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Swaziland

Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law

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Report of the IBA Mission to Swaziland

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Executive Summary

The International Bar Association (IBA) has for some time been increasingly concerned with the deterioration of the rule of law in Swaziland, which has culminated in the resignation of all the judges of the Swaziland Court of Appeal, the resignation of the Director of Public Prosecutions, the High Court of Swaziland declaring that it is no longer prepared to hear applications brought by the Government, charges of contempt of court being brought against the Attorney-General, the Swaziland police refusing to implement court orders, and the Government declaring that it would not abide by court decisions with which it did not agree. A series of national strikes has ensued.

The IBA sent a mission to Swaziland in January 2003, the terms of reference of which were:

- To ascertain the legal status of the judiciary in Swaziland and its ability to perform its duties impartially and without interference;
- To identify the domestic, regional and international legal guarantees for the effective functioning of the justice system in Swaziland;
- To determine whether these guarantees were being respected in practice and the remedies that might be available if the guarantees were not being respected;
- To make recommendations.

The members of the delegation were led by Dr Phillip Tahmindjis, IBA Programme Lawyer, and consisted of: Professor Shadrack Gutto, Professor of Law at the University of Witwatersrand, South Africa (who also acted as Rapporteur); Ms Raychelle Omamo, President of the Law Society of Kenya; Ms Yaa Yeboah, barrister, United Kingdom; and Mr Neal Gilmore, IBA Legal Specialist in Swaziland. The delegation met all major stakeholders, including: the Prime Minister; the Deputy Prime Minister; the Attorney-General; the Director of Public Prosecutions; justices of the Court of Appeal, High Court and Industrial Court; members of the magistracy; members of Parliament; members of the Law Society of Swaziland; academics and students at the Law School of the University of Swaziland; and members of civil society including trade union representatives, human rights activists, journalists and women's rights activists.

The mission found that there was a clear lack of separation of powers and respect for the judiciary by the Executive. In particular, the Prime Minister and the Attorney-General routinely interfere with judicial processes and brazenly refuse to enforce court decisions. They have also harassed the Director of Public Prosecutions (DPP) when he has attempted to take action to curb contempt of court. This has led to the resignation of the DPP and of all the judges of the Court of Appeal and a refusal by the High Court to conduct proceedings in civil cases brought by the Government. As a result, there is a serious denial of justice beyond the level of the magistracy. It is imperative that the stalemate between the judiciary and the Executive be resolved as soon as possible.

Some of the cases that have been politicised by the Executive have involved: the abduction of a

minor as a bride of the King by the King's messengers; the illegal eviction of a chief and his peoples from their traditional areas; the draconian law on non-bailable offences; cases dealing with the legality of strike action; and a case involving the age of retirement for judges. In all these cases, the Executive has taken the position that the courts have demonstrated an appetite for undermining 'Swazi law and customs'. On closer scrutiny, the mission found no merit in such accusations.

The lack of legal clarity about the extent and status of the saved provisions of the 1968 Constitution and the plethora of decrees issued by the King or in the King's name have created a fertile ground for abuse of constitutional institutions and processes. A prime example is the existence of a shadowy committee officially known as the Special Committee on Justice but popularly called the 'Thursday Committee'. To some degree, the Chief Justice has been too closely involved with the Thursday Committee. The Committee has usurped the powers and role of the Judicial Service Commission which is supposed to oversee such matters as the appointment and terms and conditions of judges. The Judicial Service Commission itself is moribund and has insufficiently clear legal powers and mandate, as expected under recognised international legal and standards.

Another complicating factor is the lack of clarity in the interaction in the Swazi legal system between customary law, the common law and human rights norms. The mission found the alleged disparity between Swazi customary law and other recognised legal norms often to be more apparent than real and that it is used as a convenient excuse to ignore court decisions.

While Swaziland is not a party to many international human rights treaties, it is a party to the African Charter on Human and Peoples' Rights, as well as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. These, together with other international instruments, provide sufficient legal basis for establishing that Swaziland is in breach of recognised international standards of human rights and the rule of law.

There are also systemic issues which should be addressed. These include, in addition to those already mentioned, the funding of the courts, the funding of the Law School, the content and quality of police training, and the criteria upon which people are selected to hold high office in the Government and the civil service, with the resulting question of the fitness for such office of the people so selected.

There is a small presence of international institutions and foreign diplomatic missions in Swaziland. The United Nations agencies are mainly involved in institutional, constitutional and law reforms, children's rights issues and the combat of the rampant spread of HIV/AIDS. Countries or regional bodies with some political and economic influence in Swaziland include the European Union, South Africa, the United Kingdom and the United States. Most are concerned about the deteriorating relations between the Executive and the judiciary, the absence of pluralism in the political order and the lack of effective management of the economy and the scourge of HIV.

Overall, in Swaziland civil society is not very strong (although there are very active elements in urban areas which are becoming more vocal on constitutional issues). This is partly because of the repressive laws and actions that militate against the freedoms of association and expression. The Law Society is small. Although active at present, it has in the past not played a visible role in defending the independence of the judiciary. The legislature is rather moribund, as free political association is outlawed and approximately one half of the members of Parliament are appointed rather than elected.

It is imperative that a thorough constitutional and legal vision be put in place in Swaziland as soon as possible. The Constitutional Drafting Committee has completed its work and most Swazis are looking forward to the King's presentation and publication of the draft constitution. Whatever constitution is promulgated, it must clearly provide for the separation of powers, the independence of the judiciary, and an independent Judicial Service Commission with powers to participate in all judicial appointments and the determination of the terms and conditions of service of all judicial officers, including the process of their removal. The new constitution must also address the status of the legislature, judicial review of administrative and legislative action, and the expansion of freedom of association in the civic and political areas. The monarchy could be entrenched but with clear constitutional regulation of its powers and role, in particular with respect to the influence of unelected and unofficial persons and bodies on the decision-making process.

Recommendations

These recommendations are designed to strengthen the rule of law in Swaziland through the effective recognition of the independence of the judiciary, reliance on agreed constitutional processes, a true respect for the balance between custom and common law, and adherence to domestic and international legal obligations.

1. Adoption of a clear timetable for publication and proper public dialogue on the draft Constitution in the form in which it was presented to the King by the Constitutional Drafting Committee. This should be followed by timely adoption and promulgation of the new Constitution.

2. There should be a clear constitutional or statutory provision acknowledging and clarifying the relationship between, and the status of, Roman-Dutch common law and customary law in Swaziland. This should be done with an understanding that both sources of law are dynamic and evolving. Ideally, neither ought to be superior to the other.

3. While the Constitution may secure the position of the monarchy, as it is likely to do, the powers of the King should be clarified in it, with appropriate indication of the role of the High Court in the review of all legislative and administrative actions.

4. As the absence of clear constitutional guarantees on basic human rights and duties is a major contributory factor to the general curtailment of freedom of association and peaceful assembly

in Swaziland, this should be addressed in the new Constitution. In particular, the fundamental rights and freedoms ought to take into account all aspects of economic, social, cultural, civil and political rights, freedoms and duties contained in African regional and international human rights instruments. The rights of women should also be addressed and protected. The Constitution could specifically incorporate the African Charter on Human and Peoples' Rights, which is already a legal obligation for Swaziland.

5. Legislation governing the appointment, tenure, conditions of service and removal of judges and magistrates should be revised and consolidated, and the new Constitution must incorporate clear protective guarantees in this regard. In particular, the legislation establishing the Judicial Service Commission must be revised and provide for the independence of the body in matters pertaining to recommendations to the King on judicial appointments, conditions of service for judges and magistrates, and their removal from office.

6. The separation of executive and judicial authority of the State and Government must be prioritised. This should, amongst other things, include disbanding the Thursday Committee, the independence of the offices of the Attorney-General and the Director of Public Prosecutions being guaranteed, and rescinding the pre-eminence of the Prime Minister's position in matters relating to the appointment or dismissal of judges and magistrates. The function of the Office of the Attorney-General as principal legal adviser to the State and Government must be separated from its role as principal litigating counsel.

7. The independence of Parliament and parliamentarians from the hegemony of the Executive should be enhanced along the lines recommended in the Commonwealth's Latimer House Guidelines.[1]

8. A review should be undertaken to determine the criteria upon which suitable people may be considered for official positions in Government and the civil service, so that the King may be properly and consistently advised. Scrutiny of the suitability of all incumbents in such positions should be undertaken.

9. To encourage a more proactive approach to parliamentary scrutiny of the rule of law, there should be created within Parliament a standing committee on justice to whom the judiciary and the Judicial Service Commission may relate matters affecting the judiciary and the administration of justice, for information and attention.

10. The courts should be given independent and adequate budgets and the current case backlog should be addressed as a matter of urgency.

11. There should be an immediate negotiated resolution to the current impasse between the judges of the Court of Appeal and the Executive, facilitated by experienced and respected intermediaries. (The IBA, through its Human Rights Institute and its Judges' Forum, could assist with this). The Government must, in this process, consider at least the making of: an unreserved apology to the former judges of the Court of Appeal for the Prime Minister's

statement of 28 November, 2002; an unequivocal withdrawal of the contention that it has the option of ignoring court decisions as it chooses; and an undertaking to diligently implement court decisions in the future.

12. Judges should be (re)appointed to the Court of Appeal immediately. Those judges who resigned should be invited to resume their appointments.

13. A strategy for effecting greater representation of Swazis at all levels of judiciary should be developed and implemented gradually.

14. Judgments of the higher courts should be reported expeditiously and regularly as a matter of urgency. Funds should be earmarked for this purpose and appropriately qualified personnel engaged.

15. To strengthen independent and constructively critical voices in defence of the rule of law and judicial independence, the University of Swaziland Law School should be strengthened and properly funded, particularly with a well-resourced library and information technology facilities. Links between the Law School and the legal profession must be strengthened and there should be a representative of the judiciary on the University of Swaziland Senate.

16. Members of the Law Society of Swaziland should continue to play, and enhance, their role as protectors of the independence of the legal profession and promote the independence and integrity of the judiciary. Amongst other things, the representatives of the Society in the Judicial Service Commission should reject co-option on illegitimate bodies such as the Thursday Committee. The watchdog responsibility and role of the Society should be enhanced. The capacity-building work that the IBA is currently doing with the Law Society should be made known to all members of the profession, to maximise its effectiveness.

17. Swaziland should meet its reporting and other obligations under the international and African regional human rights instruments to which it is a party, and, as a UN member, adhere to the principles of United Nations instruments such as the Basic Principles on the Independence of the Judiciary and the Code of Conduct for Law Enforcement Officials. All relevant officials should be educated in these obligations. Swaziland should seriously consider ratification of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Discrimination Against Women.

18. The international community has a responsibility of solidarity to help Swaziland extricate itself from its present crisis. The UNDP, UNICEF and WHO are already making positive contributions in their respective areas of competence, especially in capacity building and institutional support. In this regard, the UN agencies in Swaziland should be strengthened. Countries with presence in, or influence with, Swaziland such as South Africa, Britain, and the United States should continue to provide assistance and support to the people of Swaziland. Above all, the neighbouring countries of South Africa and Mozambique must assume a robust role in mediating the current stalemate between the Executive and the judiciary.

19. Civic education programmes should be established in schools and also made available for all Swazis.

20. A national action plan to develop and implement strategies to achieve these recommendations should be devised. This could include revitalising the Law Reform Commission, establishing the Office of the Ombudsman, and instigating Codes of Proper Conduct for politicians and civil servants.

Note

1 In J Hatchard and P Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (London: Cavendish Publishing Ltd, 1999), Chapter 2.

Chapter 1: **Introduction**

1.1 This is the Report of a mission of international jurists to Swaziland from 12 to 18 January 2003. The mission was organised by the Human Rights Institute of the International Bar Association (IBA) following increasing concerns about the rule of law and independence of the judiciary in Swaziland. The mission was generously funded by the Foundation Open Society Institute. The IBA is the world's largest representative lawyers' organisation with members, collective and individual, in 183 countries around the world. In total it represents some 2.5 million lawyers. The Bars and Law Societies of all members of the Southern African Development Community (SADC) are members of the IBA. The Human Rights Institute is the human rights arm of the IBA and was formed in 1995 under the Honorary Presidency of former South African President Nelson Mandela. It is non-political and works across the Association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary. It is directed by Officers and a Council, derived from 21 countries. Appendix 1 contains information about the IBA.

1.2 The terms of reference of the mission were:

(1) to ascertain the legal status of the judiciary in Swaziland and its ability to perform its duties impartially and without interference;

(2) to identify the domestic, regional and international legal guarantees for the effective functioning of the justice system in Swaziland;

(3) to determine whether these guarantees are being respected in practice and what remedies are available if they are not being respected;

(4) to make recommendations with respect to the above.

1.3 The members of the delegation were:

- Professor Shadrack Gutto, Professor of Law, Witwatersrand University, South Africa;
- Advocate Raychelle Omamo, President of the Law Society of Kenya;
- Barrister Yaa Yeboah, United Kingdom;
- Dr Phillip Tahmindjis, IBA Programme Lawyer, United Kingdom;
- Mr Neal Gilmore, IBA Legal Specialist, Swaziland.

The Human Rights Institute is grateful to the delegation members for their hard work compiling this Report, which is the result of their joint efforts. The Human Rights Institute is particularly grateful to Professor Gutto who agreed to be Rapporteur and whose analysis and insights now appear as Chapters 4-6 of the Report. It is also grateful for the work of Mr Gilmore in arranging an itinerary and appointments which enabled the delegation to interview the major stakeholders. The mission was led by Dr Tahmindjis.

1.4 During the course of the mission, the delegation held meetings and conducted interviews with a wide cross section of Swazis in the public service, including the Prime Minister, the Deputy Prime Minister, the Attorney-General, the Director of Public Prosecutions, senior members of the judiciary (including erstwhile members of the Court of Appeal who were interviewed in South Africa), and politicians. It also met the leadership and members of the Swaziland Law Society, and representatives of civil society including trade union representatives, journalists, women's rights activists, human rights activists, and university lecturers and law students. It also spoke to representatives of the business community and some members of the Constitution Drafting Committee, as well as representatives of the diplomatic community and United Nations agencies. The delegation was unfortunately unable to speak to his Majesty King Mswati III as he was in his annual seclusion at the time of the mission. Furthermore, the Minister for Justice and Constitutional Affairs was, according to his office staff, too ill to see the delegation at the appointed time for the meeting. The delegation wishes to express its sincere thanks to those people who gave their time and shared their valuable insights.

1.5 The mission took place against a background of increasing turmoil, national strikes, calls for the dissolution of Parliament and for the resignation of the Prime Minister, as well as the actual resignation of all members of the Court of Appeal and uncertainty as to the tenure of the Chief Justice and the Director of Public Prosecutions. The prevailing situation was fully appreciated by all members of the delegation. This Report is based on an analysis of the information gathered in meetings and interviews with the representatives mentioned above, as well as on relevant national and international laws and some important judicial decisions.

1.6 The Report sets out the findings of the delegation, together with recommendations which, if implemented, will strengthen the rule of law in Swaziland, in particular through the effective recognition of the independence of the judiciary, reliance on agreed constitutional processes, a true respect for the balance between custom and common law, and adherence to domestic and international legal obligations.

Chapter 2: Background

Geography and Demography

2.1 The independent Kingdom of Swaziland, the smallest country in the southern hemisphere (with an area of 17,363 square kilometres) lies between Mozambique and South Africa.[1] It is land-locked. The official capital city is Mbabane; most administrative acts are performed there. The royal and legislative capital is Lobamba.

