

## The drafting of the Constitution of Swaziland, 2005

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### Summary

*Swaziland gained independence from the United Kingdom on 6 September 1968, under a written, Westminster-type Constitution (the Independence Constitution). This Constitution was unlawfully repealed by His Majesty King Sobhuza II on 12 April 1973, promising that all the people of Swaziland would craft their Constitution in complete liberty and freedom, without outside pressure. In pursuit of this goal, a number of commissions were established to solicit the citizens' views on the type of constitution they wanted to govern them. Because the Independence Constitution was abrogated on the ground that it was imposed by departing colonial masters, it was expected that the Constitution to be drawn after independence would truly reflect the aspirations of all the people. This article, therefore, interrogates the question whether, in light of the wave of constitution making in Africa in the 1990s, the Swaziland constitution-making process fulfilled the requirements of an all-inclusive, participatory, transparent and accountable process. The article examines the independence of the King's appointed constitutional review bodies, given that, in order to produce a credible, legitimate and durable constitution, the review bodies must be as independent from the government as possible. Further, the article looks at the role of the African Commission on Human and Peoples' Rights as well as the Swaziland courts in enhancing a people-driven process. The article concludes that the Swaziland constitution-making process did not*

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*herald a departure from the constitutional order that existed prior to the adoption of the Constitution of the Kingdom of Swaziland Act 1 of 2005. Despite the adoption of this Constitution, the Kingdom does not qualify as a constitutional and democratic state with a justiciable bill of rights capable of enforcement by an independent judiciary.*

## 1 Introduction

We live in an era of constitution drafting. Of the close on 200 national constitutions in existence today, more than half have been redrafted. New nations and radically new regimes, seeking the democratic credentials that are a precondition for recognition by other nations and by other international political, financial, aid and trade organisations, make the writing of a constitution a priority.<sup>1</sup>

In the 1990s, the drafting of constitutions in Africa has become the norm, following decades of one-party rule, military dictatorships and no-party regimes.<sup>2</sup> African states engaged in the process of crafting new constitutions in search of democratic and legitimate governance based on the free will of the people, and to foster a culture of democracy and respect for and the promotion of fundamental rights and freedoms. A transition to democracy is a lofty undertaking, meeting the challenge of developing constitutional and institutional mechanisms to build viable and durable democratic values and practices that would guarantee political stability, a peaceful and orderly change of government,<sup>3</sup> the rule of law and a complete respect for fundamental human rights<sup>4</sup> and the civil liberties of the individual.

Constitution drafting is seen as a means of bringing peace and creating stability and prosperity, where a country's people take charge of governance and their political and economic destiny in complete

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<sup>1</sup> V Hart 'Democratic constitution making' Special Report 107, United States Institute of Peace <http://www.usip.org/pubs/specialreports/sr107.html> (accessed 3 August 2005). See also G Arnold *Africa: A modern history* (2005) 813, where he writes: 'No other region of the world has seen so much constitution making — or re-making — as Africa over the last 40 years and the new constitution worked out by the Constitutional Commission for Eritrea (CCE) following the end of its war of independence from Ethiopia in 1991 is worth examining. The constitution had to serve the basic aims of nation building, equitable development and stability, the building of democracy, the protection of human rights and assurance of popular participation.'

<sup>2</sup> JSM Matsebula *A history of Swaziland* (1988) 265 states that the Royal Constitutional Commission, appointed by King Sobhuza II on 6 September 1973, recommended that Swaziland should be declared a no-party state.

<sup>3</sup> Declaration on Unconstitutional Changes of Government (2000) AHG/Dec.150 (XXXVI) <http://www.africa-union.org/root/au/Documents/Decisions/hog/10HoGAssembly2000.pdf> (accessed 15 August 2005).

<sup>4</sup> J Oloka-Onyango & J Mugaju 'Introduction: Revisiting the multiparty versus movement system debate' in J Oloka-Onyango & J Mugaju (eds) *No-party democracy in Uganda myths and realities* (2000) 1.

freedom.<sup>5</sup> The Kingdom of Swaziland was not immune from these new winds of change,<sup>6</sup> as it remained the only absolute monarch<sup>7</sup> in the Southern African region after Lesotho adopted a democratic Constitution in 1993,<sup>8</sup> with the King becoming a constitutional monarch.<sup>9</sup>

The idea of crafting new and democratic constitutions developed out of a need for autochthonous constitutions that would give birth to democratic constitutionalism. The independence constitutions,<sup>10</sup> otherwise called first generation constitutions (with the exception of those of the Republic of Botswana<sup>11</sup> and The Gambia<sup>12</sup> before the *coup*) were repealed, amended and jettisoned by newly-independent African states, for many reasons, among them, that these were imposed<sup>13</sup> by the departing masters on the African peoples, and that, being products of western democracies, they were not suitable for economic devel-

<sup>5</sup> Eg, as long ago as 12 April 1973, His Majesty King Sobhuza II of Swaziland stated as follows when he unlawfully repealed the 1968 Independence Constitution: '[t]hat I and *all my people* heartily desire at long last, after a long constitutional struggle, to achieve full freedom and independence under a constitution created by ourselves for ourselves *in complete liberty* without outside pressures; as a nation we desire to march forward progressively under our own constitution guaranteeing peace, order and good government and the happiness and welfare of *all our people*' (my emphasis).

<sup>6</sup> T Clark *Great speeches of the 20th century* (2008) 161 171.

<sup>7</sup> J Hatchard *et al* (eds) *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 22. Of course, in terms of the King's Proclamation to the Nation of 12 April 1973, according to which His Majesty King Sobhuza II repealed the 1968 Independence Constitution, the King said: 'Now therefore, I, Sobhuza II, King of Swaziland, hereby declare that, in collaboration with my cabinet and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power is vested in myself and shall, for the time being, be exercised in collaboration with my Cabinet Ministers.' This position was reaffirmed by His Majesty King Mswati III after he had assumed the throne in 1982 and he declared by King's Decree 1 of 1982, when he declared: 'I hereby reaffirm that in terms of Swazi law and custom, the King holds the supreme power in the Kingdom of Swaziland and as such all executive, legislative and judicial powers vests in the King who may from time to time by decree delegate certain powers as functions as he may deem fit.'

<sup>8</sup> Constitution of Lesotho Order 16 of 1993 [http://www.lesotho.gov.ls/documents/Lesotho\\_Constitution.pdf](http://www.lesotho.gov.ls/documents/Lesotho_Constitution.pdf) (accessed 26 August 2005).

<sup>9</sup> Sec 44 of the Constitution of Lesotho 1993 reads: '(1) There shall be a King of Lesotho who shall be a constitutional monarch and head of state.'

<sup>10</sup> Swaziland Independence Constitution Act 50 of 1968, Statutes of Swaziland.

<sup>11</sup> C Fombad 'The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?' (2007) 23 *South African Journal on Human Rights* 93 108.

<sup>12</sup> The *coup* occurred in 1994. See in this regard *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

<sup>13</sup> M Sinjenga 'Constitutionalism in Africa: Emerging trends: The evolving African constitutionalism' (1998) 60 *The Review* 23. See also Hatchard (n 7 above) 314.

opment in Africa.<sup>14</sup> Baloro<sup>15</sup> writes that, at the initial stages, in most cases, what was put in place was a one-party regime which usually, at least nominally, espoused one political ideology or the other, for example, socialism-African-unionism in Kwame Nkrumah's Ghana, African socialism and *ujamaa* in Julius Nyerere's Tanzania and humanism in Kaunda's Zambia.

Be that as it may, there can be little doubt that the constitution-making wave of the 1990s was primarily a search for constitutionalism. It has long been suggested that:<sup>16</sup>

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure to which legislative and executive acts are to be performed and delimiting their permissible content. Constitutionalism becomes a living reality to the extent that these rules and the arbitrariness of discretion are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.<sup>17</sup>

Although others contend that constitutionalism is firmly set in a western liberal democratic mould,<sup>18</sup> it is generally accepted that African lawyers have uncritically operated within this Diceyan conceptual framework, refined by De Smith<sup>19</sup> and blessed by the Law of Lagos.<sup>20</sup> It is acknowledged that constitutionalism concerns itself with two fundamental pillars: the limitation of governmental power and the protection of fundamental rights, freedoms and civil liberties of the individual.<sup>21</sup> Classical constitutionalism, as expounded by Dicey, has been taken to greater heights by academics and scholars who now speak of modern constitutionalism. Bluterichie<sup>22</sup> put it very well when he said:<sup>23</sup>

<sup>14</sup> As above.

