

Swaziland: The King's Constitution

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Introduction

On 31 May 2003, after a delay of seven years, King Mswati III finally unveiled the draft of a new national constitution for Swaziland, at Ludzindzini royal village. While this new constitution insures that governing power remains firmly in the hands of the monarchy, it is an attempt to balance the concerns of the royal establishment (sub-Saharan Africa's last absolute monarchy) and local and international demands for political reform and the acknowledgement and respect of human rights. However, what it fails to address is the status of political opposition parties, banned since 12 April 1973 when Mswati's father, King Sobhuza II, suspended the constitution. In fact, while a new provision in the Bill of Rights guarantees "freedom of assembly and association", there is no specific mention of political parties.

As a consequence, the question of what role the monarchy must play in Swazi politics (a problem that has bedevilled this tiny kingdom ever since it gained its independence from Britain in 1968) remains fundamentally untouched.² More specifically, this relates to the ways in which a genuinely inclusive political system, one able to incorporate the demands of a "modern" state, can coexist with the vast power and privileges accruing to those owing their position to a traditional system centred on the ruling Dlamini royal lineage. This paper will attempt to identify the progress (or the lack thereof) reached so far towards creating a democratic and participatory-based system through attempts at reforming Swaziland's constitution.

Historical Background

At independence, Swaziland saw the establishment of a parliamentary multiparty system. In reality however, this system was dominated by a political creation of the Dlamini's clan, the Imbokodvo National movement (INM). In the elections of 1962 and 1967, the INM won all the seats.³ The next few years would see King Sobhuza II out-

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² B.P. Wanda, The shaping of the modern constitution in Swaziland: A review of some social and historical factors, *Lesotho Law Journal*, 1990, Vol. 6, NO. 1.

³ R. Cornwell, Swaziland: unconstitutional monarchy?, unpublished ISS paper.

manoeuvre a relatively small group of modernists who sought to reduce the role of the king to that of a constitutional monarch or figurehead. In the elections of 1972, the INM's parliamentary majority was breached when three of seats were lost to the opposition. This meant that the INM (and by implication the King) could not amend the Constitution and pass new legislation unopposed. While the INM and the King sought to overturn this election result in a long and drawn out court battle, these attempts proved unsuccessful. It is widely accepted that it was this defeat and the fear of losing power that ultimately led the late King Sobhuza II, during April 1973, to suspend the constitution. The King proclaimed:

- that the Constitution has failed to provide the machinery for good government and for the maintenance of peace and order;
- that the Constitution is indeed the cause of growing unrest, insecurity, dissatisfaction with the state of affairs in our country and an impediment to free and progressive development in all spheres of life;
- that the Constitution has permitted the introduction into Swaziland of highly undesirable political practices alien to, and incompatible with, the Swazi way of life; these practices were seen by the King as designed to disrupt and destroy Swazi's peaceful, constructive and essentially democratic methods of political activity. Sobhuza considered that this engendered hostility, bitterness and unrest.⁴

The Swazi monarch then assumed all executive powers previously granted by the constitution to the Prime Minister and the Cabinet. From that day onwards, the King has been able to act wholly in his own discretion, consulting whomsoever he wishes, not bound by law. The decree quoted above gave him the power to detain without charge, and for a renewable sixty days, any person deemed to be a threat to public peace. In addition, the courts lost all jurisdiction to deal with cases of detention.⁵ In reality, Sobhuza II 'killed' the Bill of Rights together with provisions on citizenship, Parliament and the judicial and public service. Political parties were banned, and meetings of a political nature, including processions and demonstrations, had to be authorised by the Commissioner of the Police. This spelled the end of political freedom in Swaziland. Traditional sentiments triumphed over modern political initiatives granted under a Parliamentary democratic constitutional arrangement. From 1973 to 1978, Sobhuza II ruled without an elected Parliament, making laws by decree, when the Tinkhundla system of Government was first put in place as an experiment.

King Mswati III's Reforms

Since his ascension to the throne, Mswati III has made several attempts to reform the constitution. After the reports of two Vuselas (consultative commissions established to canvass Swazi opinion on constitutional matters but led by Mswati's brothers), the king established a Constitutional Review Commission (CRC) in 1996. The criteria for appointing the Commission remained the king's secret. According to Joshua Bheki Mzizi, "the terms of reference are reminiscent of the royal attitude of 1959 in that

⁴ In this regard see the original Proclamation by His Majesty King Sobhuza II, King's Proclamation 12th April 1973, Sections 2 (a), (b) and (c).