2.2 The official languages of Swaziland are Siswati and English (English is used widely in government and commercial operations).

2.3 The population is approximately 1,125,000 (2002 estimate), with 97 per cent of the people African and three per cent European. Religious beliefs in Swaziland are: Christian (60 per cent), indigenous beliefs (39 per cent), Islamic (one per cent). The literacy rate is 78 per cent (for males over 15 years old) and 76.5 per cent (for females over 15 years old).

Political Background and History

2.4 Human remains dating back to the Stone Age have been found in Swaziland, but the Swazi people did not arrive until the mid-18th century. Around 1750, Nqwane III (of the royal Dlamini family and considered by the Swazis to be their first king) led his people from what is modern day Maputo in Mozambique to what is now southern Swaziland.

2.5 Nqwane III's successor, Sobhuza I, was raided by the Zulus from the south and moved his capital nearer to present-day Lobamba which continues to serve as the royal and legislative capital. He asked the British for help in fighting off the Zulu invaders. When Mswati II succeeded Sobhuza I, he inherited a kingdom roughly twice the size of Swaziland today.

2.6 Europeans began to arrive in the area during the 1840s. The Swazi people treated them peacefully, but the white men soon proved to be mostly greedy for land and trading concessions. After Mswati II's death, the Swazis reached agreements with the British and South Africans over a range of issues including independence, access to resources, administrative authority and security. South Africa administered Swazi interests from 1894 to 1902, when the British assumed administration after the Boer War. Britain took complete control of Swaziland in 1907 and ruled for over 60 years as a Protectorate. In 1921, the first legislative body was established in Swaziland: an Advisory Council of elected European representatives mandated to advise the British High Commissioner on non-Swazi affairs. In 1944, the High Commissioner conceded that the Council had no official status and recognised the King as the indigenous authority for the territory to issue legally enforceable orders to the Swazis.

2.7 In the early years of colonial rule, the British expected that Swaziland would eventually be

incorporated into South Africa. After World War II, however, South Africa's intensification of racial discrimination induced the United Kingdom to prepare Swaziland for independence. Political activity intensified in the early 1960s. Several political parties were formed and jostled for independence and economic development. The largely urban parties had few ties to the rural areas, where the majority of Swazis lived. The traditional Swazi leaders, including King Sobhuza II and his Inner Council, formed the Imbokodvo National Movement (INM), a political group that capitalised on its close identification with the Swazi way of life. Responding to pressure for political change, the colonial government scheduled an election in mid-1964 for the first Legislative Council in which the Swazis would participate. In the election, the INM and four other parties, most having more radical platforms, competed for seats. The INM won all 24 elective seats.

2.8 Having solidified its political base, the INM incorporated many demands of the more radical parties, especially that of immediate independence. In 1966, the UK Government agreed to discuss a new constitution. A constitutional committee agreed on a constitutional monarchy for Swaziland, with self-government to follow parliamentary elections in 1967. Swaziland became independent on 6 September 1968. Swaziland's post-independence elections were held in May 1972. The INM received close to 75 per cent of the vote. The Ngwane National Liberatory Congress (NNLC) received slightly more than 20 per cent of the vote which gained the party three seats in Parliament. In response to the NNLC's showing, King Sobhuza repealed the 1968 Constitution on 12 April 1973 and dissolved Parliament by Proclamation. He assumed all powers of government and prohibited all political activities and trade unions from operating. He justified his actions as having removed alien and divisive political practices incompatible with the Swazi way of life.

2.9 This situation continued until 1978, when a new constitution was devised, although the instrument was never presented formally to the people as is required by Swazi custom. The new constitution continued to place all power in the hands of the King, who appointed a Prime Minister and Cabinet, but the state of emergency remained in effect as political stability could not be maintained. A (partly) elected Parliament was established, but political parties were illegal and Parliament's function was limited to a largely advisory one to the King. This situation has in effect been maintained ever since, with the constitution of Swaziland comprising a number of instruments, including the 1973 Proclamation and various royal decrees. A new constitution is being drafted.

2.10 The current monarch, King Mswati III, was crowned in 1986. He is effectively the last remaining absolute monarch in Africa (but see Chapter 4 for a more detailed analysis). His reign has been threatened by plots, some organised by members of the extended royal family and angry politicians, but all such plots have been thwarted. The main opposition has come from the People's United Democratic Movement (PUDEMO) which declared itself a legal opposition in February 1992, in violation of the government ban on political association.

Government

2.11 The King is the head of state but also has executive, legislative, and judicial powers. He rules according to unwritten law and custom, in conjunction with the partially elected Parliament and a structure of published laws and implementing agencies, such as the *Libandla* and the *Liqoqo* (which are explained in more detail in Chapter 4). He is thus surrounded by numerous princes and traditional advisers. The Queen Mother is also highly influential and is second only to the King in the political hierarchy. The inner workings of the system are unclear, but it is apparent that wide consultation before major decisions are made is traditional practice. Conservative elements can thus hinder reform through direct influence in the decision-making processes and also indirectly by controlling access to the King.

2.12 The Prime Minister is the head of the Government and is appointed by the King. The Cabinet, comprising 14 ministers, is recommended by the Prime Minister and confirmed by the King. In effect there are two sets of executive government, the Prime Minister and Cabinet, and the traditional authorities in the royal palace. Apart from the Attorney-General (whose qualifications are discussed below) there are no formal requirements for appointment as a minister. According to Amnesty International, the Minister for Justice (who is responsible for overseeing the justice system as a whole and for reforming archaic laws) is a former primary school teacher with no formal legal training.

2.13 The legislative branch consists of two arms:

(1) The Senate consisting of 30 seats (ten appointed by the House of Assembly, 20 appointed by the King). Senators sit for terms of five years.

(2) The House of Assembly, consisting of 65 seats (ten appointed by the monarch, 55 elected by popular vote). Members sit for terms of five years.

2.14 Suffrage is universal on reaching the age of 18, but political parties remain officially banned.

Legal System

2.15 There is in effect a dual legal system:

(1) Modern: based mainly on British/Dutch legal systems and notionally independent. The highest court, the Court of Appeal, is composed entirely of expatriate judges, usually from South Africa, who sit for renewable two-year terms. The other courts are the High Court and the Magistrates' Courts. Judicial appointments are flexible and discretionary. The issues of tenure of judicial office, independent court budgets, lack of trained personnel, levels of remuneration and caseload management are problems in Swaziland. There is also reported to be a large backlog of pending cases (estimated at 2,000 cases) before the High Court and Magistrates' Courts. More judges are needed.

(2) Traditional: based on a system of national courts which follow unwritten traditional law and

custom. The Chiefs are custodians of Swazi law and custom and are responsible for the day-to-day running of their chiefdom. Chiefs have their own community police who may arrest a suspect and bring him or her before an inner council within the chiefdom for a trial. Chiefs are an integral part of society and act as overseers or guardians of families within the communities, and traditionally report directly to the King. Local custom mandates that chieftaincies are hereditary.

Traditional law and customs are by their very nature not codified. Defendants are not allowed formal legal counsel, but speak for themselves with help from informal advisers. Sentences from traditional courts may be appealed to the High Court and the Court of Appeal. Delays can occur in these courts as well, but the mission found that, in general, they were more expeditious in completing matters than the common law courts. Most citizens who encounter the legal system do so through these courts. Criminal appeals may go to the Judicial Commissioner as a last resort. Civil matters have the High Court as the highest court of appeal.

2.16 The state's highest prosecutor, the Director of Public Prosecutions (DPP), has ultimate authority in deciding in which court a case will be tried, but usually the decision is left to the police. The King may circumvent the regular judiciary in treason and sedition cases by appointing a special tribunal which can use different rules and procedures than the High Court. This power was last exercised in 1986. The post of DPP is currently vacant (see below).

2.17 In June 2001, by Decree No 2, the King eliminated bail for a range of crimes, including robbery, rape, murder and the holding of illegal public demonstrations. The Decree also allowed censorship of the press, made it unlawful to disobey or impugn the status of the King (on punishment of a fine amounting to US$6,000 and/or ten years' imprisonment) and placed all matters pending before the King beyond the jurisdiction of any other person or body. Judges, the Attorney-General, and the DPP could be appointed (and presumably dismissed) at will by the King on the recommendation of the Minister for Justice. The Decree was repealed by Decree No 3 on 25 July 2001, after much international criticism. Significantly, this reportedly occurred after what was described as a 'marathon meeting' between the Cabinet and the traditional advisers to the King (the Swaziland National Council). However, this Decree retained a Non-Bailable Offences Order of 1993 and makes ministers exempt from a court challenge of their actions, thus perpetuating some aspects of Decree No 2. It also validated legislation that might otherwise be invalid for inconsistency with the 1973 Proclamation repealing the Constitution. Precisely which laws are validated is not clear. The issue of the effect and validity of decrees was the basis of the Court of Appeal judgments mentioned below. In essence, the Court found that Decree No 3 was invalid and that the Non-Bailable Offences Order was also invalid. (These cases are discussed in detail in Chapter 5.)

2.18 The legal system in Swaziland is thus not only a mixture of the traditional and the new; the processes of and interaction between the two systems are unclear, with the result that it is also unclear what is valid law and what is not.

Economy

2.19 Swaziland has a free market economy with relatively little intervention from the Government. However, the bulk of economic activity, it is estimated, is controlled by ten per cent of the population. There is a small but active stock market. The local currency is the Lilangeni (plural 'Emalangeni'). The main exports are soft drink concentrate, sugar, and wood pulp. The sector of the economy which produces these exports consists mainly of large firms with foreign ownership. Swaziland sends over 50 per cent of its exports to South Africa, from whom it receives almost all its imports. About 60 per cent of citizens engage in subsistence agriculture, although many have been encouraged to switch to cash crops such as sugar, which in recent years has created a problem with the decline in international sugar prices.

HIV/AIDS

2.20 According to a report issued by the US State Department in 2002 and confirmed by the World Health Organisation, Swaziland's HIV and AIDS epidemic is the second highest in the Southern African region. It increased from less than five per cent in 1992 to more than 34 per cent in 2000 and is now expected to stabilise at 36 per cent by 2010. By then the population will be 25 per cent smaller than it would have been without the epidemic. Life expectancy will have declined to 27 years of age and the number of orphans will have increased to 120,000.

2.21 Swaziland has publicly admitted that the HIV/AIDS epidemic is a 'national disaster'. In the past, nothing or very little was done to combat the disease. On 10 May 1999, the Prime Minister, Sibusiso Dlamini, inaugurated a body to deal with the problem. The body, known as the Crisis Management and Technical Committee on HIV/AIDS, is a multidisciplinary task force charged with fighting the disease.

2.22 As part of Swaziland's 'battle with AIDS', King Mswati invoked a compulsory chastity law on young girls (but not on boys or men). Young women under 19 years of age cannot shake hands with men nor can they wear trousers. Many international organisations feel that traditionally minded policy initiatives such as these are not only ineffective at combating the high AIDS rate, but also perpetuate the high rate of infection.

Relationship with the International Community

2.23 Swaziland is a member of the United Nations and the African Union (formerly called the Organisation of African Unity). It is also a member of the Southern African Development Community (SADC). More than 40 countries have accredited ambassadors to the kingdom and six have resident representatives. Swaziland maintains diplomatic missions in Brussels (to the European Union), Copenhagen, London, Taipei, Singapore, Kuala Lumpur, Nairobi, Maputo, Pretoria, New York (to the United Nations) and Washington, DC.

2.24 Given its location, and sharing of common borders with South Africa and Mozambique,

Swaziland played a unique and privileged role during the struggle against apartheid and colonialism. This changed dramatically after the end of apartheid in South Africa in 1994. Direct foreign investment in the country has declined since it is no longer a 'front line state' and many foreign missions have scaled down their presence. The decline in economic and social conditions has left the country in an unenviable position. It is officially placed in the 'medium human development' group instead of in the 'low human development' group of countries,[2] which denies the country access to some critical development assistance and support.

2.25 The European Union (EU) has scaled down its presence in Swaziland since the liberation of South Africa in 1994. However, the EU remains Swaziland's biggest donor and provides funding of 30 million euros over a period of five years for rural development, private sector support, health and education. Relations with the EU are based on the Lomé Convention and the Cotonou Agreement. The focal areas for EU support are the promotion of human rights, good governance and the rule of law and political dialogue.

2.26 Cultural and ethnic affinity between the peoples of Swaziland and South Africa are very strong. Their legal systems are also compatible. South Africa is Swaziland's largest trading partner and the economy is reliant on South Africa not only for trade but also, as a consequence, for employment. Many Swazis correctly believe that their problems, whether in confronting HIV/AIDS or economic revival, cannot be resolved without active involvement and participation by South Africa. The two countries have a framework for cooperation (SADC) that needs to be properly implemented with some urgency and determination. South Africa has been particularly silent with respect to the recent constitutional crisis.

2.27 Although having a low diplomatic presence in Swaziland, the mission was informed that the President of Mozambique had been designated by the SADC to handle the political and constitutional crises in Swaziland. There was no evidence available to the mission to indicate any meaningful intervention so far by Mozambique to solve the crisis.

2.28 The United Kingdom was the imperial colonising power in Swaziland immediately before independence in 1968. However, it has had limited influence in recent times over Swaziland's political order or in the economy. It provides a few advisers to the King and continues to be seen as the symbol of the Commonwealth. However, the Commonwealth Secretariat, which has assisted, in particular, with personnel and advice on constitutional drafting, has recently brought pressure on King Mswati to resolve the country's rule of law problems, threatening expulsion from the Commonwealth if reforms are not effected.

2.29 Libya has no diplomatic presence in Swaziland. In 2002, the Libyan leader passed through Swaziland on his way from South Africa where the African Union was inaugurated. Since then, the King has shown some interest in Islam. At the time the mission was in Swaziland, it was reported in the local press that the King's 14-year-old son had gone for 'advanced military training' in Libya. The mission was concerned that such practices, if true, may be in

contravention of Swaziland's obligations under the Convention on the Rights of the Child.

2.30 The United States has communicated to the King its belief that he has failed to exercise positive leadership to move the country forward. Swaziland has benefited from the US African Growth and Opportunity Act (AGOA), especially with regard to preferential terms of trade in sugar. These privileges are tied to good governance, the rule of law and sound economic policies being implemented. The continuation of these privileges depends on Generalised Service Preferences (GSPs). A review of GSPs is not automatic but depends on petitions filed with the administration in Washington. This occurred in 2002 when a US labour organisation complained about Swaziland's repression of the labour movement. If the petition is found to have merit, Swaziland will be given six months to take corrective action, or lose its GSPs. A loss of GSPs leads ultimately to a loss of all AGOA privilege status. The United States appears to want to retain aspects of humanitarian assistance to Swaziland, dependent on its meeting acceptable standards of good governance. Otherwise, the United States now considers that Swaziland holds no strategic interest for it in the region.

2.31 The programmes of the United Nations Development Programme (UNDP) have focused mainly on legal and judicial reform (including restructuring of the Attorney-General's Department), constitutional reform, capacity building and governance. In particular, the UNDP is assisting Swaziland with support for the Constitutional Drafting Committee (CDC). It has paid for two lawyers and a political adviser from the Commonwealth Secretariat. Once the King accepts the draft Constitution, the UNDP has programmes planned to carry out civic education to support constitutional change. The UNDP sees the envisaged Constitution as the only solution to the current crisis and the breakdown in the rule of law. The other area of UNDP involvement is in the codification of Swazi law that started in 1997.