<sup>15</sup> J Baloro 'Democracy and human rights in Swaziland: Study of the law and practice regarding free association and assembly' in C Okapaluba *et al* (eds) *Human rights in Swaziland: The legal response* (1997) 30-31.

<sup>16</sup> A de Smith *The new Commonwealth constitutions* (1964) 106.

<sup>17</sup> Reproduced in Hatchard (n 7 above) 1.

<sup>18</sup> As above.

<sup>19</sup> IG Shivji 'State and constitutionalism: A democratic perspective' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 27.

<sup>20</sup> The Internal Commission of Jurists (ICJ) organised the African Conference on the Rule of Law consisting of 194 judges, practising lawyers and teachers of law from 23 African nations as well as countries of other continents, assembled in Lagos, Nigeria, in January 1961, to discuss freely and frankly the rule of law with particular reference to Africa, and reaffirmed the Act of Athens and Declaration of Delhi, which in turn reaffirmed the concepts of constitutionalism; [http://www.globalwebpost.com/genocide1971/h\\_rights/rol/10\\_guide.htm#lagos](http://www.globalwebpost.com/genocide1971/h_rights/rol/10_guide.htm#lagos) (accessed 8 September 2005).

<sup>21</sup> KC Wheare *Modern constitutions* (1951) 7 writes that '[c]onstitutions spring from a belief in limited government'.

<sup>22</sup> DT Bluterichie 'The confines of modern constitutionalism' (2004) 3 *Pierce Law Review* 1 <http://ssrn.com/abstract=1031529> (accessed 21 June 2005).

<sup>23</sup> Bluterichie (n 22 above) 6.

Modern constitutionalism as I use the term throughout the rest of this project refers to a set of formal legal and political concepts ... These concepts, which serve as a cornerstone of liberal political and legal theory (and evolved to support that theory), are the division and limitation of government power, the recognition and protection of certain individual rights, the protection of private property and the notion of representative or democratic government. These concepts are the backdrop against which the modern constitutionalist enterprise is judged.

Despite the fact that the basic tenets of constitutionalism are by and large well accepted, they have not been without criticism. Gutto<sup>24</sup> argues that the classical formulation by Dicey is representative of a narrow conception of state power as simply dividing it into three arms. He advances the argument that the judiciary is the most passive branch in that its effective operation is dependent on the mobilisation of the law by private citizens. The exercise of power in modern society can no longer be left to the conventional structures of government, but also includes the role played by civil society, such as non-governmental organisations (NGOs),<sup>25</sup> in influencing policies and the direction of government.

It is contended that constitutionalism, democracy and human rights are intertwined and interconnected.<sup>26</sup> Mapunda<sup>27</sup> proposes that

[c]onstitutionalism and democracy are inextricably interlinked. The Universal Declaration of Human Rights 1948; and all major United Nations resolutions; the International Covenant on Civil and Political Rights of 1966; the constitutions of modern states; of the African Charter on Human and Peoples' Rights states — all these recognise '[c]onstitutionalism and democracy as an integral part of fundamental human rights'.

Indeed, it is now generally accepted that constitutionalism in liberal political discourse revolves around issues of limited powers of government and the protection and promotion of individual rights. These issues make room for the rule of law, the separation of powers, periodic elections and the independence of the judiciary.<sup>28</sup> Constitutionalism also implies that the constitution cannot be suspended, circumvented

<sup>24</sup> SBO Gutto 'The rule of law, democracy and human rights: Whither Africa?' (1997) 3 *East African Journal of Peace and Human Rights* 130-133.

<sup>25</sup> This is illustrated by the fact that the AU adopted the Kigali Declaration in 2003, para 28, which emphasises the role played by civil society organisations in promoting and defending human rights. See C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007).

<sup>26</sup> Butleritchie (n 22 above); see also W Osiatynnski 'Constitutionalism, democracy, constitutional culture' in W Wyrzykowski (ed) *Constitutional cultures* (2000) 151-158 and R Henwood 'Constitutional culture in Africa' in W Wyrzykowski (ed) *Constitutional cultures* (2000) 107-122.

<sup>27</sup> AM Mapunda 'Conditions for the functioning of a democratic constitution' *Conference on Constitutionalism and the legal system in a democracy East and Central Africa Chief Justice Colloquium* (1995) 35.

<sup>28</sup> JO Ihonvbere *Towards a new constitutionalism in Africa* (2000) 13; see also F Kanyongolo 'The constitution and the democratic process in Malawi' in O Sichone (ed) *The state and constitutionalism* (1998) 2.

or disregarded by political organs of government, and that it can be amended only in accordance with the procedures appropriately enshrined to change the constitutional character, and that it gives effect to the will of the people acting in a constitutional mode.<sup>29</sup> Accordingly, the Swaziland constitution-making exercise must be understood in the context of achieving the creation of a limited government.<sup>30</sup>

## 2 The writing of the Constitution of the Kingdom of Swaziland Act 1 of 2005

The constitution of a nation is not simply a statute which mechanically defines the structures of government. It is a 'mirror reflecting the national soul', the identification of ideals and aspirations of a nation, and the articulation of the values bonding its people and disciplining its government.<sup>31</sup>

Bradley and Wade<sup>32</sup> define a constitution as something *antecedent* to a government; government being merely the creation of a constitution. A constitution is not the act of a government, but of a people constituting a government and a government without a constitution is power without right. These definitions tell us a lot about the nature of a constitution and its necessity. Put differently, a constitution is an account of the ways in which a people establish and limit the power by which they govern themselves, in accordance with the ends and purposes that define their existence as a political community.<sup>33</sup> This explains why the process of making a constitution is as important as the product and its observance.

The following questions are pertinent to constitution making, particularly in the context of Swaziland: Do the constitutions of Africa crafted in the 1990s, particularly which of Swaziland, 'reflect the national soul'? Does it identify the values, ideals and aspirations of the nation? Does it have in-built mechanisms to limit the power and discipline the government? Does it promote and protect fundamental human rights and freedoms and civil liberties of the individual? Two preliminary issues are worth highlighting. These are: Who are the people? Who is the nation? This is precipitated by the fact that, more often than not, African leaders refer to and purport to do things for and on behalf of

<sup>29</sup> L Henri 'Elements of constitutionalism' (1998) 60 *The Review* 12.

<sup>30</sup> As to whether or not the new Swaziland Constitution achieves this, a comprehensive discussion is made by Fombad (n 11 above).

<sup>31</sup> *S v Acheson* 1991 2 SA 805 813 (Nm High Court) *per* Mahomed AJ (as he then was), cited with approval by Masuku J in *Rex v Mandla Ablon Dlamini* Criminal Case 7/2002 (HC) (unreported) 7.

<sup>32</sup> AE Bradley *et al* (eds) *Constitutional and administrative law* (1995) 5.

