme Court, which was formerly the Court of Appeal, was established by the Court of Appeal Act of 1954, as well as by sections 145 and 146 of the Constitution. It is the highest court in the land<sup>52</sup> and has jurisdiction over all criminal and civil appeals from the High Court sitting in its original or appellate jurisdiction. It also has conferred jurisdiction under the Constitution or any other law. The Supreme Court also has supervisory and review powers over all courts in Swaziland.

## The High Court

The High Court was established by the High Court Act of 1954, as well as by sections 150 and 151 of the Constitution. The High Court has unlimited original jurisdiction in civil and criminal matters, and such appellate and review jurisdiction as was vested in it prior to the commencement of the Constitution.<sup>53</sup> The court has power to enforce the fundamental human rights and freedoms guaranteed by the Constitution, as well as to determine any matter of a constitutional nature. The jurisdiction of the High Court is expressly excluded by the Constitution in any matter in which the Industrial Court has exclusive jurisdiction. The High Court also 'has no original, but has review and appellate, jurisdiction in matters in which a Swazi (traditional) court or Court Martial has jurisdiction under any law'.<sup>54</sup> The Constitution also ousts the jurisdiction of the High Court in matters relating to the Office of the King when he acts in his capacity as *iNgwenyama*, the Office of the Queen Mother, the authorisation of a regent, the appointment and revocation

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<sup>51</sup> Section 252(3) of the Constitution.

<sup>52</sup> Section 146(1) says the Supreme Court is the final court of appeal.

<sup>53</sup> Section 151(1)(a–d) of the Constitution.

<sup>54</sup> Section 151(3)(b) of the Constitution.

of a chief, the composition of the Swazi National Council, and other matters that are regulated by Swazi law and custom.<sup>55</sup>

The High Court has its seat in the country's capital city, Mbabane. In the period 2010/2011, there was an attempt to decentralise the services offered by the judiciary by having judges of the High Court sit in regional towns around the country. This initiative has not been sustainable owing to resource constraints. This practice was laudable, as it sought to improve access to justice for the majority of the people by bringing the courts closer to them. The initiative was, however, short-lived.

## The magistracy

Magistrates' courts were established by the Magistrates Court Act 66 of 1938. Section 3 of the act created three classes of courts. Magistrates are not required to have legal training as a precondition for appointment. Section 4(4) of the act empowers the Minister of Justice, with the concurrence of the Prime Minister, to appoint and designate any magistrate as a principal magistrate or senior magistrate, with such special duties as the Minister, in consultation with the Chief Justice, may prescribe.

The criminal jurisdiction of first-class magistrates' courts extended to all offences except treason, murder and sedition, and conspiracy or an attempt to commit any of the three offences.<sup>56</sup> Under the Magistrates Court Amendment Act of 2011, the classification of the courts into first, second and third class was abolished and was replaced with a classification into principal magistrate's court, senior magistrate's court and magistrate's court.<sup>57</sup> The provisions of the Magistrates Court Act and the structure of the courts were not altered materially until 1982. In that year, the Judicial Service Commission (JSC), which had ceased to exist following the repeal of the Independence Constitution in 1973, designated, under section 5(2)(b) of the act, the office of magistrate to be a judicial office, thereby placing magistrates under the authority of the JSC. In terms of section 16, certain laws, including section 4 of the Magistrates Court Act, which originally classified magistrates courts into first, second and third class, were necessarily amended as a consequence of the coming into force of the amending act. The new section provides that a magistrate's court shall have jurisdiction over the area determined by the Minister by notice in the *Government Gazette*, and that a magistrate above the rank of senior magistrate shall have jurisdiction over every district in Swaziland.

Effectively, this law abolished the old distinction between classes of magistrates' courts in favour of the new designation of magistrate, with jurisdiction limited to a particular district, and senior or principal magistrate, with jurisdiction extending to any crime committed in any part of Swaziland.

Section 71(1) states that a person will be tried within the district in which he or she allegedly committed the offence with which he or she is charged. Every district has a magistrate or a senior magistrate. There are only three principal magistrates in Swaziland at present. Principal magistrates hear matters in more than one district; they do not have a permanent seat in one district, but are allocated cases in two districts at a time.

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<sup>55</sup> Section 151(8) of the Constitution.

<sup>56</sup> Section 70(1) of the Magistrates Court Act.

<sup>57</sup> Sections 3 and 4 of the Magistrates (Amendment) Act, 2011.

In terms of punishment, the jurisdiction of a first-class magistrates' court was a sentence of imprisonment not exceeding seven years. Currently, the jurisdiction of a senior magistrate is a sentence of imprisonment not exceeding ten years. A principal magistrate may impose imprisonment for a period not exceeding 15 years.<sup>58</sup>

The Magistrates Court (Amendment) Act has also increased the civil jurisdiction of a magistrates court by raising the maximum amount of money it can order in compensation to E10 000 in the case of magistrates, E20 000 in the case of senior magistrates and E30 000 for principal magistrates. The civil jurisdiction of the courts is subject to the legislation which empowers the clerk of the court to refuse to issue summons if he determines that parties who are Swazis should have their matter determined by a Swazi court administering Swazi law and custom.

Compared with the High Court, magistrates' courts hear the bulk of criminal matters on a daily basis. Lately, the courts often sit even over weekends to hear and dispose of matters involving, for instance, drunken driving, with the accused usually being tried summarily and fines being imposed. The fines imposed for offences under the Road Traffic Act range anywhere from between E500 (for drunk police officers) to E5 000 for ordinary people. Magistrates have discretionary power as to the type of punishment they may mete out in all matters over which they preside.

Magistrates' courts also sit as maintenance courts. They have also been designated by the Children's Protection and Welfare Bill to be children's courts. Even though the judiciary has a Code of Conduct, some of the magistrates say they have never had sight of the said document.

There is no law that stipulates the qualification one must have before being appointed as a magistrate. Lately, though, the practice is that one must have a first degree in law before being appointed to the position of magistrate. Nevertheless, there are some magistrates who only have certificates or diplomas in law, or work experience as police officers. The majority of magistrates are drawn from the Office of the Directorate of Public Prosecutions, while a number of them were previously private practitioners. Women are in the minority in the magistracy.

## The Industrial Court

The Industrial Court is established by the Constitution. The Constitution also states that the High Court does not have jurisdiction to preside over a matter in which the Industrial Court has exclusive jurisdiction. The latter court is vested with exclusive jurisdiction over labour matters in Swaziland, including unfair dismissals, disputes over labour agreements, and labour union activities such as strike action. In the past, judicial officers in the Industrial Court were employed on fixed-term contracts of two years, but this has changed and judges of the Industrial Court now enjoy security of tenure, as they are employed on permanent terms. This is with the exception of one judge who was appointed in an acting capacity pending the finalisation of a criminal matter in which he had been indicted for, amongst others, alleged corruption and fraud.

The Industrial Court has demonstrated that, in practice, it is maintaining its independence. The case of *Ben Zwane vs The Swaziland Government & Others*<sup>59</sup> is a case in point. The applicant,

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<sup>58</sup> See the Magistrates Court (Amendment) Act, 2011.

<sup>59</sup> Case No. 20/2002 (a).

a clerk of Parliament, had initially brought this matter to the Industrial Court, objecting to being transferred by the Prime Minister to another post within the civil service. The court granted the applicant his prayer and ordered the stay of the transfer. In response, and as reported in an official government publication, the Prime Minister disregarded the court order in the name of political expediency. When countering the accusation that this amounted to a violation of judicial independence, the Judge President stated:

The Honourable Prime Minister set law enforcement officers on a self-destructive mission to subvert the authority and dignity of His Majesty's Court. The Executive arm of government resorted to self-help, oblivious and regardless of the consequences of the tenets of the rule of law which is the shibboleth of any modern democracy. In doing so, the Honourable Prime Minister became the complainant, Prosecutor and judge in his own cause contrary to the tenets of natural justice.<sup>60</sup>

Rulings by the court may be appealed to a three-judge bench of the High Court sitting as the Industrial Court of Appeal, and subsequently to the Supreme Court.

## The Small Claims Court

Until recently, magistrates' courts could only preside over civil claims which did not exceed the total of E2 000. Any suit, therefore, which involved a claim higher than E2 000 had to be transferred to the High Court. The result was that the High Court was overloaded with matters involving money in excess of E2 000. As indicated earlier, the jurisdiction of magistrates' courts has since been increased and people can now lodge civil claims in these courts amounting to between E10 000 and E30 000. The problem, though, is the backlog of cases that magistrates' courts have to contend with. The practice is to prioritise criminal matters, especially matters involving accused persons who are in custody. The effect is that civil matters that are considered 'trivial' because of the low amounts being claimed may take a long time to be heard in a magistrate's court. This adds to the backlog of cases in the subordinate courts.

In order to improve access to justice by potential small claims litigants who may otherwise be deterred from accessing the courts by the prohibitive costs in the magistrates courts and the High Court, Swaziland has established small claims courts. These courts are established in terms of the Small Claims Courts Act of 2011, which allows for cases involving amounts of up to E10 000 to be heard in such courts. The cap of E10 000<sup>61</sup> may be increased by the Minister by a notice published in the Government Gazette. Legal representation is not allowed in the small claims courts on the grounds that litigants should not have to worry about lawyers' fees. The procedure is flexible and easy to follow. Litigants may opt to use any of the official languages in the country. If there is a need for an interpreter, the clerk of the court makes arrangements for this if evidence is to be given in a language which one of the parties does not fully understand.

In the small claims courts, only natural persons are qualified to institute proceedings against legal and natural persons, except the government. Juristic persons can only participate as

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<sup>60</sup> Ibid at p. 5.

<sup>61</sup> Section 16 of the Small Claims Court Act.

defendants and must be represented by a director.<sup>62</sup> Commissioners are the presiding officers in these courts and they must be admitted either as attorneys or advocates, or be law lecturers.<sup>63</sup> The act was passed in 2011, but has still not been implemented, in that no small claims court is presently operational. It is hoped that the logistics will be put in place to allow these courts to function so that a majority of the Swazi population who have small amounts to secure through litigation, may do so. These courts would also go a long way in alleviating the backlog of cases that the other common law courts battle with on a perennial basis.

## The Swazi courts

In the context of this report, the term ‘Swazi courts’ refers to courts that are set up to administer Swazi customary law. Swazi courts were created by the Swazi Courts Act of 1950. In respect of the establishment of Swazi courts, the act provides that, by warrant under his hand, the *iNgwenyama* may recognise or establish, within Swaziland, Swazi courts which shall exercise jurisdiction over ‘members of the Swazi nation’ within such limits as may be defined by such warrants. The *iNgwenyama* may suspend, cancel or vary any warrant recognising or establishing a Swazi court. The act also states that a Swazi court shall be constituted in accordance with Swazi law and custom.

In respect of the criminal jurisdiction of the Swazi courts, the act provides that every Swazi court shall exercise criminal jurisdiction to the extent set out in its warrants and subject to the provisions of the act, and that:

such jurisdiction shall extend to the hearing, trial and determining of all criminal charges and matters in which the complainant and the accused are members of the Swazi nation and the defendant is accused of having wholly or in part, within the jurisdiction of the Court, committed or been accessory to the committing of an offence.<sup>64</sup>

The civil jurisdiction of Swazi courts is dealt with in section 7 of the act, which limits such jurisdiction to causes and matters in which all parties are members of the Swazi nation, and the defendant is ordinarily resident, or the case or action arises, within the area of jurisdiction of the court. However, the following matters are excluded from the ‘ordinary jurisdiction’ of Swazi courts:

- cases in which a person is charged with an offence in consequence of which death is alleged to have occurred, or which is punishable under the law with death or imprisonment for life;
- cases in connection with marriage other than marriage contracted under or in accordance with Swazi law and custom except where and in so far as the case concerns the payment or return or disposal of dowry;
- cases relating to witchcraft, except with the approval of the Judicial Commissioner.<sup>65</sup>

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<sup>62</sup> Section 8 (1)–(3).

<sup>63</sup> Section 10.

<sup>64</sup> Section 8(2) of the Swazi Courts Act.

<sup>65</sup> Section 9 of the Swazi Courts Act.

As far as the law to be administered is concerned, the act provides that a Swazi court shall administer 'the Swazi law and custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland'.<sup>66</sup> In respect of practice and procedure in these courts, the act essentially provides that they shall be regulated in accordance with Swazi law and custom.<sup>67</sup> The Swazi Courts Act has curtailed the power of Swazi courts by prohibiting them from trying capital offences and cases involving witchcraft, as well as limiting the punishment options available. In this respect, the obvious casualty has been the traditional punishment option of banishment. It should be noted, however, that various traditional authorities continue to invoke the punishment of banishment to this day. In this respect, the case of *Makhubu Bhutana vs Chief Nhloko Zwane*<sup>68</sup> (the 'Makhubu' case) is instructive. In this case, the court stated that the Swazi Courts Act served the purpose of complementing its sister act, the Swazi Administration Act, and also confirmed indirect British rule in Swaziland.

Although the Swazi Courts Act officially abolished the traditional chiefs' courts and took away judicial power from the Swazi chiefs, the native courts which were in existence when the act came into force did not automatically cease to operate. This can be deciphered from section 14 of the act which states:

Notwithstanding anything in this Act a Native Court in Swaziland exercising jurisdiction in accordance with Swazi law and custom at the commencement of this Act shall continue to exercise such jurisdiction until the iNgwenyama, by written notice, directs that such court shall no longer exercise jurisdiction or unless a warrant under section 3 be sooner issued recognising or establishing such court as a Swazi Court under this Act.

To all intents and purposes, though, chiefs in Swaziland have continued to exercise judicial powers unabated.<sup>69</sup> Only *iNgwenyama* may terminate chiefs' courts at will or give them a further lease of life by establishing or recognising them under section 3 as a Swazi court. Judicial support for this position is found in *Ray Gwebu & Lucky Nhlanhla Bhembe vs The King and the Makhubu* case cited above.

The authority of Swazi courts must also be viewed in the light of the ill-fated Swazi Administration Order of 1998.<sup>70</sup> This legislation attempted to 'resurrect' customary criminal law and procedure in Swaziland and, had it come into force as law, its effects would have had telling repercussions for the criminal justice system in Swaziland. This law contained a miscellany of provisions establishing customary criminal law as a major player in the criminal justice system of the country. The Order, inter alia, empowered the *iNgwenyama* to establish, in accordance with

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<sup>66</sup> Section 11 of the Swazi Courts Act.

<sup>67</sup> Section 21 of the Swazi Courts Act.

<sup>68</sup> Unreported High Court case No. 7/1999.

<sup>69</sup> See *Enock Gwebu vs Chief Ntunja Mngomezulu*, Unreported High Court case No. 305/1989 and the case of *Makhubu Bhutana vs Chief Nhloko Zwane* (supra).

<sup>70</sup> No. 6/1998. This legislation was declared invalid by a Full Bench of the High Court – a decision that was confirmed by the Court of Appeal in the case of *Chief Mliba Fakudze & Others*, Unreported Court of Appeal case No. 2823/2000.

customary law, chiefs' courts with the power to exercise criminal jurisdiction in certain matters involving 'members of the Swazi nation'. The law went on to specify that the law, practice and procedure of chiefs' courts were to be based on customary law.

The immediate question that arose when the Order was passed was why, at this stage of Swaziland's progress into the 21st century, judicial power was being restored to the chiefs. The Order did not seek to restore such power to any and all chiefs. Instead, it sought to give judicial power to particular chiefs, and these were the chiefs in respect of whom the *iNgwenyama*, by warrant under his hand, would have established or recognised chiefs' courts in their chiefdoms in accordance with Swazi law and custom. One reason that was advanced for issuing this Order was that it sought to ease the case load of the other courts.<sup>71</sup>

It has been pointed out that chiefs lost their criminal jurisdiction in 1912, and their civil jurisdiction in 1950 when the Swazi Courts Act was passed. Furthermore, in a number of High Court decisions, the court ruled that chiefs no longer had judicial competence. Thus where a chief, before the Swazi Administration Order of 1998 was issued, performed judicial acts, such acts were considered a legal nullity. This irked the establishment, for whom chiefs are considered the footstool. One of the most effective weapons in the arsenal of the pre-colonial and colonial chief was the power of banishment. This power is still invoked in the Swazi context in the form of evictions.<sup>72</sup> In one widely reported case of eviction, a number of families from two chieftaincies were evicted by the armed forces in July 2000. This followed a chieftaincy dispute between the two chiefs, Chief Mliba Fakudze of Macetjeni and Chief Mtfuso Dlamini of KaMkhweli on the one hand, and Prince Maguga on the other. Prince Maguga was a senior prince and an elder half-brother of the *iNgwenyama*. The evictions were purportedly ordered by the *iNgwenyama* acting in terms of section 28 of the Swazi Administration Order.<sup>73</sup> Subsequently, the Court of Appeal of Swaziland, composed of three senior South African judges, granted interim relief to the evictees, most of whom had, together with their chief, taken refuge in South Africa since the eviction, allowing them to return to their homes pending final resolution by the courts regarding their status. The government defied this order by issuing a statement to the effect that it would not abide by the court judgment. Viewed in this context, Order 6 of 1998 can be seen as a response to the need to give judicial muscle to the chiefs, who are an essential component of the ruling elite in Swaziland, to deal with troublemakers and the so-called 'progressives' who might wish to rock the political boat.

The uncanny impact of the Order on the justice sector and on the rule of law was also that it sought to oust the supervisory jurisdiction of the superior courts in respect of matters governed by sub-sections (3) and (5) of section 28. Section 28(10) provides that 'a court shall not have jurisdiction to inquire into any order made under sub-section (3) nor shall any court issue an interdict or otherwise order the stay of such an order as a result of an appeal against conviction under sub-section (5)'.

Interestingly, the Order, like the Constitution Act, still retained the repugnancy clause as

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<sup>71</sup> Per Dr Matsebula Vincent, then socio-political analyst in the Prime Minister's office as quoted in the *Times of Swaziland*, 6 January 1999 at p. 8.

<sup>72</sup> Refer to the *Macetsheni* and *KaMkhweli* eviction cases.

<sup>73</sup> Sub-section 3.

a measure of the validity of a customary law rule in legislation enacted by a sovereign African state in the modern era.<sup>74</sup> The basis of the ‘repugnancy clause’ can be traced back to English constitutional law. In this regard, one needs to examine the cases of *Campbell vs Hall*<sup>75</sup> and that of *Calvin*.<sup>76</sup> In the former case, Lord Mansfield, speaking for a unanimous court, observed: ‘The laws of a conquered country continue in force until they are altered by the conqueror.’ In the memorandum attached and referred to in the Calvin case, it was stated:

But if a Christian King should conquer a kingdom of an infidel and bring them under his subjection, there ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and nature ... and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity.<sup>77</sup>

The above reference to English law spells out the rationale of the repugnancy doctrine that was a common feature in British colonial legislation. The doctrine is incongruous in legislation of a sovereign state in the 20th century. The validity of a customary norm must now be regulated by its consistency with other statutes of the land, including the basic law. The inclusion of the repugnancy clause in recent legislation in Swaziland must thus be reviewed.

The 1998 Order created penal provisions that were draconian. Section 5(5) stated:

Any person who fails to comply with an order made under subsection (3) or any of the conditions attached thereto shall, after thirty days’ service of the order, have his building or any structure on the Swazi area from which he has been removed, demolished without the payment of any compensation and further commits an offence and shall be liable on conviction to a term of imprisonment of not less than six months without the option of a fine.

Sub-section (6) stated that, ‘in addition to the penalty prescribed in subsection (5), a person convicted of an offence under the subsection, may be removed from the Swazi area to which the Order under subsection (3) relates by a member of the Royal Swaziland Police Force without further legal process’.

Under Swazi law and custom, one of the most serious offences that a citizen can commit is insubordination to the *iNgwenyama*, a chief or others in authority. Such an offence is punishable by the banishment of the individual offender and, in some cases, his or her family. The family of an accused person in this scenario is punished, as it is believed that ‘children may grow up to behave like their parents’.<sup>78</sup> This assertion is not without its problems, as the argument that children may grow up to behave like their parents is not only without scientific proof, but is also devoid of rational basis for the vicarious imposition of criminal sanctions on the otherwise

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<sup>74</sup> See section 20(a) of the Order and section 252(3) of the Constitution Act/2005.

<sup>75</sup> (1774) 1 Cowp 204 (98ER 1045).

<sup>76</sup> 7 Co. Rep 1.a (77 ER 377).

<sup>77</sup> See footnote in Calvin’s case entitled ‘Memorandum 9 August, 1772’, 77 ER at 398.

<sup>78</sup> A Swazi saying is that *imphangele itala imphangele*.

innocent families of the actual perpetrator of the crime. The hardship suffered by children and women when the two chiefs, Mliba Fakudze and Mtfuso Dlamini, were evicted from their areas and homes illustrates the inhumanity and harshness of banishment as a penal sanction.

It follows that if the home of a married 'offender' is removed from an area, his family would have no place in that community. The accumulation of such power in the hands of one person, no matter how benevolent, creates the opportunity for abuse and threatens the enjoyment of individual rights. This is even more so given the fact that the courts are barred in terms of sub-section 28(10) from inquiring into any order made under sub-section (3).

The Administration Order was aimed at strengthening the power of chiefs by giving them judicial authority to enforce criminal law. With chiefs' powers to punish in this manner solidified, the *tinkhundla* system of government had come full circle. *Tinkhundla* ensures, among other things, that only those people who are sympathetic and loyal to tradition, culture and the *iNgwenyama* have a say in fundamental and major decisions that affect the future of the Kingdom. The traditional elite have succeeded in employing the art of political patronage through putting their loyalists and supporters in most of the key and sensitive positions in the political administration.<sup>79</sup> In politically sensitive cases, traditional authorities flex their considerable muscle with devastating consequences for the rule of law. As Nhlapo points out, even in those cases where serious constitutional matters come before the general courts, experience has shown that the threat of intervention from the traditional order increases in direct proportion to the sensitivity of the issue raised.<sup>80</sup> Swazi law and custom is consolidating itself by adapting to the modern institutional context through refashioning and repackaging itself, as is reflected in the constitutional provisions.

The Constitution vests land in the *iNgwenyama*. In practice, however, land use is administered by the chiefs on behalf of the *iNgwenyama*. Before a person can acquire the right to use land, he must be officially recognised as a subject of the chief under whose domain he falls. This right to control the acquisition of land rights and the power to decide who should join the community and, thus, the concomitant power to ban from the community all those who displease him, make the chief an indispensable figure in the everyday life of the Swazi.<sup>81</sup>

Swazi law and custom has continued to be touted as a better option than the received law, because many people are unhappy with the received criminal justice system. The criminal justice system is often faulted as being unsuitable because of, inter alia, its delays, uncertainties, cost, technicalities and the unfamiliarity of its procedures, as well as its intimidating and impersonal atmosphere. In addition, common law courts are viewed as unsuited to serving the goal of reconciliation, which is of great importance in interpersonal relationships in small and intimate communities. Compounding the problem with the common law courts is the fact that their rules of court, procedures, evidence and even substantive rules of law exclude many grievances that are justiciable under customary law.<sup>82</sup>

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<sup>79</sup> Potholm predicted this development at p. 24. See also KO Adinkrah: 'We shall take our case to the King: Legitimacy and Tradition in the Administration of Law in Swaziland' (CILSA XXIV 1991) and Nhlapo, at 15 and 337–339.

<sup>80</sup> Op cit at 338.

<sup>81</sup> In practice every Swazi must furnish the name of his chief to the Ministry of Home Affairs every time he applies for a travel document and passport, and sometimes even when he makes application for a place in an educational institution.

<sup>82</sup> See Adinkrah op cit 238. See also AJGM Sanders, 'Legal Dualism in Lesotho, Botswana and Swaziland: A General Survey', 1968, *Lesotho Law Journal* 47 at 57.

The disaffection with the 'Western-type' criminal justice system often results in people taking the law into their own hands in the form of what is locally referred to as 'mbayiyanism', based on the case of *Rex vs Betty Mangenendlini and Mbayiyane Mnisi*.<sup>83</sup> In this case, three accused persons were charged with the ritual murder of a four-year-old girl. The court found that the prosecution had failed to prove its case beyond reasonable doubt, since the evidence of the accomplice witness on which the prosecution had relied had been discredited by the defence. The accused were then acquitted. The matter was reported in the media. Believing that the accused persons had used muti (one of the accused was a traditional healer) to achieve their acquittal, members of the community to which the accused persons belonged declared war on them, as well as the chief of the area for harbouring killers in his chiefdom. They burnt down the homesteads of the accused persons as well as the homestead of the chief. Later, they caught up with Mbayiyane Mnisi and stoned him to death. Such is the extent of people's disaffection with the criminal justice system as followed by the common law courts in Swaziland.

It is important to note that the criminal law of Swaziland was left in an undeveloped state by the British at independence. The British virtually left the criminal law at the mercy of South African law. While the British were busy enacting criminal codes for their colonies, they ignored the criminal law in Swaziland mainly because they envisaged that the Kingdom of Swaziland would eventually be incorporated into South Africa. Needless to say, this left a big vacuum in the criminal law of Swaziland. Consequently, important principles of Swaziland's criminal law, including the definition of serious crimes such as murder and culpable homicide, are not found in any statute, but must be gleaned from fragmented, Roman-Dutch common law sources. Additionally, the few statutory sources of the country's criminal law that exist are antediluvian and therefore, arguably, command no greater authority or respect than the customary law rules.<sup>84</sup>

The South African common law of crime has been dutifully relied upon in Swazi courts with no serious attempts being made to develop a 'unique Swazi law of crimes'. The failure of jurists in Swaziland to develop Swazi criminal law in this respect has resulted in the perpetuation of the slavish dependence of colonial and post-colonial Swaziland on the South African legal system, which has been compounded by the failure to publish Swaziland's law reports. The researcher was informed that the process of publishing law reports has only now been revived, although much remains to be done. In this regard, a small team within the AG's office has been reviewing case law and working with Butterworths Publishers to publish law reports. The most recently published law reports are for the years 2000 to 2002.

## G. The legislative process

Law-making in the Swazi legal system is a multifaceted process. The applicable law in Swaziland consists of: the Constitution; international law; acts of Parliament; decrees; orders in council; customary law; and Roman-Dutch common law.

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<sup>83</sup> Unreported High Court case No. 82/1991.

<sup>84</sup> Some of the statutory sources are The Crimes Act No. 6/1889; The Stock Theft Act No.6/1904; The Girls and Women's Protection Act No. 39/1920; The Obscene Publications Act No. 20/1927; The Homicide Act No. 44/1959.

The Constitution is the supreme law of the country and any law that is inconsistent with it shall, to the extent of the inconsistency, be void.<sup>85</sup> Norms of international law, unless they are self-executing,<sup>86</sup> do not have direct application in Swaziland. International conventions must first be incorporated into the country's municipal law before they can take effect.<sup>87</sup> The process of incorporation takes the form of an act of Parliament.

The importance of examining the legislative process in Swaziland is that it underpins the general policy of the government. For instance, where the government decides that, in order to be able to fight the scourge of crime, the accused person must be denied some of the rights conventionally accorded to him or her, this policy will find its way into legislation, which will ultimately deny the accused his or her right to bail. This was the case with the genesis of the Non-Bailable Offences Order.<sup>88</sup>

Parliament is the primary legislative organ of the Kingdom of Swaziland and its main function is to make laws.<sup>89</sup> Parliament in Swaziland consists of the King, the Senate and the House of Assembly.<sup>90</sup> This position has been slightly changed by the Constitution to say that Parliament consists of the King-in-Parliament<sup>91</sup> and the House of Assembly, as well as the Senate.<sup>92</sup> The two chambers sit separately, but, generally, all bills must be passed by both chambers and must receive royal assent.

As stated earlier, upon independence, Swaziland adopted a Constitution cast in the mould of the Westminster export model. Chapter V of the Constitution contained provisions relating to the legislature. Legislative power was vested in the King and Parliament, subject to the provisions of the Constitution.<sup>93</sup> However, with the abrogation of the Independence Constitution in 1973, all legislative powers were immediately vested in the King. In 1978, the King passed the Establishment of the Parliament of Swaziland Order 23 of 1978, by which he returned some legislative power to Parliament. This Order was subsequently repealed and replaced by the Establishment of Parliament of Swaziland Order 1 of 1992, which still governs the establishment of the legislature in Swaziland.

The Senate consists of 30 members, ten of whom are elected by the House of Assembly (by majority vote), and the remaining 20 are appointed by the King. Appointed Senators include chiefs, princes and people who represent special-interest groups. Chiefs are appointed on a regional and rotational basis. According to the Establishment of Parliament of Swaziland Order of 1992, the appointed Senators should be able to 'contribute substantially to the good governance of Swaziland'.<sup>94</sup>

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<sup>85</sup> Section 2 of the Constitution.

<sup>86</sup> Section 238(4).

<sup>87</sup> Section 238(2).

<sup>88</sup> No 2/1993.

<sup>89</sup> Section 106(b) of the Constitution states that the King and Parliament may make laws for the peace, order and government of Swaziland.

<sup>90</sup> See the Establishment of the Parliament of Swaziland Order, 1992.

<sup>91</sup> Section 106(a).

<sup>92</sup> Section 93 of the Constitution.

<sup>93</sup> The Constitution of Swaziland Act, 1968, Article 62(1). It is notable however, that Parliament was precluded from legislating in relation to certain specified matters which were to continue to be regulated by Swazi law and custom.

<sup>94</sup> Section 24 of the Establishment of the Parliament of Swaziland Order 23 of 1978.

The House of Assembly consists of as many members as there are *tinkhundla*, ten members appointed by the King, and the AG, who is an ex officio member. Appointees of the King are appointed after consultation with such bodies as he considers appropriate and taking into consideration 'any special interest not already adequately represented in the House.'<sup>95</sup>

The Constitution of 2005 has addressed the issue of the composition of the Senate. The Constitution provides that the Senate consists of no more than 31 members, and five of the Senators elected by the House must be female and should be representative of a cross-section of Swazi society. Of the 22 senators appointed by the King, eight of those must be female.<sup>96</sup> That the Constitution attempts to ensure gender equality in the legislature is laudable, but the fact that the constitutional provisions in this regard were disregarded when the present Parliament was elected and put into office is disconcerting. Swaziland is a signatory to the SADC Declaration (1997) and the SADC Protocol (2008) on Gender and Development. The 1997 Declaration required governments in the SADC to commit to focusing on women's interests in socio-economic, cultural, civil and political fields. This included achieving a 30% target of women in political and decision-making structures by the year 2005. Even though there has been increasing recognition by some SADC states of the need for affirmative action policies to redress the imbalance, sadly the Kingdom of Swaziland still lags behind in this respect. In the present Parliament, whose term expires in the year 2013, women constitute only 13.8% of the members.<sup>97</sup> That the Kingdom of Swaziland has also signed the 2008 Protocol on Gender and Development, which has increased the target for women's participation in Parliament and other sectors to 50%, is a sign of all the good intentions it might have about promoting women's rights. However, the rhetoric has not been matched by practice.

The High Court has jurisdiction to hear and determine any question relating to whether any person has been validly elected as a Senator by the members of the House of Assembly, and whether any person who has been validly elected as an elected member of the House is qualified to be so elected.<sup>98</sup> The court does not, however, have the power to determine any question concerning the validity of appointment of Senators or members of the House, for, to do so, would, arguably, be tantamount to questioning the Royal Prerogative and would be a breach of the concept of separation of powers.

According to the Constitution, the King and Parliament may make laws for the peace, order and good government of Swaziland.<sup>99</sup> A law is made by the passing of a statute through Parliament. During the course of its passage, a law is known as a bill, but, when it is passed, it becomes an act of Parliament. Acts of Parliament must be endorsed by a majority of the votes cast in both the House and the Senate, in the House, or at a joint sitting of the Senate and the House. Parliament cannot make laws without the concurrence of all its constituent parts, and therefore the assent of the Crown is required. The King must give consent before any legislation can take effect. After a

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<sup>95</sup> Section 14 of the Establishment of the Parliament of Swaziland Order 23 of 1978.

<sup>96</sup> Section 94(3) and (4).