2.32 The World Health Organisation (WHO) considers HIV/AIDS the major health issue facing Swaziland. The dramatic rise in the rate of infection is due to very liberal attitudes to unprotected sex in Swazi society (at least as far as men are concerned), despite the King's declaration of HIV/AIDS being a national disaster. It is perceived that the King has not demonstrated sufficient commitment to encourage behaviour against high-risk sexual practices. The health sector is severely under-resourced. WHO recommends that countries spend at least 15 per cent of their national budgets on health. Swaziland currently spends 7.1 per cent.

2.33 Swaziland is a deeply traditional society. Women do not have adequate protection under the law (see below) and the girl child is greatly disadvantaged. Child rights are seen as disruptive and contrary to traditional practices. The United Nations Children's Education Fund (UNICEF) has focused on promoting children's rights at the community level through the network of chiefs and other community leaders. The key intervention has been in the area of sexual abuse. UNICEF is concerned about corporal punishment, sexual abuse, AIDS orphans and vulnerable children and is trying to initiate a programme to provide recording equipment

at police stations. UNICEF is concerned that the UN Convention on the Rights of the Child has not been implemented or transformed into domestic legislation and the country has not fulfilled its reporting obligations under the Convention.

2.34 The constitutional crisis and breakdown in the rule of law may require some pressure and diplomatic intervention by countries and institutions that have some direct relations with the country.

Human Rights Issues

2.35 Swaziland has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights, the 1951 Convention relating to the Status of Refugees and its Protocol, the Convention on the Political Rights of Women, the SADC Declaration on Gender and Development, the SADC Protocol on Violence Against Women and 33 ILO Conventions. Significantly, it is not a party to the International Covenant on Civil and Political Rights nor to the Convention on the Elimination of All Forms of Discrimination Against Women. It has signed, but not ratified, the African Charter on the Rights and Welfare of the Child.

2.36 There have been reports by criminal defendants of the use of torture during interrogation.[3] No independent body has the authority to investigate police abuses. However, courts have invalidated confessions induced through physical abuse.

2.37 There is overcrowding and poor conditions in the prisons, which generally do not meet international standards. This is exacerbated by the (unlawful) use of provisions for non-bailable offences (discussed below), long periods of pre-trial detention, a backlog of cases (estimated by the Registrar of the High Court to be in excess of 2,000) and too few judges to handle the caseload. The Government has routinely permitted prison visits by diplomats, journalists, human rights monitors, and representatives of international organisations, although there were reports that a Special Rapporteur of the African Commission on Human Rights had been unable to visit the country.

2.38 The law requires a warrant for arrest in most cases. However, police officers with the rank of sub-inspector or higher have the right to conduct a search without a warrant if they believe that evidence might be lost through the delay in obtaining a warrant. Detainees may consult with a lawyer and must be charged with violation of a statute within a reasonable time, usually 48 hours.

2.39 The Government restricts freedom of assembly, and it also restricts freedom of association. King Sobhuza's 1973 Proclamation prohibits political parties, as well as political meetings, processions or demonstrations without the consent of the Commissioner of Police being obtained. In November 2000, Mario Masuku, the leader of the opposition organisation PUDEMO, was arrested for sedition after taking part in a peaceful protest march. He was

acquitted by the High Court in August 2002. (He had also been prosecuted for treason and sedition in the 1990s.) The 1996 Industrial Relations Act restricts the ability of trade union organisations to participate in the social and political affairs of the nation.

2.40 While Parliament is partly elected, the members of the Government are appointed by the King, who also has executive, legislative and judicial powers. Citizens do not therefore have the effective right to change their government.

2.41 Women generally have full legal rights to participate in the political process, but they are under-represented in the Government (four women are members of the House of Assembly, four women are Senators, and two women are in the Cabinet). The social status of women is low. Women traditionally need their husband's permission to open a bank account, obtain a passport, or leave the country. There are also problems on the death of the husband, as traditional inheritance customs mean that a widow has no claim on her deceased husband's property (which is transmitted to male heirs). Wife beating is frequent despite traditional restrictions against this practice. Rural women often have no alternative but to suffer in silence because traditional courts can be unsympathetic to "unruly" or "disobedient" women and are less likely than the modern courts to convict men for domestic violence. Women and girls who are victims of rape and other violence often face discrimination and hostility when they seek assistance from the police, especially if the perpetrators are family members.

2.42 Women do not have the same legal standing as men and are regarded in the legal system as being in the *potestas* of their father or husband.[4]

2.43 The 1980 Employment Act forbids employers to discriminate on the basis of race, religion, sex, or political affiliation. However, there are no records of any suits or prosecutions in this field.

2.44 Although the Government does not provide free, compulsory education for children, the country has a 99 per cent primary school enrolment rate.

2.45 Children convicted of crimes are sometimes caned as punishment.

2.46 In December 1998, the Minister of Health and Social Welfare announced a Bill giving preferential treatment to persons with disabilities for building access and other needs, but the Bill has yet to be introduced to Parliament.

2.47 The law does not prohibit trafficking in persons and although there are few documented reports, there are reports from Mozambique of traffic in women and children to Swaziland.

2.48 Swaziland does not have a diverse media. It has just one independent newspaper group, *The Times*. The rest of the media is controlled either by the King or the Government.

2.49 In 2002, hundreds of thousands of Swazis faced starvation. Two years of drought, as well as bad planning and agricultural practices were blamed for the crisis. The Government has come under criticism for buying the King a private jet worth over $50 million – a quarter of the

national budget – while famine is looming. A parliamentary committee in a recent report recommended against the purchase, which conclusion Parliament unanimously adopted on 20 March, 2003.

Current Issues

2.50 Pressure has been building for several years to modernise the political system, and many appear to recognise that there is a need for political reform, including the drafting of a new Constitution and, specifically, for a bill of rights. In 1996, the King appointed a 30-member Constitutional Review Commission (CRC), with the stated purpose of examining the suspended 1968 Constitution, carrying out civic education, determining citizens' wishes regarding a future system of government, and making recommendations on a new constitution. This was in part driven by a belief that the 1968 Constitution reflected British values rather than Swazi values. The CRC spent five years assembling what it claimed were the views of ordinary Swazis regarding the type of government they want. The CRC refused to accept group submissions (which meant that NGOs *per se* were banned from contributing) and also banned media coverage of individual submissions. No formal record of these submissions has been released, nor has there been an accounting of how many Swazis presented their views to the CRC or of what they in fact said to it. The process was further hampered by disputes between chiefs, the problem of collecting views during the rainy season and the resignations of several Committee members. It has been described as a fraud by Obed Dlamini, President of the Ngwane National Liberatory Front, a (banned) political party. The Report of the CRC in August 2001 recommended that the executive powers of the King should be maintained and the position of traditional advisers to the King be strengthened further. The ban on political parties was to be maintained. It also recommended the supremacy of Swazi customs and traditions over any contrary international human rights obligations. Bail was to continue to be banned and the death penalty used.

2.51 A Constitutional Drafting Committee (CDC) was established in February, 2002, and apparently finished the initial draft in October 2002. The CDC has apparently produced a 'liberal' document which, it is understood, recommends political pluralism. This clause has caused much conflict between Prince David (the head of the CDC) and his brother, King Mswati, and between the conservative factions of government and royalist progressives generally. There is much controversy about what the new Constitution should contain. In July 2002, the Swaziland Council of Churches organised a conference to debate these issues. An outcome was the appointment of a 14-person committee to hold an audience with the King and inform him of criticisms about the 2001 Report of the Constitutional Review Committee and royal decrees banning political activity. The committee has not been allowed access to the King. This has led to calls for an alternative Constitution. For example, the NGO Lawyers for Human Rights has drafted a Bill of Rights with constitutional guidelines.

2.52 One catalyst for recent controversy has been royal marriages. The traditional method of selection of royal brides by the King is as a result of advice from the Queen Mother, before whom virgins may dance at the annual Reed Dance, and by asking the permission of the woman's father or family. In November 2002, the widowed mother of King Mswati's eleventh bride, Zena Mahlangu, brought suit against two of his aides who abducted the girl from her school after the King decided to take her as his next wife without seeking her family's consent. This was the first time in Swazi history that a lawsuit had in effect been brought against the King. Although Chief Justice Stanley Sapire was told to drop the case, he reported that it would proceed. As a result, he and two other judges were served threatening letters from the Attorney-General, and ordered to resign, prompting an international outcry from Amnesty International and other international organisations, including the IBA. However, on 6 November 2002 the mother applied for an indefinite postponement of the case after being allowed to speak to her daughter. The aftermath of this struggle had great ramifications for members of the legal profession. DPP Lincoln N'Garua brought charges of sedition against the Attorney-General for his threats to the judiciary during the affair. Mr N'Garua refused to withdraw these charges even when threatened with dismissal and deportation at a late night meeting of the Special Committee on Justice (the so-called 'Thursday Committee'). He stated publicly that harassment (such as being locked out of his office, having his office phone disconnected, and having the Government run an advertisement seeking his replacement) had prevented him from doing his job as DPP. He has also stated that he has a video tape of the break-in, captured by surveillance equipment he had installed in his office, which clearly shows prominent members of the Government performing a ritual exorcism naked in his office. He has since decided to resign and submitted his resignation letter in February 2003 after apparently agreeing to severance terms with the Government. However, the Attorney-General has since stated that the memorandum of severance terms is not binding on the Government as it was not discussed in Cabinet. In addition, a criminal charge of culpable homicide as a result of the death of a young girl in a road accident some years ago has been revived against the DPP, who has returned to Kenya.

2.53 The legal system began to grind to a halt in late November 2002, due to the Government's refusal to follow judgments of the Court of Appeal which ruled that King Mswati had constitutional limitations on the power to make laws by decree, and that the Police Commissioner should be jailed for contempt of court for obstructing a court-ordered return of inhabitants to their traditional village. On 28 November, the Prime Minister announced that royal decrees were non-negotiable and non-debateable, even by the courts, that the Government would ignore these judgments because they curbed the King's power, and also stated that the judges making these decisions were unduly influenced by foreign powers. All the judges on the Court of Appeal resigned and returned to their homes in South Africa. They have stated that they will not return until the Prime Minister apologises and makes it clear that the Government will abide by court rulings. Trade unions went on strike in protest from 19 to 20 December 2002, and lawyers also threatened to strike. A further 'stay away' occurred in

March 2003. The Government has challenged the legality of these before the Industrial Court. However, the Industrial Court held in December 2002 that the strikes complied with the requirements of section 40 of the Industrial Relations Act.

2.54 On 9 December 2002 Swazi MPs, further disenchanted by the actions of Prime Minister Dlamini, asked the King to dissolve Parliament unless the Prime Minister resigned. So far, the Prime Minister has not resigned (nor apologised).

2.55 On 19 December 2002, the full bench of the High Court, on an application brought by the Attorney-General as a result of the decision of the Court of Appeal mentioned above, held that the Government had no right to be heard until it had purged itself of its contempt. It held that the Prime Minister should apologise and withdraw his statement of 28 November. The Court further stated that its judgment was without prejudice to the right of the DPP to institute appropriate criminal proceedings against the Prime Minister. According to newspaper reports, in December 2002 the King personally instructed the DPP to prepare charges of interference with the course of justice against the Prime Minister. Nothing came of this and, as noted above, the DPP has left Swaziland. On 3 January 2003, the Prime Minister instead stated that the matter would be addressed through consultation between the Government and its advisers, and that legal experts would be included in the consultations. Later in January, the King was reported to have ordered the Attorney-General to tour SADC countries to seek opinions on how the rule of law could be restored. In February 2003, it was reported that a joint meeting of the Cabinet and the Swaziland National Council was held to resolve the problem. Allegedly, the majority of the 25 people attending were of the view that a letter be drafted calling on the Prime Minister to withdraw his statement of 28 November and to apologise. Apparently, three influential members at the meeting (or four members, depending on the report, including Moi Moi Maselela and the Attorney-General) objected so strongly to this course of action that the majority 'cowered' (*Swazi Times*, 9 February 2003 and 16 February 2003). The proposed letter was never taken to the King for his approval and the idea was dropped. In March 2003, the Prime Minister reiterated the Government's opposition to the court judgments. In particular, the Government is insisting on applying the Non-Bailable Offences Order which the courts have struck down as unconstitutional. In the meantime, prison authorities are refusing to release suspects granted bail by the courts. It was reported that the Prime Minister held a meeting with magistrates in March 2003 to instruct them not to sign liberation warrants following the granting of bail by a court. Subsequently, the Prime Minister stated that the Government would take "appropriate action" against magistrates "used by subversive elements" who were releasing suspects in cases where the Government claims the Non-Bailable Offences Order applies.[5]

2.56 On 3 January 2003 a new and potentially powerful lobby group, the Swaziland Coalition of Concerned Civil Organisations (comprising business groups including the Swaziland Chamber of Commerce and Industry, the Federation of Swaziland Employers, and the Association of Swaziland Business Community, along with the Swaziland Law Society, the Swaziland National

Association of Teachers, religious groups including the Swaziland Council of Churches, the Swaziland Federation of Trade Unions and the Swaziland Federation of Labour), added to the pressure for political reform by releasing its manifesto calling for an end to the 'flagrant abuse of power and the breakdown in rule of law'. The coalition statement expressed concern over Swaziland's deteriorating economy, and possible sanctions imposed by the international community as a penalty for failures of good governance. The manifesto demanded that the 'government immediately recognises the independence of the judiciary, and desist from making threats against judicial officers'. It called on the Prime Minister to rein in security forces, drop plans to purchase the luxury jet for King Mswati, and stop threatening to withhold funding from NGOs with progressive political views. Such bold criticism of royal rule from the collective voices of so many disparate organisations is unprecedented in Swaziland. Similar condemnations have already come from the Swaziland Democratic Alliance, but its membership of labour unions and banned political parties was limited compared to the new coalition.

Notes

1 Swaziland has asked South Africa to open negotiations on reincorporating some nearby South African territories that are populated by ethnic Swazis or that were long ago allegedly part of the Swazi Kingdom.

2 UNDP, *Human Development Report 2002*, p 151.

3 See *Policing to Protect Human Rights: A survey of police practice in countries in the Southern African Development Community, 1997-2002*, Amnesty International, 2002.

4 See *Beyond Inequalities: Women in Swaziland* (Zakhe Hlanze and Lolo Mkhabela, eds, Women and Law Southern African Research Trust/SARDC, Mbabne and Harare, 1998).

5 Swazi *Observer*, 22-23 March, 2003

Chapter 3: Swaziland's Obligations under International and African Regional Human Rights Law

3.1 Swaziland's international and regional human rights obligations, in so far as they are relevant to the terms of reference of the mission, are principally contained in the International Convention on the Elimination of All Forms of Racial Discrimination (to which Swaziland acceded in 1969), the Convention on the Rights of the Child (which it ratified in 1995), as well as in the African Charter on Human and Peoples' Rights (ratified by Swaziland in 1995) and the Cotonou Agreement (2000). As noted above (at 2.35), Swaziland has not ratified the International Covenant on Civil and Political Rights or the Convention on the Elimination of All Forms of Discrimination Against Women, and while it signed the African Charter on the Rights and Welfare of the Child in 1992 it did not ratify it. These last three instruments are, strictly speaking, not binding on Swaziland. However, Swaziland is a party to the UN Convention on the Political Rights of Women, and as a member of the Southern African Development Community (SADC) it can be regarded as having obligations under the SADC Declaration on Gender and Development and the SADC Protocol on Violence Against Women. As a member of the United Nations it can also be argued that Swaziland has obligations, both as a result of the United Nations Charter and under customary international law, with respect to the Basic Principles on the Independence of the Judiciary (1985), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1979), and the Guidelines on the Role of Prosecutors (1990). As a member of the Commonwealth it also is at least morally bound by pledges under such instruments as the Harare Declaration (1991).