<sup>33</sup> H Belz 'Written constitutionalism as the American project' [http://www.constitution.org/cmt/belz/lcfl\\_i.htm](http://www.constitution.org/cmt/belz/lcfl_i.htm) (accessed 3 August 2005).

their 'people' or the 'nation', even if the decisions they take are detrimental to the very people they lead. This is significant in the context of Swaziland because, when the 1968 Independence Constitution was repealed, the King supposedly acted for and with the full consent of the Swazi people:<sup>34</sup>

[T]hat I and my *people* heartily desire at long last, after a long constitutional struggle, to achieve full freedom and independence under a *constitution created by ourselves for ourselves* in complete liberty without outside pressures; as a *nation* we desire to march forward progressively under our own constitution guaranteeing peace, order and good government and the happiness and welfare of all our *people*.<sup>35</sup>

In ancient Greek, the term 'people' referred to the many disadvantaged and landless masses.<sup>36</sup> However, in modern constitutional and democratic terms, 'people' has been used in a number of ways. People may be viewed as a single, cohesive and collective body bound together by a common or collective interest, in which case they are one and indivisible. This view tends to generate a model of democracy that focuses on the general or collective will of, rather than the private will. 'People' may also mean 'the majority'. Used in this sense, democracy means the strict application of the principle of majority rule in which the will of the many or numerically strongest overrides that of the minority, hence, degenerating the term into the tyranny of the majority. In the final analysis, 'people' can be thought of as a collection of free and equal individuals, each of whom has the right to make independent decisions.<sup>37</sup>

Alongside the term 'people' is the word 'nation'. Heywood suggests that this word symbolises a psycho-political construct.<sup>38</sup> What sets a nation apart from any other groups or collectivity is that its members regard themselves as a nation. A nation perceives itself as a distinctive political community. For the sake of constitutional developments, it becomes crucial that a people as a nation come to some consensus on issues affecting governance. One person or a clique acting alone cannot claim to be acting for and on behalf of a people or a nation without their involvement.<sup>39</sup> The question that arises from this analysis is whether the King had the authority to repeal the Constitution on behalf of the people of Swaziland.<sup>40</sup>

<sup>34</sup> Oloka-Onyango & Mugaju (n 4 above)

<sup>35</sup> Decree 2(e) of the King's Proclamation (my emphasis).

<sup>36</sup> A Heywood *Politics* (2007) 69.

<sup>37</sup> As above.

<sup>38</sup> Heywood (n 36 above) 106.

<sup>39</sup> Art 19 of the African Charter prohibits the domination of a people by another and reads: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

<sup>40</sup> This part of the discussion is developed by the reference to the decisions of the courts mentioned below (nn 62 & 63). See also SH Zwane 'Constitutional discontinuity and legitimacy: a comparative study with special reference to the 1973 constitutional crisis in Swaziland' unpublished LLM dissertation, University of Edinburgh, 1998 36.



Swaziland gained independence from the United Kingdom of Britain on 6 September 1968<sup>41</sup> through a Westminster-type constitution. Hlatshwayo<sup>42</sup> outlines the structure of the Constitution and remarks that it established the three arms of government, being parliament,<sup>43</sup> the executive<sup>44</sup> and the judiciary.<sup>45</sup> This Constitution was preceded by a 1967 Constitution under which national elections were held under a multi-party system on 20 April 1967.<sup>46</sup>

## 2.1 The abrogation of the 1968 Independence Constitution

There seems to be consensus among constitutional writers that the most significant factor responsible for the repeal of the Constitution was the emergence of the opposition Ngwane National Liberatory Congress (NNLC) in parliament after the 1972 general elections.<sup>47</sup> Hlatshwayo writes that the loss of three seats by the Imbokodvo National Movement (INM) ushered in a new era in Swaziland's political culture.<sup>48</sup> When the new parliament convened the next year, there was almost tangible tension between the ruling INM party and the opposition NNLC. It would seem that the INM Members of Parliament (MPs) were bent on making the life of the opposition difficult by exhibiting a somewhat hostile attitude. This tension came to a breaking point when the government declared one of the opposition members, Thomas Bhekindlela Ngwenya, a prohibited immigrant.

It has been suggested that the repeal of the Constitution is perhaps one of the most significant events in the constitutional history of Swaziland.<sup>49</sup> It is important because it marked the first constitutional crisis of the newly-independent state, and its cause can be traced to the existence of constitutional rules from two separate sources within one system.<sup>50</sup>

<sup>41</sup> Swaziland Independence Constitution Act 50 of 1968.

<sup>42</sup> NA Hlatshwayo 'The ideology of traditionalism and its implications for principles of constitutionalism: The case of Swaziland', unpublished LLM dissertation, Faculty of Graduate Studies, 1992 130.

<sup>43</sup> Ch V 1968 Constitution.

<sup>44</sup> Ch VII 1968 Constitution.

<sup>45</sup> Ch IX 1968 Constitution.

<sup>46</sup> Matsebula (n 2 above) 243.

<sup>47</sup> Matsebula (n 2 above) 257, Zwane (n 40 above) 26 as well as Khumalo contend that the different sources were that the independence Constitution attempted to separate the elements of the traditional political system from the modern constitution system within one system, 96.

<sup>48</sup> Hlatshwayo (n 42 above).

<sup>49</sup> B Khumalo 'Legal pluralism and constitutional tensions: the evolution of the constitutional system in Swaziland since 1968' unpublished LLM dissertation, Faculty of Graduate Studies, York University, Ontario, 1993 96.

<sup>50</sup> Khumalo (n 49 above) 99.



## 2.2 The Bhekindlela Thomas Ngwenya cases

The political controversy over the presence of the NNLC in parliament resulted in three of the most significant judicial pronouncements in the short history of the modern Constitution. The Ngwenya<sup>51</sup> cases were a test of the role of the judiciary as the custodian of the Constitution, fundamental rights and freedoms.<sup>52</sup> Before the elected members of parliament could be sworn in, it was alleged that one of the members of the opposition NNLC, Bhekindlela Thomas Ngwenya, did not have Swaziland citizenship. The Deputy Prime Minister, as Minister responsible for immigration, issued a declaration declaring Ngwenya a prohibited immigrant.<sup>53</sup> Ngwenya challenged the declaration, seeking an order declaring him to be 'a citizen of Swaziland'. Delivering judgment, Sir Phillip Pike CJ (as he then was) observed that, in view of the importance of the matter, affecting as it did the fundamental rights of a person who claimed to be a citizen and who had been resident in Swaziland for some years until his deportation, the case had to be heard by a full bench of two judges. As well, the court was not satisfied that the government had proved that Ngwenya was not a citizen of Swaziland, and consequently the deportation order was set aside.

Government appealed. While the appeal was pending, an amendment to the Immigration Act<sup>54</sup> was rushed through and tabled in parliament and quickly passed into law. The Amendment Act established a tribunal to decide cases of disputed nationality. An appeal against its decision could be made to the Prime Minister whose decision was final, thus excluding the jurisdiction of the courts. Its application was to be retrospective.<sup>55</sup> The tribunal invited Ngwenya to appear before it so that it could determine his citizenship status.<sup>56</sup> This was despite the fact that Ngwenya's citizenship had been confirmed by the High Court. The tribunal came to the conclusion that Ngwenya was not a citizen of Swaziland in that he was born in the Republic of South Africa. Ngwenya challenged the competence of the decision of the tribunal as well as its constitutionality.<sup>57</sup> Hill CJ (as he then was) dismissed the application.<sup>58</sup>

<sup>51</sup> *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister* 1970-76 SLR (HC) 88.

<sup>52</sup> n 51 above, 102.

<sup>53</sup> Purportedly issued in terms of sec 9(1)(g) of the Immigration Act 32 of 1964, published under *Government Gazette* 65 of 1972.

<sup>54</sup> Immigration (Amendment) Act 22 of 1972.

<sup>55</sup> Khumalo (n 49 above) 105.

<sup>56</sup> RS Mthembu 'Human rights and parliamentary elections in Swaziland' in Okapaluba (n 15 above) 124.

<sup>57</sup> *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR (HC) 119.

<sup>58</sup> Khumalo writes that in the intervening period between the first application and this one, Chief Justice Sir Phillip Pike had vacated his office. He does not tell us the reasons (107).