⁵ N Hlatshwayo, Constitutionalism and Swazi culture: A recipe for harmony or disaster, Unpublished paper presented at the Institute for Democracy and Leadership Conference, 1994.

Commissioners are taking part in the exercise in their individual capacities, and group representations are disallowed throughout the project.”⁶

The chairmanship of CRC was given to Prince Mangaliso Dlamini, a law professor and Mswati’s brother. However, in February 2001, four months before the CRC completed its review, most human rights and pro-democracy organisations in the Kingdom rejected the process and the up-coming report. This was partly a result of the fact that the chairman of the commission told a gathering at the royal Kraal that their investigations had demonstrated that the people were satisfied with the existing system. His deputies added, for good measure, that the king’s powers would be enlarged and that the country did not want trade unions.⁷ In December 2001, the King announced the formation of a Constitutional Drafting Committee to work on a final draft by the end of 2003.

During February 2002, Mswati’s revocation of the decree on ‘enlarged royal powers’ gave rise to speculation that the new constitution might include a number of more liberal provisions. However, these hopes were dealt a severe blow by the introduction of the Internal Security Act in June 2002, which stipulated harsh penalties for anyone participating in or organizing political demonstrations, as well as further restricted labour union activity.

A new constitutional dispensation for Swaziland?

The Constitutional Drafting Committee did in two years what the original commission had failed to do in five. Commissioners consulted legal and social experts, and travelled to Britain to study its parliamentary monarchical system, which King Sobhuza had rejected in 1973. The draft constitution under discussion would have pleased the late King Sobhuza because it ensures that political power remains centred in the monarchy. It does this by guaranteeing that the Swazi king remains the head of the executive, and responsible for the appointment of the prime minister, the cabinet, chiefs and judges. In addition, no bill passed by parliament becomes law without his approval. The new draft constitution will also see the re-establishment of the traditional post of ‘Authorised Person’, who would assume executive duties if the king should die or become incapacitated.

However, it reverses centuries of Swazi cultural precedent in two important ways:

- It removes the king’s ability to rule by decree; the Court of Appeal is replaced by a Supreme Court (to become the kingdom’s highest judicial body);
- It lifts Swazi women out of their legal minority status; recognises that chiefs can no longer function in isolation; and acknowledges that in modern society, groups such as the disabled and children require special attention;

Although the draft constitution is being called the ‘ultimate law of the land’, a ‘new political dispensation for Swaziland’, it does not fundamentally change the current absolutist status quo. The Swazi king remains above the law, not subject to

⁶ J B Mzizi , Constitutionalism in Southern Africa - Old Wine in New Bottles?, *Constitutionalism in Southern Africa* Volume 5 September 2001.

⁷ R. Cornwell, Swaziland: unconstitutional monarchy? unpublished ISS paper.

parliamentary legislation and with the power to dissolve parliament at any time. The draft constitution allows the King to appoint 20 of the 30-member Senate. On a more positive note however, eight of these members must be women. The other 10 members, five of whom must also be women, are then appointed by a lower House of Assembly of 76 members – 60 popularly elected, 10 appointed by the king, and six special women members.

The king remains head of the army, police force and prison system. Perhaps more sinisterly, while political parties are not mentioned in the draft constitution, "freedom of assembly and association" is guaranteed in Chapter Four, entitled Protection and Promotion of Fundamental Rights and Freedoms.

Conclusion: The imperative of constitutional, political and judicial reform

Swaziland's constitutional reform comes at a time when, even though political parties have been banned, a growing lobby for reform is gaining ground, with an agenda that has been embraced by a large proportion of the professional classes, trade unions and students. In fact, the ban on political parties has not deterred progressive forces such as the Ngwane National Liberatory Congress (NNLC), the more radical Peoples United Democratic Movement (Pudemo) and the Swaziland Youth Congress. United under a common front called the Swaziland Democratic Alliance (SDA), they have voiced criticism of the current traditional system, advocating the introduction of a constitutional monarchy.⁸ In addition, the growing call for political reform has recently included conservative organisations, such as the cultural group Sive Siyinqaba Sibahle Sinje (initially thought to be a front for Imbokodvo) and the Swaziland Federation of Labour (SFL).