3.2 Swaziland thus has a number of general obligations with respect to human rights which would apply to its present crisis. Under the Harare Declaration it has pledged to work towards 'democracy, democratic processes, and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government'. Under the SADC Treaty, Member States must 'act in accordance with … human rights, democracy and the rule of law'. These instruments, agreed to by Swaziland in the context of it being a member of the Commonwealth and a country in the Southern African region, indicate that while national circumstances can be taken into account, they must be applied in conjunction with, rather than used to override, obligations with respect to human rights and the rule of law. For Swaziland simply to contend that Swazi tradition and custom will override 'foreign' notions of human rights and recognised fundamental legal principles is both legally incorrect and morally dubious.

3.3 With respect to its more specific obligations, Swaziland to its credit satisfies its fundamental obligations under the Convention on the Political Rights of Women as there is universal adult

suffrage in Swaziland and women, *prima facie*, have access to public office. For the majority of women, however, and particularly for those living in rural areas, such access may be illusory. The provisions of the SADC's Declaration on Gender and Development indicate that countries in the region view gender equality as part of true democracy. This systemic issue is a distinct problem in Swaziland (see 2.41, 2.42) and, under this Declaration, Swaziland must be taken to concede that democratic processes are impeded by gender inequality. The SADC Protocol on Violence Against Women similarly indicates that gender-based violence, in its many forms, is contrary to democratic equality. Swaziland should therefore make improvements to the social and legal status of women as part of its constitutional review process.

3.4 Swaziland claimed in its first (and only) report to the United Nations Racial Discrimination Committee that it complies with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. However, xenophobic statements made by government officials about the integrity of foreign judges in Swaziland may amount to a breach of Swaziland's obligations under Articles 2 and 4 of the Convention not to incite racial hatred or permit public authorities or institutions to do so. In addition, Swaziland is in breach of its reporting obligations under this treaty. States Parties are obliged to provide reports to the Racial Discrimination Committee on a regular basis. After submitting a report in 1997, Swaziland has submitted nothing since.

3.5 Swaziland's obligations under the Convention on the Rights of the Child are to provide fundamental human rights as appropriate to children. Swaziland has a high rate of literacy (see 2.3 above) but not all children go to school, as is required by Article 28. Nevertheless, Swaziland made a declaration at the time of ratification of the treaty to the effect that the implementation its obligations must be achieved progressively and that Swaziland would strive for full compliance with the Article as soon as possible. It is therefore not technically in breach of this provision. However, as noted above at 2.29, reports of the King's 14-year-old son undergoing advanced military training may be a breach of Article 38 of the Convention if this training is, in effect, a form of military recruitment. In addition, Swaziland is in breach of its reporting obligations under this Convention as well. States Parties must report to the Committee on the Rights of the Child every five years. Swaziland, although becoming a party to the treaty in 1995, has never submitted a report under it.

3.6 Swaziland appears to be particularly in breach of its obligations under the African Charter on Human and Peoples' Rights. With the transformation of the Organisation of African Unity into the African Union in 2000, there was a reiteration of fundamental principles in the Constitutive Act of the African Union, including the promotion of gender equality and respect for democratic principles, human rights, the rule of law and good governance (Article 4(l), (m)). Specifically under the African Charter itself, all individuals are equal before the law and are entitled to the equal protection of the law (Article 3); parties must respect human life (Article 4); there is the right to have cases heard expeditiously by competent authorities (Article 7); freedoms of conscience (Article 8), association (Article 10) and assembly (Article

11) are guaranteed, as is freedom of movement and residence (Article 12); there is the right to equitable working conditions (Article 15); the elimination of discrimination against women is provided for (Article 18(3)); and there is the guarantee of the independence of the courts, as well as the requirement to provide appropriate institutions to promote and protect these rights (Article 26). As discussed in Chapter 2, and as elaborated on in the following chapters, in Swaziland there has been interference with the judiciary, non-compliance with court orders, a reliance on 'non-bailable' offences, the banning of political parties, the ordering of people out of their traditional homes, the harassment of demonstrators, failure to abide by agreements under employment contracts, delays in the hearing of court cases, the unequal treatment of women, and a proposal to introduce hanging as a punishment. These amount to a clear breach of the letter and the spirit of the Charter. The mission was informed that international legal obligations are not automatically incorporated as Swazi law. However, this fact relates to the process of domestic enforcement of the rights (ie they cannot automatically be pleaded before domestic courts as law) but it does not affect the binding nature of the obligations on Swaziland *per se*. Moreover, the Preamble to the Charter expressly states that there is a 'duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa'. With respect to the argument that Swazi traditions and customs must be paramount, this means that the rights in the Charter are not seen to be in conflict with traditional African customs and values. Thus, arguments of the supremacy of Swazi custom are dubious, at best. Even if such customs were to be enshrined in the new Constitution (or in other legislation) Swaziland would nevertheless be in breach of its international obligations if that custom conflicted with the rights recognised in the Charter. The Government should adopt a more sophisticated and integrated approach to the interface between custom, common law and international and regional human rights obligations, rather than simply relying on spurious claims of the unquestioned supremacy of custom.

3.7 The Cotonou Agreement of 2000 between the European Union and African, Caribbean and Pacific (ACP) developing countries is a 20-year plan which includes aid programmes for Member States. It makes a clear association between politics, trade and development, and establishes mutual obligations rather than simply creating a pot of money to assist the developing world. In particular, Article 9 provides that 'respect for human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development'. The Parties are obliged to promote and protect human rights, democratic principles, and the rule of law which are stated in Article 9 to be 'essential elements of this Agreement', together with transparent and accountable good governance. These issues are thus not only legal and moral obligations on Swaziland: they are also crucial to Swaziland's economic development. Unlike the US African Growth and Opportunity Act (discussed above at 2.30), which is also tied to good governance and the rule of law, the Cotonou Agreement is not only the unilateral generosity (with conditions attached) of one country to others: it

represents mutually agreed obligations. Swaziland is in breach of these obligations, and is breaching them at its social and economic peril.

3.8 Under the UN Basic Principles on the Independence of the Judiciary, the independence of the judiciary must be guaranteed and enshrined in the Constitution or other law. It is further provided that 'it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary' (Clause 1). Further, 'the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law' (Clause 11) and if there are any complaints made against a judge they should be dealt with expeditiously under an appropriate procedure (Clause 17). Swaziland is in breach of all of these provisions. On 4 December 2002, Dato' Param Cumaraswamy, the United Nations Special Rapporteur on the independence of judges and lawyers, issued a statement in Geneva expressing grave concern at Swaziland's 'blatant breach' of these UN principles.

3.9 Under the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment judicial or similar authorities must have the effective control of detention (Principle 4) and the exercise of powers to detain someone shall be 'subject to recourse to a judicial or other authority' (Principle 9). The Swazi Non-Bailable Offences Order breaches these principles because no recourse to a court to determine bail is allowed for certain crimes. In addition, Principle 38 provides that 'a person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial'. Not only the lack of bail, but also unreasonable delays in hearing cases, breach this principle. The mission was told of cases where accused were waiting for over two years for a trial.

3.10 Under the UN Code of Conduct for Law Enforcement Officials, the members of the police service are required to respect the law and 'to the best of their capability, prevent and rigorously oppose any violations' (Article 8). Instances of the Swaziland police and correctional services refusing to carry out and/or enforce the orders of courts are clear breaches of this requirement.

3.11 Under the UN Guidelines on the Role of Prosecutors, states must ensure that prosecutors are able to perform their professional functions without intimidation, hindrance or harassment (Clause 4) and also to ensure that prosecutors and their families are physically protected by the authorities (Clause 5). In the case of Lincoln N'Garua, the erstwhile Swaziland DPP (discussed above at 2.52), there was flagrant intimidation and harassment. In addition, as break-ins occurred not only in the DPP's office but also in his home, his family was not being protected as is required by the Guidelines. There is thus a breach which is made even more apparent when considered in the light of the obligation on prosecutors laid down by Clause 15 of the Guidelines: 'Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly … abuse of power'. The DPP was being harassed because of indictments he had issued against the Attorney-General.

3.12 Swaziland is thus in breach of several human rights obligations. This occurs not only with respect to international instruments but also, more significantly and particularly, under regional instruments such as the African Charter where arguments that the obligations are contrary to local standards become increasingly spurious.

Chapter 4: **The Constitutional and Political Order in Swaziland: Issues Arising from the Interaction of Tradition and Democracy**

4.1 The popular notion that Swaziland has no constitution is, strictly speaking, an incorrect one. When Swaziland gained independence in 1968 it had a Westminster-type constitution (the 'independence Constitution'[1]) which provided for all aspects of Government, civil liberties, the rights and powers of the King, the role of traditional institutions and stipulated an amendment procedure. On 12 April 1973, King Sobhuza II issued what was termed a Proclamation to the Nation.[2] In that Proclamation the King announced that an 'extremely serious situation has now arisen in our country'. In fact, the opposition party Ngwane National Liberatory Congress had won 20 per cent of the vote at the 1972 election (see 2.8 above). His Majesty concluded that the 1968 Constitution had failed to provide the machinery for good government and the maintenance of peace and order, and that it was the cause of unrest, insecurity and dissatisfaction. It appears that by this the King really meant that dissenting political views would not be tolerated. Two people with whom the mission spoke referred to the King producing a carefully prepared document at a supposedly spontaneous occasion of national dissatisfaction. The King assumed all legislative, executive and judicial powers and simply decreed that the 1968 Constitution was repealed. However, all other laws continued in force. The 1968 Constitution had been expressed to be the supreme law of Swaziland and provided for an amendment procedure requiring a joint sitting of both Houses of Parliament. No provision was made in it for repeal, however. The King deployed the army and the police to maintain order throughout the country. In effect, there had been a royal coup. Although the independence Constitution of Swaziland was unconstitutionally repealed by the 1973 Proclamation, there were saved provisions that continue in force together with subsequent decrees. These now constitute the supreme law of Swaziland. The saved provisions include those relating to the monarchy (Chapter IV), the Attorney-General and prerogative of mercy (sections 91 and 92) and the Judicature (Chapter IX). The Court of Appeal recently clarified and affirmed this interpretation of the constitutional position in *Professor Dlamini v The King*.[3] In the opinion of the justices of the Court of Appeal, as they were, the 1973 Decree and the saved provisions of the 1968 Constitution might only be changed by the King by decree published in the Gazette (and not by an Order-in-Council or through an Act of Parliament). Decree No 1 of 1987 expressly stated this,[4] but there remains some controversy as the Court of Appeal expressed this view to be *obiter dictum*. Despite this, the finding forms part of a series of recent court decisions that unfortunately are being used by those bent on undermining the rule of law in Swaziland to accuse the judiciary of being 'insensitive to Swazi law and customs' when courts strike down decrees not properly made under the Constitution as it now stands.

4.2 The problem with the Swazi constitutional order is that there is an unacceptable degree of uncertainty created by the nature and extent of the saved provisions of the 1968 Constitution, together with numerous subsequent decrees that amend or purport to amend the 1973 Proclamation. This has contributed to the confusion regarding the separation of powers, especially the independence of the judiciary. Subjecting a modern nation like Swaziland, which has ratified or acceded to several international human rights and good governance instruments and standards, to rule by decrees is in itself untenable.

The King, the Monarchy and Formal and Informal Executive Institutions

4.3 In modern democracies, essential attributes that promote the rule of law include the existence of a system of government which is based on the principle of separation of powers and a vibrant civil society. It is within the separation of powers that the independence of the judiciary finds expression. This Report therefore examines the nature and character of the executive arm of the Swazi State and Government before proceeding to the assessment of the judiciary.

4.4 Swaziland's Government has a fairly complex executive branch. The popular idea that the country is governed by an 'absolute monarchy' does not really illuminate the diverse and dynamic nature of governance within the executive. The King is indeed the head of state and Government, with legislative and inherent judicial powers. The latter is expressed in the area of Swazi law and custom.[5] The legislative power and role of the King is manifest in the various decrees, properly called or otherwise, that permeate this Report.

4.5 In the exercise of judicial powers with regard to Swazi law and custom, the King assumes the title of *Ngwenyama*. The King theoretically exercises this power aided by advisers who are supposed to represent the Swazi nation. The King and his advisers constitute the Swazi National Council, the *Libandla*. The division between 'Swazi law and custom' and other matters of State involving statute law and Roman-Dutch law is often difficult to draw. This complexity is not unique to Swaziland. What is special about the situation in Swaziland is the politicisation of the difference by those who claim to speak in the interest of Swazi law and culture. Among the most vocal actors in this drama within the Executive are the incumbent Prime Minister, the Attorney-General and the Minister for Justice and Constitutional Affairs. It is often not entirely clear to the public when those who purport to speak for the King do speak with the approval of the King and when they are simply misusing the name of the King to express their own opinions and wishes. To confound matters, it is a tradition among the Swazis to regard the King as one who can never lie. In the absence of official public repudiation by the King of anything attributed to His Majesty, the utterances of the 'spokespersons' are normally taken at face value.

4.6 The King *qua* King of the State of Swaziland is supposed to govern with the advice of the King's Advisory Council (*Liqoqo*). The *Liqoqo* consists of remunerated members appointed in their

personal capacity by the King to advise him on matters of State, on request. Members of the *Liqoqo* are used in a discretionary fashion by the King, and may be dismissed (as occurred during the Regency of the Queen Mother and immediately after the enthronement of Mswati III). The complexity of the Executive in Swaziland is in part attributable to the fact that some members of the *Libandla* are also appointed to the *Liqoqo*. This blurs the distinction between non-traditional and traditional affairs of government.

4.7 The Queen Mother (*Ndlovukazi*) is an important executive and moral institution because the Swazi King must always be guided by it. The *Ndlovukazi* is normally the mother of the King or the eldest wife of the King, should the mother not be alive. The *Ndlovukazi* plays a similar role to that of the *Libandla*, except that she is closer to the King and is always present to give advice. She also advises the King's wives. The information gathered by the mission suggests that in reality it is difficult to ascertain the source of advice on which the King relies in any particular matter.

4.8 The Special Committee on Justice, popularly called the 'Thursday Committee',[6] was established ostensibly to advise the King on matters of judicial and legal administration at a time when the pace of disposing of criminal cases in the courts was very slow. Although the reasons for its establishment may have been laudable, its composition and subsequent role leave much to be desired. The Committee is reputed effectively to have usurped the role of the Judicial Service Commission. The Committee sometimes interferes with the judiciary to the extent that it has sought to advise some judges on how to decide certain cases of political importance. A few days following the departure from Swaziland of members of the mission, the President of the Law Society and the Chief Justice publicly called for the distancing of the judiciary from the Committee and for its abolition.[7] The Chief Justice, the Attorney-General, the DPP, the Commissioner of Police and other heads of various security services are members of the Committee. The Prime Minister is its Chair. Among its members is one notorious member, Moi Moi Masilela, who is a mechanic by profession and is said to be the son of the King's former traditional medicine man. He is an *eminence grise* in the Committee and is reputed to be one of the few influential confidantes of the King. It appears that he wields great power, sometimes even greater than some *ex-officio* members of the Committee. The Committee has undermined the other institutions described above to some extent, such as in the recent decisions (or lack thereof) relating to resolving the current constitutional crisis.