This judgment was clearly wrong, based on a deliberate lack of appreciation of the relationship between an act of parliament on the one hand, and the Constitution on the other, as well as the role of the courts in protecting and promoting fundamental rights and freedoms. Overturning Hill CJ, the Court of Appeal<sup>59</sup> held that, constitutionally, legislative interference with the jurisdiction of the High Court would be an alteration of the Constitution; hence it required a joint sitting of parliament in compliance with the requirements of section 134 of the Constitution. This finding of the Court of Appeal enraged government.<sup>60</sup> It was as a result of this decision that the Constitution was repealed. On the afternoon of 12 April 1973, the Prime Minister introduced a motion in both houses of parliament to the effect that the Constitution be abrogated.<sup>61</sup> Members of the opposition walked out of parliament in protest to these constitutional manoeuvres, and the motion received unanimous support from both houses.<sup>62</sup> On the same day, King Sobhuza II announced the repeal of the Constitution.<sup>63</sup>

### 2.3 Judicial pronouncements on the proclamation

Both the High Court<sup>64</sup> and the Court of Appeal of Swaziland<sup>65</sup> concluded that the Constitution was unlawfully repealed. The High Court delivered two separate judgments in terms of which it held this. As to whether the King's proclamation could be set aside, the two judges hearing the matter disagreed. Masuku J concluded that it could not be set aside because it had become a *grundnorm*, while Sapire CJ (as he then was) made the following observations:<sup>66</sup>

The late King purported to act in accordance with powers he claimed to have, but which were nowhere to be found provided for in the 1968 independence Constitution. I appreciate that a host of conundrums stem both from the view I express, and that enumerated by my brother. If the abrogation by proclamation of the 1968 Constitution was incompetent in 1973, can the passage of time alone convert what was invalid into a *grundnorm*? At what stage did that which was invalid become valid? If the validity had been tested in earlier years close to 1973 what would have been the result? Can the 1973 Proclamation and the later confirmatory decrees become of

<sup>59</sup> *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR (CA) 123.

<sup>60</sup> Mthembu, Hlatshwayo and Khumalo all agree that the government was not pleased with the decision and this led to the ruling party manoeuvring the Constitution and its electoral process.

<sup>61</sup> Matsebula (n 2 above) 258.

<sup>62</sup> Hlatshwayo (n 42 above) 145.

<sup>63</sup> As above.

<sup>64</sup> *Lucky Nhlanhla Bhembe v The King Criminal Case 75/2002 (HC) per Masuku J; Nhlanhla Lucky Bhembe & Ray Gwebu & Another Criminal Case 75 & 11 of 2002 per Sapire CJ* (unreported).

<sup>65</sup> *Gwebu & Another v Rex* (2002) AHRLR 229 (SwCA 2002).

<sup>66</sup> n 64 above, 3.

themselves a valid empowerment of the King to legislate by decree? Does it really alter the outcome because the issue is only put squarely to the test some thirty years after the event? Is not the process by which my brother sees the development and establishment of the *grundnorm*, nothing more than the negation of the rule of law? I would be hard pressed to answer these questions with confidence, but incline to the view that the opinions endorsed by my brother are a negation of the rule of law. I question whether the King ever has had power to amend much less to abrogate the Constitution, whether by decree or otherwise. The 1968 Constitution had, as my brother has observed, provision for its amendment. Perceived impracticality of this provision could not itself empower or justify abrogation.

This was judicial activism at its best. However, the Court of Appeal<sup>67</sup> disagreed, holding that what happened in 1973 was a successful 'revolution' on the strength of the judgments of *Madzimbamuto v Lardiner-Burke and Another*,<sup>68</sup> *Mangope v Van der Walt and Another NNO*,<sup>69</sup> as well as *Michell and Others v Director of Public Prosecutions*.<sup>70</sup> The Court, *per* Browde JA, said that:<sup>71</sup>

Finally, the indications before us are that the government was not opposed, at least ostensibly, to a democratic dispensation. I say this despite a strong feeling amongst many that thus far this ostensible attitude has been mere lip-service.

I argue that the Court missed a golden opportunity of helping to rewrite in a constructive<sup>72</sup> way the constitutional history of Swaziland. I contend that not only is such statement erroneous, but also misleading because respect for fundamental rights and freedoms, even at the time the decision was delivered, was absolutely nil, as the very proclamation which the Court was called upon to decide its validity denied citizens their rights.<sup>73</sup> It is amazing that in the face of this draconian piece of legislation, the Court of Appeal could say that the government was not

<sup>67</sup> n 65 above.

<sup>68</sup> (1968) 3 All ER 561 (PC).

<sup>69</sup> 1994 3 SA 850 (BGD).

<sup>70</sup> (1987) LRC (Const) 127.

<sup>71</sup> n 65 above, 238 para 36.

<sup>72</sup> NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 67.

<sup>73</sup> Eg Decrees 11, 12 and 13 of the Proclamation expressly prohibited any form of political activity. Decree 11 reads: 'All political parties and similar bodies that cultivate and bring about disturbances and ill feelings within the nations are hereby dissolved and prohibited.' Decree 12 reads: 'No meetings of a political nature and no processions shall be held or take place in any public place unless with the prior consent of the Commissioner of Police, and consent shall not be given if the Commissioner of Police has reason to believe that such meeting, procession or demonstration is directly or indirectly related to political movements or other riotous assemblies which may disturb the peace or otherwise disturb the maintenance of law and order.' Decree 13 reads: 'Any person who forms or attempts or conspires to form a political party or who organises or participates in any meeting, procession or demonstration in contravention of this decree shall be guilty of an offence and liable on conviction to imprisonment not exceeding six months.'

opposed to a democratic dispensation, yet the constitution-making process had never been spared criticism. The criticism was fundamentally that the political environment was not conducive to effective free and genuine citizen participation in the constitution-making process. It is regrettable that the Court came to this conclusion, particularly because it had observed, in the very same judgment, the relevance of the African Charter on Human and Peoples' Rights (African Charter) in human rights discourse. In our view, the Court of Appeal ought to have declared the proclamation null and void, notwithstanding that the African Charter had not been incorporated into national law.<sup>74</sup> It would have been better if the Court did not pronounce on the willingness or otherwise of the government to embrace democratic governance as this issue still remains hotly contested.

#### 2.4 The Royal Constitutional Commission 1973

The search for a constitution for Swaziland began as far back as 6 September 1973 when Sobhuza II appointed the Royal Constitutional Commission (RCC) with the mandate of travelling throughout Swaziland in order to get the views of the Swazi people on the form of constitution they wanted.<sup>75</sup> The RCC made two fundamental recommendations: that Swaziland be declared a no-party state with the Swazi National Council (SNC) being the only policy-making body, and that there must be a two-chamber house of parliament composed of the assembly and senate. The Constitution Advisory Committee (CAC), whose task it was to look at the report of the RCC and advise the King on the suitability of the report, followed it.

#### 2.5 The Tinkhundla Review Commission (TRC) 1992

As pressure for constitutional reforms mounted,<sup>76</sup> the King appointed a number of committees and commissions. The first of this came to be popularly known as Vusela I and its mandate was the same as the earlier

<sup>74</sup> *Registered Trustees of the Constitutional Rights Project (CRP) v The President of the Federal Republic of Nigeria & Others* (unreported) Suit M/102/93, High Court of Lagos State *per* the Honourable Justice Onalaja O found that the fact that Nigeria had ratified and incorporated the Charter means that municipal law cannot prevail over international law. The judge continued to hold that, even if the Charter had not been incorporated, the position would have remained the same; discussed by PB Ngabirano 'Case comment — Does municipal law prevail over international human rights law in Africa? *Registered Trustees of the Constitutional Rights Project (CRP) v The President of the Federal Republic of Nigeria & Others*' (1995) 2 *East African Journal of Peace and Human Rights* 102.

<sup>75</sup> Matsebula (n 2 above) 265.

<sup>76</sup> Organisations such as the Swaziland Federation of Trade Unions (SFTU), the banned Peoples' United Democratic Movement (PUDEMO) and the Swaziland Youth Congress (SWAYOCO), Swaziland National Association of Teachers (SNAT), and later the Swaziland Federation of Labour (SFL) and the revived Ngwane National Liberatory Congress (NNLC) and others demanded genuine democratic changes.

1973 Commission discussed above. The system was severely criticised as people called for the introduction of multiparty democracy and a constitutional monarch,<sup>77</sup> the result of which was the appointment of the Tinkhundla Review Commission (TRC).<sup>78</sup> Its terms of reference included considering and making appropriate recommendations to promote the democratic process in Swaziland.<sup>79</sup>

The TRC was accountable to the King<sup>80</sup> and its reports were to be confidential and not disclosed to anybody until further notice.<sup>81</sup> Any member of the public who wanted to make submissions would do so in person and could not represent or be represented at any instance in any capacity.<sup>82</sup> Because it was single-handedly appointed, the Commission was received with mixed feelings. Organised pro-democracy groups denounced it as being undemocratically appointed and that one person drew up its terms of reference.<sup>83</sup> It presented its report<sup>84</sup> to the King and recommended, among others, that there must be a written constitution for Swaziland.<sup>85</sup> Some people wanted political parties while others did not.<sup>86</sup> It further recommended that it had carefully considered both views and was of the view that a multiparty system is not one of the principles of democracy whilst it is certainly one of its mechanisms. It, however, concluded that the nation's opinion on a multiparty system or the unbanning of political parties be tested in the future.<sup>87</sup>

## 2.6 The Constitutional Review Commission (CRC) 1996

At the height of political unrest and instability,<sup>88</sup> the King appointed the Constitutional Review Commission (CRC),<sup>89</sup> chaired by his brother,

<sup>77</sup> Baloro (n 15 above) 51.