<sup>97</sup> After the September 2008 elections, out of 66 Members of the House of Assembly, only nine are women. Out of 30 Senators elected by the House of Assembly and appointed by the King, only 12 are women (IPU, May 2009).

<sup>98</sup> Section 28 of the Establishment of Parliament Order, 1992.

<sup>99</sup> Section 106.

bill has gone through all its stages in Parliament, it is sent to the King for the Royal Assent. The King may withhold his assent and, in certain circumstances, may refer either the whole bill or parts of it back for consideration at a joint sitting of both chambers. Where such a bill is passed by a joint sitting of the Senate and the House within 90 days of it being referred to Parliament by the King, it is again presented to the King for assent, but if it is not passed the bill lapses.

When a bill has been duly passed and assented to by the King, it becomes law, but does not come into operation until it has been gazetted by the AG. It is notable that, in Swaziland, until a seminal decision of the Court of Appeal reversed this legal position,<sup>100</sup> the King could make laws independently of the two chambers of Parliament.

There are three kinds of bills that can be presented before Parliament: public bills, private bills and hybrid bills. Public bills relate to law which will be of general application once it is passed.<sup>101</sup> Private bills deal with personal matters or with local matters in a particular area of the country only.<sup>102</sup> Hybrid bills are in effect public bills which nonetheless have an impact on private interests in such a way as to make it necessary that part of the procedure for private bills be adapted for their passage.<sup>103</sup>

Bills may also be classified with respect to the manner of their introduction. From this perspective, a bill may be either a government bill or a private member's bill. A government bill is one that is introduced by a Member of Parliament who is also a Minister, while a private member's bill is one that is introduced by a Member of Parliament who is not a Minister. A bill may be introduced in either chamber of Parliament, except for money bills, which cannot be introduced by the Senate.

There are no discernible mechanisms through which the public can have insight into, make inputs into or influence parliamentary activities or the law-making process. Bills dealt with in Parliament usually reflect the interests of the different government ministries as opposed to the interests of the public. Members of Parliament are also not known to solicit the opinions of their constituencies in law-making matters, and the public is not empowered to recall a representative who may be regarded as lax. There are also no known mechanisms which Members of Parliament are expected to use in order to realistically consult with their constituencies. Coupled with the absence of power on the part of the electorate to recall an ineffective Member of Parliament, the public is left in a vulnerable position if Members of Parliament resort to disregarding the electorate's views.

It is the duty of Parliament to facilitate public participation and involvement in the business of Parliament and its committees. At present, the public only gets to follow parliamentary proceedings when these are aired over the national radio station, and, even then, such proceedings are not broadcast consistently.

The King can legislate independently of Parliament through decrees. In the past, decrees would be passed in order to resolve matters of constitutional or political significance. Examples of decrees that the King has passed are: Decree 4 of 1987, which declared the King's Proclamation

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<sup>100</sup> *Ray Nhlanhla Bhembe & Another vs Rex* (supra).

<sup>101</sup> Standing Orders of the House of Assembly 1968, Part XIII.

<sup>102</sup> Standing Orders Relating to Private Bills 1968, section 2.

<sup>103</sup> Standing Orders of the House of Assembly, section 131.

to the Nation of 1973 to be the supreme law in Swaziland; Decree 1 of 1982, which was passed in order to establish the Supreme Council of State or *Liqoqo*; and the Decree issued in September 1983 to remove the Queen Regent Dzeliwe from office. The latter decree was issued under the hand of the then authorised person, Prince Sozisa. In 1987, another decree was issued to set up a special tribunal whose duty it would be to try a case of high treason involving accused persons who were convicted and subsequently pardoned.

King's Orders-in-Council are legislation passed by the King together with his Council of Ministers. This type of legislation will usually be passed when Parliament is prorogued. The Directorate of Public Prosecutions Order of 1973 and the Establishment of the Parliament of Swaziland Orders of 1978 and 1992 are examples of Orders-in-Council that were passed when Parliament was not in existence for one reason or another.

Proclamations consist of legislative instruments of foreign origin which were incorporated into the laws of Swaziland for historical reasons. There are Proclamations by the English Sovereign and Parliament, which have changed their name but still apply in Swaziland. The Swazi Courts Act of 1950, for instance, was originally known as the Native Courts Proclamation and was passed by the British Parliament.

Judicial precedent is yet another legal principle which applies in Swaziland. Judicial precedent consists of decisions of superior courts which expound on the common law or interpret statutes. The doctrine of precedent requires a judge, in deciding a case, to follow the decision of a superior court in a previous case if the factual situations in the two cases are similar. Viewed in this sense, previous decisions of the High Court and Supreme Court are therefore a source of law for courts subordinate to them.

The Constitution, in section 146(5), provides that 'the Supreme Court may depart from its own previous decision when it appears to it that the previous decision was wrong'.<sup>104</sup> The case of *Daniel Mbudlane Dlamini vs Rex*<sup>105</sup> (the 'Daniel Mbudlane Dlamini case') is instructive in this respect. Here, the appellant had been sentenced to death after being convicted of murder. The trial court found that he had failed to prove, on a balance of probabilities, that extenuating circumstances existed. The Court of Appeal had, in previous cases, held that the onus of proving the existence or otherwise of extenuating factors lay with the accused person. In the Daniel Mbudlane Dlamini case, however, the Court of Appeal held that the onus did not lie with the accused to establish the existence of extenuating circumstances. The duty fell not on the accused but on the court, so the Court of Appeal reasoned.

There are a number of advantages of the doctrine of judicial precedent, including: enhancing predictability of the law, thus allowing people to arrange their affairs with a clear idea of the legal consequences of their conduct or misconduct; limiting the abuse of discretion by a corrupt judge, who would otherwise easily depart from established legal rules; and saving the court time, since it does not have to consider every case afresh.

One of the disadvantages of the judicial precedent doctrine, however, is that it promotes rigidity and stultification of the law. If an earlier decision which ought to be followed was wrong,

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<sup>104</sup> Section 146(5).

<sup>105</sup> Unreported Court of Appeal case No. 11/1998.

the subordinate courts are bound to follow that wrong decision until the Supreme Court changes the said decision.

Swaziland applies Roman-Dutch common law as part of the laws in Swaziland.<sup>106</sup> When a matter is not addressed by legislation, common law applies. Common law differs from legislation in that it involves the enforcement of codes of behaviour which are considered generally acceptable by the community.

Courts in Swaziland interpret both statutory and common law. Interpretation of common law finds expression in the South African case of *Bank of Lisbon & South Africa vs De Omelas & Another*,<sup>107</sup> where the court ruled that a specific defence, the *exceptio doli generalis*, which was previously applied in South African courts did not form part of South African law, as it was never part of the Roman-Dutch common law, the common law that applies in South Africa.

Swazi customary law also forms part of the law of Swaziland. The Constitution, as well as other statutory enactments, support the duality of the legal system as well as that of the courts because of the fact that customary law applies with equal force as the 'received law'. The problem with applying customary law is that principles of customary law are imprecise, amorphous and hidden in oral tradition. As such, they provide little certainty for litigants who may want to have their matters tried in customary courts.

## H. Law reform in the justice sector

Swazi law and custom will maintain its relevance in the modern era if it evolves with the times. There is a need for integration and possible unification of the current two legal systems if certainty with regard to the workings of the two legal systems is to be obtained to the benefit of the development of the country and respect for the rule of law. The challenges presented by the duality of the Swazi legal system can be addressed through either integration or unification. Legal unification entails a change in the condition of legal pluralism to unity law. It involves the creation of a uniform system by way of the total and complete substitution of the existing legal systems. Integration, on the other hand, means bringing together, under one enactment, the different laws with regard to a particular branch of the law so that the different systems continue to exist without conflict. Integration, which in actual fact is partial unification, facilitates gradual unification.<sup>108</sup>

For systematic, rational and coherent development of the principles of the customary law of crimes, there is a need for the establishment of a special body with the mandate to periodically review the types of antisocial conduct that qualify under customary law for condemnation as crimes. When the codification of Swazi law and custom is finalised, the scope and content of customary law crimes may not be altered at the whim or caprice of any individual chief in the Kingdom. After all, a code, by definition, is a complete and exhaustive statement of a particular branch of law. Thus, in 'post-codification' Swaziland, it will no longer be a sufficient basis for criminalisation that a particular chief disavows, for example, the wearing of pants among women in his chiefdom when similar conduct is acceptable in a neighbouring chiefdom. If

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<sup>106</sup> Section 252 of the Constitution.

<sup>107</sup> 1998 (3) SA 580 (A).

<sup>108</sup> Whepton, F.P. Van R. 'Traditional Law in Modern Governance-Recording of Swazi Law and Custom' (Unpublished).

there is a need to periodically review the scope and content of customary law crimes, a special body composed of the cognoscenti of Swazi law and custom should be vested with authority to reform this law.

There is a need for Swaziland to establish a law reform commission that would be responsible for updating legislation that goes back to the colonial era and for drafting new legislation that would address the country's development as well as issues of gender equity. The practice of amending legislation and drafting new legislation on an ad hoc basis has been the subject of complaints by members of civil society, who maintain that there is insufficient transparency in the prioritisation of legislation that is amended. Civil society has complained that Parliament is quick to effect changes in legislation that threatens the vested interests of a select but powerful class, while disregarding the interests of the majority, who must bear the brunt of the effect of archaic, imprecise and nebulous legislation which negates the protection of human rights, especially of women, children and disabled people. There is a need to update most of the available legislation to make it comply with the constitutional tenets of non-discrimination and the equality of all before the law. The Deeds Registry Act, the Marriage Act as well as the Administration of Estates Act are some pieces of legislation which are in urgent need of reform, as they hold back women and children, through the minority status thrust on them by law, in their efforts to participate as equals with men in the economic development of the country. There is also an urgent need for Parliament to ensure that the long-awaited Sexual Offences and Domestic Violence Bill is passed as a matter of urgency, since it classifies the scourge of domestic violence as a criminal offence, unlike the common law which does not recognise domestic violence as a specific offence, although it does provide for the prosecution of offenders for related offences.

The debate around the Sexual Offences and Domestic Violence Bill has taken more than seven years and Parliament has been very slow to ensure that the bill is finalised speedily, despite holding several workshops to discuss the proposed bill. During one workshop that Members of Parliament (MPs) held in connection with this bill, it was agreed that further consultation was still needed, as disagreements remained over the criminalisation of 'stalking'. The argument was that stalking is part of Swazi culture in matters of courtship. A man, so the MPs argued, is entitled under Swazi law and custom to 'stalk' a woman until she accedes to his demand.<sup>109</sup>

On the other hand, the government and Parliament have finally passed the Children's Welfare and Protection Act, which seeks to establish, among other things, a child-friendly justice system. In this way, government has worked towards improving access to justice for children through legislation that prioritises the best interests of the child. This law provides for children's participation in litigation and protects them from serving sentences that would compromise their stages of development. The act also has provisions which ensure protection of children who are victims of crime from the harshness of the normal courts, where, for example, they would have to face their abusers.

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<sup>109</sup> See the *Swazi Observer*, 9 October 2009, 'MPs Defend Stalking a Woman as Swazi Age-old Tradition', p. 5.

The government of the Kingdom of Swaziland must be commended for enacting the Small Claims Court Act of 2011. One would hope that the act will soon be followed by action for the operationalisation of small claims courts. Such courts will go a long way towards enabling the majority of people who cannot afford the services of lawyers to access justice in matters relating to petty civil claims. It is recommended, though, that the position of Commissioner in these courts should be open to people who have a legal background, but who have not necessarily been admitted as attorneys or appointed as law lecturers. Small claims courts are required to follow a flexible procedure and to ensure that language is not a barrier to fair proceedings. Presiding over such a process cannot be beyond the ability of people who have, say, a first degree in law, even if they are not admitted attorneys or are not law lecturers.

The high poverty level of the Swazi population impedes access to justice and the right to a fair hearing, as a large part of the population cannot afford to pay lawyers' fees. For its part, legal representation provided by the government is limited to offences carrying the death penalty or life imprisonment, and no comprehensive legal aid system is available. In addition, the population lacks confidence in the judiciary and legal profession, as absence of transparency in the appointment of judges are widespread.<sup>110</sup> Public confidence in the justice system has also been eroded by the failure to uphold the rule of law, specifically by the executive arm of government. The Constitution does not provide for the establishment of free legal aid, despite the population's inability to access justice. There is therefore a need for the enactment of a law that would establish and regulate a legal aid system in Swaziland.

Overall, government appears to be making reasonable progress in the area of law reform, despite the absence of a law reform commission. Nevertheless, delays that are the order of the day with respect to some legislation are regrettable. Examples of legislation affected by delays include the Marriage Act as well as the Sexual Offences and Domestic Violence Bill.

There is therefore a need for the government to undertake a comprehensive consultative review of existing legislation. A systematic assessment of the legislative terrain would allow a comprehensive, prioritised plan for law reform to be prepared and would lend coherence to the efforts that are presently being undertaken on an ad hoc basis. The fact that no mechanisms have been put in place to assess the impact of laws that have been passed in recent times is in itself telling, as it suggests that laws are passed only as a formality. Civil society can make a meaningful contribution to the monitoring of the implementation of legislation in practice.

The government of Swaziland should also be commended for the policies that have been put in place in the shortest time possible, such as the National Gender Policy, the Children's Policy and the Youth Policy.

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<sup>110</sup> See the *Times of Swaziland*, 11 December 2011 on 'Judiciary Untrustworthy' where Justice M Mamba, a keynote speaker at the 63rd anniversary of the adoption of the UDHR on 10 December 2011 referred to a reader's comments in the *Times of Swaziland* of the 9 November 2011, where the reader wrote 'Another winning streak by government. How nice. Congratulations. I need to be educated more on why all government-related cases are always heard by two judges, especially in the past 3 years'. Judge Mamba said there is no confidence in the judiciary especially where there are matters against government. He stated that 'we really have to conduct an introspection since one rotten apple can spoil the rest'. [www.times.co.sz/News71743.html](http://www.times.co.sz/News71743.html) (accessed 11 July 2012).

## I. Recommendations

- There is need for the government to undertake a comprehensive consultative review of existing legislation. A systematic assessment of the legislative terrain would allow a comprehensive, prioritised plan for law reform to be prepared and would lend coherence to the efforts that are presently being undertaken on an ad hoc basis.
- It is recommended that a law establishing and regulating a legal aid system be enacted. This is because the high poverty rate of the Swazi population impedes access to justice and the right to a fair hearing as a large part of the population cannot afford to pay lawyers' fees.
- It is recommended further that the Small Claims Court Act be amended to include a provision that says Commissioners or presiding officers in these courts may be appointed from people who have a legal background, not necessarily those who are law lecturers and admitted attorneys.
- Swaziland must establish a Law Reform Commission that would be responsible for updating legislation and drafting new legislation in line with constitutional provisions.

# 2

## Management and oversight of the justice system

### A. Introduction

The Ministry of Justice comprises the following departments: the Judiciary; the Law Office, which houses the Attorney General's (AG) chambers and the Director of Public Prosecutions' (DPP) chambers; Correctional Services; the Elections and Boundaries Commission; the Commission on Human Rights and Public Administration; the Anti-Corruption Commission; the Master of the High Court; and the Judicial Service Commission. Through the Office of the AG, the Ministry of Justice is responsible for drafting and reviewing legislation that affects every citizen. The Judiciary is the institution that has the last say on matters of interpreting the Constitution and all other laws. The Elections and Boundaries Commission oversees the election of the legislature, the Commission on Human Rights and Public Administration ensures that human rights prevail, while the Anti-Corruption Commission is there to ensure that the laws and institutions provided by the Constitution are not misused for personal gain. The mandate of the Anti-Corruption Commission is to fight and prevent corruption in both the public and private sectors through investigation, prevention and public-education strategies.<sup>111</sup> The Judicial Service Commission oversees key appointments within the Judiciary. The DPP and Correctional Services guarantee that all criminal violations of citizens' and State's constitutional rights are adequately addressed.

With the exception of the Public Administration Department and Correctional Services, all departments and commissions enjoy a certain level of independence in policy and operational matters. The various departments and commissions have institutionalised the basic principles

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<sup>111</sup> <http://www.acauthorities.org/country/sz> (accessed on 21 February 2013).

of proper planning and management through the drafting and implementation of strategic planning. However, the strategic plans, including those that have been in force for years now, are neither published on line nor have they been easily accessible inside or outside the Ministry. The plans are also not systematically connected with one another, nor are they monitored beyond each department or commission. There is therefore a need for a coordinated, strategic approach by the Ministry to rectify this anomaly.

## **B. The administration**

The Administration Department in the Ministry of Justice is responsible for drafting and controlling the Ministry's budget for human resources and for coordinating the departments and commissions. The Department, therefore, takes on the function of developing and monitoring the strategic direction of the Ministry. It has also taken several steps in the past to increase transparency concerning the Ministry's work. However, important information is still not available online, such as the annual report of the Ministry, all strategic documents and reports on departments and commissions, and other key data on the Ministry. Making such information available online would ensure transparency and accountability, which are important considerations that the Constitution exhorts.

## **C. The Attorney General**

Chapter VI of the Constitution contains the provisions dealing with the executive arm of government. It is in this chapter of the Constitution that provision for the AG is made. The AG is appointed by the King on the recommendation of the Minister of Justice and in consultation with the Judicial Service Commission.<sup>112</sup> The AG is the principal legal adviser to the government, is an ex officio member of the Cabinet, and provides legal representation for chiefs in their official capacity in legal proceedings.<sup>113</sup> The independence of the AG is guaranteed by the Constitution. In addition, section 95 of the Constitution states that the AG is an ex officio member of Parliament. The position of the AG is thus an invidious one. On the one hand, he has to give legal advice to, and draft legislation on behalf of, the executive, and, on the other, he has to do the same for Parliament. In a way, this might put the AG in a position of conflict of interest whenever the interests of Parliament and those of the executive differ in respect of certain legislation. It is therefore recommended that Parliament have its own legal drafting section and its own constitutional expertise so as to obtain independent advice.

The Office of the AG is currently divided into two sections: the legislative section and the litigation section.

### **Legislative section**

The AG's office is responsible for legislative drafting as well as for giving advice to the executive arm of government. The coming into force of the Constitution in 2005 necessitated the review of some legislation in order to align it to the Constitution. Further, the courts have declared certain legislation unconstitutional and have also ordered that it be reviewed for conformity with the

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<sup>112</sup> Section 77(1).

<sup>113</sup> Section 77(3).

Constitution. There are a number of laws that require reform, and some support for this work was provided by the Commonwealth, which sent experts to give technical assistance during the law review process.

The Constitution does not elaborate on the process of legal drafting required before a draft bill reaches Parliament. However, it is recommended that the process be made transparent. This can be achieved through the public display of draft bills for comment, by notifying non-governmental organisations (NGOs) and interest groups that are registered for legislative lobbying, by submitting statements and conducting consultations regarding draft laws, by conducting roundtables or public hearings on important or complex legislation, and by reviewing all relevant laws by way of the Anti-Corruption Commission in order to determine corruption risk.

With regard to transparency of legislation, it is worth noting that, out of over 700 pieces of legislation impacting the citizens of Swaziland, only 2 are available on the Swaziland Legal Information Institute (Swazilii) database, meaning that less than 2% of statutes are available to the public. In a transparent state, all legislation should be available at no cost to all its citizens. It is recommended, therefore, that legislation should be made available online and that this should be complemented by the public availability of a print version at key points all over the country. It is also important to point out that legislation should also be made available in both English and SiSwati, these being the official languages in Swaziland.

## **Litigation section**

The AG represents the government and chiefs in all legal proceedings and reviews all government contracts. Even though the line ministries have their own legal advisers, all representation in court is done centrally by the AG whenever the state is a party to the proceedings. This results in a heavy workload being borne by the litigation section. In order to avoid excessive backlogs, sufficient staffing with corresponding incentives is necessary.

## **D. Commission on Human Rights and Public Administration**

Section 163 of the Constitution establishes the Commission on Human Rights and Public Administration (CHRPA). The functions of the CHRPA are to: investigate complaints concerning alleged violations of fundamental rights and freedoms; investigate complaints of injustice, corruption, abuse of power in office, and unfair treatment of any person by a public officer in the exercise of official duties; and to promote and foster strict adherence to the rule of law and principles of natural justice in public administration.

In 2009, the King appointed the Commissioner and five Deputy Commissioners. The Commissioner subsequently vacated his position when he was appointed as a Cabinet Minister. At the time of writing of this report, this position had not been filled, as it is presently held by one of the Deputy Commissioners on an acting basis. The Commission has yet to recruit a sufficient number of staff in order to become fully operational. Despite this lack of staff, and even though the Commission has not rolled out a publicity campaign pertaining to its functions, it had already received 57 complaints at the time of writing of this report. It is fair to assume that this figure will rise steeply once citizens become fully aware of the operations of the Commission.

Human rights violations in Swaziland arise mainly from: the absence of an operational oversight body on human rights; a lack of awareness of their rights on the part of many citizens; the fact that pre-constitutional legislation is not in line with the Constitution; the Bill of Rights not yet being fully absorbed into the practices of the public administration; judicial proceedings not always meeting all standards for an independent and fair judiciary; Swazi law and custom, as well as its procedures, not always being constitutional in every aspect; and the absence of a legal aid system. A large number of cases that have so far been lodged with the Commission already reflect these challenges. Many of the cases concern the rights of workers, the right to a fair trial and administrative justice, the prohibition of inhumane or degrading treatment, and property rights. The present offices of the Commission are not centrally located and are not easily accessible by public transportation. It is recommended that the Commission should relocate its offices to a place that would be centrally situated and accessible to all. The capital city, Mbabane, would be an ideal location.

Ideally, the Commission should also be proactive in executing its constitutional mandate. The work of the Commission will have full impact if the Commission does not rely only on the submission of complaints, but also on its own proactive monitoring of institutions and sectors of society with real or perceived human rights challenges.

The Commission is also expected to act as an Integrity Commission, with the mandate to process asset declarations and enforce the Code of Conduct of public officials. Ordinarily, these functions should be carried out by the Anti-Corruption Commission, but that is not the case because the Anti-Corruption Commission was not operational when the Constitution was drafted and came into force. The Anti-Corruption Commission was established in 2008 under the Prevention of Corruption Act of 2006. There is therefore a need to align the anti-corruption functions of the Anti-Corruption Commission and of the Integrity Commission in order to facilitate an overall, effective and efficient anti-corruption regime.

The declaration of assets and liabilities must be in line with international standards regarding the form of such declarations, and this includes the verification of data submitted, sanctions for failure to make submissions or for making false statements, as well as public transparency of the declarations. The same should apply to the forfeiture of assets in cases of inexplicable wealth.

A Human Rights and Public Administration Commission Bill drafted in 2011 is aimed at operationalising the constitutional provisions establishing the Integrity Commission. Once the Bill is finalised by the legislative arm of government, it will ensure that the Commission can meet all its strategic objectives.

## **E. The Elections and Boundaries Commission**

The Elections and Boundaries Commission (EBC) is an independent authority created by the Constitution to regulate the conduct of elections. Members of the EBC are appointed by the King on the advice of the Judicial Service Commission. The coming into force of the Constitution in 2005 has meant that all pre-existent laws regarding elections need to be revised and brought in line with the Constitution as well as with international standards. In this context, it is important to note that voting is only a right in the full sense once

each voter (whether participating or not) has the standing to challenge election procedures and outcomes in court (not to mention the substance of the case). At present, the laws of Swaziland do not have provisions to this effect.

There is a need to establish a comprehensive voter registration system and full transparency of the register to prevent any irregularities in the upcoming elections in 2013. The need for transparency also extends to documents such as election timetables, annual reports, the EBC's strategy, and the results of previous elections – which, in the past, have not been available on the EBC's website.

## F. Anti-Corruption Commission

The Anti-Corruption Commission (ACC) was established in 2008 under the Prevention of Corruption Act. Since its inception, the ACC has submitted a total of 18 cases to the DPP, beginning in March 2008. This is less than four cases per year. At the same time, the Commission reported a backlog of 362 cases at the end of 2011. The substantial backlog and the low number of cases ready for prosecution need to be reviewed in view of the organisational setup and the number of staff necessary for investigations.

Asset declarations are submitted to a different entity, namely the Human Rights Commission. Such a dual system is in line with international standards and the practice in other African countries. However, the ACC as well as other law-enforcement agencies need to have unfettered access to the declarations. The Constitution inherently allows for such intra-agency access to the declarations, because they are a logical prerequisite for investigating and building up cases of illicit enrichment. Section 241(4) of the Constitution does not support the contrary conclusion, as it relates to asset declaration only as formal evidence before a court or the Integrity Commission. As the system of asset declarations is part of the anti-corruption effort, the Integrity Commission and the ACC must cooperate in both areas.

The independence of the ACC must be assured, otherwise it might refrain from investigating cases where political retribution could be expected, such as those involving high-profile suspects. In this context, it seems anomalous that all commissions have constitutional status but not the ACC, which was only re-established after the adoption of the Constitution. It is recommended that future constitutional review should therefore aim at providing for the establishment of the ACC in the Constitution, as is done in other African countries.<sup>114</sup>

Public awareness and public acceptance of the Commission's work depend on the transparency of its work. The ACC should, therefore, publish its national policy and strategy, information pertaining to its staff and the structure of its department, as well as detailed statistics, and all of this should also appear on its website. This is the practice with anti-corruption agencies in other jurisdictions.<sup>115</sup>

The Minister of Finance has stated that Swaziland loses a lot of money to corruption. In the Medium Term Budget Policy Statement, the Minister pointed out that 'corruption continues to be a major economic setback, with the public sector being the most affected.'<sup>116</sup> He reasoned that

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<sup>114</sup> See Article 79 of the Constitution of Kenya; Article 108A of the Constitution of Zimbabwe.

<sup>115</sup> See the Anti-Corruption Commission Annual Report 2010/2011 p. 18.

<sup>116</sup> 2010/2011, published in the *Nation Supplement*, December, 2009.

the most effective way of dealing with corruption was to strengthen the institutions designed to curb it. The Minister stated that, in an effort to fight the scourge of corruption, government had allocated E37 million to the ACC in the medium term.

It is necessary to create additional institutions within the justice sector to ensure proper implementation of the Constitution. New legislation as well as legislative and executive practice are now largely based on the Constitution; a number of institutions and commissions have been established in accordance with the Constitution; and a number of court decisions have now made reference to the Constitution as a source of law.<sup>117</sup> However, many challenges remain, as there is no systematic jurisprudence available on the Constitution. Given this lack of guidance, courts are sometimes hesitant to consider constitutional questions. In large parts of Swazi society, the Constitution and the Bill of Rights are little known, as the rights granted by the Constitution are often not claimed or enforced. Furthermore, many central questions on interpreting the Constitution and its future development remain unresolved. The establishment of a Constitutional Court would help steer the ship of constitutional interpretation to calmer waters. Such establishment finds support in the Poverty Reduction Strategy and Action Plan, which state that, 'following the adoption of the Constitution and the Bill of Rights, the Ministry of Justice and the AG's office shall establish a Human Rights and Constitutional Court to hear all cases concerning human rights and constitutional abuse and violation'.<sup>118</sup> This institution would help articulate and specifically develop constitutional jurisprudence in Swaziland.

The Constitution of Swaziland in many respects stands on a different plane from most constitutions in the region. The Constitution provides for a King who exercises a central function in the oversight of governance and the appointment of high-ranking public officials. Comparing the particularities of the Swazi Constitution with other constitutions in the region would allow for the development of a constitutional jurisprudence in Swaziland.

There is also a need to set up a constitutional affairs section within the Office of the AG. The functions of this department would be to: advise central government, the regions, local government and the *tinkhundla* on constitutional matters; advise Parliament on constitutional matters, but as long as there is no conflict of interest between the executive and legislative power; review draft legislation to ensure constitutionality; strategically review and develop the Constitution; serve as a secretariat for the monitoring of the Ministry's programmes and policies; as well as coordinate donor assistance with regard to implementation of the Constitution.

In summary, it can be said that the Ministry of Justice and Constitutional Affairs is responsible for: the administration of justice through the courts; the drafting of legislation and amendments to existing laws through the Office of the AG; the administration of deceased estates; the conduct of national (parliamentary) elections, local government elections, and bye-elections for Members of Parliament; the prevention of corruption; the provision of safe custody and the rehabilitation of offenders; and the promotion and protection of human rights and the

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<sup>117</sup> See *R vs Motsa* High Court case No. 37/2010 (2012) SZSC p. 6.

<sup>118</sup> 2006, Vol. 2, No. 8.1.9.

enforcement of the leadership Code of Conduct. The Ministry defines its role as being, *inter alia*, the promotion and fostering of adherence to the rule of law and natural justice. The Elections and Boundaries Commission is responsible for the conducting of elections. The Constitution provides that this is an independent body.<sup>119</sup> It receives its budget from, and reports to Parliament through, the Ministry of Justice.

Overall, management of the justice sector in Swaziland was initially the responsibility of the Ministry of Justice until fairly recently, when it was transferred to the judiciary. This was the result of the constitutional provisions which require administrative as well as institutional independence of the judiciary. The judiciary administers its own budget, but the Minister of Justice reports on its behalf to Parliament. In 2011, Swaziland experienced the impact of the global economic crisis and, as a result, no sector remained unaffected by the economic downturn. The judiciary was no exception.

Even though the judiciary has its own budget which in principle it controls, this financial autonomy is not absolute. The procurement procedure is an example. The procurement procedure within the judiciary entails the participation of the main state machinery. An instructive illustration is the procurement of computers and other information technology-related machinery. This has to be done through the Computer Services Department, which insists on laying down the specifications of the equipment and in identifying the supplier. This defeats the whole purpose of procuring necessary equipment for the judiciary, since some equipment is peculiar to this sector and can best be understood by experts in the sector rather than generic computer experts. Further, the current procurement system is slow to deliver, and, since the judiciary has no control over it, it cannot influence or accelerate the outcome. As a result, procuring basic equipment like a desktop computer can take well over a year.<sup>120</sup> This negatively impacts on justice delivery, as it means that the tools required for the job are not in place when required. It is recommended that the current procurement system be abandoned and replaced by one where the judiciary itself can assert its own financial independence.

As an independent arm of government, the judiciary has developed and put in place a strategic plan.<sup>121</sup> The effectiveness of the strategic plan is however hindered by different factors, not least of which is inadequate funding<sup>122</sup> for the justice sector as a whole. This has resulted in insufficient numbers of well-trained administrative staff, as well as poor record-keeping. These problems are acknowledged in the strategic plan of the judiciary, although there does not appear to be any clear plan to address them.

The Ministry of Justice, and specifically its administration section, is responsible for coordination of the preparation of the Ministry's budget, in consultation with the heads of different departments of the Ministry.

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<sup>119</sup> Section 90(13) of the Constitution.

<sup>120</sup> Dube, A Report on 'Assessment Study on Delayed Justice Delivery', 2010 p. 42.

<sup>121</sup> The Judiciary of Swaziland Strategic Plan 2007–2012.

<sup>122</sup> The Judiciary of Swaziland Strategic Plan, para 7.2, p. 20.

## G. Planning and financial management

The justice sector consists of a myriad of institutions, including: the courts; the AG's office; the DPP; Correctional Services; the Office of the Master of the High Court; the ACC; the Commission on Human Rights and Public Administration; the Elections and Boundaries Commission; and the Judicial Service Commission. All justice sector institutions have heads who are responsible for planning and management in respect of each department. Before planning for each institution is done, its officers identify the needs of the various sections and departments of their institutions. Planning is basically done on an ad hoc basis in all departments within the justice sector.<sup>123</sup>

## H. Funding of the justice sector

In general, all justice sector officials interviewed for this research complained that the sector is underfunded.<sup>124</sup> This fact is buttressed by the Judiciary Strategic Plan, which classifies inadequate funding as a threat to the judiciary.<sup>125</sup> The inadequate funding of the justice sector must, however, be understood in the context of the fiscal crisis that is presently engulfing the country, a problem that is pervasive within almost all public sector institutions. Nevertheless, there is a strong case for increasing the budget for the justice sector, even though the country is going through hard economic times. The government needs to commit itself to increasing funding for the establishment and operation of a legal aid system, for prosecutions, for legal education and training for students, as well as for continuing legal education for lawyers and the judiciary.