4.9 Given the above 'traditional' and informal institutions that perform executive roles and functions, it is difficult to define the boundaries of the Executive in the Swazi State and Government. It is equally difficult to demarcate the boundary between the Executive and other branches of State and Government. To further complicate matters, there is also the official Cabinet which is presided over by the Prime Minister. The Attorney-General and the Minister for Justice and Constitutional Affairs are also members of the Cabinet. This means that part of the core of the 'Thursday Committee' is replicated in the Cabinet.

4.10 The other important office in law enforcement and the administration of criminal justice is the directorate of public prosecutions headed by a Director of Public Prosecutions (DPP).[8] The former DPP, Lincoln N'garua, like some judges in the High Court and the judges in the Court of Appeal, has recently been robust in discharging his statutory duties. He has indicted the Attorney General for contempt of court (see Chapter 2). The reaction of some members of the Cabinet and the 'Thursday Committee' has been swift and harsh. His position, like that of the Chief Justice, has been advertised as vacant.[9] Following sustained harassment by the Attorney-General, the Prime Minister and the Minister for Justice and Constitutional Affairs, he was forced to consider early termination of his contract of service. He has subsequently been charged with defeating the ends of justice and culpable homicide in connection with a motor accident he was involved in some years ago. In February 2003, the DPP tendered a letter of resignation to the King indicating that this should take effect from 28 February. He has since left the country. He has said that he will return to Swaziland when the trial commences. There is currently a dispute as to whether he is entitled to a severance payment (see 2.52 above). Without prejudging the issues involved, it appears that the legal system is being used selectively to silence or to punish those who are unwilling to comply with the dictates of the politically powerful who are bent on disregarding the core values and principles of the rule of law.

4.11 The Attorney-General is the principal legal adviser to the King and Government. The incumbent, Mr P M Dlamini, has proved to be an overzealous ally of the Prime Minister, Dr B S S Dlamini, in attacking the judiciary whenever court decisions do not reflect the wishes and expectations of the Executive. A prime example is a letter dated 1 November 2002 which the Attorney-General personally served on three judges of the High Court demanding that the court discontinue proceedings in the *Lindiwe Dlamini* case.[10] The judges were told to recuse themselves or they would be dismissed. As the proceedings were discontinued at the request of the complainant a few days later, the Attorney-General purported in a letter to withdraw the threats 'unconditionally' and apologised to the court for his an unacceptable behaviour.[11] However, by that stage irreparable damage had been done. In effect, the Attorney-General has failed to balance his position as an officer of the court sworn to uphold the law and preserve the integrity of the justice system and his role as legal adviser to the executive arm of Government. The State and Government require competent legal advice that is thoughtful, objective and balanced. General legal advice to the State and Government should not be conflated with the role of counsel in litigation, in which the interest of the client and the desire to win at all costs are often of primary importance. It is a general belief within the legal fraternity that at the time of his appointment the Attorney-General had not attained the prescribed period of admission to the legal profession for appointment to his office.[12] In an attempt to rectify the anomalies regarding his appointment, a Legal Notice was issued which stated: 'Notwithstanding any law, the appointment of the Attorney-General in terms of Legal Notice No 120 of 1999 shall be deemed to have been validly done and shall not be questioned in any court of law, body or institution'.[13]

4.12 At this juncture it is reasonable to conclude that the executive branch in Swaziland is patently a problem for good governance. It also positively undermines the independence of the judiciary (see Chapter 5). Part of the problem lies with the constitutional order and partly with the personalities of those who occupy the various positions within its institutions. At face value, the system appears to be consultative and highly democratic. In fact the decision-making processes are not transparent and the power vacuum created when a virtually absolute monarch is inattentive allows undue influence on decisions by the strong or the manipulative. Any reforms to normalise the situation must tackle these constitutional arrangements as well as address the criteria of selection, appointment and accountability of the office bearers.

Notes

1 Constitution of Swaziland 1968, Act No 50 of 1968.

2 Proclamation No 7 of 12 April 1973.

3 *Dlamini v The King*, Appeal Case No 41/2000, judgment delivered on 14 June 2001.

4 King's Proclamation (Amendment) Decree 1987, sections 3 and 4.

5 Section 1 of King's Proclamation (Amendment) Decree 1987.

6 The name is derived from the day of the week when the Committee usually convenes.

7 Speeches delivered at the official opening of the 2003 Sessions of the High Court held on 20 January 2003.

8 Created under the Director of Public Prosecutions Order, No 17 of 1973 as an office exercising independently some of the constitutional powers relating to public prosecutions that had been vested in the Attorney-General.

9 *The Swazi Observer*, 23-24 November 2002, p 6.

10 *Lindiwe Dlamini v Qethuka Sgombeni Dlamini and Tulujane Sikhondze*, High Court Civil Case No 3091/2002. See also below under 'Examples of judicial decisions…'.

11 Letter dated 4 November 2002.

12 Section 119(2) of the Constitution provides that a person must have practised as an advocate or attorney in Swaziland for at least ten years or be qualified for appointment to the High Court. The Attorney-General was admitted to practice in Swaziland in 1997 and so would not normally qualify for the position until 2007.

13 Legal Notice No 67 of 2001, 30 April 2001.

Chapter 5: The Judiciary, the Legal System(s) and Legal Pluralism: Issues Arising from the Interaction of Custom and Politics

5.1 Before examining the judiciary and its relationship with the other branches of State and Government, especially the Executive, it is critical to make a few observations about Swaziland's legal system and the challenge of legal pluralism. Swaziland's legal system recognises and operates under three main sources of law: statute law, including decrees that are properly proclaimed by the King[1]; Roman-Dutch common law[2]; and Swazi traditional law and customs (practices which have been developed since time immemorial).

Court Structures in Swaziland

5.2 The present constitutional crisis in Swaziland does not directly affect the Swazi national courts[3] which administer Swazi law and customs exclusively. For this reason, this Report shall not make detailed observations and comments on the cases heard in these courts. This emphasis should not be interpreted to mean that the traditional courts are not important. On the contrary, the mission probed the composition and role of these courts that dispense law to, and interpret and apply customs for, the majority of Swazis, especially the rural poor and women.

5.3 The Swazi national courts have both criminal and civil jurisdiction. They deal with petty criminal offences and civil actions concerning customary property rights such as cattle ownership and grazing rights arising in the locality in which the court has jurisdiction (similar to a parish). Criminal cases can be referred to the Magistrates' Courts or the High Court through the offices of the DPP. Civil cases may be referred to the High Court by the local chiefs. National courts are presided over by one president, two assessors and one court clerk. The clerk records statements and administers oaths. The proceedings are informal and are guided by natural justice and customary law. Lawyers do not appear in any of the courts. The courts have power to enforce their orders and to issue warrants of attachment and arrest. Sentences and fines in criminal cases are limited to ten months imprisonment or a fine of E120. Civil cases are limited to disputes up to E1,000. Contrary to popular belief, the courts are formal courts of record,[4] although on appeal evidence is invariably reheard.

5.4 The structure of the Swazi national courts and the appeal system are as follows[5]:

(a) the Court of First Instance is the lowest court of record;

(b) appeals from the Court of First Instance lie to the Swazi Court of Appeal;

(c) appeals from the Swazi Court of Appeal lie to the Higher Swazi Court of Appeal;

(d) criminal appeals and reviews lie directly to the Judicial Commissioner and can thereafter be referred to the High Court. Civil appeals from the Higher Swazi Court of Appeal lie directly to the High Court but can be referred from that court to the Judicial Commissioner for final disposal.

The mission was also told that disputes between Chiefs may go directly to the King and that an alternative route of appeal may traditionally lie through the local Governor directly to the King or the Queen Mother. However, for the last ten years, the Swazi National Council has heard appeals brought in this manner. All suits are commenced by a complaint followed by summons. No pleadings are filed, evidence is given orally and parties are allowed to call witnesses. In the year 2001, 9,085 cases were dealt with and concluded by these national courts. The proceedings in these courts are generally expeditious with an average case taking one to three days to conclude. Judgments are delivered immediately.

5.5 The non-traditional part of the judiciary in Swaziland is made up of the Court of Appeal (which is the highest court), the High Court, Industrial Court of Appeal, Industrial Court and the Magistrates' Courts. Prior to the 1968 Constitution, the jurisdiction of these courts was provided for in their respective legislation.[6] The mission was told that Magistrates' Courts have criminal jurisdiction for sentencing up to periods of ten years and for maximum fines of E2,000. The High Court in effect handles the residue (except for industrial matters which are heard by the Industrial Court), with appeals to the Court of Appeal.

Legal Pluralism

5.6 Legal pluralism is not unique to Swaziland. In most democracies where internal conflict of laws arises from legal pluralism there are normally established rules and principles to resolve the conflicts. The General Administration Act states: 'The Roman-Dutch common law, save in so far as the same has been heretofore or may be from time to time hereafter modified by statute, shall be the law of Swaziland'.[7] This might be interpreted as making Roman-Dutch common law superior in cases of conflict if there is no other express law to the contrary. An oblique reference to the hierarchy of the laws in Swaziland is also expressed in the Swazi Courts Act that states: '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'.[8] 'Swazi courts' are traditional courts hearing limited civil and criminal matters between Swazi citizens.[9] This provision, therefore, does not apply to the Court of Appeal, the High Court or the Magistrates' Courts. However, these courts may use assessors to help determine 'traditional' matters brought before them, but this is done more as evidence in the case rather than as binding law. Moreover, Swazi law must not be inconsistent with 'any other law in force'. The precise interface between customary law and common law is therefore obscure, particularly if statute law does not expressly resolve a legal question. The issue has in

the past been resolved more with respect to the venue in which the case was brought, rather than with respect to issues of supremacy *per se*. The Swazi national courts administered customary law and the courts in the non-traditional system administered Roman-Dutch common law and statutes. For this reason, this chapter closely analyses five recent cases which have attempted to resolve this problem.

5.7 In the current crisis, the Executive maintains that the judges of the Court of Appeal and some judges in the High Court have encroached on and undermined traditional law and customs, and by implication the authority of the King. This contention appears to have no merit as it is based on an incorrect interpretation of recent court decisions where legal issues had little or nothing to do with the alleged conflict between Roman-Dutch law and Swazi traditional law and customs. In one such case (discussed in more detail below), the central issue before the Court was the status and the interpretation of the Proclamation of 1973 as well as the legal status of subsequent decrees.[10] The Court in fact affirmed, on the basis of a necessity doctrine, the subsequent constitutional efficacy of the 1973 Proclamation while acknowledging that it was nevertheless contrary to the Constitution of 1968. The Court further clarified the distinction between decrees, Orders-in-Council and ordinary legislation. Nothing in the judgment and subsequent decisions suggests that the Court undermined or intended to undermine the powers of the King or Swazi law and custom as the Prime Minister alleged in his statement of 28 November 2002.[11] Either the Prime Minister was not advised properly or he deliberately misinterpreted the judgments in question. If anything appears to be supreme in these circumstances, it is politics.

The Judiciary and Appointment of Judges

5.8 The Judiciary Act 1968[12] provides for the appointment of judges to the non-traditional courts from qualified Swazis as well as from lawyers of the Republic of South Africa and all Commonwealth countries. This may explain why the Chief Justice[13] and the Judge President of the Industrial Court[14] are from South Africa and Kenya, respectively. It also puts into context why one of the other High Court judges[15] and all the five erstwhile judges in the Court of Appeal[16] are South Africans. All 13 magistrates, however, are Swazis.

5.9 It should be pointed out that in spite of the long tradition and legislated position of appointing judges from Commonwealth countries, especially South Africa, some people within the executive branch of government are engaged in a cynical xenophobic campaign against the foreign judges as a convenient way of explaining the current constitutional crisis as being one that has been created by these judges. This is done by misinterpreting and/or misrepresenting court judgments that do not accord with their own political agendas.

5.10 In general, it may be appropriate to call for greater representation of suitably qualified Swazis at all levels of the judiciary, including in the positions of Chief Justice and judges of the Court of Appeal. The President of the Law Society agrees with this,[17] although he cautions against the

appointment of Swazi judges under the present conditions in which the Executive is harassing the judiciary and pressuring foreign judges to resign. The integrity of any suitable appointees at present might be questioned. It should be pointed out that in some countries in Africa, for example in Kenya, there have been campaigns to curb the recruitment and hiring of foreign judges on contracts because the insecurity of their tenure is thought to undermine their independence and integrity. On the other hand, Lesotho and Botswana have Appeal Courts comprising expatriate judges. The mission did not come across any evidence to suggest that the foreign judges in Swaziland are compromised or are suspected by right-thinking people of being compromised simply because they are not Swazis. However, there were some allegations that lack of security of tenure rather than nationality has resulted in some judges blurring the demarcation between judicial independence and support of policies driven by the Executive. The Prime Minister's assertion that some judges are under "outside" interference is not shared by any of the other numerous people interviewed by the delegation, with the exception of the Attorney-General. The problems are internal. It is an established fact that prior to the appointment of the present Chief Justice to the highest full-time position in the judiciary, a respected Swazi national was serving in an acting capacity. It is commonly believed that, because of his strict adherence to the rule of law and jealous protection of the independence and integrity of the judiciary, he was forced to vacate the office. The current Chief Justice was installed in an acting position before being promoted. Despite the fact that he has publicly opposed interference in judicial processes by the Executive (as in the Zena Mahlangu case), there is also a widely held perception that the Chief Justice in some instances may have compromised himself by being too close to the Executive and by being a member of the Thursday Committee.

5.11 Because of the nature of customary law, no formal legal qualifications are required for appointment to the Swazi national courts. All members of these courts are Swazis. They are appointed by the King on the advice of the Judicial Committee of the Swazi National Council.

5.12 The appointment and discipline of the magistracy is regulated by the Judicial Service Commission (JSC) established under section 113 of the 1973 Constitution (the saved provisions).[18] Magistrates must be lawyers of at least five years' experience. The Chief Justice is the chair of the JSC. Under Regulations made in 1968 and incorporated into the Judicial Service Commission Act of 1982,[19] the Chair wields wide-ranging administrative powers and decision-making ability that perhaps should not ordinarily reside in a judicial officer, including the power to remove any judicial officer 'in the public interest'.

5.13 The central problem in Swaziland is, however, the fact that the JSC as currently constituted and mandated cannot be regarded as an independent institution that advises the King on the appointment, tenure and dismissal of judges. The first problem is its composition. The JSC is composed of the Chief Justice (Chair), the Chairman of the Civil Service Board and three appointees of the King, two of whom must possess some legal qualifications and experience.[20] The Permanent Secretary to the Ministry of Justice and Constitutional Affairs is secretary to

the JSC.[21] The Chair and one other member can form a quorum at a meeting.[22] In effect this means that the Chief Justice and the Chairman of the Civil Service Board can meet and take decisions, including that of advising the King on appointment or dismissal of judges.