<sup>78</sup> Established by Decree 1 of 1992.

<sup>79</sup> Sec 3(d) Decree 1 of 1992.

<sup>80</sup> Sec 4 Decree 1 of 1992.

<sup>81</sup> Sec 5 Decree 1 of 1992.

<sup>82</sup> Sec 9 Decree 1 of 1992.

<sup>83</sup> One of the members, Mandla Hlatshwako, refused to participate in the Commission and his organisation, PUDEMO, refused that he be part of it because they had not mandated him. See JB Mzizi 'Leadership, civil society and democratisation in Swaziland' in A Bujra *et al* (eds) *Leadership, civil society and democratisation in Africa: Case studies from Southern Africa* (2002) 165; see also R Russon 'Social movements and democratisation in Swaziland' in L Sachikonye (ed) *Democracy, civil society and the state: Social movements in Southern Africa* (1995) 66.

<sup>84</sup> TRC Report 30 June 1992.

<sup>85</sup> n 84 above, 44.

<sup>86</sup> n 84 above, 49.

<sup>87</sup> n 84 above, 88.

<sup>88</sup> The country was experiencing an unprecedented wave of labour and political demonstration predominantly led by the labour unions, particularly the SFTU under the leadership of the charismatic Secretary-General Jan Sithole, which was joined by the SNAT and later the SFL. The protests continue to date.

<sup>89</sup> Established by Decree 2 of 1996.

Prince Mangaliso Dlamini. Although its terms of reference were initially to produce a draft constitution for Swaziland, the mandate was subsequently changed so that it had to produce a report.<sup>90</sup> It presented its report to the King in August 2001.<sup>91</sup> The report was shallow, lacked statistical support for the recommendations, and was misleading and contradictory in many respects. It stated that the Commission was<sup>92</sup>

truly representative of all political persuasions and opinions. Members were drawn from political organisations, trade unions, medical doctors, lawyers, civil servants, the private sector, university professors and lecturers, businessmen, chiefs, priests, whites, coloureds and indigenous Swazis.

It did not mention that the members did not represent constituencies, but served in their individual and personal capacities. Section 4 of the Decree reads:<sup>93</sup>

Representation

- 4 Any member of the public who desires to make a submission to the Commission may do so in person or in writing and may not represent any one or be represented in any capacity whilst making such submission to the Commission.

That the members did not represent any body is clear from the Commission's admission that for the reason of section 4 above, 'group submissions were not allowed ... In a way, it could be said that the collection of the submissions was done "*in camera*".<sup>94</sup> I contend that the recommendations of the CRC failed to ensure that the writing of the Constitution would guarantee constitutionalism. It failed to ensure that the three arms of government were clearly demarcated and delimited.<sup>95</sup> In making the King an absolute monarch, it recommended that 'there is a (small) minority which recommends that the powers of the monarchy must be limited'.<sup>96</sup> It recommended that the King continues to hold executive authority with the power to appoint and dismiss the Prime Minister and Ministers,<sup>97</sup> fundamental rights and freedoms must not be incompatible with Swazi custom and tradition,<sup>98</sup> the right to freedom of association and assembly, to form and join political parties,

<sup>90</sup> Swaziland Constitutional Review (Amendment) Decree 1 of 2000.

<sup>91</sup> CRC Final Report on the submissions and progress report on the project for the recording and codification of Swazi law and custom (undated).

<sup>92</sup> CRC Report (n 91 above) 21.

<sup>93</sup> The meaning of this section was a subject of debate in the challenge of the constitutional validity of the Constitution discussed below (n 145).

<sup>94</sup> CRC Report (n 91 above) 27.

<sup>95</sup> CRC Report (n 91 above) 21. The reference to Swazi law and custom is as provided for under Amendment Decree 1 of 1982 and the Kings' Proclamation as it makes the King an absolute monarch by vesting all powers in him.

<sup>96</sup> As above.

<sup>97</sup> CRC Report (n 91 above) 80-81.

<sup>98</sup> CRC Report (n 91 above) 83.

continue to be restricted as political parties must remain banned.<sup>99</sup> While courts are the custodians of the law, they are to apply the law with due regard to the customs and traditions of the Swazi people. The courts' jurisdiction on bail matters is severely curtailed in that they should not grant bail.<sup>100</sup> That the recommendations were not intended to produce a constitution that would ensure constitutionalism was expressed aptly by Okpaluba when he said:<sup>101</sup>

If you give me the Constitutional Review Commission document, there is nothing to put down there, there is no principle there that can enable anybody to draft anything ... If you talk of Swaziland, I think the CRC had every opportunity to put in some of those things there. They had five (5) years to do that. Where are the documents they are supposed to have read, to show the homework they did, that they have consulted the people?

## 2.7 The Constitution Drafting Committee (CDC) 2002

Like the previous bodies, the King handpicked members of the Constitution Drafting Committee (CDC),<sup>102</sup> once again chaired by his brother, Prince David Dlamini. Its function was to draft, in consultation with the Attorney-General and other experts, a constitution suitable for the Kingdom of Swaziland<sup>103</sup> and was accountable to the King.<sup>104</sup> Criticism against it being undemocratically elected fell on deaf ears as the Committee continued its work. Dissenting voices called for a more open and democratically-elected, all-inclusive and broad-based structure. Organisations demanded, among others, that all obstacles and impediments to free political participation and activity be removed; the prince-led CDC be democratised and widened up to encompass all stakeholders on agreed ground rules and terms of reference; there must be put in place an interim transitional executive authority; there must be put in place an autonomous electoral body and there must be agreement on an appropriate time for democratic elections.<sup>105</sup>

<sup>99</sup> CRC Report (n 91 above) 95.

<sup>100</sup> CRC Report (n 91 above) 82.

<sup>101</sup> C Okpaluba 'Constitutionalism and constitution making' paper delivered at the workshop on 21-23 June 2002 of the Council of Swaziland Churches in conjunction with the Southern African Conflict Prevention Network (SACPN) *Bridging the divide* 35.

<sup>102</sup> Decree 1 of 2002.

<sup>103</sup> Sec 3 Decree 1 of 2002.

<sup>104</sup> Sec 9 Decree 1 of 2002.

<sup>105</sup> There was a demand that the October 2003 national elections be postponed pending the finalisation of the Constitution, in terms of which elections would be conducted even if they would establish an interim government.



The Commonwealth Expert Team later observed:<sup>106</sup>

[W]e do not regard the credibility of these national elections as an issue: no elections can be credible when they are for a parliament which does not have power and when political parties are banned.

The report further recommended an early promulgation of a new constitution providing for the power to be held by parliament, the unbanning of political parties and ensuring respect for the rule of law and the establishment under the Constitution of an independent election management body and other issues.

## 2.8 Presentation of the draft Constitution and reactions

The CDC produced its first draft Constitution and presented it to the King on 31 May 2003.<sup>107</sup> The King extended its period to purportedly allow the people to read and make inputs before the Constitution could be adopted. Even as this was happening, the call for an open, all-inclusive process based on the free and popular will of all the people continued.<sup>108</sup> The draft Constitution was subjected to all forms of criticism, the first being that it was not written in the vernacular language<sup>109</sup> to enable the vast majority of illiterate Swazis to understand it. As a result, a SiSwati version was produced.