Even though the judiciary is now independent and controls its budget, the amount that is allocated to the justice sector in the national budget is still determined by the executive with the approval of Parliament. Representatives of the various institutions in the justice sector submit their requests to the Ministry of Finance, which modifies the requests to fit within the national budget. Although, in the past, Parliament has been overruled by the executive on matters of the budget and government spending, the Constitution provides that Parliament has a decisive say in determining the amount of money allocated to the justice sector. Funds are disbursed by the Treasury to the ministries on a monthly basis, a system that allows the executive to exercise control of funding for the justice sector even after the budget has been passed by Parliament. This system is aimed at instilling spending discipline in ministries, although the downside of the system is that it makes long-term planning difficult, especially because the Treasury is empowered to vary the amounts disbursed.

The United Nations (UN), through its strategic planning and resource programming tool, the United Nations Development Assistance Framework (UNDAF), estimates that approximately USD9 760 750 will be required to assist government in the area of governance for the period 2011 to 2015. Table 2 shows how the money is allocated.

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<sup>123</sup> This was the view of Mr Masilela, the Under Secretary in the Ministry of Justice. He was interviewed in his office on 9 February 2012.

<sup>124</sup> This was the view of the Under Secretary in the Ministry of Justice. Mr Masilela was interviewed in his office on 9 February 2012.

<sup>125</sup> The Judiciary of Swaziland Strategic Plan at p. 23.

Table 2: Monies received from donors for governance issues

Governance issue	USD
Supportive policy & legal framework for improved governance in place	2 310 750
Increasing people's knowledge of rights	3 550 000
Enhancing gender equality	2 400 000
Access to justice for all	1 500 000
<b>Total</b>	<b>9 760 750</b>

Source: [www.unicef.org/about/execboard/files/Swaziland\\_Final-UNDAF-2011-2015SIGNED.pdf](http://www.unicef.org/about/execboard/files/Swaziland_Final-UNDAF-2011-2015SIGNED.pdf) (Accessed on 2 August 2012).

## I. Auditing

Auditing of government ministries and departments is the responsibility of the Auditor General's office. The Accountant General is responsible for the preparation and fair presentation of financial statements of all government ministries in accordance with the Finance Management and Audit Act of 1967,<sup>126</sup> as amended in 1992. The financial auditing procedures are adequate to ensure accountability, as reliance is placed on the Finance Management Act, the Audit Act (as amended in 1992) as well as the Public Procurement Act of 2011. The legislation referred to herein applies to all public institutions, including those in the justice sector. Audits of the justice sector are fairly comprehensive and detailed. In some instances, the Auditor General has criticised financial management in institutions within the justice sector. However, audits by the Auditor General are largely ineffective, as they are not followed by any disciplinary action in cases where public officials have been found to have mismanaged or even misappropriated public funds. Also, such audits have not resulted in any further investigations or prosecutions in appropriate cases. There have also been delays in reporting such cases, since there is a shortage of staff.

Donor funding of projects in the justice sector has dwindled in recent years. In some cases, donors give grants to government to be used for specific projects, while, in others, they do this through direct budget support. Where money is given to an institution within the public sector, donors expect that such monies to be accounted for directly to them.

This means that, in addition to the regular audit reports that government ministries and departments prepare, they also have to prepare separate audit reports to be submitted directly to their donors. This route is not without its problems, since different donors may require different reporting specifications. It is suggested that this problem may be addressed through the establishment of sector-wide basket funding arrangements where multiple donors pool their direct assistance to the justice sector institutions and, in return, only require one report accounting for the pooled assistance. The need for institutions to report directly to donors is also reduced if donors adopt the direct budget support approach whereby they channel their funding for the sector through the national budget. In terms of this arrangement, state institutions in the justice sector will account for funds collectively. Such an arrangement has the advantage of consolidating reporting procedures.

<sup>126</sup> Section 18.

## J. The judiciary and administrative autonomy

For a long time, administration of and budgeting for the judiciary was controlled by the Ministry of Justice. This position only changed after the Constitution was adopted in 2005. Even then, the change and transformation were not without problems. The transfer of administrative, financial and managerial power from the executive to the judiciary has been slow, acrimonious and erratic. This is largely because there is no legislation that sets out the country's system of court administration. This is unlike the situation in countries such as Malawi, which has passed the Judicature Administration Act. In Swaziland, the judiciary is only now in the process of establishing a human resources department responsible for the administration of judicial personnel. In the meantime, support staff of the judiciary are still recruited, administered and disciplined centrally by the executive through the Civil Service Commission, this being the body responsible for such issues within the entire civil service.

There is a need to provide for an autonomous court administration service which should be headed by an official – the equivalent of a Principal Secretary – who reports directly to the head of the judiciary. Such an official would focus exclusively on judicial administration and, by extension, provide court administration with a degree of formal independence that gives it some protection from inappropriate political influence.

Finances of the judiciary are controlled by the Office of the Registrar of the Supreme Court. That financial independence of the judiciary is a critical element of governance is not in question. It is recommended that one of the strategies to ensure the financial independence of the judiciary is to establish direct reporting by the Chief Justice to Parliament for all budgetary matter. This is not the position currently, as only the Minister of Justice reports to Parliament on behalf of the judiciary.

### Administrative staff

The Strategic Plan of the judiciary states that judicial officers are appointed to positions that require them to have administrative acumen without training in administrative skills. This, in part, refers to magistrates, who usually have to double up as administrative heads of their work stations as well as their entire cadre performing administrative tasks within the judiciary. This points to the need to strengthen the general effectiveness of administration and management of the judiciary. The judiciary currently operates without a human resource development plan.<sup>127</sup> This makes it difficult to assess the training needs of administrative personnel within this sector. In total, the country has fewer than 350 court administrative staff.

Swaziland does not have a judicial training institute and currently offers training for judicial officers on an ad hoc basis, and then only infrequently. There are no fixed training schedules, and most officers interviewed for this report had not undergone any training on the job. Some respondents within the justice sector indicated that they pursue further training on their own, but, since the training courses are not scheduled, they are faced with time constraints. There is, therefore, a need for the Registrar of the High Court to establish a working relationship with training institutions, both local and regional, in an endeavour to

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<sup>127</sup> This was the view of Mrs Mhlanga, Human Resource Manager, during an interview with the author at the High Court on 10 February 2012.

develop training schedules for the judiciary, administrators within the justice sector, as well as support staff.

There is a need to put in place a human resource development plan, coupled with a training strategy and continuing career development for both judicial and court administrative officers. There is also a need to create an institute whose mandate would be to meet the needs of both the judicial and administrative staff if the objectives of the judiciary are to be achieved. The Strategic Plan recognises the need to develop a structured training development programme that responds to individual training needs. Administrative staff in general, and clerical staff in particular, also require training in information and communications technology.

The Strategic Plan singles out the salaries of ad hoc interpreters as being below competitive levels.<sup>128</sup>

The judiciary does not have internal disciplinary mechanisms to handle allegations of corruption or other subsidiary misbehaviour by court administrative staff. In most cases where administrative staff is alleged to have engaged in corrupt practices, their cases are handled through the criminal justice process, if not through the ACC.

## **Court facilities**

For a long time, the physical condition of, and facilities at, the courts in general were in a poor state. Most court buildings were old, dilapidated and in a sorry state of disrepair. The Swazi courts, especially in Mbabane and Manzini, are in urgent need of repair, while those in Nhlanguano have been overhauled and are in an acceptable state. The High Court building is presently undergoing renovation, although it is a relatively new building. The Mbabane magistrate's court as well as the Manzini magistrate's court buildings have also been renovated recently. Even though recently renovated, the Mbabane magistrate's court building exhibits major defects, in that the roof is leaking in some areas and wall tiles in some offices have fallen off. Moreover, air conditioners in the magistrates' chambers are not functional.

The Office of the Judicial Commissioner is also in urgent need of maintenance, as it is in an appalling state of disrepair. The road to the building housing the office also needs urgent maintenance.

On the whole, the government is engaged in a major project for rebuilding and refurbishing magistrates' courts and most of the court buildings around the country. The government has also been constructing new court buildings around the country. Most of the new court buildings have made provision for access by people who have physical disabilities. In the High Court, though, there is still a shortage of courtrooms. It is hoped that, as the government continues to improve the physical infrastructure within the judiciary, the shortage of courtrooms will also be an issue that will be addressed. At present, the government is also constructing houses for judges. It is hoped that once the project of building judges' houses is complete, houses for magistrates will also be built.

In order to ensure durability of infrastructure, the judiciary should establish building maintenance schemes and address problems relating to maintenance.

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<sup>128</sup> The Judiciary of Swaziland Strategic Plan at p. 15.

## Availability of legislation and jurisprudence

The Strategic Plan for the judiciary acknowledges the fact that there is a lack of availability of legislative texts in the courts. It provides that the Office of the Registrar ‘shall ensure that all relevant judicial officers have access to updated statutes and law reports’.<sup>129</sup> This may suggest that other role players within the justice sector have access to legislation and jurisprudence, when that is in fact not the case.

General availability of legislation and jurisprudence is generally poor, as lawyers, judges and court staff do not have ready access to such resources. This lack of availability of legislation and jurisprudence for court personnel constitutes an acute impediment to judges, and court personnel, in fulfilling their duties. Magistrates’ courts and Swazi courts were found to be the worst affected, as they did not have gazetted laws, law reports and recent judgments of the superior courts. The researcher was told that the problem of non-availability of judgments of the superior courts had been partially solved with the setting up of a website where most of the judgments are posted. The problem is also that most of the subordinate courts do not have internet facilities and cannot access the judgments from the Swazilii site.

There is also a shortage of libraries for use by staff within the justice sector. The library that is available at the High Court is poorly resourced, although donors have, in the past, donated some textbooks to supplement the resource material here. The University of Swaziland has a library that can be used even by members of the public, on condition they apply and are allowed to be associate members. The import of this condition for use of the University library is that even members of the judiciary would have to be associate members before they could be allowed to use the resource material in the library – not that the material in the library is up to date.

Lawyers and magistrates indicated that it was difficult to know if there had been any amendments to the law or even to be certain that the law one was relying on was the current legislation on an issue. Such problems were attributed to the failure of most law firms and the judiciary to acquire copies of amendments in a regular and timely manner to enable access by all staff.

Judgments by courts were also said to be difficult to access by staff within the justice sector. Currently, there is a process of upgrading and publishing law reports. This process is being driven by the Office of the AG, with the cooperation of the Office of the Chief Justice. A Law Reporting Committee made up of magistrates, a judge of the High Court and the Registrar of the High Court, as well as a representative from the Law Society, has been set up to identify and summarise cases for publication in the law reports. The appointment procedure for the Committee is, however, not transparent, resulting in individuals with little or no research background being appointed to the Committee. This impacts negatively on the work of the Committee, as determination of cases to be published may not be carried out timeously and the nature of the cases identified to be reported on may not be reflective of the latest trends in law reporting. There is a need, therefore, to appoint competent individuals to the Committee based on their academic, practical and research profile. The process of law reporting is also proceeding at a very slow pace and may be delayed as the country struggles to deal with its cash-flow problems.

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<sup>129</sup> Para 8.2 on Quality of Judgments, p. 28.

The use of unreported judgments is the order of the day in both the superior and subordinate courts in the absence of comprehensive and updated law reports – the most recent volume of law reports dates back to the period 1987 to 1995. Some decisions are selected for publication online through the Swazilii website. Despite this new development of providing Swaziland legal resources online, there is still the problem of inability to speedily upload all the latest decisions of the superior courts. The judgments posted online are not necessarily judgments that will be reported in the law reports. Thus they do not need to be scrutinised by the Law Reporting Committee before they can be published.

The intermittent availability of judgments of the superior courts impacts negatively on access to justice, as legal practitioners struggle to secure copies of decisions of the court to help prepare for the cases they handle in court. As a result of the poor publication of judgments generally, and law reporting that is out of date, subordinate courts often apply legislation that has been declared invalid by the superior courts.

In order to improve access to information in the form of court judgments, the Registrar of the High Court should, as an interim measure, devise a system of photocopying all judgments handed down by the High Court and Supreme Court and make these available to legal practitioners and the public at a fee. Photocopies of court decisions should be made available to subordinate courts, the DPP's office and the AG's office at no cost. For every judgment that is delivered in the superior courts, a copy must be given to the High Court library.

At present, the numbering of court judgments that are available is not systematic. Since the cases are unreported, the numbering follows the case number, which, in most cases, does not tally with the date of delivery of a judgment. This makes research difficult. There is a need for a systematic numbering system to be developed based on the date and year of delivery of the judgment in each case. It is recommended that the South African Legal Information Institute's (SAFLII) medium neutral citation (MNC) might be followed. A medium neutral citation allows court decisions to be cited irrespective of their publication medium, namely in print form or in electronic form available on the web. It consists of three main components, namely: the year of publication, the designator and the sequential number.<sup>130</sup>

The superior courts also need to have their own institutional websites that are directly managed by the judiciary. Currently, the government's Computer Services Department requires that all information technology-related issues, including institutional websites, should be managed centrally by the Department. This is counterproductive, because, while the Department has technical expertise, it does not have the legal expertise. The risks of leaving a legally oriented website to non-legal experts are incalculable. For instance, legal language is esoteric. As a result, a non-legal person is inclined to want to correct the language, and, in the process, the appeal and grammatical finesse might be lost.

There is a need, therefore, for the Registrar of the High Court to facilitate the establishment of an institutional website for both the High Court and the Supreme Court. There is also the need to recruit an information technology (IT) expert to be stationed at the High Court to set it up, and to edit, manage and oversee the website and e-mail system. As an interim measure, at least two High Court staff members may be taken through a crash course on website design and management.

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<sup>130</sup> [www.austlii.edu.au/techlib/standards/mnc.html](http://www.austlii.edu.au/techlib/standards/mnc.html) (accessed on 21 February 2013).

Since website design and management do not necessarily require technical expertise, most employees can be equipped with knowledge to set up and manage a website for the courts. The benefit is that a legally inclined person will be managing the legal content posted on the website.

There is also a lack of expert commentary on the law as it develops in Swaziland. There are few, if any, textbooks which have commentaries on the law of Swaziland. The libraries are, however, replete with books and other resource materials that trace legal developments in other jurisdictions, especially in South Africa. Most staff within the judiciary use such resource material for comparative purposes. There is also no law journal published in Swaziland. The reasons advanced, usually by academics in the Department of Law at the University of Swaziland, are that they are short-staffed and have heavy teaching loads; as such, they are unable to dedicate time to research and to publishing commentaries.

Judges of the superior courts have access to internet facilities and may, therefore, use online journals and other commentaries. The same is not true of magistrates' courts and Swazi courts.

## **K. Public information**

The Constitution provides that 'in the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy hearing ... by an independent and impartial court'.<sup>131</sup> The Criminal Procedure and Evidence Act (CP&E), on the other hand, provides that criminal trials will ordinarily take place in open court. In cases where it is expedient to do so, the court may exclude 'females, minors or the public' from the hearing of certain cases. The provisions of the CP&E may be contrary to human rights norms and standards, in that it does not restrict the scope of judicial power to the protection of witnesses or children only, but also extends it to other categories of members of the public. The law does not preclude journalists from reporting on cases that are being heard in courts.

## **L. Recommendations**

- It is recommended that the Ministry of Justice's administration department should ensure transparency of the ministry's work by making important information such as the ministry's annual reports, strategic documents and reports on departments and commissions available online.
- At present the AG is in the invidious position of being legal advisor of both the executive and Parliament. This raises issues of conflict of interest. It is recommended that Parliament should have its own legal drafting section and its own constitutional expertise to obtain independent advice.
- The process of drafting Bills to be passed by Parliament should be made transparent. This can be done through the public display of draft Bills for comment, by notifying NGOs and interest groups registered for legislative lobbying, by submitting statements and conducting consultations regarding draft laws or through public hearings on important or complex legislation.
- Legislation availability and transparency should be ensured at no cost to the citizen. Legislation should also be made available online and it should be complimented by the

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<sup>131</sup> Section 21(1).

public availability of a print version at key points all over the country. Legislation should be made available in the two official languages – English and SiSwati.

- The Human Rights Commission Bill, 2011 should be made into law so that the commission can begin to execute its mandate as spelt out in the constitution and made operational by the Bill.
- The Electoral Boundary Commission should establish a comprehensive voter registration system and full transparency of the register to prevent irregularities in the election in 2013. There is a need for transparency to extend to documents such as election time tables, annual reports, the EBC's strategy and the results of previous elections in the EBC website.
- It is recommended that the ACC and the Integrity Commission must cooperate in sharing information relating to asset declaration.
- In order to ensure the independence of the ACC, there is need to endow the ACC with constitutional status. This implies constitutional review with the aim of making provision of the ACC in the Constitution and not only in an Act of Parliament.
- The ACC must publish its national policy and strategy, detailed statistics of cases it has handled, information pertaining to its staff and structure and its departments in its website to ensure public acceptance of its work and for reasons of transparency.
- It is recommended that a Constitutional Court be established to steer the ship of constitutional interpretation to calmer waters in line with the Poverty Reduction Strategy of 2006.
- It is recommended that the current system of procurement within the judiciary be overhauled and be replaced with one in which the Judiciary itself can assert its financial independence.
- There is a need to provide for an autonomous court administration service which should be headed by an official – the equivalent of a Principal Secretary – who reports directly to the head of the judiciary. Such an official would focus on judicial administration and by extension, provide court administration with a degree of formal independence that gives it some protection from inappropriate political influence.
- It is recommended that a human resource development plan is devised and implemented, coupled with a training strategy and continuing career development for both judicial and court administration officers.
- In order to improve access to information in the form of court judgements, the Registrar of the High Court, as an interim measure, should devise a system of photocopying all judgments handed down by the High Court and Supreme Court and make these available to legal practitioners and the public at a fee. Photocopying of court decisions should be made available to subordinate courts, the DPP's office and the AG's office at no cost. For every judgment that is delivered in the superior courts, a copy must be given to the High Court library.
- In order to ensure proper maintenance of the buildings belonging to the judiciary, the judiciary should establish building maintenance schemes to address problems relating to maintenance.

# 3

## Government respect for the rule of law

### A. The rule of law as an exhortation

The Constitution of the Kingdom of Swaziland incorporates the doctrine of the rule of law.<sup>132</sup> Such incorporation comprehends the principle of legality. It is at the heart of the concept of a constitutional state that the lawgiver and the executive in all spheres are constrained by the principle that ‘they may exercise no power and perform no function beyond that conferred on them by law’.<sup>133</sup> Simply put, the rule of law means that, whenever government functionaries and officials take decisions or carry out any government activity, such acts and decisions must be premised on the law. This is an exhortation to the principle of legality and, by extension, the rule of law.

The Constitution provides that it is the duty of citizens to promote democracy and the rule of law.<sup>134</sup> The Preamble speaks to the importance of updating the laws of the land and promoting ‘good governance and the rule of law’.<sup>135</sup> The aim of the rule of law is to protect basic individual rights by requiring the government to act in accordance with predetermined, clear and general rules enforceable by impartial courts in accordance with fair procedures. This means that various state organs must obey the law, and that there must be a law authorising everything the state does. It follows, therefore, that, if the state acts without legal authority, it is acting lawlessly, and this cannot be countenanced by a constitutional democracy.

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<sup>132</sup> Para 4 of the Preamble.

<sup>133</sup> *Fedsure Life Assurance vs Greater Johannesburg TMC* 1999 (1) SA 374 at 399–400.

<sup>134</sup> Section 63(e).

<sup>135</sup> Preamble, para 3.

The judiciary is the only organ of state which bears the onerous task of ensuring that the law is not perverted by those who lord over the citizenry. An independent judiciary may arguably be said to be the cornerstone of the rule of law, as the courts are not only the guardians but also the ultimate interpreters of the Constitution.<sup>136</sup>

As can be seen from the preliminary observations on constitutional provisions, the legislative framework is comprehensive in its provisions for the rule of law. The legislative framework is, however, not buttressed by a code of conduct for Cabinet Ministers and Members of Parliament, even though the Constitution provides for one. The judiciary has a code of conduct, which, the researcher found, some members of the judiciary were not aware of, especially in the magistracy.

Despite the clear constitutional framework exhorting the notion of the rule of law, overall government compliance with court decisions remains wanting. The Speech from the Throne<sup>137</sup> as well as the Budget Speech<sup>138</sup> for the year 2012/2013 were loud in their silence concerning respect for the rule of law. Swaziland's history of failure to respect and uphold the rule of law is well documented. Different governments have paid lip service to respect for the rule of law, but, in practice, government's lack of respect for the rule of law is evident, especially when court decisions are not in favour of the executive arm of government.

## **B. Mechanisms for review and accountability**

In relation to judicial control of public officials' actions, Swaziland adheres to the English law model that posits that administrative bodies are subject to supervision by the ordinary courts. This model differs from that which obtains in civil jurisdictions where administrative bodies are subject to supervision by special administrative courts rather than ordinary courts. The reason is that a rigid conception of the separation of powers prevented the post-Revolution courts of law from interfering in legislative or executive action. This included administrative action which was considered to be a political rather than a legal concern.

The traditional English suspicion of the specialised French courts has always been attributed to the influence of Dicey's formulation of the doctrine of the rule of law. Dicey emphasised the subordination of both citizen and public authorities to the 'ordinary courts'.

For a long time in Swaziland, the rights of citizens were not enshrined in a constitution. Consequently, their enforcement depended upon the decisions of the ordinary courts. At the time, courts controlled the actions of government officials through the *interdictum de homine libero exhibendo* (habeas corpus) or actions for malicious prosecution and false imprisonment, and thereby safeguarded the rights of the individual. The need for the independence of the judiciary in this situation cannot be overemphasised.

The task of reviewing the legality of administrative decisions is the exclusive preserve of the superior courts in Swaziland. For a long time, powers to review administrative decisions were said to flow from common law, but, now, such powers flow from the Constitution.<sup>139</sup> The Constitution states that a person who appears before 'any administrative authority has ... a right

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<sup>136</sup> Preamble, para.7.

<sup>137</sup> Delivered by the King at the opening of the 4th Session of the 9th Parliament on 3 February 2012.

<sup>138</sup> Delivered by the Minister of Finance, Hon. Sithole Majoji in Parliament on 16 February 2012.

<sup>139</sup> Section 33.

to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved'.<sup>140</sup> The Constitution has thus created a constitutional right to administrative justice, coupled with a constitutional principle of legality.

In the recent case of *The Prime Minister of Swaziland & Others vs MPD Marketing Supplies (Pty) Ltd*,<sup>141</sup> the Supreme Court reviewed and set aside the decision of the Cabinet and the Prime Minister to blacklist, with immediate effect, the respondent from supplying some government parastatals. The respondent supplied the government and its parastatals with materials, namely different products and services which were not listed. The respondent would offer its services to the government following the award of tenders. The court held that such exercise of power by the Prime Minister and the Cabinet had to be sanctioned by the Constitution and that, in the absence of a constitutional provision to that effect, the Prime Minister had acted unlawfully. The court stated: "The State needs to appreciate that it too is not above the law. With us every official from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as every other citizen."<sup>142</sup>

The other consideration is the import of the supremacy clause in the Constitution of Swaziland. With the backing of the court's power to review administrative actions and decisions, the Swazi Constitution takes on the nature of a supreme law. This means that the provisions of the Constitution will prevail over all other legal or political actions of government which are inconsistent with it. Legislation or administrative decisions that are inconsistent with the provisions of the Constitution become invalid on the basis that there was no legal authority for them.

Once the courts declare a provision of the law or an administrative decision to be invalid for reasons of unconstitutionality, the law is deemed to have been unlawful or unconstitutional from the time the Constitution came into being. In other words, when the High Court or the Supreme Court declares a law to be unconstitutional, unless it expressly states when the unconstitutionality becomes/became effective, such law is deemed to have been illegal from the time the Constitution came into force. Thus invalidated legislation is considered to have become ineffective from the time the Constitution was made the supreme law and not from the time the court rules the law to be unconstitutional and therefore void.<sup>143</sup>

Section 33 of the Constitution entrenches judicial review of administrative action and related common law remedies. This means that, where rights contained in the Bill of Rights are directly enforced, including the right to administrative justice, judicial review will proceed on a constitutional basis. This, by necessary implication, means that all cases dealing with the control of public power are constitutional cases, even if they do not fall within the Bill of Rights and thus within the purview of section 14.

The Constitution grants the High Court power to decide over constitutional matters, which necessarily includes judicial review of administrative action. In contrast, subordinate courts

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<sup>140</sup> Section 33(1).

<sup>141</sup> Supreme Court case No. 18/2007.

<sup>142</sup> Op cit 52–53 as quoted from Dicey: 'The Introduction to the Study of the Law of the Constitution' 10 ed. MacMillan Press, London 1959 at p. 193.

<sup>143</sup> Doo Aphane's case.

do not have the power to review administrative action. Innes CJ, in the case of *Johannesburg Consolidated Investment Co vs Johannesburg Town Council*, stated: ‘Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, the Court may be asked to review the proceedings complained of and set aside or correct them.’

### c. Examples of government defiance of the rule of law

Public officials, including Cabinet Ministers, may be charged under the criminal law.<sup>144</sup> Civil claims may also be instituted against them if they are found to have abused their office. Members of Parliament facing criminal charges for abusing public office, resulting in the loss of public funds, have not been suspended from office while their matters are pending in court. Public officials, on the other hand, are usually suspended and commissions of enquiry set up to investigate their misdeeds. If the commission of enquiry recommends that the public officials be indicted, the majority are never prosecuted.<sup>145</sup> Investigations are usually set up either through invoking provisions of the Commissions of Enquiry Act of 1963 or through parliamentary committee systems. A poignant example involving the parliamentary committee process is the ‘land grab’ saga involving Ministers of the Crown and the Prime Minister in 2011. Parliament had set up a committee to establish how certain members of the Cabinet had bought government land at hugely discounted prices from the Ministry of Housing. While Parliament was conducting its investigation, the Prime Minister filed an urgent application with the High Court seeking an order that the land in question be transferred to his name. Parliament would hear none of it and stated that the High Court could not preside over the matter, as it was at the time before Parliament. The Chief Justice heard the matter and granted the Prime Minister the interim relief he sought. Put differently, the Chief Justice ordered the Minister of Housing to show cause why the Crown land should not be transferred into the Prime Minister’s name, as he had already paid for the land. Parliament subsequently reported the matter to the King. The King ruled that the land should not be given to the Cabinet Ministers.

Interestingly, in the same year, the Minister of Housing, without authority, bought vacant and undeveloped land for an exorbitant amount of E30 million using public funds. Except for being berated by Parliament and being asked to pay a paltry fine for her indiscretions, she was never cited for any criminal action pertaining to the matter. She was, however, ordered by Parliament to approach the buyer and ask that the sale be reversed. The amount of E30 million was finally recouped from the ‘willing buyer’.

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<sup>144</sup> There are a number of Members of Parliament who are facing criminal charges for having used public funds to feather their nests. The paradox though is, they have not been suspended from office but they continue to execute their parliamentary duties as ‘honourable Members of Parliament’ even though they are accused persons in the different courts in which they appear from time to time. Criminal cases involving MPs go as far back as the Parliament that went out of office in 2008. An example is the case of *Mr Titus Thwala*, who was charged with defrauding a public school where he formerly served as Principal. As of 3 October 2012, his matter continues to be postponed at the Manzini Magistrate Court. See the *Swazi Observer*, 3 October 2012 at p. 15.

<sup>145</sup> Reference is made to the case of suspects who were implicated in the ‘disappearance’ of E50 million of public funds that had been earmarked to help train people to start businesses. The then Principal Secretary was implicated in the matter but at the time of writing this report, the matter has not been tried in court. The case of *Ben Simelane* – a civil servant in the Ministry of Labour who admitted to embezzling public funds and was transferred to another duty station – is another example.

In yet another case, Minister Macford Sibandze was dismissed for misleading the Prime Minister into signing and sanctioning the Minister's trip abroad. The Minister had informed the Prime Minister that the Ministry had the funds for the Minister's trip when in fact this was not the case. The funds that were used by the Minister belonged to a dormant parastatal which the Prime Minister's office knew nothing about. Failure to disclose the source of the funding of the trip resulted in the Minister's suspension and subsequent dismissal as a Cabinet Minister. An enquiry was set up to investigate the conduct of the Minister before he was dismissed. The result of the investigation was never made public. The Minister was never charged with a criminal offence and he later resumed his parliamentary duties as a backbencher.

In the case of *Minister of Home Affairs & Others vs Mliba Fakudze & Others*, the Court of Appeal in June 2002 allowed about 200 families who had been evicted from Macetsheni and KaMkhweli to return to their homes on the ground that the eviction order was defective. These families had been evicted in October 2000 for having refused to accept a new chief following a decree passed by the King. Despite the Court of Appeal's ruling, the Commissioner of Police and the 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 to be in contempt of court and were sentenced to a 30-day term of imprisonment. Suffice it to say that neither of the public officials served a day in custody for the contempt of court conviction.

In the case of *Ray Gwebu & Lucky Nhlanhla Bhembe vs The King*, the appellants successfully challenged the validity of a law that had been passed which classified certain offences as being offences in respect of which those indicted therewith were not to be allowed bail by the courts. The Appeal Court held that the law was unconstitutional and that the said preclusion should fall away. The lower courts were, therefore, at liberty to grant or deny bail to applicants based on the merits or demerits of their respective cases. In response to this judgment, the executive issued a statement declining to comply with this court order. The appellants were subsequently denied their freedom, even though a court had granted them bail.

In *R vs Mkhangezi Gule*, the accused was arraigned before the Manzini Magistrate's Court, charged with rape. He applied for, and was admitted to, bail. He duly complied with all the terms stipulated by the court, including the payment of E3 000 in cash as his bail deposit. The Commissioner of Correctional Services however refused to release the accused on bail in terms of the court order. In doing so, the Commissioner placed reliance on the statement of the head of the executive which decreed that no inmate would be released on bail if charged with an offence that had hitherto been legislated to be non-bailable, and one such offence was rape. This was notwithstanding the fact that the Court of Appeal had authoritatively declared the law rendering certain offences to be non-bailable as unconstitutional.

The Theft and Kindred Offences by Public Officers Act of 1975 stipulates that any officer who is alleged to have stolen government property should be suspended with immediate effect. Such suspension, the act provides, should be followed by prosecution of the public official for misappropriation of funds. However, the provisions of this legislation are applied selectively

at best or are not invoked at all.<sup>146</sup> In the main, public officials who have either abused school children or have misappropriated public funds are redeployed to other work stations and are not punished in the conventional sense of the term.

Police brutality was the issue in the case of Mandlenkhosi Mathous and Ngubeni.<sup>147</sup> Here, no disciplinary action was taken against police officers who had tortured a suspect to death on the pretext of investigating the commission of a crime. Instead, the implicated police officers were transferred to other police stations. To date, there has not been a case where police officers who have engaged in brutality have either been disciplined or prosecuted.

As can be seen from the examples referred to above, the mechanisms and procedures for addressing complaints against executive conduct and public officials are in place but are ineffective. This is largely because there is lack of coordination between the institutions charged with the duty of reigning in public officials who act outside the ambit of the law. There is also a lack of transparency that would allow citizens to know to whom they need to address their complaints. A coherent system with one clear point of entry for citizens would be better. The country is devoid of any serious and dedicated investigative approach to controversial executive action or a lack of executive action. In addition, the challenges of effective enforcement are a result of a lack of political will and not so much a lack of resources.

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<sup>146</sup> See the case involving Ben Simelane, a civil servant in the Ministry of Labour and Public Service. The *Times of Swaziland*, Sunday 11 March 11 2002 reported 'I stole Government's E183 000'. The officer admitted misappropriating government money. He was not suspended, nor charged, nor prosecuted, instead he was transferred to another workstation, much against the Auditor General's Report, 2011/2012.

<sup>147</sup> Legal Notice 93 of Gazette 75/2004.