5.14 The second problem and the central weakness with the JSC is the mandate given to it by the 1982 legislation. That legislation does not include judges in the definition of 'judicial officer'. Only magistrates and the office of the Registrar and Assistant Registrar of the High Court or of the Court of Appeal are defined as judicial officers.[23] Consequently, a role of the JSC in dealing with the appointment of judges can only be identified by implication from its functions in the general clause that reads: 'to advise the King in pursuance of any law providing for such advice by the Commission'.[24] As a matter of interpretation, the 'law' providing for advice from the JSC that has direct relevance here is the saved provisions in the 1968 Constitution. The provisions of the Constitution require that the Chief Justice, judges of the High Court and Judge President of the Court of Appeal shall be appointed by the King, acting in accordance with the advice of the JSC.[25] Other judges of the Court of Appeal are appointed by the King, acting in accordance with the advice of the Judge President.[26] This style of legislating is, to say the least, rather unusual. The Judicial Service Commission Act of 1982, an ordinary Act of Parliament, was enacted with the full knowledge of the existence of the saved provisions of the Constitution. It would have been more appropriate to include a reference in it directly to the saved provisions of the Constitution. The deliberate vagueness of the legislation lends itself to manipulation and conflicting interpretations. The Minister for Justice can expand the definition of "judicial office" by notice in the Gazette,[27] but has not done so. The matter should be addressed with urgency in the ongoing process of constitutional review and drafting.

Security of Tenure for Judges and Conditions of Service

5.15 The Basic Principles on the Independence of the Judiciary,[28] as described in Chapter 3, provide that the independence, security, adequate remuneration, conditions of service, pensions and age of retirement of judges shall be adequately secured by law, and that tenure shall be guaranteed until a mandatory retirement age or the expiry of their term of office, where such exists. Except for the judges on fixed-term contract of service,[29] the retirement age for judges of the High Court was 75 years prior to the 1968 Constitution.[30] The Constitution reduced the retirement age of the judges of the High Court to 62 years,[31] with a proviso that this could be changed through an Act of Parliament. Decree No 2 of 2001 purported to amend section 99 of the saved provisions of the 1968 Constitution by prescribing 65 years as the retirement age for judges of the High Court,[32] but it was subsequently repealed.

5.16 The retirement age for judges of the Court of Appeal was dealt with differently, although with the same divergence between what the Constitution provided and what a later Act prescribed. The Constitution sets the retirement age for the judges of the Court of Appeal at 62,[33] while the legislation provides for retirement at 75 years.[34]

5.17 An important aspect in the current crisis in the judiciary is the attempt by the Executive to force the Chief Justice into early retirement, allegedly contrary to the law. Acting on the advice of the Attorney-General, the King purported to terminate the services of the Chief Justice by 14 August 2001.[35] The reasoning was that the Chief Justice had attained retirement age. The Chief Justice, on the other hand, contends that since he presides in the High Court and also sits in the Court of Appeal, his age of retirement ought to be 75 and not 62. The matter has been the subject of litigation but has yet not been settled conclusively.[36] Notwithstanding the dispute, the Principal Secretary in the Ministry of Justice and Constitutional Affairs caused an advertisement for the post of Chief Justice to be published in *The Swazi Observer* of 23-24 November 2002.

5.18 The Constitution does not mandate the JSC to play any formal role in negotiating or recommending terms and conditions of service for the judges of the High Court or Court of Appeal. What is provided for are two simple identical general clauses that provide that the appointments are '…subject to any other law, upon such terms and conditions as the King may determine on the advice of the Minister [for Justice and Constitutional Affairs]…'.[37] This is reinforced by section 131 of the Constitution which provides that the salary and allowances paid to judges of the High Court and Court of Appeal, appointed members of the JSC, members of the Public Service Commission, the Attorney-General and the Director of Audit, shall be prescribed.

5.19 In effect, the lack of a uniform approach in the determination of the conditions of service of the judges, in which the JSC should have a defined, meaningful and precise role based on clear and uniform standards, makes this issue a matter of largely unregulated executive discretion. It is only recently that a prescription stipulating the salaries and allowances of the judges was published.[38] Even then, it did not disclose all the benefits accruing to all judges. This explains why the mission was inundated with conflicting interpretations of the powers and functions of the JSC, even among the judges and legal practitioners. It also explains the cloud of suspicion and rumours surrounding differential treatment of certain judges by the Executive. Clearly this has negative impact on the morale of the judges and the principle of independence of the judiciary.

5.20 The manner of removal of judges from office before the prescribed retirement age is an important consideration in assessing the degree of security of tenure that is enjoyed by the judiciary. The saved provisions of the Constitution clearly stipulate that judges of the High Court may only be removed from office for inability to perform judicial functions or for misbehaviour.[39] These provisions are almost identical to those in the Basic Principles on the Independence of the Judiciary. There is a requirement in the law that the King, acting in his discretion, may appoint a tribunal to investigate and make recommendations whenever a question of removing a judge because of alleged inability or misbehaviour arises.[40] A glaring omission is the lack of any similar provisions applicable to the removal of judges of the Court of Appeal. In fact, the Constitution is silent on this matter.

Problems of Funding and Infrastructure

5.21 As well as remuneration of and conditions of service for judges, the courts themselves are experiencing serious problems of funding and lack of adequate infrastructure. In 2001, the Judicial Commissioner complained that court officials of the Swazi national courts have no transport and must sometimes carry on buses large amounts of money collected as fines. He also complained that there were no proper court houses or staff offices. The Magistrates Courts are suffering from a large backlog of cases and need more staff. The mission was told that an independent budget was needed. Courts must at present rely on the Ministry of Justice to allocate funds to them from its budget and their budgets can therefore be cut for reasons of political expediency (such as to pay for the King's private jet). In one Magistrates Court visited by the mission there is a fax machine, but the court cannot afford to buy ink cartridges for it. Magistrates receive the same level of remuneration and terms and conditions as civil servants (although they are not allowed to join the Civil Service Union on the pretext that, as magistrates, they are *not* like civil servants). The mission was told that while there is no shortage of qualified lawyers who could be appointed as magistrates, "no attorney in his right mind would chose to become a magistrate." Personnel in the High Court also spoke of a backlog of approximately 2000 cases and of the need for more judges.

5.22 The neglect in funding, together with an apparent toleration of incompetently drafted legislation, has impacted on the justice system to the extent that the Government has been called negligent in its duties to the community to provide an adequate justice system.

Some judicial decisions which have vexed the Executive; the Executive's defiance of the judgments and its refusal to enforce the law

5.23 The five cases summarised below illustrate the effects of the systemic problems discussed above and in Chapter 4, and, more importantly, the Government's statements about these cases shows how they have been misused by the Executive to justify interference with the judiciary. The Executive, in particular the Attorney-General and the Prime Minister, have openly declared that they will not enforce court judgments which they claim are 'un-Swazi'. The cases chosen are drawn from different courts: the High Court, the Industrial Court and the Court of Appeal. To its credit, it is noted that in some of the cases the Executive has retracted its attack on the judiciary – but only after exerting extreme political pressure on the judges and the justice system.

5.24 *Lindiwe Dlamini v Qethuka Sgombeni Dlamini and Tulujane Sikhondze*, (High Court Civil Case No 3091/2002): This case involved the abduction and detention of an 18-year-old high school student, Zena Mahlangu, by royal messengers, apparently on the instruction of the King who had 'chosen' her as his 11th bride/wife. Under Swazi law and custom, the age of majority is 21 years, while under Roman-Dutch law applicable in Swaziland, the age of majority is 18. The mother of the student, Ms Lindiwe Dlamini, challenged the abduction. Because the mother

was denied access to her daughter, she applied to court for an interdict (injunction). The High Court appointed *curatricis ad litem* to approach the Royal Guest House where Ms Mahlangu was being kept with a view to interviewing her. Permission to enter was denied on the basis that only the authority of *Ludzidzini* (the royal household) would be recognised. The Attorney-General reacted by intimidating the three High Court judges hearing the case, saying they should recuse themselves or they would be dismissed. Although the proceedings in the case were later suspended, pending the outcome of negotiations between the mother and the Royal Palace, the refusal to give access to the *curatricis ad litem* and the Attorney-General's intimidation of the judges amounted to criminal contempt of court. The intimidation of the judges was also carried out by the heads of the security services: Commissioner of Police, Mr Edgar Hillary; the Commissioner of Correctional Services, Mr Mnguni Simelane; and Major General of the Armed Forces, Mr Sobantu Dlamini. The DPP reacted to this by indicting the Attorney-General and all these officials with three charges: obstructing the course of justice, sedition and contempt of court. The irony in the case is that the Swazi Royal House was contravening the same Swazi law and custom that it is supposed to nurture and develop, because 'chosen' brides are not abducted: their father's permission is sought first. On 4 November 2002, the Attorney-General wrote a letter of apology to the High Court, withdrawing and apologising for his statements. However, a very bad precedent had been set. What is also of concern to the mission is the fact that at the relevant date Ms Mahlangu was an 18-year-old finishing high school. It was reported that she had been promised designer clothes, jewellery, her own home and a BMW car. At no time in the proceedings was the reality of her 'consent' to the marriage examined.

5.25 *Ben M Zwane v Swazi Government,* (Industrial Court of Swaziland, Case No 20/2002): This case involved the forced transfer of the Clerk to Parliament on the order of the Prime Minister to a position of Principal Assistant Secretary in the Ministry of Agriculture and Co-operatives. The reason for the Prime Minister's antipathy to Mr Zwane was the fact that he had 'interfered' with the arrangements for the opening of Parliament and was therefore a 'security risk'. (Mr Zwane had apparently parked in an unauthorised area reserved for their Majesties' motorised escort and had unilaterally changed the rehearsal date for the opening.) Mr Zwane challenged this in the Industrial Court where he sought an order to declare the directive null and void. In the alternative he asked for an order to stay the directive until the matter could be resolved through normal administrative complaints and disciplinary procedures. On 6 February 2002, the Court granted an injunction against the Government and the Commissioner of Police, preventing them from interfering with Mr Zwane in 'exercising his powers, duties and functions as Clerk to Parliament, including his powers, duties and functions relating to preparations for the opening of Parliament'. The *status quo* was to be preserved pending the final determination of the case. On the day the injunction was granted, the Prime Minister wrote to the Commissioner of Police, sending copies to the President of the Industrial Court, informing him that he had 'taken a political, and not a legal, position that Mr Zwane is barred from performing his duties, until further notice'. In effect the Prime Minister was instructing a

law officer not to enforce the law, contrary to well-recognised domestic legal standards,[41] as well as contrary to clear international norms and standards,[42] and a subversion of the authority of the court. The Prime Minister had become complainant, prosecutor and judge in his own case, contrary to the tenets of natural justice. Mr Zwane immediately applied for an order compelling the Prime Minister to purge his contempt of court. The order was granted. By a letter dated 20 February 2002, the Prime Minister wrote a letter to Court in which he apologised for the contempt of court and withdrawal of the offending statement. He also informed the Court that a notice of appeal against the order had been filed in the Industrial Court of Appeal. In the meantime, the Full Court of the Industrial Court held that the Prime Minister's actions in ordering the transfer of Mr Zwane were *ultra vires* because they were contrary to Swazi law[43] which requires the Prime Minister, who does have the power to transfer civil servants, to do so only with the advice of the Civil Service Board. He cannot lawfully do it unilaterally. The similarity between the behaviour of the Prime Minister in this case and that of the Attorney-General in the *Lindiwe Dlamini* case above is striking.

5.26 In *Professor Dlamini v The King* (Court of Appeal, Case No. 41/2000) the applicant sought a declaration that the Non-Bailable Offences Order (No 14 of 1993) was *ultra vires* the saved provisions of the 1968 Constitution, in that the Order sought to oust the inherent jurisdiction of the High Court to hear bail applications. The Order provided that, notwithstanding any provision in any law, a court must refuse to grant bail for certain offences. The Court of Appeal found that the Order did indeed oust the inherent jurisdiction of the High Court and was to that extent *ultra vires* the Constitution. The Court pointed out that while in certain cases it may indeed be improper for a court to grant bail, a draconian law that categorises a large number of offences as non-bailable undermines the basic principle of the presumption of innocence.[44] This is also contrary to Article 7 of the African Charter of Rights and Freedoms as well as contrary to section 104 of the independence Constitution which was saved by Decree No 7 of the King's Proclamation of 1973. This is because the Non-Bailable Offences Order removes the High Court's inherent jurisdiction provided for in that section and so it is void for inconsistency with the section. The Non-Bailable Offences Order was not merely a fetter on the High Court's inherent jurisdiction, but a complete ouster of it because the Court was prevented from even hearing bail applications. On the State's alternative argument that the Order was in effect a valid amendment to the Constitution, the Court of Appeal was of the opinion that according to the law, a decree to amend the Constitution must be published in the Gazette. The Court of Appeal pointed out that the King's Proclamation of 1973 partly repealed the independence Constitution but retained all other laws, which were to be construed 'as may be necessary to bring them into conformity with this and ensuing decrees'. The 1973 Proclamation provided that section 144 of the independence Constitution was retained with an amendment: the term 'Act of Parliament' means an Act of the Parliament of Swaziland and 'includes an Order-in-Council'. However, the Proclamation stated that it, and its successors, were the 'supreme law of Swaziland'. Therefore, a King's Order-in-Council, being equated with an Act of Parliament, is inferior to a decree properly issued by the King. Any

Order-in-Council contradictory to a decree would be void. But, the Proclamation also provided in paragraph 14A(2) that: 'The King may, by decree published in the Gazette, amend or repeal this Proclamation … and he may by decree amend any other law'. It appears, therefore, that Orders-in-Council have a lower status than decrees, an 'ordinary' decree may amend a law, but only a decree published in the Gazette may amend Swaziland's Constitution. The correct procedure was not followed in making the Order in question. However, as this part of the Court of Appeal's decision has been questioned (and was stated to be merely an *obiter dictum* by the Court of Appeal in *Gwebu & Bhembe v R*, discussed below), precisely what sort of decree may amend the Constitution remains a matter of some speculation. It is an issue which should be clarified.

5.27 However, instead of a clarification, the reaction of the Executive to the ruling was to issue another decree (Decree No. 2 of 2001) directed at nullifying the Court decision. Among other matters contained in Decree No 2 which had serious implications for the rule of law was the reintroduction of non-bailable offences similar to those in the faulted Order of 1993. Not only were murder and rape non-bailable offences, but also car theft. This Decree also made it an offence to impersonate, insult or ridicule the monarchy, imposing the sanction of a fine of up to E50,000 and imprisonment for up to ten years. The international derision which greeted Decree No. 2 was followed immediately by the introduction of another Decree (No 3 of 2001) which repealed it but retained the Non-Bailable Offences Order. (The King, on his own public admission, stated that when he assented to Decree No. 2 he was unaware of its contents). With such tit-for-tat actions initiated by the Executive, a collision course between the Executive and the judiciary was set. The time in which all this occurred was quite short: the *Professor Dlamini* decision was delivered on 14 June 2001; Decree No 2 was signed on 22 June 2001; and Decree No 3 was signed on 24 July 2001.