Local and international organisations represented the most criticism, among these the International Bar Association (IBA),<sup>110</sup> which observed that, in order for a constitutional review and making process to be legitimate, it must satisfy four tests. These are that the process must be as inclusive as possible, as transparent as possible, as participatory as

<sup>106</sup> Commonwealth Secretariat 'Swaziland National Elections 18 October 2003: Report of the Commonwealth Expert Team' [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B9C9C4FF0-8E15-40E4-98B1-138FE7A81FF9%7D\\_SwazilandNationalElections\\_report.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B9C9C4FF0-8E15-40E4-98B1-138FE7A81FF9%7D_SwazilandNationalElections_report.pdf) (accessed 5 November 2003) 18.

<sup>107</sup> In his written presentation, the Chairperson informed the King and the world that they as the Committee had thought long and hard about the system that Swaziland should follow, and concluded that the country should remain a no-party state. From this it is clear that it is not the people who do not want democracy but those who were tasked to write the Constitution for and on behalf of the people.

<sup>108</sup> These calls were being made by many groups, including Lawyers for Human Rights, the newly formed Swaziland Coalition of Concerned Civic Organisation (SCCCO), later joined by the National Constitutional Assembly (NCA) formed on 27 September 2003 with a view to concentrate on influencing the direction of the process and, if need be, produce an alternative working constitution from the point of view of civil society. It was composed of various civil society groupings, including the banned political parties.

<sup>109</sup> A Kalu 'Language and politics: Towards a new lexicon of African constitutionalism' in J Oloka-Onyango (ed) *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 37-51 39. The writer argues that, because African constitutions are written in foreign languages, they tend to convey values that are not upheld.

<sup>110</sup> International Bar Association 'Striving for democratic governance: An analysis of the draft Swaziland Constitution August 2003' <http://www.ibanet.org/images/downloads/HRISwazilandAnalysis.pdf> (accessed 5 August 2005).

possible and it must be accountable to the people. Amnesty International (AI)<sup>111</sup> produced its observations, which it made available to the CDC. The CDC and government accused organisations of interfering in the process and refused them entry to local communities for purposes of conducting civic education.<sup>112</sup>

## 2.9 The context of the drafting of the 2005 Constitution

One of the major challenges that the CDC faced was that it worked while the country was facing a crisis in the rule of law. In November 2002, the Court of Appeal delivered two judgments:<sup>113</sup> firstly, that the King lacked authority to make law by decree; and secondly committing the Commissioner of Police for contempt of court. In response, government issued a statement in which it refused to comply, contending that the judges had no power to strip the King of powers given to him by the Swazi people. The statement alleged that forces outside the system influenced the judges and that they had not acted independently. As a result, government declared that it would not recognise these judgments.<sup>114</sup> In December 2002, all the judges of the Court of Appeal resigned.<sup>115</sup> The full bench of the High Court, in defending the impaired integrity and dignity of the Court, issued an order that the Prime Minister purges his contempt.<sup>116</sup> He refused.

Another case in which the government showed gross contempt for the rule of law is *Lindiwe Dlamini v Qethuka Sigombeni Dlamini and Tulujane Sikhondze*.<sup>117</sup> In this case, the Attorney-General, in the company of the Major-General of the Umtsofo Swaziland Defence Force, Sobantu Dlamini, the Commissioner of Police, Edgar Hillary, and the Commissioner of Prisons, Mnguni Simelane, confronted the judges presiding over the case. They instructed the judges to stop hearing the matter or resign.<sup>118</sup> The judges refused to resign, choosing to

<sup>111</sup> Amnesty International 'Memorandum to the Constitution Drafting Committee on the Draft Constitution for Swaziland October 2003' <http://www.amnesty.org.ru/library/Index/ENGAFR550042004?open&of=ENG-SWZ>(accessed 6 August 2005).

<sup>112</sup> Such organisations included Lawyers for Human Rights; Women and Law Southern Africa Research Trust (Swaziland Chapter); the Co-ordinating Assembly of Non-governmental Organisations (CANGO); and SCCCCO, not to mention political parties.

<sup>113</sup> *Gwebu* (n 65 above) and *Commissioner of Police & Two Others v Madeli Fakudze* Civil Appeal Case 38/2002 (unreported).

<sup>114</sup> Press Statement 22/02 His Excellency the Right Honourable Prime Minister Dr BSS Dlamini 28 November 2002.

<sup>115</sup> They only resumed work around June 2005 after a protracted process of negotiations with the government, after the Minister for Justice and Constitutional Affairs, who also was Chairperson of the Constitution Drafting Committee, filed an affidavit undertaking that all judgments of the court will be complied with. All along the country operated without a Court of Appeal.

<sup>116</sup> *The Attorney-General v Ray Gwebu & Lucky Nhlanhla Bhembe* Case 3699/2002 (HC) (unreported).

<sup>117</sup> Civil Case 3091/2002 (HC) (unreported).

<sup>118</sup> A letter dated 1 November 2002 in court file confirmed this.

stand by their oath of office.<sup>119</sup> Another case that deserves mention is that of Zwane.<sup>120</sup> Zwane was purportedly transferred from his position as clerk to parliament to that of Under-Secretary in the Ministry of Agriculture and Co-operatives. He challenged the transfer in the Industrial Court, which found in his favour. The Prime Minister and government refused to comply with the Industrial Court's judgment, contending that it had taken a political decision. To date it has been observed that the crisis in the rule of law continues.<sup>121</sup> AI,<sup>122</sup> the IBA and the International Commission of Jurists (ICJ)<sup>123</sup> discuss these developments fully.<sup>124</sup>

In the meantime, dissenting voices to the regime were persecuted and prosecuted. A case in point is that of leaders of the trade unions<sup>125</sup> and the trial of Mario Masuku,<sup>126</sup> leader of the opposition Peoples' United Democratic Movement (PUDEMO). Masuku was charged with the crime of sedition<sup>127</sup> for allegedly uttering in public words translated to mean 'Down with His Majesty King Mswati's reign' and having made a statement in public persuading churches, schools, colleges and universities, as well as every house that all these places should become houses for revolution. The court acquitted and released him upon holding that the prosecution had failed to prove its case beyond reasonable doubt.<sup>128</sup>

These are the conditions under which the Constitution of 2005 was written. The question that begs an answer is whether it can be said that the process was designed to give birth to a credible democratic constitution, reflecting the genuine aspirations and views of the Swazi people. In this study, it is argued that the Swaziland constitution-

<sup>119</sup> Statement read in open court by Chief Justice Sapire, court file.

<sup>120</sup> Industrial Court Case 20/2002 (unreported).

<sup>121</sup> Statement of the Coalition published in *The Times of Swaziland* 24 August 2005 <http://www.times.co.sz/058.html#article 9> (accessed 24 August 2005).

<sup>122</sup> Amnesty International 'Swaziland human rights at risk in a climate of political and legal uncertainty' 20 July 2004 <http://www.amnesty.org/en/library/info/AFR55/004/2004/en> (accessed 8 September 2005).

<sup>123</sup> International Commission of Jurists 'Report of the Centre for the Independence of the Judges and Lawyers — Fact-Finding Mission to the Kingdom of Swaziland, June 2003' [http://www.icjcanada.org/en/documents/2003-06\\_Swaziland.pdf](http://www.icjcanada.org/en/documents/2003-06_Swaziland.pdf) (accessed 5 August 2005).

<sup>124</sup> nn 110 & 123 above respectively.

<sup>125</sup> Amnesty International Report on Swaziland <http://web.amnesty.org/web/ar2001.nsf/webafrcountries/SWAZILAND?OpenDocument> (accessed 8 September 2005); 'Swaziland: Fears of safety/ill treatment : Musa Dlamini, Mario Masuku, Jan Sithole and other trade union officials and political activities' <http://www.amnesty.org/en/library/info/AFR55/001/2000/en> (accessed 5 August 2005).

<sup>126</sup> *Rex v Mario Masuku* Criminal Case 84/2001 (HC) (unreported). See also Amnesty International Report on Swaziland 'Swaziland: Acquittal of Mario Masuku is an opportunity to end persecution of the opposition' <http://www.amnesty.org/en/library/info/AFR55/002/2002/en> (accessed 8 September 2005).

<sup>127</sup> Sec 4(1)(b) of the Seditious and Subversive Activities Act 46 of 1938, as amended.

<sup>128</sup> *Rex v Mario Masuku* (n 126 above).

making process was not designed to yield such a constitution, but instead to entrench the ruling Tinkhundla regime.