# 4

## Independence and accountability of judges and lawyers

### **A. Introduction**

Until recently, the judiciary in Swaziland was held in high esteem, mainly because it maintained its autonomy in the adjudication and interpretation of the law. As indicated earlier, the concepts of judicial independence and separation of powers were enshrined in the Independence Constitution, but subsequently met their premature demise when the King's Proclamation to the Nation was made law. Even when the King had usurped and vested all legislative, executive and judicial power in himself, the judiciary still found it possible to interpret the law and to uphold the little that was left of people's rights. In the process, the executive felt threatened and inevitably tensions between the two arms of government emerged. It is only recently that the judiciary seems to have been subdued through the purging of non-compliant judges and the rewarding of those who can and do toe the executive's line. With respect to the doctrine of separation of powers, Swaziland seems to have retrogressed despite a constitutional dispensation that provides a sound normative framework for the doctrine.

The concept of an independent judiciary cannot be discussed without setting out, at the outset, the features of the Judicial Service Commission.

### **B. The Judicial Service Commission**

Section 159 of the Constitution provides for the establishment of an independent Judicial Service Commission (JSC). The JSC is made up of the Chief Justice, who acts as the chairperson, two legal practitioners in good professional standing, the Chairperson of the Civil Service

Commission, and two persons appointed by the King.<sup>148</sup> In effect, all the members of the JSC are appointed by the King. Remarkably, the Constitution does not require the appointing authority to consult with the President of the Law Society before appointing members of the Law Society to the JSC.

The JSC is established under the Judicial Service Commission Act,<sup>149</sup> which also provides for other matters incidental thereto. The act provides, *inter alia*, that the Principal Secretary to the Ministry of Justice shall be the Secretary to the Commission,<sup>150</sup> that appointed members of the JSC shall hold office for a period of five years or such lesser period, but not being less than two years, and that the JSC shall 'regulate its procedure and, with the consent of the Prime Minister, may confer powers or impose duties on any public officer'.<sup>151</sup> Clearly, the provisions cited here are contrary to the Constitution in so far as they sanction executive control over the operation of the JSC. According to the Constitution, members of the JSC remain in office for a period of four years.<sup>152</sup>

There is a need to amend the Judicial Service Commission Act in conformity with the Constitution, which, among other things, provides that the JSC shall not be subject to the direction and control of any person or authority.<sup>153</sup>

The JSC has wide recommendatory powers in the appointment of persons to key offices in the justice sector and in administering the judiciary. In order to guarantee the independence of the judiciary that is necessary for promoting the rule of law, the JSC itself needs to be fully independent. In this context, the independence of the JSC itself needs to be reviewed. Whereas international standards require that the body overseeing judicial appointments be independent from the executive and the legislature, the members of the Swazi JSC are all royal appointees.

There is a need for the JSC to be seen and perceived to be independent in its operations if public confidence in the judiciary is to be restored. This can be achieved through legislation that lays down criteria for the appointment and dismissal of judges that are in line with regional and international standards.<sup>154</sup> In particular, the legislation should: provide for the public announcement of all vacancies in the judiciary; that only job-relevant merit counts, having regard to qualifications, integrity, ability and efficiency; that grounds for exclusion from appointment as judges should be clearly articulated; that there should be written explanations for the grading of each candidate; that there should be access by all candidates and the public to the written explanations; that there should also be an appeal process in case of denial of promotion; and, lastly, that there should be recusal of the JSC members in cases of conflict of interest.

In order to provide judges with ethical guidance and ensure their full accountability, the JSC should also draft and publish a judicial code of conduct in line with the Bangalore Principles of Judicial Conduct. While the Leadership Code of Conduct set out in the Constitution<sup>155</sup> will

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<sup>148</sup> Section 159(2)(a–d).

<sup>149</sup> No. 13/1982.

<sup>150</sup> Section 3(5).

<sup>151</sup> Section 4(8).

<sup>152</sup> Section 159(4).

<sup>153</sup> Section 159(3).

<sup>154</sup> See Opinion No. 1 (2000) of the Consultative Council of European Judges (CCJE).

<sup>155</sup> Chapter XVI, Section 239.

also apply to judges once adopted, it falls short of recognised standards of judicial conduct. The Leadership Code of Conduct seeks to ensure that those in leadership positions are committed to the rule of law and administrative justice and that they do not abuse their office by engaging in acts of corruption. In addition, the Disciplinary Inquiry Regulations of 1972 have to be reviewed to bring them in conformity with constitutional provisions, as well as regional and international standards. In particular, the Regulations should provide that violations of the judicial code of conduct constitute disciplinary offences; that disciplinary procedures must be in line with regional and international standards; that a decision of the disciplinary tribunal is subject to appeal; and, finally, that disciplinary hearings must be conducted in a timely manner.

The JSC should also strive for full transparency in its operations. In this regard, it should provide, at least annually, information online on the following areas of the Commission's work: information on selection and promotion (specifically the number of vacancies, the number of applicants, the names of successful candidates, etc.); information concerning disciplinary procedures and sanctions (for instance, the number of investigations opened and those concluded, the outcomes, and the courts concerned); and information on the complaints (number of complaints, nature of complaints, outcomes of disciplinary sanctions, etc.).

Since the independence and impartiality of judges also depend on them maintaining a high degree of professional competence, there is a need for the JSC to provide for their ongoing training. For this purpose, the JSC should establish systematic vocational training for judges of all courts within the country. This will require that the JSC: assesses the training needs; develops training curricula or modules; develops an economic remuneration system (i.e. rewards judges who have gone for training by assigning them fewer cases or rewards training efforts with bonus points for promotion purposes); sends new judges for introductory training in judicial ethics and international human rights law; and gives judges crash courses in constitutional interpretation.

### **c. Judicial independence**

The term 'independence of the judiciary' has two distinct meanings. The first, which relates to the principle of separation of powers, is that only the judiciary should carry out judicial functions, and that it should discharge those functions free of interference by the other two branches of government. The second is that individual members of the judiciary should be insulated from external factors, both negative (i.e. fear of unpleasant consequences) and positive (i.e. inducements), which might influence them in deciding cases.

The importance of the independence of the judiciary was captured by the Chief Justice of Canada in the case of *Re: Provincial Court Judges*, where he stated:

Judicial independence is valued, because it serves important societal goals – it is a means to secure those goals. One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another societal goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.

Strictly construed, the concept of an independent judiciary is not for the benefit of judges as much as it is for the litigants. If judges are enabled by law to carry out their function without fear or favour, the litigants who appear before them benefit, as the law is interpreted in the way it is understood by the judiciary and not based on political expediency. The Constitution does not expressly posit that independence of the judiciary is a right. The Constitution states that, in the determination of both civil and criminal proceedings, 'litigants shall be given a fair and speedy public hearing ... by an independent and impartial court or adjudicating authority established by law'.<sup>156</sup> Independence of the judiciary may therefore be viewed as a human right in so far as it is implied in the right to a fair trial.

Judicial independence is generally secured in two ways, namely through tenure of judicial officials and through the manner in which judges may be removed from office. Each of these two methods will be examined in turn.

## **Tenure of judicial officials**

Judges are appointed by the King on the advice of the JSC. The JSC is supposed to be the sole and independent adviser to the King in this regard. The independence of the JSC ensures an independent judiciary. The independence of the JSC is, however, brought into question when some of its members are also members of other bodies whose objects may compromise the independence of the JSC in the exercise of its function of recommending people for appointment to the offices of judge, Attorney General (AG), Director of Public Prosecutions (DPP), magistrate and Registrar of the High Court.

Judicial appointments to all levels of the judiciary should be made on merit, with appropriate provision for the progressive removal of gender imbalances. At present, because the system of appointment of judges is opaque, it is not known what considerations are taken into account when a judge is appointed to judicial office. In some cases, prospective judges are interviewed before they are appointed, while, in others, individuals are appointed without being interviewed. Local judges are appointed on a permanent basis, while expatriate judges are appointed on contract.

The Constitution provides that 'a person who is not a citizen of Swaziland shall not be appointed as Justice of a superior court after seven years from the commencement of this Constitution'.<sup>157</sup> The present setup is that there are three expatriate judges in the superior courts, and they are all on contract. The Chief Justice is an expatriate who also doubles up as Judge President of his native country, Lesotho. Such an arrangement is undesirable, as the office of Chief Justice has many demands – its holder is not only the head of the judiciary, but is also responsible for the administration of the courts in the country. The administration of the courts is the mandate of the office of Chief Justice, which is carried out with the cooperation of the Office of the Registrar of the High Court. It is submitted that the demands of the Office of Chief Justice require that the incumbent be available at all material times if people are to be assured of their right to access to justice. This is not possible if the incumbent is periodically unavailable because he has to attend to matters in Lesotho.

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<sup>156</sup> Section 21(1).

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

Until the Constitution of 2005 was passed into law, the tenure of office of judges of the High Court was governed by the retained articles 99 and 100 of the Independence Constitution of 1968. Article 99(4) stated that the office of any judge of the High Court could not be abolished while there was a substantive holder thereof. For some time, there appeared to be uncertainty concerning the retirement age of judges. In terms of article 99(5) of the Independence Constitution, judges were required to retire at the age of 62 years or such other age as might be prescribed by an act of Parliament. This confusion led to the then Chief Justice seeking a High Court declaration concerning the retirement age of judges.

Fortunately, the Constitution of 2005 clarified the issue by providing that the office of a judge shall not be abolished while there is a substantive holder of the office, and that judges may retire at any time after attaining the age of 65 years.<sup>158</sup>

Security of tenure of judges is an important factor in determining whether or not the judiciary is independent. The Constitution provides that the salary and term of a judge shall not be altered after appointment to the disadvantage of the holder of that office.<sup>159</sup> Section 160(1)(c) provides that the JSC shall review and make recommendations on the terms and conditions of service of judges and persons holding judicial office. The problem with vesting this responsibility in the JSC is that the independence of the JSC itself is questionable, since it is made up exclusively of royal appointees.

In Swaziland, judges are paid from the Consolidated Fund.<sup>160</sup> As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained. Appropriate salaries and benefits, support staff, resources and equipment are essential to the proper functioning of the judiciary. There is no specialised body that is charged with the responsibility of representing the judiciary in negotiations over judicial terms and conditions of service. This limits the independence of the judiciary, since salaries of judicial officers are only fixed by the executive arm of government in negotiations for improved salaries and other conditions of service for the public sector as a whole. A system which requires judges to negotiate their salaries and benefits directly with the executive is likely to lead to lack of independence. There ought to be an independent body to make recommendations regarding salaries and benefits to avoid the possibility of political interference through economic manipulation. It is recommended that there be a constitutional duty on Parliament to fix the salaries, allowances and pensions of judges. This body would be appointed by the executive and would be attached to Parliament. Such an independent body or commission would have to be established every three years by government to inquire into the adequacy of salaries and benefits of judges and magistrates.

Judicial independence also implies the existence of administrative independence, that is, control by the courts over administrative decisions that have a direct and immediate bearing on the existence of the judicial function. This includes, but is not limited to, matters such as the assignment of judges, the determination of court sittings and court lists and related matters such as the allocation of courtrooms, and the direction of the administrative staff carrying out these

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<sup>158</sup> Section 156(1)(a).

<sup>159</sup> Section 208(3) and (4).

<sup>160</sup> Section 141(5) of the Constitution, 2005.

functions. At present, Swaziland experiences serious problems relating to the manner in which judges of the High Court are allocated matters, and this does not augur well for establishing an independent judiciary. The problems largely relate to the trend that has developed that politically sensitive cases and cases where the government is a litigant will be assigned only to specific judges.

In practice, the Chief Justice appears to have extensive administrative powers over the functioning of the courts as well. When lawyers engaged in a prolonged boycott of the courts in 2011, the Chief Justice is reported to have convened a meeting with magistrates where he verbally instructed them to proceed with trials, with or without lawyers representing litigants. Viewed from this angle, the extensive administrative powers of the Chief Justice in effect undermined the legitimacy of the judiciary and the decisional independence of the judicial officers. The end result is that judicial officers who do not toe the Chief Justice’s line are now insecure in their positions.

The system of appointing judges is opaque in so far as it establishes no criteria for vetting candidates. Consequently, there is no guarantee that people who become judicial officers are the most deserving.<sup>161</sup> Individuals who are appointed to judicial office despite not being the most qualified are likely to secure their positions by protecting the interests of the authority that put them into office in the first place, for instance through resisting making decisions that may be adverse to those interests. This clearly compromises the decisional independence of such officers.

*Table 3: Distribution of judges and magistrates by courts and gender*

	Supreme Court	High Court	Magistrates’ courts	Swazi courts	Industrial court	Total
Men	6	5	15	25	4	55
Women	0	4	5	0	0	9
<b>Total</b>	<b>6</b>	<b>9</b>	<b>20</b>	<b>25</b>	<b>4</b>	<b>64</b>

The Constitution makes no reference to the need for the composition of the judiciary to reflect gender equality, as it does with respect to Parliament. Despite this shortcoming, out of the eight members of the High Court, four are male and the other four are female. Two of the female judges are not citizens of Swaziland and are engaged on contract, while the other two are Swazi citizens. There appears to be official reluctance to appoint more Swazi women to the High Court bench, as it is only recently that the second Swazi woman was appointed to the bench.<sup>162</sup> The JSC does not have any policy aimed at actively increasing the number of qualified women in the judiciary, although the country’s Gender Policy<sup>163</sup> does provide that the government must ensure that ‘the Constitution be translated into gender-responsive legislation where necessary’.<sup>164</sup> There

<sup>161</sup> M Ndlangamandla writing in the *Mail and Guardian* of 10–16 May 2013 refers to the recent prevalence of appointments of ‘sweetheart judges’ at p. 30.

<sup>162</sup> Judge Mumcy Dlamini was appointed in March 2012.

<sup>163</sup> 2010.

<sup>164</sup> Para 12.5.2.

is also a need to localise the Swazi bench in line with constitutional provisions.<sup>165</sup> Except for one local male judge who was appointed recently, the Supreme Court is manned entirely by non-Swazis. Even the Chief Justice is not a citizen of Swaziland. Increasing the number of Swazis on the Supreme Court bench is imperative, as that is what section 157 of the Constitution dictates.

## Removal of judges from office

Section 158 of the Constitution provides that judges can only be removed from office if found guilty of serious misbehaviour or if they are unable to perform the functions of their office as a result of infirmity of body or mind.<sup>166</sup> The King acts on the advice of an ad hoc committee<sup>167</sup> in the case of the Chief Justice, and on the advice of the Chief Justice in the case of any judge of a superior court, before instituting an investigation into whether the Chief Justice or the judge should be removed from office. If the King is of the view that the reasons for removing either the Chief Justice or a judge should be investigated, 'the King shall refer the matter to the Judicial Service Commission'.<sup>168</sup> The JSC shall enquire into the matter and recommend to the King whether the Chief Justice or the judge ought to be removed from office. The King has to act on the recommendation of the JSC. Section 158(7) provides:

Subject to considerations of fairness and natural justice, the Commission [JSC] shall be reconstituted for the purpose as may be appropriate, the Chief Justice being replaced by the most senior Justice of the Supreme Court, and a Justice who is a member of the Commission being replaced by another Justice appointed by the other members of the Commission.

Although the Constitution establishes a mechanism for the removal from office of a judge who is guilty of misconduct, it fails to provide for a due-process mechanism to ensure that the process of removal is transparent, impartial and fair. The result is that removal of a judge from office can be reduced to a circus, as happened with the removal of Justice Masuku in 2011. Contrary to section 158(3) of the Constitution, Judge Masuku was, on 29 June 2011, presented with charges that had been drafted and signed by the Chief Justice. Had the JSC been dealing with the matter, the Secretary of the JSC, and not the Chief Justice, would have signed the charge sheet. On the following day, the judge was suspended from office by the Chief Justice. In the light of section 158, the judge ought to have been suspended by the King<sup>169</sup> and not by the Chief Justice. That the Chief Justice had prepared and signed the charge sheet, that he had also suspended the judge, that some of the charges intimated that Judge Masuku 'aspired to be Chief Justice', and that he was furthermore disrespectful to the Chief Justice should have been enough reason for the Chief Justice to recuse himself from the proceedings. He did not. In August 2011, the Chief Justice presided over the removal of the judge from office in defiance of the principles of natural

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<sup>165</sup> Section 157(1) states: 'A person who is not a citizen of Swaziland shall not be appointed as Justice of a superior court after seven years from commencement of this Constitution.'

<sup>166</sup> Sub-section (2).

<sup>167</sup> A Committee made up of the Minister of Justice, the Chairman of the Civil Service Commission and the President of the Law Society of Swaziland – section 158(10) of the Constitution.

<sup>168</sup> Sub-section (3).

<sup>169</sup> Sub-section (6).

justice and of section 158(7) of the Constitution. The judge was ultimately removed from office in September 2011 with complete disregard for section 158 of the Constitution. The Constitution provides for the setting up of an inquiry, including allowing the judge in question an opportunity to be heard.

The effect of the brazen disregard of the Constitution in the case of the removal of Judge Masuku was to damage the reputation of the Swazi justice system. The fact that the justice system failed to protect and uphold the rights of a judge is a serious indictment on the independence of the judiciary in Swaziland. The question that arises is: If the justice system has no respect for the rights of judges, what hope is there for the ordinary citizen?

In November 2002, in *Minister of Home Affairs & Others vs Mliba Fakudze & Others*, the Court of Appeal ruled that evicted families from Macetsheni and KaMkhweli be allowed to return to their homes on the ground that the eviction order concerned was defective. In another case, the Court of Appeal ruled that Royal Decree 3 of 2001, which denied bail to pre-trial prisoners charged with certain offences such as rape, was not valid since there was no legal basis on which the King could rule by decree. This was because the Order in Council of 1978 declared that the monarchy could not issue further royal decrees until a new constitution came into force. The government did not comply with the Court of Appeal ruling and prison officials refused to release suspects charged with offences falling under the 1993 Non-Bailable Offences Order,<sup>170</sup> which was reconfirmed in Royal Decree 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, and that they have not acted independently'. Two days later, six Court of Appeal judges resigned en masse.

On 19 December 2002, the High Court stated that it would refuse to consider any legal application by the government unless the statement of the Prime Minister was unconditionally withdrawn together with the issuing of an apology and the government abided by Court of Appeal rulings. The then Chief Justice Stanley Sapire resigned on 3 April 2003 after being threatened with demotion by the executive.

On 4 May 2003, the King demoted Justice Masuku to the Industrial Court. Masuku had decided not to process legal applications from the government until the Prime Minister withdrew his statement of 28 November. He was then transferred by Legal Notice 29 of 3 April 2003 to the Industrial Court. This was contrary to the provisions of the Constitution.<sup>171</sup> Masuku filed an application with the High Court in which he argued that his transfer to the Industrial Court was unlawful. The High Court finally ruled in his favour in May 2004, holding that Masuku should be reinstated, as the Legal Notice was unlawful. Government complied with the court order, as Judge Masuku was allowed to continue working as a judge of the High Court.

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<sup>170</sup> Order No. 14/1993.

<sup>171</sup> Article 100 of the Independence Constitution stated that a judge could not be demoted.

## D. Cases where the executive refused to respect the rule of law

The case of *Ben M Zwane vs The Swaziland Government & Others*<sup>172</sup> is one of many where the executive has failed to respect the rule of law in Swaziland. The applicant was employed by the government of Swaziland as the Clerk of Parliament. He was later informed that he was to be transferred to the Ministry of Agriculture where he would hold the position of Assistant Principal Secretary. The applicant objected to the transfer and approached the court, requesting a declaratory order to the effect that the purported transfer was invalid because the Office of the Prime Minister had no power to effect the said transfer. In the alternative, the applicant prayed that the transfer be stayed and suspended until such time as the dispute had been resolved by the Civil Service Board, a body that is responsible for the hiring, transfer, promotion, demotion and dismissal of civil servants. The court granted interim relief to the applicant which stayed the transfer, while also giving the respondent a chance to file its response. No sooner had the court issued the order than the Prime Minister issued a press release and wrote a letter to the Commissioner of Police, which letter was copied to the President of the Industrial Court, among others. In the letter, the Prime Minister stated that he had barred the applicant from performing his duties as Clerk of Parliament until further notice. The Prime Minister claimed that he had taken action in his capacity as Minister for Parliamentary Affairs. The Prime Minister thus barred the applicant from performing his duties in spite of a court order interdicting the government of Swaziland and the Royal Swaziland Police from preventing the applicant from performing his duties.

The court observed that it was most unusual for a party in pending proceedings to write a letter to the presiding judge. The court further observed that it was particularly unacceptable if such a letter touched on issues pending for determination, and, worse still, if the contents of the letter were a direct affront to an interim decision contained in an order of court. The order, it was said, had been served on the Royal Swaziland Police (RSP) to enforce. Ironically, however, the RSP had now turned into a messenger tasked with delivering the respondent's letter defying the court order.

The court stated that it was regrettable that the Prime Minister had:

set the law enforcement officers on a self-destructive mission to subvert the authority and dignity of His Majesty's court. The Executive arm of government resorted to self-help, oblivious to, and regardless of, the negative impact of the action on the tenets of the rule of law which is the shibboleth of any modern democracy. In doing so, the Honourable Prime Minister became the complainant, prosecutor and judge in his own cause contrary to the tenets of natural justice.<sup>173</sup>

The brazen disregard for the rule of law by the executive was unfortunate in so far as it confirmed the view that the executive neither upheld the rule of law nor respected judicial independence, especially with respect to the right of access to justice by the citizenry. Thus the executive went

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<sup>172</sup> Unreported Industrial Court case No. 20/2002(a) supra.

<sup>173</sup> *Ben Zwane* (supra) p. 5.

against all that Mokgoro J described as the constitutional right of access to court in the case of *Lesapo vs North West Agricultural Bank and Another* that:

the right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right to access to court is a bulwark against vigilantism and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance.<sup>174</sup>

Although this is a South African decision, it has persuasive authority in Swaziland.

The other case where the executive defied the rule of law was that of *Ray Gwebu & Lucky Nhlanhla Bhembe vs The King* (hereafter 'Ray Gwebu'). Here, the appellants approached the court seeking an order declaring a decree unconstitutional. The decree in question prohibited courts from granting bail to persons charged with certain specified offences. Based on the application, the Court of Appeal ruled the decree to be unconstitutional and invalid, since the King had had no legal basis for issuing the decree, as the Establishment of the Parliament of Swaziland Order of 1978 declared that the King could not issue decrees until a new constitution was in place. The executive defied the Court of Appeal ruling and, instead, swiftly procured the enactment of the Criminal Procedure & Evidence (Amendment) Act 4 of 2004 which purported to re-enact, if not validate, the decree which had been annulled by the Court of Appeal. Since the government did not recognise this ruling by the Court of Appeal, prison officials refused to release suspects charged with the specified offences, thereby contravening the well-known precepts that require law enforcement agencies to obey only lawful orders.<sup>175</sup>

Through the enactment of the Criminal Procedure & Evidence (Amendment) Act 4 of 2004, the government effectively limited or ousted the jurisdiction of the courts in order to achieve its own goals. As a result, suspects who were, in terms of the Ray Gwebu judgment, entitled to apply for bail, and who were in certain cases granted bail, remained in custody. The import of this illegal stance on the part of the executive is that, years later, the taxpayer had to foot the bill for the illegal and continued incarceration of suspects when they subsequently successfully prosecuted civil claims against the government. Instructions were given to frustrate the release of those admitted to bail. The result was that the courts were rendered unable to function. Worse still, the Court of Appeal resigned en masse and there was no Court of Appeal for about two years. The knock-on effect was that dissatisfied litigants had nowhere to lodge their appeals.

The executive in Swaziland appears to find the courts not to be politically compliant and has engaged in efforts to limit the powers of the courts and thereby render them ineffective. In effect, this undermines the system of checks and balances, in that court orders may be overridden by legislative action, as was the case in *Ray Gwebu*.

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<sup>174</sup> Para 22, p. 418G.

<sup>175</sup> The Police Act 29/1957, section 7(3).

Another case in point is that of *Minister of Home Affairs & Others vs Mliba Fakudze & Others* in which the Court of Appeal had allowed 200 families which had been evicted from Macetjeni and KaMkhweli to return to their homes on the ground that the relevant eviction order was defective. These families had been evicted in October 2000 for having refused to accept a new chief following a decree by the King relieving the two areas, KaMkhweli and Macetjeni, of their chiefs and replacing them with Prince Maguga. Despite the Court of Appeal ruling, the Commissioner of Police and the Lubombo Regional Commander prevented the families from returning and barred the execution of the court order. The Commissioner of Police and the Regional Commander of Lubombo were subsequently held in contempt of court and were sentenced to a 30-day term of imprisonment. Both members of the RSP never got to serve their sentences in prison because service of the court process was frustrated by the same institution that was supposed to serve the court order on the Commissioner of Police and the Regional Commander.

In the case being discussed, the integrity and independence of the Court of Appeal judges who heard the matter was thus blatantly challenged, with the executive stating explicitly that it would not recognise the court's orders and would treat them as if they had not been issued. The executive also went a step further and stated that all state functionaries whose legal duty was to enforce the court orders would be instructed not to comply with them.

As a result of the executive's failure to respect and uphold the rule of law, many litigants could not access justice, and those who did were not afforded fair trials as the tension between the judiciary and the executive mounted. Such was the effect of holding the courts hostage through failure to enforce court orders and judgments.

Through its actions, the executive constituted itself into a Supreme Court of Appeal. It was the executive which now chose which judgments were palatable or consonant with political aspirations. The legal correctness of judgments was disregarded as political correctness became the operative criterion.

On 17 May 2003, the AG issued a statement in which the government unconditionally retracted the 28 November statement by the executive which had alleged that judges of the Court of Appeal were 'influenced by forces outside our system and that they were not acting independently' in their work. The statement by the AG affirmed that the government respected the rule of law and the independence of the judiciary and accepted the fundamental obligation to abide by court judgments. It was on the basis of this statement that the judges of the Court of Appeal who had resigned agreed to withdraw their resignation and reassume their duties. Despite the assurance from the AG's office, the government continued to disregard the rulings of the Court of Appeal and refused to release suspects granted bail by the magistrates' courts and the High Court.

In addition, even though the government entered into a pact with the judges of the Court of Appeal, who had by now reassumed their duties, in terms of which the government agreed to be bound by, and carry out, the orders of the courts, the government did not comply with the court decision to allow the families evicted from KaMkhweli and Macetjeni to return home.

By the year 2004, the evicted families had lived as internally displaced people for more than three-and-a-half years. In this case, the government violated various human rights of the evicted families, including the right to property, the right to effective legal remedies, and the rights to

livelihood, shelter, education and health. By violating these rights, the government abdicated its international obligations.

The African Charter on Human and Peoples' Rights (ACHPR) provides that people have a right to have their cause heard, as well as a right to appeal a decision.<sup>176</sup> The evicted families were denied both rights by the executive. Article 14 of the ACHPR also provides that the right to property shall be guaranteed. In the case of the families that were evicted, their right to own and enjoy their property, coupled with the right to shelter, was trampled upon by the executive arm of government. In one case,<sup>177</sup> the ACHPR stated that:

Although the right to housing or shelter is not expressly provided for under the African Charter the corollary combination of the provision protecting the right to enjoy the best attainable state of mental and physical health ... the right to property and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected.

The ACHPR further provides that punishment is personal and can be imposed only on the offender. In the case of Macetjeni and KaMkhweli, most of the family members, especially the women and children, became guilty by association with the respondents.

The provisions of the United Nations (UN) Convention on the Rights of the Child (CRC) were also violated, as children belonging to the evicted families had their right to protection from interference with privacy, family, home and correspondence<sup>178</sup> brought to nought by the executive. When the children were evicted, the children's best interests<sup>179</sup> – a central tenet of the CRC – were disregarded.

Another case which illustrates the Swazi executive's contemptuous attitude to the rule of law, independence of the judiciary and the doctrine of separation of powers is that of *Lindiwe Dlamini vs Qethuka Sigombeni Dlamini & Another*.<sup>180</sup> In this matter, the daughter of the applicant had been removed from her custody without her knowledge and consent to become the King's fiancée. The applicant alleged that her daughter had been abducted from her school by the respondents and applied to the court for an order to compel them to return her daughter to her custody. The matter was heard by three judges of the High Court.<sup>181</sup> The AG applied for standing as the King's representative and to be allowed to oppose the application. His application, in his capacity as representative of the King, would have amounted to a waiver of the King's immunity from civil proceedings in his private capacity. The Chief Justice, possibly worried at this implication, encouraged the AG to withdraw his application and then proceeded to appoint him as *amicus curiae* to advise the court on issues of customary law. This decision was made without prior notice to the applicant's lawyers and despite the fact that the AG proceeded to submit a

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<sup>176</sup> Article 7(a) and (b).

<sup>177</sup> *Social and Economic Rights Action Centre (SERAC) vs Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>178</sup> Article 31.

<sup>179</sup> Article 3(1).

<sup>180</sup> Unreported High Court case No. 3091/2001.

<sup>181</sup> The then Chief Justice Stanley Sapire; Justice Stanley Maphalala and Justice Jacobus Annandale.

lengthy document which supported the respondents' position that the King had the right under customary law and practice to take girls as wives without parental consent.

Subsequent to this development, the AG, escorted by heads of security forces, confronted the judges who were presiding over the matter and demanded that they should resign or recuse themselves from the matter. The Chief Justice stated in open court that, despite the threat issued by the AG, he and his colleagues would continue to preside over the case, as they were duty bound to ensure that justice was done. The AG subsequently wrote to the Chief Justice and the other presiding judges in the following terms: 'In case your resignation letters are not received as stipulated, the office of the AG is under strict instructions to submit the relevant instruments for your removal from office.'

Having reviewed the letter and interviewed the relevant parties, the DPP formally charged the AG with obstructing the course of justice, attempting to defeat or obstruct the course of justice, contempt of court and sedition.

In a subsequent statement by the King, he distanced himself from the acts of the AG and advised that the monarch had had no knowledge of the AG threatening the three judges of the High Court, and had furthermore not mandated such action. The matter was subsequently withdrawn indefinitely when an announcement was made that the girl round whose custody the whole matter had revolved and the King were officially engaged.

The charges against the AG remained in force, although he refused to appear in court when summoned. A meeting was subsequently convened of palace advisers and some high-ranking government officials at which the DPP was ordered to withdraw the charges against the AG or face dismissal. The DPP opted to offer to resign if the government would pay him appropriate compensation. The government subsequently denied that officials had intimidated the DPP. Interestingly, however, it announced its intention to reopen a motor vehicle accident investigation involving him, a case that had earlier been closed by the police.

A few days later, the government placed an advertisement seeking applications for the position of DPP and followed this by halting the proceedings against the AG. In doing the latter, the government directly supported an overt attack against the independence of the judiciary and against the rule of law. In addition, by its action against the DPP, the government violated sections 4 and 5 of the UN Guidelines on the Role of Prosecutors,<sup>182</sup> which require states to:

ensure that prosecutors are able to perform their professional function without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability; and that they and their families are protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.

The Commonwealth (Latimer House) Principles on the Three Branches of Government provide that a judge at risk of removal be judged by an independent and impartial tribunal, and that the grounds of removal be limited to inability to perform judicial duties or to serious misconduct. The Constitution provides for the removal of judges, but the provision falls short of the Latimer

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<sup>182</sup> Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders; Havana, Cuba on 27 August–7 September 1990. See also *Year Book of the International Commission of Jurists*, Hart Publishing, Oxford.

House Principles in so far as it does not require the JSC to investigate alleged misbehaviour in accordance with the rules of natural justice. There is an urgent need to restore confidence in the judiciary. The starting point, it is submitted, would be compliance with the provisions of the Latimer House Principles through the setting up of an impartial tribunal that would assess the reasons presented for the proposed impeachment of any judge. There is a need to make provision for a mechanism that will take into account the requirements of due process in order to ensure that the procedure for the impeachment of judges is transparent, impartial and fair.