5.28 The final round of the assault by the Executive on the judiciary and the rule of law played itself out in late 2002. Along with the *Lindiwe Dlamini* case (above), the Macetjeni and kaMkhweli areas 'evictions/chieftainship' case was heard: *Madeli Fakudze v The Commissioner of Police, Attorney-General and Abraham Dladla,* (Appeal Case No 8/2002). The case appears to be the tip of an iceberg of political power struggles within the monarchy. The case arose when the Minister for Home Affairs gave orders for many hundreds of Swazis, including their Chief, to be evicted and removed from the Macetjeni and kaMkhweli areas of Swaziland. Apparently, the move was effected with a view to creating room for Prince Maguga to be installed as Chief of the areas in question. The courts repeatedly made orders requiring that the evictees be allowed by the police and security forces to return to their homes and land. The removals had been effected under section 28(3) of the Administration Order (an Order-in-Council of 1998) allowing the Ngwenyama to instruct the Minister for Home Affairs to remove any person from one area in Swaziland to another. Section 28(10) provided that: 'A Court shall not have jurisdiction to inquire into any order made under subsection 3'. The Chief Justice of the High Court, Sapire CJ, found that the court nevertheless had jurisdiction to hear the matter because

the Ngwenyama's order did not stipulate the date of the removal or the area to which the people were to be sent. Consequently, these issues could be litigated and the Court stayed the execution of the order until the people could exercise their traditional rights to appeal to the Ngwenyama (finding so with the assistance of assessors). The applicants attempted to do this, but after being kept waiting for some hours they were informed by officials that they could not lodge their petition, that the matter was closed, and they were then "chased away" (See *Chief Mtfuso II & Others v Swaziland Government* – Court of Appeal, Case No. 40/2000). However, in another hearing one month later, Sapire CJ reversed his earlier decision. On appeal, the Court of Appeal held that Sapire CJ had no grounds to do this. The original court order was restored and the applicants attempted to return to their homes. However, they were prevented by the police from doing so. The applicants returned to the High Court for relief. The Full Court of the High Court (Case No 2823/2000) held that there are three types of legislation in Swaziland. The first are decrees of the King made pursuant to the Proclamation of 1973. The extent to which these could validly be made had never been fully tested, but the Full Court intimated that this power should only be used in emergencies on proper advice. The second type are Acts of Parliament, made pursuant to the Constitution, as amended. The third type are Orders-in-Council, of which the Administrative Order was one. Orders-in-Council are made pursuant to the Legislative Procedure Decree (No 1 of 1998) which is an enabling instrument. However, the High Court found that Decree to be invalid for two reasons. First, part of it was incomplete (details of specific Legal Notices on which it relied had been left blank in the document, but the document had still been given to the King to sign, and was so signed). It could be of no force or effect because of vagueness. Secondly, the Decree was only expressed to apply until the establishment of the next Parliament (which did occur prior to the Administrative Order being enacted, so the Decree by its own terms had ceased to exist by this time.) The Administrative Order therefore had no constitutional basis. An injunction was then sought against the police and contempt proceedings initiated against the responsible officials who were still preventing the applicants returning home. These orders were granted, but an appeal was lodged to the Court of Appeal on the basis that the refusal to allow the return had been for reasons of national security. However, no evidence to support this assertion was tendered and the appeal was dismissed (Case No 8/2002).

5.29 The Government also appealed against the decision to set aside the removal orders (Case No 6/02). The Court of Appeal dismissed this application as well, holding that, even if the Administrative Order were valid and operative (a question which it found unnecessary to answer), the procedures required under it had not been properly carried out (service of the order on the people named in it and on the local police not having been effected). As well, the Court of Appeal held that the King should not have delegated to the Minister for Home Affairs his discretion in deciding the important issue of the precise area to which the people were to be moved. What could amount to 'a fundamental invasion of human rights' should not be delegated. As the procedure set out in section 28 of the Administrative Order had not been complied with, the provision in section 28(10) ousting the Court's jurisdiction could not apply.

5.30 These court orders have been ignored. Contempt of court proceedings have also led to rulings that have not been enforced. The last order for committal of the Commissioner of Police and Superintendent Agrippa Khumalo for contempt of court for preventing the return of the evictees was given in the Court of Appeal on 22 November 2002 (Case No 38/02). The order was not obeyed.

5.31 In the meantime, the case of *Gwebu & Bhembe v R* (Cases Nos 19-20/2002) came before the Court of Appeal. It involved the validity of Decree No 3 of 2001 (the Decree which had repealed Decree No 2 but which reinstated the Non-Bailable Offences Order of 1993). The Court of Appeal held that Decree No 3 was contrary to Article 7 of the African Charter of Human and Peoples' Rights (the presumption of innocence). The Charter has not been incorporated into Swazi law. Nevertheless, the Court held that the Charter could still be used as an aid to interpret Swaziland's laws. An argument that King Sobhuza II had no power to repeal the independence Constitution in 1973 by Proclamation (on which the validity of Decree No 3 depended) was considered with some sympathy but ultimately rejected by the Court because of tacit acceptance by the Swazi population and because to do otherwise might lead to anarchy. However, the King's Proclamation of 1973 included an undertaking that the King would only exercise his power in collaboration with the Council of Ministers, which was reinforced in 1978 by the Establishment of Parliament Order which provides for the composition of Parliament and the Executive. Section 80 of that Order provides that existing laws continue to be valid (subject to their conformity with the Proclamation and this Order) and that the Proclamation itself continues in 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 of Swaziland and brought into force and effect'. As the High Court's jurisdiction under the independence Constitution was unaffected by the 1973 Proclamation (ie it was unlimited) and as the Proclamation could only be amended after a new Constitution came into force, the jurisdiction of the High Court must remain inviolable and Decree No 3 which purports to alter this is constitutionally invalid.

5.32 It should be noted that the Establishment of Parliament Order 1978 was in fact repealed by the Establishment of Parliament Order 1992. No mention is made in the judgement of the 1992 Order. This may mean that it might not be legally necessary for a new Constitution to be in place for the Decree to have effect. It will depend on the extent to which the 1992 Order repeals or retains elements of the 1978 Order. However, instead of taking the legal course of seeking a declaration to clarify the judgement, the Prime Minister issued Press Statement 22/02 on 28 November 2002 in which he accused the judges of being 'influenced by forces outside our system and that they are not acting independently'. The statement went further to affirm that 'Government does not intend to recognise the two judgements of the Court of Appeal [the Fukudze and Gwebu cases]'. The mission was informed that while the cases were discussed in Cabinet, this statement was not discussed and it did not in fact reflect a consensus position of the Government. It is these charges and defiance by the Prime Minister which prompted all five judges of the Court of Appeal to tender a letter of resignation. The letters clearly indicate

that none of the judges is prepared to consider returning to his post unless and until the unfounded allegations against them and the statements defying court orders are retracted unconditionally. To worsen the situation, the Prime Minister continues to insist that the return of the evictees to their ancestral land would cause much bloodshed, while giving no evidence to substantiate this claim. On the remission of the *Gwebu* case to the High Court to determine whether the two applicants should be granted bail, the Attorney-General sought orders that the invalidity of Decree No 3 (which repealed Decree No 2) meant that Decree No 2 (and, as a consequence, its non-bailable offences provisions) was revived. The High Court refused to determine the matter on the basis that the Prime Minister was in contempt of court because of his statement. Until that contempt was purged, the Government could not come before the courts with 'clean hands' and so its applications would not be entertained. Litigation involving the Government of Swaziland is therefore grinding to a halt.

5.33 What needs to be emphasised is that the *Fakudze* case does *not* mean that the courts can fetter the King's power: it means that if the King has *properly* exercised his powers in accordance with existing laws, a court cannot interfere with this; if the King has not properly exercised his powers this is tantamount to the King not having acted at all. The *Gwebu* case relates only to the validity of Decree No. 3 and does *not* purport to strike down all royal decrees. No question of Swazi customary law was in issue. Assertions that the cases do otherwise are patently wrong.

Notes

1 Interpretation Act 1970, section 2(1) read with the King's Proclamation to the nation of 12 April 1973.

2 General Administration Act 1905, section 3.

3 Established under the Swazi Courts Act, No 80 of 1950, as amended.

4 *Id*, section 22.

5 *Id*, section 28.6 For example: Court of Appeal Act, No 74 of 1954; High Court Act, No 20 of 1954; and Magistrates' Courts Act, No 66 of 1938.

7 *Ibid*.

8 Swazi Courts Act, No 80 of 1950, section 11.

9 *Id*, sections 7, 8.

10 *Gwembu & Bhembe v R* (Cases No 19-20/2002)

11 Press Statement 22/02 entitled 'Court of Appeal judgements – Decree Number 3 of 2001, and the Contempt of Court Case against the Police'.

12 Act No 38 of 1968.

13 Stanley Sapire CJ.

14 Justice Mathews Nderi Nduma.

15 Annandale J.

16 RN Leon JP, NW Zietsman JA, J Browde JA, J H Steyn JA, and C E L Beck JA.

17 *Times of Swaziland*, Sunday 5 January 2003, p 10.

18 Judicial Service Commission Regulations, 1968, Regulations 2(2)(c) and Parts III and IV.

19 Act No 13 of 1982, section 15 read with section 4.

20 *Id*, section 3. Contrast this with the provision under section 113 of the 1968 Constitution which provides for only three members of the JSC – the Chief Justice, the Chair of the Public Service Commission and one other member appointed by the King.

21 *Id*, section 3(5).

22 *Id*, section 7.

23 *Id,* section 5(2).

24 *Id*, section 5(1).

25 1968 Constitution, sections 98(1) and 106(1).

26 *Ibid*, section 106(2).

27 Judicial Service Act, section 5(2)(c)

28 UN Gen Ass Resolution 40/32 of 29 December 1985 and 40/146 of 13 December 1985.

29 The mission was informed that the current Chief Justice, Justice Sapire, was initially on a contract of employment but this was regularised when he was appointed Chief Justice. The mission was also informed that Justices Annandale (High Court) and Nduma (Industrial Court) are on contract.

30 High Court Act 1954, section 3.

31 Constitution, section 99 (1) and (5).

32 Decree No 2 of 2001, section 14.

33 Section 107(1) and (5).

34 The Court of Appeal Judges (Age of Retirement) Act, No 1 of 1972, as amended.

35 Legal Notice No 68 of 2001.

36 *Minister of Justice and Constitutional Affairs v Sapire, In re: In ex parte application of Sapire, Stanley Wilfred*, High Court Civil Case No 1822/ 2001; *Minister of Justice and Constitutional Affairs v Stanley, In re: In ex parte application of Stanley Wilfred Sapire*, Court of Appeal Civil Appeal No 49/2001.

37 Constitution, sections 98(1) for High Court judges, and 106(1) for judges of the Court of Appeal.

38 Legal Notice No 147 of 15 November 2002.

39 1968 Constitution, section 100(1).

40 *Id*, section 100(2)-(5).

41 The Police Act (No 2 of 1957) as amended provides: 'Every member of the Force shall promptly obey and execute all orders and warrants lawfully issued to him by any competent authority' (section 7(3)).

42 Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169 of 17 December 1979.

43 Civil Service Order 1973 together with the Public Service Commission (General) Regulations 1963 and the King's Proclamation No 1 of 1981.

44 In a separate case, Justice Thomas Masuku restated the principle of judicial discretion in granting or refusing to grant bail to accused persons – see S Fakudze, 'Bail Will Not Be Automatic', *Times of Swaziland*, 5 February 2003, p 2.

Chapter 6: **Other Nascent Players**

The Law School and the Law Society

6.1 The judiciary and the institutions administering the law draw their human resources mainly from the Law School in the Faculty of Social Sciences at the University of Swaziland and from the legal practitioners who are members of the Law Society of Swaziland. The Law School produces about 20 to 30 lawyers a year. It has little financial support and the library resources are poor. There is little contact between the Law School and the legal profession and no judges or advocates sit on the University Senate. The mission was told: "No-one seems to care about the Law School." This is made worse by the fact that there is no official reporting of judicial decisions, except for the select cases published in South Africa. Access to judicial decisions is only possible by photocopying the judgements. In a common law system, the absence of up-to-date law reports means that the state of the law is uncertain. This has a negative impact on the quality of teaching and learning as well as on legal practice. Nevertheless, the delegates, when they interviewed law students, were impressed by their candid comments and constructive criticism of the legal and political system in Swaziland. This potentially rich future resource is, for lack of proper nurture, being squandered.

6.2 The Law Society of Swaziland is regulated by statute.[1] Its membership is drawn from attorneys and advocates. Advocates are admitted to practice by the High Court and attorneys are similarly admitted but must also file their papers with the Attorney-General. The membership of the Society is small, although it has an active Council. In the past, the Society has not been vocal enough on matters affecting judicial appointments and the interference by the Executive with the judiciary. Recently however, the Society has added its voice to calls for disbanding the Thursday Committee, non-interference with judicial proceedings, respect for court orders and complained about the apparent irregularities in the appointment of the Attorney-General. It is understood that following the commencement of proceedings to challenge the Attorney-General's appointment, the latter wrote to the attorney lodging the case and questioned both his nationality and his right to practice. One of the applicants in that case also received a letter from the Attorney-General advising him that he was required to file the accounts of his firm at the Attorney-General's office within 21 days.

Parliament

6.3 It is the opinion of the mission that the Executive has succeeded in making in-roads into the judiciary and administration of law partly because of the weakness of the legislature. The weakness of Parliament is in part attributable to a political system which stymies organised opposition by banning political parties. Even though there are two fairly active political parties outside Parliament operating as an 'opposition',[2] the law as it presently stands does not allow the exercise of freedom of association in politics. This is despite the 1978 Decree that reinstated

Parliament as an important institution of State and Government. Even though the present legislature is moribund and plays largely a rubber stamp role for the Executive, there are from time to time signs of democratic debate. For example, Parliament recently opposed the purchase of an expensive jet for the King. It is understood that the Executive is still manoeuvring with a view to circumventing this rare show of independence and courage. Most recently, the King is understood to have stated that the purchase of the jet was on hold.

Civil Society

6.4 The mission was generally impressed by the small but vibrant urban-based civil society structures and institutions, whose representatives it met. These included, in addition to the Law Society, human rights organisations, representatives from the print media, trade unions, (unrecognised) political parties, business organisations, academics, students, and activist women involved in promoting gender equality. The various civil society institutions formed the Swazi Coalition of Concerned Civic Organisations in 2002, which has lately become very active in calling for reforms. The mission had the impression, however, that the majority of Swazis who live in remote rural areas with traditional leaders and minimal access to resources, had little contact with these urban-based organisations. Those who are urban-based and educated clamour for constitutionalism and democratisation, but not for the abolition of the monarchy. Those in rural areas have little or no appreciation of the constitutional crisis and appear to have an unwavering acceptance of all decisions which appear to be made by the King.

6.5 There is no legally-guaranteed freedom of association or assembly. Meetings of the existing but non-recognised political parties are suppressed by the security services and leaders of opposition movements are routinely harassed. Mario Mauku, the leader of PUDEMO, has been charged with (and acquitted of) sedition more than once. Trade unions have also been harassed and peaceful protest actions are sometimes denied without any reasonable justification. When trade unions recently attempted to meet to discuss the Macetjeni evictions case, the meeting was broken up by the police. On occasion, the courts have reaffirmed the right of peaceful assembly and protest by trade unions and workers. The termination of employees who strike has been overturned by the Industrial Court on the basis of natural justice[3] and compensation ordered. Government attempts to prohibit protest marches by injunction have similarly failed for lack of good cause.[4] The mission considers nevertheless that the absence of clear constitutional guarantees on basic human rights and duties is a major factor in the general curtailment of freedom of association and peaceful assembly in Swaziland and a fetter on civil society generally.