Four organisations filed an application to the High Court under the NCA<sup>129</sup> for an order, among others, that they are entitled to participate in the process, pursuant to the relevant provisions of Decree 2 of 1996, and that they are and have always been entitled in pursuit of their rights and legitimate expectations to participate in the constitution-making process in that the CRC was obliged at all material times to receive and consider oral and written presentations from applicants in terms of the African Charter and the New Partnership for Africa's Development (NEPAD).

While the proceedings were pending, the King, purportedly exercising customary powers, summoned the nation to the national cattle byre,<sup>130</sup> Ludzidzini Royal residence, to debate the draft Constitution. The four organisations, applicants in the above-mentioned matter, attended the meeting and raised objections to the discussion on the ground of the rule of *sub judice*.<sup>131</sup> However, the meeting proceeded, the government contending that there was no court order stopping a discussion of the draft Constitution. Eventually, organised groups withdrew from the discussion after complaining to the Chairperson that the proceedings were in any event stage-managed and they were not given a fair chance to present their case.

## 2.10 Parliamentary debate and adoption of the Swaziland Constitution

In October 2004, the Swaziland Constitution Bill 8 of 2004 was presented and tabled before parliament. Before the debate started, the four organisations again filed an urgent application seeking an interdict, preventing parliament from debating and passing the Bill

<sup>129</sup> Civil Case 1671/2004 (HC) (unreported). This is supposedly a national meeting at the Royal residence where the people are summoned to attend a meeting at the King's cattle byre. They sit on the ground and presumably issues of national significance are discussed. This forum has been questioned as inappropriate for an effective way of addressing issues of governance. It is basically informed and influenced by Swazi law and custom and things are to be done in a particular customary way. Although it is supposed to be a traditional democratic way of getting the government's view of the people, it fails to live up to genuine democratic aspirations. Eg, views which are deemed to be unpopular to those of the ruling regime are not tolerated. It is therefore not at all an effective way of constitutional governance.

<sup>130</sup> Letter presented to the Chairperson of the meeting, Prince David, in September 2004. The cattle byre is supposedly a national assembly where the King addresses the nation; see Matsebula (n 2 above) 240.

<sup>131</sup> *Swaziland Federation of Trade Unions, People's United Democratic Movement, Swaziland Federation of Labour, Ngwane National Liberatory Congress v Chairman of the Constitutional Review Commission & Five Others* Civil Case 1671/2004.

into law.<sup>132</sup> The basis of the application was that, pending the determination of the main application discussed above, parliament must be interdicted from debating the Constitution. They contended that parliament was not independent and therefore not suited to enact a national constitution, in the light of its powerlessness. The full bench of all five judges<sup>133</sup> of the High Court heard the matter and dismissed it, upholding points *in limine*<sup>134</sup> raised by the Attorney-General on behalf of the respondents. It did not give reasons at the time.

In a subsequent judgment on 23 March 2005, the Court gave its reasons. An analysis of this disappointing judgment is beyond the scope of this study. It suffices to say that the judgment represents a very sad day for Swaziland in so far as judicial activism is concerned.<sup>135</sup> The Court missed yet another opportunity to rise to the occasion in defence of fundamental rights and freedoms to guarantee the right to participation. It wrongly found that, according to Decree 2 of 1996, organisations had no right to participate. It held that that labour unions were creatures of industrial law and therefore had no business with the Constitution and that political parties remained banned in terms of the King's proclamation.

Amidst the challenges to the process, the King, after referring back to parliament<sup>136</sup> the areas he wished to be revisited, signed the Constitution into law. The coming about of the 2005 Swaziland Constitution, which His Majesty King Mswati III signed into law, inside the cattle-

<sup>132</sup> *Swaziland Federation of Trade Unions, Peoples' United Democratic Movement, Swaziland Federation of Labour, Ngwane National Liberation Congress v Chairman: Constitutional Review Commission & Seven Others* Civil Case 3367/2004.

<sup>133</sup> Annandale ACJ, Matsebula J, Maphalala J, Nkambule AJ & Shabangu AJ. It is important to mention that the appointment of Annandale ACJ as Acting Chief Justice, and the appointments of Nkambule J and Shabangu J were at the time being challenged by the Law Society of Swaziland in the matter filed as *Law Society of Swaziland v Swaziland Government & Five Others* Case 743/2003, in which the Society called upon the government to show cause why the appointment of Justices Nkambule and Shabangu as judges of the High Court and the appointment of Judge Annandale as the Acting Chief Justice could not be declared a nullity. Their very independence was therefore questionable. The applications were never finalised because there were no judges to determine them, government having frustrated the appointment of an outside judge or judges to adjudicate on it.

<sup>134</sup> The Attorney-General argued that the applicants had failed to establish urgency, that the court had no jurisdiction to entertain the matter since it was a matter affecting the principle of separation of powers, that the applicants had no *locus standi* and that the applicants had failed to set out grounds for an interdict, among others.

<sup>135</sup> L Tibatemwa-Ekirikubinza 'The judiciary and enforcement of human rights: Between judicial activism and judicial restraint' (2002) 8 *East African Journal of Peace and Human Rights* 145-173. See also Udombana (n 72 above).

<sup>136</sup> While parliament was in session debating the Bill, the Prime Minister rushed to parliament with a special message from the throne, the instruction which was to effect certain changes in the Bill as the King pleased.

byre,<sup>137</sup> on 26 July 2005,<sup>138</sup> has therefore taken 32 years. Although parliament enacted the Constitution and it was later rubber-stamped by the 'people' at the meeting convened at Ludzidzini Royal Residence, the adoption was still subject to a court challenge, which has since been determined.<sup>139</sup> The applicants sought an order directing the government to convene and constitute a constitutional assembly, national convention or such other democratic institution which the court deems necessary, which is broadly representative of the Swaziland society, including all representative bodies that are entitled to and are willing to take part.

It is not surprising that, while the King said that 'no one should complain about the Constitution, but follow what it says',<sup>140</sup> it remains rejected by many organisations.<sup>141</sup> It is not enough that the international community has welcomed the Constitution.<sup>142</sup> The Secretary of the Commonwealth, Don McKinnon, is on record as saying that the adoption of the Constitution represented a historic day for the people of Swaziland.<sup>143</sup> It should be noted that, while the international community, particularly the Commonwealth, played a significant role in ensuring that Swaziland has a written constitution, civil society in Swaziland, including political parties, has suggested that it has reneged from

<sup>137</sup> The Uganda Constitution of 1966 was famously referred to as the Pigeon Hole Constitution because President Amin advised members of his parliament that they would get their copies in their pigeon holes in parliament. See SWW Wambuzi (Chief Justice) (as he then was) 'Constitutionalism and the legal system in a democracy' Conference on constitutionalism and the legal system in a democracy East and Central Africa Chief Justice Colloquium, 28, 29 & 30 March 1995 6. Because of the adoption of the Swaziland Constitution inside the cattle-byre, it befits that we refer to it as the 'cattle-byre Constitution'.

<sup>138</sup> Adopted as the Constitution of the Kingdom of Swaziland Act 1 of 2005. *The Times of Swaziland* 27 July 2005 carried as a headline on the front page 'Historic!'; on the same note, *The Swazi Observer* 27 July 2005 proclaimed 'A new identity for Swaziland'.

<sup>139</sup> nn 149 & 154 below.

<sup>140</sup> *The Times of Swaziland* 27 July 2005; *The Swazi Observer* 27 July 2005.

<sup>141</sup> Statement of the SCCCO published on 24 August 2005, the NCA statement of July 2005. People's United Democratic Movement (PUDEMO) said in 2004, and their position has not changed: 'We will only be interested in a constitution that would be inclusive of the entire people of Swaziland, not just a few. So we reject this draft constitution with contempt.' 'Swaziland Opposition demand legalisation of Parties' <http://www.irinnews.org/report.aspx?reportid=45051> (accessed 29 August 2005). Commenting during the visit by Njongonkulu Ndungane, the Bishop of the Anglican Church of Southern Africa, Swaziland's Anglican Bishop Meshack Mabuza, said on his country's controversial palace-driven constitutional reform process: 'It is not the content of the Constitution that bothers us, it is the process of the Constitution — it will only be legitimate if the people have a hand in the process.' 'Bishops wrap up Swaziland mission' <http://www.mg.co.za/article/2004-07-13-bishops-wrap-up-swaziland-mission> (accessed 29 August 2005).