Nevertheless, in the absence of an internally based legal political opposition, the Swaziland Federation of Trade Unions (SFTU) has led the call for reform from within. Yet, the recent failure of the SFTU to organise successful mass action in Swaziland has raised serious doubts about the capacity and the support base of progressive movements in that country. Most political analysts believe that the influence of progressive forces is far greater outside the country, a consequence of the repressive nature and intolerance of dissent that has informed the monarchy's interaction with progressive forces. Even though the need for reform is quite evident, and tensions continue to simmer under the surface, progressive movements find themselves in a position where opportunities to express their discontent have become fewer and far between, especially as the palace increases its crack down on opposition elements in society. It has recently emerged that, for example, most pro-democracy movements in Swaziland have decided not to participate in the October 2003 parliamentary elections. These organisations believe that their participation would validate the new draft constitution, which they have rejected since the process began in 1996. Obed Dlamini, a former prime minister who is now president of the banned NNLC, has described the constitutional draft process as "shameful", stating that his party would reject the result.⁹

Reform of the judicial system is also particularly important, because of constant interference by the monarchy. Recently, the government refused to abide by court

⁸ The Economist Intelligence Unit, Swaziland Country Profile: 2002.

⁹ Swaziland: Opposition reject draft constitution, *IRIN Report*, 10 June 2003.

decisions, prompting the resignation of the Court of Appeal's judges on 30 November 2002 and the forced resignation of the Chief Justice of the High Court, whose independent-minded rulings have riled the palace. And, despite widespread condemnation, the government refused to reverse its position.¹⁰ Following a fact finding mission to Swaziland in January 2003, the International Commission of Jurists, Centre for the Independence of Judges and Lawyers (ICJ/CIJL), has released a report considering that although the draft constitution was a step towards the resolution of the "rule of law" crisis that has paralysed jurisprudence in the kingdom, it was not the final solution. In fact, this report argued that "threats to judicial independence, in violation of international human rights standards, are deeply rooted and routine in Swaziland", and further concluded that "periodic attacks on the judiciary by the executive reveal an executive attitude that holds the judiciary, the rule of law, and the separation of powers in virtual contempt, in particular when they conflict with entrenched interests".¹¹

In short, the draft constitution provides Swazis with a sound basis to begin dialogue about the type of political system that would be best suited to the social and political conditions that obtain in that country. Particularly encouraging is the fact that the king's ability to rule by decree is absent. However, It has been argued by constitutional lawyers that if no mechanisms exist for justiciability of a constitution, the rights and freedoms contained in such a constitution may be rendered useless. Therefore, there clearly exists a strong need to create and strengthen institutions that will assist in upholding the rule of law and that will broaden democratic practices in the "participatory based system" that the Swaziland aspires to achieve. If this is not guaranteed one cannot help but wonder whether or not Swaziland's future will look much like its past.

¹⁰ There are numerous examples of the violation of the independence of the judiciary. See in this regard, Amnesty International Report on Swaziland, January-December 2002. <<http://web.amnesty.org>>.The following is a list of some of the more serious infringements by the palace:

- On 30 October 2002 the Attorney General (AG), an appointee of the king, together with the Chiefs of Staff of the army, police and prison services, instructed the Chief Justice and two High Court judges to stop hearing the case of a young woman secretly taken from school by agents of the king. When the judges continued to hear the case, the AG ordered them to resign. The Chief Justice lodged a complaint with the Director of Public Prosecutions (DPP), but the AG refused to appear in court to answer the charges. On 12 November, government officials ordered the DPP to withdraw the case against the AG or resign. He refused. Government officials then raided and searched the DPP's office and prevented him from regaining access to his files.
- On 22 November 2002, the Court of Appeal upheld a court ruling that the Commissioner of Police and another senior officer were in contempt of court and should serve a 30-day prison sentence. Police had repeatedly obstructed Madeli Fakudze and others from returning to their homes in Macetjeni, despite a Court of Appeal ruling in June that they should be allowed to return. Madeli Fakudze and other members of his community had been evicted from their homes in 2000 by the security forces. Both the Commissioner of Police and the Prime Minister declared their refusal to submit to the November ruling.
- In November 2002, the Court of Appeal ruled that a King's Decree under which pre-trial prisoners were denied the right to apply for bail was invalid. The Prime Minister stated that the government would not abide by the ruling.

¹¹ ICJ, Swaziland - Fact-Finding Mission to the Kingdom of Swaziland, Independence of Judges & Lawyers - Documents
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