In this regard, it is recommended that the JSC be restructured so that it is able to act as an independent body. This can be done through making it mandatory for the appointing authority to take advice from the Chief Justice and the President of the Law Society when deciding to appoint members of the Law Society to this body. It is also recommended that the composition of the JSC be broadened to include representatives of civil society, since they are the consumers of services delivered by the judiciary. As it stands, section 158 of the Constitution is at odds with the requirements of an independent judiciary as stated in the ACHPR.<sup>183</sup>

There is also a need for the creation and establishment of a system that will ensure that judges are appointed to judicial office on the basis of merit as opposed to any other unknown criterion. If the system of appointment of judges is transparent and subject to a vetting procedure, it might deter the appointing authority from appointing people based on no other criteria except fealty to the law and merit.

It is also recommended that, if the judiciary is able to attract people of the right calibre, the terms and conditions of service of the judiciary be improved, but with their salaries being negotiated with an independent committee. This might have to be coupled with a management performance system for judges to ensure that they perform optimally.

## **E. Lawyers**

Most law graduates who practise law in Swaziland will have received their legal education from the University of Swaziland, while the remaining few are graduates of universities in South Africa and other countries.

Over the years, private legal practice has not been able to absorb all law graduates of the University of Swaziland, with the result that most of them remain unemployed. Those who are absorbed by the legal profession as practitioners complain that their pay is too low, especially during their articles. For its part, the Law Society has been complaining that the quality of the graduates has continued to decline. The President of the Law Society has stated that the graduates lack technical competence when they join the legal profession. The emphasis of training at Law School has been on commercial law at the expense of human rights law. Only recently has the Department of Law begun to promote and emphasise the theory and practice of human rights law, in particular through its newly introduced Clinical Legal Education courses.

The University has also been teaching and producing graduates at the diploma level through its Institute of Distance Education. Some of the learners who graduate with a diploma in law are

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<sup>183</sup> Article 28 provides that 'States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.'

employed in the public sector either as clerical officers or as support staff within the judiciary. Some are court interpreters and clerical officers within the judiciary.

The legal profession in Swaziland is regulated by the Law Society, a body that also serves as Swaziland's bar association. The Law Society is established by the Legal Practitioners' Act<sup>184</sup> and the Law Society's bye-laws.<sup>185</sup> The act makes it mandatory for all persons admitted and enrolled as legal practitioners in Swaziland to become members of the Law Society of Swaziland. The Law Society exists: to represent the views of the profession; to initiate and promote reforms in legislation, the administration of justice and the practise of law; to uphold the integrity of legal practitioners;<sup>186</sup> to maintain the status and dignity of the legal profession; and to deal with the interests of the legal profession.

According to the register of legal practitioners at the time of writing of this report, Swaziland had 72 attorneys in the employ of government, 77 attorneys in private practice and in non-governmental organisations (NGOs), 17 advocates based in Swaziland, and 9 South African advocates who have been admitted to practise in Swaziland. As of February 2012, a total of 13 attorneys had been admitted to practise law in Swaziland.<sup>187</sup>

Most law firms are located in the country's two main cities, with only a few based in some of the smaller outlying towns of the country, where the majority of people live. In effect, this limits access to legal representation by the majority of the people, particularly those who are too poor to afford travel to the towns, where most of the lawyers are located.

In addition to travel costs, lawyers' fees are also prohibitively high for most people. Except for a report by the Committee that was set up by the Law Society to create a demarcation between junior and senior attorneys' fees, there is no fees tariff that seeks to standardise the fees that attorneys are expected to charge. The law does not provide the scale or minimum fees that lawyers must charge for their services. The report of the Committee is meant to serve as a guide to practising attorneys.

## Disciplinary mechanisms for lawyers

The Law Society is empowered by the Legal Practitioners' Act to apply to the Chief Justice for the suspension or removal of a legal practitioner cited for professional misconduct. The act also provides for the establishment of a Disciplinary Tribunal, a body that is headed by a chairperson who is appointed by the Chief Justice. The chairperson of the Tribunal then appoints two others from the Law Society in consultation with the President and Council (Executive) of the Law Society. The entire membership of the disciplinary mechanism is made up of lawyers only. This raises the suspicion that lawyers cover up for one another in an effort to protect their own, to the detriment of clients who usually suffer when their monies are embezzled by their lawyers. The Regulations provide that the "Tribunal shall conduct its hearings in private and shall permit the practitioner to be represented by another legal practitioner, if he so wishes".<sup>188</sup> The effect of

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<sup>184</sup> 1964.

<sup>185</sup> 1992.

<sup>186</sup> This includes advocates, attorneys, notaries and conveyancers.

<sup>187</sup> Information sourced from the offices of the Law Society of Swaziland, Mbabane on 9 February 2012.

<sup>188</sup> Section 12(1) of the Legal Practitioners' Act.

this provision is that the hearings of the Tribunal are not open to the public. As such, it is not transparent.

An aggrieved member of the public can lodge a written complaint with the Secretary of the Law Society, who must then refer such complaint to the chairperson of the Tribunal for appropriate action. This procedure was largely unknown to most of the respondents who were interviewed in the course of the present research. There is therefore a need for the Law Society to publicise the procedure.

The Tribunal has the power to suspend legal practitioners who are guilty of professional misconduct. If the Tribunal is also of the view that 'it would be contrary to public interest to allow a legal practitioner to continue to practise ... because of any mental or physical disability',<sup>189</sup> the Tribunal must direct the Law Society to apply to the High Court for the suspension of the said legal practitioner. It is unclear what physical disability would be contrary to public policy necessitating removal from the roll. Ordinarily, physical disability should not disqualify someone from practising law. For this reason, this proviso might not pass constitutional muster, as it is discriminatory against disabled people. The Tribunal can only suspend legal practitioners for a period not exceeding three months and order a fine not exceeding E1 000<sup>190</sup> – which is, in effect, a paltry fine. There is a need to amend the act to ensure that more stringent punishments can be imposed by the Tribunal. The act should therefore be amended to give the Tribunal punitive powers, subject to appeal to or review by the High Court.

Complaints of lawyers misappropriating funds of their clients abound in Swaziland. Recently, a lawyer who doubles up as a member of the JSC was alleged to be withholding monies belonging to his client and to his employer. Interestingly, the accused lawyer came out boldly, stating that he would defy the Tribunal and not appear before it.<sup>191</sup> He stated that the Law Society was out to destroy his character. The procedure dictates that, once a lawyer is charged with professional misconduct, the Chief Justice must sign a subpoena which must be served on the accused lawyer before his or her matter may be heard by the Tribunal. In the present case, the Chief Justice is said to have declined to sign the subpoena, citing failure by the Law Society to provide the accused lawyer with further particulars in accordance with his request.<sup>192</sup> Another case reported in the media recently pertains to a lawyer who is alleged to have sold land on behalf of his client, but who never remitted the proceeds of the sale to the client. It is alleged that the lawyer said he could not remit the proceeds of the sale to his client because they constituted his legal fees. The amount in question totalled E400 000.<sup>193</sup>

In some instances, lawyers are accused of cheating their clients by taking a lion's share of monies accrued from successful claims made to the Motor Vehicle Accident Fund (MVA). Lawyers are also accused of charging exorbitant fees for 'consultations, their asking price at times going way above that of the salary of an ordinary worker in the public service'.<sup>194</sup> The AG

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<sup>189</sup> Section 27 ter (1)(b).

<sup>190</sup> Section 27 ter of the Legal Practitioners' Act (supra).

<sup>191</sup> See the *Times of Swaziland*, Sunday 28 October 2012, 'I won't appear before tribunal', pp. 4–5.

<sup>192</sup> The *Times of Swaziland*, Sunday 28 October 2012 'CJ, Law Society clash again', pp.4–5.

<sup>193</sup> The *Times of Swaziland*, 31 October, 'Top lawyer in E2.1 farm sale dispute', p. 3.

<sup>194</sup> See the *Nation Magazine*, 'Lawyers not above the law', September 2012, p. 31.

is on record as stating that lawyers flout the provisions of the Legal Practitioners' Act<sup>195</sup> by failing to submit to the AG the audited certificates of their accounts. As of February 2011, less than 20 law firms had complied with the act in this regard. The Deputy AG went so far as to say that the impunity with which lawyers fail to uphold the rule of law in this regard 'means our courts are serviced mostly by crocodile attorneys'.<sup>196</sup>

There have been a number of cases involving lawyers who misappropriated their clients' monies. The case of *Rex vs Bheki and Thembele Simelane* is a recent example. In this case, the accused lawyers were alleged to have misappropriated monies amounting to many millions of Emalangeni. The lawyers were charged with theft. Before the matter could be heard in court, the first accused died and only the remaining accused was tried and convicted by the High Court. He was sentenced to a term of imprisonment and did not succeed in his appeal to the Supreme Court.

Recently, Parliament attempted to set up a select committee to investigate claims of misconduct against lawyers. Lawyers filed an urgent application in the High Court where they challenged Parliament's powers to conduct such investigations. In his papers filed with the court, the President of the Law Society argued that the whole parliamentary exercise was aimed at naming and shaming members of the Law Society without anything being achieved, thereby denigrating their dignity. The Law Society argued that there was a self-regulation mechanism that was effective in bringing to justice lawyers who had committed professional misconduct. The reality, though, is that the Tribunal has not conducted disciplinary proceedings against lawyers in a long time. The reason is not difficult to find: Because Swaziland has one university where a majority of the lawyers studied, they have a symbiotic relationship that would be difficult to break.<sup>197</sup> A full bench of the High Court concluded that Parliament did not have the power to initiate investigations against errant lawyers, as there is a self-regulatory mechanism under the Legal Practitioners' Act. The court ruled that the establishment of the Select Committee and the duties it was meant to carry out were illegal and unconstitutional, as it was established contrary to the provisions of the Legal Practitioners' Act.

The Law Society does not have the exclusive prerogative to deal with errant lawyers to the exclusion of all other law-enforcement agencies. Errant lawyers can be prosecuted for criminal offences such as defrauding their clients. They can also be reported to the Anti-Corruption Commission (ACC) for investigation. The public also has recourse to sue a law firm for damages by way of a civil claim.

In order to improve the accountability of lawyers, the Swaziland Law Society should publicise the mechanism through which members of the public may lodge complaints about the professional misconduct of lawyers. There is a need to amend and strengthen the Legal Practitioners' Act to provide that members of the Tribunal should include two other people from civil society.

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<sup>195</sup> *The Nation*, 'Crocodile lawyers killing the ideal of the rule of law', April 2011, p. 34.

<sup>196</sup> *The Nation*, 'Crocodile lawyers killing the ideal of the rule of law', April 2011, p. 34.

<sup>197</sup> *The Nation*, September 2012 (*supra*), p. 33.

Table 4: Guide to legal practitioners' fees

Category	Number of years in continuous practice	Hourly rate (not exceeding)
Junior junior attorney	From admission and enrolment up to 3 years	E400.00
Junior attorney	Between 3 and 6 years	E800.00
Junior senior attorney	Between 6 and 10 years	E1 200.00
Senior attorney	Ten years and over	E2 000.00

Source: Sourced at the Law Society of Swaziland's offices.

According to the report of the Committee that drew up the guidelines for attorneys' fees, most junior junior attorneys are not eligible to practise for their own account, as they still require supervision by a senior practitioner. A junior attorney may practise for his or her own account, but may not have an articled clerk serving articles in his or her law firm. Junior senior and senior attorneys may practise for their own account and may also train articled clerks. Junior attorneys may apply to the Council of the Law Society for leave to be promoted to the next category in line, depending on such factors as industriousness and ability as substantiated by the applicant. The Council may in its discretion elevate or refuse to elevate such attorney.

The Committee's guidelines also deal with the issue of specialist practitioners. The report states that such attorneys have to write an examination and then apply to the Council to be conferred with specialist status once they have passed the examination. At present, there is no attorney who has written and sat any examination and has been bestowed with 'specialist' status. Effectively, Swaziland is replete with general practitioners and not a mixture of generalist and specialist practitioners.

The relationship between the Law Society and the executive arm of government has always been lukewarm at best and frigid at worst. This is borne out by the following cases and examples.

In April 2003, the Law Society decided to boycott all court proceedings presided over by the Acting Chief Justice and two High Court judges because, in the opinion of the Society, the appointment of the said judges was unconstitutional. Members of the Law Society also protested against the demotion of the then Justice Masuku from the High Court bench to the Industrial Court. As a result of the boycott, some lawyers were charged with contempt of court. Two of the attorneys were convicted of 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 was required to appear in court on charges of inciting lawyers not to appear before judges. The then President of the Law Society was subsequently threatened with deportation for holding dual citizenship.

This state of affairs elicited a statement by the UN Special Rapporteur on the independence of judges and lawyers in Swaziland which stated 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 as flawed judicial appointments would certainly undermine the rule of law'.<sup>198</sup>

<sup>198</sup> Per Dato' Param Kumaraswamy, <http://www.icj.org/dwn/database/AttacksonJustice-Swaziland2005.pdf> (accessed 12 March 2012).

In July 2011, members of the Law Society embarked on the longest boycott yet of the courts. The boycott ended only in December 2011. The bone of contention this time were Practice Directives 2 and 4 of 2011. The latter directive prohibited legal practitioners from instituting legal action against the King either directly or indirectly. In addition, in terms of the directives, the Registrar of the High Court was ordered to refuse to accept summons or application for proceedings against the King either directly or indirectly. In effect, the Chief Justice was denying litigants their right of access to justice by issuing the directives.

Practice Directive 2 of 2011 was to the effect that urgent applications could no longer be taken to the duty judge. Instead, they would be allocated by the Chief Justice to a judge of his choice. Through this directive, the Chief Justice, it was argued, infringed upon the constitutional right of litigants to approach courts in a fair and impartial manner by being the sole determinant of the appropriate judge to hear a matter.

In addition to the concerns outlined above, lawyers also accused the Chief Justice of being responsible for the unconstitutional arrest of the Judge President of the Industrial Court in May 2010. The Judge President was charged with corruption and fraud in the High Court after a warrant for his arrest had been signed by the Chief Justice and a search of his (the Judge President's) office had been conducted by the police. The Law Society alleged that the warrant had been signed by the Chief Justice without reference to the JSC, contrary to the provisions of the Constitution and the tenets of judicial independence. The Basic Principles of Judicial Independence provide that 'a charge made against a judge shall be processed expeditiously and fairly under an appropriate procedure ... [and] that the examination of the matter at its initial stages shall be kept confidential'.<sup>199</sup> When the Minister of Justice attempted to intervene and resolve the impasse between the government and the lawyers, he himself was dismissed from office. The Prime Minister was subsequently quoted as saying that the government was proud of the Chief Justice.<sup>200</sup>

The effect of the standoff between the Law Society and the leadership of the judiciary resulted in many accused persons being denied their right to legal representation. This was even more the case when the Chief Justice was reported by some magistrates to have directed them to continue with hearing matters even when the lawyers were not present to represent their clients. Swaziland had never sunk lower into the abyss of impunity and denial of people's rights to a fair trial and, by extension, of access to justice and to the rule of law.

It is worth noting that, in general, members of the public appeared to support the boycott of the courts by legal practitioners. For the first time in as many years, the public sympathised with the lawyers' cause of fighting to restore the rule of law.

At the beginning of the legal year in February 2012, there was no occasion to mark the official opening of the High Court as had been the tradition in previous years. The official reason given for the failure to hold the opening was that the judiciary did not have sufficient funds to host the occasion. It was telling, however, that, when the Law Society offered to donate towards the hosting of the occasion, the Chief Justice declined the donation.

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<sup>199</sup> Para 17, Basic Principles of Judicial Independence, [www.ohchr.org/english/law/injudiciary.htm](http://www.ohchr.org/english/law/injudiciary.htm) (accessed 12 March 2012).

<sup>200</sup> The *Swazi Observer*, 12 July 2011, 'PM defends Makhulu Bass', p. 4.

The Constitution contributes to the problematic relationship between the executive and the Law Society. The Constitution provides that members of the JSC consist of, among others, ‘two legal practitioners of not less than seven years practice and in good professional standing appointed by the King’.<sup>201</sup> The fact that the Constitution does not require the King to consult the Law Society when deciding on the two legal practitioners to be appointed as members of the Commission is not without problems, because it creates room for the King to appoint to the Commission lawyers who are likely to serve his interests in the appointment of judges. This arrangement is therefore unlikely to ensure the independence of the judiciary as required by the Constitution and international instruments to which Swaziland is a party, such as the ACHPR.<sup>202</sup>

## **Disciplinary processes in respect of legal practitioners**

As in other jurisdictions, Swaziland has had her fair share of complaints relating to breaches of standards of professional conduct and ethics among legal practitioners, especially with respect to the handling of clients’ monies and property. There have been allegations of attorneys misappropriating clients’ monies entrusted to their care and of the community of lawyers covering up for one another so that accused lawyers never get punished for unprofessional conduct and failure to adhere to legal ethics.

Allegations that lawyers are not disciplined when they commit acts of misconduct are inaccurate. Attorneys are disciplined through the Disciplinary Tribunal, a body which has powers to investigate and provide redress in cases of complaints made against legal practitioners. The Tribunal is made up of a chairperson and two other members selected by the chairperson and the President of the Law Society from among members of the Law Society. The fact that the constitution of the Tribunal does not provide for the inclusion of a non-lawyer is cause for concern, as members of the public complain that the Tribunal is simply there to look after the interests of lawyers and not those of the public. The other shortcoming is that the Tribunal can only order fines of up to E1 000 for losses suffered by clients. However, these shortcomings are counterbalanced by the provision that empowers the High Court, at the instance of an application by the Law Society, and for any reasonable cause shown, to order the suspension or removal of any attorney from the roll of practising attorneys in Swaziland.

## **F. Provision for the Directorate of Public Prosecutions**

In Swaziland, the prosecution of crime is the responsibility of the Director of Public Prosecutions (DPP), which is a public office under the Ministry of Justice and Constitutional Affairs. The office was established in 1973 through the Director of Public Prosecutions Order of 1973. The Constitution further elaborates the powers of the DPP by providing that the holder of the office: ‘shall be independent and not be subject 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’.<sup>203</sup> The DPP has the authority to institute, undertake, take over, continue and discontinue criminal proceedings before any court.

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<sup>201</sup> Section 159(2)(b).

<sup>202</sup> Article 26.

<sup>203</sup> Section 162(6)(a).

In addition, the Criminal Procedure & Evidence Act (CP&E) deals with some of the powers of the DPP, as well as with procedural matters in the prosecution of crime. Officially, the DPP has the authority to decide which court will try a case. The CP&E in section 6 states that the DPP may at any stage stop a criminal prosecution that has been instituted by his office. In cases where the DPP has declined to prosecute and a private party has instituted criminal proceedings, the DPP may, at any stage, take over and continue with the matter and even discontinue the matter before it is finalised.<sup>204</sup> This grants the DPP wide discretionary powers which may be abused. It is submitted that such abuse could be prevented if the law were amended to provide that the DPP may only discontinue prosecution of a matter taken over from a private prosecutor with the permission of the court.

The Constitution enjoins the DPP to consult the AG in relation to matters where national security may be at stake. This provision does not enhance the independence of the DPP, as it subjects his professional judgements to vetting by the AG on matters of national security.<sup>205</sup> This is compounded by the fact that such limitation of the DPP's power is based on a nebulous term such as 'national security'. In order to enhance the independence of the prosecution service, the DPP must not be subject to the professional direction of the AG. It is further recommended that section 162(7) of the Constitution be repealed or be amended to indicate that, notwithstanding any general policy directives by the AG, the final decision on whether to commence or terminate any prosecution is a matter for the DPP and shall be subject only to judicial review.

The Constitution does go some way towards limiting the DPP's discretion by requiring that the DPP 'shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process'.<sup>206</sup> The reality, though, is that the DPP's office has instituted, and continues to institute, proceedings against private citizens for reasons of political expediency, even where there is insufficient evidence against the accused. A case in point is that of *Rex vs Mario Masuku*, who was arrested and kept in custody for a year, but, when his trial began, he was acquitted at the close of the case for the prosecution because the prosecution had failed to make out a preliminary case against him.

Presently, the DPP's office is divided into four sections, namely: the Crimes Against Persons Unit, the Anti-Corruption Unit, the Fraud and Transactional Crimes Unit, and the Domestic Violence and Sexual Offences Unit.

Prosecutors in the DPP's office are assigned to work in each section and there is no provision for rotation of such staff among the four sections. The idea is to create a specialised cadre of prosecutors within each of the above sections. However, owing to a high staff turnover in the DPP's office, individuals who may have been trained and may have accumulated experience working in their respective sections often have to be replaced by new people. It is only when a staff member leaves the section concerned that other prosecutors in-house can move to another section where a vacancy has been created.

The Domestic Violence and Sexual Offences Unit is currently operated from the office of the DPP at the Mbabane Magistrate's Court and not from the other magistrates' courts throughout

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<sup>204</sup> Section 162(4)(b) and (c).

<sup>205</sup> Section 162(7).

<sup>206</sup> Section 162(6)(a) *supra*.

the country. It is recommended that the success of the specialised prosecutorial presence at the Mbabane Magistrate's Court should be replicated in the other magistrates' courts throughout the country.

Reports of abuse of power by law-enforcement officials, such as physical abuse and wrongful imprisonment, are damaging the trust of the public in the police service. Difficulties in investigating incidents exacerbate the situation. Establishing a prosecutorial unit dedicated to abuse of the law by law-enforcement officials will be a significant step towards showing political will in investigating all reported cases. In addition, such a unit could carry out targeted integrity tests against officers who are suspected of violence or other abuse.

Information and case management in the DPP's office are largely maintained manually in records that are labour-intensive. As a result, case records are neither fully accurate nor sufficiently secure. The issuing of dockets and files by the police to the Office of the DPP is especially problematic. There is no statute regulating the route a docket or police file should follow. There is only a long-standing practice between the DPP and the police that the docket must first be transmitted to the regional police commander. On being satisfied that the suspect has indeed committed a serious offence, the Regional Commander must further transmit the docket to police headquarters. From there, the matter is taken to the office of the DPP. In the meantime, the suspect is being remanded in the magistrate's court. This process may take up to a year or more to be finalised. The case management system of the DPP needs to be based on information technology and be integrated with the respective systems of the police, the judiciary and Correctional Services.

## **G. Recommendations**

- Lawyers seeking to join the judiciary must be vetted to ensure that not only the best-qualified candidates are appointed, but also that their integrity is beyond reproach. The Law Society and the administration of the judiciary must work together and conduct an open process of vetting. There is also a need for a broad-based Judicial Service Commission (JSC) that will ensure that candidates who apply to be judges are further vetted in an open process to ensure equality of treatment of judicial officers.
- Induction and continuing education of members of the bench and the bar should be an ongoing and mandatory process. This should be facilitated by the establishment of links with local and regional institutions where candidates may be sent for training.
- The Judicial Code of Conduct should be revised to reflect international best practice and must be made available to all members of the bench, both in the superior courts and in the subordinate courts. All the stakeholders in the judiciary must be consulted when the revision of the Code of Conduct takes place. The administration of the judiciary must lead the process of revising the Code of Conduct, as well as ensuring that all members of the bench have access to the document. The Code of Conduct should require high standards for all levels of the judiciary, and overall improvement in service delivery and ratings by the members of the public.
- The Registrar of the High Court must put in place performance evaluation mechanisms for individual judicial officers as well as the entire judiciary.

# 5

## Criminal justice

### **A. Introduction**

The criminal justice system in Swaziland gives the police and the Director of Public Prosecutions (DPP) wide discretionary powers, which are largely unregulated. Although police officers are in the front line in the battle against crime, they have little or no knowledge of the law and are expected to make some of the most important decisions: whether to stop and question an individual; whether there are reasonable grounds to suspect that an offence has been committed or is about to be committed; whether to effect an arrest; when and how to interrogate a suspect within the rules of due process; and when to caution a suspect about his or her legal rights. The police officer must learn to endure provocative behaviour and may be exposed to violence, yet must be careful not to use unnecessary and unlawful force and violence against the citizen. The DPP, on the other hand, has the power to prosecute or not to prosecute, as well as to continue or discontinue prosecutions. Such wide and unregulated discretionary powers in the hands of public officials is likely to be abused, to the detriment of the citizenry.

### **B. Power to effect arrest**

The power to arrest is probably one of the most critical competencies that the police have. Arrest represents one of the major invasions of, and restrictions on, individual freedom. Not only does it affect one's freedom of movement, but it can also affect the dignity and privacy of the person. This is no more apparent than in present-day Swaziland where perceived political opponents, often innocent, are routinely arrested and subsequently released without charge. In this situation, almost invariably, arrest is used as an effective device to muzzle, if not completely silence, political opponents. With the economic downturn with which the country is faced, it is now common for police officers to arrest large numbers of people for the contravention of traffic laws as a means of raising revenue. The offenders are routinely fined sizeable amounts

of money, if they are commoners, and a pittance if well known.<sup>207</sup> The public generally holds the view that the prosecution of traffic offenders is pursued with vigour and that such offenders are fined routinely so that the state may raise revenue to replenish funds depleted through acts of corruption by public officials.

The fact that the law is applied selectively impacts negatively on the rule of law. In addition, because of its potential to negatively affect other rights such as the right to privacy, the right to freedom of movement and association, and the right to security of the person, the power to arrest has critical implications for the establishment of a constitutional legal order whose main attribute is the promotion of the rule of law. The exercise of such wide discretionary powers by the police and the prosecution authority often results in the persecution of enemies, whether real or imagined, of those who have the monopoly of power. If the law is used selectively to punish a vulnerable and powerless segment of society, the rule of law becomes a commodity that is in short supply – and this is the situation in Swaziland.

The Constitution entrenches a Bill of Rights which requires that policing in Swaziland accord with respect for, and the promotion and protection of, human rights. This necessitates reform of laws that are perceived to be used merely to target people who are considered political opponents of the present establishment. Of particular interest are laws that affect the freedom of trade unions and other organisations to engage in protest action. The Public Order Act<sup>208</sup> deals with: the control of public gatherings; the prohibition of offensive weapons at public meetings and processions; the power to prohibit entertainment and sporting events; acts or conduct constituting an incitement to public violence; jurisdiction in the matter of punishment; other laws concerning dispersal of riotous gatherings; intimidation and molestation; and wrongfully inducing boycotts. Suffice it to say that some provisions of this legislation are inconsistent with the right of freedom of association enshrined in the Constitution. Instead of dealing with offences committed by members of the police service and outlining disciplinary measures within the police service, the Police Act should also provide that policing will be carried out in accordance with human rights principles. The act should also make provision for the administration of justice and the role of the police within the broad justice machinery. There is a need, therefore, to strengthen the Police Bill that is presently being drafted by taking these aspects into account.

According to the Police Annual Report of 2011, the crime rate has not gone down significantly, even though the police say they have made steady progress towards reducing crime.

The law does not provide for legal aid, except when a person is charged with a crime that may attract capital punishment if he or she is convicted. In that case, the government will pay for counsel to defend an indigent accused. Other than such cases, indigent accused persons are routinely denied legal representation because they cannot afford to raise money for bail bonds or to pay lawyers' fees.

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<sup>207</sup> Commoners are usually fined anything from E1 000 up to E5 000, while prominent and connected people can get away with light fines of between E250 up to E500, with the most lenient punishment being a caution and discharge. At one time newspapers reported that junior police officers arrested a Prince for drunken driving. Instead of locking the Prince in custody, senior police officers visited the Prince at his home to apologise that he had been nabbed for drunken driving. Because public sentiment went against the favouritism that was displayed by the police, the Prince subsequently paid a fine after he had his matter heard in chambers by a magistrate.

<sup>208</sup> No. 17/1963.

## C. Protection from crime

Historically, Swaziland was perceived as a country that was the epitome of peace and tranquillity. This situation is changing, as the crime rate has been steadily increasing as a result of urbanisation, unemployment and poverty.<sup>209</sup> The police, however, continue to attempt to reduce crime rates. The strategy of the police service has involved enlisting the active support and involvement of the community in policing through the slogan *nawe uliphoyisa*, which means 'You are also a police officer'. The 2010 Police Annual Report stated that crime had gone down by 0.1%, and that, for crimes including terrorism and crimes against the state (otherwise referred to as prioritised cases), it had declined to 8.9% as compared with, say, the year 2008/2009 when prioritised crimes stood at 9.6%. Even though the number of criminal offences decreased, murder, robbery and firearms-related offences continued on an upward trend to 10%, 19.6% and 9.1% respectively. Cases of car theft and stock theft, on the other hand, decreased by a total of 35.8% and 12.9% respectively.

Measuring crime, particularly over a period of time, is fraught with difficulties. Recorded crime levels undercount the real levels of crime, as they do not reflect unrecorded crimes. For crime to make it into the official police records, two things need to happen. First, victims or witnesses must report it to the police. Secondly, the police must record the crime in their records. As can be seen from table 5, crimes involving property, vehicle theft, robberies and burglaries are reported at a higher percentage than those involving interpersonal violent crimes.

The general perception is that Swaziland's criminal justice system, with its core components of policing and crime control, courts and correctional services, is in a state of crisis. Not only are the number of people awaiting trial at an all-time high, but the efficiency of the prosecution service is also in decline, the prisons are overcrowded, and the quality of policing is deteriorating. That the police continue to issue records of crime statistics that show decreasing crime levels is small comfort for the majority of people who remain in custody while awaiting trials.

As can be seen from table 5, the number of cases reported to the police and those disposed of by the courts have not fallen by any large margin.

Table 6 indicates the statistics for prioritised crimes from 2008 to 2010.

The police service attributes the reduction in crime levels to the introduction of policing initiatives by the organisation. These initiatives include organised-crime target squads which focus on serious crimes such as terrorism, armed robbery, car hijacking, serial killing and copper theft. A Department of Domestic Violence has also been created which deals with cases of violence within the family and is manned by officials who have been trained to deal specifically with such cases.

As in most countries, it is to be expected that actual unreported crime rates will likely be considerably higher than the reported crime rates. This is mainly because some victims of crime do not report the crimes to the police for a number of reasons, including lack of public confidence in the ability of the police to respond to reports of crimes with courtesy, honesty, empathy and efficiency. Yet the performance standards of the police organisation require that, when a member of the public visits a police station seeking help or information or to make a report, he or she

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<sup>209</sup> Police Annual Report (2010), p. 36.

be attended to promptly, politely and courteously, and that the police will arrive at the scene of a crime within ten to 20 minutes in urban areas and within 30 minutes in rural areas.

*Table 5: Statistics in respect of cases reported to the police and in respect of cases disposed of by the courts*

Year	2009	2010	2011
Cases brought forward	21 235	12 937	15 111
New cases reported	44 375	44 334	42 474
Number of cases handled each year	65 610	57 271	57 585
Convicted by the High Court/ magistrates' courts	11 108	11 594	11 104
Acquitted by the High Court/ magistrates' courts	256	299	209
Convicted by Swazi national courts	4 848	5 452	5 090
Acquitted by Swazi national courts	404	404	275
Accused insane, dead or too young	44	34	18
Awaiting trial	10 377	10 377	10 182
Pending investigation	12 883	9 929	12 939
Closed undetected	29 360	15 111	21 108
Disposed of	6 629	5 406	4 515

Source: Royal Swaziland Police Annual Report 2011, p. 16.

*Table 6: Statistics in respect of crimes prioritised by the police in the period 2008 to 2010*

Crime committed	2008	2009	2010	% Change 2009/2010
Murder & culpable homicide	217	187	208	10.1%
Armed robbery	407	274	341	19.6%
Rape	638	624	588	-6.1%
Car theft	105	129	95	-35.8%
Car hijacking	47	31	54	42.6%
Housebreaking and theft	6 973	6 655	5 814	-14.4%
Stock theft	1 801	1 425	1 262	-12.9%
Firearms	87	90	99	9.1%
Drugs	918	941	1 106	14.9%
<b>Total</b>	<b>11 240</b>	<b>10 387</b>	<b>9 535</b>	<b>-8.9%</b>

Source: Royal Swaziland Police Annual Report 2010.

## Policing

Section 4(3) of the Constitution provides that the King and *iNgwenyama* is the Commander-in-Chief of the police service and the correctional services. The Minister responsible for the Royal Swaziland Police (RSP) is the Prime Minister. The RSP is responsible for maintaining internal security as well as law and order. The police service was until recently considered to be professional, despite inadequate resources and bureaucratic inefficiency. Members of the police service are, however, susceptible to political pressure and corruption. The government routinely fails to prosecute or discipline police officers for abuses. There is no independent body established to investigate police abuses. There is, however, an internal police complaints and discipline unit that supposedly investigates reports of police abuse, although it does not release results of its findings to the public.