Media

6.6 There is a small but vibrant print media which is concentrated in the main urban areas such as Mbabane and Manzini, and a fledgeling television industry. At the time of the mission,

newspapers openly published critical reports of illegal or irregular acts and practices by State and government functionaries. They also published in full the text of a one-page advertisement by the Swazi Coalition of Concerned Civic Organisations demanding, among other things, that the irregular purchase or lease of a jet for the King be rescinded and the rule of law be restored. They also published information about the mission itself.

6.7 There are approximately 50 journalists in Swaziland, most of them Swazis, with only a handful of foreign journalists. The journalists have a professional union but it deals mainly with issues of ethics. The journalists who work in state and government institutions have their own workplace association. In some instances, there have been attempts to use industrial/labour relations laws to discipline media workers who engage in protest action. Where such actions have been challenged in the courts, the results have been generally protective of media freedom.[5] However, recent reports by media groups in southern Africa have accused the Government of silencing the press through legislation on defamation, national security and sedition as well as licensing laws.[6] In particular, the *Guardian* was closed down by the authorities, while the *Nation Magazine* was threatened with closure.

Constitutional Review and Drafting Committees

6.8 On 19 February 2002, the King proclaimed the establishment of the Constitutional Drafting Committee (CDC). It is chaired by a respected Swazi diplomat, Prince David Dlamini. It is composed of 15 other members drawn from Parliament, the business community, the religious community and representatives of the Office of the Attorney-General. Although the majority of the members are men, there is a strong representation of women. A team of independent international experts sponsored by the Commonwealth support the work of the CDC. It was expected to finalise its work and to present the draft constitution to the King within a period of eight months. By November 2002, it had finalised a draft but delayed its presentation to the King because he was observing his annual seclusion. The draft must be officially handed to the King who would then authorise its presentation and publication to the nation. This has not yet happened and enquiries by the mission about the likely release date resulted in no authoritative answer being given.

6.9 The CDC was given an open and wide mandate. It had to draw from the report of the Constitution Review Commission (see 2.50 above), documents pertaining to the current constitutional framework, the independence Constitution, the constitutions of other countries, international instruments and the 1992 Tinkhundla Review Commission Report.[7] The CDC was specifically required to consider and make provision for such issues as the entrenchment of the monarchy and other Swazi traditional institutions, fundamental human rights and freedoms, mechanisms for the amendment of the new constitution and other matters relevant to good governance.[8] The mission was assured that the CDC invited a cross section of individuals and experts to make representations and the King personally invited the IBA to comment on the final draft once it is released.[9] The King did not apparently interfere with the

work of the CDC except on an isolated occasion when some detractors misinformed him that the draft provided for a multi-party political system. The CDC is reported to have defended itself by pointing out to the King that the draft dealt with issues related to fundamental rights and the freedoms of association and assembly. Overall, the final product is said by those who took part in the drafting to have the stamp of the Swazi nation, while incorporating reasonable aspects of international best practices for modern constitutional monarchies. In the opinion of the mission, the resolution of the current constitutional crisis depends to a great extent on the speedy formal adoption, proclamation or enactment of a new constitution appropriate both to Swaziland and to internationally recognised human rights.

Notes

1 Legal Practitioners Act, No 15 of 1964, section 34.

2 Ngwane National Liberatory Congress led by Obed Dlamini and Peoples United Democratic Movement (PUDEMO) led by Mario Masuku.

3 *Hlope & Others v Swazi Television Authority* (Case No. 155/2000)

4 See *Swazi Government v Swazi Federation of Trade Unions and Swazi Federation of Labour,* Industrial Court, Case No 347/2002, judgment delivered on 8 January 2003.

5 See, for example, the *Hlope* case, above.

6 *Media Law and Practice in Southern Africa No 17: Swaziland* (Article 19 – Africa Centre for Free Press & Media Institute of Southern Africa (MISA), June 2001.

7 Establishment of the Constitution Drafting Committee Decree 2002, section 3(1).

8 *Id*, section 3(2).

9 A team of 14 international constitutional experts has been assembled for this purpose.

Chapter 7: Conclusions and Recommendations

'… the Courts are perceived to be an appendage, if not an instrument, of the Executive.'

Masuku J, *Fakudze v Commissioner of Police, Attorney-General & Another*

7.1 Judicial independence is a vital element of the rule of law. The mission has concluded that interference with the judiciary is a major problem in Swaziland and that this is exacerbated by systemic issues. That interference, and the systemic issues which allow it to exist and even flourish, must be addressed as a matter of urgency.

7.2 The interference with judicial processes by the Government, the refusal to accept judicial rulings, and the encouragement of the police to ignore court orders, are breaches of Swaziland's domestic laws as well as of its human rights obligations under the African Charter on Human and Peoples' Rights. They have adversely affected men, women and children in Swaziland, particularly with respect to the unlawful eviction of hundreds of people from their traditional homes and their forced relocation in a manner which is contrary even to Swazi customary law.

7.3 Much of the effort by the Government to address these issues has either been half-hearted or driven by the political ambitions of a few powerful people, and in many instances has degenerated into bullying and name-calling. It has all been ultimately so ineffective and counter-productive that the legal system in Swaziland is grinding to a halt: there is no final court of appeal; the courts are refusing to hear cases brought by the Government; and there is no Director of Public Prosecutions. Moreover, Swazi custom itself is being subverted: the manner in which Zena Mahlangu was spirited away was contrary to custom; the manner in which hundreds of people were evicted from the traditional homes in the Macetjeni and kaMkhweli areas was contrary to custom; custom requires a consultative approach to problem solving, but when an *Indaba* was called so that the King could speak to lawyers, judges and politicians, the Law Society and non-government lawyers were not invited to attend. Another example is the organised mass 'stay aways' to protest the Government's handling of these and other issues. The response of the Government has been to take action in the Industrial Court to stop the protests by court injunction rather than undertaking a serious and comprehensive engagement with the people. If the Government does not have the courage at least to listen to views opposed to its own, the crisis can only be aggravated. The inability of the Government to come to grips with these issues is further illustrated by the tardy process of the constitutional review, which is the most significant single issue in the reform process. Although the King commissioned a new Constitution in 1996, with a delivery date set for two years later, the process is now dragging into its seventh year.

7.4 The new Constitution should embody the customs and traditions of Swaziland in so far as they do not conflict with fundamental notions of human rights and the rule of law, which must also be supported. The extent to which current problems in Swaziland are blamed on 'foreigners' and on articulate opposition groups who, it is claimed, are driven by 'anti-Swazi' sentiment, is counter-productive and reflects a refusal to acknowledge or address systemic shortcomings.

7.5 Those systemic issues which need to be addressed include: the true and proper interface between Swazi law and custom, the common law system, and Swaziland's international human rights obligations; the appointment and tenure of judges; the remuneration and conditions of work of judges and court personnel; the provision of adequate infrastructure for the systems of courts; the process of high-level decision making (in particular the use of informal un-Gazetted committees to drive Government policy and which subvert constitutionally established bodies); the training of police; adequate funding of the Law School; the freedom of the press; adequate safeguards for the freedoms of opinion, association and assembly; the qualifications of, and fitness for office of, senior members of the Executive and the Civil Service and the processes of appointment to these positions; transparency in the decision-making process overall so that the people can clearly see who is making decisions; and a proper respect for civic organisations. Inadequate attention to these issues has created a political vacuum in Swaziland which has unfortunately been filled by people who appear to have their own interests, rather than the interests of Swaziland as a whole, at heart. As in South Africa in the recent past, injustice, corruption and illegality must be courageously faced, so that the problems can be dealt with and the healing process commence.

7.6 Other countries in the southern African region have had to face similar problems. Nelson Mandela, a traditionalist from a Zulu royal family, now lives in and supports a constitutional democracy. In particular, the South African Law Commission produced an extensive report on traditional legal systems and how they can properly function and interact with law produced in the context of internationally recognised principles of human rights. The process is difficult, but by no means impossible. The mission refuses to believe that Swazi tradition and custom is lacking in compassion, mercy and natural justice. Indeed, it saw much evidence to the contrary, particularly in the consultation process which is a principal feature of it, leading to the generation of norms based on consensus. The mission equally believes that systemic issues, and in particular a self-interested rump of individuals, are subverting this traditional process and encouraging the perception that traditional Swazi procedures of law and government are farther from internationally recognised norms than they in fact are. The King should promote the Swazi custom of consultation – *true* consultation: his Majesty needs to have a dialogue with the people and not just with those who have access to the palace. These issues should be faced and dealt with, and those people fomenting misconceptions removed, as his Majesty is entitled to be properly advised.

7.7 Swaziland has no better opportunity to do this than now, while it is in the process of a constitutional review. If it does not tackle these problems it will not only continue to face

regional and international opprobrium; its people will suffer. In March 2003, a suspect at Zakhele Remand Centre was denied freedom despite the fact that he had obtained a liberation warrant from a court of law. That suspect is 15 years old.

The Way Forward: Recommendations

Efforts to put Swaziland back on the path of democracy, respect for the rule of law and scrupulous adherence to the revival and protection of the independence of the judiciary must address the following:

1. Adoption of a clear timetable for publication and proper public dialogue on the draft Constitution in the form in which it was presented to the King by the Constitutional Drafting Committee. This should be followed by timely adoption and promulgation of the new Constitution.

2. There should be a clear constitutional or statutory provision acknowledging and clarifying the relationship between, and the status of, Roman-Dutch common law and customary law in Swaziland. This should be done with an understanding that both sources of law are dynamic and evolving. Ideally, neither ought to be superior to the other.

3. While the Constitution may secure the position of the monarchy, as it is likely to do, the powers of the King should be clarified in it, with an appropriate indication of the role of the High Court in the review of all legislative and administrative actions.

4. As the absence of clear constitutional guarantees on basic human rights and duties is a major contributory factor to the general curtailment of freedom of association and peaceful assembly in Swaziland, this should be addressed in the new Constitution. In particular, the fundamental rights and freedoms ought to take into account all aspects of economic, social, cultural, civil and political rights, freedoms and duties contained in African regional and international human rights instruments. The rights of women should also be addressed and protected. The Constitution could specifically incorporate the African Charter on Human and Peoples' Rights, which is already a legal obligation for Swaziland.

5. Legislation governing the appointment, tenure, conditions of service and removal of judges and magistrates should be revised and consolidated, and the new Constitution must incorporate clear protective guarantees in this regard. In particular, the legislation establishing the Judicial Service Commission must be revised and provide for the independence of the body in matters pertaining to recommendations to the King on judicial appointments, conditions of service for judges and magistrates, and their removal from office.

6. The separation of executive and judicial authority of the State and Government must be prioritised. This should, amongst other things, include disbanding the Thursday Committee, the independence of the offices of the Attorney-General and the Director of Public Prosecutions being guaranteed, and rescinding the pre-eminence of the Prime Minister's

position in matters relating to the appointment or dismissal of judges and magistrates. The function of the Office of the Attorney-General as principal legal adviser to the State and Government must be separated from its role as principal litigating counsel.

7. The independence of Parliament and parliamentarians from the hegemony of the Executive should be enhanced along the lines recommended in the Commonwealth's Latimer House Guidelines.[1]

8. A review should be undertaken to determine the criteria upon which suitable people may be considered for official positions in Government and the civil service, so that the King may be properly and consistently advised. Scrutiny of the suitability of all incumbents in such positions should be undertaken.

9. To encourage a more proactive approach to parliamentary scrutiny of the rule of law, there should be created within Parliament a standing committee on justice to whom the judiciary and the Judicial Service Commission may relate matters affecting the judiciary and the administration of justice, for information and attention.

10. The courts should be given independent and adequate budgets and the current case backlog should be addressed as a matter of urgency.

11. There should be an immediate negotiated resolution to the current impasse between the judges of the Court of Appeal and the Executive, facilitated by experienced and respected intermediaries. (The IBA, through its Human Rights Institute and its Judges' Forum, could assist with this). The Government must, in this process, consider at least the making of: an unreserved apology to the former judges of the Court of Appeal for the Prime Minister's statement of 28 November, 2002; an unequivocal withdrawal of the contention that it has the option of ignoring court decisions as it chooses; and an undertaking to diligently implement court decisions in the future.

12. Judges should be (re)appointed to the Court of Appeal immediately. Those judges who resigned should be invited to resume their appointments.

13. A strategy for effecting greater representation of Swazis at all levels of judiciary should be developed and implemented gradually.

14. Judgments of the higher courts should be reported expeditiously and regularly as a matter of urgency. Funds should be earmarked for this purpose and appropriately qualified personnel engaged.

15. To strengthen independent and constructively critical voices in defence of the rule of law and judicial independence, the University of Swaziland Law School should be strengthened and properly funded, particularly with a well-resourced library and information technology facilities. Links between the Law School and the legal profession must be strengthened and there should be a representative of the judiciary on the University of Swaziland Senate.

16. Members of the Law Society of Swaziland should continue to play, and enhance, their role as protectors of the independence of the legal profession and promote the independence and integrity of the judiciary. Amongst other things, the representatives of the Society in the Judicial Service Commission should reject co-option on illegitimate bodies such as the Thursday Committee. The watchdog responsibility and role of the Society should be enhanced. The capacity-building work that the IBA is currently doing with the Law Society should be made known to all members of the profession, to maximise its effectiveness.

17. Swaziland should meet its reporting and other obligations under the international and African regional human rights instruments to which it is a party, and, as a UN member, adhere to the principles of United Nations instruments such as the Basic Principles on the Independence of the Judiciary and the Code of Conduct for Law Enforcement Officials. All relevant officials should be educated in these obligations. Swaziland should seriously consider ratification of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Discrimination Against Women.

18. The international community has a responsibility of solidarity to help Swaziland extricate itself from its present crisis. The UNDP, UNICEF and WHO are already making positive contributions in their respective areas of competence, especially in capacity building and institutional support. In this regard, the UN agencies in Swaziland should be strengthened. Countries with presence in, or influence with, Swaziland such as South Africa, Britain, and the United States should continue to provide assistance and support to the people of Swaziland. Above all, the neighbouring countries of South Africa and Mozambique must assume a robust role in mediating the current stalemate between the Executive and the judiciary.

19. Civic education programmes should be established in schools and also made available for all Swazis.

20. A national action plan to develop and implement strategies to achieve these recommendations should be devised. This could include revitalising the Law Reform Commission, establishing the Office of the Ombudsman, and instigating Codes of Proper Conduct for politicians and civil servants.

Note

1 In J Hatchard and P Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (London: Cavendish Publishing Ltd, 1999), Chapter 2.

Appendix I

About the International Bar Association

the global voice of the legal profession

In its role as a dual membership organisation, comprising 16,000 individual lawyers and 180 Bar Associations and Law Societies, the International Bar Association (IBA) influences the development of international law reform and shapes the future of the legal profession. Its Member Organisations cover all continents and include the American Bar Association, the German Federal Bar, the Japan Federation of Bar Associations, the Law Society of Zimbabwe and the Mexican Bar Association.

Grouped into three Sections – Business Law, Legal Practice, and Energy & Natural Resources Law – more than 60 specialist Committees provide members with access to leading experts and up-to-date information as well as top-level professional development and network-building opportunities through high-quality publications and world-class Conferences. The IBA's Human Rights Institute works across the Association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide.

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