<sup>142</sup> L Sisay, United Nations Development Deputy Representative Resident to Swaziland, was quoted, saying: 'This is a very great day for Swaziland. I think Swazi's have witnessed the dawn of a new era' *The Swazi Observer* 27 July 2005.

<sup>143</sup> <http://www.thecommonwealth.org/Templates/System/LatestNews.asp?NodeID=144636> (accessed 1 September 2005).

its fundamental principles as enshrined in the Harare Declaration,<sup>144</sup> particularly paragraph 9 of the Declaration.

### 3 Decision of the African Commission on Human and Peoples' Rights ignored

It is important to mention that while the constitution-making process was going on, pending before the African Commission on Human and Peoples' Rights (African Commission) was a complaint by Lawyers for Human Rights (LHR).<sup>145</sup> In this complaint, LHR was alleging that the King's Proclamation of 1973 was in violation of articles 1, 2, 9, 10 and 13 of the African Charter. In the context of the constitution-making process, LHR complained that the Swaziland government had not put in place any mechanism to ensure effective and free citizen participation under article 13 of the African Charter. The complainant stated that the proclamation banned political parties and prohibited citizens from engaging in free political activity so that their participation in the process was more meaningful.

Indeed, the African Commission found that the proclamation was in violation of the African Charter as alleged by the complainant. It found that, although the proclamation was promulgated before Swaziland ratified the African Charter in 1995, its presence constituted a continuous violation, yet the Swaziland government had an obligation under article 1 to bring its laws in conformity with the African Charter. It was argued before the African Commission that, for purposes of constitution making, the banning of political parties undermined the people's capacity to participate freely and effectively in the process as the environment was not conducive to this. The African Commission agreed and recommended that the proclamation be brought into conformity with the provisions of the African Charter and that the state engages with other stakeholders, including members of civil society, in the conception and drafting of the new Constitution.

This decision has not been heeded by the Swaziland government. The government was to report to the African Commission within six months on what steps had been taken to comply with the African Commission's decision. However, no such steps have been taken, even in the face of a formal request to engage made by LHR<sup>146</sup> on behalf

<sup>144</sup> Adopted by the Heads of Government Meeting of the Commonwealth on 20 October 1991, Harare, Zimbabwe. See C Heyns *Human rights law in Africa Vol 1* (2004) 741.

<sup>145</sup> *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

<sup>146</sup> The letter was dated 2007, and is on file with the author and was hand-delivered at the office of the Minister for Justice and Constitutional Affairs as line minister responsible for the Constitution.



of the NCA. As a public relations exercise, Swaziland hosted the 43rd ordinary session of the African Commission, in which it portrayed a good image on the human rights situation in Swaziland.<sup>147</sup> LHR had occasion to reply to the Prime Minister's statement, indicating that, despite the coming into force of the Constitution, the human rights situation remained unchanged.<sup>148</sup>

#### 4 Application for declaration of invalidity of the Constitution

Pursuant to the adoption of the Constitution, an application<sup>149</sup> was brought to have it declared invalid on the ground that the process leading to its promulgation was not participatory, so as to include all the people of Swaziland in terms of the provisions of paragraph 2(e)<sup>150</sup> of the King's proclamation, as read with section 80(2)<sup>151</sup> of the Establishment of the Parliament of Swaziland King's Order-in-Council. The crux of the argument was that the CRC misconceived its functions as given to it by section 4<sup>152</sup> of Decree 2 of 1996 when it deprived political parties and all others of the right to participate in the making of the Constitution. This argument was also supported by the right to participate freely in one's government as guaranteed under international law as interpreted by the African Charter in the LHR communication mentioned above, particularly in the light of the fact that Swaziland has ratified not only the African Charter but also the International Covenant on Civil and Political Rights (CCPR) and other human rights instruments.

Both the High Court<sup>153</sup> and the Supreme Court of Swaziland<sup>154</sup> refused the application, holding that section 4 precluded organisations

<sup>147</sup> An address by the Prime Minister at the official opening of the session.

<sup>148</sup> Formal statement made in the NGO Forum in its capacity as an organisation with observer status with the Commission.

<sup>149</sup> *Jan Sithole NO (in his capacity as the Trustee of the NCA) & Others v The Prime Minister of Swaziland & Others* Case 2792 of 2006 (as yet unreported).

<sup>150</sup> n 5 above.

<sup>151</sup> It reads: 'Repeal and savings. 80(2) Save in so far as is hereby expressly repealed or amended the King's Proclamation of the 12th April 1973 shall continue to be of full force and effect: Provided that the King may by decree published in the Gazette amend or repeal the said Proclamation after a new Constitution for the Kingdom of Swaziland has been accepted by the King and the people and brought into force and effect.'

<sup>152</sup> Sec 4: 'Representation. 4 Any member of the general public who desires to make a submission to the Commission may do so in person or in writing and may not represent any one or be represented in any capacity whilst making such submission to the Commission.'

<sup>153</sup> In a unanimous judgment delivered by Banda CJ in which Mamba J and Maphalala J concurred.

<sup>154</sup> Civil Appeal 35 of 2008, judgment delivered by Tebutt JA in which Zietsman JA, Ramodibedi JA, Foxcroft JA and Ebrahim JA concurred (as yet unreported).

from participating as such in the constitution-making process.<sup>155</sup> A full analysis of these judgments is a subject for another day. It suffices to say that these judgments do not suggest that the judiciary is independent in Swaziland as observed by Fombad when he writes:<sup>156</sup>

Taking into account the enormous challenges that have arisen in the last few years over the rule of law, judicial independence and the good administration of justice, it is submitted that the new Constitution does not appear to provide any basis for expecting any radical changes to the current situation. If the root cause of all these problems were caused by the exorbitant powers exercised by the King, the new dispensation has simply entrenched these powers in no uncertain terms. At the core of it is the fact that the scope for effective judicial independence is very limited.

## 5 Conclusion

The Tinkhundla system has been able to fool the world and the people of Swaziland into believing that the constitution-making process was genuine. The CDC succeeded in achieving this because it was composed of members whose interest was to entrench the *status quo*. The fact of the matter is that the regime entrenched itself under the guise of a constitution-making process which was neither inclusive, democratic or based on the genuine aspirations of the people of Swaziland. Hlatshwayo, who resigned from the CRC, puts it aptly when he remarks:<sup>157</sup>

Swazi constitutional developments are very much like a journey taken by the slowest of all animals, and which has the capacity to convince its beholders that it is different from the animal they might have seen a few minutes before — the chameleon to be precise. *It is ever changing but never really changing.*

The difficulty with the Swaziland political-constitutional set-up is that those who are in power claim to have divine authority to rule. As such, they do not need legitimacy given by the people. In this regard, Hatchard observed that<sup>158</sup>

[t]he troubled history of the two 'traditional' monarchies of Lesotho and Swaziland does not suggest that rulers with an obvious claim to legitimacy in the traditional sense are better able to deliver good governance to their peoples.

<sup>155</sup> In an earlier judgment, *MPD Supplies (Pty) Ltd & Another v The Prime Minister & Others* Civil Appeal 8 of 2007 (as yet unreported) ) 31, the Supreme Court had said: 'Nevertheless, this Court is mindful that the Constitution is not just another law. It is the product of negotiation. Compromises and accommodations have inevitably been made. Therefore it constitutes a sacred covenant.'

<sup>156</sup> Fombad (n 11 above)

<sup>157</sup> n 103 above, 'Swaziland constitutional framework' 15 (my emphasis).

<sup>158</sup> Hatchard *et al* (n 7 above) 324.

In similar terms Currie,<sup>159</sup> writing on democracy and accountability, remarks that, at least since the French and American revolutions, it has been accepted that no person or institution has a divine right to govern others. From this it follows that government can only be legitimate in so far as it rests on the consent of the governed. It does not seem that this has dawned on the Swazi traditional authority.

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<sup>159</sup> | Currie *et al* (eds) *The Bill of Rights handbook* (2005) 13.