The mission of the RSP is to uphold the rule of law fairly and firmly and, in the process, ensure the safety of all communities through the prevention of crime, the protection of life and property, the preservation of public peace and order, the detection of crime, and bringing offenders to justice. The values of the organisation are loyalty, honesty and integrity, impartiality, confidentiality, courtesy, patience, customer satisfaction and community participation. All these well-meaning values have a hollow ring to them, since the experience of some members of the public at the hands of the police is at odds with them.

The police service is divided into five departments, namely: Management Services and Administration; Legal Department; Operations; Criminal Investigations; and Human Resources and Training. The Commissioner of Police is the administrative head of the organisation and is responsible for the discipline of police personnel. The Commissioner reports to the Prime Minister, but is also accountable to the King as Commander-in-Chief of the police. Promotions are only announced and effected when there is a need to fill vacant posts created by as a result of death, resignation, retirement, and transfers of officers to other ministries. In the year 2011, for instance, a total of 79 officers left the RSP for various reasons. Of these, 29 retired, six resigned, four were dismissed, 38 died, and two were transferred to other ministries. The total number of police officers and civilian staff is listed in Table 7.

*Table 7: Ranks and total number of police and civilian officers within the RSP*

Title	Number in establishment register	Number of officials on the ground
Commissioner	1	1
Deputy Commissioner	2	2
Assistant Commissioner	8	8
Senior Superintendent	24	22
Superintendent	44	44
Assistant Superintendent	74	74
Inspector	158	143
Cadets	10	8
Sergeants	599	589
Constables	3 387	3 216
Support staff	265	233
<b>Total</b>	<b>4 572</b>	<b>4 340</b>

Source: Royal Swaziland Police Annual Report 2011.

## Legal framework

Responsibility for policing is vested in the Royal Swaziland Police (RSP). The RSP are established by the Constitution<sup>210</sup> and the Police Act. The Constitution provides that overall superintendence of the RSP vests in the Commissioner of Police, who is responsible for administration and discipline within the RSP. The Commissioner of Police is appointed by the King, acting on the advice of the Minister responsible for the police service, as well as the appropriate service commission or similar body.<sup>211</sup> Officers below the rank of Deputy Commissioner of Police are employed by the Civil Service Commission pending the formal establishment of a sector service commission or similar body.<sup>212</sup>

## Police recruitment procedure

The RSP and not the Civil Service Commission recruits junior police officers. The recruitment and selection process is fairly comprehensive and includes the advertising of vacancies in local newspapers circulating in Swaziland. Applicants are required to submit their applications to the Regional Recruitment Board in their local regions within five days of publication of the advertisement. The Board then interviews candidates by administering written tests and matching applicants' qualifications with the entry requirements for selection. The entry-level qualification is that a candidate must have passed Form 5, with passes in at least six subjects, including a minimum of three credits and a pass in English language. The Regional Recruitment Board has to inform candidates about the outcome of their performance at this stage of the interview. Only candidates who have been successful in the first stage of the interview are allowed to continue to the second stage, during which they are asked oral questions. In the final stage, candidates undergo a physical fitness test. As can be seen, the process is fairly comprehensive. However, it is not transparent, as only members of the RSP are familiar with it. Beyond RSP headquarters, the public does not know about the recruitment process. As this is useful information of particular interest to people who might want to join the police service, it is recommended that such information be published on the newly unveiled police website.

Once police recruits are identified, they undergo training at the Police College for a period of nine months. Although the researcher was not given the specific content of the modules taught, it was said that training entails all policing-related subjects as well as training in human rights.

This is important in view of the fact that the Constitution sets a firm basis for the protection of human rights. To a growing number of Swazis, the police are currently regarded with suspicion, if not outright hostility. This is largely because, for a long time, the police were prone to suppress the human rights of suspects in their custody and of people who were exercising their freedom of association.<sup>213</sup> Through training in respect for human rights, the police can change the perception that they are an instrument for perpetrating violence to being perceived

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<sup>210</sup> Section 189.

<sup>211</sup> Section 189(4).

<sup>212</sup> Section 189(5).

<sup>213</sup> See 'Swaziland: Journalists Harassed, Detained by Police', [allafrica.com/stories/201009150817.html](http://allafrica.com/stories/201009150817.html) (accessed on 30 August 2012), where it was reported that on the 6 September 2010, a journalist from the *Times of Swaziland* was harassed and detained by police while covering a meeting organised by the Swaziland Democracy Campaign in Manzini.

as agents of peace. There is a need for the police to maintain the delicate balance between law enforcement and respect for human rights and human dignity. The need to review and initiate training programmes which emphasise human rights and community values and programmes which expose members to policing practices in established democracies has never been greater. Indeed, both the community and the police need to be made aware of the values and wealth of human rights and democratic traditions.

The RSP are in the process of reviewing and updating the Police Act, and it is hoped that provision will be made for the sector service commission referred to herein. The RSP are also in the process of drafting a strategic plan whose mission statement is to 'uphold the rule of law fairly and firmly, ensuring the safety of all communities in partnership with all stakeholders through the prevention of crime, protection of life and property, preservation of public peace and order, detection of crime and bringing offenders to justice'.<sup>214</sup>

### **Police disciplinary mechanism**

The RSP fall under the Prime Minister's office and have a duty in terms of the Constitution 'to provide a disciplined force for the preservation of the peace, the prevention and detection of crime, the apprehension of offenders against the peace and for the exercise of powers and duties which are conferred upon the Police by the Laws of Swaziland'.<sup>215</sup> To this end, the country is divided into four police districts, namely Hhohho, Manzini, Lubombo and Shiselweni. All police stations in these regions are directed by the General Policing Branch, which, in turn, is responsible for the enforcement of all aspects of law and order, its principal duty being the protection of life and property.<sup>216</sup> At present, there are 24 police stations and 26 police posts spread across all four districts. In view of this huge responsibility, it can be expected that one of the main concerns of the police is the maintenance of a disciplined and loyal police service. In fact, the draft strategy of the police states that discipline and respect for human rights and dignity is a concept that our organisation embraces and truly believes is vital. The draft strategy, which the RSP intend to review, will ensure adherence to a code of conduct for police officials and will act as a guide for the actions of all personnel. It will also serve to curtail abuse of human rights. Provision is also made in the Police Act for the enrolment, discipline and administration of the RSP and matters ancillary thereto.

Part 3 of the act provides for disciplinary proceedings which may be instituted against members of the force as and when necessary. There is, however, no provision for the lodging of complaints by members of the public against members of the force. This is despite the fact that complaints about police officers abusing their powers are common. Additionally, there are few reports of disciplinary measures being initiated internally, a fact which reflects an absence of public knowledge of such hearings rather than an absence of hearings altogether. It is difficult for the public to ascertain what appropriate measures exist for keeping the police in check, and this, in turn, can erode public confidence in the RSP.

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<sup>214</sup> The Royal Swaziland Police Service Corporate Draft Strategic Plan 2011–2016 at p. 17.

<sup>215</sup> Section 189(1).

<sup>216</sup> Draft Strategic Plan p. 17.

Part 5 of the act provides for the administration of rewards and fines by the police service. There appears to be serious laxity in the supervision of this area within the police service. Allegations of police corruption have been made by members of the public through the media. In certain instances, however, these allegations have not been proved and have remained mere allegations. However, if there were knowledge of the procedures by which people can report suspected abuses in this and other areas, perhaps there would be headway in dealing with the culprits should the allegations concerned be proven. In any event, increased transparency in this and other areas of the RSP's administration would enhance public confidence, and this could only serve to bolster the RSP's efforts in respect of law enforcement.

The RSP are often the first point of contact which people have within the statutorily defined structures in the criminal justice system. This implies that there is the promise and expectation that the police themselves will bring to justice those who have either broken the law or who have engaged in actions which are harmful to others or their property. Bringing criminals to justice should, by implication, engender the reassurance on the part of the police among communities that officers will carry out their duties with integrity, common sense and sound judgment. To many, the police seem the most accessible, though not unproblematic, department in the justice sector. However, people are sceptical of the police's ability to act with integrity, apply common sense and sound judgment. People who were interviewed for the present research generally did not regard the RSP as effective in detecting and preventing crime. As evidence of this claim, respondents referred to the soaring crime rate within their communities. They referred specifically to the increase in crimes and acts of violence against women, such as husbands assaulting their wives, incest and rape, to illustrate police inefficiency. However, the linking of violence against women to the apparent ineffectiveness of the police may be erroneous. Rather, the evidence would suggest that it may be indicative of further deteriorating relations between men and women, together with a corresponding increase in the reporting of violations against women in and around their homes. It may further suggest an increased awareness of violence against women and the powerlessness that many may experience as a result.

The Police Act provides that the Commissioner appoints members of the force below the rank of Inspector and may promote, suspend, reduce the rank of or discharge any such member.<sup>217</sup>

## Disbarment from joining trade unions

Regulation 19 of the Police Regulations made under the Police Act prohibits members of the RSP from joining trade unions, political associations or other associations for collective bargaining purposes. However, the Regulation permits them to become members of associations the membership of which is, by their constitutions, confined solely to members of the force. An equivalent provision relating to prison wardens is section 18 of the Prisons Act.

In the cases of *Khanyakwezwe Alpheus Mhlanga & Another vs The Commissioner of Police & Others* and *Swaziland Correctional Services Union vs The Commissioner of Correctional Services & Others*,<sup>218</sup> the court was requested to declare the prohibition of membership of trade unions for

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<sup>217</sup> Section 5.

<sup>218</sup> Unreported Supreme Court case No.s 12/2008 and 764/2007.

police and prison officers to be unconstitutional because it violated their right to freedom of association and freedom of assembly, as well as their right to organise, including the right to go on strike. In deciding the case, the court considered section 39 of the Constitution, which provides:

In relation to a person who is a member of a disciplined force of Swaziland, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter ... [guaranteeing the right of the people to freedom of association and freedom to join trade unions].

The court concluded that the restriction of these rights for members of the uniformed services was permitted by the Constitution and was therefore valid. However, it made the following observations:

There is a lot to be said for, or in favour of, according all workers without exception or distinction to freely join or become members of a trade union of their choice. This would, inter alia, give more and effective meaning to the Bill of Rights contained in Chapter 3 of our Constitution and accord with Swaziland's obligations under the various international instruments to which she is signatory. The three pieces of legislation that were under the spotlight in these applications, need to be reconsidered as a matter of urgency. Perhaps, as a starting point, consideration should be given to allowing members of the Disciplined Forces to form and join and be members of a trade union of their choice but without the right to go on strike.

## **Police abuse of human rights**

Policing in Swaziland is characterised by poor performance and abuse. This is partly because of the poor working conditions of members of the police service. Members of the police service live in deplorable conditions and almost invariably are accommodated in small houses that are not properly maintained.<sup>219</sup> It must be noted, however, that the government continues to build more flats for the police in different regions. The police are also under resourced as well as short-staffed. The high death rate as a result of HIV/Aids, coupled with the number of police officers who retire on a yearly basis, has also adversely affected the police in the execution of their duties. For instance, from 2009 to 2011, a total of 136 police officers died, while 98 retired.<sup>220</sup>

The Criminal Procedure and Evidence Act (CP&E) grants the police wide discretionary powers, which often encourages abuse of citizens' rights by the police, including alleged extra-judicial killings<sup>221</sup> and beatings and the use of excessive force on detainees.<sup>222</sup> Restrictions on

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<sup>219</sup> See [www.observer.org.sz/index.php?news=3051](http://www.observer.org.sz/index.php?news=3051), 'Non-sharing Cop wants house to himself' (accessed 2 August 2012).

<sup>220</sup> Police Annual Report, 2010/2011.

<sup>221</sup> See the matter of Bhekinkhosi 'Scar face' Masina. Masina was shot at the back while allegedly fleeing from the police. Masina was a notorious criminal who had eluded the police over time and hid in the forests in the Lubombo region. When he was found, he was shot and killed by a number of police who had set out to arrest him.

<sup>222</sup> See the *Times of Swaziland*, 24 June 2012, 'These deaths should stop', also at [www.times.co.sz/news.Features/76856.html](http://www.times.co.sz/news.Features/76856.html) (accessed 30 August 2012).

freedom of speech and the press as well as the harassment of journalists, especially during strike action by labour organisations or student protests, are also the result of these wide discretionary powers. Recently, it was reported that police officers had harassed a number of people whom they suspected to be drug dealers. The police are said to have assaulted the suspects and to have then bundled them into a police vehicle. The suspects managed to escape from the police vehicle while it was in motion and without the knowledge of the police. The suspects reported the incident to the police at the Mbabane Police Station. The police public relations spokesperson admitted that two people had reported the incident to the police, but stated that the suspects were not cooperative with the police, who were responding to a call at the homestead of a drug dealer and that this had made the police believe they were the suspects. The spokesperson went on to state that the 'suspects' were then bundled into the police van with the aim of taking them to the police station for further questioning. The 'suspects' then escaped from the moving police van. When the police spokesperson was asked why the police did not follow up on the matter, she said that the police had subsequently discovered that the 'real' suspects in the drug deal had already been arrested by other police officers.

The Constitution and the CP&E prohibit arbitrary arrest and detention. In practice, though, the police have often ignored this prohibition. For instance, on 10 February 2010, a protest by University of Swaziland students was disrupted by the police when they detained five leaders of the Swaziland National Union of Students (SNUS). In the course of the events of the day, Sicelo Vilane, a journalism student, was arrested for taking pictures of police detaining the SNUS leaders. Upon searching him, the police found a membership card for the Swaziland Youth Congress (SWAYOCO), a banned political entity. The student was charged with terrorism, although the charges were later dropped.<sup>223</sup>

On 12 April 2011, police detained Motern Koefen, a consultant from Denmark working with the Foundation for Socio-economic Justice, as he was on his way to a meeting with the Swaziland Chapter of the Global Democracy Campaign. Police subsequently released Koefen without charging him.

On 1 May 2011, police arrested and detained a number of political activists who were participating in a May Day celebration. The arrests were made on the grounds that they were not workers and should not have been participating in an event hosted by the Swaziland Federation of Trade Unions (SFTU) and the Swaziland National Association of Teachers (SNAT).

The law prohibits the police from arresting any person without a warrant of arrest, except when they observe a crime being committed, or when they believe that the person is about to commit a crime, or when they conclude that evidence will be lost if arrest is delayed. Every arrested person may consult with a lawyer of his or her choice. In addition, the state pays the costs of hiring defence counsel in cases in which the potential penalty is death or life imprisonment. Section 16(2) of the Constitution provides that 'a person who is arrested or detained shall be informed as soon as reasonably practicable ... of the reasons for the arrest and detention'. Such a person must be brought before a court within 48 hours of the arrest or detention.<sup>224</sup> The reality,

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<sup>223</sup> See <http://www.state.gov/g/drls/hrrpt/2010/af/154372.htm> (accessed 12 September 2011).

<sup>224</sup> Section 16(4) of the Constitution.

though, is that arresting authorities do not always charge detainees within the period set by the law. However, detainees are promptly informed of the charges against them, are allowed to consult with lawyers of their choice, and have access to their families.

## **D. The community police**

This is a non-statutory structure which first emerged in 1996 as a neighbourhood watch group. Some commentators argue that the community police were formed in response to rampant stock theft in the lowveld, a place that is densely populated with livestock. It has also been argued that the formation of this structure was a result of the perceived ineffectiveness of the RSP in bringing those involved in stock theft to justice.<sup>225</sup>

Another view is that the community policing structure is the brainchild of the RSP, in particular the Crime Prevention Unit. According to information received from RSP headquarters, chiefs are rightfully claiming that the community police remain accountable to them, because it was the chiefs' authority which established the new grassroots policing initiative. The RSP introduced the concept to the chiefs. The chiefs, acting in consultation with their communities, then elect community police within their areas. Community police enjoy considerable support from, and acceptance by, the communities in which they operate. This would seem surprising, especially since the community police are often perceived to be nothing more than vigilante groups. Respondents interviewed for the present research bemoaned the fact that the state does not provide community police with the means to carry out their job effectively. They cited the fact that the community police do not have a uniform, handcuffs, cellphones or even whistles to warn one another if a crime has been committed. The respondents were further of the view that community police are effective, because they catch criminals and hand them over to the RSP. This, however, is usually done after the suspects have been beaten and forced to make confessions. The local nature of the community police means that they are generally more readily accessible than agents of the state, the latter not necessarily being based in all the rural communities around the country.

The community police are showered with praise for the allegedly unbiased manner in which they treat cases and people in the community. It is further felt that they are quick and effective in apprehending criminals. This is attributed to the fact that they know the communities and their members well. It must be pointed out, however, that, whilst this may be the case, there may be instances where people are wrongfully arrested because they are believed by the community to be criminals. There is, therefore, a need for the community police to have proper investigatory skills.

Community police sometimes torture suspects in an effort to extract confessions. Members of the RSP in particular explained that suspects brought to them by the community police usually have traces of being beaten or have injuries sustained during the course of arrest and interrogation by the community police. Indeed, some of the community police admitted that they use 'mild force' to subdue the suspects and talk to them until they tell them exactly what they did in relation to a reported crime. There appears to be no real system of checks and balances in community police structures, and this increases the potential for committing human rights offences.

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<sup>225</sup> Aphane, MD et al 'Charting the Maze: Women in Pursuit of Justice in Swaziland', p. 114.

## E. The law relating to bail in Swaziland

To its credit, the criminal justice system in Swaziland has a functioning bail system, as suspects can request bail at their first appearance in court, except in the most serious cases such as murder and rape, where bail may be granted only by the High Court. The law pertaining to bail in Swaziland has undergone changes since 1991 when the legislature enacted various laws designed to restrict the availability of bail to accused persons. These laws were motivated by the view that bail was being abused by the accused. It was also suggested that the courts had become too liberal in the granting of bail. These assertions were not backed by empirical evidence. In the event, though, the law was amended to require accused persons to pay huge amounts to be admitted to bail, and, in some cases, to remove the discretion of courts to grant bail. The effect of the reforms was to undermine the presumption of innocence.

The first assault on the right to bail came from the Theft of Motor Vehicles Act,<sup>226</sup> which was drafted in response to the alleged increase in the rate of vehicle thefts and the demand by car owners that offenders should not be treated lightly by the law. It had generally been thought that, by granting accused persons bail prior to the trial and by imposing light sentences on conviction, the courts were in effect failing to deter car thieves. The general objective of the act was, therefore, to impose heavy penalties for crimes connected with motor vehicles and to make bail difficult to obtain. Section 18 of the act provided that, where a person was charged with car theft or the offence of receiving a stolen car or attempting to commit any of these offences, 'the amount of bail shall not be less than half the value of the motor vehicle stolen'.

Section 8 of the act imposed a fine of E3 000 for dealing in stolen cars, while section 9 provided that a fine of E5 000 could be imposed upon an offender convicted of altering or tampering with a stolen car and, in terms of section 10, for mounting a false registration plate. In the case of all these and other offences, the act provided that, in relation to any person charged with the commission of such offence, bail would be not less than half the amount of the maximum or minimum fine for that offence. The act further made release on the offender's own recognisance impermissible. The act also made it mandatory for accused persons to pay cash as the bail bond and not be granted bail merely on the basis of non-cash sureties.

As a result of the promulgation of the Theft of Motor Vehicles Act, courts were deprived of the discretion to grant bail, to determine whether to require a cash bond for such bail, and to determine the amount of the cash bond. The courts attempted to resist this curtailment of their discretion, as exemplified by the case of *Mary Dlamini vs The King*.<sup>227</sup> The central issue for determination by the court in this case was whether a senior magistrate had been correct in denying the applicant bail despite the furnishing of sureties, a procedure not provided for by the Theft of Motor Vehicles Act. The magistrate had stated that the applicant was to deposit the sum of E17 500 in cash in terms of the provisions of section 18 of the act.

The High Court reviewed the magistrate's decision and observed that, although the act made no provision for the furnishing of sureties, it did not explicitly state that they could not be accepted. The High Court thus implied that the magistrate ought to have at least engaged in an

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<sup>226</sup> No. 16/1991.

<sup>227</sup> Unreported High Court Civil Appeal case No. 126/1991.

exercise in statutory interpretation before reaching his decision not to allow sureties. The court also stated that, since the CP&E also had provisions regulating the furnishing of sureties, the requirements that a monetary deposit should be made was the exception rather than the rule, and that it was completely irrelevant that a practice of requiring cash deposits rather than sureties had developed.

The High Court was of the view that the requirement that bail should not be excessive was an established right in law based on the presumption of innocence, and that any statute which negated an existing right required express language. In somewhat unclear terms, the court also suggested that the act in question had to be construed in very strict terms because it curtailed the right to be released on bail.

A more devastating assault on bail came with the Non-Bailable Offences Order, a law which came into operation in 1993. The law was enacted by the King in Council, as Parliament had been prorogued. Essentially, it stipulated a number of offences in respect of which bail could not be granted. The offences included rape, robbery and murder.

Cases that came before the High Court regarding the application of the Non-Bailable Offences Order included those of *Methula & Another vs The King*, *Nkwanyane vs The King*, and *Gumedze vs The King*.<sup>228</sup> In these cases, the court construed section 3(1) of the Non-Bailable Offences Order as not prescribing the automatic denial of bail. The court held that, in every case, the prosecution had to lead evidence that showed that the charge faced by the accused did 'involve' an offence listed in the Schedule to the Order. In response to this approach by the court, Parliament amended the 1993 Order to state: 'Notwithstanding any provision in any other law, a court shall refuse to grant bail to any person charged with any of the offences in the Schedule hereto.'<sup>229</sup> The effect of the amendment was that, once an accused was charged with an offence which was listed in the Schedule, bail would be refused by the court. The courts could not even consider any special circumstances of the individual accused, such as any defence he or she might have to the charge. Perhaps the biggest problem with this law was that it led to an increase in the number of people remanded in custody for periods of up to 12 months before they were tried. If they were not eventually convicted, then they had spent all that time in custody to their detriment. In any case, there was also no law that provided for the compensation of such people. Clearly, this was a heavy-handed approach whose justification was simply elusive.

The Non-Bailable Offences Order effectively gave the DPP discretionary powers in matters of bail. If the DPP indicated that the charge would be a non-bailable offence, the courts could not come to the assistance of the accused.

The laws prohibiting courts from exercising their discretion whether to admit an accused person to bail were subsequently declared unconstitutional and therefore invalid by the Court of Appeal. This invalidation of the laws on non-bailable offences was followed by the passing of Decree 3 of 2001, a law which purported to validate, if not re-enact, the Non-Bailable Offences Order.

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<sup>228</sup> Unreported High Court judgement dated 15 October 1993.

<sup>229</sup> Non-Bailable Offences Order (Amendment) Act, 4/1994, Section 2.

The validity of the 2001 Decree was tested in the case of *Ray Gwebu and Lucky Nhlanhla Bhembe vs The King*. In this case, the appellants had been charged before the High Court with offences that were non-bailable under the said Decree. They contended that Decree 3 was invalid on the ground of unconstitutionality and requested the High Court to grant them bail. Their application was dismissed. They then filed an appeal with the Court of Appeal. The appellants' attorney submitted that Decree 3 could only be valid if it had been promulgated on the advice of the King's Council and after the coming into force of a new constitution. The latter submission was based on the provision of section 80(2) of the Establishment of the Parliament of Swaziland Order of 1978, which contained such a requirement. Even though the 1978 Order had purportedly been repealed by the King's Decree 1 of 1980, the Court of Appeal found that the latter Decree was itself invalid because it was passed before the coming into force of the new Constitution.

The laws precluding bail in Swaziland were patently out of step with international law, specifically with Principle 39 of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment. Principle 39 provides as follows:

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law.<sup>230</sup>

The laws were also contrary to the presumption of innocence, in that they sought to detain people who were supposedly innocent until a properly constituted court of law had found them guilty.

The Suppression of Terrorism Act of 2008 is another enactment that has been used by the police to target those who are considered political dissidents. The key provisions of this law are inherently repressive and constitute a breach of Swaziland's obligations under international and regional human rights law. For instance, the act allows for up to seven days' detention incommunicado without charge or trial, which is clearly contrary to article 9 of the International Covenant on Civil and Political Rights (ICCPR).<sup>231</sup>

The Human Rights Report on Swaziland<sup>232</sup> observed that lengthy pre-trial detention is common in Swaziland. In 2007, the International Centre for Prison Studies found that 31% of the prison population consisted of pre-trial detainees. Judicial inefficiency and staff shortages contribute to the problem, as does the police practice of prolonging detention to collect evidence and prevent detainees from influencing witnesses. In some cases, people are exonerated after spending years in custody. Ordinarily, the police should arrest only after they have conducted their investigations and are satisfied that the suspect is linked with the commission of an offence. They are not supposed to arrest so that they can begin to investigate.

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<sup>230</sup> [www.un.org/documents/ga/res/43/a43r173.htm](http://www.un.org/documents/ga/res/43/a43r173.htm) (accessed 4 August 2012).

<sup>231</sup> (1) provides that 'everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. (3) 'Anyone who is arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release'.

<sup>232</sup> See the US Department of State 2010 Human Rights Report, [www.state.gov/j/rls/hrrprt/2010/af154372.htm](http://www.state.gov/j/rls/hrrprt/2010/af154372.htm) (accessed 3 February 2012).

## F. Police code of conduct

Police discipline is regulated by Part 3 of the Police Act as well as by Parts 4 and 5 of the Regulations made under the act. Both the act and the Regulations may be viewed as a code of conduct, as they set out the norms in respect of both personal and official behaviour and lay down the punishments that may be imposed in cases of breach of these norms. The Police Act, read with the Regulations, lays down no specific requirement obliging police officers to comply with international human rights standards. The only exception is section 30, which makes it an offence for a police officer to threaten or use unjustifiable 'personal violence or ill-will against any person in his custody'. Effectively, this requires compliance with the human rights standards which protect every person from torture or cruel, inhuman and degrading punishment or treatment. In the absence of a code of conduct for the police service, reliance is placed on the law and Regulations.

There has been no study conducted into the issue of police discriminating between various sections of society. However, an official of the Swaziland Action Group against Abuse (SWAGAA) who was interviewed for the present study stated that reports from people she had counselled in her line of duty reflected that the police treat members of certain sections of the population less favourably than others. She stated that women complained of the less than civil treatment they received at the hands of the police whenever they went to report cases of sexual or domestic violence against them by their partners. The case of Thuli Rudd is just such an example. In this matter, the accused, who was in an openly lesbian relationship with the deceased, was charged with her murder. During her trial, it was stated that the police had harassed and abused her both physically and verbally on account of her sexual orientation.

### Police abuses

The Police Act provides that one of the important duties of the police is the preservation of peace and the maintenance of law and order. There is a need to train and reorient police officers to maintain public order in a manner that is consistent with human rights and international standards of policing. The Constitution prohibits practices such as torture and abuse at the hands of the police. However, the provision prohibiting law-enforcement officials from engaging in torture is placed in the section on 'directives of state policy' in the Constitution.<sup>233</sup> The effect of this is that the provision is not enforceable in any court or tribunal. There are no other laws that specifically prohibit torture as such, although officials could be punished under the laws that deal with acts related to torture. In practice, this has not happened and no punishments have been reported. Cases of torture at the hands of the police are investigated, but the findings are not usually made public. This is with the exception of the Siphon Jele enquiry which resulted from the alleged use of torture by security officers during interrogation.<sup>234</sup> It was alleged that, during the interrogation, the security forces assaulted citizens and subjected them to excessive force, including physical beatings and temporary suffocation using a rubber sheet and plastic bags over their faces, covering their noses and mouths.

Other forms of abuse reported include the beating of a woman, who was eight months'

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<sup>233</sup> Section 57(3).

<sup>234</sup> *The Nation*, April, 2011, 'How the Law Failed a Man who Died because of a t-shirt', pp. 24-31.

pregnant, following her attempt to defend a vendor at the Mbabane bus rank in February 2010. In another incident that occurred on 14 February of the same year, a suspected gun smuggler claimed that the police had tied him to a tree, suffocated him and shot him twice in the back. In yet another incident, the police were reported to have forcibly apprehended a woman whom they had accused of stealing a cell phone. At the police station, the police allegedly stripped the woman naked and locked her in a room for some time before releasing her without charge.<sup>235</sup> In June 2012, it was reported that a 26-year-old man had died mysteriously and under violent circumstances while inside a holding cell at the Mbabane Police Station.<sup>236</sup> The police alleged that the man had banged his head several times against a wall during his second day in police custody. He was only discovered dead the following morning by the police. Surprisingly, the man was not facing a criminal charge, but had been locked up so that arrangements could be made for him to be taken to the psychiatric hospital. He was kept in police custody for three days while the police made arrangements for him to be taken to hospital. In the case of all these incidents, no action was taken, nor was any expected against the members responsible, because of the prevalence of a culture of impunity on the part of the police.

There were also credible reports of the use of excessive force by community police members during the course of 2009. For instance, on 30 May 2009, a man who was suspected of robbing three Msunduzi residents was paraded naked through the town, tied to a pole, and severely beaten. He was later hospitalised for his injuries. On 10 January 2009, community police forced a man to eat raw goat meat as punishment for allegedly killing a neighbour's goat.<sup>237</sup> Another incident involved community police members who kidnapped and beat a man for allegedly stealing his employer's laptop computer. In this case, though, the community police were arrested following the incident, although the results of their trial, if any, remain unknown. In another case, a person was beaten by community police, until he lost consciousness, for allegedly damaging the windows of a neighbour's house. No arrest followed this incident.

These reports by the media and human rights organisations suggest that police abuses are frequent enough to be a matter of urgent concern. Such concern is heightened by the fact that the proposed amendment of the Police Act does not include any provision that seeks to relate policing in Swaziland to respect for human rights. It is recommended that, with the advent of the new Constitution in Swaziland, the amendment of the Police Act incorporate human rights standards and norms that bind the police.

## **G. Investigation of complaints against the police**

Swaziland does not have an independent and impartial body which has the authority to investigate police abuses. The result is that impunity prevails and the government fails to investigate, prosecute and discipline police officers responsible for human rights abuses, including torture and excessive use of force, some of which may lead to deaths in custody. In theory, though, members of the public can report complaints against the police to the Commission on Human

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<sup>235</sup> All the cases referred to herein were reported in the US Department of State Report (supra).

<sup>236</sup> The *Times of Swaziland*, June 11, 2012, 'Brutal Death in Police Cell', pp. 1–2.

<sup>237</sup> 2009 Human Rights Report: Swaziland, p. 2, <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135979.htm> (accessed 15 May 2012).

Rights and Public Administration.<sup>238</sup> Although the Commission is operational, its effectiveness is limited in that it only has part-time staff and is not adequately resourced to work as a fully fledged office. It is also presently housed at a place next to the parliamentary grounds, an area which, according to Swazi law and custom, widows are not allowed to visit. This effectively limits the categories of people who can lodge complaints with the Commission. The Commission is empowered by the Constitution to investigate complaints concerning alleged violations of fundamental rights and freedoms, as well as complaints of injustice, corruption, abuse of power in office, and unfair treatment of any person by a public official in the exercise of official duties.<sup>239</sup> However, Parliament has still not enacted legislation to broaden its mandate.

From the constitutional provisions, it is clear that the mandate of the Commission is fairly wide in so far as it deals with the investigation of human rights violations. However, the Commission neither specialises in, nor prioritises the investigation of, complaints of police abuses. The same is true of the courts – cases involving complaints against the police are not necessarily a priority.

Despite the limitations of the courts, they have been able to bring to account police officers who have abused their power. For example, the High Court, per Mamba J, recently awarded certain political activists damages for assault, battery and false imprisonment.<sup>240</sup> It remains to be seen if the Supreme Court will confirm the decision of the High Court.

Internal investigations by the police are as opaque as they are ineffectual. There is a need for an independent authority that will focus exclusively on such complaints. It is important that there should be public awareness concerning such an authority; that its mandate be publicised; and that its financial and operational independence be guaranteed. This would ensure that it becomes an effective mechanism for enforcing the authority's accountability and the cooperation of the police service. It is recommended that the Police Amendment Bill be strengthened to include provisions for the establishment of an independent police complaints authority. Such an authority would be independent, accountable and entitled to the cooperation of the police service.

## H. Fair trial

In keeping with international standards, the Constitution provides extensive protection of the rights of accused persons. It provides for equality before the law, which aligns closely to the relevant provisions of the ICCPR. The Constitution, however, fails to provide for protection against unreasonable search and seizure, arbitrary detention and imprisonment, and other human rights violations pertaining to arrests and criminal proceedings.

There is no broad duty of disclosure on the prosecutor to enable the accused to prepare properly for trial, and prosecutors may use this to strengthen their cases by withholding information from the accused. Yet, the public duty of the Crown Prosecutor should not focus on 'winning or losing cases, since the fruits of the investigation which are in possession of Counsel for the Crown are not its property for use in securing a conviction but the property of the public

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<sup>238</sup> Section 163.

<sup>239</sup> Section 164.

<sup>240</sup> See *Alex Somopho Langwenya vs The Government of Swaziland & Others*, High Court case No. 1350/2000 at [www.swazilii.org/sz/judgment/high-court/2006/131](http://www.swazilii.org/sz/judgment/high-court/2006/131) (accessed 7 July 2012).

to be used to ensure that justice is done'.<sup>241</sup> This obligation to disclose is not absolute. The Crown retains the discretion to withhold some information, such as material it considers to be irrelevant, but these discretionary aspects remain controversial and need clearer legal provisions.

## I. Right to legal representation

The consumers of the justice system usually hire legal representatives to present their cases in the common law courts. Legal representation is not allowed in the traditional courts. Legal representatives may be either attorneys or advocates, and, in the case of the Industrial Court, labour consultants. Attorneys and advocates undergo legal training at tertiary level. Attorneys are further required to write and pass a bar examination before they are allowed to practise. Both attorneys and advocates must be admitted to the bar by the High Court. Labour consultants, on the other hand, do not necessarily have to possess any form of legal training. The Industrial Relations Act provides that a party to proceedings in the Industrial Court can elect to represent himself or herself or to obtain the services of a lawyer, or, alternatively, be represented by any person authorised by the aggrieved party. Whilst this provision was originally intended to ensure that those members of the public involved in industrial disputes could access justice without the expense and technical barriers that lawyers often bring, it has only achieved the contrary. The primary intention of the legislature was to ensure that even the poor had unrestricted access to justice. However, most labour consultants are not lawyers and lack legal training. Consequently, they end up delaying proceedings unnecessarily. Most respondents complained about the level of competence in English of most labour consultants and their failure to understand court rules and procedure. This impacts negatively on the delivery of justice, as most of the time is spent explaining court procedure and the use of legal terminology to the labour consultants. Needless to say, most clients have lost good cases as a result of a labour law consultant's failure to abide by, or to understand, court rules and time limits. There is a need, therefore, for amendment of the Industrial Relations Act to provide that labour consultant should at least have a diploma in law.

The Constitution provides for the right to a fair trial, and, specifically, for the right to legal representation at government expense in cases where the accused is charged with an offence that carries capital punishment or life imprisonment.<sup>242</sup> This provision has a derogation, in that legal representation is not allowed to people whose matters are heard in the Swazi courts and the Swazi Court of Appeal. Effectively, the right to legal representation does not extend to matters that are heard in courts whose jurisdictions entail presiding over cases involving members of the Swazi nation, and to courts which utilise only the SiSwati language and where the court procedure is in accordance with Swazi law and custom.<sup>243</sup>

Swaziland is a party to the African Charter on Human and Peoples' Rights (ACHPR), which protects the rights of people accused of criminal offences, including their right to a fair trial, some of which are elaborated on in the ancillary documents of the ACHPR.

There is no provision in the law for legal aid. In practice, though, some non-governmental organisations (NGOs) provide legal aid, and then refer their clients to practising attorneys if

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<sup>241</sup> Stuart, D 'Prosecutorial Accountability in Canada', in PC Stenning (ed.), *Accountability for Criminal Justice: Selected Essays* (Toronto: University of Toronto Press, 1995).

<sup>242</sup> Section 21 (2)(c).

<sup>243</sup> Section 21(13)(b).

the matters concerned require litigation. The University of Swaziland, through its Department of Law, offers a course in Clinical Legal Education. This course requires final-year students to spend some time in the Law Clinic providing services for indigent persons. The Department has partnered with the NGO, Save the Children, which provides the Law Clinic with cases that are then dealt with by the students. Where a case requires that courts be approached for a remedy, the Department, through its law lecturers, takes up the matter on behalf of the indigent client. Before a matter can be dealt with by the Law Clinic, though, a client is subjected to a means test. Similar 'legal aid' services are also provided by the Council of Swaziland Churches and Women and Law in Southern Africa – Swaziland Chapter (WLSA).

The majority of cases that are heard in the courts concern people who cannot afford the services of an attorney. Although there are no reliable statistics to buttress this assertion, lawyers who were interviewed stated that at least 90% of the matters heard in the magistrates' courts concern people who are not legally represented. The exception is the High Court, where people are charged with murder. In such cases, even those who cannot afford to pay a lawyer are represented at government expense. Swaziland has very few lawyers who have substantial experience in legal practice. In the absence of experienced lawyers, many accused persons are not able to obtain the services of lawyers who meet the requirements of the United Nations Basic Principles on the Role of Lawyers (1990), which are that the right to legal representation entitles a person to have a lawyer of 'experience and competence commensurate with the nature of the offence' to provide 'effective legal assistance'.

One of the urgent tasks for the government is to establish a comprehensive legal aid system. Even though the Constitution guarantees equality before the law, a fair hearing and the right to legal representation, access to justice continues to be a challenge owing to the cost of legal services. A special task force should be established within the office of the Attorney General (AG) to review and draft legislation to make legal aid operational in Swaziland.

In the absence of a juvenile court, children are tried as adults in Swaziland. The minimum age of criminal capacity in Swaziland is seven years. The requirement set by international law is that states parties ratifying the Convention on the Rights of the Child (CRC) must review the minimum age of criminal capacity to ensure that a fixed age is established below which children will be presumed not to have the capacity to infringe penal law.<sup>244</sup> Furthermore, the Beijing Rules specify that the age should not be set too low, bearing in mind the child's evolving capacities and development. Although no international instrument specifies a fixed minimum age, the Committee on the Rights of the Child has criticised countries where the minimum age has been set at below 12 years.<sup>245</sup> As world-renowned expert Nigel Cantwell has said, the real issue is not where a country sets the minimum age, but what will happen to children in conflict with the law below that minimum age.

A consultative process conducted by Save the Children in 2004<sup>246</sup> established that there is support in Swaziland for the adjustment of the present minimum age of criminal responsibility. There is also a need for alternative measures to deal with children below the minimum age

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<sup>244</sup> Article 40(3)(a).

<sup>245</sup> Examples of such countries are the Republic of South Africa and the United Kingdom.

<sup>246</sup> Gallinet, J 'Final Report on Consultative Process in Swaziland', conducted on behalf of Save the Children, Swaziland, 2004.

who come into conflict with the law. However, it must be clarified that, under international law, the prohibition on penal responsibility for those young people below the minimum age of responsibility also entails that they may not legally be arrested or detained in custody of any sort pending the imposition of any alternative measures.

Article 40 of the CRC requires that children in conflict with the law be treated humanely and in a manner consistent with their vulnerability, and that a child not be imprisoned unless he or she is of such depraved character or is so unruly that it would be in his or her best interests to be imprisoned. In practice, these principles are not adhered to in the Swazi criminal justice system, as children are tried in the same way as adults in the absence of a juvenile court and a juvenile justice system. The CP&E has no separate, child-specific provisions and generally applies to adults and children alike.

It is worth noting that, with respect to the outcome of cases against children, there exists the Reformatory Act which provides for juveniles (under 16 years) and juvenile adults (between 16 and 21 years) to be detained in reformatory in terms of a court order. The act stipulates that the sentence should not be less than two years and not more than five years.<sup>247</sup>

In September 2012, Parliament passed the Children Protection and Welfare Act, a law that has domesticated relevant international treaties on child protection and juvenile justice. More importantly, the law provides for the diversion of children who may have committed certain crimes, but are considered to be first offenders. The act also provides for the creation of a Children's Court, as well as for the protection of children's property from 'property grabbers'. It is hoped that the Minister responsible for this act will, as soon as possible, publish the date on which the legislation becomes operational.

## People living with HIV and Aids

Swaziland has one of the world's highest number of people living with HIV and Aids relative to the size of the national population. In fact the HIV/Aids pandemic has been declared a national disaster. The Minister of Health has stated that, in a country of a million people, 80 000 are on antiretroviral treatment. This he said when addressing members of Parliament during the Ministry's Portfolio Committee debate on 31 October 2012. People who are HIV positive require special medication and are affected by environmental and nutritional factors. People who live with the virus interact with the justice system at different levels, for instance as victims, witnesses or complainants. As a result, the functioning of the justice system either impacts them positively or negatively. The medication regimen of people living with HIV requires regular consumption of antiretrovirals, a routine that is regularly broken where the HIV-positive person is incarcerated for long periods of time. An example is the case of *Rex vs Phumzile Malinga*,<sup>248</sup> which involved an accused person who was kept as an awaiting-trial prisoner for two years when she was on antiretrovirals. She defaulted with regard to her treatment, as she could not take her medication with her when she was first arrested, and her relatives were not able to visit her for lack of means. The accused was initially charged with attempted murder, a charge that was subsequently reduced to assault with intent to cause grievous bodily harm. Eventually, she was found guilty of

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<sup>247</sup> Van Bueren, G. 'The International Law on the Rights of the Child'.

<sup>248</sup> Manzini Magistrates' Court, case No.45/2007.

assault and sentenced to three years' imprisonment, which was wholly suspended. The accused had been kept in prison while awaiting trial with her twin children, who were two years old when she was incarcerated.

## **Gender-based violence, women, and people living with disabilities**

Women complainants in domestic violence cases are often treated differently from complainants in cases of other criminal offences. Procedurally, after a crime has been reported, the police are supposed to use the information given them to make a statement in order to process the matter further. They then conduct investigations, formulate a charge against the perpetrator and have him or her arrested. However, this does not always happen in domestic violence situations. Instead, when a woman victim goes to the police station to lay a charge, it was said, police officers persuade her to return home to sort the matter out amicably. Victims of domestic violence stated that the police are quick to counsel them, even going to the extent of calling in the perpetrator for the same purpose, without taking up the matter as a criminal case.

The police argue that their actions are motivated by the vacillation of women complainants stemming from their desire to maintain relations with their abusive partners or husbands. This is their weightier justification. While conceding that such action is not within their authority, they insist that, faced with a situation wherein a woman may withdraw a case as many times as she reports it, they find it more expedient to seek other avenues for resolving the conflict, sometimes allowing the women to withdraw such cases. The police have now established a Domestic Violence Unit where cases of a sexual nature and those of domestic violence are handled. The problem is that the Unit is centrally located at police headquarters and not in all police stations around the country. The Unit is manned by officers who are trained in the area of domestic violence. The recurrent problem, though, is that police officers who work in the Domestic Violence Unit are not exempt from being transferred and rotated to other departments within the police service. This hampers the work of the Unit and results in more funds being needed to train more officers, who might then subsequently also be transferred elsewhere. There is therefore a need to ensure that officers within this Unit are retained, and even promoted to serve within the Unit, in order to keep their expertise. There is also a need to replicate the success of the Domestic Violence Unit in all police stations to enable complaints, who may live far from police headquarters in Mbabane, to access justice in this regard.

The justice system should also be accessible to people living with disabilities (PWDs). Owing to their social status as a marginalised group, the justice machinery should offer them maximum protection. There should be no environmental, legal or linguistic barriers for PWDs in the justice system. A study by Dube states that disabled offenders are discriminated against in a variety of ways, an example being the confiscation of a person's crutches on arrest, as these are regarded as a weapon – even though, to the disabled person, they are an aid for walking.<sup>249</sup> Deaf people find it difficult to express themselves because of shortage of sign-language interpreters. If a PWD is called to court as a witness and cannot fully express himself or herself for want of such interpreters, the court cannot benefit from the testimony. The police are also not trained in

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<sup>249</sup> Dube, AB, *Delays in Justice Delivery* (supra).

sign language; hence it is difficult for them to deal with cases involving PWDs. The University of Swaziland has recently initiated the establishment of a Sign Language Research Unit and will soon be offering sign language as a course.<sup>250</sup> The aim of the research is to collect data concerning the various sign languages in use in the country and to then prepare a curriculum and module on sign language. It is recommended that the stakeholders within the justice sector utilise the expertise at the University of Swaziland to ensure that the rights of PWDs who need to access the justice system are upheld.

In dealing with sexual offences where the complainant is a PWD, the police tend to take them less seriously, as they view PWDs as asexual beings and therefore as being incapable of engaging in sexual activity, let alone being raped. There are no laws specifically protecting PWDs, except for a constitutional provision which enjoins the state to take appropriate measures to ensure that PWDs realise their full mental and physical potential. Such provision further calls on Parliament to enact laws for the protection of PWDs. This provision is weak in so far as it does not contain affirmative-action provisions. It also leaves the substance of disability rights to Parliament. The result is that the justice system fails to adequately protect the rights of PWDs.

Swaziland only recently ratified the Convention on the Rights of Persons with Disabilities.<sup>251</sup> It is to be hoped that such ratification will soon be followed by the enactment of legislation incorporating the content of the Convention so as to ensure that the rights of the disabled are protected.

## J. Victim and witness protection

There is a Witness Protection Act which provides for the protection of witnesses or victim-witnesses. The act was passed in 2010 but is still not operational. The act establishes an Office for Witness Protection headed by a Director who is supported by witness-protection officers. Under the act, any witness who has reason to believe that his or her safety, or that of anyone related to him or her, is or may be threatened by any person or group or class of persons may, in terms of the act, request that he or she, or any related person, be placed under protection as provided for in the act.

For its part, section 56 of the Prevention of Corruption Act<sup>252</sup> provides that, in cases involving corruption, a witness shall not be obliged to disclose the particulars of any informer.

At present, there is no systematic witness-protection programme operated by the police, by another law-enforcement agency or by the judicial authority. There has also been no study conducted to establish any correlation between intimidation of witnesses and the high rate of acquittals in criminal matters. There is, however, research on delayed justice delivery which concludes that, in most of the courts in Swaziland, cases are derailed due to lack of evidence, as potential witnesses refuse to testify for fear of reprisals. There is a need, therefore, for the state to ensure that witnesses are confident that their safety and protection are guaranteed. This can be achieved through setting up a witness-protection programme in accordance with the Witness Protection Act.

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<sup>250</sup> The *Swazi Observer*, October 19, 'Uniswa to Introduce Sign Language Course', p. 14.

<sup>251</sup> September, 2012.

<sup>252</sup> No. 3/2006.

## K. Appropriate remedies and sentencing

A court has wide powers to impose sentences. In deciding how to exercise this power in a specific case, the court exercises a discretion, which involves making a choice from among various possibilities. In the case of sentencing, these 'possibilities' consist of the various types of sentences, and, normally, also the measure of the type of sentence decided upon.

This discretion may not be exercised arbitrarily, for a court is expected to act within the limits prescribed by the legislature and in accordance with the guidelines laid down by the higher courts. The basic requirement is that the discretion must be exercised reasonably and judicially. The general principles of sentencing are that any punishment must fit the criminal as well as the crime, that it must be fair to society, and that it should be tempered with mercy, depending on the circumstances of the case.

Most statutory offences are enacted with an attendant penalty clause which provides for imprisonment or a fine, or other forms of punishment.<sup>253</sup> In addition to any punishment, a person convicted of a crime may be ordered to pay appropriate compensation to the victim of the crime.<sup>254</sup> This is not the norm in our courts, mainly because courts trying criminal cases view their primary function as the imposition of proper punishment in respect of guilty persons rather than as consolation of the victim.

The Constitution provides that the death penalty shall not be mandatory and that a sentence of life imprisonment shall not be less than 25 years.<sup>255</sup> The CP&E provides for the imposition of the death penalty in the case of murder where extenuating factors have not been found to exist. While the CP&E provides for the death penalty, it prohibits the imposition of this sentence on children under the age of 18 years<sup>256</sup> and on women who are pregnant. In addition, the act provides that no child under the age of 14 years shall be subject to a sentence of imprisonment.<sup>257</sup>

Section 305 of the act also provides for certain alternative sentences for children, such as placing the child in the custody of a suitable person. It also provides for sentences to be suspended or postponed with certain conditions attached thereto.<sup>258</sup>

There is one juvenile facility in Swaziland, namely the Malkerns Juvenile Industrial School. A total of 502 children were jailed in the months April to July 2012. These children were then enrolled at Malkerns Juvenile Industrial School. The School admitted 98 children in the month of April, a figure which rose to 198 in May, and, by June, the number had risen to 206.<sup>259</sup> The children held at the juvenile facility are either on remand or serving out sentences. The children go to school in the morning and do gardening and play soccer, tennis or volley ball in the afternoon.

The children serve a maximum of two years at the facility, after which they are released back to the community. There is one exception: in 2011, two boys aged between 14 and 16 years were each sentenced to nine years for rape.<sup>260</sup> The University of Swaziland Law Clinic took the matter

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<sup>253</sup> Section 296(2) of the Criminal Procedure & Evidence Act, 1938.

<sup>254</sup> Section 321 op cit.

<sup>255</sup> Section 15(3).

<sup>256</sup> Section 296(1).

<sup>257</sup> Section 296(2).

<sup>258</sup> Section 313.

<sup>259</sup> See the *Times of Swaziland*, Sunday 21 October, 2012, p. 12, '206 Children Behind Bars'.

<sup>260</sup> See *Siboniso Jele vs The King* (supra).

on review to the High Court. The boys were at first granted bail, but were then subsequently released when it was found that the magistrate who had sentenced them had misdirected herself as regards the law.

Swaziland has not ratified the Second Optional Protocol to the ICCPR, which is aimed at the abolition of the death penalty. Notwithstanding this, its retention of the death penalty is contrary to international standards set by international bodies to which she is a party. In October 2011, when Swaziland went through the Universal Peer Review (UPR) at the United Nations (UN), the Minister of Justice stated that, in practice, Swaziland had all but abolished the death penalty, since no one had been executed since the 1980s. Effectively, the Minister was making reference to a *de facto* moratorium as opposed to a *de jure* moratorium. However, as recently as 2011, the High Court sentenced one David Simelane to death after he was convicted on a number of counts of murder. He joined Mandla Maphalala, who had been sentenced to death in 2001. It is recommended that the *de facto* moratorium on the death penalty be formalised by the abolition of such penalty. In this connection, it must be noted, however, that there has been no campaign against the imposition of the death penalty in Swaziland.

## L. Prisons

### Legal and institutional framework

Correctional Services was established in terms of the Prisons Act of 1964. The Constitution states that Correctional Services is responsible for the protection and holding on terms of convicted persons, for the rehabilitation of these persons, as well as for the keeping of order within the correctional or prison institutions in the country. The responsibilities of Correctional Services are to:

- administer sentences imposed by legally constituted courts in Swaziland;
- provide safe containment of all persons committed to custody by the courts;
- facilitate the administration of justice through the production of offenders in courts for trial;
- rehabilitate and reform offenders through education, training and counselling;
- promote offenders' opportunities for social reintegration through aftercare programmes;
- actively participate in national security activities together with other security services;
- take part in the activities of royal close protection unit; and
- protect royal residences.

The intent to correct or rehabilitate however seems to be impeded by the Prisons Act itself. Section 11 of this act, for example, provides for the use of force against prisoners by prison officers, while section 11(3) stipulates the instances in which an officer would be justified in using a firearm against a prisoner. Section 11(2) states that an officer or warder may apply 'what force is reasonably necessary' to secure obedience or maintain discipline in a prison. However, no limit as to the force to be used is suggested. There is furthermore no indication of the type of prisoner behaviour which may warrant the use of force by an officer or warder. The use of force in prison may be difficult to keep in check, since prisons, unlike other statutory structures,

operate outside the ambit of normal public scrutiny. Section 16 of the same act, apparently by way of checking prison officers' conduct, enumerates the offences of which an officer may be found guilty. Included among these is the unlawful use and distribution of drugs by and to prisoners. Punishment for violations of this section however seem remarkably mild, namely a maximum fine of E50 (less than USD10) or three months' imprisonment.

While section 11 seems to provide prison officials with unrestricted powers to inflict punishment on prisoners, section 32(2) provides prisoners with a mechanism for petitioning the Minister of Justice in matters relating to discipline. Other than stating that a prisoner may do so, the process for lodging a petition is not clarified. It is therefore not clear through which structures petitions are to be lodged.

The Prisons Act, in section 34, makes provision for prison facilities for men and women inmates. There is only one women's prison in Swaziland and it is situated at Mawelawela, in Luyengo. This facility houses both adult and juvenile female inmates and prisoners awaiting trial. Because the facility is centrally located, most of the inmates' relatives cannot afford to visit the prisoners, since the place is far from most of the regions in Swaziland. Yet men, whose prison facilities are decentralised, sometimes find themselves in their local prison, which is accessible to their relatives.

While it is acknowledged that prisoners have rights, there is concern about the violation of these rights by prison officials. Issues of concern include the lack of facilities, staff shortages, overcrowding in prisons, as well as rape in prison.<sup>261</sup> A total of 502 children were jailed from April to July 2012 for various offences. According to the public relations officer at Correctional Services, this figure represents 4% of the entire inmate population of 2 901 as of July 2012.<sup>262</sup> Like most departments in the justice sector, correctional services has been experiencing financial shortages. All of the foregoing thus add up to negatively impact the proper administration and operation of this department. This, as can be expected, impacts directly and negatively on the wellbeing of inmates and awaiting-trial prisoners. Prison clinics, for example, are said to experience chronic shortages of even very basic medicines, and this impacts negatively on both prison staff and inmates.

Problems reported by prisoners, and which are cited in newspaper reports, include the following:

[P]oor medication leading to frequent deaths of awaiting-trial prisoners, overcrowding and exposure to contagious diseases. Some prisoners have been waiting for five years to see the psychiatrist, poor diet, delays in trying cases, criteria used in selecting cases to [go before] the courts as opposed to order of arrest, confusion at the Director of Public Prosecutions' office, [and] if accused persons in the same case plead differently, the one who pleads not guilty remains in prison and [is] forgotten.<sup>263</sup>

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<sup>261</sup> Aphane, MD et al 'Charting the Maze: Women in Pursuit of Justice' (supra) p. 158.

<sup>262</sup> See the *Times of Swaziland*, Sunday 21 October, 2012 '206 Children Behind Bars', p. 12.

<sup>263</sup> *Times of Swaziland*, 29 September, 2009 'Judges Fail to Withstand what Death Row Prisoners Experience', p. 36.

One of the reasons for some of the prisons being overcrowded is a sentencing practice adopted by many courts which is strongly focused on imprisonment. As a consequence, even first-time petty offenders are sent to prison. Where juvenile and child offenders are concerned, this practice can be counterproductive. There is therefore an urgent need to review the current Prisons Act to ensure compliance with international standards such as the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. There also needs to be provision for the availability and application of alternative forms of imprisonment wherever such alternatives would benefit society. Among these alternative forms of imprisonment and ways of reducing overcrowding in prisons are: the abolition or reduction of sentences of less than six months; home confinement, daily reporting to the police, community supervision and service, electronic monitoring, overnight confinement, and extramural employment; obliging courts to consider and reject alternative sentencing options before imposing sentences of imprisonment; setting maximum inmate levels per prison and granting authority to refuse the taking in of inmates above such limits; and making use of community-based sanctions for probation or parole violators.

The CP&E provides that it is a criminal offence to detain a prisoner beyond the statutory time limits.<sup>264</sup> Correctional Services is therefore under a duty to inform prisoners of their rights under this provision, and specifically that the law specifies a time limit of 31 days or 6 months of pre trial detention. Correctional Services must proactively enforce this provision, if only to ensure respect for prisoners' rights.

The vision of the department is to be an effective and efficient provider of security and a value-based justice reform initiative in enabling a crime-free society. The mission is to professionally contribute to public safety by actively encouraging and assisting offenders to become law-abiding citizens, and by exercising best practices in penal reform.<sup>265</sup>

Correctional Services has an unpublished strategic plan. Correctional Services still bases its case management on manual records, which are labour-intensive. There is a need, therefore, to base case management on information technology systems. This will allow the services rendered to be more efficient and to be integrated with the case management systems of the police, judiciary and the DPP.

Facilities operated by Correctional Services are crowded. These include both remand centres and prisons where convicted prisoners serve their jail terms. In these conditions, prisoners are vulnerable to abuse such as rape. Prison rape is an issue that is surrounded by taboos and shame, and the stigma of victims as well as the power structures among prisoners hinder reporting of such cases through official channels.<sup>266</sup> It is still a common belief that not much can be done when victims do not report the abuse. However, in practice, the occurrence of sexual abuse in prisons corresponds to how much the authorities do about it. Other countries have implemented successful programmes, inter alia by taking into account the special vulnerabilities of certain prisoners. Areas covered include supervision, inmate screening for vulnerability to

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<sup>264</sup> Section 136(1).

<sup>265</sup> Correctional Services' Draft Strategic Plan, p. 3.

<sup>266</sup> See US Department of Justice, *Sexual Victimization Reported by Former State Prisoners*, 2008, <http://bisojp.usdoj.gov/content/pub/pdf/svrfspo8.pdf> (accessed 5/6/12).

abuse, medical and mental health services, reporting mechanisms, investigations, staff training, administrative sanctions, internal monitoring and external audits.<sup>267</sup>

The Prisons Act does not meet current requirements for the protection of human rights of prisoners and the application of other international standards for their treatment. The act does not prescribe the protection of rights as part of the mandate of the Commissioner of Correctional Services. There are reports in the media that Correctional Services is currently preparing a new bill in place of the Prisons Act. The whole process, though, is not transparent, as other stakeholders have not been consulted on the amendments. It is only when there is wide consultation of all stakeholders that a comprehensive correctional services act can be realised.

It is recommended that government, in consultation with stakeholders, overhaul the Prisons Act to bring it in line with constitutional provisions and also with international human rights standards. It is also recommended that the Police (Amendment) Bill be strengthened to provide for the regime of civilian oversight of the detention of people in police cells.

### M. Rate of imprisonment

In the course of the 2011/2012 year,<sup>268</sup> the male inmate population increased by 3.7% from 2 596 to 2 700, whilst the female population decreased by 13.21% from 106 to 92. On the other hand, admissions for males decreased by 10.9% from 1 817 to 1 619, whilst female admissions decreased by 0.97% from 104 to 103. Releases for males decreased from 1 323 to 770, which is 41.8%, whilst female releases decreased from 105 to 101, which is 3.81%. Effectively, inmate population increased by 3.37% from 2 701 to 2 792 during the 2011/2012 year.<sup>269</sup>

Table 8: Rates of imprisonment for the 2010/2011 year

Male	Female
2 101 convicts	72 convicts
599 remands	20 remands
870 admissions (convicts)	60 admissions (convicts)
749 admissions (remands)	44 admissions (remands)
<b>Total = 4 319</b>	<b>Total = 196</b>

Source: RSP Annual Police Report 2010/2011.

### N. Conditions of detention

At Mawelawela, the only female detention facility in the country, detainees who have not been convicted are not held separately from convicts. Children live with their mothers in the facility, while juveniles are also held in the women’s correctional facility, although they sleep in different

<sup>267</sup> See US Department of Justice, National Standards to Prevent, Detect and Respond to Prison Rape <http://www.ojp.usdoj.gov/programs/pdfs/preafinalrule.pdf> (accessed 5/5/12). See also Kaufman, P. ‘Prison Rape: Research Explores Prevalence, Prevention’ National Institute of Justice Journal No. 259, March, 2008 <http://www.ncjrs.gov/pdffiles1/nij/221505.pdf> (accessed 5/5/12).

<sup>268</sup> Government financial year starts on April 1 and ends on March 31.

<sup>269</sup> The *Times of Swaziland*, Sunday October 21, 2012 (supra) p. 12. See also 2009 Human Rights Report: Swaziland, <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135979.htm> (supra) p. 2.

quarters. Failure to segregate prisoners violates international human rights standards such as those set down by article 8 of the UN Minimum Standards for the Treatment of Prisoners, which requires the segregation of male and female, untried and convicted, adult and young, and civil and criminal prisoners.

The government does not allow independent monitoring of prison conditions by local human rights groups or the media. The International Committee of the Red Cross made a request to visit and monitor prisons and jails, but did not receive permission to do so.<sup>270</sup> It is only officers working on programmes to fight HIV/Aids who have been allowed frequent entry to prison and detention centres.

Overcrowding in prison cells is a problem and exposes inmates and officers to diseases and life-threatening infections such as tuberculosis, HIV/Aids and hepatitis. There are allegations that sexual activity, including sodomy and rape, takes place in prisons. There is inadequate bedding and detainees have to sleep on the floor. Most prison structures are old and dilapidated and in need of major rehabilitation and refurbishment. Fortunately, the government has started to undertake the rehabilitation of some prison structures in different parts of Swaziland. Some of the achievements during the 2011/2012 financial year in this regard include the fencing of the Matsapha, Big Bend Correctional Stores and Piggs Peak institutions, the rehabilitation of ablution facilities at the Correctional College, and the renovation of three cell blocks at the Mbabane Correctional Institution. The upgrading of the sanitary system at Manzini Remand Centre, Nhlanguano, and Matsapha Correctional Institutions, as well as the construction of a primary school and high school at Malkerns, have also been finalised. More projects of this nature are also under way or are being planned. An important achievement has been the replacement of old toilet systems with conventional systems at the Manzini Remand Centre, Nhlanguano, and Matsapha Correctional Institutions, as well as at the Correctional College. It is remarkable that the government has undertaken these projects despite the harsh economic times the country is going through.

The Commissioner for Correctional Services has said there is a need for his department to find innovative solutions to the problem of overcrowding in prisons, including the use of non-custodial sentences for petty offenders.

Offenders are housed in the 12 facilities that Correctional Services has throughout the country. As of 24 October 2012, the department had 1 600 officers as against a prison population of 3 018. Even though there are challenges facing Correctional Services, the Commissioner has stated that Correctional Services is able to give offenders under its care three balanced meals a day, reasonable shelter with hot water and beds, as well as adequate blankets and uniforms.

In the 2009/2010 year, government authorities investigated and documented allegations of inhuman conditions experienced by people held in custody. The reports of the investigation were, however, never made public.

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<sup>270</sup> Human Rights Report: Swaziland op cit, p. 3.

## **O. Reintegration of offenders**

A rehabilitation programme is offered to children by the Swaziland Association for Crime Prevention and the Rehabilitation of Offenders (SACPRO), but not Correctional Services. The length of the programme depends on the lengths of the sentences of the children in each group. The programme content is based on imparting life and entrepreneurial skills. In addition, SACPRO provides follow-up visits for those children who return home after release.

Correctional Services is involved in the rehabilitation and reintegration of offenders. Convicted inmates are involved in programmes such as crop production, livestock production, building and maintenance, as well as in psycho-social activities, education, and healthcare services. Inmates are also put through programmes to enable reintegration into society when they leave prison. The programmes include: restorative justice; follow-up visits; community service; extramural penal employment; and employment assistance.

## **P. Recommendations**

- Swaziland must establish a robust law reform process to facilitate the incorporation of Swaziland's human rights treaty obligations into its domestic law and to provide training in these obligations for all state officials, especially police officers and prison warders.
- The Police Act and the Prisons Act must be repealed and must be replaced with a legal framework for both the police and prison regime that is in line with constitutional and international human rights standards.
- The government should form a cross-departmental group, made up of representatives of the police, the judiciary and Correctional Services, charged with developing a strategy for reducing prison overcrowding. This strategy may include a practice directive from the Office of the Chief Justice instructing judicial officers to exercise restraint in imposing custodial sentences in criminal cases, particularly for relatively minor offences or young offenders.
- The government should construct more correctional facilities and police cells, and should also extend existing facilities and equip them with proper facilities to improve not only prisoners' welfare, but also the conditions under which they can meet visitors and consult with their lawyers.
- Swaziland must prohibit and impose sanctions for the crimes of torture and other cruel, inhuman or degrading treatment or punishment under domestic law, must ensure that all complaints of torture and other ill-treatment are subjected to thorough, independent and impartial investigation, and must see to it that the perpetrators are brought to justice, as required under article 7 of the ICCPR.
- Swaziland must, by law, restrict the lethal use of firearms by the police and other law-enforcement officials to those circumstances where it is strictly unavoidable in order to protect life, and only if other means remain ineffective. The law must also require that any deployment of force is done according to the principles of necessity and proportionality as stated in article 6 of the ICCPR, and as required under the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Principles

5 & 9) and the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

- Swaziland must ensure that training for law-enforcement officials in the areas of public-order policing, arrest and detention procedures, the investigation of criminal suspects, and the handling of victims of crime is based on international human rights standards aimed at ensuring the highest standards of professional conduct.
- Swaziland must establish an effective, adequately resourced, accessible and independent body which is empowered to investigate complaints against law-enforcement officials, including complaints of human rights violations.
- Swaziland must abolish the death penalty altogether in the Constitution and must ratify the Second Optional Protocol to the ICCPR, which provides for the abolition of the death penalty.
- Swaziland must also unconditionally abolish corporal punishment.
- A self-sustaining rehabilitation service must be established as a medium- to long-term goal.
- Correctional Services should extend its transparency to the public at large. This should involve regular participatory planning with the unit responsible for rehabilitation (SACPRO), cooperation with the Commission on Human Rights and Public Administration, and reaching out to citizens' initiatives and members of communities.
- The government must implement the provisions of the newly enacted Children's Welfare and Protection Act of 2012, especially the provisions relating to the juvenile justice system.

# 6

## Access to justice

### A. Introduction

In Swaziland, there are statutory and non-statutory structures that people approach for the purpose of conflict resolution. These structures include, but are not limited to, the family, the church, non-governmental organisations (NGOs), chiefs' courts and the Office of *Ndabazabantu*.

### B. The family

The family is considered the most important and immediate justice-delivery structure for many people. For this purpose, the family consists of the head of the nuclear family and other adult males. If the nuclear family is unable to resolve the matter, the extended family (*lusendvo*) will be informed and a meeting will be convened to resolve the matter. The family is usually approached to settle family-related problems such as conflicts between and among spouses and siblings, as well as squabbles between parents and children, inheritance conflicts, and issues of child maintenance. Describing the regulation of public life within a family, Marwick states that 'every married man is really a judicial officer, since he has the power to adjudicate in matters disputed by his children'.<sup>271</sup> In cases of dissatisfaction about a ruling taken at the family level, such cases are then referred to the chief. The mediating process at the family level takes the form of a meeting to discuss and take decisions, to which family authorities and other parties are invited. Problems are discussed within the parameters of the nuclear family and, where this structure fails to adequately address the issues, these problems are referred to the extended family.

As a justice-delivery structure, the family deals with problems on a private as opposed to a public level. This structure, however, has challenges as regards the enforcement of its decisions

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<sup>271</sup> Marwick, BA 'The Swazi-An Ethnographic Account of Natives of the Swaziland Protectorate', Frank Cass & Co. Ltd, 1996 at p. 285.

on offenders. In most cases, women readily adhere to the family rulings, while most men do not comply with the rulings. Compliance by men with decisions taken within the family is usually ensured through the ancestral cult.<sup>272</sup> This is possible within a family because, in the Swazi context, the family typically includes both the living and the dead through ancestors.

Although the family is regarded as an important centre for mediating and settling conflicts, certain roles within the family have proven to be detrimental to its members, especially women. The family often assumes the role of a gatekeeper, which results in it harbouring criminals and promoting the escalation of conflicts. The protection, by the family, of the perpetrator of crime committed within the private sphere is usually selective, as such protection mostly favours men. In practice, men who are perpetrators of domestic violence are shielded by the family, and, in the absence of a comprehensive Sexual Offences and Domestic Violence Act, women and children bear the brunt of systematic and institutional violation of their rights and cannot obtain protection from their assailants. In the majority of cases, a married woman will suffer in silence – even to death – if she is the victim of domestic violence and the family fails to address the matter. This is mainly because most women are dependent on the family for their survival, as, more often than not, the man is the breadwinner and also the perpetrator of the domestic violence. Women will also suffer in silence when their matters are not heard by the family, as Swazi customary law holds that a family should not wash its dirty linen in public.

### c. Chiefs' courts

The Kingdom of Swaziland is, for purposes of local government, divided into chiefdoms which are administered by the chiefs on behalf of the King.<sup>273</sup> Every indigenous Swazi is under the control of a chief, even if he or she may not, at any given time, be living in the chiefdom.

Land, which is of critical importance to the Swazis, is vested in the King.<sup>274</sup> In practice, however, land use is administered by chiefs on behalf of the King. Before an individual can acquire the right to use land, he must be officially recognised as a subject of the chief under whose domain he falls. This right to control the acquisition of land rights, the power to decide who should join the community, and power to ban from the community all those who displease the chief, make chiefs indispensable figures in the everyday life of the Swazi. The chiefs continue unofficially to exercise judicial powers, and people continue to bring their cases before the chiefs' courts. The average Swazi in the rural areas is more comfortable taking his case to the person who has traditionally been performing this function than to the general courts about which he knows very little and in which he has no trust at all. People are sure that the chief's court will apply the law of their ancestors and that they will be judged by the people they know personally and who profoundly control other aspects of their lives.

The chiefs' courts are largely unregulated by the law in Swaziland. Every adult male in the chiefdom is expected to attend the proceedings and to actively participate in the deliberations of the chief's court. Court sessions are normally held in the open under a tree near the chief's official residence, which is called *umphakatsi*. The court is composed of the presiding officer

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<sup>272</sup> Aphane, MD. et al (supra) p.96.

<sup>273</sup> Section 233(1) of the Constitution.

<sup>274</sup> This is with the exception of privately held title-deed land. See Section 211(1) of the Constitution.

and a council of advisers called *bandlancane*, which is made up of between six and ten males nominated by the chief.<sup>275</sup> The chief's court settles disputes amongst families and community members. The court plays an active role in examining the parties to a dispute. Spectators often freely join in the proceedings by interposing interrogatories. In principle, no evidence is excluded, and all evidence is judged on its merits.

Where family matters are concerned, the chief's court will only hear the matter once it has been deliberated upon by the family. The chief works through the inner council, which is chosen from among the community and consists mostly of men. The chief does not attend trials in person, as he also hears matters tried by the inner council on appeal. Matters heard by these structures relate to family disputes, minor cases of assault, land disputes, stock theft, maintenance-related conflicts, as well as *emalobolo*-related disputes.

The way the chief's court is composed means it is not gender balanced, as only men make up the court. The chiefs' courts were said to be biased against women defendants in the majority of cases heard by them. This, respondents said, was because most men tend to be protective of other men and tend to view women who complain before the chiefs' courts as problematic. Women respondents stated that chiefs' courts were effective in solving the matters brought to them, because, even though they did not mete out harsh punishments to male offenders in domestic violence matters for instance, they did hand out admonishments to men who resorted to violence in the home. They also stated that most male offenders readily complied with orders emanating from a chief's court, a far cry from the family council orders. A widow however stated that she was not allowed near the chief's residence while in mourning. Effectively, this means that a widow cannot participate in a case before the chief's court while in mourning. From a human rights perspective, the cultural practice of mourning (*kuzila*) is discriminatory in that it applies only to women. When a husband dies, the wife is expected to wear mourning gowns for periods which range from six months to three years. Men, though, are not expected to wear mourning gowns when a wife dies.

The emphasis in chiefs' courts is more on reconciliation of the people involved in a dispute than on retribution.<sup>276</sup> For those found guilty, the chief's court may impose a monetary fine or a fine of a cow. For serious offences, such as when a man commits adultery, the fine is a herd of cattle. The losing party may also be required to pay compensation to the victorious party. The court may further make an order for the restoration of any item or goods unlawfully removed or claimed by the defendant. The ultimate punishment can also be banishment of the wrongdoer from the chiefdom. A party who is not satisfied with a decision of the chief's court may take his matter through the Swazi court machinery and ultimately to the King. Swazi law and custom endow any Swazi who is aggrieved by a decision made by his chief with the right to seek an audience with the King and the Councillors at the Royal Palace for redress. This customary remedy is a form of final appeal and serves as a check on the abuse of power by local and other authorities.

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<sup>275</sup> Aphane, MD (supra) p. 99.

<sup>276</sup> Aphane, MD (supra) p. 99.

The chiefs' courts are regarded as efficient, as proceedings are finalised speedily. Respondents were of the view that this is because chiefs' courts are not saddled with bureaucratic red tape, which is the bane of common law courts and other formal institutions within the justice sector. Respondents stated that the common law courts are notorious for case delays, uncertainties, costs, technicalities, unfamiliarity of their procedures, as well as their intimidating and impersonal atmosphere. Additionally, the European-style courts are viewed as woefully unsuited to serving the goal of reconciliation, which is of great importance in interpersonal relationships in small intimate communities like those in rural Swaziland.

#### **D. *Ndabazabantu***

The Office of *Ndabazabantu*, which literally means 'one who likes other people's stories', is a structure that was created by the colonialists and is now considered to be part of the traditional mechanism for conflict resolution in the case of land disputes. This structure does not have the power to impose punishment, either by way of imprisonment or by way of a fine, nor can it sign a warrant of attachment for restitution of property in civil matters. This structure is largely an extra-legal forum based solely on the pursuit of reconciliation and consensus. There is no process of appeal to or from it, and one's only recourse when aggrieved with the outcome of the hearing would be to appeal to the King.

#### **E. Swazi courts**

The Swazi courts are regulated by the Constitution and the Swazi Courts Act of 1950. These courts preside over matters involving Swazi nationals living under the customary law regime. The application of customary law is sanctioned by section 252(2) of the Constitution, which provides that the principles of Swazi law and custom are recognised and adopted and shall be applied and enforced as part of the law of Swaziland. However, section 252(3) stipulates that the provisions of section 252(2) do not apply in respect of any custom that is inconsistent with a provision of the Constitution or a statute and is enforced as part of the law of Swaziland. These constitutional provisions buttress those of the Swazi Courts Act, which provide that, where customary law is repugnant to natural justice, it shall to the extent of that repugnancy be void. However, instances where customary law is declared void for failure to comply with natural justice are hard to find. An example would be denial of legal representation under customary criminal procedure, for this is a clear infraction of the rules of natural justice and of the right to a fair trial.

Over the years, however, the precise definition of a Swazi national has become blurred as more and more non-nationals are tried and convicted by these courts. These courts are presided over by court presidents who sit with assessors, who are all male. They are supposedly appointed to their positions on the basis of being experts in customary law. There are no clearly defined rules as to what constitutes an expert on matters of Swazi law and custom. The process of appointment of court presidents is very opaque and such appointments are made by the King. The language of proceedings is SiSwati and no legal representation is allowed. In theory, the courts preside over minor criminal matters as well as civil matters involving Swazi law and custom. In practice, though, the police often refer serious criminal cases of domestic violence to these courts.

Swazi courts have no power to preside over marriage disputes where the parties are married under the civil regime, nor can they preside over matters of witchcraft or divorce. In practice, though, the courts have presided over serious matters of domestic violence where they handed down paltry fines and sentences. The Swazi Courts Act provides that these courts can hand down punishment that is commensurate with the offence, but, in practice, the fines they hand down are outlined in a warrant signed by the King.

In practice, Swazi courts are perceived to be lenient towards male offenders, especially in matters of domestic violence. The general view of the people interviewed on this issue was that Swazi courts allow a man to get away with an admonishment when they should in fact have sentenced the perpetrator to a term of imprisonment. Those interviewed further believed that women offenders are usually dealt with more harshly by Swazi courts than male offenders. The reason, they stated, was that the courts are manned by males and there is no one to put across the views of women, particularly in domestic violence matters.

Since all the non-statutory justice-delivery structures are accessible to most people, there is a need to regulate them properly to ensure that their operations do not infringe people's rights and also to ensure that they get budgetary support from central government. The activities of the informal mechanisms for the administration of justice are not factored into the strategy and plans of the justice sector in Swaziland. The Constitution and the Swazi Courts Act only recognise Swazi courts and not chiefs' courts.

There is also a need for the government to integrate the informal justice mechanisms into the planning and funding for the justice sector. If formally established and regulated by legislation, chiefs' courts have the potential to make the formal judiciary more accessible for more people, especially the poor and marginalised members of society. There are no fees that are paid in the chiefs' courts and the language of communication is the local language, SiSwati. In order to avoid violating international standards, it is recommended that the law should explicitly require that traditional authorities who preside over traditional courts should not perform executive functions.

There is also a need for the Office of the Judicial Commissioner to instruct both the Swazi courts and the chiefs' courts to uphold human rights, especially the right to equality of persons before the law, and particularly as between male and female litigants, bearing in mind the record of most traditional institutions in perpetuating institutionalised, socio-cultural bias against women. The state, in working with some of the United Nations (UN) agencies resident in Swaziland, has begun providing basic training in the constitutional principles of a fair trial for presiding officers in Swazi courts. This training should be extended to all role players in the informal mechanisms of justice delivery, like the chiefs' courts.

The law in Swaziland does not impose a positive obligation on the government to provide people with the means of access to appropriate forums for the resolution of legal disputes. Nevertheless, there exist a number of institutions that facilitate such access. An example is the Conciliation, Mediation and Arbitration Commission (CMAC), a body that has given hundreds of people access, for a minimal charge, to a forum for the resolution of labour disputes. It is hoped that, once established and operational, the Small Claims Court will provide an additional route through which increasing numbers of people will access justice more speedily, at less financial cost.

One of the most urgent tasks of the justice sector must be to introduce a legal aid system that is comprehensive.<sup>277</sup> Even though the Constitution guarantees equality before the law, a fair hearing and the right to legal representation, access to justice continues to be a challenge owing to the cost of legal services. It is the responsibility of the Ministry of Justice to set up a legal aid system, and this needs to be done after a review and the drafting of appropriate legislation, and bearing in mind the Final Report on National Feasibility Study for the Establishment of a Legal Aid System for the Kingdom of Swaziland.<sup>278</sup>

There is a need, therefore, to remove all barriers to the provision of legal services by non-practising lawyers who work for NGOs, to establish suitable professional-fee tariffs that take into account the fees charged to indigent clients, and to impose a legal obligation on practising attorneys to provide a determined level of pro bono services for indigent citizens per year as a condition of practice. There is also a need to allow contingency-fee arrangements between attorney and client if the client is indigent, and to permit the serving of pupillage and articles in legal aid organisations that are recognised for such purposes so that pupils and articulated clerks can be admitted as advocates and attorneys of the High Court. There also ought to be provision for legal aid work to be done by students of the University that constitutes a compulsory component of their practical-law course in the LLB programme. Lastly, there should be provision for a compulsory period of service by Pupil Crown Counsel at a legal aid clinic prior to their engagement by the Office of the Attorney General (AG) or DPP.

The bigger challenge is with the broader range of civil matters. In Swaziland, lawyers are not allowed to enter into contingency arrangements and to charge contingency fees, as such fees are regarded as unethical. This arrangement may also be regarded as a champertous agreement, that is, an agreement whereby an outsider provides finance to enable a party to litigate in return for a share of the proceeds of the action if that party is successful. Put differently, champertous agreements are pacts whereby a party is said to ‘traffic’, gamble or speculate in litigation. Such agreements are regarded by the common law as contrary to public policy and unenforceable on the ground that they encourage speculative litigation and consequently amount to an abuse of the legal process. There is a need to update the law in this respect, as the common law position in this regard is obsolete. In a constitutional state, the issue of public policy now has to be considered in the light of constitutional rights and values, especially the right of access to court as indirectly provided for under the right to a fair trial.

A constitutional state bears a positive obligation to promote the resolution of disputes through legal means. As was stated by the South African Constitutional Court in the case of *S vs Makwanyane*:

[I]n a constitutional state, individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only because the State, in the constitutional state compact, assumes the obligation to protect these rights. If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights.

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<sup>277</sup> In line with the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, 2004.

<sup>278</sup> Report prepared by LKM on behalf of UNDP (Swaziland) 2008.

In an interview conducted with a former judge of the High Court, it was revealed that awareness and knowledge of rights are minimal amongst most Swazis. This observation is not, however, validated by any systematic surveys or studies to measure levels of awareness or even identify areas where the problems are more acute, as no such study has ever been conducted in Swaziland.

Where the government has made efforts to disseminate information amongst citizens regarding rights and legislation, these have been sporadic and few and far between. For instance, the Elections and Boundaries Commission carried out awareness campaigns and civic education to encourage people to participate in the national elections of 2008. Women and Law in Southern Africa (WLSA) carried out an awareness campaign in which it encouraged the electorate to vote for a woman. There have been times when civil society organisations have tried to conduct civic education but were denied permission to do so by government authorities.

## F. Access to courts

### Physical access

Access to justice is hindered by poor physical access to courts, particularly for citizens who reside in the rural areas. The physical location of courts is an obstacle to accessing justice, in that people have to travel long distances to come to court, and, in most cases, may not have money to make the trip. The courts are located mainly in the urban areas and no common law court is situated in the rural areas, where the only courts available are the traditional courts.

The High Court, the Supreme Court and the Industrial Court are even less geographically accessible to most Swazis, since they are located in the capital city, Mbabane, and there are no circuit courts in the regions where the High Court, Supreme Court and the Industrial Court may sit from time to time.

For a long time, the physical design of most court premises in Swaziland did not take into account the particular situation of people with physical disabilities. Most of the court buildings had stairways, with no alternative for people who used wheelchairs. However, the new buildings and the revamped magistrates' courts all make provision for disabled people to access the courtrooms.

Access to justice is also hindered by language. In Swaziland, English is the language used in court for record purposes. If a person is not comfortable with the use of English, court interpreters help with interpreting. In the case of *Mbuyisa Dlamini vs The King*,<sup>279</sup> the High Court held that it was a fatal irregularity in criminal proceedings to hear a matter without the assistance of a court interpreter. What emerged during an interview with one of the court interpreters was that they do not undergo any training in the work they do. It is thus recommended that court interpreters be trained specifically to do their job, since some people may lose cases owing to incorrect interpreting by court interpreters. It is also recommended that courts concentrate on administering substantive justice without paying undue regard to procedural technicalities. There is also a need for the court rules to be simplified to enable most people to follow the proceedings. Swazi court rules of procedure should be developed and enacted to standardise the procedures and practices of the courts.

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<sup>279</sup> Unreported High Court case No. 2627/2006.

Some of the challenges in accessing justice include, but are not limited to: failure to deliver judgments on time; unreasonable delays in the finalisation of cases; unwarranted and unsubstantiated court orders; and poorly considered judgments. All these have devastating effects on the lives of the Swazi people and also put a strain on government resources.

Another cause of frustration for many people is the lack of communication regarding cases. People travel long distances only to be told when they get to court that their matters have been postponed.

## Financial access

According to the 2008 Poverty Reduction Strategy and Action Plan (PRSAP), 69% of Swazis live in poverty. The level of impoverishment coupled with high HIV infection rates, gender inequality, weak governance institutions, as well as the fiscal crisis the country is going through make it difficult for most people to access justice through the use of the courts.

The fees that legal practitioners charge at present range from E400 per hour for a junior attorney up to E2 000 per hour for a senior attorney. By the ordinary person's standards, these fees are prohibitive. Legal ethics oblige lawyers to charge adequately and properly for their professional services, unless they are genuinely acting *pro deo* or *pro amico*. A lawyer may not charge more or less than the fees prescribed, as to do so constitutes unprofessional conduct. There is a need to pass legislation that would compel legal practitioners to put in a certain number of hours a year doing *pro bono* or *pro deo* work.

There is also a need to set up a legal aid system to help the large number of people who do not have the means to hire and pay a lawyer to represent them. The traditional and other non-state justice systems must be strengthened and brought in line with the country's obligations under international law to make justice accessible to indigent members of society.

## G. Right to appear and jurisdictional restrictions

There is nothing in the laws of Swaziland precluding anyone from the right to appear in court. There is also no law that compels any person to have legal representation in either civil or criminal proceedings before the courts of the land. In some cases where private citizens have appeared in person in civil matters, the High Court has advised them to secure the services of a lawyer because of the technicalities that come with litigation in civil matters. In criminal matters, the accused is always advised, as a matter of procedure, to secure the services of a lawyer if he or she can afford one. In practice, most people appear in person because they cannot afford to hire lawyers. However, their limited capacity to handle the procedural technicalities and the language, as well as the alienating atmosphere of the common law court system, mean that their ability to represent themselves effectively is constrained. There is therefore a need for a comprehensive legal aid system that would ensure real equality of the scales in the administration of justice, especially where the poor and marginalised members of society are involved in litigation in the common law courts.

The legal position on the question of *locus standi* in Swaziland is that only a person who has a direct and substantial interest in a matter is entitled to be heard by the courts, that is, a person who is directly affected by the decision which is the subject of review. This legal position

is steeped in the common law, but has been emphasised in many decisions of the High Court and the Supreme Court. In the case of *Lawyers for Human Rights & Another vs The Attorney General & Another*,<sup>280</sup> the issue of *locus standi* was canvassed and the law authoritatively stated. This was a case where an urgent application had been brought before the High Court for an order declaring, inter alia, that the retirement age for judges of the High Court of Swaziland was 75 years. The applicants based their request on section 99(5) of the Independence Constitution, which provided that the retirement age for judges was 62 years or such other age as Parliament might prescribe. In 1970, Parliament passed a law which stipulated that the retirement age for judges was 65 years. In 1973, Parliament increased this to 75 years. In June 2001, Decree 2 was issued and provided that the retirement age for judges would be 65 years. There was thus a conflict between the retirement age prescribed by Parliament (75 years) and that provided for in Decree 2, which was 65 years. It is in connection with this conflict that applicants approached the High Court for a declaratory order in terms of which the court would pronounce on the correct retirement age for purposes of certainty.

The High Court stated that any person can bring an action to vindicate a right which he or she possesses, as long as he or she is able to show that he or she has a direct interest in the matter and not merely an interest which all citizens have. The reason for this general rule, the court reasoned, is to prevent abuse by 'busy bodies, cranks and other mischief makers'. The court pointed out that, as a general rule, it is not open to a person simply because he or she is a citizen and a taxpayer to invoke the jurisdiction of a competent court to obtain a ruling on the interpretation or application of legislation or its validity when that person is not either directly affected by the legislation or is not threatened by sanctions for an alleged violation of the legislation. Consequently, the court found that the applicants did not have *locus standi* in the matter, because they were only human rights organisations whose constitutions stated their objectives to be the promotion of human rights, with no power to institute legal proceedings in matters touching on the judiciary and legislation considered adverse to the proper functioning of the judiciary. This decision of the High Court was confirmed by the Supreme Court.

That the decisions were made prior to the 2005 Constitution taking effect is immaterial, because, in 2006, the High Court and the Supreme Court confirmed the law as stated in these decisions. In the subsequent High Court case of *Swaziland National Ex-Miners Workers Association and Others vs The Minister of Education and Others*, it was stated that any person or group has legal standing in constitutional litigation. This interpretation is, however, subject to the Supreme Court's confirmation before it can be regarded as precedent.

As recently as June 2011, Save the Children, represented by the University of Swaziland Law Clinic, filed a petition to be joined as *amicus curiae* in proceedings for the eviction of families at Madonsa in Manzini. The High Court permitted Save the Children to file an *amicus curiae* petition. However, the matter is still pending in court.

It is recommended that more NGOs be encouraged to apply to be joined as friends of the court as a way of bringing to the attention of the courts the interests of the poor and vulnerable

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<sup>280</sup> Unreported Court of Appeal case No. 34/2001 & *Lawyers for Human Rights vs The Attorney General & Another* Unreported High court case No. 80/2000.

people in litigation proceedings. The Constitution does not provide for public-interest litigation. It does, however, provide that any person who alleges a contravention of the Bill of Rights can approach the High Court for a remedy.<sup>281</sup> The Constitution should be amended to make provision for public-interest litigation, especially because a majority of the poor and marginalised cannot afford to approach the High Court when their rights are violated, as they do not have the financial resources and the legal expertise. NGOs that presently provide legal aid for the poor and marginalised would be able to approach the courts on their behalf if the Constitution were to be amended to provide for public-interest litigation.

## H. Reasonable delay

A research project titled Assessment Study on Justice: Delayed Justice Delivery was undertaken by Angelo Dube on commission by the judiciary and the United Nations Development Programme (UNDP). The findings of the research were as follows: that there are long delays before the hearing of cases in the courts in Swaziland; that lack of resources is not the only factor resulting in people failing to access justice; that there are insufficient numbers of judicial staff; that there is a lack of properly trained court staff; that there is a lack of adequate resources; that pre-trial procedures are complex, cumbersome and time-consuming; and that the court rolls are overload and delay matters. Further, the civil justice system is particularly slow, complex, fragmented and overly adversarial.

Among the causes of delays in civil litigation are: waiting for the allocation of trial dates; missing court documents; courts that lack adequate equipment, facilities and staff; practitioners who do not cooperate with one another or who deliberately engage in delaying tactics; insufficient courtrooms for hearings and trials; and court libraries that are not adequately resourced.

## I. Respect for court orders

In Swaziland, cases of disrespect for court orders on the part of individuals are the exception rather than the rule. Cases of disobeying court orders usually involve men who refuse to own up to their maintenance obligations towards their minor children, ostensibly because they do not have the money.

With the exception of government, people and institutions in Swaziland respect court orders. However, there are cases where law-enforcement agencies have not enforced certain court judgments, for example the case of *Vuvulane Irrigated Farms Ltd vs Moses Mathunjwa & Others*.<sup>282</sup> In this case, the government failed to enforce a court decision against Royal Investment Trust, Tibiyo.

## J. Mechanisms for asserting rights outside the court system

### The Commission on Human Rights and Public Administration

Human rights commissions are institutions established to check human rights abuses in countries. They also have a promotional as well as a protective mandate, as provided for by the Principles Relating to the Status of National Institutions (Paris Principles). Human rights

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<sup>281</sup> Section 35(1).

<sup>282</sup> Unreported Supreme Court case No. 233/2007.

commissions are often described as permanent and independent institutions that are established by governments with the aim of promoting and protecting human rights. These are not ad hoc institutions and they play an important role in mediating between government and civil society, with the overarching role of complementing rather than displacing other functionaries. The Commission on Human Rights and Public Administration in Swaziland is therefore not a court, nor does it play the role of a court. As such, it cannot usurp the jurisdiction of the courts. The Commission is supposed to be more accessible than the courts, because it is less expensive and faster to respond, and its procedure is less formal.

The Constitution establishes the Commission on Human Rights and Public Administration.<sup>283</sup> The mandate of the Commission is to investigate complaints concerning alleged violations of fundamental human rights and freedoms by public officials and to make recommendations aimed at protecting human rights. The Constitution enjoins the Commission to submit reports of its work to Parliament.<sup>284</sup> The Commission's mandate goes so far as the investigation of public officials and no more. There is thus a need to expand the mandate of the Commission to cover actions of people who are not public officers.

A notable aspect of the Commission is that it is composed entirely of royal appointees.<sup>285</sup> This militates against the Paris Principles, which state that the composition of such institutions should be such that they comprise a wide cross-section of the nation.

The Commission does not have the power to attempt conciliation of disputes under the Bill of Rights provisions of the Constitution. Yet, this would go a long way to stave off litigation before the High Court.

The Commission is further limited in that it is precluded from investigating matters relating to the exercise of the royal prerogative by the Crown.<sup>286</sup> This gives the King's agents virtual *carte blanche* to exercise the royal discretion in any way they (the agents) see fit. There is every reason to argue that the royal agents are above the law in this respect.

The Commission presently operates from a place where widows are precluded from entering the vicinity of the Commission's offices. The effect is that widows whose rights have been violated cannot approach the Commission to register their complaints – a self-defeating proposition for the Commission. Since the Commission was established almost three years ago it has not heard a single matter, nor has it published any annual report – ostensibly because it is still not well resourced. It also does not have a secretariat or enabling legislation that sets out how it is expected to go about its functions.

## **K. Recommendations**

- The government should collaborate with relevant stakeholders to set up an effective and comprehensive national legal aid system to enable more Swazis to access justice.
- The government should enact enabling legislation for the restructuring of the Commission on Human Rights and Public Administration in order to make it more independent, effective and accessible.

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<sup>283</sup> Section 163(1). Section 163(1).

<sup>284</sup> Section 168(8).

<sup>285</sup> Section 163(3).

<sup>286</sup> Section 165(3)(c).

- The government should establish an alternative dispute-resolution mechanism to ease the backlog in the courts and to ensure the expedient resolution of justice.
- The government and civil society organisations should facilitate the orientation of officials in the traditional justice system, in the constitutional norms of equality and non-discrimination and motivate them to apply the norms.
- The state should integrate informal and traditional mechanisms for accessing justice (i.e. chiefs' courts) into national plans, strategies and budgets for the justice sector.
- The government should regulate informal and traditional mechanisms through legislation.

# 7

## Development partners

Swaziland has always relied on external multilateral and bilateral donor assistance. Down the years, however, donor assistance has continued to dwindle, mainly because of a shift in interests to other countries in the region – especially after the end of the war in Mozambique and after the end of apartheid in South Africa. Further reasons have been: low government capacity and slow implementation rates in respect of development programmes; divergent ideas on governance issues and reform; and conditionalities built into aid packages, which are sometimes considered to be too stringent.

### **A. Coordination of development assistance**

There exists an Aid Policy Statement on External Assistance to ensure that externally funded projects and programmes are consistent with national and sectoral priorities and have maximum impact on national development. The Aid Policy Statement spells out that, while external funding agencies will normally have their own priority areas of support, often with attached conditionalities, the country however reserves the right to assess the impact of these conditionalities and to make a decision on the basis of overall costs and benefit. The document also defines procedures for planning, budgeting for, implementing and monitoring external assistance programmes or projects.

The development of the Aid Policy Statement clearly points to an attempt on the part of government to improve coordination efforts of donors and government. However, the impact of these efforts is limited by the absence of an effective sectoral strategic plan for the justice sector that would allow donor assistance to be linked to goals that are cross-cutting to the sector. There is, therefore, a need for donors and government to agree on a sector-wide approach.

## **B. Donor-funded projects and human resources**

The Minister of Finance, in his most recent Budget Speech, stated that donor partners provided financial and technical support in the areas of agriculture, water, governance, health, education and infrastructure projects. The United Nations (UN), the Minister noted, had provided funds for health, gender programmes, statistics, and poverty-reduction initiatives. Further, the United States President's Emergency Plan for Aids Relief (PEPFAR) and the Global Fund, said the Minister, continued to be important partners in the fight against HIV/Aids. The Minister projected that total revenue and grants for the year 2012/2013 would be E12.2 billion.

## **C. Donor projects and human resources**

Development partners in Swaziland hire local and external staff. There are no donor-funded projects within the justice sector which are likely to cause human resources to be lured away from government. But, again, with government's recent problems regarding the payment of civil servants' salaries, qualified and skilled civil servants continue to look for greener pastures, especially in the private sector.

## **D. Development assistance and promotion of, and respect for, human rights**

Viewed in its wider and narrower confines, all development assistance for the justice sector is geared towards addressing human rights concerns. The United Nations Development Programme (UNDP), for instance, bases its development aid on a human rights-based approach.

Most of the development assistance is linked to a human rights conditionality in order to democratise and also to promote and uphold human rights.

## **E. Access to information on development assistance**

Information on the justice sector is not deliberately withheld by donors. Donor agencies in the country were willing to supply the necessary information through interviews as well as through documentary information. Most of the information was available online. It was a different story, though, with some government departments within the justice sector. Some of the information is available online. However, it is not comprehensive, which makes for a very untidy assessment of the total amount of aid given to the country, of its distribution among the various institutions in the sector, and of the proportion of the total budget in relation to the national budget. There is, therefore, a need for an integrated database with all the information on all programmes providing assistance to the justice sector.

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